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NFJE Leadership

In This Issue

2019 Symposium Recap

The Science of Deciding

By William F. Ray

The 2019 NFJE Symposium was a great success, thanks to an all-star faculty. The program, titled "The Science of Deciding," began with an enlightening and entertaining keynote presentation by Prof. Jeff Rachlinski of the Cornell Law School. Prof. Rachlinski provided an overview of Nobel Prize-winning social science, with a focus on his research into judicial decision processes (and the strengths and weaknesses of those processes).

Day two of the Symposium started with a series of interactive "experiments," with the audience of over 140 state-court appellate judges participating. Led by Prof. Rachlinski, and with technological and scientific support provided by a team of experts from DecisionQuest, the audience completed questionnaires and saw their collective responses in real time. NFJE owes a debt of gratitude to Prof. Rachlinski, and to the Ph.D. participants from DecisionQuest who contributed their time and resources to building the program, including Dan Wolfe, John Gilleland, and Andrea Krebel. The experiments helped identify mental shortcuts and decision processes that can sometimes yield unintended results—and I am proud to report that NFJE participants proved to be shrewd, thoughtful deciders!

After a collegial luncheon shared by the faculty, program committee, and audience of judges, Prof. Terry Maroney of Vanderbilt Law School presented a lecture on "Emotion, Angry Judges, and 'Dispassionate' Decision Making." Prof. Maroney, whose scholarship has influenced judicial thought for over two decades, was joined by Judge David Mann of the Washington Court of Appeals whose insights perfectly complemented Prof. Maroney's presentation.

The Symposium closed with two sessions presented by panels of distinguished judges and scholars. The first session, with Justice William Cassel of Nebraska and Prof. Chad Oldfather of Marquette University School of Law, examined the values (and occasional pitfalls) of collaboration and interaction among appellate judges as they go about the business of the courts. The final session, led by Andrew Wistrich (a retired U.S. Magistrate Judge and a long-time collaborator with Prof. Rachlinski) and Judge Michael Hyman of the Illinois Court of Appeals, included thought-provoking recommendations for how the audience could make use of the social science principles to influence their own courts' processes and decisions.

The judges who attended gave the program high marks. I am especially grateful to the faculty and to the entire program committee for their dedicated work. And thanks also to Gino Marchetti, Dan Kohane, and the NFJE Board of Directors for supporting the program. Let's all redouble our support for NFJE—it's a most worthy cause!

William F. Ray is a member of Watkins & Eager PLLC in Jackson, Mississippi. Mr. Ray's practice focuses on commercial litigation and arbitration. He is a former member of the DRI Board of Directors, and a past chair of the DRI Law Institute and the DRI Commercial Litigation Committee. A member of the NFJE Board of Directors, Mr. Ray serves as chair of the 2019 NFJE Symposium.

2020 Symposium Update

By Tillman J. Breckenridge

The NFJE Program Committee is hard at work on the 2020 Symposium. Right now, the Committee is assembling the faculty for a Symposium exploring how automation and artificial intelligence will change judging, both in substance and procedure. We are expecting to have panels on liability and fault in the new age, cybersecurity, and insuring new risks, among other things—including a renowned futurist. We definitely welcome any input from past and future attendees on topics and faculty you all would love to see, and we look forward to seeing you in July.

Tillman J. Breckenridge is a partner of Pierce Bainbridge Beck Price & Hecht LLP in Washington, D.C. He has represented companies, individuals, and governments in the Supreme Court of the United States, as well as in every federal circuit and several state appellate courts. Mr. Breckenridge is also the St. George Tucker Adjunct Professor of Law at William & Mary Law School, where he teaches appellate advocacy and manages the school's Appellate and Supreme Court Clinic. He is a past chair of the DRI Appellate Advocacy Committee and serves a chair for the 2020 NFJE Symposium.

Feature Articles

Does the ALI's Restatement of the Law, Liability Insurance Conflict with States' Oversight of Insurance?

By Laura A. Foggan and Rachael Padgett

The American Law Institute (ALI) has been an important source of scholarship on the law since 1923, and has produced more than 70 projects, including Restatements of the Law, aimed at courts; Model Codes, aimed at legislatures; and Principles of the Law, which offer "best practices" in developing areas of the law. See Past and Present Projects (as of March 2019), available at https://www.ali.org/media/filer_public/c5/38/c5387be9-980a-4d69-af6d-ad4d4a067606/past-present-3-19.pdf. The ALI describes its Restatements of the Law as projects aimed at "clear formulations of common law," which "reflect the law as it presently stands or might appropriately be stated by a court." Capturing the Voice of the American Law Institute: A Handbook for ALI Reporters and Those Who View Their Work (2015 ed.) ("Style Manual") at 11.

The purpose and scope of the ALI's Restatements, especially where they adopt positions that deviate from majority rules or propose novel rules not established in the law, have been the subject of scholarship and debate. ALI Director Richard Revesz recently wrote that "the first round of Restatements, completed between 1923 and 1944, almost always restated majority legal rules," but that some ALI participants came to view this approach as a "straitjacket," characterized by an undue emphasis on "announc[ing] a more or less binding and final rule of law." Richard L. Revesz, ALI Quarterly Newsletter (August 8, 2019). This prompted the organization to give further thought to the proper role of its Restatements and to embrace a broader mission than to state the law as it is. *Id.* ALI's resolutions and guidelines evolved to permit broader latitude and scope in formulating Restatements. Thus, in today's Restatements, "a preponderating balance of authority would normally be given weight, as it no doubt would generally weigh with courts, but it would not be thought to be conclusive." *Id.* Legal scholars have debated the wisdom of permitting broader latitude in the ALI's Restatements, with some commentators contending that modern ALI work products increasingly advocate for subjective legal reform. Victor E. Schwartz & Christopher E. Appel, *The American Law Institute at the Cross Road: With Power Comes Responsibility,*

Nat'l Foundation for Judicial Excellence, Vol. 2, Issue 1 (May 22, 2017).

The recently finalized *Restatement of the Law, Liability Insurance* has been at the center of much of this controversy. But while it has been scrutinized for creating novel new rules rather than restating sound existing legal rules, little attention has focused on a different question: whether there is a fundamental tension between the ALI's *Restatement of the Law, Liability Insurance* and the primacy of state-based oversight and jurisdiction over the insurance system, as established by the McCarran-Ferguson Act. Individual state laws and regulations govern everything from the organization and financial operation of insurance companies, to the requirements and approval process for insurance policy forms, and the standards for appropriate claims handling. Under the state-based insurance regulation system, each state operates independently to regulate their own insurance markets, and there can be significant differences between states in their approaches to insurance law and regulation.

The U.S. state-based system of insurance regulation has long protected consumers and helped create a vibrant, competitive and innovative insurance market. As commentators have recognized, "State regulators play an important role in maintaining stability and affordability in insurance markets, and it is important that the goals of the insurance regulators and the insurance liability system work in harmony." Victor E. Schwartz & Christopher E. Appel, *The American Law Institute at the Cross Road: With Power Comes Responsibility*, Nat'l Foundation For Judicial Excellence, Vol. 2, Issue 1 (May 22, 2017). But the ALI *Restatement* was developed without input from state insurance commissioners and other regulators in what is otherwise a highly regulated industry. *Id*.

On each issue it addresses, the ALI *Restatement* proffers one legal rule—what it essentially contends is the single "best" rule—as its statement of the law that should govern liability insurance contracts. But given the diversity among state insurance regulatory systems and the interplay of liability insurance principles with other legal rules within a state, is liability insurance susceptible to a uniform set of "best rules"? Is there or can there ever be a "best rule" for a liability insurance contract question that is not grounded in each state's own distinctive insurance regulatory and legal framework?

Consistent with the state-based oversight of the insurance system, the law of individual states governs liability insurance disputes. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.,* 348 U.S. 310, 317 (1955) (noting that insurance is "controlled by state law"); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Terra Indus., Inc.,* 346 F.3d 1160, 1164 (8th Cir. 2003) ("State law governs the interpretation of insurance policies."). State insurance law is nuanced, reflecting diverse realities of the different insurance marketplaces in the states. Liability insurance law is often grounded on an individual state's public policy, law and regulatory scheme. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Ballard*, 54 P.3d 537, 541–42 (N.M. 2002) (explaining that "in New Mexico, family exclusion provisions [in uninsured motorist policies] … violate public policy and fundamental principles of justice," and "compensatory damages protect innocent accident victims consistent with the fundamental public policy purpose of the [state's] Financial Responsibility Act"); *In re ATP Oil & Gas Corp. v. Water Quality Ins. Syndicate*, 531 B.R. 694, 701–02 (Bankr. S.D. Tex. 2015) (applying Texas insurance law in a choice of law analysis, noting that "when a state has enacted a law to protect its citizens who were the intended beneficiaries of insurance policies, that law (depending on the totality of the facts) may be recognized as creating a compelling interest in favor of the state's regulatory insurance scheme").

A state's choice of its legal rule for almost any insurance contract issue is also inter-dependent on that jurisdiction's other insurance law rules. In other words, what makes sense as the "best" insurance law rule on a particular issue often depends on that state's legal environment for liability insurance more generally. For example, a state might adopt the minority approach requiring an express agreement for recoupment of defense costs before permitting an insurer to recover costs advanced when coverage is uncertain. Yet that state might ameliorate its harsh approach to recoupment by adopting other insurance law rules protecting insurers that face uncertainty in determining whether there is a duty to defend.

By its nature, the *Restatement* creates blanket rules for all states to apply on each topic it addresses. This presumes that a single uniform approach is better than a diverse state-based one, and necessarily casts aside differences in each state's existing body of state insurance law and regulation. In deciding state law rules governing liability insurance contracts, does adopting a rule out of the *Restatement* deprive consumers of key state protections or preempt state law rules that respond to unique insurance markets?

The decisions state courts make in developing their jurisdiction's insurance law principles reflect each state's own insurance market and public policy choices. In fact, many times state courts have reached opposite results in deciding what legal rule to apply to liability insurance questions, citing specific public policies that directly contradict another state's approach. *Compare Pitzer College v. Indian Harbor Ins. Co.*, 447 P.3d 669 (Cal. 2019) (overriding parties' choice of New York law and holding that California's common law notice-prejudice rule is a "fundamental public policy" of the state) *with*

Bailey v. Lincoln Gen. Ins. Co., 255 P.3d 1039, 1046-47 (Colo. 2011) ("There are multiple, competing public policy principles animating Colorado's insurance laws: not only is it the public policy of this state to protect tort victims, but it is also the public policy of this state to provide insurers and insureds the freedom to contract, allowing insurers to shift risk based on their insureds' misconduct, especially when that misconduct significantly increases the risk of insurers' liability and may be encouraged by indemnification); *compare Public Serv. Mut. Ins. Co. v. Goldfarb*, 425 N.E.2d 810, 814 (N.Y. 1981) (holding that even where an insurance policy provided coverage for punitive damages, the public policy of New York required that "[u]nder no circumstances … can the insurer be compelled to indemnify [the policyholder] for punitive damages") *with Wingard v. Lansforsakringer* AB, 2013 WL 5493177, at *11–*12 (M.D. Ala. 2013) (finding that enforcement of a punitive damages exclusion in an insurance policy would contravene Alabama public policy reflected in its Wrongful Death statute, because application of the exclusion would "not only deprive Plaintiff of a remedy under the insurance contract, but also … violate the strong public policy of the forum state"). As these examples show, a single "best" set of rules to govern liability insurance contracts may encroach on public policy choices reflected in individual state insurance systems and on state primacy in overseeing insurance.

There are many prominent cases that highlight how states' distinct insurance law and public policy can come into play in deciding important insurance law issues. For instance, in *Southern Silica of Louisiana, Inc. v. Louisiana Ins. Guar. Ass'n*, 979 So.2d 460 (La. 2008), the Louisiana Supreme Court looked to its rules endorsing pro rata allocation among insurers for long-tail claims in construing the state's guaranty fund statute. State guaranty associations, which protect policyholders from insolvent insurance companies, are a core aspect of state law and regulation addressing insurer solvency. Yet states, fashioning such laws to the needs of their own jurisdictions, have significantly different rules governing guaranty fund benefits and coverage. Louisiana's statute regulating guaranty association payouts requires the policyholder to "first exhaust any and all other insurance available for any policy period for which insurance is available before recovering from [the Association]." In *Southern Silica*, a policyholder sued Louisiana's state guaranty association, alleging that the association owed it indemnity and defense for liability arising from exposure to silica for periods in which one of its insurers was insolvent. 979 So.2d at 462-63. The guaranty association argued that the statute required the other solvent insurers to "fill the gap" and pay the amounts otherwise recoverable from the fund. *Id.* at 463. Essentially, this would have made the other insurers jointly and severally liable for the entire loss so long as their policies were triggered at all, without regard to the limited periods for which they insured the policyholder. The Supreme Court of Louisiana rejected that argument and interpreted the Louisiana statute to merely "state[] the order in which a claim must be handled," and "provide[] a procedure for asserting a claim against [the Association]: the claimant must 'exhaust' the other solvent insurers' pro rata shares of his or her damages before asserting a claim against [the Association] to pay [the insolvent insurer's] pro rata shares…" *Id.* at 468-69 (emphasis added). The court found that requiring the solvent insurers to pay the share allocable to the guaranty fund would be "contrary to the proration of insurance coverage that is a component of the significant exposure test in long latency disease cases," *i.e.,* the pro rata allocation method adopted by Louisiana. *Id.* at 466. In other words, Louisiana's rule providing for allocation of liability on a pro rata basis in turn informed its interpretation of its guaranty fund statute.

Florida's application of its choice of law regime in the context of automobile insurance coverage is another good example of how individual states' insurance law and public policy impact liability insurance rules. Florida generally follows the *lex loci contractus* rule, deciding insurance disputes under the law of the state where the insurance contract was formed. *See State Farm Mut. Auto Ins. Co. v. Roach*, 945 So.2d 1160, 1168 (Fla. 2006). But under Florida's public policy exception, the law of the place of contracting will not govern if "public policy requires the assertion of Florida's paramount interest in protecting its citizens from inequitable insurance contracts." *Id.* (citing *Lincoln Nat. Health & Cas. Ins. Co. v. Mitsubishi Motor Sales of Am., Inc.*, 666 So.2d 159, 160–61 (Fla. Dist. Ct. App. 1995)). Florida prohibits an insurer from providing coverage against injury from an uninsured motorist as prescribed by statute and then denying or limiting liability through operation of an other insurance, pro rata, or excess-escape clause. In *Gillen v. United Servs. Auto. Ass'n*, 300 So.2d 3 (Fla. 1974), there was a conflict between the law of the place of contracting, New Hampshire, which would enforce an "other insurance" clause, and Florida law, which would not enforce an other insurance clause on the facts of the case. The court found that Florida's public policy overrode the parties' choice of New Hampshire law because the policyholder had become a permanent Florida resident and had notified the insurer of the move to Florida, making the insurer aware of the risk pool it had entered into. *Id; see also Boardman v. United Servs. Auto Ass'n*, 470 So.2d 1024, 1031 (Miss. 1985) (applying "center of gravity" choice of law test, unless another state's law applies "and that law is contrary to the deeply ingrained and strongly felt public policy of this state").

These cases demonstrate that law on liability insurance law questions often differs between individual states, because it is driven by unique policies and regulatory considerations in each jurisdiction. States' desire to have their own law given full effect is evidenced in other ways, too. For instance, in a few states, legislation explicitly provides that insurance policies "delivered" or "payable" in that state may not be construed according to the laws of any other state. *See* Tex. Ins. Code Art. 21.42. This reflects the individual state's investment in its own oversight of insurance operations in the jurisdiction. This is unsurprising because insurance is an industry heavily regulated by the states, based on jurisdiction-specific needs and risks. *See* National Association of Insurance Commissioners, *State Insurance Regulation: History, Purpose, and Structure*, available at https://www.naic.org/documents/consumer_state_reg_brief.pdf. State legislatures set insurance law policy by supervising insurance departments and enacting laws regulating the industry. *Id.* State-specific regulation of insurance succeeds in part because insurance "is effectively regulated by those familiar with the risks"; for example, flood and storms in the Gulf and Atlantic states; tornados and hail in the Midwest; and earthquakes and wildfires in the West. George W. Goble, *State vs. Federal Regulation of Insurance*, 8 J. of Am. Assoc. of Univ. Teachers of Ins. 57 (1941). Insurance law is also impacted by state specific considerations, such as geography, population demographics, and forms of businesses and industries unique to each state. *See id.*

Insurance commissioners and state regulatory systems reflect their own state's priorities, consumer needs, and functions. Similarly, insurance law is uniquely state-law driven. This backdrop casts doubt on the weight that should be afforded to a single liability insurance rule for all states, such as those proposed by the ALI *Restatement of the Law, Liability Insurance*. The tension between the *Restatement* and the primacy of state interests in insurance suggests we must evaluate carefully whether the uniform rules proposed in the ALI's *Restatement* are appropriate in each state's unique insurance climate, given the legitimate interests of states in their own insurance law systems.

Laura A. Foggan chairs the Insurance/Reinsurance Practice at Crowell & Moring LLP. She is a partner in the firm's Washington, DC office. Ms. Foggan served as the American Insurance Association's liaison to the ALI Restatement of the Law, Liability Insurance project. She is an experience insurance coverage lawyer who handles trial and appellate matters across the country.

Rachael Padgett is an associate and member of the Insurance/Reinsurance and Mass Tort, Product and Consumer Litigation groups at Crowell & Moring LLP.

The Rule of Law

By Dan D. Kohane

As Presented at the National Foundation for Judicial Excellence Symposium, July 2019

I am a first-generation American. I am here because of the collapse of the rule of law and the subsequent victory over that collapse. Over my life I learned that fact and it is because of my respect for the rule of law and for an independent judiciary, I stand before you as incoming president of the NFJE

Indeed, I was the first of my family born in the United States. My parents, Jewish, were both born in the second decade of the last century in Germany. They were Germans and they were Jews and they were citizens. Like all citizens, they were protected by the rule of law. As a teenager, my father was an agitator as anti-Jewish laws started to become the norm and at the urging of people who "knew," ended up fleeing the country, by himself, in 1936, to Palestine at age 18. He did not see his parents again for almost 12 years, until 1948.

My father's parents were able to escape the destruction of the rule of law and fled to Italy where they were protected by wonderful Italian Catholics in a detention camp for four years. They left behind their family, almost none of them survived.

The U.S. government resisted allowing many European refugees into the country during World War II but eventually, under a program pressed by Eleanor Roosevelt, were allowed into the country, not as refugees, but as political interns. For a year, my paternal grandparents were quarantined in the only European refugee camp during WW II, Operation Safe Haven in Oswego, New York. When the War ended, instead of being sent back to Europe, Congress succumbed to pressure and passed a law that permitted them to become naturalized Americans. They were taken out of Oswego, crossed the

border at Niagara Falls, and then immediately re-crossed into New York and now my father's parents, supported by the rule of law, were processed.

My mother's parents left their parents and siblings behind, and also escaped into Palestine. The family they left behind in Germany succumbed to the collapse of the rule of law and were caught up in the horror of the holocaust. My parents met and married in British-run Palestine, my older sister was born in Israel and then my parents, as immigrants, moved to the United States in August of 1952. My mother smuggled me into the country in utero. My parents and sister became naturalized citizens. By fate, since I was born in the United States, I was born a citizen.

The rule of law had collapsed in Germany, starting in the late 1920s and the Nazi government, wrapping its arm around that collapse, tried to create a new society, new Reich, with a government recognizing that to flourish and survive, it had to continue to reject the rule of law that protected its citizens.

Eventually, with many millions of deaths as a backdrop, that government was defeated, and the rejection of the rule of law was crushed.

The lesson is clear, the protection and preservation of the rule of law is paramount to freedom.

You, as appellate judges and justices, are the guardians and protectors of the rule of law and fight that battle every day. As lawyers, we admire you, respect you, and honor your mission.

As Dwight Eisenhower said, the "Clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law." Another put it this way, the "bedrock of democracy is the rule of law and that means we have to have an independent judiciary who can make decisions independent of the political winds are blowing."

When I started out as a lawyer, I did not consider how important it was to preserve and protect the independence of the judiciary and rule of law. Close to 40 years of practice has taught me what is now so very clear. As I started trying cases, handling appeals, and getting involved with local and state bar associations, the DRI and its sister organizations, did I comprehend the connection between what my parents and grandparents suffered and what goes on today.

As a trial lawyer and an appellate lawyer, and an active participant in the quest for civil justice, I learned the role of independent appellate courts in preserving the rule of law, in making certain that the political winds blowing, the passion of public discourse, the biases and prejudices that often lead to the rule of law being abrogated, cannot and will not rule the day.

You protect us from those who want to reject the rule of law. You assure civil justice and refuse to allow those who might encourage a different approach to democracy and democratic principles to win.

You do so because of your independence from the legislature and from the executive and outside influences.

Alexander Hamilton, in Federalist 78 spoke so eloquently about the critical nature of judicial independence, after he described the powers of the executive and the legislative branches:

> The general liberty of the people can never be endangered by the judiciary; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. There is no liberty, if the power of judging be not separated from the legislative and executive powers.
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> And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter. An independent judiciary is "the citadel of public justice and public security.

The NFJE exists, to address the important legal policy issues affecting the law and civil justice by proving meaningful support and education for an independent judiciary to protect the rule of law. I am honored to assume the presidency and salute Gino Marchetti, my wonderful predecessor, Richard Boyette, its visionary founder, and salute those attorneys and staff out in the audience and elsewhere, some of the busiest lawyers in the country, who get busier and give up more of their time because they believe in the importance of an independent, educated and enlightened judiciary.

Thank you to William Ray and the wonderful program committee, including Vice Chair Tillman Breckenridge, who has taken up the reins for next year's program which will be held July 17–18, 2020, in this exact location.

Before I sit down, I want to take one moment to speak to you about how we keep the lights on.

If you look at page six of the Annual Report, over 75 percent of the donations that support the NFJE are funded by contributions from lawyers, state and local defense organizations, foundations and not-for-profit organizations. Think about that: lawyers and law firms, who dig deeply into

their pockets to support the NFJE, who are not in this room. You don't know who they are, they are not invited to attend, they don't get to shake your hands and they do not receive any financial benefit from your attendance here.

So why do they contribute the many thousands of dollars to fund the NFJE?

They do so because they know the return on investment is an educated and enlightened judiciary. For 15 years, the NFJE has sounded the clarion trumpet in its fight to provide meaningful support and education to support an independent judiciary, the defenders of the rule of law. We, as lawyers, as citizens, as Americans, understand and embrace how important this cause is to the legal profession and to the lawyers who defend litigants in civil lawsuits. We need a judiciary, independent, enlightened, educated, to assure even-handed justice and who will, at the end of the day, assure the rule of law is never compromised.

I am going to ask one favor of you. If you know of a local, state or national organization that you think might help contribute to our cause because that organization agrees with the importance of an educated and enlightened judiciary, this cause, your cause, please identify that organization so we may reach out to them.

I thank you for being here, for doing what you do, for loving and honoring our Constitution and for protecting the rule of law. We at the NFJE will be here for you.

Dan D. Kohane, a senior member of Hurwitz & Fine, P.C., is a nationally recognized insurance coverage counselor who serves as an expert witness, conducts extensive training, consultation and in-house seminars on this highly specialized practice. Mr. Kohane is known in the industry for his comprehensive newsletter, Coverage Pointers, a bi-weekly publication summarizing important insurance coverage decisions. He teaches Insurance Law as an adjunct professor at the University at Buffalo Law School and heads the firm's Insurance Coverage practice group. He is the president of the National Foundation for Judicial Excellence.