

Insurance Law as Public Interest Law

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INTRODUCTION

For over a century, numerous lawyers in the United States have devoted their careers to promoting and serving the public interest in some way. The public interest law movement more formally began in the 1960s and was grounded in a mission of using legal institutions to advance social justice causes.¹ In essence,

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1. See Robert W. Gordon, *Are Lawyers Friends of Democracy?*, in THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE 31, 43–46 (Scott L. Cummings ed., 2011); see also Helen Hershkoff & David Hollander, *Rights into Action: Public Interest Litigation in the United States*, in MANY ROADS TO JUSTICE: THE LAW RELATED WORK OF FORD FOUNDATION GRANTEEES AROUND THE WORLD 91 (Mary McClymont & Stephen Golub eds., 2000) (explaining how the Ford Foundation's public interest law initiative was one of the original sparks of the public interest law movement); EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE LEGAL SERVICES PROGRAM 39 (1974) (noting that the federal legal services program was one of the original avenues for public interest lawyers to provide representation). See generally Scott Cummings, *Reframing Public Services Law: Innovative Approaches to Integrating Public Service into the Legal Profession*, 33 U. ARK. LITTLE ROCK L. REV. 355 (2011); Scott Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891 (2008).

public interest lawyers attempt to “speak law to power”² by providing access to justice for underrepresented individuals unable to afford representation,³ assisting traditionally marginalized groups unable to effectively change laws through the political process,⁴ and championing the fight for civil and criminal rights, consumer protection, the elderly, and the poor.⁵ Although public interest law was originally used to connote left-oriented reform activities, politically conservative activists in recent years have undertaken activities and advocacy in the name of the public interest.⁶ This has triggered a resurgence of scholarly interest devoted to mapping the organization, practice, and meaning of public interest law in the modern era.⁷ Suffice to say, what is public interest law is currently deeply contested and the subject of considerable debate.⁸

This Article does not advocate for one meaning of public interest law over another, and therefore avoids engaging the current right-versus-left contestation over what public interest law means. Instead, I suggest that both sides of this debate conceptualize what is public interest law too narrowly. In particular, public interest law does not necessarily involve or require public interest lawyers. Moreover, public interest law does not only consist of lawyers litigating cases involving civil and criminal rights, environmental regulation, social welfare law, and consumer protection. Rather, there are other areas of law, in particular, business law, often outside the traditional social justice domains that can be mobilized and structured in ways that promote the collective good. Business law is not distinct from public interest law; it is a necessary component of public interest law. One business law area that at times serves the public interest is insurance law.

This Article counters contemporary public interest law scholarship by arguing that insurance laws and regulations serve the public interest by enabling insurance to assist the very same unrepresented and underrepresented groups that public interest lawyers are often concerned with: the poor, minorities, the elderly, consumers, employees, and other marginalized groups. Insurance law is public interest law because insurance is at times foundational to the public interest. Moreover, insurance law is often necessary for insurance to work favorably for the

2. Richard Abel, *Speaking Law to Power: Occasions for Cause Lawyering*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 69 (Austin Sarat & Stuart Scheingold eds., 1998).

3. See DEBORAH L. RHODE, ACCESS TO JUSTICE (2004).

4. See RICHARD L. ABEL, POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980–1994, at 1–3 (1995).

5. See MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973, at 40–41 (1993); MARK V. TUSHNET, THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950 (2d ed. 2005).

6. See ANN SOUTHWORTH, LAWYERS OF THE RIGHT 8–10 (2008); Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of “Public Interest Law,”* 52 UCLA L. REV. 1223, 1224–31 (2005).

7. Cummings, *Reframing*, *supra* note 1, at 355–56.

8. See *infra* notes 14–35 and accompanying text.

public. Using a series of examples from a number of lines of insurance, I highlight how insurance's risk transfer, spreading, and distribution functions promote the public welfare by allowing injured victims to seek relief and compensation.⁹ Most importantly, insurance creates a collection scheme that allows people access to justice *without* necessarily requiring people to retain lawyers. This alone serves the public interest.

This Article proceeds as follows: Part I begins by highlighting the various meanings of public interest law since the inception of the term in the 1960s. I show how the meaning of public interest law has evolved over time and is currently contested as liberal and conservative organizations both claim they are acting in the public interest. Part II explains the ways in which insurance law achieves many of the same goals public interest lawyers attempt to achieve. First, I argue that liability insurance finances the civil legal system and, more specifically, tort liability. Liability insurance assists unrepresented and underrepresented groups by providing a compensation scheme that allows injured victims to obtain relief for tort claims. Second, state insurance laws often require the purchase of certain lines of insurance. Specifically, I highlight how mandatory automobile insurance arose in part because many victims of automobile accidents did not have health or disability insurance and often failed to sue or successfully litigate their negligence claims. Thus, injured victims had no viable mechanism through which they could be compensated for their injuries. State-mandated automobile insurance laws ensure that risks that are difficult to predict will be pooled and spread, such that many losses connected to automobile use will be compensated. Liability insurance in general, and automobile insurance in particular, serve the public interest because they allow individuals, regardless of an injured victim's race, gender, age, and socioeconomic status, to seek compensation for injuries without using a lawyer and going to court. To the extent that a lawyer is needed to pursue the case, lawyers are incentivized to take the case because they know they will be able to collect from the liability insurer.

Part II.B highlights how workers' compensation insurance also serves the public interest. State workers' compensation statutes enacted in the early twentieth century addressed the rising number of work-related accidents and the fact that the litigation system was unpredictable, expensive, filled with delays, and often led to small recoveries for people with work-related injuries.¹⁰ Workers' compensation laws enable workers' compensation insurance to act in the public interest by allowing individuals suffering work-related injuries to receive compensation relatively quickly and without needing to obtain a lawyer and establish tort liability.

Part II.C explains how various forms of health insurance in the United States that are codified and ultimately funded by state and federal governments, such as

9. See *infra* notes 36–65 and accompanying text.

10. See *infra* notes 66–90 and accompanying text.

Medicare and Medicaid, allow many of the same groups public interest lawyers traditionally advocate for, i.e., the elderly, formerly working disabled, and those living in poverty, to receive health care where they otherwise would not be able to.¹¹ Similar to automobile and workers' compensation insurance systems, socialized forms of health insurance have the added benefit of allowing many unrepresented or underrepresented communities in society to receive health care services and benefits without needing to use a lawyer.¹² Even when insurance does not function to assist the public, Part II.D shows how state insurance regulations guide and direct insurance company behavior toward the public interest by setting forth regulations designed to ensure insurer solvency, insured access and availability to insurance, fair rates, and fair business practices.¹³

This Article concludes by calling for a deeper evaluation and reflection on the meaning of public interest law in society, one that goes beyond the issues that public interest lawyers traditionally address. In particular, rather than focusing on defining tight boundaries for what is public interest law and advancing the concept of social justice, public interest scholars may want to broaden their conceptualization and evaluate how many areas of law, including business law, promote and advance the public welfare.

I. THE CONTESTED MEANING OF PUBLIC INTEREST LAW

The term “public interest law” has evolved since its inception. Coined in the 1960s, “public interest law” was initially a self-conscious effort to describe the rising trend toward using legal advocacy to advance and enhance a liberal political agenda.¹⁴ Public interest lawyers were recognized as unique not only for their commitment to social change, but also for their ability to use legal institutions to advance social causes.¹⁵ In particular, public interest lawyers turned to the federal courts to protect marginalized groups and promote their version of the public and collective good.¹⁶ After examining the public interest law movement in the 1970s, Burt Weisbrod described public interest law as “activity that (1) is undertaken by an organization in the voluntary sector; (2) provides fuller representation of

11. See *infra* notes 91–115 and accompanying text.

12. See *infra* notes 91–115 and accompanying text.

13. See *infra* notes 116–131 and accompanying text.

14. Louise G. Trubek, *Public Interest Law: Facing the Problems of Maturity*, 33 U. ARK. LITTLE ROCK L. REV. 417, 417–23 (2010); see also Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2028–29 (2008).

15. See Cummings, *Internationalization*, *supra* note 1, at 893–94.

16. See Scott L. Cummings, *The Future of Public Interest Law*, 33 U. ARK. LITTLE ROCK L. REV. 355, 367 (2011).

underrepresented interests (would produce external benefits if successful); and (3) involves the use of law instruments, primarily litigation.”¹⁷

If successful, public interest activity provides more comprehensive representation of “some interest that is underrepresented in the sense that the interest has not been fully transmitted through either the private market or governmental channels.”¹⁸ Not surprisingly, the public interest law movement often involved discussing what public interest *lawyers* do for a living.¹⁹ Although there was disagreement about the definition, meaning, and theoretical justification for public interest law, and public interest lawyers in particular,²⁰ there was general

17. Burton A. Weisbrod, *Conceptual Perspective on the Public Interest: An Economic Analysis*, in PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 4, 22 (Burton A. Weisbrod et al. eds., 1978).

18. *Id.* at 20.

19. See Charles R. Halpern & John M. Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1095 *passim* (1971) (asserting that public interest lawyers were necessary to represent groups whose interests were underrepresented in administrative agencies and courts); Robert L. Rabin, *Lanyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 231–61 (1976) (exploring the present and future consequences of public interest lawyers and legal reform); Robert L. Rabin, *Abandoning Our Illusions: An Evaluation of Alternative Approaches to Law Reform*, 27 STAN. L. REV. 191, 199–200 (1974) (“Yet another conception of public interest law . . . refer[s] to traditionally unrepresented interests—interests that do not necessarily relate to either consumer or majority concerns, or to any single, widely shared substantive value, but that nevertheless might otherwise remain unrepresented in a particular, significant controversy . . . From this perspective, to which I subscribe, the key to understanding public interest representation is *access*. . . [A]nd to regard public interest advocacy as a modest corrective to the ever-present threat of myopic policy formation dominated by economically powerful interests.”); Report of the Special Committee on Public Interest Practice, 100 ANN. REP. A.B.A. 625, 965 (1975) (“Public interest legal service is legal service provided without fee or at a substantially reduced fee, which falls into one or more of the following areas:” poverty law, civil rights law, public rights law, charitable organization representation, administration of justice.).

20. The Council for Public Interest Law defined “public interest law” as:
[T]he name that has recently been given to efforts to provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in recognition that the ordinary marketplace for legal services fails to provide such services to significant segments of the population and to significant interests. Such groups and interests include the poor, environmentalists, consumers, racial and ethnic minorities, and others.

COUNCIL FOR PUB. INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA 6–7 (1976). Others have attempted to define “public interest law.” See, e.g., JEREMY COOPER & RAJEEV DHAVAN, PUBLIC INTEREST LAW 10 (1991) (“Public interest law involves in essence the use of a wide and diverse range of strategies to widen the access of the general populace to the sources of power and the decision making processes that affect their daily lives, specifically using the processes of the law to achieve this end.”); see also JEREMY COOPER, KEYGUIDE TO INFORMATION SOURCES IN PUBLIC INTEREST LAW 10 (1991) (“[W]hereas the details surrounding the precise definition of the term ‘public interest law’ are the subject of some controversy and divergence, there is remarkably consistent consensus as to what constitutes its broad themes.”); Ruth Buchanan & Louise G. Trubek, *Resistances and Possibilities: A Critical and Practical Look at Public Interest Lanyering*, 19 N.Y.U. REV. L. & SOC. CHANGE 687, 687–89 (1991–1992); Edgar S. Cahn & Jean Camper Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1006 (1970) (“[U]nderlying the currency of ‘public interest law’ is a newly emergent and valid understanding of the need to protect all members of society in their relatively passive capacity as

consensus that the basic goal of the public interest law movement was to assure the adequate representation of unrepresented and underrepresented interests and people.²¹ The original Ford Foundation program officers, Gordon Harrison and Sanford Jaffe, designed and developed the foundation's public interest law funding initiative and defined public interest law as "the representation of the underrepresented in American society" for the "benefit of large classes of people."²² Weisbrod and his co-authors identified a series of areas that public interest law activities at the time focused on: consumer protection, civil liberties, employment, education, health care, welfare benefits, education, housing, voting, occupational health and safety, and environmental protection.²³ Moreover, they identified several underrepresented groups that public interest lawyers typically served at the time: the general public, women, children, prisoners, the elderly, the mentally impaired, racial and ethnic minorities, and those living in poverty.²⁴

Because of the ambiguity in the meaning of terms such as "underrepresented" and "public interest," a wide variety of groups mobilized lawyers working in the nonprofit sector to achieve public policy goals.²⁵ Unlike the

citizens who consume not only material goods and services but also governmental policies and programs."); Scott Cummings, *The Market for Public Interest Law Services*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1075, 1075 (2011) (public interest law is "the provision of legal services broadly defined to advance some vision of the public good beyond mere client representation"); Southworth, *Conservative Lawyers*, *supra* note 6, at 1236 ("Although there was considerable disagreement about the meaning and theoretical justification for this organizational form, public interest lawyers generally asserted that new types of organizations and lawyers were necessary to respond to the deficiencies of pluralism by representing groups whose interests were underrepresented in administrative agencies and courts."); *The Practice of Law in the Public Interest*, 13 ARIZ. L. REV. 797, 798 (1971) ("The term public interest law does not lend itself to precise definition. It clearly contemplates, however, the representation of diverse groups of people presently underrepresented in our society."); Weisbrod, *supra* note 17. For a discussion of the challenges of defining the public interest, see Frank J. Sorauf, *The Public Interest Reconsidered*, 19 J. POL. 616 (1957).

21. See NAN ARON, LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND 3 (1989) ("Public interest law is the name given to efforts to provide legal representation to interests that historically have been unrepresented or underrepresented in the legal process. Philosophically, public interest law rests on the assumption that many significant segments of society are not adequately represented in the courts, Congress, or the administrative agencies because they are either too poor or too diffuse to obtain legal representation in the marketplace."); Kenney Heglend, *Beyond Enthusiasm and Commitment*, 13 ARIZ. L. REV. 805, 805 (1971) ("The basic goal of the public interest law movement is to assure adequate representation of currently unrepresented and underrepresented interests and peoples. Democratic theory and the adversary system require that all be heard. All are not. Thus, the large 'public interest' umbrella encompasses such diverse interests as racial equality, consumer protection, and ecology.")

22. Gordon Harrison & Sanford M. Jaffe, *Public Interest Law Firms: New Voices for New Constituencies*, 58 A.B.A. J. 459, 459 (1972); see also *supra* note 1 and accompanying text.

23. Weisbrod, *supra* note 17, at 29; Joel F. Handler et al., *The Public Interest Law Industry, in PUBLIC INTEREST LAW*, *supra* note 17, at 42, 57 tbl.4.7; Burton A. Weisbrod, *Part II Area Studies: Public Interest Law in Action, in PUBLIC INTEREST LAW*, *supra* note 17, at 149, 149.

24. Weisbrod, *supra* note 17, at 29; Handler et al., *supra* note 23, at 58 tbl.4.8.

25. Southworth, *Conservative Lawyers*, *supra* note 6 (highlighting how conservative lawyers and groups created legal advocacy organizations anchored in a right-wing agenda under the framework

original public interest movement's liberal, left-leaning ideology, these lawyers and the organizations they were affiliated with espoused a different view of public interest law anchored more in politically conservative values.²⁶ Ann Southworth has shown how conservative and libertarian lawyers created legal advocacy organizations similar to the public interest organizations of the political left but dedicated to advancing a right-wing political agenda under the rubric of serving the public interest.²⁷ These organizations attempted to achieve goals that were different from the goals of those individuals who originally founded the public interest law movement.²⁸ Conservatives argued that "underrepresentation" was a politically contingent term that changed over time. Thus, on contentious issues of public policy, one organization's conception of the public interest could be construed differently by another group. For example, conservatives argued that environmental regulation reduces the number of jobs for the public, and consumer regulation increases prices and leads to inefficient and inequitable results that are not in the public interest.²⁹ Scott Cummings describes the contested public interest law landscape as follows:

As a result, on the most contentious socio-political issues of the day, liberal public interest groups—standing for economic regulation, redistributive social welfare, the separation of church and state, the rights of criminal defendants, and protections for minority groups—have found themselves pitted against their conservative counterparts advocating a mirror-image agenda—free markets, small government, a prominent role for religion in public life, law and order, and an end to affirmative action.³⁰

As conservatives challenged the meaning of public interest law from the right, critics from the left argued that litigation and, rights-based rhetoric in particular, by themselves, were not adequate mechanisms for achieving social

that these organizations were serving the public interest); see also SOUTHWORTH, *LAWYERS OF THE RIGHT*, *supra* note 6 (describing the creation of conservative legal advocacy).

26. See SOUTHWORTH, *LAWYERS OF THE RIGHT*, *supra* note 6; Southworth, *Conservative Lawyers*, *supra* note 6.

27. See SOUTHWORTH, *LAWYERS OF THE RIGHT*, *supra* note 6; Southworth, *Conservative Lawyers*, *supra* note 6; see also STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE TO CONTROL THE LAW* (2008) (examining conservative mobilization in the context of law schools, public interest law groups, and the judiciary).

28. SOUTHWORTH, *LAWYERS OF THE RIGHT*, *supra* note 6, at 8–29.

29. See Scott L. Cummings, *The Pursuit of Legal Rights—and Beyond*, 59 *UCLA L. REV.* 506, 519 (2012) ("In terms of efficiency, conservatives argued that it was not obvious that regulation benefited society at large, rather than simply making distributional choices. Thus, environmental regulation could have the effect of reducing jobs, or consumer regulation could increase prices. Without aggregating individual preferences for a clean environment and jobs, for consumer safety and low prices, it was not clear *ex ante* what the optimal social welfare function was. The concept of equity was also indeterminate. Who qualified as an underrepresented group? Conservatives argued that the concept of underrepresentation was politically contingent and changed over time.")

30. Cummings, *supra* note 16, at 369; see also Cummings, *supra* note 29.

change.³¹ This liberal critique of lawyer-led strategies argued that lawyer-dominated advocacy weakened participatory democracy and ultimately disempowered the very societal actors public interest lawyers were advocating for.³²

In sum, since the development of the public interest law movement, the meaning of public interest law can only be described—at best—as ambiguous and deeply contested.³³ The contested meanings reflect a deep political, ideological, and cultural struggle. Liberal and conservative groups' jousting over the meaning of public interest law led to a series of inconsistent and competing definitions. Specifically, terms such as “public interest,” “unrepresented,” and “underrepresented” have taken on multiple meanings and interpretations by advocacy organizations. A variety of public interest advocacy organizations—liberal and conservative—now claim to speak on behalf of unrepresented and underrepresented communities. As Scott Cummings notes, “contemporary public interest lawyering has moved beyond the founding conception and now can be understood as a diverse set of ideals and practices deeply engaged in the political fight to shape the very meaning of a just society”³⁴ such that “forty years after the invention of public interest law, we no longer have a working definition of what exactly it is.”³⁵

The following section uses the existing framework as developed by public interest law advocates and scholars and highlights the ways in which insurance laws protect and serve many of the same unrepresented and underrepresented interests public interest lawyers—regardless of ideology—advocate for. Focusing on liability insurance, automobile insurance, workers' compensation insurance, health insurance, and the insurance regulatory framework, I demonstrate how insurance allows underrepresented communities such as the elderly, the poor, the disabled, the mentally ill, employees, consumers, and the general public to obtain relief and compensation for injuries and harms that occur. Moreover, insurance does something that public interest law advocates do not necessarily highlight: insurance allows people to seek relief often without needing a lawyer. That is, through insurance laws, insurance-in-action sometimes works in the public interest.

31. Cummings, *supra* note 29, at 520.

32. *Id.*

33. See Southworth, *Conservative Lawyers*, *supra* note 6, at 1236–37 (2005) (discussing the contested meaning and construction of the public interest law movement).

34. Cummings, *supra* note 29, at 510.

35. *Id.* at 517.

II. THE MULTI-FACETED WAYS THROUGH WHICH INSURANCE LAW SERVES THE PUBLIC INTEREST

A. How Liability Insurance Laws Serve the Public Interest

Liability insurance, as a system of insurance, serves the public interest in a very important way: it acts as the banker and financier for the civil litigation system. Without liability insurance, many underserved individuals who were innocently injured as the result of a tort by another person, regardless of the injured victim's race, gender, age, or socioeconomic class, would not be compensated in our civil litigation system. A plaintiffs' lawyer's decision to represent an injured victim in a tort case is predicated not merely on proving the elements of a tort, but on collectability, i.e., "defendant's ability to pay and the facility with which the defendant can be made to pay."³⁶ Over the past century, tort law has continually sought available sources of recovery and often creates and expands the liability of individuals and businesses that are likely to be covered by or have access to liability insurance.³⁷ Insurance companies in turn responded by creating new forms of liability insurance to meet the new liabilities when existing insurance was not available.³⁸ As tort law expands, so does liability insurance. Because of consumer debt, the ability of bankruptcy to discharge civil liabilities, and the few but important exceptions to the assets that must be liquidated in a bankruptcy proceeding, liability insurance is the primary asset plaintiffs can count on collecting in tort litigation in the United States.³⁹ The presence of liability insurance and the credit economy in general *produces* solvent defendants and often shapes how plaintiffs and defense lawyers litigate cases.⁴⁰

36. Tom Baker, *Liability Insurance as Tort Regulation: Six Ways That Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1, 4 (2005) ("For a lawyer considering whether to take a particular case on a contingency basis, however, or for a litigant considering whether to finance a claim upon some other basis, these legal elements are only a starting point. Liability by itself is not enough. The defendant must have the ability to pay.").

37. For a thorough examination of the relationship between tort law and liability insurance, see KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11*, at 1–5, 220–25 (2008).

38. *See id.* at 220.

39. *See* Baker, *supra* note 36, at 4–5 ("My field research confirmed the obvious point that insurance is the asset that matters for all but the wealthiest of individual defendants and small organizations."); *see also* Stephen G. Gilles, *The Judgment-Proof Society*, 63 WM. & MARY L. REV. 603, 610 (2006) (asserting that "the principal mechanism for spreading tortiously caused losses is liability insurance").

40. *See* Steve Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 186 (2001). Steve Yeazell has noted how the rise of insurance and credit in the last seventy-five years has allowed plaintiffs' attorneys and defendants' attorneys to flourish and sustain themselves:

Instead, we need to connect some developments that individually will be quite well known, and to reflect on how they have transformed the practice of civil litigation, particularly the hemisphere focusing on torts. Broadly speaking, one can summarize these changes by saying that a large expansion of consumer credit and insurance created a vast pool of solvent potential defendants. As this happened, procedural changes made it possible to

In fact, insurance law scholar Kenneth Abraham argues that the presence of liability insurance increases opportunities for legal change and promotes the general welfare because it incentivizes plaintiffs' lawyers to litigate against defendants with insurance and potentially appeal cases:

[T]he pace of legal change also may be affected by liability insurance because, other things being equal, plaintiffs, and plaintiffs' attorneys, are less likely to pursue claims against defendants with limited assets. *New law is not made when claims are not brought at all; there can be legal change only when cases are tried and appealed.* Therefore, the greater willingness of plaintiffs to pursue claims against insured defendants, and the greater ability of liability insurers, as distinguished from ordinary individuals, to litigate and appeal cases, create more numerous opportunities for legal change.⁴¹

Thus, liability insurance serves the public interest by creating and facilitating a collection process that allows injured victims to seek financial compensation for their injuries. Given the prevalence of liability insurance in society and its connection to the tort system, liability insurance allows victims the ability to pursue both deep pockets and more pockets. While public interest law is often correlated to what public interest lawyers do, here liability insurance serves the public good because it allows victims to seek relief without needing to retain a lawyer. To the extent litigation is necessary to resolve the case, liability insurance incentivizes plaintiffs' lawyers to take cases because they know they can potentially collect against an insured defendant. In doing so, liability insurance makes recovery for underserved communities easier and faster. But for liability insurance, many tort victims would "lump" their losses and not file suit or would be forced to seek the assistance of a lawyer.⁴²

Insurance laws play an important role in allowing liability insurance to serve the public interest. The fact that individuals are often required either by law or contract to purchase liability insurance demonstrates that legislators, judges, and contracting parties recognize liability insurance as a predicate for tort liability and that victims of tort liability should have a mechanism through which they can seek relief for their injuries.⁴³ The evolution of compulsory automobile insurance in the United States perhaps best exemplifies how liability insurance furthers the public interest by producing solvent defendants and enhancing the chance that deserving plaintiffs will succeed in actually recovering compensation for their injuries.

probe more deeply into the minds and file cabinets of these defendants. . . . With credit has come liability insurance, and with liability insurance has come growth in "defendant populations."

Id. at 186–87.

41. ABRAHAM, *supra* note 37, at 224 (emphasis added).

42. See William L.F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 63, 81 (1974) (discussing how many victims of potentially legally cognizable claims do not actually take legal action and "lump" their losses instead).

43. See Baker, *supra* note 36, at 5 (explaining that liability insurance has become "a de facto element of tort liability").

In the early twentieth century, the exponential growth in the number of automobiles being driven on American roads led to an increase in the number of automobile accidents.⁴⁴ These accidents often led to fatalities:

Viewed by today's standards, there was carnage on the roads. Over 30,000 people were killed in auto accidents in 1930. This was 30 percent of all the accidental deaths that occurred that year. Today, there are about 44,000 auto-related fatalities per year, constituting about 40 percent of all accidental deaths. But the effective fatality rate from driving in 1930 was nearly 20 times higher than it is today. In 1930 there were 28 deaths for every 100 million miles driven; today the rate is 1.46 deaths per 100 million miles.⁴⁵

Coupled with the rising number of accidents was a dearth of viable avenues to seek compensation and relief for injuries. First, the vast majority of people lacked disability and health insurance.⁴⁶ Second, although insurers responded by selling coverage for automobile liability, only twenty-five percent of drivers were insured in the 1920s.⁴⁷ Third, drivers had a difficult time seeking recovery for their injuries through the litigation system.⁴⁸ Accident victims could pursue litigation under negligence claims, but it was often difficult and costly to prove liability.⁴⁹ Moreover, typically a victim could not recover if she was contributorily negligent.⁵⁰ This combination of a lack of available health and disability insurance, incomplete liability insurance, and a difficult negligence standard meant that only a small number of accident victims recovered compensation in tort.

Most states responded by passing "financial responsibility laws."⁵¹ These laws required a driver involved in an accident to post a bond or show other evidence of her financial ability to pay future claims in order to retain driving privileges.⁵² A driver typically satisfied this requirement by submitting proof that she had purchased liability insurance.⁵³ In 1925, Connecticut was the first state to enact a financial responsibility law.⁵⁴ By 1932, eighteen states had passed similar laws.⁵⁵ Although these laws clearly served the public interest, they only helped ensure that a driver would be prepared and able to compensate a victim of a

44. See ABRAHAM, *supra* note 37, at 70.

45. *Id.* at 71.

46. See *id.* at 72 (discussing the challenges of obtaining compensation through other insurance sources).

47. *Id.* at 71.

48. *Id.*

49. See *id.* at 71–72.

50. See *id.*

51. For a comprehensive analysis of financial responsibility laws, see *id.* at 72–73.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

future accident. These laws did not provide relief and compensation for the person subject to the current accident.

Despite insurance company opposition, Massachusetts in 1927 enacted the first generally applicable compulsory automobile liability insurance legislation.⁵⁶ Unlike financial responsibility laws, this law required drivers to show their ability to cover damage caused by accidents in advance.⁵⁷ Mandatory automobile insurance was an attempt to collectivize the cost of injuries. In particular, by purchasing automobile liability insurance, each driver would pass along the cost of the injuries she caused to a pool composed of other drivers. Making automobile insurance mandatory placed both tortfeasors and victims in the same risk pool and thus spread the cost of accidents among them.⁵⁸ Legislators and the general public came to understand mandatory liability insurance as protecting the victim as much as the policyholder. In the 1960s, states increasingly began adopting compulsory insurance requirements in the automobile context.⁵⁹ Today, forty-nine states and the District of Columbia require compulsory liability insurance for drivers.⁶⁰ Initially contested and controversial, mandatory automobile insurance laws serve

56. For a comprehensive history of the manner in which automobile insurance became mandatory in the United States, see ABRAHAM, *supra* note 37, at 72; *see also* M.G. WOODRUFF III ET AL., *AUTOMOBILE INSURANCE AND NO-FAULT LAW* § 3:21, at 90 (1974). During this time, a group of scholars, lawyers, and judges affiliated with Columbia University produced a proposal for automobile liability and insurance reform that came to be known as the Columbia Plan. ABRAHAM, *supra* note 37, at 74–75. Modeled largely on workers' compensation insurance, the plan envisioned mandatory purchase of automobile liability insurance by all owners of motor vehicles. The plan also proposed a no-fault theory of compensation such that victims would not be required to prove negligence in order to recover damages. Thus, the authors of the Columbia plan were more interested in securing compensation for victims than reducing the need for compensation by encouraging the prevention of accidents. Ultimately, the Columbia plan was not adopted due to opposition by insurance companies, a lack of consensus that automobile accidents—like workplace injuries—warranted a no-fault compensation system, and the economic crisis resulting from the Depression. *See id.*

57. *See* ABRAHAM, *supra* note 37, at 72–74.

58. For a thorough discussion of the risk-spreading function of mandatory automobile insurance, see Young B. Smith, *Compensation for Automobile Accidents: A Symposium—The Problem and Its Solution*, 32 COLUM. L. REV. 785, 792 (1932).

59. Insurance treatises at the time articulated the dual goals of automobile insurance, noting the purpose of mandatory automobile insurance was to “(1) Protect[] the tortfeasor of an automobile accident from financial disaster resulting from a judgment rendered against him in a court of law” and “(2) [p]rovide[] compensation for the victim of an accident for injuries received from the accident.” WOODRUFF ET AL., *supra* note 56, § 3:1, at 75.

60. *Compulsory Auto/Uninsured Motorists*, INSURANCE INFORMATION INSTITUTE (May 2012), http://www.iii.org/issues_updates/compulsory-auto-uninsured-motorists.html. Only New Hampshire does not have a compulsory automobile insurance liability law. Instead, New Hampshire requires all drivers to show they are financially responsible and requires drivers who have been convicted of driving under the influence to purchase automobile liability insurance. N.H. REV. STAT. ANN. § 264 (2012); *see also* JERRY S. ROSENBLUM, *AUTOMOBILE LIABILITY CLAIMS: INSURANCE COMPANY PHILOSOPHIES AND PRACTICES* 4 (1968).

the public interest by making drivers financially responsible to others they injure in an accident and are now treated as a necessary cost of living in the United States.⁶¹

Courts in particular have also done their share to promote victim compensation through the expansive interpretation of automobile liability insurance policy provisions.⁶² For example, courts flexibly interpret the “omnibus” clause⁶³ and “arising out of the ownership, operation, or use” of the insured motor vehicle in ways that trigger coverage so that victims have a mechanism through which to seek compensation.⁶⁴ In addition to courts, regulators eventually understood and evaluated liability insurance provisions as protecting not just the policyholder, but also the victim.⁶⁵ As the scope of coverage provided in a standard automobile liability insurance policy expanded, it became more likely that innocent victims of automobile accidents would receive compensation.

In sum, liability insurance in general, and mandatory automobile insurance laws in particular, serve the public interest by creating a risk-spreading system that makes those who cause accidents financially responsible to victims. Whereas injured persons were historically unable to obtain compensation for injuries when insurance was not required, liability insurance provides a mechanism for injured victims to seek relief. By legally requiring everyone who drives to have insurance, liability insurance creates a compensation system that allows injured victims to sue without necessarily having to obtain a lawyer and file a lawsuit. To the extent that a lawyer is needed to resolve an automobile dispute, the presence of liability insurance incentivizes plaintiffs’ lawyers to represent victims on a contingency basis because they know there is a likely source they can eventually collect from.

61. See ABRAHAM, *supra* note 37, at 102. Abraham explains how automobile insurance has become a part of American society:

[I]nsurance turns many accidents that would have been a major financial misfortune into mere personal inconveniences. For most people, paying sizable sums for auto insurance has simply become a part of the background cost of living. The whole insurance and liability system for dealing with auto accidents has become so embedded in our lives that it is almost transparent. Auto liability is a prime example of how the routinization and bureaucratization in a field of liability tends to move it from the foreground to the background of public concern, despite the very substantial amount of money that is sometimes involved.

Id.

62. *Id.* at 79; see, e.g., *Owens v. Ocean Accident & Guar. Corp.*, 109 S.W.2d 928, 930 (Ark. 1937) (finding that liability for dropping a patient prior to loading her into an insured ambulance was covered); *Mullen v. Hartford Accident & Indem. Co.*, 191 N.E. 394, 395 (Mass. 1934) (finding that liability for an injury caused by oil leaking from an insured vehicle was covered); *Quality Dairy Co. v. Fort Dearborn Cas. Underwriters*, 16 S.W.2d 613, 614–15 (Mo. Ct. App. 1929) (finding that liability for harm resulting from the detachment of a wagon from the insured vehicle was covered).

63. In general, the omnibus clause provides coverage of liability incurred by anyone operating the insured vehicle with permission. See ABRAHAM, *supra* note 37, at 78.

64. *Id.* at 79 (“Each time the courts held that there was insurance in a borderline situation, they ensured not only that the driver was covered but also that the victim would have a source of recovery if his claim were successful.”).

65. See *id.* at 78; Baker, *supra* note 36, at 2–7.

B. How Workers' Compensation Insurance Laws Serve the Public Interest

Established through legislative enactment, workers' compensation insurance is another line of insurance that serves the public interest. Workers' compensation systems provide benefits to employees suffering occupational injuries.⁶⁶ An employee must prove an injury occurred during the course of employment, at which point the employer must provide medical care for the injured employee. Workers' compensation insurance is not only a no-fault compensation scheme, but also a tort replacement system because it provides compensation without needing to establish tort liability.⁶⁷ A workers' compensation scheme serves multiple purposes: it reduces litigation in courts, it provides employees with a quick system through which to seek relief and compensation, and it manages costs for employers by spreading the costs through the purchase of insurance to cover workers' injuries.⁶⁸

Prior to the passage of modern workers' compensation laws, it was very difficult for injured workers to receive compensation for medical costs and lost wages from a work-related injury.⁶⁹ In theory, a worker had the ability to file a tort suit against another worker who, due to negligence, had caused her injury. This right to sue was severely curtailed in the mid-nineteenth century by the adoption of the English doctrine of the fellow-servant rule in many states.⁷⁰ Under the fellow-servant rule, a servant (employee) had no claim against the master (employer) for injuries caused by another worker.⁷¹ Instead, claims were limited to incidences where the employer was partially at fault.⁷² Occasionally, courts limited the application of the fellow-servant rule by allowing some dramatic work-related injuries to be compensated on a case-by-case basis.⁷³ However, despite the fellow-servant rule and other defenses such as contributory negligence and assumption of risk, the civil justice system continued receiving many work-related legal claims. In the late nineteenth and early twentieth centuries, work-related injuries significantly rose, in part due to the rise of industrial jobs:

66. Gregory T. Presmanes & Seth Eisenberg, *Hazardous Condition: The Status of Illegal Immigrants and Their Entitlement to Workers' Compensation Benefits*, 43 TORT TRIAL & INS. PRAC. L.J. 247, 248 (2008).

67. See MARC A. FRANKLIN ET AL., TORT LAW AND ALTERNATIVES 828, 834–35, 866–69 (8th ed. 2006) (discussing how workers' compensation insurance has long replaced the tort remedy with a no-fault compensation scheme); Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 836–37 (2011) (discussing the replacement of tort remedies).

68. Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 67–71 (1967) (providing a lengthy discussion of the purposes of workers' compensation insurance).

69. See *id.* at 53–59 (tracing the evolution of workers' compensation insurance in the United States); JAY E. GREINIG, PRENTICE HALL'S WORKERS' COMPENSATION HANDBOOK 101–02 (1987).

70. See Friedman & Ladinsky, *supra* note 68, at 53–59 (highlighting the evolution of the workers' compensation doctrine).

71. *Id.* at 53.

72. See *id.*

73. See *id.* at 59 (noting a few exceptions for unique factual situations).

One reason for the continued litigation may have been simply the great number of accidents that occurred. At the dawn of the industrial revolution, . . . the human consequences of that technological change were unforeseeable. In particular, the toll it would take of human life was unknown. But by the last quarter of the nineteenth century, the number of industrial accidents had grown enormously. After 1900, it is estimated, 35,000 deaths and 2,000,000 injuries occurred every year in the United States. One quarter of the injuries produced disabilities lasting more than one week. The railway injury rate doubled in the seventeen years between 1889 and 1906.⁷⁴

Because few injured workers received compensation, labor unrest increased among workers and their unions.⁷⁵ Under the earliest state employers' liability statutes, the issue of liability and the amount awarded still depended upon court rulings and jury verdicts. However, the civil justice system and adjacent employer liability commissions were often filled with delays⁷⁶ and expensive,⁷⁷ and they often led to very small recoveries⁷⁸ because lawyer fees absorbed much of the recovery.⁷⁹ Thus, lost wages and medical costs were very hard to recoup in that

74. *Id.* at 60.

75. *See id.* at 65–66.

76. *See id.* In 1910, the New York Employers' Liability Commission reported that delays ran from six months to six years:

The injured workman is driven to accept whatever his employer or an insurance company chooses to give him or take his chance in a lawsuit. Half of the time his lawsuit is doomed to failure because he has been hurt by some trade risk or lacks proof for his case. At best he has a right to retain a lawyer, spend two months on the pleadings, watch his case from six months to two years on a calendar and then undergo the lottery of a jury trial, with a technical system of law and rules of evidence, and beyond that appeals and perhaps reversals of questions that do not go to the merits. . . . If he wins, he wins months after his most urgent need is over.

Id. at 66; *see also* W.F. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 23–24 (1936).

77. *See* Friedman & Ladinsky, *supra* note 68, at 66.

78. *See id.* Drawing from data obtained from the New York Employers' Liability Commission, Friedman highlighted injured workers' recovery was low:

When an employee did recover, the amount was usually small. The New York Commission found that of forty-eight fatal cases studied in Manhattan, eighteen families received no compensation; only four received over \$2,000; most received less than \$500. The deceased workers had averaged \$15.22 a week in wages; only eight families recovered as much as three times their average yearly earnings. The same inadequacies turned up in Wisconsin in 1907. Of fifty-one fatal injuries studied, thirty-four received settlements under \$500; only eight received over \$1,000.

Id. at 66; *see also* DODD, *supra* note 76, at 19–21.

79. *See* Albert C. Lin, *Beyond Tort: Compensating Victims of Environmental Toxic Injury*, 78 S. CAL. L. REV. 1439, 1505 (2005) (highlighting the challenges employees faced when bringing lawsuits against employers); *see also* Friedman & Ladinsky, *supra* note 68, at 66–67. Friedman highlighted the challenges of using the litigation system to seek relief and noted recoveries were often very small:

Litigation costs consumed much of whatever was recovered. It was estimated that, in 1907, "of every \$100 paid out by [employers in New York] on account of work accidents but \$56 reached the injured workmen and their dependents." And even this figure was unrepresentative because it included voluntary payments by employers. "A fairer test of employers' liability is afforded by the \$192,538 paid by these same employers as a result of law suits or to avoid law suits, whereof only \$80,888, or forty-two percent, reached the

climate. While employees found the litigation process unpredictable and onerous, employers also did not like the potential for unpredictable jury verdicts, high court costs, and difficult negotiations with insurance companies regarding these claims.⁸⁰

Against this backdrop, state workers' compensation schemes emerged in the early twentieth century in the United States in order to benefit employers and workers by replacing uncertain remedies and relief with certain ones.⁸¹ These workers' compensation statutes eliminated the process of using courts to establish civil liability in cases involving work-related injuries. Under workers' compensation statutes, compensation was based on statutory schedules and the responsibility for initial determination of employee claims was removed from the courts and given to an administrative agency.⁸² Most states also abolished the fellow-servant rule and the ability to invoke defenses such as assumption of risk and contributory negligence.⁸³ Employees and employers avoided the expenses and risks of tort litigation as work-related injury disputes were funneled to a presumably more efficient administrative system.⁸⁴ The compensation scheme for employers who elect to come under the program is the exclusive remedy for an employee injured accidentally on the job.⁸⁵ These systems are designed to provide compensation to the injured employee in a nonadversarial manner without regard to fault. Employers received immunity from suit in return for paying premiums to support the system.⁸⁶

After a few states initially passed workers' compensation statutes, the rest of the states followed. Employers and legislators determined it was in their interest to indemnify injured workers with set schedules, caps, and insurance than to risk going to court where damages could vary wildly.⁸⁷ From 1911 to 1948, all fifty states passed some form of workers' compensation statutes and thereby reduced the flood of litigation by giving employers fixed liability for an employee's injury, provided that the injury qualified.⁸⁸ Currently, workers' compensation programs in

beneficiaries." A large fraction of the disbursed payments, about one-third, went to attorneys who accepted the cases on a contingent basis.

Id. at 66 (internal citation omitted).

80. Oliver T. Beatty, *Workers' Compensation and Hoffman Plastic: Pandora's Undocumented Box*, 55 ST. LOUIS U. L.J. 1211, 1221–22 (2011) (noting the problems both employees and employers had with the civil justice system).

81. Research on behalf of state commissions revealed that creating a workers' compensation scheme would be no more expensive than the current litigation scheme. Most commissions also recommended creating a workers' compensation scheme that fixed liability upon the employer regardless of fault. See Friedman & Ladinsky, *supra* note 68, at 70–71.

82. *Id.*

83. *Id.*

84. See Joan T.A. Gabel, *Escalating Inefficiency in Workers' Compensation Systems: Is Federal Reform the Answer?*, 34 WAKE FOREST L. REV. 1083, 1089 (1999).

85. Friedman & Ladinsky, *supra* note 68, at 71.

86. See Grenig, *supra* note 69, at 102.

87. Beatty, *supra* note 80, at 1222.

88. *Id.*

the United States cover over 125 million workers, cost employers over \$60 billion, and pay out approximately \$50 billion in benefits.⁸⁹ As this brief history highlights, the workers' compensation system emerged from a desire to create a new, workable, and predictable mode of handling accident liability that balanced the interests of labor and management.

This Article does not suggest that workers' compensation schemes are foolproof. Clearly, they are not perfect systems and reform efforts are ongoing.⁹⁰ However, as with automobile insurance, workers' compensation laws serve the public interest in a number of ways. First, workers' compensation laws assist some of the very same groups public interest lawyers advocate for: employees, the poor, injured victims, and those traditionally underserved and underrepresented. Second, workers' compensation insurance allows for a subsegment of the tort victim population—those accidentally injured at work—to receive compensation and relief without needing to establish fault. Third, workers, for the most part, can receive compensation and move through the workers' compensation system without needing to use a lawyer. Fourth, workers' compensation insurance systems reduce the amount of litigation in courts and increase employee access to relief and compensation. Finally, workers' compensation schemes provide policy incentives for workplace safety and employee protection, which of course serve the public interest.

C. How Health Insurance Laws Serve the Public Interest

As with mandatory automobile insurance and workers' compensation insurance, the socialized aspects of health insurance serve many of the same underserved and underrepresented communities public interest lawyers traditionally serve. Social insurance “is the policy of organized society to furnish

89. See Lin, *supra* note 79, at 1505; see also CECIL THOMPSON WILLIAMS ET AL., NAT'L ACAD. OF SOC. INS., WORKERS' COMPENSATION: BENEFITS, COVERAGE, AND COSTS, 2001, at 2 (2003).

90. Both employers and employees have complained about the workers' compensation system:

Over the past two decades, employers have complained about the escalating costs of the workers' compensation system, while employees have complained of inadequate compensation. Although costs stabilized in the mid-1990s, with the number of claims following a downward trend, overall costs have risen dramatically in the last few years. These increases may be due to rising medical costs, to attempts by insurers to compensate for having previously charged insufficient premiums, or to increased involvement of lawyers in the claims process. Meanwhile, the decline in benefits has been blamed on the introduction of managed care and other cost-controls.

Lin, *supra* note 79, at 1506. See generally Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform,"* 50 RUTGERS L. REV. 657, 683–703 (1998) (describing the workers' compensation “crisis” of rising costs and diminishing benefits); Eston W. Orr, Jr., Note, *The Bargain Is No Longer Equal: State Legislative Efforts to Reduce Workers' Compensation Costs Have Impermissibly Shifted the Balance of the Quid Pro Quo in Favor of Employers,* 37 GA. L. REV. 325, 351–52, 356–57 (2002) (arguing that some states altered the balance crucial to workers' compensation by raising their compensability standards, lowering disability payments, limiting medical benefits, restricting litigation costs, and expanding employer immunity).

that protection to one part of the population, which some other part may need less, or, if needing, is able to purchase voluntarily through private insurance.⁹¹ Typically, insurance is considered social if the insurance is compulsory and easily available, and the price bears some relation to the ability to pay.⁹²

Through various laws, state and federal governments finance a number of health care institutions and programs that are popularly conceived of as social insurance and, consequently, serve many of the communities public interest lawyers serve, as well as the public interest more broadly.⁹³ For example, the federal government provides health care to millions of veterans in 1400 veterans' hospitals, clinics, and nursing facilities; TRICARE⁹⁴ provides over 5.5 million members of the military and their dependents health care; approximately 600 facilities run by the Indian Health Service provide 1.5 million Native Americans with health care; and a variety of special groups, through block grants to the states, provide funding for health care relating to maternal and child health, alcohol and drug abuse treatment, mental health, preventive health, and primary care.⁹⁵ State governments also provide health care through more traditional programs, such as state mental hospitals, state university hospitals, and workers' compensation.⁹⁶ However, states also increasingly provide health care through insurance pools for the high-risk uninsured, pharmaceutical benefit programs, and programs to provide health insurance for the uninsured poor.⁹⁷ Aside from health care provided at the federal and state levels, county and local governments also operate local hospitals.⁹⁸ When the cost of direct government health care programs is added to the cost of government employee health benefits and tax subsidies that support private health insurance benefits, tax-financed health care spending in the United States amounts to sixty percent of total health care spending.⁹⁹

Of course, the largest socialized or public health care programs are the federal Medicare program and the state and federal Medicaid programs. Medicare

91. I.M. RUBINOW, *SOCIAL INSURANCE* 3 (1913).

92. Tom Baker, *Health Insurance, Risk, and Responsibility After the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 1577, 1579 (2011) ("While all insurance is social—so that 'the loss lighteth rather easily upon many than heavily upon few'—to be considered social insurance in the traditional sense, the insurance must be compulsory and easily available, and the price must bear some relation to the ability to pay.") (internal citation omitted).

93. BARRY R. FURROW ET AL., *HEALTH LAW* 369 (6th ed. 2008).

94. TRICARE, more formally known as the Civilian Health and Medical Program of the Uniformed Services, is the health care program serving active duty military service members, National Guard, and Reserve members, retirees, and their families. *What is TRICARE?*, TRICARE, <http://tricare.mil/mybenefit/home/overview/WhatIsTRICARE> (last updated June 12, 2012).

95. FURROW ET AL., *supra* note 93, at 369.

96. *See id.*

97. *See id.*

98. *See id.*

99. *See* Steffie Woolhandler & David U. Himmelstein, *Paying for National Health Insurance—And Not Getting It*, *HEALTH AFF.*, July/Aug. 2002, at 88, 91, 93.

helps the elderly and formerly working disabled receive health care.¹⁰⁰ Medicare covers nearly thirty-seven million elderly and 6.6 million disabled beneficiaries and is generally linked to another major social insurance program in the United States: Social Security.¹⁰¹ Medicare has generally been successful in securing broad access to health care for many people who would otherwise be uninsured.¹⁰² In particular, Medicare pays for approximately forty-nine percent of the health care received by the elderly in the United States.¹⁰³ “Almost half of Medicare beneficiaries have incomes of 200 percent of the federal poverty level or less, and sixty percent of elderly Medicare beneficiaries receive at least half of their income from Social Security.”¹⁰⁴ While not a perfect program, Medicare has helped the poor and elderly, two groups that public interest lawyers often represent, receive higher levels of health care than they would otherwise receive.

Medicaid also serves many underrepresented groups, especially certain categories of the poor. In particular, Medicaid is available on a national basis for pregnant women, children (including disabled children), parents of dependent children, and low-income elderly and disabled Medicare recipients (known as “dual eligibles”).¹⁰⁵ Eligibility is almost always related to economic need, and virtually every Medicaid applicant must show that his or her income and resources fall below certain levels set by the states pursuant to broad federal guidelines. These individuals must meet state-determined income ceilings that vary by category, though there is a national floor for some categories.¹⁰⁶ Medicaid coverage has often been relegated to certain categories of “deserving poor,” “categorically needy” and “medically needy,” though there has been a recent shift toward decoupling Medicaid eligibility from welfare recipient status.¹⁰⁷ Although

100. See Baker, *supra* note 92, at 1579. In general, Medicare covers seniors, i.e., “those who paid, or were married to someone who paid, Social Security taxes for forty quarters” or disabled, i.e., those “who paid, or were dependents of someone who paid, Social Security taxes for forty quarters before becoming totally disabled.” *Id.* at 1581. See generally PATRICIA A. DAVIS, CONG. RESEARCH SERV., R41436, MEDICARE FINANCING (2011) (explaining the history and the financing of Medicare).

101. FURROW ET AL., *supra* note 93, at 369–74.

102. *See id.*

103. *Id.* at 374.

104. *Id.* at 373.

105. Baker, *supra* note 92, at 1584 (explaining Medicaid eligibility requirements); see also FURROW ET AL., *supra* note 93, at 397–99.

106. Baker, *supra* note 92, at 1584 (“[I]ndividuals had to meet state-determined income ceilings that varied by category . . . : 100% of the index for the elderly, disabled, and children aged 7 to 19, and 133% of the index for pregnant women and children 6 years of age or younger.”).

107. The Patient Protection and Affordable Care Act (PPACA) abandons the concept of “deserving poor” altogether. In 2014, all United States lawful residents with family incomes less than 133% of the federal poverty level will be entitled to Medicaid. Combined with Medicare, Medicaid insures approximately a quarter of the American population. *See id.*

Medicaid does not cover all of America's poor, when combined with Medicare, Medicaid insures approximately a quarter of the American population.¹⁰⁸

These social insurance components of our health care system serve the public interest in a number of ways, including by increasing access to health care and by broadening the safety net.¹⁰⁹ The socialized components of the health insurance system also build into the health care system mechanisms that promote the health and safety of individuals living in American society.¹¹⁰ More specifically, through Medicare and Medicaid, the elderly, formerly working disabled, and certain categories of the poor, including all children in low-income families, are able to receive health care where they otherwise might not be able to. Further, individuals are also able to access health care services and benefits without needing to employ a public interest lawyer to advocate on their behalf.

Part of the current political, economic, and cultural debate over the viability of the Patient Protection and Affordable Care Act (PPACA) and the Health Care and Education Reconciliation Act of 2010 (HCERA) is whether American society is prepared to treat health insurance as serving the public good or simply as an individual commodity. For decades, United States income tax and employment law encouraged the provision of general health benefits through employment and thus made employment-based health insurance a practical obligation for many small employers and some large employers.¹¹¹ However, employers still

108. FURROW ET AL., *supra* note 93, at 370.

109. For articles arguing that health insurance promotes health, and access to care in particular, see, for example, Lawrence O. Gostin, *Securing Health or Just Health Care? The Effect of the Health Care System on the Health of America*, 39 ST. LOUIS U. L.J. 7, 9–10 (1994–1995) (noting that access to care is a critical component to promoting health and that “promotion of the health of the population is the most important objective of health care reform”); Wendy K. Mariner, *Health Reform: What's Insurance Got to Do With It? Recognizing Health Insurance as a Separate Species of Insurance*, 36 AM. J.L. & MED. 436, 450 (2010) (“A more transparent approach to reform would make explicit that health plans constitute a valuable, separate species of insurance designed primarily to finance socially beneficial health services by spreading the cost of care.”). For articles arguing that the lack of insurance or insufficient insurance leads to poorer health, see, for example, COMM. ON THE CONSEQUENCES OF UNINSURANCE, INST. OF MED., HIDDEN COSTS, VALUE LOST: UNINSURANCE IN AMERICA 4 (2003) (“[T]he aggregate, annualized cost of the diminished health and shorter life spans of Americans who lack health insurance is between \$65 and \$130 billion annually for each year of health insurance foregone.”) (emphasis omitted); Jonathan Gruber, *Covering the Uninsured in the United States*, J. ECON. LITERATURE 571, 582–83 (2008) (highlighting studies that note the adverse impact a lack of insurance has on health); Diane Rowland & Adele Shartzter, *America's Uninsured: The Statistics and Back Story*, 36 J.L. MED. & ETHICS 618, 618 (2008) (“The large and growing number of uninsured people is of concern because health coverage makes a difference in whether and when people get necessary medical care, where they get their care, and ultimately how healthy people are.”).

110. See Allison K. Hoffman, *Three Models of Health Insurance: The Conceptual Pluralism of the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 1873, 1876–78 (2010) (noting that one of the major conceptions of health insurance is that it promotes health).

111. See Alain C. Enthoven & Victor R. Fuchs, *Employment-Based Health Insurance: Past, Present, and Future*, 25 HEALTH AFF. 1538, 1538–39 (2006) (“The exemption of employer payments for health insurance from employees' taxable income, combined with substantial efficiency advantages of group over individual insurance, fueled rapid expansion [in employment-based insurance].”).

maintained the legal choice to offer health insurance while individuals' only health insurance obligations have been to pay Medicare taxes and participate in financing Medicaid through the payment of their ordinary state and federal taxes.¹¹² Starting in 2014, the PPACA will require large employers to purchase insurance for their employees' entire lifetime. Moreover, for the first time in U.S. history, the PPACA abandons the concept of the "deserving poor" and expressly recognizes a national entitlement to health care for all of the poor—including working-age, able-bodied individuals—which will be financed through tax revenues.¹¹³ Thus, the PPACA and HCERA attempt to create health care solidarity through a combination of "private ownership, markets, choice and individual responsibility."¹¹⁴ Proponents of the PPACA clearly see the law as recognizing health insurance as a public good, while opponents view health insurance as an individual choice. While the Supreme Court in *National Federation of Independent Business v. Sebelius* was fairly careful not to address the policy merits of the PPACA, its decision upholding the PPACA and the individual mandate as a permissible tax¹¹⁵ in essence allows many aspects of American health insurance to be treated as compulsory, socialized, and serving the public interest.

D. How Insurance Regulations Serve the Public Interest

When insurance by itself does not function to assist the public, state regulation attempts to equalize the power imbalance and steer insurance companies toward maintaining services and products that serve the public interest. To begin with, the U.S. Supreme Court recognized almost a century ago that insurance is business that implicates the public interest.¹¹⁶ States have followed the Supreme Court's lead by developing a regulatory framework that tries to protect the public.

For example, each state's insurance department has broad, legislatively delegated powers to enforce state insurance laws, promulgate rules and regulations, and conduct hearings to resolve disputed matters. State insurance commissioners in particular are afforded broad discretion and power because their

112. See Baker, *supra* note 92, at 1579 (highlighting the distinctions between the current health care model and President Obama's PPACA and HCERA).

113. See *id.* at 1584–86.

114. *Id.* at 1579. Baker notes that this approach is anchored in earlier conceptions of insurance as being "mutual":

While some might regard this contract as the unnatural union of opposites—solidarity on the one hand and markets, choice, and individual responsibility on the other—those familiar with insurance history will recognize in the Act an effort to realize the dream of America's early insurance evangelists: a "society united on the basis of mutual insurance."

Id. at 1579–80 (internal citation omitted).

115. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2595–96 (2012).

116. See, e.g., *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 411–15 (1914) (noting the business of insurance is in the public interest and therefore justifies rate regulation by legislation).

primary responsibilities are to protect the public.¹¹⁷ As articulated by most states, the goals of insurance regulation include fair pricing of insurance, protecting insurance company solvency, preventing unfair practices by insurance companies, and ensuring the availability of insurance coverage.¹¹⁸ In doing so, insurance regulation helps ensure solvency and the insurer's ability to pay claims in the future, standardizes policy coverage, requires fair claims processing, and mandates certain levels of minimum coverage along particular lines of insurance.¹¹⁹ Moreover, insurance laws and regulations that prohibit risk classification and segmentation result in redistribution to groups in need.¹²⁰ All states have the power to approve insurance rates, to periodically conduct financial examinations of insurers, license companies, agents, and brokers, and to monitor and regulate claims-handling practices.¹²¹

Insurance regulation uses a number of specific regulatory tools aimed at preserving solvency of insurance companies and, consequently, protecting consumers of insurance. State regulation subjects insurance companies to a series of requirements all aimed at making sure insurance companies are financially

117. See ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW 103 (4th ed. 2007) (“The Department of Insurance exercises authority delegated to it by the legislature. The primary responsibility of the Insurance Commissioner is to protect the public, and to that end the authority of the Commissioner is usually stated broadly. As an implementer of law, the Commissioner makes ‘law’ in a broad sense.”); see also KENNETH S. ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY 38–41 (1986) (providing a brief analysis of the role of the typical Insurance Commissioner).

118. Jerry articulates the purpose of insurance regulation as follows:

Although the larger objectives of insurance regulation are to prevent destructive competition, compensate for inadequate information, relieve unequal bargaining power, and assist consumers incapable of rationally acting in their best interests, the articulated objectives of state legislative regulation are essentially fourfold: (1) ensuring that consumers are charged fair and reasonable prices for insurance products; (2) protecting the solvency of insurers; (3) preventing unfair practices and overreaching by insurers; and (4) guaranteeing the availability of coverage to the public.

JERRY, *supra* note 117, at 90–91. See also TOM BAKER, INSURANCE LAW AND POLICY 640 (2d ed. 2008) (“Access and availability regulation is a relatively new feature on the insurance regulatory landscape. As the name suggests, these regulations are directed at ensuring that insurance is available and that people have access both to insurance and to the goods and services for which insurance is required.”); Spencer L. Kimball, *The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law*, 45 MINN. L. REV. 471 (1961).

119. See JERRY, *supra* note 117, at 90–103; Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners*, 26 FLA. ST. U. L. REV. 625, 627–29 (1999) (discussing the goals of an insurance regulatory scheme).

120. See Kyle Logue & Ronen Avraham, *Redistributing Optimally: Of Tax Rules, Legal Rules, and Insurance*, 56 TAX. L. REV. 157 (2003).

121. See, e.g., NAIC MODEL LAWS, REGULATIONS, AND GUIDELINES §§ VI-1775-1, VI-1780-1 (Property & Casualty Model Rating Law); *id.* § III-390-1 (Model Law on Examinations); *id.* § III-320-1 (Organization and Ownership of New Insurance Companies); *id.* § II-218-1 (Producer Licensing Model Act); *id.* § VI-880-1 (Unfair Trade Practices Act); *id.* § VI-900-1 (Unfair Claims Settlement Practices Act).

sound.¹²² Some examples include capital requirements, financial reporting and accounting disclosures, limits on the kinds and types of investments insurance companies can make with funds held in reserve to pay claims, and requirements that insurance companies provide a legitimate basis for insurance rates they charge consumers.¹²³ When solvency regulations fail to prevent insurance companies from failing, states use guaranty funds, which provide a way for insureds to seek coverage in the event that their insurance company becomes insolvent.¹²⁴ Insurance guaranty funds are an emergency measure that requires surviving insurance companies to provide funds to cover an insolvent insurer's claims. In short, guaranty funds protect consumers by paying all or a portion of the insolvent insurer's claims.¹²⁵

Insurance regulation also attempts to ensure availability of insurance coverage through regulations relating to residual market mechanisms. Residual market mechanisms establish a means for people to purchase insurance when there is no other insurer willing to provide insurance to them at a lower price than that charged in the residual market.¹²⁶ Residual market structures are most common in areas in which there is mandatory insurance, such as automobile insurance and workers' compensation.¹²⁷ However, many states also have residual market mechanisms for property and health insurance.¹²⁸ If there were no residual market mechanisms in place, insurance companies "could control access to many goods and services that require insurance" and potentially shut out individuals in need of insurance.¹²⁹

State insurance regulation serves the public interest in part because insurance policies are complex and consumers often have a difficult time obtaining information concerning what insurance policies and provisions mean. Consumers are not well equipped to assess a company's future solvency, evaluate a company's claims handling practices, or compare coverage in various policies.¹³⁰ Consumers

122. See BAKER, *supra* note 118, at 637–40 (analyzing the ways in which state regulation protects the public). See generally JERRY, *supra* note 117, at 61–140, for a comprehensive explanation of the features of insurance regulation.

123. See BAKER, *supra* note 118, at 638–39.

124. For background on guaranty funds, see DAVID A. MOSS, *WHEN ALL ELSE FAILS: GOVERNMENT AS THE ULTIMATE RISK MANAGER* 264–71 (2002).

125. BAKER, *supra* note 118, at 683–84 (explaining the value of guaranty funds to consumers).

126. See *id.* at 640 (highlighting the basic parameters for how a residual market mechanism works). See generally Carol A. Heimer, *Insuring More, Ensuring Less: The Costs and Benefits of Private Regulation Through Insurance*, in *EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY* 116 (Tom Baker & Jonathan Simon eds. 2002).

127. See BAKER, *supra* note 118, at 640.

128. *Id.*

129. *Id.*

130. See Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389, 1412–22 (2007) (highlighting the limited information that consumers have about insurance); Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263, 1266 (2011) ("Despite massive marketing campaigns by insurers emphasizing the importance of

invest large sums of money in insurance coverage in advance of making a claim on a policy. Thus, the value of insurance to consumers lies in the future performance by insurance companies of the various contingent obligations they agree to provide. Some examples of the interests insurance protects include an individual's future ability to provide for dependents in case of death or injury, to retire, to obtain necessary medical treatment, to replace damaged or destroyed property, and to be compensated for bodily injury. Regulating the insurance industry increases the likelihood that insurers will fulfill their obligations upon receiving a covered claim from an insured.

Obviously, I am not suggesting that insurance regulation always works. Clearly, insurance regulation often falls short of achieving its goals.¹³¹ The insurance regulatory framework, however, does attempt to at least steer insurance company behavior toward being more in line with the public interest by taking steps to ensure insurer solvency, curb unfair business practices, establish fair rates, and ensure the access and availability of insurance.

CONCLUSION

Insurance does not always serve the public interest. However, this Article explores how insurance laws and regulatory schemes—at times—allow insurance to serve many of the same interests public interest lawyers serve: the unrepresented, the underrepresented, the injured, consumers, employees, children, women, minorities, the elderly, the mentally ill, and the poor. In addition to liability insurance financing the civil litigation system, state laws require people to purchase automobile insurance and allow employers to opt into state-created workers' compensation insurance schemes. In doing so, insurance laws provide injured persons with insurance mechanisms through which to seek relief. Health insurance laws such as Medicaid and Medicare assist the poor and the elderly (and other groups) by increasing access to care to those who may not otherwise be able to purchase health insurance. Though not perfect, insurance regulation, in addition to court decisions, attempts to ensure that insurance companies follow through on their promises, remain solvent, and avoid unfair business practices. Without insurance laws and regulations, policyholders could not possibly trust

coverage in addition to premiums, it is currently virtually impossible for ordinary consumers to compare the scope of coverage that different carriers provide. Insurers do not make their policy language available to consumers until after they purchase coverage. Apart from several high-end carriers, insurers do not describe coverage in their marketing materials with sufficient specificity to allow for an assessment of their policies' comparative breadth.”).

131. See, e.g., JERRY, *supra* note 117, at 105–12 (highlighting the challenges of state insurance regulatory frameworks); RANDALL, *supra* note 119, at 664–85 (examining and challenging justifications for continuing state regulation of insurance); SCHWARCZ, *Reevaluating*, *supra* note 130, at 1263–71; DANIEL SCHWARCZ, *Regulating Insurance Sales or Selling Insurance Regulation? Against Regulatory Competition in Insurance*, 94 MINN. L. REV. 1707, 1755–72 (2010).

insurers to pay claims or remain solvent.¹³² Using a series of examples, I highlighted how insurance is a system of risk spreading, transfer, and distribution that promotes the public good and often allows individuals to seek compensation without needing to use a lawyer. Insurance law is a necessary component of public interest law because it provides a collection mechanism for injured persons seeking compensation and relief for injuries.

While the definition of public interest law is currently ambiguous and contested by liberal and conservative groups, neither group sufficiently captures what is public interest law. Too often the public interest *law* movement is defined by what public interest *lawyers* do for a living. The public interest law movement should account for the ways in which legal systems can actually serve the public interest by allowing underserved communities to seek relief without needing a lawyer. Public interest law does not necessarily require a public interest lawyer. Business law areas such as insurance law at times serve the public interest in a variety of capacities that are overlooked in the traditional discourse over what constitutes public interest law. Thus, public interest law scholars would be well served to focus less on defining what is public interest lawyering and more on concrete descriptions of the ways systems of law promote the general welfare. Only then will we begin to see the multi-faceted and diverse ways in which law serves the public interest.

132. See Daniel Schwarcz, *Redesigning Consumer Dispute Resolution: A Case Study of the British and American Approaches to Insurance Claims Conflict*, 83 TULANE L. REV. 735, 741–50 (2009).