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NARROWING THE FRAME: CONSUMER INSURANCE POLICIES AND THE LIMITS OF THE RESTATEMENT OF CONSUMER CONTRACTS

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Introduction

Efforts to restate the law must contend with a fundamental framing challenge: Determining how broadly or narrowly to define the area of law to be addressed.[1] This decision inevitably involves trade-offs. Narrow formulations may yield nuanced and precise rules, but risk diminishing the utility of the restatement and obscuring overarching themes and objectives. Conversely, broad formulations may provide a more comprehensive view of the law, but risk oversimplifying its nuances, conflating distinct lines of precedent, and overlooking critical details.

Compared to the influential *Restatement of the Law Second, Contracts,*[2] the *Restatement of Consumer Contracts* (RCC) adopts a relatively narrow framing of its subject matter.[3] As explained in its Introduction, the RCC's comparatively focused lens aims to "provide courts with more tailored guidance in adjudicating consumer-contract disputes than the Restatement of the Law Second, Contracts."[4] This approach is sensible, as courts do indeed frequently adapt general contract law doctrines to the specific context of consumer contracts, reflecting the unique and widely-understood realities of these agreements. Most importantly, large firms have considerable information and power advantages relative to consumers, who typically lack the sophistication, time, or leverage to read, understand, or negotiate contractual terms.[5] Moreover, disputes involving consumer contracts often revolve around a recurring set of terms governing topics such as consumer warranties, arbitration of disputes, and privacy rights.[6]

While the RCC achieves significant explanatory power and doctrinal nuance by narrowing its focus as compared to the *Restatement of the Law Second, Contracts,* it dedicates limited attention to the prospect that its framing should be further refined. Could there be benefits to more significantly narrowing the scope of the RCC's subject matter, to address specific types of consumer contracts, such as landlord-tenant leases, credit card agreements, or—foreshadowing the focus of this Essay—insurance

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[1] *See* Oren Bar-Gill, Omri Ben-Shahar, & Florencia Marotta-Wurgler, *Searching for the Common Law: The Quantitative Approach of the Restatement of Consumer Contracts*, 84 U. Chi. L. Rev. 7, 12 (2017).

[2] Restatement (Second) of Contracts (1979).

[3] Restatement of Consumer Contracts (2023).

[4] *See id.* at 4.

[5] *See generally* Margaret Jane Radin, Boilerplate: The Fine Print, Vanishing Rights, And The Rule Of Law (2013); Omri Ben-Shahar & Carl E. Schneider, More than You Wanted to Know (2012); Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 Iowa L. Rev. *1745, 1749 (2014); Yannis* Bakos, Florencia Marotta-*Wurgler* & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. Legal Stud. 1 (2014).

[6] *See generally* RCC, *supra* note 3, at 1; *see also* Radin, *supra* note 5.

policies? The RCC appears to implicitly reject this idea. Its stated aim is to "present a comprehensive set of requirements unifying the common-law jurisprudence of consumer contracts."[7] The implication seems to be that a narrower focus on specific sub-types of consumer contracts is neither necessary nor productive.

This Essay critiques that implicit message of the RCC by examining one particularly distinctive domain of consumer contract law: The law governing consumer insurance contracts. The RCC makes clear throughout that its general approach to consumer contracts encompasses insurance policies, regularly citing insurance disputes and using insurance-based illustrations.[8] Indeed, the RCC's focus on consumer contracts likely requires this approach, as insurance contracts are perhaps the most frequently litigated subtype of consumer contracts. Yet certain black-letter rules or official comments in the RCC are in direct tension with doctrines that courts apply to disputes involving consumer-oriented insurance contracts. These sources of tension implicate key doctrines addressed by the RCC, including *contra proferentem*, consumers' reasonable expectations, and unconscionability.[9] Part I of this Essay develops and explains these conclusions.

After exploring how key doctrines of consumer insurance law diverge from the RCC in Part I, Part II argues that this divergence is normatively defensible. That conclusion follows from many particularities of the consumer insurance setting—including the fact that consumer insurance contracts were historically standardized across different insurers, are often sold by knowledgeable intermediaries, are pre-approved by state insurance regulators, are often read by consumers or their proxies after a loss occurs, and provide important information to third parties like state insurance regulators and coverage lawyers. Yet the RCC's broad focus on consumer contracts generally causes it to overlook these issues.

Part III concludes by briefly raising the prospect that a new Restatement of Insurance Law may be appropriate. This conclusion follows in part from the arguments developed in prior Sections. But it also follows from the fact that dozens of important insurance law doctrines are omitted from both the RCC and from the Restatement of the Law of Liability Insurance (RLLI),[10] leaving numerous gaps for a Restatement of Insurance Law to fill.

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[7] *See* RCC, *supra* note 3, at 4.

[8] *See infra* Part I.

[9] *See id.*

[10] *See infra* Part III. *See generally* Tom Baker & Kyle D. Logue*, In Defense of the Restatement of Liability Insurance Law*, 24 Geo. Mason L. Rev. 767 (2016) (describing the RLLI project).

I. Divergences Between the RCC and the Law of Consumer Insurance Contracts

Insurance policies are one of many consumer contract types addressed by the RCC. However, the RCC's black-letter provisions do not establish unique rules for insurance policies or other subcategories of consumer contracts, such as leases or employment contracts. Instead, the RCC adopts general principles applicable to all consumer contracts. This Part argues that at least some of these general rules are in tension with established principles of consumer insurance law.[11] It highlights two such sources of tension. Section A focuses on *contra proferentem*, while section B turns to the doctrines of unconscionability and reasonable expectations.

A. Contra Proferentem

1. The RCC's Tie-Breaker Version of Contra Proferentem

The RCC adopts a limited "tie-breaker" version of *contra proferentem*. Under this version of the doctrine, courts "choosing among the reasonable meanings of a standard contract term," should prefer "the meaning that operates against the business supplying the term."[12] But this preference, the RCC makes clear, should only be operationalized as a last resort, if "other factors relevant to the construction of the meaning of a term are not decisive."[13] Under this tie-breaker version of *contra proferentem*, courts confronting ambiguous contract language should only interpret these ambiguities against the drafter if factors like extrinsic evidence, the apparent purpose of the drafter, or consumers' reasonable expectations do not clarify the intended meaning of the contested language.

The RCC applies its limited tie-breaking version of *contra proferentem* broadly to all consumer contract disputes, including consumer insurance disputes. Indeed, the RCC's very first example of the doctrine involves a dispute regarding the meaning of a life insurance policy that excluded coverage for persons "engaged in aviation."[14] Because the phrase is "susceptible to two possible interpretations—riding in an airplane or operating it," the RCC suggests that an insured who died while he was a passenger in a commercial airline should be entitled to coverage.[15] Left unstated, but implicit from the context, is that no alternative interpretive tools—such as the apparent purpose

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[11] *See, e.g.*, James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation: Text Versus Context*, 24 Ariz. St. LJ 995 (1992).

[12] RCC, *supra* note 3, at § 4(b).

[13] *Id.* at Comment 3 to § 4 (emphasis added).

[14] RCC, *supra* note 3, at Illustration 1 to § 4.

[15] *Id*.

of the exclusion or relevant extrinsic evidence—clarifies the intended meaning of the operative phrase.

2. Consumer Insurance Law's Muscular Version of Contra Proferentem

In contrast to the minimalist, tie-breaking version of *contra proferentem* articulated by the RCC, consumer insurance law typically embraces a robust version of the doctrine that functions as a primary interpretive tool rather than as a last-resort tie-breaker. Under this approach, courts interpreting consumer insurance contracts often prioritize *contra proferentem* over alternative interpretive methods, including consideration of extrinsic evidence or the apparent purpose of disputed language. In some cases, courts confronting ambiguous policy language even find coverage that is more expansive than that which an insured could reasonably expect.[16]

Consider first the question of whether courts should permit insurers to introduce extrinsic evidence to clarify potentially ambiguous language in consumer insurance policies. In disputes involving reasonably sophisticated policyholders, courts do indeed commonly allow extrinsic evidence to "disambiguate" ambiguous terms.[17] However, in the context of disputes involving consumer insurance contracts, courts often—and perhaps typically—reject this approach, holding that the elevated role of *contra proferentem* in consumer insurance law precludes reliance on extrinsic evidence to clarify ambiguous insurance policy language.[18] For instance in *Wash. Nat'l Ins. Corp. v. Ruderman,* the Florida Supreme Court invoked *contra proferentem* to find that an "Automatic Benefit Increase Percentage" in a long-term care policy applied to multiple benefits rather than just the daily benefit, rejecting the insurer's argument that marketing materials were admissible to clarify the parties' intent to the contrary.[19] Similarly, in *Burns v. Smith*, the Missouri Supreme Court refused to admit extrinsic evidence to clarify the meaning of a "business pursuits" exclusion in a liability policy, emphasizing that ambiguities must be resolved in favor of the insured.[20]

In some cases involving consumer insurance disputes, courts go even further in prioritizing *contra proferentem* over alternative interpretive tools. For instance, some courts have suggested that ambiguous consumer-oriented

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[16] *See* Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 Mich. L. Rev. 531, 545–47 (1996).

[17] *See, e.g.*, Stone Container Corp. v. Hartford Steam Boiler Inspection & Ins. Co., 165 F.3d 1157, 1161 (7th Cir. 1999); Gold v. Rowland, 156 A.3d 477 (Conn. 2017).

[18] *See* Daniel Schwarcz, *Coverage Information in Insurance Law*, 101 Minn. L. Rev. 1457, 1505 (2017).

[19] Wash. Nat'l Ins. Corp. v. Ruderman, 117 So.3d 943, 949 (Fla. 2013).

[20] Burns v. Smith, 303 S.W.3d 505, 509 (Mo. 2010).

insurance policy language should be interpreted against insurers even when doing so would result in coverage that is more expansive than the coverage an ordinary consumer might expect.[21] Consider, for instance, *Rusthoven v. Commercial Standard Insurance Co*., in which the court interpreted contradictory terms in an auto insurance policy to allow the insured to recover $25,000 in uninsured motorist coverage for each vehicle that their company owned, resulting in total coverage of $1,675,000.[22] This result effectively penalized the insurer for drafting ambiguous policy language even though doing so resulted in significantly more coverage than the policyholder in that case might plausibly have expected based on their purchase.[23]

B. Unconscionability and the Reasonable Expectations Doctrine

1. Judicial Regulation of Contract Terms under the RCC: Unconscionability and Reasonable Expectations

The RCC primarily addresses substantively unfair consumer contract terms through the doctrine of unconscionability.[24] Consistent with established interpretations, the RCC treats unconscionability as a subject-matter-neutral tool for courts to define the limits of unfair consumer contracts.[25] The RCC's official comments illustrate this principle with diverse examples, including liability waivers in recreational services, loan agreements, and contracts for purchasing tangible goods.[26]

The RCC can also be interpreted to include a second doctrinal tool, rooted in consumers' reasonable expectations, that enables courts to refuse to enforce unreasonable or unfair consumer contract terms.[27] The RCC references the concept of "reasonable expectations" across multiple sections, including in provisions on the proper interpretation of consumer contracts,[28] the use of deceptive practices to induce consumer assent,[29] affirmations of facts or promises by businesses or third parties about the contract's attributes,[30] and the presence of procedural unconscionability.[31] But the official comments suggest that at least in some cases, "the protection of consumers' reasonable

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[21] *See* Abraham, *supra* note 16, at 545–47.

[22] Rusthoven v. Commercial Standard Insurance Co., 387 N.W.2d 642, 645 (Minn. 1986).

[23] *See* Kenneth S. Abraham & Daniel Schwarcz, Insurance Law and Regulation 58 (7th ed. 2020).

[24] RCC, *supra* note 3, at § 6.

[25] *Id.*

[26] *See id.*

[27] *See* David Hoffman, *Consumers' Unreasonable Textual Expectations*, Harv. Bus. L. Rev. (forthcoming 2025).

[28] RCC, *supra* note 3, at § 4.

[29] *See id.* at § 7.

[30] *See id.* at § 8 & § 9.

[31] *See id.* at § 6.

expectations" can and should negate the "legal effect of standard contract terms, even when the meaning of those terms is neither ambiguous nor otherwise unclear."[32] This is particularly true, the RCC suggests, when consumers' reasonable expectations are shaped by the business's precontractual promises or affirmations of fact.[33]

2. Judicial Regulation of Policy Terms in Consumer Insurance Law

Despite its doctrinal and theoretical significance in consumer contract law, the doctrine of unconscionability is largely absent from consumer insurance law. Perhaps the clearest evidence of this is that none of the RCC's 28 illustrations of the doctrine involve insurance contracts.[34] Even more striking, the reporters' notes reference approximately 55 consumer contract cases involving unconscionability, yet only one appears to involve an insurance dispute.[35] Similarly, none of the leading insurance law casebooks include material focused on unconscionability,[36] and none of the major insurance law treatises devote extensive attention to it.[37]

A key explanation for the unconscionability doctrine's absence in consumer insurance law is the historical prominence of the Reasonable Expectations Doctrine in this setting.[38] This doctrine was famously introduced by Robert Keeton, who described it as requiring that "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations."[39] Unlike the unconscionability doctrine, the Reasonable Expectations Doctrine did not require courts to conclude that policy terms were inherently unfair before finding coverage. Instead, its focus was principally procedural, turning on whether consumers had objectively reasonable expectations of coverage limitations based on factors such as insurers' marketing, the insurance policy's title, general consumer knowledge about insurance, the relevant language's

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[32] *See id.*
[33] *See id.*
[34] *See id.*
[35] *See* Fritz v. Nationwide Mut. Ins. Co., No. CIV. A. 1369, 1990 WL 186448, at *1 (Del. Ch. Nov. 26, 1990).
[36] *See generally* Schwarcz & Abraham, *supra* note 23*;* Tom Baker, Kyle Logue, & Chaim Saiman, Insurance Law and Policy (5th ed. 2022); Jeffrey W. Stempel, Erik S. Knutsen, & Peter Swisher, Principles of Insurance Law (5th ed. 2020).
[37] *See, e.g.*, Couch on insurance; New Appleman on insurance.
[38] *See* Kenneth S. Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 Va. L. Rev. 1151, 1153 (1981).
[39] Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 Harv. L. Rev. 961, 967 (1970).

clarity and prominence, and judges' perspectives on what risks consumer insurance policies should cover.[40]

In the decades after Keeton first articulated the Reasonable Expectations Doctrine, it gained significant traction in insurance case law. At least a dozen states formally adopted it; in the process, they found coverage in a wide range of disputes in which the policy's language unambiguously restricted coverage. For example, courts in several prominent cases refused to enforce an unambiguous definition of "burglary" in a burglary policy, which required visible markers of forcible entry on the burglarized building's exterior. These courts reasoned that no insured would reasonably expect such an artificially narrow definition of burglary to be buried in a policy's fine print.[41]

However, in recent decades, courts have retreated from this "strong" form of the Reasonable Expectations Doctrine, almost entirely abandoning it as a tool that allows them to ignore clear and unambiguous policy language.[42] According to the Restatement of the Law of Liability Insurance, only two states (Hawaii and Alaska) embraced this strong version of the doctrine as of 2019.[43] Moreover, many states have explicitly repudiated the doctrine entirely.[44] Others have clarified that it applies only when the relevant policy language is ambiguous[45] or so confusing and technical that it could not be understood by a reasonable consumer who was focused on the relevant text.[46]

II. Justifications for the Divergence Between the RCC and Consumer Insurance Law

Section I highlights significant tensions between key doctrines governing consumer insurance contracts and the RCC. This Section argues that the RCC's approach of ignoring these tensions is, at a minimum, normatively contestable. Just as particular attributes of consumer contracting led courts to adopt a set of rules distinct from those in the *Restatement of the Law Second, Contracts*, so too do unique market, regulatory, and institutional dynamics of consumer insurance contracting plausibly warrant a specialized set of

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[40] *See* Abraham, *supra* note 38.

[41] *See, e.g.*, Atwater Creamery Co. v. W. Nat'l Ins. Co., 366 N.W.2d 271 (Minn. 1985); C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169 (Iowa 1975).

[42] Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 Wm. & Mary L. Rev. 1389 (2007); Jeffrey W. Stempel, *The Insurance Policy as Thing*, 44 Tort Trial & Ins. Prac. L.J. 813 (2009).

[43] Restatement of Ins. Law § 3, Reporters' Note H.

[44] QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc., 94 So.3d 541 (Fla. 2012); Wilkie v. Auto-Owners Ins. Co., 664 N.W.2d 776 (Mich. 2003); Allen v. Prudential Prop. & Cas. Ins. Co., 839 P.2d 798 (Utah 1992).

[45] *See, e.g.*, Walker v. Auto-Owners Ins. Co., 517 P.3d 617, 623 (Ariz. 2022); Bell v. Progressive Direct Ins. Co., 757 S.E.2d 399, 407 (S.C. 2014).

[46] *See* Zacarias v. Allstate Ins. Co., 775 A.2d 1262, 1268 (N.J. 2001).

doctrines tailored to these contracts. This Section advances that claim by examining the normative foundations of the two key divergences between the RCC and consumer insurance law identified in Section I: *contra proferentem* on one hand, and the doctrines of unconscionability and reasonable expectations on the other.

A. Justifications for a Comparatively Muscular Contra Proferentem in Consumer Insurance Law

As described in Section I, many courts embrace a more muscular version of *contra proferentem* when interpreting consumer insurance contracts as compared to other types of consumer contracts.[47] Under this version of the doctrine, insurers are barred from introducing extrinsic evidence to clarify ambiguous policy language. Moreover, in some cases, courts find coverage when policy language is textually ambiguous, even when there are potentially conflicting arguments based on the apparent purpose of the language or consumers' reasonable expectations of coverage.

The fundamental trade-offs between adopting a tie-breaker approach to *contra proferentem* and embracing a more robust version of the doctrine are reasonably consistent across different types of consumer contracts. The strongest argument for a more rigorous application of *contra proferentem* is that it creates powerful incentives for firms to eliminate ambiguities by redrafting contract terms.[48] Firms face less incentive to do so when they can prevail in court by relying on extrinsic evidence, appealing to consumers' reasonable expectations, or emphasizing the contract's overarching purpose.[49] A robust version of *contra proferentem* thus operates as a classic penalty default rule.[50]

The basic downsides of a robust *contra proferentem* doctrine are similarly consistent across subtypes of consumer contracts. Most notably, a strong *contra proferentem* doctrine can more frequently lead to litigation outcomes that diverge from a firm's intended or expected meaning of the contract. It may also encourage litigation by enabling creative lawyers to argue that contract language is ambiguous. These dynamics increase costs and uncertainty for firms, potentially inflating consumer prices or reducing product availability.

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[47] *See supra* Part I.A.

[48] *See* Abraham, *Theory of Insurance Policy Interpretation*, *supra* note 16; Michelle E. Boardman, *Penalty Default Rules in Insurance Law*, 40 Fla. St. U. L. Rev. 305 (2013); Tom Baker & Kyle D. Logue, *Mandatory Rules and Default Rules in Insurance Contracts*, in Research Handbook On The Economics Of Insurance Law 377, 379–83 (Daniel Schwarcz & Peter Siegelman eds., 2015).

[49] *See* Abraham & Schwarcz, *supra* note 23, at 58–59.

[50] *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87, 97–100 (1989).

Even more, they may prompt firms to redraft contracts so that they are both less ambiguous and less favorable to consumers.[51]

While the fundamental trade-offs in calibrating the power of *contra proferentem* are thus fairly consistent across consumer contract settings, these tradeoffs unfold in distinctive ways in the insurance context, often supporting the more robust version of the doctrine reflected in insurance case law.[52] That is so for at least three reasons. First, insurers in consumer markets face substantial market and regulatory costs when redrafting policy language, so they often cling to ambiguous language unless they are provided with a strong countervailing incentive to redraft. Second, clear and unambiguous policy language is particularly valuable in consumer insurance markets. Finally, insurers face significant, often effective, constraints that limit their ability to redraft policy terms in ways that unreasonably restrict coverage. Consider each of these factors in turn.

First, insurers face unique costs to redrafting policy language, which often lead them to resist updating that language.[53] The most apparent such cost is regulatory: insurers in nearly every state must submit to state regulators proposed changes to consumer insurance policies, and they typically cannot implement those changes without regulatory prior approval.[54] This pre-approval process is often costly and time-consuming.[55] Another significant cost to amending policy language is administrative. When insurers update policy language, they must notify their policyholders at varying times based on the termination dates of their policies, often through physical mail. Beyond their administrative costs, these notifications may trigger consumers who would otherwise auto-renew their policies to shop for competing coverage. This risk is especially pronounced because long-term customers are particularly valuable to insurers, as they result in lower acquisition costs (such as commissions) and often exhibit relative tolerance for premium increases that raise rates above competitive levels.[56]

Although the costs to insurers of redrafting ambiguous policy language can be substantial, the benefits of unambiguous policy language in consumer

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[51] *See* Daniel Schwarcz, *The Role of Courts in the Evolution of Standard Form Contracts: An Insurance Case Study*, 46 BYU L. Rev. 471 (2021).

[52] *See* Schwarcz, *Coverage Information*, *supra* note 18.

[53] Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 Mich. L. Rev. 1105 (2006); Christopher C. French, *Insurance Policies: The Grandparents of Contractual Black Holes*, 67 Duke L. J. Online 40 (2017).

[54] *See* Abraham & Schwarcz, *supra* note 23, at 150–54.

[55] *See* Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. Chi. L. Rev. 1263 (2011).

[56] *See generally* Daniel Schwarcz, *Ending Public Utility Style Rate Regulation in Insurance*, 35 Yale J. Reg. 941 (2018).

insurance markets are even more significant.[57] Of course, most insurance consumers—like most consumers in general—rarely review contract language at the time of purchase.[58] But insurance consumers often do scrutinize policy terms when coverage is denied.[59] At such moments, consumers have strong financial incentives to examine policy language closely, as they may pursue internal appeals, regulatory complaints, or litigation, if the denial is unjustified.[60] Moreover, consumers can easily focus on this language because insurers are often required by state law to cite it in coverage denials.[61]

Unambiguous policy language can also plausibly enhance consumer understanding of coverage before a claim arises, despite the fact that most insureds do not review their policy terms at the time of purchase. In part, this is because many consumers still obtain insurance through market intermediaries, such as agents and brokers.[62] Many of these intermediaries are reasonably well-informed about the details of coverage terms due to licensing requirements and their experience with claim resolutions. Clear and unambiguous policy language can both promote this knowledge among intermediaries and enable them to more effectively answer consumers' questions about coverage. Additionally, consumer insurance policies still tend to be somewhat standardized across insurers and states. When insurers adopt clear and unambiguous language, these improvements can consequently spread broadly across markets and jurisdictions.

The third factor suggesting that the benefits of a robust application of *contra proferentem* may outweigh its costs in consumer insurance markets is the significant constraints insurers face in redrafting policies to unreasonably restrict coverage.[63] The primary such constraint is regulatory. State regulators are often well equipped to challenge newly proposed unreasonable coverage restrictions, even if they are less well situated to compel insurers to clarify potentially ambiguous language or alter long-standing policy

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[57] *See* Kyle D. Logue, Brenda Cude, & Daniel Schwarcz, *The Value of Understandable Consumer Insurance Contracts*, 8 Int'l Rev. of Financial Consumers 1, 1–2 & 4 (2023).

[58] *See* Bakos, *supra* note 5, at 1.

[59] *See* Willem H. Van Boom, Pieter Desmet & Mark Van Dam, *"If It's Easy to Read, It's Easy to Claim"—The Effect of the Readability of Insurance Contracts on Consumer Expectations and Conflict Behaviour*, 39 J. Consumer Pol'y 187 (2016); Alexander J. Wulf & Ognyan Seizov, *How to Improve Consumers' Understanding of Online Legal Information: Insights from a Behavioral Experiment*, 56 Eur. J. L. & Econ. 559, 559 (2023).

[60] *See* Michelle Boardman, *Insuring Understanding: The Tested Language Defense*, 95 Iowa L. Rev. 1075 (2010); Schwarcz, *Coverage Information*, *supra* note 18 at 1495–99.

[61] *See* Unfair Claims Settlement Practices Act § 4 (Nat. Ass'n. Ins. Comm'rs 1997) (defining an unfair claims settlement practice to include "[f]ailing in the case of claims denials or offers of compromise settlement to promptly provide a reasonable and accurate explanation of the basis for such actions").

[62] *See generally* Daniel Schwarcz, Tom Baker & Kyle Logue, *Regulating Robo-Advisors in an Age of Generative AI*, 82 Wash. & Lee L. Rev. 775 (2025); Daniel Schwarcz, *Differential Compensation and the Race to the Bottom in Consumer Insurance Markets*, 15 Conn. Ins. L. J. 723 (2009).

[63] *See* Schwarcz, *Evolution of Standard Form Contracts*, *supra* note 51, at 476–79.

language.[64] Additionally, market forces can play a role in limiting insurers' ability to impose new unreasonable restrictions, particularly given the prevenance of agents and brokers. Reputational forces may exert greater influence on insurance policy terms than in other consumer markets as the contract is itself the product.[65]

Taken together, these three factors offer a compelling justification for courts' adoption of a robust *contra proferentem* doctrine in consumer insurance markets. Indeed, empirical research shows that such caselaw has played a pivotal role in shaping homeowners insurance policies over the past fifty years, serving as the primary catalyst for inducing insurers to articulate their obligations with greater precision and clarity.[66] Notably, these judicially driven revisions have frequently resulted in expanded coverage, suggesting that judicial invocation of *contra proferentem* does indeed empower regulators and market intermediaries to negotiate meaningful drafting improvements in homeowners policies.[67]

To be clear, there are also reasonable arguments against employing a muscular approach to *contra proferentem* to consumer insurance disputes. Here too, however, these costs take on distinctive forms in the consumer insurance context. For example, *contra proferentem* can undermine predictability for insurers and create correlated risks across millions of policies. This, in turn, can impose substantial costs on insurers, who depend on predictable loss patterns and the independence of covered risks to accurately price coverage and manage their risk portfolios.[68] Additionally, court-mandated coverage that deviates from insurers' intent may exacerbate insurance-specific challenges, such as moral hazard or adverse selection.

Ultimately, then, a strong normative argument supports the observed reality that courts apply a stricter version of *contra proferentem* in consumer insurance disputes compared to other types of consumer disputes. At the same time, many of the most persuasive arguments against this approach also take on a particular valence in the insurance context. Consequently, the RCC's embrace of a uniform and comparatively weak version of this doctrine for all consumer contracts, including consumer insurance policies, is open to critique on both normative and doctrinal grounds. However, the RCC's broad focus on consumer contracts as a whole, rather than on specific subcategories of consumer contracts, results in it ignoring these issues.

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[64] Schwarcz, *Coverage Information*, *supra* note 18, at 1492–94.
[65] *See generally* Schwarcz, *A Products Liability Theory*, *supra* note 42.
[66] Schwarcz, *Evolution of Standard Form Contracts*, *supra* note 51, at 525.
[67] *See id.* at 477, 500, 516, & 525.
[68] *See* ABRAHAM & SCHWARCZ, *supra* note 23, at 3–6.

B. Justifications for the Absence of Judicial Regulation of Consumer Insurance Policies

I have long argued that courts should more aggressively regulate the content of consumer insurance policies.[69] Perhaps unsurprisingly, courts have largely ignored these arguments—along with similar ones made by other academics.[70] As discussed in Part I, modern courts virtually never overturn insurance policy language that clearly and unambiguously restricts coverage. To the contrary, they almost entirely ignore the unconscionability doctrine in insurance disputes and they overwhelmingly reject the "strong" form of the reasonable expectations doctrine.[71] Regardless of the normative desirability of this approach, it is shaped by unique features of insurance markets that are largely ignored by the RCC.

Several of these factors have been described in the prior Section. Perhaps most importantly, state regulation of policy terms may reduce the likelihood that these terms unreasonably favor insurers. Similarly, consumers' ability to seek clarification of those terms from agents and brokers arguably presses against strong judicial policing of policy terms.

But several additional, insurance-specific, factors also help to explain courts' resistance to policing the content of consumer insurance policies. First, the nature of insurance contracts makes it particularly challenging to identify policy terms that are unreasonably one-sided. Unlike provisions such as mandatory arbitration clauses or terms permitting intrusive privacy practices—which can plausibly be framed as deprivations of presumed consumer rights[72]—contested insurance policy terms typically limit insurers' affirmative obligations to compensate insureds for losses. The fairness of such limitations depends entirely on the specific coverages consumers have purchased, as insurance consumers have no baseline right to compensation from an insurer unless they have purchased such protection. Consequently, in most consumer insurance disputes, assessing whether a coverage restriction is substantively unfair is difficult, if not impossible, without considering the context in which the coverage was purchased. This reality helps to explain why the unconscionability doctrine – which requires both substantive and procedural unfairness, and contemplates that these elements are analytically distinct – is such a poor fit for insurance.

Second, judges and juries may be particularly prone to exhibiting bias in favor of policyholders when granted broad discretion to assess the fairness of coverage restrictions. Policyholders in consumer insurance disputes

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[69] *See, e.g.*, Schwarcz, *A Products Liability Theory*, *supra* note 42.

[70] *See, e.g.*, Jeffrey W. Stempel & Erik S. Knutsen, *Rejecting Word Worship: An Integrative Approach to Judicial Construction of Insurance Policies*, 90 U. Cin. L. Rev. 561 (2021).

[71] *See supra* Part I.B.

[72] *See, e.g.*, Radin, *supra* note 5, at 19–32.

have typically suffered significant losses due to unforeseen circumstances, while defendants are large corporations whose primary purpose is to pay for such losses. When courts focus narrowly on interpreting specific policy language, they can often set aside these legally irrelevant realities. However, when the governing rules give decision-makers broad discretion to deem policy terms unreasonably one-sided or inconsistent with consumers' reasonable expectations, decision-makers are often naturally inclined to favor policyholders.[73] While this tendency is understandable in individual cases, it can lead to increased litigation rates and substantial costs for insurers, driving up premiums for all consumers.

Third, while the extent of ex-ante state regulatory oversight is critical in determining the appropriateness of ex-post judicial regulation of insurance policies, courts face significant challenges in accurately evaluating the effectiveness of this oversight.[74] If state insurance regulators have specifically assessed the reasonableness of a particular coverage term, then there is little justification for courts to invalidate such terms using doctrines like reasonable expectations or unconscionability. Regulators possess greater expertise regarding insurance markets than judges and are often more democratically accountable.[75] Yet courts have limited insight into the robustness of such regulatory oversight, particularly with respect to whether state approval of an insurance policy accounted for a specific type of coverage dispute before the court. Lacking such information, it may be reasonable for courts to presume that state oversight operates effectively, and to rely on democratic mechanisms to address any regulatory shortcomings.

There are, of course, many compelling arguments pointing in the opposite direction, suggesting that courts should aggressively police the terms of consumer insurance policies. For example, these contracts are unusually opaque: insurers often fail to make them readily accessible online, and the policies are significantly more complex than most consumer contracts.[76] Furthermore, the historical standardization of insurance policies has led to regulatory mechanisms and market institutions that are structured around the erroneous assumption that competing insurers' coverage terms are uniform.[77]

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[73] *See* Amy Monahan & Daniel Schwarcz, *Rules of Medical Necessity*, 107 Iowa L. Rev. 423, 433–34 (2022) (describing how patients often won litigation involving whether medical care ordered by a treating physician was "medically necessary" due to the breadth and malleability of this term).

[74] *See* Abraham & Schwarcz, *supra* note 23, at 152–53.

[75] *See id.* at 115–16.

[76] Daniel Schwarcz, *Transparently Opaque: Understanding the Lack of Transparency in Insurance Consumer Protection*, 61 UCLA L. Rev. 394, 400-425 (2014); *see also* Daniel Schwarcz, Brenda J. Cude, Kyle D. Logue & German Marquez Alcala, *Read but Not Understood? An Empirical Analysis of Consumer Comprehension in Homeowners Insurance,* 112 Va L. Rev. (forthcoming, 2026).

[77] Schwarcz, *Reevaluating Standardized Insurance Policies*, *supra* note 58, at 1347–48.

That said, the point here is not to argue whether courts are right to reject doctrines like unconscionability and the strong reasonable expectations doctrine in the insurance context. Rather, it is to highlight that courts' reluctance to apply these doctrines is plausibly justifiable based on distinctive features of insurance markets. Consequently, the RCC's failure to address these issues in articulating general rules of consumer contract law that apply to insurance disputes is impossible to justify.

III. Towards a Restatement of Insurance Law

Parts I and II argue that consumer insurance law frequently diverges from the RCC, and that compelling reasons for and against this divergence exist but remain unaddressed by the RCC. While these arguments constitute important critiques of the RCC, they do not alone warrant the creation of a separate Restatement dedicated to consumer insurance contracts. Such a project would have an overly narrow scope and substantial overlap with both the RCC and the Restatement of the Law, Liability Insurance (RLLI).

However, the tensions between the RCC and consumer insurance law discussed above bolster the argument for a more comprehensive Restatement of Insurance Law. Such a Restatement could focus some attention to resolving these tensions. But its primary focus would be to extend, and fill gaps in, both the RCC and the RLLI.

One way a Restatement of Insurance Law might accomplish this is by extending RCC rules to the insurance law setting. Many core doctrines in insurance law are consistent with, but more specific than, the RCC's rules. For example, the contractual duty of good faith limits the extent to which businesses can exercise discretion to undermine the interests of consumers.[78] But nearly every state relies in part on this doctrine to impose a variety of more specific obligations on insurers when resolving policyholder claims.[79]

Another, even more important, role for a Restatement of Insurance Law would be to restate rules of first-party insurance law that are absent from both the RCC and the RLLI. For example, courts confronting subrogation claims frequently must decide whether a policyholder's interest in full compensation should take priority over an insurer's subrogation claim.[80] Unsurprisingly, the complex rules governing this issue are absent from both the RCC and the RLLI, as they can apply to policyholders who are not consumers, and they are not specific to liability insurance. But this is hardly an isolated example; countless rules of insurance law are absent from both the RCC and the RLLI,

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[78] *See* RCC, *supra* note 3, at § 5.

[79] *See* Jay M. Feinman, *The Law of Insurance Claim Practices: Beyond Bad Faith*, 47 Tort Trial & Ins. Prac. L. J. 693, 702–05 (2012).

[80] *See* Franklin v. Healthsource of Ark., 942 S.W.2d 837, 838–39 (Ark. 1997).

either due to their specificity to insurance, their relevance to sophisticated insureds, or their applicability to first-party insurance disputes. Examples include doctrines addressing the designation of life insurance beneficiaries, the definition of "disabled" in disability insurance policies, the determination of whether a covered or excluded peril caused a property insurance loss, the interpretation of "medical necessity" in health insurance policies, and the meaning of vehicle "use" in auto insurance policies. In each of these areas, a complex and often opaque web of judicial opinions provides the governing framework, creating significant challenges for both practitioners and scholars. A new Restatement of Insurance Law could bring much-needed clarity to these issues, addressing gaps left by the RCC and the RLLI while highlighting tensions between the rules governing consumer insurance disputes and more general doctrines of consumer contract law.