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"Grossly Negligent Utilities," "Unimaginable Property Damage" and the Scope of Liability Insurers' Duty to Indemnify Subrogated Property Insurers - Probative and Empirical Inferences from Courts' Divided Subrogation and Indemnification Decision

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"GROSSLY NEGLIGENT UTILITIES," "UNIMAGINABLE PROPERTY DAMAGE," AND THE SCOPE OF LIABILITY INSURERS' DUTY TO INDEMNIFY SUBROGATED PROPERTY INSURERS—PROBATIVE AND EMPIRICAL INFERENCES FROM COURTS' DIVIDED SUBROGATION AND INDEMNIFICATION DECISIONS

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SYNOPSIS:

Each year, extreme weather, natural disasters and allegedly "grossly negligent" investor-owned utilities concurrently destroy property, persons and lives. In the wake, billions of dollars are lost. Given utilities' general immunity under the judicially created filed-rate or filed-tariff doctrine, residential and commercial owners are precluded from filing ordinary-negligence actions against utilities. Thus, many injured consumers try to settle their property-loss claims with their insurers. Some property insurers satisfy the "make-whole" doctrine and cover all losses. Most insurers, however, refuse to settle any claim. Or, they partially compensate the insureds. Yet, an overwhelming majority of property insurers are increasingly filing subrogation actions against utilities and the latter's liability insurers—demanding to be totally reimbursed for the entire value of each property-loss or personal-injury claim. Should the "most profitable property insurers in the world" have standing to file duty-to-indemnity actions against utilities—if the insurers refuse to fully compensate injured property owners after natural disasters and energy interruptions? The question has produced conflicting judicial rulings—given that a few states' anti-subrogation statutes are ambiguous. Should unsophisticated utility customers have a right to file ordinary-negligence actions against utilities? The answer might be easy—given utilities' ever-rising rates as well as politically "conservative" and "liberal" state supreme courts' negligence-based, utility-maintenance and pro-consumers decisions. The Article explains the origin and substance of utilities-caused, subrogation and indemnification disputes. It also presents the results of an empirical study to help explain the judicial

conflicts—focusing on courts' differential application of settled rules and allowing extra-legal factors to influence the outcome of cases. Expectantly, the findings will provide some "judicial guidance" for state legislatures who are contemplating 1) whether to adopt or revise anti-subrogation statutes—which block property insurers' direct actions against utilities' liability insurers, and 2) whether to enact legislation that would allow average ratepayers to commence ordinary- and gross-negligence actions against highly profitable utility companies.

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I. INTRODUCTION

Historically, investor-owned utilities (IOU) have satisfied the energy demands of the majority of residential and commercial customers.[1] Publicly owned utilities and cooperatives covered the remaining needs.[2] Significantly, the overwhelming majority of private utilities embrace a so-called "vertically integrated model" that involves two primary actors.[3] An energy company produces and supplies natural gas, coal, or nuclear.[4] And the utility purchases the energy, ensures that the energy reaches residential and commercial customers, calculates usage, and sends bills to the ratepayers.[5]

Utility owners and their critics agree: investor-owned utilities are natural monopolies.[6] IOUs have the authority to 1) construct new facilities and infrastructure, 2) purchase certain types of fuel, 3) negotiate energy prices, and 4) determine the price consumers must pay.[7] Certainly, investor-owned utilities do not have unbridled authority. Local and state governments regulate IOUs.[8] Moreover, the Department of Energy Organization Act of 1977 established the Federal Energy Regulatory Commission (FERC).[9] Briefly put, the FERC also regulates utilities' interstate transmission of electricity, oil, and natural gas.[10]

There is, however, a major exception: the FERC does not regulate

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[1] *See* AM. PUB. POWER ASSOC., 2021 Statistical Report 10 (2021); Sean Ross, *How Strongly Do Regulations Impact the Utilities Sector?*, INVESTOPEDIA (Mar. 9, 2022), https://www.investopedia.com/ask/answers/070915/how-strongly-does-government-regulation-impact-utilities-sector.asp [https://perma.cc/SP94-WZXG] ("[P]rivately owned utility companies served 66.9% of electricity customers across the country in 2021.").

[2] *See* AM. PUB. POWER ASSOC., *supra* note 1.

[3] David P. Tuttle, *The History and Evolution of the U.S. Electricity Industry: Part of a Series of White Papers,* U. TEX. AUSTIN ENERGY INST. 11 (July 2016), https://energy.utexas.edu/sites/default/files/UTAustin_FCe_History_2016.pdf [https://perma.cc/5MSG-A8FW].

[4] *Id.*

[5] *Id.*

[6] *See* Ross, *supra* note 1; *cf.* Tuttle, *supra* note 3 ("Historically, a vertically integrated utility in the U.S. was an investor-owned utility and was regulated by an independent public entity typically known as a public utility commission or public service commission.").

[7] Tuttle, *supra* note 3, at 11.

[8] *See* Ross, *supra* note 1; *see also Reliability Council of Texas,* OFF. OF PUB. UTIL. COUNS., https://www.opuc.texas.gov/index.php/regulatory-agency/ [https://perma.cc/MYP6-YC9X] (last visited Jan. 16, 2023) ("ERCOT manages the flow of electric power to 22 million Texas customers . . . . [It notifies and works] with the proper electric utilities and electric generators . . . . When a consumer chooses a retail electric provider, ERCOT ensures the details of that purchase, such as pricing, are communicated to the appropriate companies in a timely manner.").

[9] 42 U.S.C. §§ 7134, 7171(a) (1977).

[10] Energy Policy Act, 16 U.S.C. § 824j-1(a) (2005); Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 796(17)–(18), 824(a)–(3).

utilities in Texas.[11] Instead, the Texas Public Utilities Commission regulates the Electric Reliability Council of Texas (ERCOT). This latter, private entity "manages the flow of electric power to 22 million Texas customers"—which is approximately "85 percent of the state's electric load."[12] ERCOT also has a duty to ensure that utility ratepayers have sufficient power regardless of time or weather conditions.[13]

In theory, regulators monitor utilities' monopolistic practices to achieve three arguably conflicting interests: 1) guaranteeing that *utility ratepayers'* energy costs are reasonable or affordable,[14] 2) ensuring that *bondholders* receive a reasonable "return on equity,"[15] and 3) providing reasonable opportunities for *utility owners* to earn a fair return on their investment.[16] Critics, however, strongly insist that IOUs are significantly less concerned about protecting unsophisticated ratepayers' interests and more concerned about satisfying bondholders' and utility owners' expectations.[17]

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[11] *See* Catherine Morehouse, *Congress, Texas Should 'Rethink' ERCOT's 'Go It Alone Approach': FERC Chair Glick*, UTIL. DIVE (Feb. 19, 2021), https://www.utilitydive.com/news/congress-texas-should-rethinkercots-go-it-alone-approach-ferc-chair/595335/ [https://perma.cc/T86M-H9FM].

[12] *See* OFF. OF PUB. UTIL. COUNS., *supra* note 8.

[13] *Id.*

[14] *See* Keogh v. Chi. & Nw. Ry. Co., 260 U.S. 156, 163 (1922) (establishing the *filed rate doctrine* which prohibits regulated utilities from charging rates for services if the rates do not appear in mandatory and properly filed regulatory tariffs); Sw. Bell Tel. Co. v. Metro-Link Telecom, Inc., 919 S.W.2d 687, 692–93 (Tex. App. 14th 1996), citing Ark. La. Gas Co. v. Hall, 453 U.S. 571, 579 (1981) (stressing that a filed tariff governs the relationship between a utility and its customers, and reiterating that the *filed rate doctrine* operates "across the spectrum of regulated utilities" and applies where state law creates a state agency and a statutory scheme to establish reasonable rates).

[15] *Cf.* Sw. Bell Tel. Co. v. Ark. Pub. Serv. Comm'n, 715 S.W.2d 451, 454 (Ark. Ct. App. 1986) (emphasizing that a controversial mathematical formula was designed to establish "an allowable return on equity based upon an estimate of investors' expectations").

[16] *See* Gen. Tel. Co. v. Corp. Comm'n (In re Application Gen. Tel. Co.), 652 P.2d 1200, 1204 (N.M. 1982) ("[A utility commission's failure] to provide rates that will give the company a reasonable rate of return constitutes a violation of due process and a taking of property without just compensation."); Norfolk v. Chesapeake Tel. Co., 64 S.E.2d 772, 782 (Va. 1951) (stressing that allowing a utility to obtain a reasonable return on equity is a major component of the ratemaking process).

[17] *See* Thomas Elias, *Customers Pay Tab for Utility Negligence*, DAILY REPUBLIC (Apr. 21, 2022), https://www.dailyrepublic.com/all-dr-news/opinion/state-national-columnists/%E2%80%A8%E2%80%A8customers-pay-tab-for-utility-negligence/ [https://perma.cc/K4GS-QA8K] ("For most of the past half-century, the PUC has almost always given more emphasis to the need for keeping utilities profitable than . . . preventing utilities from ripping off . . . customers."); Ivan Penn, *Power Lines and Electrical Equipment are a Leading Cause of California Wildfires*, L.A. TIMES (Oct. 2017, 2:05 PM), https://www.latimes.com/business/la-fi-utility-wildfires-20171017-story.html [https://perma.cc/2RGA-2BU8]; Jennifer

Furthermore, state governors[18] and members of Congress[19] also criticize utility owners—asserting that IOUs' ordinary and gross negligence increase ratepayers' energy costs and destroy ratepayers' property interests. What is the proffered evidence? Consider some recently reported and controversial findings: 1) between 2013 and 2021, utilities directly caused wildfires—which destroyed thousands of *insured* ratepayers' residential and commercial properties;[20] 2) utility owners' failure to repair deteriorating transmission and

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Larino, *Entergy Learns Katrina Lessons, But Damage Prevention Still In Question,* THE TIMES-PICAYUNE (July 18, 2019, 2:04 PM), https://www.nola.com/news/article_bb5f05b6-701b-5a6b-adfd-42f64f30b5b7.html [https://perma.cc/6RYL-DD2D] (reporting that Hurricane Katrina destroyed nearly 28,900 utility poles, more than two million homes and businesses did not have electricity, post-Katrina financial maneuvers occurred, critics fear that New Orleans is still vulnerable to crippling outage and *ratepayers probably will pay substantially greater costs* in the future unless the grid is improved).

[18] *See, e.g.,* Judith Kohler, *Governor Blasts Ruling That Allows Xcel to Recover $509M,* DENVER POST (May 14, 2022, 4:57 PM), https://www.denverpost.com/2022/05/13/judge-recommends-xcel-energy-can-recoup-509-in-storm-costs/ [https://perma.cc/G5XZ-8C8H] (accusing Xcel Energy of negligence for failing to prepare an ice-and-snow storm and for failing to communicate more effectively with customers and encouraging the latter to reduce their electricity-and-gas usage); Andrew Scurria, *Puerto Rico Governor Axes $8.3 Billion Power Utility Restructuring Deal,* WALL ST. J. ONLINE, (Mar. 9, 2022, 10:45 PM), https://www.wsj.com/ [https://perma.cc/29EY-XDDF] ("Puerto Rico's governor axed an $8.3 billion debt-restructuring agreement for the . . . public power utility, reflecting a lack of political support for raising electricity rates to pay off bondholders."); Ken Costello, *Should Public Utilities Compensate Customers for Service Interruptions*? NAT'L REGUL. RSCH. INS., Report No. 12-08, at 2 (July 2012) https://pubs.naruc.org/pub/FA86AD59-0662-E1F4-1213-3698BF336139 [https://perma.cc/9MAR-KJRC] ("In the aftermath of prolonged power outages . . . state utility commissions, legislatures, and governors have acted to hold utilities more accountable."); Patrick McGeehan, *Connecticut Utility Faulted by Report on Storm Efforts,* N.Y. TIMES (Dec. 2, 2011), https://www.nytimes.com/2011/12/03/nyregion/connecticut-light-and-power-unprepared-for-northeaster-report-says.html [https://perma.cc/Y5ZC-9LXX] (disclosing a governor's report that accuses Connecticut's biggest utility of gross negligence—failing to contemplate a destructive autumn snowstorm that paralyzed the state. Gov. Dannel P. Malloy said, "[The utility's] poor preparation [is] not surprising . . . when the worst-case scenario was compounded by a factor of eight . . . ."); *see also Conn. Governor Set to Sign Legislation Allowing Fines for Utilities During Outages,* SNL FIN. 1 (May 14, 2012); *see also NJ Legislator Proposes Bill Mandating Reliability Standards for Utilities,* SNL FIN. 1 (May 11, 2012).

[19] *See generally Public Utilities and Utility Rates,* GOVTRACK.US (The website lists numerous house and senate bills which are designed to protect designed to protect consumers' interest and prevent utilities' arguably negligent actions and inaction), https://www.govtrack.us/congress/bills/subjects/public_utilities_and_utility_rates/6037 [https://perma.cc/LB6G-8N44] (last visited May 21, 2022).

[20] *See* Rob Bailey, *As Wildfires Get Costlier and Deadlier, Insurers and Utilities Pay the Price,* MARSH-MCLENNAN BRINK (Aug. 24, 2021), https://www.brinknews.com/as-wildfires-get-costlier-and-deadlier-insurers-and-

distribution infrastructures caused hundreds of deaths;[21] 3) allegedly, between 2017 and 2021, IOUs' failure to warn millions of ratepayers about hurricanes and outages caused deaths and business-interruption losses;[22] and 4) utilities' *intentional interruption* of services indirectly or concurrently caused deaths and property damage—ranging between $80 and $130 billion.[23]

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utilities-pay-the-price/ [https://perma.cc/7GNM-3AQV] ("[The 2017–2018 wildfires] cost . . . more than $15 billion each year, . . . [raising] the prospect of large numbers of homes becoming uninsurable."); Claire Wilkinson, *Utilities Contractors Challenged in Finding Wildfire Coverage,* BUS. INS. (May 25, 2021), https://www.businessinsurance.com/article/20210525/NEWS06/912342050/Utilities-contractors-challenged-in-finding-wildfire-coverage [https://perma.cc/XD2X-DHKY] (reporting that wildfires are spreading across the country, five 2020 wildfires erupted in Western states, and each caused more than $1 billion in damage).

[21] Gold, Blunt, & Smith, *PG&E Sparked at Least 1,500 California Fires,* WALL ST. J. (Jan. 13, 2019, 3:19 PM), https://www.wsj.com/articles/pg-e-sparked-at-least-1-500-california-fires-now-the-utility-faces-collapse-11547410768 [https://perma.cc/WW8C-P5VA] (reporting that between 2013–2019, utility-caused fires destroyed more than 14,000 homes, killed more than 100 people, and generated "liabilities as high as $30 billion"); Ivan Penn, *Power Companies' Mistakes Can Cost Billions. Who Should Pay?* N.Y. TIMES (June 14, 2018), https://www.nytimes.com/2018/06/14/business/energy-environment/california-fires-utilities.html [https://perma.cc/Y8MG-CGT2] (reporting that wildfires killed dozens of people, the estimated at property losses were $12 billion, and Pacific Gas and Electric's failure to maintain safe conditions around power lines was the proximate cause of the deaths).

[22] *See* William Rabb, *Florida Power & Light Class Action Opens Door to Subrogation—Future Storm Claims,* INS. J. (Jan.18, 2022), https://www.insurancejournal.com/news/southeast/2022/01/18/649667.htm [https://perma.cc/BKT9-4QH3] (reporting a court certified a $10 billion class action against Florida's largest utility company. More than four million people—who lost power in 2017 during Hurricane Irma—alleged that Florida Power & Light was negligent by failing to fully prepare for the storm or to 'harden the system, despite collecting a surcharge for that purpose."); Aldhous, Lee & Hirji, *The Texas Winter Storm And Power Outages Killed Hundreds More People Than The State Says,* BUZZFEED NEWS (May 26, 2021), https://www.buzzfeednews.com/article/peteraldhous/texas-winter-storm-power-outage-death-toll [https://perma.cc/MAA5-JPK3] ("The true number of people killed by the disastrous [Winter Storm Uri] and power outages in Texas . . . is likely four or five times what the state has acknowledged . . . . The state's tally currently stands at 151 deaths . . . . [However,] we estimate that 700 people were killed . . . . This astonishing toll exposes the full consequence of [the] officials' neglect . . . .").

[23] *See* Ariana Garcia, *Winter Storm Uri Cost Texas Between $80 and $130 Billion—Report Shows,* CHRON (Nov. 2, 2021), https://www.chron.com/politics/article/Texas-winter-storm-freeze-deaths-financial-cost-16585329.php [https://perma.cc/837H-KRHL] (reporting that Texas's catastrophic Winter Storm Uri left over 200 people dead and that the storm costed between $80 billion to $130 billion—based on the Federal Reserve Bank of

Certainly, these latter allegations have not been conclusively substantiated. On the other hand, utility owners and critics agree: 1) utilities—electric,[24] gas,[25] and water[26]—have caused directly or indirectly many deaths, bodily injuries, and major property damage; 2) utilities' mismanagement, operations, and equipment failures often create perils—fires, gas leaks, contaminated water, and outages—that destroy persons and

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Dallas's estimation of direct and indirect property losses and forgone economic opportunities); *Texas Officials Revise Death Count of 2021 Winter Storm to 246*, INS. J. (Jan. 6, 2022), https://www.insurancejournal.com/news/southcentral/2022/01/06/648348.htm [https://perma.cc/GD2W-PV2Y] ("[T]he Texas Department of State Health Services confirms a final death count from the February 2021 Winter Storm Uri and the subsequent collapse of the Texas electric power grid. The DHS reports 246 winter storm-related deaths across 77 Texas counties, a revision from the previously reported death toll of 210.").

[24] *See* Penn, *supra* note 17 (reporting that investor-owned utilities—Southern California Edison, San Diego Gas & Electric, Pacific Gas & Electric—were assessed $25.7 million for the 2007–2015 Malibu, Butte, Witch, Rice and Guejito fires); Douglas MacMillan & Beth Reinhard, *Louisiana Power Outages Renew Questions About Utility Giant's Preparedness For Storms*, WASH. POST (Aug. 31, 2021, 7:25 PM), https://www.washingtonpost.com/business/2021/08/31/ida-entergy-hurricane-louisiana-power/ [https://perma.cc/M28D-5PF5] (reporting that Entergy—an energy monopoly—provides electricity to three million customers but failed to prevent widespread outages when Hurricane Ida destroyed the utility's aging infrastructure).

[25] *See* Ellie Rushing, *Residents Want Answers After Gas Explosion*, PHILA. DAILY NEWS 6 (Jan. 30, 2020), (reporting that homeowners and residents complained incessantly about frequent water-service interruptions, gas leaks and the smell of gas. The Pennsylvania Public Utility Commission concluded a crack in a 92-year-old gas main caused the explosion that collapsed five rowhouses and killed two people); Rachel Gutman, *Dozens of Massachusetts Homes Exploded. A Gas Expert Weighs In*, THE ATLANTIC (Sept. 14, 2018), https://www.theatlantic.com/science/archive/2018/09/massachusetts-explosions-fire-gas/570361/ [https://perma.cc/C7MP-2EZ8] (reporting that suspected gas leaks caused seventy residential fires and explosions—killing one resident and injuring at least twenty-five others. Columbia Gas terminated service for 8,600 residential and commercial customers ensure that homes and businesses were leak-free).

[26] *See Detroit Shuts Off Water Fountains at 106 Public Schools, High Levels of Lead Are Found in The City's Schools As New Year Begins*, WASH. POST (Sept. 4, 2018, 4:35 PM), https://www.washingtonpost.com/ [https://perma.cc/C8K3-VHAM] (reporting that lead-contaminated water was distributed to water fountains in Detroit's and Baltimore's large school districts and disclosing that the water utilities cited aging plumbing rather than breach of duty as the cause); *Centreville Residents Sue Water Util., City, Over Sewage and Stormwater Flooding*, EARTH JUST. (July 20, 2021), https://earthjustice.org/news/press/2021/centreville-residents-sue-water-utility-city-over-sewage-and-stormwater-flooding [https://perma.cc/63EQ-VWB9] (reporting that more than two dozen residents sued the Cahokia Public Water District in federal court after the utility's severely deteriorated, malfunctioning and poorly designed sewer and stormwater systems spilled raw sewage and stormwater into customers' homes, and yards).

property;[27] 3) utility ratepayers spend approximately $638 billion annually for residential and commercial property insurance;[28] 4) after utility-caused property losses occur, insurers rarely compensate *insured* ratepayers enough to completely replace or repair totally destroyed property;[29] 5) after *partially* covering utility-caused losses, property insurers usually increase ratepayers' annual insurance premiums;[30] and 6) investors-owned utilities typically increase or try to increase energy prices after utility-related perils directly or indirectly cause massive property losses.[31]

Thus, given the strong association between utility-created perils and massive property losses, two interrelated questions are appearing more frequently on energy-related websites, social media, and insurance-defense blogs: 1) whether *insured* or *uninsured* property owners have standing to file negligence-based lawsuits against investors-owned utilities[32] and 2) whether

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[27] *See, e.g.*, Penn, *supra* note 17 (reporting that the governor was criticized vetoing legislation that would have required California Public Utilities Commission to develop procedures to prevent fires from overhead electrical equipment); MacMillan & Reinhard, *supra* note 24 (reporting that "Entergy has been fined for deferring maintenance, criticized for moving too slowly to reinforce its grid and has resisted calls to increase its investments in renewable energy").

[28] *See* INS. INFO. INST., 2021 INS. FACT BOOK 14, https://www.iii.org/sites/default/files/docs/pdf/insurance_factbook_2021.pdf [https://perma.cc/GL49-3ERD] (last visited May 23, 2022) (reporting that property & casualty insurance comprises primarily automobile, home, and commercial coverage, and that the net premiums for this class of insurance rose 3.2 percent in 2019).

[29] *See generally Homeowners Insurance Guide,* TEX. DEPT. OF INS. https://www.tdi.texas.gov/pubs/consumer/cb025.html [https://perma.cc/PJ6W-435D] (last visited May 23, 2022) (disclosing that homeowners' insurance protects against various risks or perils—which damage an insured's property interest and stressing that property insurance usually pay a percentage of an insured's limit of coverage for property repairs or replacements).

[30] *Cf.* Andrew Hurst, *Average Cost of Home Ins. Rises 27% After a Fire,* VALUEPENGUIN (Sept. 24, 2021), https://www.valuepenguin.com/cost-of-home-insurance-after-residential-fire [https://perma.cc/Q5FE-V6GE] (examining insurance rates before and after fires totally destroyed property, and reporting that homeowners' insurance rates increased nationally and in every state).

[31] *See, e.g.*, George Avalos, *PG&E Revenue, Profits Soar After Utility Charges More On Monthly Bills,* EAST BAY TIMES (Apr. 28, 2022), https://www.eastbaytimes.com/2017/07/27/pge-profits-nearly-double-soar-to-406-million-during-second-quarter/ [https://perma.cc/5Q9G-5R5S] (reporting that Pacific, Gas & Electric's equipment caused a massive fire in 2021, PG&E increased its monthly charges twice in early 2022 and the state PUC authorized both increases); *see* Penn, *supra* note 17 ("[P]ower providers across the nation want ratepayers to bear the financial burden when things go wrong, whether the cause is a natural disaster, a utility's negligence or even poor decision-making by executives.").

[32] *Cf.* Ellen M. Gilmer, *Can You Sue When the Power Goes Out? Liability Shields Explained,* BLOOMBERG LAW (Feb. 17, 2021), https://news.bloomberglaw.com/environment-and-energy/my-electricitys-out-can-i-

property insurers have standing to commence *subrogation* and *indemnification* actions against IOUs' *liability insurers*.[33]

Generally, IOUs purchase third-party insurance—which requires *liability insurers* to *defend and indemnify* IOUs against legitimate and even groundless third-party claims.[34] Consequently, after spending billions of dollars to cover utility-caused damage, utility ratepayers' *property insurers* are increasingly and unapologetically embracing two contentious legal positions: 1) *property insurers* have a contractual, statutory, or equitable right to commence a *subrogation action* against ratepayers' "negligent and grossly negligent" investors-owned utilities[35] and 2) the utilities' *liability insurers* have a *contractual duty to indemnify* the allegedly *subrogated* property insurers.[36]

To help understand residential and commercial property insurers' subrogation and duty-to-indemnify claims, consider the facts in a recently filed and widely reported lawsuit—*All American Insurance Co. v. Electric Reliability Council of Texas, Inc.*[37] In February 2021, *Winter Storm Uri* arrived in Texas—bringing extremely low temperatures and causing directly or indirectly "unimaginable" property damage and bodily injuries.[38] More

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take-someone-to-court-for-damages [https://perma.cc/9P2X-B7H3] (last visited May 24, 2022) ("Legal shields . . . may compound the frustrations for the millions of people left in the dark amid crippling winter power outages in Texas and beyond. Threats of class action lawsuits . . . are cropping up on social media and message boards . . . targeting electric utilities and grid operators.").

[33] *See, e.g.*, Lawrence T. Bowman, *Rolling Brownouts and ERCOT,* MONDAO BUS. BRIEFING (Mar. 4, 2021), https://www.mondaq.com/unitedstates/insurance-laws-and-products/1042682/rolling-brownouts-and-ercot [https://perma.cc/3RSZ-32PK] (disclosing that attorneys have received several subrogation assignments involving the question whether *subrogated* property insurers have any recourse against electric utilities and/or regulators). *See also* Judy Greenwald, *Court Rejects Insurer's Subrogation Bid in Dartmouth Dorm Fire*, Business Insurance (Mar. 11, 2021), https://www.businessinsurance.com/ [https://perma.cc/2JS5-U43W] (last visited May 26, 2022) (reporting that New Hampshire Supreme Court affirmed a lower court's ruling that prevents a property insurer from commencing a $4.5 million subrogation action against two students who started a dorm fire at Dartmouth College).

[34] *See infra* notes 88–93 and accompanying text.

[35] *See infra* notes 159–87 and accompanying text.

[36] *See infra* notes 270–312 and accompanying text.

[37] Petition for Plaintiff (No. D-1-GN-21-007428) 2021 WL 6274598.

[38] *See Hearing on "Power Struggle: Examining the 2021 Texas Grid Failure" Before the Comm. on Energy & Com., Staff Memorandum*, 117th Cong. 2 (2021), https://docs.house.gov/meetings/IF/IF02/20210324/111365/HHRG-117-IF02-20210324-SD002.pdf [https://perma.cc/U3U4-PR4H]; Dan Esposito & Eric Gimon, *The Texas Big Freeze: How Much Were Markets to Blame for Widespread Outages?*, UTIL. DIVE (June 3, 2021), https://www.utilitydive.com/news/the-texas-big-freeze-how-much-were- markets-to-blame-for-widespread-outages/601158/ [https://perma.cc/A935-76RB] ("[*Winter Storm Uri*] exposed Texas energy market failures—racking up an *unimaginable* $52.6 billion in [electric-system cost and] leaving residents short 1.6 million megawatt-hours of electricity."); Neelam Bohra,

than 4.5 million people lost electric and gas power.[39] An estimated 246 died.[40] Water pipes burst—causing business-interruption losses as well as widespread destruction of residential and commercial property.[41] In the course of events, "more than 500,000" homeowners and business owners filed insurance claims.[42]

As of this writing, property insurers have spent approximately "$10.3 billion to cover their customers' damages."[43] However, in one geographic location, "between 60% and 70%" of the insureds *did not* receive any compensation.[44] Moreover, depending upon the ratepayers' ZIP codes, the property insurers refused to pay thirty percent to fifty percent of the claims.[45] Yet, in late December 2021, a highly sophisticated group of 131 property insurers[46] sued the Electric Reliability Council of Texas (ERCOT) and thirty-seven "power generating companies" (PGCs) or IOUs in Texas.[47]

Significantly, the *All American Insurance* pleading does not list ERCOT's and the PGCs' liability insurers as defendants. But, without a doubt, the property insurers' action is designed to secure compensation from the third-party insurers. To be sure, ERCOT's liability insurer—Cincinnati Insurance Company—understands the property insurers' strategy and is extremely concerned.[48] Thus, Cincinnati filed a federal declaratory judgment

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Almost 70% of ERCOT Customers Lost Power During Winter Storm, Study Finds, THE TEXAS TRIB. (Mar. 29, 2021, 5:00 AM), https://www.texastribune.org/2021/03/29/texas-power-outage-ERCOT/ [https://perma.cc/38RD-YQFF] (reporting that Winter Storm Uri caused unimaginable hardships—leaving hundreds of thousands without power, bursting pipes, and causing other water-supply problems); Scott Krist, *Texas Winter Storm Wrongful Death Lawsuits*, THE KRIST LAW FIRM: LEGAL BLOG (Mar. 5, 2021), https://www.houstoninjurylawyer.com/texas-winter-storm-wrongful-death-lawsuits/ [https://perma.cc/9QVF-JUVV] (reporting that Winter Storm Uri caused devastating losses and is stunning and "countless Texas families are grieving an unimaginable loss as a result").

[39] *See Hearing on "Power Struggle: Examining the 2021 Texas Grid Failure," supra* note 38.

[40] *See Texas Officials Revise Death Count of 2021 Winter Storm to 246*, *supra* note 23.

[41] *See* Garcia, *supra* note 23.

[42] *See* Rabb, *supra* note 22.

[43] *See* Jason Wheeler, *A Year After the 2021 Texas Winter Storm, Many Insurance Claims Have Been Closed Without Payment*, WFAA NEWS (Feb. 14, 2022), https://www.wfaa.com/ [https://perma.cc/6A82-7WM8] (last visited May 27, 2022).

[44] *Id.*

[45] *Id.*

[46] All American Ins. Co., et al., v. Elec. Reliability Council of Texas, Inc., et al.,, No. D-1-GN-21-007428, WL 6274598, *1, *8–17 ¶ 5 (Dist. Ct. 126th Dis. Travis Cty. Texas 2021).

[47] *Id.* at ¶ 11–48.

[48] *See* Mary Williams Walsh & Clifford Krauss, *Texas Froze and California Burned. To Insurers, They Look Similar*, N.Y. TIMES, Apr. 13, 2021 (reporting that ERCOT purchased a liability insurance policy from Cincinnati Insurance Company

action—asking the court to declare that Cincinnati has no contractual duty to indemnify ERCOT or defend it against the property insurers' claims.[49]

What are the property insurers' specific claims? They alleged: 1) ERCOT has a duty to preserve ratepayers' residential and commercial property—exercising a degree of knowledge, skill, and care that ordinary electricity-grid managers and operators would use under the same or similar circumstances;[50] 2) ERCOT breached its duty by failing to prepare PGCs for *Winter Storm Uri*;[51] 3) ERCOT mismanaged Texas's power grid that distributes electricity to twenty-six plus million ratepayers;[52] and 4) the electricity council failed to warn ratepayers about foreseeable and adverse consequences that accompanied *Winter Storm Uri*.[53]

The *Uri* insurers also argued that the power-generating companies breached several duties: 1) failing to adequately winterize facilities and equipment,[54] 2) failing to ensure that qualified staff was available to satisfy all energy requirements,[55] and 3) failing to operate their utilities reasonably in order to transmit electricity steadily.[56] Even more importantly, the *Uri* insurers contend that ERCOT's and the PGCs' acts and/or omissions were grossly negligent[57]—proximately causing the ratepayers' indivisible losses.[58] In addition, according to the insurers, ERCOT and the PGCs are jointly and severally liable for an estimated ten billion dollars in compensatory damages.[59]

However, to prevail, the property insurers must address both procedural and substantive questions: 1) whether each of the 131 *Uri* insurers has standing to sue as a contractual, an equitable, or a statutory subrogee,[60] and 2) if so, whether ERCOT's and the PGCs' liability insurers have a duty to indemnify each subrogated insurer.[61] Why are these timely and pressing

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and the insurer sued, seeking declaratory relief) https://www.nytimes.com/2021/04/13/business/texas-freeze-utilities-california-fires.amp.html [https://perma.cc/7RC2-SVTP].

[49] *See* Cincinnati Ins. Co., v. Elec. Reliability Council of Texas, Inc., 2021 WL 1265165 (W.D. Tex.), at ¶ 1 ("Cincinnati asks the court to . . . [declare that ERCOT's liability insurance contract] does not require Cincinnati to defend or indemnify ERCOT in connection with certain underlying matters . . . arising Winter Storm Uri and the related power outages that occurred across the state of Texas.").

[50] Plaintiff's Original Petition, All American Ins. Co., et al., v. Elec. Reliability Council of Texas, Inc. (2007) (No. D-1-GN-21-007428), 2021 WL 6274598, at ¶ 134.

[51] *Id.* at ¶135, ¶138.

[52] *Id.* at ¶133.

[53] *Id.* at ¶138.

[54] *Id.* at ¶144.

[55] *Id.*

[56] *Id.*

[57] *Id.* at ¶150.

[58] *Id.* at ¶130.

[59] *Id.* at ¶141.

[60] *See infra*, notes 106–32 and accompanying text.

[61] *See infra*, notes 251–61 and accompanying text.

questions? The Federal Power Act allows the FERC to regulate interstate utility rates.[62] And the McCarren-Ferguson Act[63] permits state commissioners to regulate the prices that consumers pay for property insurance.[64] But arguably, utility and insurance regulators do not adequately protect utility and insurance consumers' interests.

Again, investor-owned utilities and property insurers raise prices—after catastrophic weather events or utility—created perils destroying commercial and residential property.[65] Yet, unlike the FERC or state regulators, some

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[62] *See, e.g.*, Ethan Howland, *FERC Eyes Rule Changes to Prevent Utilities From Charging Ratepayers for Political Expenses*, UTILITY DIVE (Dec. 17, 2021), https://www.utilitydive.com/news/ferc-utilities-rule-charging-ratepayers-for-political-lobbying/611695/ [https://perma.cc/38AF-C7CP] (reporting that "a majority of states use FERC's accounting system" and FERC's accounting rules prevent utilities from passing the costs of political outreach to their customers' bills); FERC v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 762–3 (2016). (The Federal Power Act (FPA) authorizes the Federal Energy Regulatory Commission (FERC) to regulate "the sale of electric energy at wholesale in interstate commerce," including both wholesale electricity rates and any rule or practice "affecting" such rates. 16 U.S.C. §§ 824(b), 824d(a), 824e(a) . . . In an increasingly competitive interstate electricity market, FERC has undertaken to ensure "just and reasonable" wholesale rates, § 824d(a), by encouraging the creation of nonprofit entities to manage regions of the nationwide electricity); Priyam Desaee, *What the FERC—The Likelihood That the Federal Government Can Override California's Renewable Portfolio Standards*, 42 U.C. DAVIS L. REV 116, 121 (2019):

> In 1935, Congress passed the Federal Power Act (FPA), which provided the primary basis for federal regulatory oversight of the domestic sale of electricity. In 1977, Congress went a step further by creating the Federal Energy Regulatory Commission (FERC) via the Department of Energy Organization Act. In this way, Congress gave FERC 'exclusive authority to regulate the sale of electric energy at wholesale in interstate commerce.' In particular, FERC is tasked with controlling prices for interstate transactions and regulating rates and charges in relation to public utilities with respect to interstate transmissions or wholesale sales.

[63] 15 U.S.C. §§ 1011–15 (1988) (reading in pertinent part: § 1011 Declaration of Policy—Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States).

[64] *See, e.g.*, Joseph Burns, *Health Insurance Markets Are Concentrated—and Getting More So,* MANAGED HEALTHCARE (Dec. 13, 2021), https://www.managedhealthcareexecutive.com/view/health-insurance-markets-are-concentrated-and-getting-more-so [https://perma.cc/5EE5-L8SP] (reporting that the McCarran-Ferguson Act allows states to regulate insurance, which can cause consolidation among insurers and increased premium costs).

[65] *See supra*, notes 29–31 and accompanying text; *see also* Aliya Uteuova & Andrew Witherspoon, *What Is Causing US Utility Bills to Rise and Will It Persist in Warmer Months?,* THE GUARDIAN (Mar. 13, 2022),

state supreme courts—in both politically "conservative" and "liberal states"—are continually assessing whether a significant relationship exists between forcing utilities to indemnify, say, subrogated property insurers, and ever-increasing utility prices.[66] Consequently, as of this writing, sharp divisions exist among and between state and federal appellate courts.[67] Some state courts declare that ratepayers' property insurers are subrogees and allow them to bring actions against IOUs and their liability insurers.[68] Some federal circuits, however, embrace a contrary position.[69] Still, other state and federal courts might allow property insurers to sue as subrogees declaring that IOUs' liability insurers have no duty to indemnify the subrogated insurers.[70]

The primary purpose of this Article is to inform legislators, jurists, regulators, and consumers regarding utilities' and property insurers' increasingly frequent, controversial, and complex subrogation and indemnification disputes. Secondarily, the Article shares the results of an empirical study—which discloses the effects of multiple legal and extralegal factors on appellate courts' disposition of subrogation and indemnification disputes.

Part I begins the presentation by briefly outlining the important distinction between first-party property insurance and third-party liability insurance. Generally, ratepayers are more likely to purchase only first-party property insurance. On the other hand, utilities are significantly more likely

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https://www.theguardian.com/us-news/2022/mar/13/us-utility-bills-energy-prices-increase [https://perma.cc/ME35-QVWQ] (reporting that weather-related disruption and a dramatic rise in energy prices in the United States caused utility bills to soar.); Bruna Alves, *Residential Electricity Price Growth in the U.S. 2000-2022,* STATISTA (July 6, 2021), https://www.statista.com/statistics/201714/growth-in-us-residentialelectricity-prices-since-2000/ [https://perma.cc/4XZX-GX2E].

[66] *See infra*, notes 363–64 and accompanying text; *see also* Franklin Mut. Ins. Co. v. Jersey Cent. Power & Light Co., 902 A.2d 885, 887–88 (N.J. 2006) (citing Weinberg v. Dinger, 524 A.2d 366, 375 (N.J.1987)) (reporting continued concern about the utility customers' "paying twice"—first through insurance premiums and then through increased utility rates—and stressing, "[u]ntil we are satisfied that the public will not suffer that disadvantage, we decline to alter the subrogation rule of *Weinberg.*"); Clay Elec. Co-op., Inc. v. Johnson, 873 So.2d 1182, 1189 (Fla. 2003) (citing Weinberg v. Dinger, 524 A.2d 366, 375 (N.J. 1987)) (stressing that state supreme courts "address existent public policy concerns" involving utilities, but rejecting the utility's argument that allowing the third-party action would (1) open a floodgate of similar lawsuits against electric companies and other utilities, (2) increase consumers' rates for electricity, water and other utility services, and (3) increase utilities' liability insurance premiums); *List of Blue States and Red States In U.S.—2022 Update*, GKGIGS (providing a detailed listing of states and explaining that the terms "Red" or "Blue" have been expanded to differentiate between perceived "conservative" and "liberal" states, respectively, in the lexicon of American journalism) https://www.gkgigs.com/list-of-blue-states-and-red-states/ (last visited on Aug. 2, 2022).

[67] *See infra*, notes 262–318 and accompanying text.

[68] *Id.*

[69] *Id.*

[70] *Id.*

to purchase both property and liability insurance. Part II discusses the various types of subrogation doctrines.

There is debate surrounding the general question: whether property insurers have standing to commence ordinary and gross-negligence actions against utility companies and the latter's liability insurers. Therefore, Part III examines whether the failure-to-make-whole, subrogation immunity, and waiver-of-subrogation defenses categorically bar a property insurer's standing to sue as a contractual subrogee.

Part IV discusses courts' application of insurance-specific doctrines to answer two pressing procedural and substantive questions: 1) whether subrogated property insurers have standing to commence a "direct" gross-negligence action against utilities and 2) if so, whether the utilities' liability insurers have an automatic contractual duty to indemnify the subrogated property insurers.

Put simply, the questions appearing in Parts III and IV are producing split decisions among and between state and federal appellate courts. Part V, therefore, presents the statistically significant findings of an empirical study. The investigation measures the separate, joint, and simultaneous effects of various factors on the dispositions of property insurers' and utilities' subrogation and indemnification disputes. Those clusters of variables are types of utility companies, consumers' underlying tort- and contract-based claims, types of plaintiffs-subrogees, types of plaintiffs-indemnitees, types of insurance contracts, types of defendants, and types of affirmative defenses.

As I pen this Article, some state legislatures, utilities' advocates, and critics, as well as some courts, are weighing two interrelated questions: 1) whether the anti-subrogation doctrine precludes property insurers from filing gross-negligence actions against investor-owned utilities[71] and 2) whether liability-limitation clauses in tariffs prevent injured customers from commencing ordinary negligence actions against for-profit utilities.[72] Therefore, the Article concludes by encouraging state legislators to 1) consider the implications of the legal analysis and empirical findings in the study and 2) decide whether utility customers and their property insurers may file subrogation and duty-to-indemnify claims directly against allegedly negligent utilities and the latter's liability insurers. Again, these issues are producing diverse rulings among and between state and federal appellate courts.

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[71] *See infra*, note 367 and accompanying text.

[72] *Compare* Szeto v. Arizona Pub. Serv. Co., 503 P.3d 829, 835–38 (Ariz. App. Div. 2021) (rejecting Arizona Public Service's defense—that its tariffs precluded customers' ordinary negligence action after power lines and a fire destroyed the consumers' house—and reaffirming that utilities have "common law duty to exercise the highest degree of skill and care to protect life and property"), *with* CenterPoint Energy Res. Corp. v. Ramirez, 640 S.W.3d 205, 216–17 (Tex. 2022) (embracing the natural-gas utility's defense that a liability-limitation provision in the tariffs precluded customers' ordinary negligence suits after a gas explosion injured a house guest who inadvertently opened an "unused gas valve" in the homeowners' utility room).

II. BRIEF REVIEW—FIRST-PARTY PROPERTY AND THIRD-PARTY LIABILITY INSURANCE

Homeowners', business, fire, and property insurance contracts are first-party insurance contracts.[73] However, under these types of contracts, it must be emphasized the definition of coverage is somewhat complicated. For example, under a homeowner's insurance agreement, an insurer will cover a property loss only if a "covered peril" or a "peril insured against" causes the loss.[74] On the other hand, a property insurer has no contractual obligation to cover a consumer's property damage if an "excluded peril" proximately and efficiently caused the destruction.[75]

Quite frequently, duty-to-indemnify clauses appear in first-party property insurance contracts.[76] The typical clause states that the insurer will indemnify after a residential or commercial property owner replaces or repairs its partially or totally destroyed property.[77] Still, it must be stressed a property insurer has a duty to indemnify an insured only if a "covered peril" or "a peril insured against" destroys the insured's property.[78] Conversely, a property insurer has no duty to indemnify if the insured does not send a notice-of-loss letter "as soon as practicable."[79]

There is another major rule: A property insurer's duty to defend and duty to indemnify "are distinct and separate duties."[80] As discussed more

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[73] *See, e.g.*, Great Am. Ins. Co. v. Jim Stephenson Motor Co., No. 05–94–00858, 1996 WL 135688, at *5 (Tex. App. Dallas Mar. 26, 1996, writ denied) (reporting that first-party insurance covers an insured's property or person and citing passages in insurance dictionaries and glossaries).

[74] *See, e.g.*, Manhattan Fire & Marine Ins. Co. v. Holloway, 359 S.W.2d 203, 205–06 (Tex. App. Austin 1962) (concluding that the destroyed house was "covered" because the servant's occupancy was not "directly or indirectly responsible for the loss"); *see also* Warrilow v. Norrell, 791 S.W.2d 515, 527 (Tex. App. Corpus Christi 1989, writ denied) (concluding that an insurer is not liable under a property insurance contract unless a covered peril caused the loss).

[75] *Warrilow*, 791 S.W.2d at 527 ("In Texas, if one force is covered and one force is excluded, the insured must show that the property damage was caused solely by the insured force, or he must separate the damage caused by the insured peril from that caused by the excluded peril.") (citing Travelers Indem. Co. v. McKillip, 469 S.W.2d 160, 162 (Tex. 1971)).

[76] *See generally* Nationwide Mut. Fire Ins. Co. v. Somers, 591 S.E.2d 430, 435 (Ga. Ct. App. 2003).

[77] *Id.*

[78] *See generally* Keystone Consol. Indus., Inc. v. Emps. Ins. Co. of Wausau, 456 F.3d 758, 762 (7th Cir. 2006) (declaring that the duty to indemnify arises only if there has been "actual coverage" of a loss).

[79] *See, e.g.*, Silver v. Indemnity Ins. Co. of North America, 79 A.2d 355, 558 (1951) (finding that the contract required a notification of a loss "as soon as practicable," meaning "as soon as reasonably can be expected").

[80] *See, e.g.*, Telecomms. Network Design v. Brethren Mut. Ins. Co., 5 A.3d 331, 335 (Pa.Super.2010) ("The duty to defend is broader than the insurer's duty to indemnify."); Am. & Foreign Ins. Co. v. Jerry's Sport Center, Inc., 2 A.3d 526,

extensively below, a liability insurer's duty to defend arises when a third party alleges facts that are potentially or reasonably covered under a liability insurance contract.[81] Contrarily, a property insurer's duty to indemnify generally arises after a trial on the merits—after probative evidence establishes that a "covered peril" caused the insured's loss. Or stated slightly differently, a property insurer's duty to indemnify is triggered if a property insurance contract covers a loss and the insured prevails on the merits.[82]

A. *First-Party Property Insurance Contracts*

The Insurance Service Office (ISO) has fashioned a standard "commercial property and business income" insurance contract. It reads in pertinent part: "We will pay for the actual loss of business income [that occurred after] the necessary "suspension" of your operations" during the "period of restoration." The "suspension" must be caused by [a] direct physical loss of or damage to property at [the] premises described in the Declarations."[83]

Assume that extremely hot or cold weather, a strong wind, fire, heavy snow, or lightning destroys a utility's generation and transmission infrastructure. The destruction causes a prolonged power outage. In the wake, there are business interruptions and commercial property damage. Did a "covered cause of loss" produce the damaged property and interruptions? Do commercial property insurers have a contractual duty to indemnify the business owners under a utility service interruption insurance contract?

The short answer to each question is no. Why? Unknowingly, large corporations' and small businesses' property insurance contracts contain an ISO "causes of loss" exclusion provision. It states:

> We will not pay for loss or damage caused directly or indirectly by any of the following[:] . . . Utility Services—The failure of power, communication, water or other utility service supplied to the described premises, however caused, if the failure. . . . (1) [O]riginates away from the described premises. . . . [O]r (2) originates at the described premises, but only if such failure involves equipment used to supply the utility service to the described premises from a source

541–44 (Pa. 2010) (reaffirming that an insurer's duty to indemnify follows the duty to defend).

[81] *Id.*

[82] *See* Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1, 5 (Tex.2007) (stating—amid a certified question inquiring whether duty to defend or indemnify is triggered by allegations in petition—that "[w]e do not reach the duty to indemnify . . . as that duty is not triggered by allegations but rather by proof at trial").

[83] Integrated Biomass Res., LLC v. AIX Specialty Ins. Co., No. 2:19-cv-02060-SU, 2021 WL 4256478, *2 (D. Ore. May 17, 2021).

away from the described premises.[84]

However, to counter any potential utility-exclusion defense, electric as well as water and gas utilities purchase off-premises power insurance[85] or a utility-service-interruption insurance contract.[86] Essentially, the utility buys a commercial property insurance contract and also purchases an endorsement. Simply put, under the latter, property insurers must compensate property owners if 1) a "covered peril" causes a "utility failure," 2) the "utility failure" causes a business loss or interruption, and 3) the "utility failure" originates away from the insureds' premises.[87]

B. *Third-Party Liability Insurance Coverage*

Utility companies, as well as residential and commercial consumers, purchase liability insurance to cover third-party property-loss and/or personal-injury claims.[88] Property owners may purchase third-party coverage under a "liability insurance contract" and/or under an "indemnity insurance

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[84] Todd Tippett & David Winter, *Commercial Property Insurance Coverage for Texas Winter Freeze Losses*, JDSUPRA (Feb. 24, 2021), https://www.jdsupra.com/legalnews/commercial-property-insurance-coverage-5800228/ [https://perma.cc/M4XF-WECL] (reporting the many commercial insurance contracts exclude coverage for utility service outages, which originate beyond an insured business's premises).

[85] *See* Pel Hughes Printing, L.L.C. v. Hanover Ins. Grp., No. 07-4044, 2008 WL 1774288, at *4 (E.D. La. Apr. 16, 2008) (considering the scope of coverage under an "Off-Premises Power Failure-Direct Damage and Time Element" insurance provision).

[86] *See* Raspberry Junction Holding, L.L.C v. Southeastern Conn. Water Auth., 203 A.3d 1224 (2019) (noticing that the water utility had purchased utility service interruption insurance).

[87] *Id.*; *see also* Johan Qin, *What Is Utility Service Interruption Coverage?* ADVISORSMITH (May 16, 2022), https://advisorsmith.com/business-insurance/what-is-utility-service-interruption-coverage/ [https://perma.cc/D9YM-LEZN].

[88] *See also* Jason Metz, *72% of Homeowners Don't Understand Essential Home Insurance Coverage*, FORBES ADVISOR (May 31, 2022), https://www.forbes.com/advisor/homeowners-insurance/survey-homeowners-insurance-knowlege/ [https://perma.cc/8YTZ-AFN5] (reporting that homeowners' insurance includes coverage for fires, smoke, tornadoes, vandalism, falling objects, burst pipes and other issues and disclosing that many homeowners cannot identify eligible claims); *cf.* BRIDGET SIEREN-SMITH ET AL., UTILITY COSTS AND AFFORDABILITY OF THE GRID OF THE FUTURE, AN EVALUATION OF ELECTRIC COSTS, RATES AND EQUITY ISSUES PURSUANT TO CAL. PUB. UTIL. CODE. SEC. 9131.1, 118 (2021), https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/office-ofgovernmental-affairs-division/reports/2021/senate-bill-695-report-2021-and-en-banc-whitepaper_final_04302021.pdf (reporting that Southern California Edison plans to reduce wildfire insurance costs through customer-funded self-insurance and stressing that utilities are required to carry $1 billion in insurance, which costs about $400 million per year).

contract."[89] Generally, third-party insurance is designed to help shield an insured from having to pay out-of-pocket damages to a third-party victim. Additionally, "[under a liability insurance contract], . . . the insurer's obligation to pay arises as soon as the insured incurs liability for [a] loss."[90] However, under an indemnity insurance contract, an insurer is only required to reimburse the insured after the insured has paid or been ordered to pay third-party claims.[91]

All liability insurance contracts have several common features: 1) a coverage provision — listing the types of risks that insurers will assume; 2) a broad exclusion clause — outlining various exclusions and limitations; 3) a right-to-settle clause — giving insurers the exclusive right to settle third-party claims; 4) a duty-to-defend provision — requiring liability insurers to hire legal counsel for the insured's benefit and pay defense costs, and; 5) a duty-to-pay clause — disclosing the conditions under which insurers will pay after the insured's liability has been established.[92]

Even more relevant, liability insurers have no obligation to cover a third-party's loss if an insured's intentional act was the cause in fact and/or proximate cause of the loss.[93] Conversely, if an insured's negligence caused the third party's injuries, the liability insurer must attempt to settle the third-party's claim or defend the insured against a third-party lawsuit.[94] In addition, a liability insurer's duty to indemnify under a "true" indemnity insurance contract is somewhat different from its obligation under a general liability insurance contract. Under the former, an indemnity insurer must reimburse all expenses only after the insured pays a third-party claimant.[95]

Also, true indemnity insurance contracts generally do not contain duty-to-defend clauses. Instead, an insured has exclusive authority to retain an

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[89] *See MGM Grand Wins Award in Lawsuit on Las Vegas Fire,* WALL ST. J. (Jan. 23, 1985) ("MGM Grand Hotels said a federal judge ruled in its favor in the first of three lawsuits between the company and its insurance carriers over the settlement of claims from the 1980 fire at the MGM Grand Hotel . . . [The federal judge] ordered American Excess Insurance Company . . . to pay $4.7 million to cover legal fees and other costs that MGM Grand incurred in *defending more than 3,000 liability claims by hotel guests* from the fire, in which 84 people died . . . American Excess previously paid MGM Grand $10 million to cover claims by hotel guests *specified by its indemnity policy.*") (emphasis added).

[90] Little v. MGIC Indem. Corp., 836 F.2d 789, 793 (3rd Cir. 1987).

[91] *See* Fight Against Coercive Tactics Network, Inc. v. Coregis Ins. Co., 926 F.Supp. 1426, 1432–33 (D. Colo. 1996); s*ee also* Little, 836 F.2d at 793 ("In general, under an indemnity policy the insurer is obligated only to reimburse the insured for covered loss that the insured himself has already paid.").

[92] *See* WILLY E. RICE, CONSUMER LITIGATION AND INSURANCE DEFENSE 665–66 (Cognella Academic Publishing 3d ed. 2017).

[93] Willy E. Rice, *Insurance Contracts and Judicial Discord over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct: A Historical and Empirical Review of Federal and State Courts' Declaratory Judgments 1900–1997*, 47 AM. U. L. REV. 1131, 1145–47 (1998).

[94] *Id.*

[95] *Id.* at 1146–47 & nn.76–78 (discussing the major differences between "true" indemnity insurance contracts and indemnity clauses in liability contracts).

attorney and control the legal defense without securing the indemnity insurer's consent.[96] And, like liability insurance agreements, indemnity insurance contracts exclude coverage for an insured's allegedly fraudulent, malicious, dishonest, or intentional acts.[97] Lastly, indemnity insurance agreements appear in a variety of flavors.[98]

III. A REVIEW OF INSURANCE-RELATED SUBROGATION DOCTRINES

During the interval between 2010 and 2022, severe weather events, as well as utilities' questionable actions and inactions, concurrently destroyed ratepayers' property.[99] In the wake, some property insurers spent billions of dollars to help replace or repair some damaged property.[100] Even more relevant, during the twelve-year period, many property insurers raised well-pleaded subrogation claims—before utility commissions or in judicial proceedings—after compensating businesses and homeowners.[101]

But it is important to stress: In the previously discussed *All American Insurance Company* pleading, the property insurer's *theories of recovery* are unequivocally ordinary and gross negligence.[102] In fact, the word "subrogation" does not appear in the 80-page pleading. Instead, the 131 and highly sophisticated *Uri-Storm* insurers-plaintiffs simply *allege* they are "bona fide subrogees" under the terms of the insurance contract, in equity, and "by operation of law."[103] Stated more narrowly and slightly less awkwardly, the insurers-plaintiffs assert they have a right to commence a subrogation action against "any person or entity" that might be liable for their insureds' property damage.[104]

Nevertheless, from an insurance perspective, there are major questions. Must a plaintiff clearly state a cognizable subrogation claim or action? Is "subrogation by operation of law" a valid claim or theory of liability? What is the distinction between an equitable subrogee and a "subrogee under an

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[96] *Id.*

[97] *Id.*

[98] *Id.* at 1147 ("Insurers sell several types of . . . indemnity contracts: Professional indemnity plans, hospital indemnity insurance, workers compensation indemnity plans, excess-employers indemnity policies, and industrial indemnity insurance. Directors' and officers' policies . . . , however, appear to be the most widely distributed and well-known type[s] of indemnity contracts.").

[99] A search of online databases should confirm this assertion. On June 2, 2022, the author searched Google's NEWS database—searching the twelve-year period between January 2010 and May 2022 and using the query: *utilities and subrogation.* The search retrieved 270 news articles. The author also searched LexisNexis's NEWS database, searching the seven-year period between January 2015 and May 2022 and using the query: *subrogat! /s utilit! or electric! and insurance.* The latter query retrieved 296 unduplicated newspaper articles.

[100] *Id.*

[101] *Id.*

[102] Plaintiff's Original Petition, All American Ins. Co., et al., v. ERCOT (2021) (No. D-1-GN-21-007428), 2021 WL 6274598, at ¶¶ 127–150.

[103] *Id.* at ¶ 10.

[104] *Id.*

insurance contract"? Is the doctrine of subrogation a procedural defense or a substantive theory of recovery? And, if it is the latter, must a plaintiff prove various elements to prevail? Clearly, there are several subrogation doctrines. The following sections briefly outline each doctrine and discuss courts' varying answers to these questions.

A. *Equitable Subrogation*

Generally and respectively, property and liability insurers pay property damages and settle third-party claims on behalf of insureds.[105] Consequently, these insurers might have legitimate equitable subrogation claims—against the party who destroyed the insured's property and against the tortfeasor who actually injured the third-party complainant.[106]

Essentially, under the doctrine of equitable subrogation, a property insurer acquires a right to "stand in the insured's shoes."[107] Or, stated slightly differently, after covering the insured's property loss or injuries, the insurer inherits the insured's right to sue the legally responsible tortfeasor or third party.[108] Significantly, a subrogated insurer does not receive any new legal or equitable rights that exceed the transferred rights.[109] Moreover, any defense that may be raised against the insured may also be raised against a subrogated insurer.[110]

How do property insurers become subrogees? A survey of state supreme courts' decisions reveals: The burden-of-proof standards vary considerably—requiring insurers to prove very few or numerous elements. For example, Texas courts apply the equitable subrogation doctrine to resolve debtor-debtee disputes when two conditions exist: 1) An innocent party involuntarily pays another party's debt, and 2) equity demands that the beneficiary reimburses the payor.[111] Thus, to prevail in an equitable-subrogation trial, Texas courts require an allegedly subrogated insurer to prove just two elements: 1) a third party is primarily liable for the insured's loss or an unpaid debt and 2) the insurer involuntarily covered the loss or paid the debt.[112]

In contrast, the Supreme Courts of Arizona, Delaware, Florida, and Iowa require property insurers to prove five elements: 1) the insurer paid a disputed claim to protect its interests; 2) the payment was involuntary; 3) the insurer is not legally and primarily liable for the debt; 4) the insurer paid the entire debt, and; 5) injustice will not appear, or the rights of others will not be

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[105] *See* Interstate Fire & Casualty Ins. Co. v. Cleveland Wrecking Co., 182 Cal.App.4th 23, 32 (2010).
[106] *Id.*
[107] *Id.* at 31–32.
[108] *Id.* at 32.
[109] *Id.; see also* Smith v. Sprague, 244 Mich. 577, 579–80 (1928).
[110] *Interstate Fire,* 182 Cal.App.4th at 32.
[111] *See* Argonaut Ins. Co. v. Allstate Ins. Co., 869 S.W.2d 537, 541–42 (Tex. Ct. App. Corpus Christi 1993).
[112] *Id.*

compromised if the insurer becomes a subrogee.[113]

Property insurers have the heaviest burden of proof in California. To prevail in an equitable-subrogation proceeding, an insurer must prove eight elements: 1) a negligent third party is liable for the insured's property loss; 2) the insurer is not primarily liable; 3) the insurer totally or partially compensated the insured for the loss property; 4) the insurer involuntarily paid the claim to protect its interest; 5) the insured assigned its cause of action—against the third-party tortfeasor—to the property insurer; 6) the tortfeasor's acts or omissions caused the insured's damages; 7) justice requires a total transfer of tort liability from the insurer to the third-party defendant, who has an inferior equitable claim or right, and; 8) the insurer's liquidated damages equal the amount that the insurer paid to cover the insured's property loss.[114]

B. *Contractual Subrogation*

Equitable subrogation is legal fiction.[115] Or, it is a "flexible and elastic equitable doctrine"—requiring courts to apply equity jurisprudence to decide right-of-subrogation disputes on a case-by-case basis.[116] In contrast, the doctrine of contractual subrogation arises from the terms of a valid contract.[117] To illustrate, consider two fairly similar subrogation provisions. Both are entitled "Transfer of Right of Recovery." The first one appears in ISO's widely distributed *commercial property insurance* contract. It reads in appropriate part:

> If any person or organization . . . for whom we make [a] payment . . . has rights to recover damages from another, those *rights are transferred* to us to the *extent of our payment*. That person or organization must do everything necessary to secure our rights and must do nothing after loss

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[113] *See, e.g.,* Sourcecorp, Inc. v. Norcutt, 258 P.3d 281, 284 (Ariz. Ct. App. 2011), aff'd, 274 P.3d 1204 (Ariz. 2012); E. Sav. Bank, FSB v. Cach, L.L.C., 124 A.3d 585, 590 (Del. 2015); Dade County School Bd. v. Radio Station WQBA, 731 So.2d 638, 646 (Fla. 1999); Weitz Co., LLC v. Lexington Ins. Co., 982 F.Supp.2d 975, 1004 (S.D. Iowa 2013), (citing *In re Hemphill*, 18 B.R. 38, 47 (Bankr. S.D. Iowa 1982) and *In re Hagen*, 147 B.R. 166, 167 (Bankr. N.D. Iowa 1992)).

[114] Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co., 182 Cal.App.4th 23, 33–34 (2010) (quoting Fireman's Fund Ins. Co. v. Maryland Cas. Co., 65 Cal.App.4th 1279, 1292 (1998)); *see also* North American Specialty Ins. Co. v. National Fire & Marine Ins. *Co.*, No. 2:10–cv–01859–GMN–NJK, 2013 WL 1332205, at *3 (D. Nev. Apr. 2, 2013) (accepting without declaring that Nevada courts would adopt and apply California's eight-elements equitable-subrogation test).

[115] *See* Smith v. Sprague, 244 Mich. 577, 579–80 (1928).

[116] Atlanta Int'l Ins. Co. v. Bell, 438 Mich. 512, 521 (1991).

[117] Fortis Benefits v. Cantu, 234 S.W.3d 642, 648 (Tex. 2007) (citing Sereboff v. Mid Atl. Med. Services, Inc., 126 S.Ct. 1869, 1872–73 (2006) (reaffirming that contractual subrogation expresses parties' intent and arises from contractual terms).

> to impair them.[118]

The second subrogation provision appears in ISO's ubiquitous commercial general liability insurance contract. It states in relevant part:

> If the insured has rights to recover *all or part* of any payment [that] *we have made*, . . . those *rights are transferred to us*. The insured must do nothing after loss to impair them. At our request, the insured will bring [a] "suit" or transfer those rights to us and help us [to] enforce them.[119]

As discussed more carefully in a later section, the language in these and similar transfer-of-right clauses has generated diverse answers to the question: whether property insurers must totally compensate insured property owners before commencing subrogation actions against investor-owned utilities and liability insurers.[120] Above, the "extent of our payment" phrase in the property-insurance contract is arguably ambiguous. The second provision, however, is explicit: a liability insurer may commence a right-of-subrogation action after *completely or partially* paying a third-party victim's property-loss or personal-injury claim.[121]

Also, assuming that an insurer conquers the procedural barrier and files a contractual- subrogation action, a pressing substantive question arises: does an insurer qualify immediately as a contractual subrogee—making the defendant strictly liable or requiring the defendant to indemnify instantly as a matter of law? Or must the insurer establish a *prima facie* case by proving multiple elements? Among the state appellate courts that have considered these questions, there are diverse rulings.

For example, in *SwedishAmerican Hospital Association of Rockford v. Illinois State Medical Inter-Insurance Exchange*,[122] the Illinois Court of Appeals declared that an insurer must prove the same elements to qualify as an equitable or a contractual subrogee. The elements are:

1) the insurer is primarily liable for the insured's covered property loss; 2) the insurer is secondarily liable for the same loss; and 3) the insurer discharged its liability.[123] However, in *Bay Rock Operating Co. v. St. Paul Surplus Lines Ins. Co.*,[124] the insurance contract stated: after reimbursing the insured for *any* loss, the insurer becomes a subrogee—retaining "*all* of the

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[118] Bethany Boardwalk Grp. LLC v. Everest Sec. Ins. Co., 2020 WL 7054760, *2, *11 (D. Md. Dec. 2, 2020) (emphasis added).

[119] *See* Philadelphia Indem. Ins. Co. v. Yap, 2022 WL 1546631, at *4 (M.D. Pa. May 16, 2022) (emphasis added).

[120] *See* discussion *supra* Part III-A and the accompanying discussion.

[121] *See* Philadelphia Indem. Ins. Co. v. Yap, 2022 WL 1546631, at *4.

[122] SwedishAmerican Hosp. Ass'n of Rockford v. Ill. State Med. Inter-Insurance Exch., 916 N.E.2d 80, 101 (Ill. App. Ct. 2009).

[123] *Id.* at 105; *see also* Home Ins. Co. v. Cincinnati Ins. Co., 821 N.E.2d 269, 280 (Ill. App. Ct. 2004).

[124] Bay Rock Operating Co. v. St. Paul Surplus Lines Ins. Co., 298 S.W.3d 216 (Tex. App. 2009).

insured's rights" to recover damages from "any other person . . . who may be liable for [the] loss."[125]

Therefore, applying the plain meaning rule,[126] the Texas Appellate Court issued a three-pronged declaration: 1) St. Paul "stepped into the shoes of its insured"; 2) the insurer had a contractual-subrogation right as a matter of law, and 3) St. Paul only had to prove that the defendants' negligence caused the insured's property loss and damages.[127]

C. *Statutory Subrogation*

State legislatures enact statutes which also create various subrogation rights.[128] Some statutes are insurance-specific—allowing property, liability, health, and other insurers to file subrogation and indemnification actions. For instance, if a negligent person or entity injures an employee during the course of employment, workers' compensation statutes allow employers to file a subrogation-indemnification action against the tortfeasors.[129] Uninsured motorists and personal-injury-protection statutes create a subrogation right for automobile insurers who pay insured motorists' medical bills or property damage.[130] In addition, so-called no-fault insurance statutes give insurers a right to commence a subrogation action after paying a third-party judgment or settling a claim.[131] And in some states, earth-movement or land-subsidence statutes allow property insurers to file a subrogation action against a water, gas, or energy utility company that caused subsidence damage on an insured's property.[132]

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[125] *Id.* at 226 (emphasis added).

[126] *See generally*, Willy E. Rice, *Insurance Contracts and Judicial Discord,* 47 AM. U. L. REV. 1131, 1162–65, nn. 164–82 (Discussing the various doctrines and illustrating how state and federal courts apply them to interpret rights and obligations under insurance contracts. Generally, states apply five doctrines to interpret words and phrases in insurance contracts: the plain-meaning, "four corners," adhesion, ambiguity, and reasonable expectation doctrines).

[127] *See Bay Rock Operating Co.*, 298 S.W.3d at 226 (emphasis added).

[128] Tex. Ass'n of Sch. Bds. v. Ward, 18 S.W.3d 256, 259 (Tex. App. 2000).

[129] Bureau of Workers' Comp. v. Verlinger, 108 N.E.3d 70, 73–74 (Ohio 2018) (finding that Ohio's workers' compensation statute is an insurance "subrogation statute"—allowing a self-insuring employer to sue as "statutory subrogee"); Johnson v. Second Inj. Fund, 688 S.W.2d 107, 108 (Tex. 1985) (reaffirming that Texas workers' compensation statute creates a statutory right of subrogation).

[130] State Farm Mut. Auto. Ins. Co. v. Cox, 515 S.E.2d 832, 833–34 (Ga. 1999) (concluding that Georgia's uninsured motorist statute does not give an insurer a right to commence a subrogation action "in its own name"); Enterprise Rent-A-Car Co. of Boston, Inc. v. Arbella Mut. Ins. Co., 884 N.E.2d 973, 975 (Mass. 2008) (declaring that an auto insurer or a self-insured rental entity—that pays compulsory personal-injury-protection benefits—may seek subrogation under Massachusetts's personal injury protection statute).

[131] *See* Nitchals v. Williams, 590 P.2d 582, 585–86 (Kan. 1979) (concluding that Kansas "no-fault insurance" statute creates a subrogation right).

[132] *See* Illinois Mine Subsidence Ins. Fund v. Union Pac. R.R. Co., 2019 WL

Given the extreme variability among insurance-specific subrogation statutes, a familiar question reappears: What must an insurer prove to prevail in a statutory-subrogation trial? First, it is important to stress: trial judges rather than juries determine whether an insurer is a statutory subrogee.[133] Thus, some courts only require workers' compensation insurers to prove that an injured employee has been fully compensated.[134] Most courts, however, apply variations of the made-whole rule to determine whether an insurer is a subrogee under various statutes—including "public utilities and regulated industries" statutes.[135] Procedurally, the made-whole doctrine prevents an insurer from becoming a statutory subrogee "unless [an] insured has been made whole for his loss."[136] And substantively, the made-whole rule prevents unjust enrichment.[137]

IV. JUDICIAL CONFLICTS INVOLVING PRIVATE UTILITIES' AND PROPERTY INSURERS' SUBROGATION DISPUTES

Highly regulated industries—like electric, gas, and water utilities—must file a tariff with state regulators or administrative agencies.[138] Put simply, a tariff is a public document that outlines a utility's services, rates, regulations, customary practices, or business practices.[139] More importantly, a filed tariff is an enforceable, adhesion, and asymmetrical contract—binding a utility and its customers.[140] Generally, a tariff limits a utility's tort liability if certain practices, services, or interruptions directly or indirectly destroy a ratepayer's

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4015883, at *1 (C.D. Ill. Aug. 26, 2019) (reporting that Illinois's mine-subsidence-reinsurance statute allows property insurers to secure subrogation rights from parties who are caused subsidence damage).

[133] *See, e.g.,* SunTrust Bank v. Travelers Prop. Cas. Co. of Am., 740 S.E.2d 824 (Ga. App. Ct. 2013).

[134] *Id.* at 827 (explaining an insurer's burden of proof under a workers' compensation statute).

[135] Nelson v. Innovative Recovery Servs., Inc., 2001 WL 1480515, at *4 (Tenn. App. Ct. Nov. 21, 2001) (reaffirming that a plurality of jurisdictions have embraced the made-whole doctrine); EMC Ins. Cos. v. Entergy Ark., Inc., 924 F.3d 483, 485–86 (8th Cir. 2019) (interpreting the subrogation provision in Arkansas public utilities statute and observing that the made-whole doctrine has been adopted with significant variations in many jurisdictions).

[136] Riley v. State Farm Mut. Auto. Ins. Co., 381 S.W.3d 840, 848 (Ark. 2011).

[137] *See* State Farm Bureau Cas. Ins. Co. v. Tallant, 207 S.W.3d 468, 473 (Ark. 2005) (stressing that subrogation is an ordinary aspect of indemnity insurance which prevents unjust enrichment or an insured's receiving a double recovery).

[138] *See* Brockway Glass Co. v. Pennsylvania Pub. Utility Comm'n, 437 A.2d 1067, 1070 (Pa. Commw. Ct. 1981).

[139] *Id.*

[140] *See, e.g.*, National Fuel Gas Distrib. Corp. v. Pub. Serv. Comm'n, 95 N.Y.S.3d 382, 391 (N.Y. App. Div. 2019) (finding that the "present" tariff allowed unharmful asymmetrical ratemaking); Auchan USA, Inc. v. Houston Lighting & Power Co., 961 S.W.2d 197, 200 (Tex. App.1996) ("Contracts between HL&P and its customers are contracts of adhesion.").

property or person.[141] To illustrate, consider the language in a large California utility's limitation-of-liability clause:

> PG&E will exercise reasonable diligence and care to furnish and deliver a continuous and sufficient supply of electric energy to the customer. [But we do] not guarantee continuity or sufficiency of supply. PG&E will not be liable for interruption ... or any loss or damage of any kind . . . , except that arising from [PG&E's] failure to exercise reasonable diligence . . . . Similarly, PG&E shall not be liable ...for damages or losses resulting from interruption due to transmission constraint, allocation of transmission or...other transmission related outage, planned or unplanned.[142]

On two occasions, during the late-nineteenth and early-twentieth centuries, the Supreme Court decided questions surrounding the validity of a utility's limitation clause and the scope of its protection.[143] Arguably, the "filed rate doctrine" or the "filed tariff doctrine" evolved directly from those decisions.[144] Stated briefly, under the doctrine, all utility customers are "conclusively presumed" to have constructive knowledge of a filed tariff.[145]

Some state and federal courts apply the filed-tariff doctrine rigidly and unforgivingly to protect investors-owned utilities' interests.[146] Or, stated slightly differently, courts are divided over whether a limitation-of-liability clause prevents customers from commencing ordinary-negligence actions against regulated utilities.[147] Courts are also split over whether the filed-rate

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[141] *See Auchan USA, Inc.*, 961 S.W.2d at 200.

[142] Tesoro Ref. & Mktg. Co. LLC v. Pac. Gas & Elec. Co., 146 F. Supp. 3d 1170, 1176 (N.D. Cal. 2015) (emphasis added).

[143] *See generally,* Primrose v. Western Union Tel. Co., 154 U.S. 1, 16–21 (1894) (finding that the regulators did not approve the filed rate, but concluding that the limitation should be given effect absent any evidence of the utility's willful misconduct or gross negligence); Western Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566, 571 (1921) (concluding that the limitation-of-liability clause was part of the filed rate and precluding the utility's compensating an injured customer for an amount greater than the amount stated in the filed tariff).

[144] *See generally, Primrose,* 154 U.S. 1, 16–21; *Western Union Tel. Co.*, 256 U.S. at 571.

[145] *See* Fax Telecommunicaciones Inc. v. AT&T, 138 F.3d 479, 489 (2d Cir. 1998).

[146] *See* Simon v. KeySpan Corp., 694 F.3d 196, 205 (2nd Cir. 2012); Arkansas La. Gas Co. v. Hall, 453 U.S. 571, 577 (1981) (stressing that the filed-rate doctrine has "been extended across the spectrum of regulated utilities").

[147] *Compare* Landrum v. Florida Power & Light Co., 505 So.2d 552, 554 (Fla. Dist. Ct. App. 1987) (finding that a valid tariff precluded ordinary-negligence actions); Lee v. Consolidated Edison Co. of N.Y., 98 Misc.2d 304, 306 (N.Y. App. Term 1978) (same); Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 109 (1992) (same), *with* Southwestern Pub. Serv. Co. v. Artesia Alfalfa Growers' Ass'n, 353 P.2d 62, 68–71 (N.M.1960) (holding that public policy prevents a tariff from shielding a negligent and liable utility); Forte Hotels, Inc. v. Kansas

doctrine or traditional rules of contract shield a utility whose gross negligence or willful misconduct destroys consumers' property or person.[148]

Certainly, as of this writing, the more pressing multi-pronged procedural question is whether the common-law *made whole doctrine*, as well as the insurance-specific *subrogation- immunity* and *waiver-of-subrogation* defenses, bar property insurers' standing to sue as subrogees. These issues are addressed in this part.

A. *Judicial Conflict—Whether the Made Whole Doctrine Precludes a Subrogated Property Insurers' Standing to Sue Utilities and Liability Insurers*

News reports are consistent in California, Texas, Florida, New York, the Carolinas, and other states: after extreme weather, natural disasters, and utilities' negligence concurrently cause widespread property damage and personal injuries, some insurers do not cover residential and commercial customers' losses.[149] Many property insurers do not *immediately* indemnify every injured insured.[150] Still, other insurers only *partially compensate* insureds for a property or business-interruption loss.[151]

City Power & Light Co., 913 S.W.2d 803, 804–06 (Mo. Ct. App. 1995) (applying Kansas law and holding that the tariff's limitation of liability is unreasonable and unenforceable).

[148] *Compare* Satellite Sys., Inc. v. Birch Telecom of Okla., Inc., 51 P.3d 585, 589 (Okla. 2002) (stating that courts "overwhelmingly reject attempts to limit liability either by contract or by tariff for gross negligence, willful misconduct, and fraud."), *with* Houston Lighting & Power Co. v. Auchan USA, Inc., 995 S.W.2d 668, 675 (Tex. 1999) (declining to declare unequivocally whether a tariff may limit liability for gross negligence or willful misconduct because the plaintiff had abandoned its gross-negligence claim).

[149] *See, e.g.*, Sophie Kasakove, *For Storm Victims, Rebuilding Becomes the Disaster After the Disaster,* N.Y. TIMES, Feb. 27, 2022 (reporting that storms, floods and fires batter homes across the country with heightened intensity, homeowners are increasingly fighting with property insurers for months or years to secure compensation) https://www.nytimes.com/2022/02/27/us/hurricane-damage-insurance.html [https://perma.cc/7V6J-VC3N]; Robin Epley, *How the Survivors of the Wildfires PG&E Started Are Being Victimized All Over Again*, THE SACRAMENTO BEE (June 19, 2022), https://www.sacbee.com/opinion/article261979050.html#storylink=cpy [https://perma.cc/B7CW-T6ZB] (reporting that PG&E utility's negligence started fires between 2015 and 2018, and fire-victims still have not been fully compensated); *"My Home Is Still Uninhabitable": Ten Months After Winter Storm Some Texans Still Waiting On Insurance Claims*, CBSNEWS-DALLAS-FORT WORTH (Dec. 6, 2021), https://www.cbsnews.com/dfw/news/home-uninhabitable-10-months-devastating-winter-storm-texans-waiting-insurance-claims/ [https://perma.cc/NR7Y-G8FV] (reporting that more than 400,000 Texas homeowners filed an insurance claim for damages following the historic Uri Winter Storm and as of June 30, 2021, nearly 9% of the claims remained opened) (last visited June 23, 2022).

[150] *Id.*

[151] *Id.*

Generally, under the insurance-specific "made whole" or "make whole" doctrine, an insurer may enforce a right of subrogation only after an insured has been fully compensated for a loss.[152] Some jurisdictions, however, have created an exception to the made whole doctrine. In some states, the make whole doctrine is only a default rule—allowing an insurer and its insured to contractually abrogate the equitable doctrine at will.[153] The Texas Supreme Court, for example, has declared unequivocally: the equitable "made whole" doctrine may not invalidate a contractual subrogation provision, which expressly governs an insured's and its insurer's intent and rights.[154]

More importantly, the made whole rule has created split judicial decisions over a persistent question: whether a property insurer has standing to commence a subrogation action against an allegedly negligent utility if the insurer *partially* compensates an injured property owner.[155] This confusion, however, is not surprising given the exceptions to the made whole doctrine.

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[152] *See, e.g.*, United States v. Lara, No. 3:08–CR–00169V, 2009 WL 3754069, at *2 (D. Conn. Nov. 6, 2009).

[153] *Id.* at *2; Barnes v. Indep. Auto. Dealers Ass'n of Cal. Health & Welfare Benefit Plan, 64 F.3d 1389, 1394 (9th Cir. 1995) (stressing that the make whole principle is a "rule of interpretation" that can be signed away).

[154] Fortis Benefits v. Cantu, 234 S.W.3d 642, 649–50 (Tex. 2007).

[155] *Compare* Mid–Continent Ins. Co. v. Liberty Mut. Ins. Co., 236 S.W.3d 765, 776–77 (Tex. 2007) (concluding that an insured has no contractual-subrogation rights that a co-insurer may assert against another co-insurer after the latter has fully indemnified the insured); Plut v. Fireman's Fund Ins. Co., 85 Cal. App. 4th 98, 104 (2000) (reaffirming the made-whole rule and declaring that a property insurer has no contractual-subrogation right until the insured has been fully compensated or "made whole"); Continental W. Ins. Co. v. Swartzendruber, 570 N.W.2d 708, 712 (Neb. 1997) (reaffirming that a property insurer has no right to recover the funds that a tortfeasor paid an insured until the insured has been fully indemnified); Roberts v. Safeco Ins. Co., 941 P.2d 668, 671 (Wash. App. 1997) (interpreting the "extent of our payment" phrase and reaffirming that an insurer has no right of subrogation until an insured has been fully compensated for her damages); Hardware Dealers Mut. Fire Ins. Co. v. Ross, 262 N.E.2d 618, 621 (Ill. App. Ct. 1970) (affirming that an insurer's subrogation right does not accrue if a tortfeasor partially reimburses the insured); Oss v. United Servs. Auto. Ass'n, 807 F.2d 457, 460 nn.11–13 (5th Cir. 1987) (embracing the proposition that a liability insurer has no contractual-subrogation right to sue a tortfeasor until the insurer fully covers an insured's personal-injury or property-damage claim); Trinity Universal Ins. Co. v. Employers Mut. Cas. Co., 586 F.Supp.2d 718, 731 (S.D. Tex. 2008) (concluding that an alleged insurer-subrogee may not file a subrogation claim against another co-insurer after the latter fully indemnifies the insured-subrogor, citing Mid–Continent Ins. Co. v. Liberty Mut. Ins. Co., 236 S.W.3d, at 776–77), *with* Employers Ins. Co. of Wausau v. Penn-America Ins. Co., 705 F.Supp.2d 696, 707–10 (S.D. Tex. 2010) (embracing the position of most courts and rejecting the "overly broad" subrogation-exclusion rule in *Mid–Continent Ins. Co* because the fully indemnified rule "would effectively end contractual subrogation in Texas"), *and* Met Life Auto and Home Ins. Co. v. Lester, 719 N.W.2d 385, 388 (S.D. 2006) (declaring that the "extent of our payment" language does not restrict a property insurer's right-of-subrogation action until its insured has been made whole).

On the other hand, it is surprising to discover: subrogated insurers *may or may not* have standing to sue electric, gas, or water utilities—even if the insurers *fully indemnify* their insureds after a loss. A brief review of a few conflicting federal courts' decisions should be instructive.

First, consider the subrogation dispute in *EMC Insurance Companies v. Entergy Arkansas, Inc.*[156] Milton and Norma Blakely owned a house in Arkansas, and they purchased electricity from Entergy Arkansas, Inc.[157] In October 2012, a fire seriously damaged Norma and Milton's house. In 2014, a second fire completely destroyed the house—while it was being repaired without electricity.[158] The Blakelys' property insurer—EMC Insurance Companies—paid $203,247.49 to cover the entire loss.[159]

Two years later, the assertedly subrogated insurer filed a diversity action against Entergy in the Western District Court of Arkansas. In its complaint, EMC raised both negligence and excess-liability claims: 1) Entergy's equipment caused the 2014 fire and 2) the utility was liable for damages which exceeded the $203,247.49 payment.[160] The district court granted Entergy's motion to dismiss—declaring *as a matter of law* that EMC did not have standing to sue.[161] EMC appealed. The Eight Circuit Court of Appeals rejected the lower court's standing-to-sue analysis and holding—stressing that the ruling violated Arkansas law.[162]

Although securing a right to sue Entergy, the insurer still did not prevail. Why? Put simply, EMC did not prove that "the Blakelys had been made whole"—even though EMC *offered* and the Blakelys *accepted* the $203,247.49 payment.[163] Arkansas has adopted a fairly demanding evidentiary standard—the so-called "objective documentation" test. To establish that an insured has been wholly compensated for a property loss, an insurer must present written and definitive proof.[164] An "objective documentation" may be a "confirmatory" settlement contract, a made-whole contract, or a judicial ruling—which must be filed before an insurer submits

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[156] EMC Ins. Cos. v. Entergy Ark., Inc., 924 F.3d 483 (8th Cir. 2019).
[157] *Id.* at 485.
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.* at 487 (The district court in effect ruled that an insurer can *never* assert (or commence) a subrogation claim against an alleged tortfeasor such as Entergy *without first* obtaining . . . the insured's agreement or a court determination that the insured has been made whole. We conclude this ruling conflicts with what appears to be well-settled Arkansas law.") (emphasis added).
[162] *EMC Ins. Cos., Inc.*, 924 F.3d at 488–89.
[163] *Id.* at 488 (citing Lopez v. United Auto Ins. Co., 427 S.W.3d 154, 158 (Ark. App. Ct. 2013) (reaffirming that an insurer bears the burden of proving before or during trial that its insured has been made whole).
[164] Ward v. Williams, 118 S.W.3d 513, 520 (Ark. 2003) (stressing that courts must apply an objective test—using "*objective indicators* of an agreement and not subjective opinions"—to determine if an insurer has satisfied the made-whole doctrine) (emphasis added).

an indemnification, damages, or excess-liability claim to a jury.[165]

Now, consider a more liberal, contrary, and pro-insurer ruling in *Mid-Continent Casualty Company v. Engelke*.[166] Joseph Picard decided to build a new house on his land in northeastern Montana. Picard wanted to purchase water from Dry Prairie Rural Water Authority.[167] Therefore, to install underground water lines, the utility hired Alan Engelke, an excavator, to dig a trench on Picard's property.[168] Before Engelke began excavating, Picard disclosed that underground lines were already present, including the nearby Anvil Well's saltwater disposal line.[169]

While digging the trench, the bucket on Engelke's excavator struck the saltwater line—damaging it and forcing both ends of the line to appear above the surface.[170] Subsequently, salt water discharged—polluting the ground and causing property damage. Avery Bakken owned the Anvil Well and saltwater line when the discharge occurred.[171] Thus, Montana Oil and Gas Commission ordered Bakken to remove the contamination from the land.[172] Mid-Continent Casualty Company insured Bakken against such perils.

A subrogation clause in the insurance contract allowed Mid-Continent to become a subrogee if a certain event occurred.[173] Thus, as matters progressed and disagreements evolved, Mid-Continent filed negligence-based actions against Dry Prairie and Engelke. The lawsuit was filed in the District Court of Montana. In response, the water utility moved for summary judgment and asserted the following: Mid-Continent did not have standing to sue as a subrogee because the insurer violated the Make Whole Doctrine.[174] More specifically, Dry Prairie argued that Mid-Continent did not fully reimburse Avery Bakken for the cost of remediating the saltwater contamination.[175]

The *Engelke* district court disagreed and allowed Mid-Continent's subrogation claim to proceed.[176] Why? Montana embraces the majority rule, which states: an insurer must reimburse an insured wholly for all property losses before suing a third party who actually caused the harm.[177] However, Montana does not require insurers to present only "objective documentation" to establish that an insured has been wholly compensated. Montana's

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[165] *EMC Ins. Cos., Inc.*, 924 F.3d at 488; *see also* Williams v. State Farm Mut. Auto. Ins. Co., 2017 WL 4478327, *3–4 (E.D. Ark. Oct. 6, 2017) (asking whether State Farm's "objective documentation" proved the parties' *mutually assented* and had a *meeting of the minds,* and rejecting the insurer's assertion that letters and other communications confirmed that the insureds had been "made whole") (emphasis added).

[166] Mid Continent Casualty v. Engelke, 337 F.Supp.3d 933 (D. Mont. 2018).

[167] *Id.* at 937.

[168] *Id.*

[169] *Id.*

[170] *Id.* at 938.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.* at 939.

[175] *Id.* at 940.

[176] *Id.*

[177] *See* Swanson v. Hartford Ins. Co. of Midwest, 46 P.3d 584, 587 (Mont. 2002).

evidentiary burden of proof is less stringent, allowing the insurer to present affidavit testimony, as well as discovery responses and documents, to satisfy the made whole doctrine.[178]

Finally, consider the controversy in *Gas Service Company v. Hunt*.[179] Rexford and Helen Hunt resided in Kansas and owned a house that contained a gas furnace.[180] To heat the house, the Hunts purchased natural gas from an investors-owned utility, the Gas Service Company (GSC).[181] As fate would have it, the furnace stopped working. GSC's agents inspected and adjusted the furnace.[182] After the agents left the house, a fire erupted approximately 20 or 30 minutes later "in and about the gas furnace."[183] The Hunts' total financial loss was $8,512.95. Insurers contributed $4,698.75—which *totally* satisfied the insurers' contractual obligations. But, the insurance proceeds only *partially* covered the Hunts' total damages.[184]

The Hunts initiated a negligence action in a Kansas state court, which was removed to a federal district court. In their complaint, Helen and Rex alleged that GSC's employees failed to ensure that the furnace was working properly before leaving the house.[185] The jury agreed and awarded $7,202.65. The gas utility appealed to the Tenth Circuit Court of Appeals, which concluded that sufficient evidence was present for a trial by jury.[186] More importantly, the Tenth Circuit applied Kansas law and declared that the insurers became contractual subrogees *immediately* when the underwriters paid $4,698.75. The insurance payment, however, only covered a part (55%) of the Hunts' total loss.[187]

Even more importantly, unlike the insurer in *Entergy Arkansas*, the *Hunt* insurers did not have to produce a settlement agreement or a judicial ruling to establish conclusively that Helen and Rex were "made whole." In Kansas, both insured property owners and their subrogated insurers may sue a tortfeasor to collect excess damages to cover a total loss when: (1) the insurers completely satisfy the contractual obligation by paying the policy limit and (2) the insurers' contribution only partially compensates the insured.[188]

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[178] Mid Continent Casualty v. Engelke, 337 F.Supp.3d 933, 940.
[179] Gas Service Company v. Hunt, 183 F.2d 417 (10th Cir. 1950).
[180] *Id.* at 418.
[181] *See Kansas Gas Service-Natural Gas Utility*, THE LEAGUE OF KANSAS MUNICIPALITIES, https://www.lkm.org/page/NaturalGasUtility? [https://perma.cc/T5JQ-7G6Y] (last visited Jun. 26, 2022) ("Kansas Gas Service is . . . the largest natural gas utility in Kansas . . . . [It] has been known by a variety of names—Gas Service Company, Kansas Gas & Electric Company—and has a 100-year tradition of utility service.").
[182] *Gas Service Company,* 183 F.2d at 418.
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Id.* at 420.
[188] *Id.* at 419 ("[If] the owner has been reimbursed for only part of the loss and

B. *Judicial Conflict—Whether a Subrogation Immunity Defense Precludes Property Insurers' Filing Ordinary and Gross Negligence Actions Against Utilities*

Briefly, courts recognize and apply a variety of immunity defenses—judicially created, governmental, and sovereign—depending on plaintiffs' theories of recovery.[189] Assume that a property insurer satisfies the made whole doctrine by fully compensating a property owner for a utility-caused loss. Also assume that, wanting indemnification, the subrogated insurer sues the allegedly ordinarily or grossly negligent utility and the latter's liability insurer. Would the aforementioned immunity defenses block the subrogated property insurer's action? Certainly, regulated private and public utilities have raised so-called subrogation-immunity defenses. However, as of this writing, courts' inconsistent application of the immunity defense continually generates conflicting judicial decisions.

Perhaps, the best illustration of a major intra-state conflict is occurring among appellate courts in New Jersey. First, consider the subrogation dispute in *Weinberg v. Dinger*.[190] Paul Weinberg owned apartments in Penns Grove, New Jersey.[191] A fire began in and spread throughout the building, gutting the twelve-unit structure.[192] On behalf of the municipality, Penns Grove, a water utility company, installed and maintained fire hydrants and water mains.[193] Firefighters, however, were unable to save the apartments because the water pressure in the fire hydrants was low.

In the course of events, Weinberg and his tenants sued Penns Grove. The complaint alleged that the utility was negligent in failing to repair a dilapidated water system which concurrently caused the property damage.[194] In response, the utility raised an immunity defense, citing language in its filed tariff. Specifically, Penns Grove argued that Weinberg, as well as his property insurer, had no standing to commence a subrogation-negligence

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asserts a claim against the wrongdoer for the balance in excess of the amount paid, both the insured and the insurer own portions of the substantive right against the wrongdoer.").

[189] *See, e.g.*, DeFever v. City of Waukesha, 743 N.W.2d 848, 850–53 (Wis. Ct. App. 2007) (embracing the water utility's governmental immunity defense and barring plaintiff's suit after the utility failed to properly install a water pipe); Colonial Penn Ins. Co. v. Burnham, 2002 WL 960174, at *3–4 (Conn. Super. Ct. Apr. 11, 2002) (rejecting Connecticut's sovereign immunity defense and allowing the subrogated automobile insurer to file a negligence action); Bongo v. N.J. Bell Tel. Co., 595 A.2d at 562–63 (N.J. Super. Ct. 1991) (applying a judicially-created immunity defense and declaring that the subrogated automobile insurer had standing to sue the telephone utility whose alleged negligence destroyed the insured's vehicle).

[190] Weinberg v. Dinger, 24 A.2d 366 (N.J. 1987).

[191] *Id.* at 367

[192] *Id.*

[193] *Id.*

[194] *Id.*

action.[195] In the end, the *Weinberg* court abolished utilities' long-standing, judicially-created tort immunity defense. On the other hand, the New Jersey Supreme Court created a "subrogation immunity defense," which prevents subrogated insurers from filing negligence-based or indemnification actions against utilities.[196]

Approximately twenty years after deciding *Weinberg*, the Supreme Court of New Jersey decided the procedural dispute in *Franklin Mutual Insurance Company v. Jersey Cent. Power & Light Company*.[197] Briefly, in 1999, Hurricane Floyd arrived in New Jersey. At that time, Jersey Central Power & Light Company (JCP&L) was the major electricity provider. The hurricane interrupted JCP&L's operations for seven days, and the power outage caused the food in Belcher's Village Market to spoil.[198]

Belcher's property insurer, Franklin Mutual Insurance Company, paid $6,255.78 to cover the property loss.[199] Later, the insurer filed a subrogation-indemnification action against JCP&L. Before the trial court, the utility cited *Weinberg's* immunity defense, arguing that Franklin Mutual had no standing to sue. On appeal, New Jersey Supreme Court embraced JCP&L's argument, declaring that *Weinberg* applies to all regulated utilities' "service interruption" disputes and reaffirming the validity of *Weinberg*'s carved-out subrogation immunity defense.[200]

Significantly, as the state supreme court was weighing the litigants' claims and defenses in *Franklin Mutual*, a New Jersey superior court was deciding a similar dispute in *E&M Liquors, Inc. v. Public Service Electric & Gas Company*.[201] The facts are sparse and uncomplicated. An electric utility, Public Service Electric & Gas Company (PSE&G), installed a pole next to a large commercial building in Clifton, New Jersey. A high-voltage wire, which was attached to the pole, dislodged, fell to the sidewalk, and began "flopping around" on the ground.[202] The live wire carved a deep hole in the sidewalk and ignited a fire that destroyed the building.[203]

Evidence revealed conclusively that severe weather, vandalism, or another peril *did not* cause the wire to fall.[204] Still, the live wire caused damage for *fifty minutes* before PSE&G intervened. The insurers paid $452,476.59 to cover the tenants' property damage and business- interruption losses.[205] To recoup their expenditures, the insurers filed a contractual-subrogation action against PSE&G. In response, the electric utility raised a *Weinberg's* subrogation-immunity defense—asserting that the insurers did

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[195] *Id.* at 375–78.
[196] *Id.* at 378–79.
[197] *Franklin Mut. Ins. v. Jersey Cent. Power*, 902 A.2d 885 (N.J. 2006).
[198] *Id.* at 886 n.2.
[199] *Id.* at 886–87 n.2.
[200] *Id.* at 887 (emphasis added).
[201] *E & M Liquors, Inc. v. Public Service Elec. & Gas Co.*, 909 A.2d 1141 (N.J. Super. Ct. App. Div., 2006).
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id.* at 1141–42.

not have standing to sue.[206] The trial judge accepted the defense, and the insurers appealed.

The New Jersey superior court, however, rejected PSE&G's immunity defense. Arguably, the *E&M Liquors* court applied the insurance-specific concurrent causation doctrine as well as a negligence-foreseeability doctrine to reach a questionable and strained conclusion.[207] In a nutshell, the lower court declared the following: PSE&G's tariff-related negligence (service interruption) and a "covered peril" (severe weather, vandalism, or an "outside force") did not concurrently cause the insureds' losses. Instead, PSE&G's negligent failure to repair a high-voltage power line was the independent, precipitating, direct and proximate cause of the fire, which ultimately destroyed property and businesses.[208]

In the end, the *E&M Liquors* court refused to apply *Weinberg*'s subrogation-immunity defense, allowing the subrogated insurers to sue PSE&G.[209] Significantly, the New Jersey Supreme Court refused to review the lower court's ruling in *E & M Liquors.*[210] Even more problematic, numerous state and federal courts within and beyond New Jersey have created *case-specific exceptions* to *Weinberg*'s immunity defense, perpetuating a major judicial split by only allowing certain subrogated insurers to sue allegedly negligent utilities.[211]

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[206] *Id.* at 1141.

[207] *E & M Liquors, Inc.*, 909 A.2d. at 1144; s*ee also Overstreet v. Allstate Vehicle and Prop. Ins. Co.*, 34 F.4th 496, 496–97 (5th Cir. 2022) ("Under Texas's concurrent causation doctrine, when insured property is damaged by . . . *covered and uncovered causes*, the insured must prove how much of the damage is *solely attributable* to the covered cause. But courts have *sent mixed signals* about when the concurrent causation doctrine applies, and what the doctrine requires when it does."); *see also* Fowler v. Callis, 159 Cal. App. 2d 746, 324 P.2d 728 (1958) (emphasis added) (stressing that the question is whether defendant's *negligent and precipitous conduct* was the proximate cause of the injury and concluding that whether negligence is an independent or a concurrent cause is a question of fact).

[208] *E & M Liquors, Inc.*, 909 A.2d at 1143.

[209] *Id.* at 1144 (refusing to extend the limited subrogation immunity defense to protect public utilities against damages claims which arise independently from utilities' negligence).

[210] E & M Liquors, Inc. v. Public Service Elec. & Gas Co., 917 A.2d 786 (N.J. 2007) (cert. denied).

[211] *Compare* Buckley v. Standard Inv. Co., 581 N.E.2d 920, 922 (Ind. 1991) (precluding an allegedly negligent gas utility from raising a governmental immunity defense under Indiana's Tort Claims Act), *with* Harford Mut. Ins. Co. v. Potomac Elec. Power Co., 2003 WL 23304961, at *6 (D. Md. Sept. 4, 2003) (concluding that a tariff-immunity defense does not preclude subrogated property insurers' suing a utility for negligence which is unrelated to the delivery of service), *and* Adams v. Northern Illinois Gas Co. 809 N.E.2d 1248, 1269 (Ill. 2004) (embracing the view that "utilities do not have a general tort immunity," because they have a duty to act reasonably—preventing unreasonable risks and protecting the public from foreseeable danger), *with* Ebert v. South Jersey Gas Co., 615 A.2d 294, 296 (N.J. Super. Ct. 1992) (allowing a property insurer to file a subrogation action against an allegedly negligent gas utility that installed a gas line

C. *Gross Negligence Claims and Judicial Conflict Over Whether a Waiver of Subrogation Precludes Property Insurers' Standing to Sue*

Consider the Wildwood Water Utility's tariff that was recently filed in the State of Washington. It reads in relevant part:

> [The] customer shall *indemnify*... [the Utility against] any claim for damage to *property or personal injury or death* resulting from or in connection with the work done under this agreement, ... except that which is the result of the [Utility's] *gross negligence or intentional misconduct*....The [customer agrees] to purchase insurance...to protect against loss by fire, which ...shall be customer's sole source of recovery..., except for [the] Utility's *gross negligence or intentional misconduct*....[The] insurance policy shall include a *waiver of subrogation* as applied to [the] Utility.[212]

Now, review the waiver-of-subrogation provision that Southern California Gas Company (SCGS) added to its tariff. The pertinent language reads in part:

> Commercial General Liability Insurance. Biogas Producer shall carry . . . [a] commercial general liability policy—insuring against liability arising from bodily injury, death, property damage, personal and advertising injury . . . . [The] policy shall contain a *waiver of subrogation in favor of [the] Utility*.[213]

Arguably, both waivers of subrogation were fashioned *specifically* to prevent ratepayers' property insurers from filing subrogation actions against the California and Washington utilities. Additionally, it is debatable whether the waiver in SCGS's amended tariff *categorically* protects the gas utility

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which exploded and damaged property), *and Bongo,* 595 A.2d at 559 (declaring that *Weinberg's* carve-out does not immunize a public telephone utility from a motor-vehicle subrogation claim).

[212] Wildwood Water Company, *Naming Rates For Wildwood Water Company—Containing Rules and Regulations Governing Service*, UBI 604-011-653 ⁋⁋ 6, 8 (Mar. 26, 2020), https://www.utc.wa.gov/sites/default/files/2021-02/WN%20U-2%20Wildwood%20Water%20Company%20LLC.pdf [https://perma.cc/LD48-DU8M] (last visited June 19, 2022) (emphasis added).

[213] *See In the Matter of the Application of Southern California Gas Company (U 904 G) to Establish a Biogas Conditioning & Upgrading Services Tariff,* 14 (Sept. 6, 2013), https://www.sdge.com/sites/default/files/regulatory/D.12-04-024%20-%20Attachment%20B.pdf [https://perma.cc/6PH6-JXRV] (last visited June 19, 2022).

from a subrogee's gross-negligence lawsuit.[214]

Still, assume that a subrogated property insurer survives a utility's made whole or subrogation-immunity defense. One unrelenting procedural question remains: whether a waiver of subrogation prevents an insurer from initiating a gross or "wanton and willful" negligence action against utilities and other corporate entities.[215] The question is extremely timely—in light of the previously discussed, widely reported, and ongoing subrogation dispute in the so-called *Winter Storm Uri* lawsuit.[216]

Once more, in *All American Insurance Company. v. Electric Reliability Council of Texas, Inc.*, an extraordinarily large number (131) of property insurers have filed a gross-negligence action against a large number (48) of energy and utility companies.[217] Significantly, the property insurers' headquarters are located in twenty-seven states.[218] More significantly, approximately sixty-six percent (66.4%) of the insurers' headquarters are located in just seven states: California, Connecticut, Delaware, Illinois, New York, Pennsylvania, and Texas.[219] But even more significantly, courts in the latter jurisdictions are seriously divided over whether waivers of subrogation prevent insurers from commencing gross-negligence actions.[220]

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[214] *Id.* (arguably, without knowing more, the listed injuries in the contract must arise solely from the utility's negligence rather gross negligence); *see also* S.S.D.W. Co. v. Brisk Waterproofing Co., 556 N.E.2d 1097, 1100 (N.Y. 1990) ("It makes no difference whether the policy under which subrogation is sought is one which the owner purchased specifically to insure the [work] . . . or some other policy covering the owner's property . . . in either event, the waiver clause, if given its plain meaning, bars subrogation only for those damages covered by insurance"); *see also* Bd. of Comm'rs of Jefferson Cnty. v. Teton Corp., 30 N.E.3d 711, 716 (Ind. 2015) (stressing that a court must examine everything in a waiver of subrogation—the positioning and plain meaning of words—to determine the scope of the waiver's protection or exclusion).

[215] *See* Lawrence T. Bowman, *Rolling Brownouts and ERCOT,* MONDAQ BUS. BRIEFING (Mar. 4, 2021), https://www.mondaq.com/unitedstates/insurance-laws-and-products/1042682/rolling-brownouts-and-ercot [https://perma.cc/GCB2-NL6G] (last visited June 21, 2022) (observing that a tariff eliminates a utility's liability for ordinary negligence that causes property damage or personal injury, but whether a utility is liable for intentional, grossly negligent or willful misconduct is separate).

[216] *See* Garcia, *supra* note 23.

[217] *All American Ins. Co., et al.*, 2021 WL 6274598, ¶¶ 5, 11–48, 150.

[218] *Id.* at ¶ 5.

[219] *Id.* The overwhelming majority of insurers are "headquartered" in the following geographic locations: California (8), Connecticut (15), Delaware (9); Illinois (17), New York (4), Pennsylvania (8) and Texas (26).

[220] *Compare* Jewelers Mut. Ins. Co. v. ADT Sec. Services, Inc., 2009 WL 2031782, *6 (N.D. Cal. July 9, 2009) (holding that the waiver of subrogation barred the insurer's gross negligence action); St. Paul Fire & Marine Ins. Co. v. Elkay Mfg. Co., 2003 WL 139775, *4 (Del. Super. Ct. Jan. 17, 2003) (reaffirming that "waiver of subrogation clauses must be enforced"); St. Paul Fire & Marine Ins. Co., v. Universal Builders Supply, 317 F.Supp.2d 336, 342 (S.D.N.Y. Mar. 31, 2004) (concluding that the waiver of subrogation barred the insurer's gross negligence

Perhaps, the most pronounced conflict is found among federal courts in New York. To illustrate, consider the facts and ruling in *American Motorist Insurance Company v. Morris Goldman Real Estate Corporation.*[221] Jodamo International, Ltd. ("Jodamo") owned a retail-clothing business in New York City and leased space from Morris Goldman Real Estate Corporation (MGREC).[222] The waiver-of-subrogation clause in the lease stated in part: 1) if a loss or property damage occurs, each party shall file an insurance claim "before making any claim against the other party"; and 2) each party, as well as any other party, waives the right of subrogation.[223]

In January 2000, the store's sprinkler system froze, ruptured, and discharged water for several hours.[224] Jodamo's inventory was damaged. And the tenant's insurers, American Motorist Insurance Company and Chubb Custom Insurance Company ("Insurers"), paid more than $430,000 to cover the loss. Three years later, the Insurers filed a multi-pronged subrogation suit against MGREC—alleging that the landlord breached a contractual duty to maintain a properly functioning sprinkler system. In response, MGREC argued that the waiver of subrogation precluded the Insurers' standing to sue.

The Southern District Court of New York embraced MGREC's wavier defense, concluding that New York's law barred the allegedly subrogated insurers' ordinary-negligence and breach-of-contract claims. On the other hand, the federal judge allowed the Insurers to amend their complaint by alleging that MGREC's gross negligence was the efficient proximate cause of a poorly maintained fire-suppression system and Jodamo's property loss. Why? The court declared that New York's public policy does not allow an

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action after scaffolding collapsed, causing property damaged and one death); Penn Avenue Place Associates, L.P. v. Century Steel Erectors, Inc., 798 A.2d 256, 260 (Pa. Super. Ct. May 2, 2002) (concluding that the waiver of subrogation applied to the entire fire-damage claim that the insurer paid; and Behr v. Hook, 787 A.2d 499, 504 (Vt. 2001) (holding that waivers of subrogation barred the insurer's gross negligence claim after a gas-related fire destroyed the insureds' property), *with* Certain Underwriters at Lloyd's of London v. Brewer Ferry Point Marina, Inc., 2022 WL 1624041, *11 (D. Conn. May 20, 2022) (maintaining that the waiver of subrogation would not bar the insurers' gross negligence suit); Colonial Props. Realty Ltd. P'ship v. Lowder Constr. Co., 567 S.E.2d 389, 394 (Ga. Ct. App. 2002) (holding waiver of subrogation does not block a willful and wanton negligence action), Lincoln General Ins. Co. v. Federal Const., Inc., 2010 WL 4978852, *1 (N.D. Ill. Dec. 2, 2010) (declaring that waiver may not block a willful and wanton negligence action); Charter Oak Fire Ins. Co. v. Trio Realty Co., 2002 WL 123506, at *4, (S.D.N.Y. Jan. 31, 2002) (holding that the waiver of subrogation did not bar the insurer's gross negligence claim); Travelers Indem. Co. of Conn. v. Losco Group, Inc., 136 F.Supp.2d 253, 256 (S.D.N.Y. 2001) (same); *and*, Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.,106 S.W.3d 118, 134 (Tex. Ct. App.1st, 2002) (concluding that the waiver of subrogation did not apply to insurer's gross negligence claim).

[221] American Motorist Ins. Co. v. Morris Goldman Real Estate Corp., 277 F.Supp.2d 304 (S.D.N.Y. 2003).

[222] *Id.* at 305–06.

[223] *Id.* at 306.

[224] *Id.*

entity to escape tort liability for its allegedly grossly negligent conduct.[225]

Three years after publishing its *American Motorist* decision, the same federal district court decided the waiver-of-subrogation dispute in *Indian Harbor Insurance Company v. Dorit Baxter Skin Care, Inc.*[226] The facts surrounding the latter dispute are not complex. Like the landlord in *American Motorist,* George Lax, LLC owned and managed a commercial property in New York City.[227] Dorit Baxter Skin Care, Inc. ("Dorit") leased a one-floor unit in the building.[228] In January 2004, a fire erupted near a dryer in Dorit's laundry room.[229] Purportedly, the fire erupted after Dorit or its agents ignored a conspicuous warning sign and put vegetable-oil-ladened fabrics in the dryer.[230] Earlier, Dorit installed a partial partition, and that installation blocked the fire-suppression system in the ceiling and prevented water from reaching the fire.[231]

After the fire, Lax's commercial property insurer paid $594,609.20 to cover Lax's losses.[232] Twelve months later, the insurer filed a subrogation suit against Dorit—alleging that the tenant's gross negligence was the proximate cause of the fire and property damage.[233] Citing a waiver-of-subrogation clause in the lease agreement, Dorit argued that the property insurer did not have standing to sue.[234] Put simply, the Southern District Court of New York embraced Dorit's subrogation-waiver defense. Why? The federal district court declared: Under New York law, a waiver of subrogation is enforceable against both ordinary- and gross-negligence claims.[235]

Conceivably, the "confusion" in the Southern District Court will have increasingly negative implications for utilities and property insurers who choose to litigate waiver-of-subrogation disputes in federal courts beyond New York. To illustrate the slight concern, consider the facts, analysis, and holding in *National Union Fire Ins. Co. of Pittsburgh, PA v. Jenbacher Ltd.*[236] Biogas Energy Solutions LLC ("Biogas") owns a facility in Illinois—capturing methane gas from a landfill, generating electricity, and selling it to a local utility company.[237] Jenbacher Ltd. ("Jenbacher")—a Delaware corporation—provides maintenance services.[238]

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[225] *Id.* at 308 ("[T]he waiver of subrogation clause does not bar tort claims based on gross negligence.").
[226] Indian Harbor Ins. Co. v. Dorit Baxter Skin Care, Inc., 430 F.Supp.2d 183 (S.D. N.Y. 2006).
[227] *Id.* at 184.
[228] *Id.* at 184–85.
[229] *Id.* at 185.
[230] *Id.*
[231] *Id.*
[232] *Id.* at 185.
[233] *Id.* at 186.
[234] *Id.* at 187.
[235] *Id.* at 189, citing St. Paul Fire & Marine Ins. Co. v. Universal Builders Supply, 409 F.3d 73, 85–87 (2d Cir. 2005).
[236] National Union Fire v. Jenbacher, 2012 WL 1441981, at *1.
[237] *Id.*
[238] *Id.*

In June 2003, Biogas and Jenbacher fashioned an operating and maintenance agreement. A waiver-of-subrogation clause required Biogas' insurer to "waive its rights of subrogation against Jenbacher."[239] In September 2009, a fire erupted at the facility—causing significant property damage and business-interruption losses.[240] National Union Fire Insurance Company of Pittsburgh—Biogas' property insurer—covered the losses. Approximately two years later, National Union sued Jenbacher in the Northern District of Illinois Court.[241] The complaint alleged that Jenbacher's gross negligence, willful and intentional conduct caused the fire.[242]

In response, Jenbacher cited the anti-subrogation clause in the maintenance contract and argued that the insurer failed to state a viable gross-negligence action.[243] The Northern District Court discovered, however, that the Second Circuit and lower federal courts had applied New York's law and issued conflicting waiver-of-subrogation decisions.[244] Thus, to resolve the impasse, the *Jenbacher* court considered the dispute and analysis in a then-recently published state court—*Abacus Federal Saving Bank v. ADT Sec. Servs., Inc.*[245]

Briefly, in *Abacus,* the New York Court of Appeals reaffirmed several principles: 1) New York's public policy precludes an entity from escaping liability if the entity's gross negligence destroys property or persons, and 2) exculpatory clauses do not shield grossly negligent tortfeasors from complainants' lawsuits[246] Applying those rules, the Abacus court declared that the waiver-of- subrogation clause provided a total defense against a "breach of contract cause of action."[247]

Returning to the controversy in *Jenbacher,* the Northern District Court of Illinois applied the holding in *Abacus* and concluded: "[C]ontrary to National Union's assertion, the waiver of subrogation barred National Union's gross-negligence action against Jenbacher."[248] Arguably, since the publication of *Abacus,* New York's highest court has not persuasively resolved the waiver-of-subrogation confusion—as it pertains exclusively to insurers' right to commence gross-negligence claims. What is the evidence?

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[239] *Id.*

[240] *Id.*

[241] *Id.*

[242] *Id.* (specifically, the insurer alleged that Jenbacher's agents "intentionally and willfully disabled safety equipment"—including methane and heat detection systems—which were designed to prevent property damage and personal injury).

[243] *Id.*

[244] *Id.* at *3. The court compared St. Paul Fire & Marine Ins. Co. v. Universal Builders Supply, 409 F.3d 73, 84 (2nd Cir. 2005) (waiver of subrogation clause bars a claim of gross negligence under New York law) with Am. Motorist Ins. Co. v. Morris Goldman Real Estate Corp., 277 F.Supp.2d 304, 309 (S.D.N.Y.2003) (waiver of subrogation does not bar a claim of gross negligence under New York law).

[245] Abacus Federal Saving Bank v. ADT Sec. Servs., Inc., 967 N.E.2d 666 (N.Y. 2012).

[246] *Id.* at 669–70.

[247] *Id.*

[248] National Union Fire v. Jenbacher, 2012 WL 1441981, at *4.

Briefly, in 2020, the New York Court of Appeals decided *Matter of Part 60 Put–Back Litigation*[249]—citing *Abacus* and focusing extensively on a breach-of-contract action and the enforceability of an exculpatory clause. The New York Appeals Court stressed: 1) public policy prevents a party from fashioning an exculpatory clause that allows the party to escape liability for gross negligence, and 2) gross negligence precludes the enforceability of only an exculpatory clause in a breach-of-contract action.[250] Clearly, the appellate court was discussing the applicability of gross-negligence defense as it pertains to a contract-based, rather than a tort-based, subrogation action.

V. INDEMNIFICATION CLAIMS AND SUBROGATED INSURERS' QUESTIONABLE RIGHT TO COMMENCE DIRECT ACTIONS AGAINST LIABILITY INSURERS

Reconsider several earlier disclosures: in February 2021, *Winter Storm Uri* concurrently caused massive amounts of property damage.[251] After spending billions of dollars to cover the losses, "scores of the world's largest and most influential property insurance companies [sued] Electric Reliability Council of Texas and three dozen Texas electricity providers."[252] The subrogated insurers want to be reimbursed or indemnified. Once more, Cincinnati Insurance Company—ERCOT's liability insurer—initiated declaratory-judgment action—petitioning the court to declare that Cincinnati has no contractual duty to defend or indemnify ERCOT against the property insurers' claims.[253] Or stated another way, Cincinnati has argued that it has no duty to indemnify ERCOT if the utility is forced to reimburse the subrogated property insurers.

From a historical perspective, two additional and timely questions are likely to surface: 1) whether *Storm-Uri* subrogated insurers have standing to commence *direct-action lawsuits* against ERCOT's and the energy providers' liability insurers, and 2) if the answer is yes, whether the property insurers may file *gross-negligence actions* against ERCOT's and the energy providers' liability insurers to recoup billions of expended dollars. Why are these important questions?

Once more, among state supreme courts, one principle is clear: A

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[249] *Matter of Part 60 Put–Back Litigation,* 36 N.Y.3d 342 (N.Y. 2020).

[250] *Id.* at 353.

[251] Mark Curriden, *More Insurance Companies Sue ERCOT, Energy Providers over Billions in Winter Storm Property Damage*, THE TEXAS LAWBOOK, Mar. 4, 2022, https://texaslawbook.net/more-insurance-companies-sue-ercot-energy-providers-over-billions-in-winter-storm-property-damage/ (last visited June 30, 2022) [https://perma.cc/PA8W-3P5Z].

[252] *Id.*

[253] *See The Cincinnati Insurance Company, v. Electric Reliability Council of Texas, Inc.*, 2021 WL 1265165 (W.D. Tex.), at ¶ 1; Mary Williams Walsh & Clifford Krauss, *Texas Froze and California Burned. To Insurers, They Look Similar*, N.Y. TIMES, Apr. 13, 2021, https://www.nytimes.com/2021/04/13/business/texas-freeze-utilities-california-fires.amp.html [https://perma.cc/EL5W-CN6T] (last visited May 27, 2022).

subrogated insurer stands in the shoes of its insured and has a right to sue a third-party tortfeasor who actually damaged the insured's person or property.[254] But, a majority of state supreme courts have also adopted an equally important principle: A subrogee's rights are subject to the same limitations or defenses that a defendant may raise against the subrogor.[255] Focusing on these principles, consider the judicial splits in the following two sections.

A. *The Scope of Subrogated Property Insurers' Right to Commence a Direct Action Against Utilities' and Other Tortfeasors' Liability Insurers*

State supreme courts generally agree: A subrogor and its subrogee may commence the same causes of action against an alleged wrongdoer or tortfeasor.[256] Courts are divided, however, over whether a subrogated property insurer or any third-party accuser has standing to file a "direct action" against a tortfeasor's liability insurer. Why? Consider the "Legal Action Against Us" or the "No Direct Action" provision—which appears in ISO's commercial general liability insurance contract. It reads in relevant part:

> *No person* or organization has a right . . . to join us as a party, bring us into a suit—asking for damages from an insured—or sue us *unless all . . . terms have been fully complied with.* A person or organization *may sue* us to recover [under] an agreed settlement or [after a] . . . *final judgment* against an insured.[257]

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[254] *See, e.g.*, *Continental Ins. Co. v. Connecticut Natural Gas Corp.*, 497 A.2d 54, 60 (1985) (Under the doctrine of equitable subrogation, "[a] subrogee has no rights against a third person beyond what the subrogor had . . . or one cannot acquire by subrogation what another . . . did not have.").

[255] *See, e.g.*, Allstate Ins. Co. v. Palumbo, 994 A.2d 174, 178 (Conn. 2010) (reaffirming that a subrogee's claim or cause of action against a defendant is subject to all defenses that a defendant may raise against the subrogor); Maryland Cas. Ins. Co. v. Welchel, 356 S.E.2d 877, 881 (Ga. 1987) (same); Liberty Mut. Ins. Co. v. Fales, 505 P.2d 213, 216 (Cal. 1973) (same).

[256] *See, e.g.*, Auto Club Ins. Ass'n v. New York Life Ins. Co., 485 N.W.2d 695, 699 (Mich. 1992) (declaring that a subrogee has the same cause of action that a subrogor has against a defendant); Bright v. American Termite Control Co., 220 Cal.App.3d 1464, 1468 (1990) (declaring that a subrogation action claim is distinguishable from "separate causes of action"—when a subrogee asserts "essentially the same causes of action" as the subrogor); Boley v. Daniel, 72 So. 644, 645 (Fla. 1916) (concluding that a subrogation claim is not a new cause of action—allowing a subrogee and subrogor to file the same cause of action).

[257] *See, e.g.*, Zegar v. Sears Roebuck & Co., 570 N.E.2d 1176, 1178 (Ill. App. Ct. 1991) (defining the "Legal Action Against Us" clause as a "no direct action" clause); *see also* Getty Oil Co. v. Ins. Co. of N. Am., 845 S.W.2d 794, 801 (Tex.

Although the ubiquitous "no direct action" clause appears in liability insurance contracts across the nation, a few jurisdictions have enacted statutes which allow third parties or judgment creditors to file direct actions against liability insurers.[258] For example, Connecticut's direct-action statute reads in pertinent part:

> Each insurance company [that insures a person against a] loss, bodily injury or property damage . . . shall become absolutely liable [for damages] . . . . [The payment of the loss shall not depend upon an assured's satisfying a *final judgment* for causing the loss, damage or death] . . . . [I]f the judgment is not satisfied within thirty days . . . , [the] *judgment creditor* shall be *subrogated* to all [of the insured's rights] and shall have *a right of action against the insurer* . . . .[259]

Stated briefly, Connecticut's legislature enacted the direct-action statute to create rights: 1) giving third-party victims the same contractual rights that an insured acquires under a liability insurance contract, and 2) imposing upon liability insurers a duty to pay or indemnify a third-party victim regardless of whether a judgment has been paid.[260]

In Louisiana, third-party victims may also file a direct action against liability insurers. The statute reads in relevant part:

> [A liability insurance contract shall not] be issued or

1992) (reaffirming that a "no action" clause prevents a third party's right of action against a liability insurer until the third party secures a settlement or judgment against the insured), citing Great Am. Ins. Co. v. Murray, 437 S.W.2d 264, 265–66 (Tex. 1969).

[258] *See* Royal Indem. Co. v. Aetna Cas. & Sur. Co., 229 N.W.2d 183,190 (Neb. 1975) ("While there are a few jurisdictions that permit direct actions against liability insurance carriers in situations such as this, Nebraska does not have a statute . . . or other decision or rule authorizing such direct action"); *cf.* Armstrong v. U.S. Fire Ins. Co., 2008 WL 4646103, *3 (E.D. Tenn. Oct. 16, 2008) ("Tennessee, Missouri, Connecticut, and Massachusetts are not 'direct action' states"), *with* Wild v. Subscription Plus, Inc., 292 F.3d 526, 529 (7th Cir. 2002) (observing that Louisiana and Wisconsin are direct-action states—allowing an injured party to sue his tortfeasor's liability insurer as well as the tortfeasor).

[259] Conn. Gen. Statutes § 38a-321 ("Liability of Insurer Under Liability Policy") (emphasis added).

[260] *Id. See also* Brown v. Employer's Reinsurance Corp., 539 A. 2d 138, 141 (1988) (stressing that the statute protects an injured third party by allowing the party or judgment creditor to become a subrogree, the third party assumes the insured's rights and has standing to sue the liability insurer); *see also* Dacruz v. State Farm Fire & Cas. Co., 794 A.2d 1117, 1123 (Conn. Ct. App. 2002) (reaffirming that a third-party victim must first obtain a final judgment in an underlying tort action, and declaring that the victim may bring a direct action for indemnification against the insurance company under §38a-321 as a matter of law).

> delivered in this state [if it allows an insolvent or bankrupt insured to release an insurer from its duty to pay third-party damages which occur] during the existence of the policy . . . . [An] injured person or his survivors . . . shall have *a right of direct action* against the insurer within the terms and limits of the policy . . . . [The] action may be brought against the insurer alone, or against both the insured and insurer jointly.[261]

In *Cacamo v. Liberty Mutual Fire Insurance Company,*[262] the Louisiana Supreme Court explained the statute's purpose: "The direct-action statute [grants] a *procedural right of action* against an insurer [when a] plaintiff has a *substantive cause of action* against the insured. It was enacted to give special rights to tort victims—not to insureds."[263] Stated another way, under Louisiana's statute, subrogated insurers have the same right as their insureds—a right to commence direct actions against tortfeasors' liability insurers.[264] Still, substantial confusion remains. Citing the state's direct-action statute, the Supreme Court of Louisiana has also declared: A subrogated property insurer *may not* file a *direct action* against a tortfeasor's liability insurer—even if an injured property owner and a tortfeasor *settle* a claim without notifying the subrogated property insurer or receiving the latter's consent.[265]

On the other hand, Texas does not have a direct-action statute, which allows a third party to commence a lawsuit directly against a liability insurer.[266] Yet, the Texas Supreme Court has declared: Under the doctrine of common-law subrogation, a property insurer *may be* eligible to sue a responsible third party under *any theory of recovery* if the property insurer settles or pays a first-party claim.[267] Why is this possible? The Supreme Court of Texas has an answer: An injured homeowner and the tortfeasor *may* fashion an assignment contract, which allows the homeowner and its subrogated property insurer to file a direct action against the tortfeasor's liability insurer.[268] So, may subrogated property insurers commence a direct

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[261] Louisiana Rev. Stat. § 22:1269(A), (B)(1) ("Liability Policy and Direct Action Against Insurer").

[262] Cacamo v. Liberty Mut. Fire Ins. Co., 764 So.2d 41 (La. 2000).

[263] *Id.* at 43 (emphasis added).

[264] *See* Audubon Ins. Co. v. Farr, 453 So.2d 232, 235 (La. 1984).

[265] *Id.*

[266] *See* Tex. Ins. Code Ann. § 541.060(b) (stating that a third party may not file a direct cause of action against a liability insurer); *see* Allstate v. Watson, 876 S.W.2d 145, 147 (Tex. 1994) (rejecting the contention that Tex. Ins. Code Ann. § 541.060(b) allows a third-party claimant to file a direct action against a liability insurer).

[267] *See* Medina v. Herrera, 927 S.W.2d 597, 604 (Tex. 1996).

[268] *See* Great Am. Ins. Co. v. Hamel, 525 S.W.3d 655, 662, 666–68 (Tex. 2017) (declaring that "a judgment or settlement between an insured and a third party binds the liability insurer in a subsequent coverage suit," but stressing that the injured party must secure a judgment in a "fully adversarial" proceeding).

action against allegedly negligent utilities' and other wrongdoers' liability insurers? Perhaps, Delaware Superior Court has a more insightful answer:

> Under Delaware law, [a third-party complainant has] common-law standing to bring a direct action against [a liability] insurer under an express *assignment* . . . or *as a matter of subrogation* . . . . [However, whether a third party has standing under] a *modified theory of subrogation is more complicated* . . . . [There is authority in Delaware and in insurance-law treatises that allows a third party] to bring a direct action against a liability insurer after a liability judgment has been entered against the insured. Unfortunately, the authority is neither well-developed nor well-explained—[regarding the question of whether a third party may initiate a cause of action directly against a liability] insurer under a common law theory of subrogation.[269]

B. *The Scope of Liability Insurers' Duty to Indemnify Subrogated Insurers*

We have learned: regulated utilities and their customers form contractual obligations under filed tariffs. Various utilities and their underwriters create rights and obligations under liability insurance contracts. But we have also discovered: liability insurance is actually "third-party insurance" that companies and utilities purchase for the benefit of third parties.[270] To be sure, subrogated property insurers are third parties. And, generally, third-party grievants have no standing to commence negligence- or contract-based actions directly against a liability insurer.

Still, assume the following: extremely stormy weather and a gas, electric, or water utility's negligence concurrently destroy a homeowner's property. The homeowner's property insurer satisfies the "make whole" doctrine by fully compensating the homeowner. Shortly thereafter, the subrogated property insurer—"standing in the shoes of the homeowner"—files a direct and successful indemnification lawsuit against the utility's liability insurer. Now, consider the ongoing, substantive, and fervently debated question: whether the liability insurer has a contractual duty to indemnify a subrogated property insurer.

Briefly put, the answer is extremely complicated—because state and

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[269] Rodriguez v. Great American Insurance Company, 2022 WL 591762, at *1 (Del. Super. Ct, Feb. 23, 2022) (emphasis added)

[270] *See, e.g.*, CX Reinsurance Company Limited v. Johnson, 259 A.3d 174, 185 (Md. Spec. Ct. App. 2021) (reaffirming that liability insurance is "generally issued for the benefit of third parties who are injured and have a claim against a tortfeasor"); *see, e.g.*, Beta Eta House Corp. v. Gregory, 230 So. 2d 495, 499 (Fla. Dist. Ct. App. 1970) ("[L]iability insurance, by its very nature, is intended to benefit and protect injured third party members of the public . . . . [A]ll types of liability insurance policies . . . benefit injured third parties.").

federal courts often *do not weigh the same legal and extrajudicial variables or probative facts* when deciding insurance-specific indemnification disputes. Consequently, highly conflicting rules have emerged, even though some direct-action, duty-to-indemnify disputes involve the *same or substantially similar* commercial general liability (CGL) insurance contracts. A review of the disputes and contrasting analyses in two state- and federal-court decisions should highlight the problem and concern.

First, consider the underlying negligence-based lawsuit in *Nash Street, LLC v. Main Street America Assurance Company.*[271] Suzanne Lussier and Shaun Wilson owned Nash Street, LLC ("Nash")—which leased residential and commercial property.[272] In 2011, Hurricanes Sandy and Irene damaged their property in Milford, Connecticut. Suzanne and Shaun hired a contractor—New Beginnings Residential Renovations, LLC ("New Beginnings")—to renovate the house. Subcontractors, however, were hired to crib or lift the house temporarily—using wooden blocks—and restore the concrete foundation.[273]

While the subcontractor was lifting the house, it fell off the blocks.[274] The property owners filed a lawsuit—alleging that New Beginnings' and the subcontractor's negligence caused the collapse and damage.[275] When the dispute evolved, Main Street America Assurance Company ("America Assurance") insured New Beginnings' business under a commercial general liability insurance contract. Therefore, the contractor asked America Assurance to provide a legal defense against Suzanne and Shaun's lawsuit. The liability insurer refused to defend.[276] Ultimately, in the underlying lawsuit, Suzanne and Shaun received a $558,007 default judgment against New Beginnings.[277]

New Beginnings, however, did not pay the judgment. Therefore, citing Connecticut's direct action statute, Suzanne and Shaun commenced an indemnification action directly against the liability insurer.[278] In response, America Assurance alleged: 1) the liability insurance contract did not cover Suzanne and Shaun's third-party, property-damage claim; 2) an "occurrence"—as defined under the policy—did not proximately cause the damaged property; and 3) several insurance exclusion clauses in the liability policy barred the subrogated property owners' indemnification claim.[279] The trial court agreed—granting America Assurance's summary-judgment motion and concluding that the insurer "had neither a duty to defend nor a

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[271] Nash Street, LLC v. Main Street, 251 A.3d 600 (Conn. 2020).
[272] *Nash-Street, LLC*, CT-REGISTRY.COM, https://www.ct-registry.com/884890-nash-street-llc [https://perma.cc/VTP4-HYTJ] (last visited July 8, 2022).
[273] *Nash Street, LLC*, 251 A.3d at 603.
[274] *Id.*
[275] *Id.*
[276] *Id.* at 604.
[277] *Id.*
[278] *Id. See also* Samelko v. Kingstone Ins. Co., 329 Conn. 249, 262 (2018) (citing §38a-321, reaffirming that a judgment creditor may "stand in the shoes" of an insured, and a subrogee and an insured have the same rights and protections).
[279] *Nash Street, LLC*, 251 A.3d at 604, n.2.

duty to indemnify."[280]

Suzanne and Shaun appealed to the Supreme Court of Connecticut—arguing that the adverse summary judgment was erroneous.[281] More specifically, the subrogees asserted: The trial court conflated a duty to defend and a duty to indemnify. The former arises when there is a *possibility of coverage*, and the latter arises when an insurer's legal liability or obligation to pay has been established.[282] To determine whether Suzanne and Shaun's assertion was meritorious, Connecticut Supreme Court reviewed the coverage provision in the CGL insurance contract. It reads in pertinent part:

> [America Assurance] will pay those sums that the insured becomes *legally obligated to pay as damages* because of "bodily injury" [or] "property damage" . . . . [We] have the *right and duty to defend* the insured against any *suit* seeking those damages . . . . This insurance applies . . . [to] *bodily injury* and *property damage* only if . . . the bodily injury or property damage is *caused by an occurrence* . . . . [Property damage is a] physical injury to *tangible property* . . . [and] *occurrence* is an *accident*.[283]

The Connecticut State Supreme Court also examined a broad exclusion. In relevant part, it stated:

> This insurance does not apply to . . . [a] *particular part of real property* on which . . . any contractor or subcontractor [performed] . . . or [a] *particular part of any property* that must be restored, repaired or replaced because 'your work' was incorrectly performed."[284]

Continuing its analysis, the supreme court reviewed settled and insurance-specific rules. First, in Connecticut, a liability insurer's duty to defend is broader than its duty to indemnify.[285] Consequently, an insurer's duty to defend does not depend on whether an injured third party prevails against an insured in an underlying lawsuit.[286] Instead, an insurer must defend an insured if an allegation in a third party's complaint falls *even possibly* within the liability-insurance coverage provision.[287] An insurer's duty to indemnify is narrower—depending on the probative fact and theory of recovery under which a third party secured a default or money judgment in

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[280] *Id.* at 605, n.3.
[281] *Id.* at 604.
[282] *Id.*
[283] Nash St., LLC, v. Main St. Amer. Assurance Co., 2018 WL 11239525, at *1 (Conn. Super. Ct.) (emphasis added).
[284] *Id.*
[285] *See* Travelers Casualty & Surety Co. of America v. Netherlands Ins. Co., 312 Conn. 714, 739 (2014).
[286] *See* Wentland v. American Equity Ins. Co., 267 Conn. 592, 600–01 (2004).
[287] *Id.*

an underlying trial.[288]

In the end, the Supreme Court of Connecticut clarified the dispute: whether any *possibility* of coverage was present when America Assurance rejected New Beginnings' request for a legal defense.[289] And, after concluding that a possibility existed and rejecting the insurer's no-coverage and exclusion defenses, the court decided in favor of Suzanne and Shaun.[290] To reach that conclusion, the Connecticut Supreme Court applied and reaffirmed a non-negotiable principle: If a liability insurer breaches its contractual duty to defend, the insurer may not subsequently argue that it has no contractual duty to indemnify.[291]

Now, consider fairly similar facts, the same controversial insurance contract, and a contrary outcome in *Barton v. Nationwide Mutual Fire Insurance Company.*[292] Robert and Mindy Barton resided in Hoover, Alabama. In October 2006, the Bartons and a general contractor—Stacy Alliston Design and Building, Inc. (SADB)—executed a house-construction contract. The negotiated price was $697,125. SADB built the frame, and several subcontractors installed doors, walls, and utility outlets.[293]

After living in the house for one year, Mindy and Robert began discovering major defects and poor workmanship.[294] Among other surprises, they discovered: 1) water poured into the attic and ran down the walls after a thunderstorm; 2) water deteriorated molding and rotted places in the roof; and 3) water also entered and settled in some electrical outlets—creating a severe fire hazard.[295] Ostensibly, SADB's agents visited the house to make repairs. However, a few years later, evidence revealed that the water-damaged perils remained.[296]

An appraiser concluded that the repairs would cost roughly $215,000. But the Barton's property insurer—Allstate Insurance Company—only paid $780.32 to paint stained walls.[297] Therefore, citing Alabama's subrogation statute, Robert and Mindy filed a direct action in a state court against SADB

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[288] *Id.*

[289] Nash Street, LLC v. Main Street, 251 A.3d, at 610.

[290] *Id.* at 616.

[291] *Id.* at 604, 616 n.3. *See also* Capstone Building Corp. v. American Motorists Ins. Co., 308 Conn. 760, 817 (2013) (stressing that a liability insurer is estopped from raising a no-duty-to indemnify defense if the underwriter breaches the duty-to-defend provision); Black v. Goodwin, Loomis & Britton, Inc., 239 Conn. 144, 149, 156 (1996) (declaring that a liability insurer may not hide behind an exculpatory or exclusion provision to defeat a third party's or judgment creditor's statutory subrogation claim under § 38a-321 if the insurer breaches its duty to defend); Missionaries of the Co. of Mary, Inc. v. Aetna Cas. & Sur. Co., 155 Conn. 104, 113–14 (1967) (declaring that an insurer must fully reimburse or indemnify its insured if the insurer waived a right to contest a duty-to-indemnify claim).

[292] Barton v. Nationwide, 524 F.Supp.3d 1219 (N.D. Ala. 2021).

[293] *Id.* at 1222.

[294] *Id.* at 1222–23.

[295] *Id.* at 1223.

[296] *Id.*

[297] *Id.*

and its liability insurer—Nationwide Mutual Fire Insurance Company ("Nationwide").[298] Their underlying complaint comprised multiple and mixed theories of recovery—negligence/wantonness, breach-of-contract, deceptive-practices, and fraud claims.[299] After a bench trial, the Alabama judge awarded $900,000 in damages—consisting of $450,000 for property damage and $450,000 for emotional distress or personal injury. SADB did not oppose the judgment.[300]

What explains the state court's large personal-injury award—which SADB did not oppose? During the bench trial, Mindy disclosed that Robert and their daughter were diabetic. Mindy also reported that she worried about the water-logged and extremely hazardous electrical outlets—which greatly increased the likelihood of a major fire.[301] In addition, she was receiving chemotherapy for breast cancer and their financial resources were diminishing.[302] Therefore, given her health condition, she disclosed that the water-damaged and mold-contaminated house increased her emotional distress.[303]

To enforce the underlying state-court judgment, Robert and Mindy filed their statutory subrogation action in the Northern District Court of Alabama.[304] Nationwide filed a motion for summary judgment. SADB's comprehensive liability insurer did not raise a procedural defense to challenge the Bartons' standing to sue. Instead, Nationwide asserted: It had no contractual duty to indemnify the Bartons because the Bartons' injuries were not covered under the liability insurance contract.[305]

Significantly, the controversial CGL-insurance coverage and exclusion clauses in *Barton* and *Nash Street* are identical. In *Barton*, the relevant coverage provision also reads:

> [Nationwide] will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" [or] "property damage . . . ." We will have the right and duty to defend the insured against any suit seeking those damages . . . . This insurance applies . . . [to] bodily injury and property *damage* only if . . . the bodily injury or property damage is caused by an occurrence . . . .[306]

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[298] *Barton*, 524 F.Supp.3d, at 1222; *see also* Alabama Code §27-23-2.
[299] *Barton*, 524 F.Supp.3d, at 1225.
[300] *Id.* at 1226.
[301] *Id.* at 1224.
[302] *Id.*
[303] *Id.* at 1224–25.
[304] *Id.* at 1222.
[305] *Id.* at 1227.
[306] *Id.* at 1227, 1230 (citing Owners Ins. Co. v. Jim Carr Homebuilder, LLC, 157 So.3d 148, 153 (Ala. 2014)) ("The . . . Nationwide policy in this case provided . . . typical CGL coverage [which is] standard for a CGL policy . . . . [It only provided] coverage for bodily injury or property damage caused by an "occurrence," as defined under the policy.").

So, we must ask: Did the *Barton* federal district court also apply a possibility-of-coverage rule to decide whether Mindy's and her family's legal claims were covered? Or, asking slightly differently, did the *Barton* court apply the possibility-of-coverage rule—like the *Nash Street* court—to declare whether Nationwide had a contractual duty to indemnify the subrogated Bartons? The short answer is no. In *Barton*, the federal judge applied an injury-by-injury rule—requiring a third party or subrogee to prove that a tortfeasor's liability insurance contract potentially covers an injury.[307] Under Alabama law, allegations in a third party's complaint do not trigger a liability insurer's duty to indemnify.[308] Instead, an "occurrence," an accident or an insured's unintentional conduct, must cause a specific bodily injury or property loss.[309]

The Northern District found that the Bartons' probative evidence was "credible" and even "compelling"—regarding some injuries.[310] In particular, the district court concluded: SADB's negligence—a combination of "faulty construction" and a failure to repair enormously dangerous electrical outlets—was a "covered occurrence" that caused some injuries.[311] Yet, the Northern District declared that Nationwide had no duty to indemnify the subrogated Bartons.[312] Why?

The Supreme Court of Alabama embraces an apportionment-of-damages test.[313] The rule requires judgment creditors like the subrogated Bartons to

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[307] *Id.* at 1229, 1232 (stressing that the Bartons produced evidence proving that Nationwide's insurance policy potentially covered their injury before trial).

[308] *See also* United States Fid. & Guar. Co. v. Armstrong, 479 So.2d 1164, 1167 (Ala. 1985) (concluding that bare allegations in a third party's complaint may trigger a liability insurer's duty to defend but a separate analysis is required to determine whether the insurer has a duty to pay or indemnify); City Realty, Inc. v. Continental Cas. Co., 623 So.2d 1039, 1047 (Ala. 1993) (declaring that the insured's conduct rather than an allegedly injured third party's allegations determine whether an insurer has a duty to indemnify); Alabama Farm Bureau Mut. Cas. Ins. Co. v. Dyer, 454 So.2d 921, 924–25 (Ala. 1984) (stressing that a purely subjective standard determines whether the insured's conduct—an "occurrence"—caused property damage or bodily injury which was not "expected or intended from the standpoint of the insured").

[309] *Armstrong,* 479 So.2d at 1166.

[310] *Barton,* 524 F.Supp.3d at 1231.

[311] *Id.*

[312] *Id.*

[313] *See* Pennsylvania Nat. Mut. Cas. Ins. Co. v. St. Catherine of Siena Par., 790 F.3d 1173, 1178 (11th Cir. 2015) (citing Alabama law and reaffirming that "when an insured causes multiple injuries, coverage is determined on an injury-by-injury basis, and the insurer is obligated only to indemnify for damages arising out of the covered injuries"); *see, e.g.*, Town & Country Prop., L.L.C. v. Amerisure Ins. Co., 111 So.3d 699, 710 (Ala. 2012) (holding that a liability insurer had a duty to indemnify only for the "covered" damages—rather than *all* damages—after an occurrence caused some of various third-party injuries); United States Fid. & Guar. Co. v. Bonitz Insulation Co. of Ala., 424 So.2d 569, 573–74 (Ala. 1982) (segregating damaged and "covered" property from damaged and "excluded" property).

initially segregate "covered injuries"—under an insurance occurrence clause—from "excluded injuries."[314] Then, subrogees must prove that a "covered injury" solely caused the harm damages.[315] Focusing on the state-court judgment and applying the test, the federal district court concluded: The Bartons failed to segregate covered and excluded injuries and failed to apportion recoverable and unrecoverable damages under the liability insurance contract.[316]

The district court acknowledged: from 2006 to 2020, some of Mindy's "emotional distress arose . . . because her daughter and husband [were] diabetic." But, during that 14-year period, "credible and compelling" evidence also established: SADB's negligence proximately caused the Bartons' injuries generally and Mindy's emotional distress specifically.[317] Still, the federal court declared that the liability insurance contract precluded Mindy's recovering any emotional-distress damages.[318]

Therefore, a few commonsensical questions beg for answers: Did the Northern District Court issue a reasonable decision? Arguably, Mindy was an "unsophisticated" as well as a financially and medically compromised consumer-subrogee. How could Mindy or an unsophisticated consumer segregate conclusively or persuasively "covered" and "excluded" episodes of emotional distress that spanned 14 years? Should state supreme courts reject utilities and their liability insurers' apportionment-of-damages defense and protect the interests of arguably unsophisticated judgment creditors, subrogees, or utility customers like the Bartons?

VI. AN EMPIRICAL ANALYSIS—STATE AND FEDERAL COURTS' DISPOSITIONS OF SUBROGATION AND INDEMNIFICATION DISPUTES AMONG PROPERTY INSURERS, UTILITIES, AND LIABILITY INSURERS

As discussed earlier, two timely and extremely controversial questions have emerged: 1) whether subrogated property insurers have standing to file ordinary- or gross-negligence actions against utilities and their energy suppliers—who allegedly damaged various residential and commercial property interests; and 2) whether utilities' liability insurers have a duty to indemnify subrogated insurers, who compensate damaged property owners—before or after the owners secured a default or money judgment against the utilities.

As we have learned, these interrelated questions have produced split

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[314] *Pennsylvania Nat. Mut. Cas. Ins. Co.*, 790 F.3d at 1178; *Town & Country Prop., L.L.C.*, 111 So.3d at 710; *United States Fid. & Guar. Co.*, 424 So.2d at 573.

[315] *Pennsylvania Nat. Mut. Cas. Ins. Co.*, 790 F.3d at 1178; *Town & Country Prop., L.L.C.*, 111 So.3d at 710; *United States Fid. & Guar. Co.*, 424 So.2d at 573–74.

[316] *Barton,* 524 F.Supp.3d at 1232 ("[T]he Bartons failed to show that all of the emotional distress damages awarded by the state court were covered under the policy and did not provide the court with any means of determining what amount of damages were covered under the policy.").

[317] *Id.* at 1222–24.

[318] *Id.* at 1232.

subrogation and indemnification decisions between state and federal courts. Thus, the next question is why? Perhaps, the best answer is familiar: courts generally perform a fact-by-fact[319] or case-by-case[320] analysis to decide legal disputes. Consequently, one should expect to find some conflicting rulings within the same federal circuit or among courts within the same jurisdiction. On the other hand, the author and other commentators have published empirical findings—which reveal that courts often allow both probative and non-probative evidence—legal and extralegal factors—to influence the outcome of a controversy.[321]

In addition, while conducting preliminary research for this Article, a more perplexing finding was uncovered: Among courts within the same jurisdiction, split decisions appear even when the probative facts in two lawsuits are nearly identical and the insurance contracts are the same. Therefore, the unexpected revelation and curiosity motivated the author to conduct a full empirical study—in light of the current, interrelated and impassioned debates over 1) whether state legislatures should enact new or abolish current anti-subrogation statutes and 2) whether courts should force "grossly negligent" utility companies and their liability insurers to indemnify subrogated property insurers who settled utility customers' property-losses and personal-injury claims.

Hopefully, the present empirical and more comprehensive analysis of state and federal courts' case-by-case deliberations and conclusions will enhance jurists' understanding of these complex issues and provide some guidance—as state legislators weigh various utility-reform bills. A

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[319] *See* Architex Association, Inc. v. Scottsdale Ins. Co., 27 So.3d 1148, 1161 (Miss. 2010) (requiring a fact-by-fact analysis—an examination of specific facts in each case—to determine whether activities are "occurrences" under a CGL insurance contract); Nautech Marine Surveyors & Consultants, Inc. v. Provident Indem. Life, 1995 WL 92357, *4 (E.D. La. Mar. 3, 1995) (requiring a fact-by-fact analysis to determine whether an equitable estoppel defense is appropriate).

[320] *See, e.g.*, State Farm Florida Ins. Co. v. Loo, 27 So.3d 747, 750 n.5 (Fla. Dist. App. Ct. 2010) (identifying numerous state courts that apply a case-by-case analysis to decide subrogation disputes); Fire Ins. Exch. v. Hammond, 83 Cal. App. 4th 313, 319 (2000) (observing that in California, a subrogation dispute is generally resolved on a case-by-case basis, focusing on the parties' reasonable expectations"); Am. Family Mut. Ins. Co. v. Auto-Owners Ins. Co., 757 N.W.2d 584, 594 (S.D. 2008) (reiterating that a case-by-case analysis is required to determine whether a subrogation claim is barred); DiLullo v. Joseph, 259 Conn. 847, 852 (2002) (stressing that a case-by-case analysis of each insurance contracts determines the disposition of each subrogation dispute); Atlanta Intern. Ins. Co. v. Bell, 475 N.W.2d 294, 295 n.1 (Mich. 1991) (stressing that "the application of equitable subrogation should and must proceed on [a] case-by-case analysis . . . of equity jurisprudence").

[321] *See, e.g.*, Recent Publications, 124 Harv. L. Rev. 1343, 1344 (2011) ("[The author employs] an expertise in political science and a robust understanding of legal analysis to illuminate the impact [of extrajudicial factors on the decision in a case . . . . [The author] sketches a divided federal court system where . . . [appellate courts are] more sympathetic to the facts of a case than the policy-driven Supreme Court.") (emphasis added).

discussion of the study's sampling, methodological procedures, and findings appears below.

A. *Data Sources and Sampling Procedures*

Applying generally-accepted research methodologies, the author constructed a null hypothesis: No statistically significant difference exists between subrogated property insurers' and other subrogees' likelihood of winning a duty-to-indemnify dispute in state and federal courts. An alternate hypothesis states: "xtralegal factors" or "case-specific facts" are more likely to explain any statistically significant differences between purportedly subrogees' and indemnitees' likelihood of prevailing in state and federal courts.

To build a representative sample of utility-related subrogation cases, the author executed several queries and variations of each on Thomson-Westlaw and Lexis-Nexis platforms.[322] The queries retrieved 359 relevant or "squarely on-point" decisions—involving equitable, contractual, and statutory subrogation disputes among property insurers, allegedly "negligent" utilities, and the latter's liability insurers.

Also, as discussed elsewhere, the author has sampled, coded, and analyzed hundreds of consumer-protection, bad-faith, arbitration, duty-to-defend, and other insurance-related disputes—over three decades.[323] The statistical findings and legal analyses were published.[324] Put simply, during

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[322] On July 20, 2022, the following queries were executed in Westlaw's "All-States, Insurance-Case" database:

- SY(subrogation /23 insurance insured! insurer!) % utility utilities electric! energy (N = 3, 226);
- SY(subrogation /23 (insurance insured! insurer! /p utility utilities electric! energy company companies power)) % auto automobile (N = 439).

Also, on March 16, 2022, the following query was executed in Westlaw's "All-Federal, Insurance-Case" database:

- SY(subrogation /23 (insurance insured! insurer! /p utility utilities electric! energy company companies power)) % auto automobile (N = 106).

[323] *See* Willy E. Rice, *Abolishing The Communications Decency Act Might Sanitize "Politically Biased," "Digitally Polluted," And "Dangerously Toxic" Social Media?—Judicial And Statistical Guidance From Federal-Preemption, Safe-Harbor And Rights-Preservation Decisions*, 24 SMU SCI. & TECH. L. REV. 257, 299 n.297 (2021).

[324] *See* Willy E. Rice, *Courts Gone "Irrationally Biased" in Favor of the Federal Arbitration Act?—Enforcing Arbitration Provisions in Standardized Application Forms and Marginalizing Consumer-Protection, Antidiscrimination, and States' Contract Laws: A 1925-2014 Legal and Empirical Analysis*, 6 WM. & MARY BUS. L. REV. 405, 483–93 nn.568–600 (2015) (discussing consumers' inability to secure timely and effective remedies under the FAA and presenting empirical and statistical arguments against enforcing mandatory arbitration clauses); Willy E. Rice, *Allegedly Biased, Intimidating, and Incompetent State Court Judges and the*

the same period, a fairly large number (2,268) of indemnification and other insurance-specific cases were added to the author's database. These latter cases are also included in the present case study. Why?

The current study focuses on whether allegedly subrogated property insurers have standing to file indemnification claims against allegedly negligent utility companies and the latter's' liability insurers. But, property insurers also file subrogation-indemnification actions against other types of defendants as well as against liability insurers. Even more importantly, subrogation and indemnification are very different legal principles.[325] Or stated slightly differently, subrogation is a procedural, standing-to-sue claim, and indemnification is a substantive, duty-to-reimburse claim. To obtain a representative sample or to increase the study's validity and reliability, statistical analyses of purely subrogation and indemnification disputes, as well as other insurance-related disputes, are required. Thus, the total sample size for the current study is 2,627.[326]

The author also applied another widely used methodology to analyze the content or information in each reported case.[327] Numerous binary (0,1) or "dummy" variables were formed.[328] In due course, the binary data were

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Questionable Removal of State Law Class Actions to Purportedly Impartial and Competent Federal Courts—A Historical Perspective and an Empirical Analysis of Class Action Disposition in Federal and State Courts, 1925-2011, 3 WM. & MARY BUS. L. REV. 419, 425 (2012); Willy E. Rice, *Judicial Bias, the Insurance Industry and Consumer Protection: An Empirical Analysis of State Supreme Courts' Bad-Faith, Breach-of-Contract, Breach-of-Covenant-of-Good-Faith and Excess-Judgment Decisions*, 1900–1991, 41 CATH. U. L. REV. 325, 337–40 (1992) (outlining the origin of the bad faith doctrine and discussing the effects of continuing judicial conflicts on consumers' ability to secure timely and effective remedies).

[325] *See, e.g.*, Allstate Ins. Co. v. Metropolitan Dade County, 436 So.2d 976, 978 (Fla. Dist. Ct. App. 1983) (providing an excellent explanation of the "difference between subrogation . . . and indemnification rights").

[326] The names and citations for the 2,627 state- and federal-court cases cannot be included here. The footnote would be too long. However, a large Microsoft Excel database of the sampled cases, citations as well as numerous Stata-Program working files—containing executed equations, table and statistics—are stored at the author's location and/or with this law journal's office.

[327] *See generally*, Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 77, 88, 90–91 nn.58, 103, 111–12 (2008) (discussing Professor Rice's published content-analysis studies involving the dispositions of various common-law and statutory claims in state and federal courts); Daniel T. Young, *How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modeling to Evaluate Bruce Ackerman's Theory of Constitutional Change*, 122 YALE L. J. 1990, 2010–13 (2013) (applying and discussing content analysis); Robert E. Mitchell, *The Use of Content Analysis for Explanatory Studies*, 31 PUB. OPINION Q. 230, 237 (1967).

[328] Briefly, each subcategory is an independent binary (0, 1) or "dummy" variable. *See* William H. Greene, ECONOMETRIC ANALYSIS 116–18 (5th ed. 2003) (explaining the purpose and use of dummy variables in regression analysis); Claudia M. Landeo & Kathryn E. Spier, *Irreconcilable Differences: Judicial*

inserted into a large matrix. Various statistical procedures were applied to analyze the case-specific facts—the probative, fact-by-fact or case-by-case evidence in the records. The statistical findings appear below in four tables.

B. *State and Federal Litigants' Demographics and Legal Statuses*

Table 1 presents six groups of binary variables—describing the demographic characteristics and legal statuses of various plaintiffs and defendants who litigated subrogation and indemnification claims in state and federal courts. The variables are: courts' geographic locations, types of insurance disputes, plaintiffs of record, defendants of record, types of insurance coverage, and underlying causes of action.

First, in the East, Midwest, and West, state rather than federal courts are likely to decide the majority of cases—58.2%, 59.3%, and 58.8%, respectively. On the other hand, state and federal courts in the South decide about an equal number of disputes. The percentages are 51.6% and 48.4%, respectively.

Resolution of Business Deadlock, 81 U. CHI. L. REV. 203, 223 n.54 (2014) (discussing probit analysis and "dummy variables (0,1)").

TABLE 1. LOCATIONS AND ATTRIBUTES OF VARIOUS LITIGANTS WHO FILED AND DEFENDED AGAINST SUBROGATION, INDEMNIFICATION AND OTHER CLAIMS IN STATE AND FEDERAL COURTS

Predictor Variables or "Probative Facts In the Records"	State Courts (N = 1,534)	Federal Courts (N = 1,093)	(N = 2,627)
COURTS' LOCATIONS			
East	58.2	41.8	(N = 584)
Midwest	59.3 **	40.7	(N = 727)
South	51.6	48.4 **	(N = 382)
Southwest	62.6 **	37.4	(N = 449)
West	58.8	41.2	(N = 485)
"CURRENT" INSURANCE DISPUTES			
Property Insurers' Subrogation Claims	75.8 ***	24.2	(N = 359)†
Insurers' & Others' Indemnity Claims	63.6	36.4	(N = 748)†
Common-Law & Statutory Claims	51.7 ***	48.3 ***	(N = 1,520)
"PLAINTIFFS OF RECORD" OR "REAL PARTIES IN INTEREST" †			
Allegedly Subrogees—Property Insurers	75.8 ***	24.2	(N = 359)
Allegedly Indemnitees:			
Property Insurers	20.0	80.0 ***	(N = 25)
Corporations	37.0	63.0 ***	(N = 205)
Small Businesses	71.0	29.0	(N = 124)
Personal-Property Owners	77.9	22.1	(N = 154)
Landowners & Homeowners	91.4 ***	8.6	(N = 128)
Financial Institutions	50.0	50.0	(N = 18)
Third-Party Victims	83.3 ***	16.7	(N = 30)
Governments	33.3	66.7 ***	(N = 24)
Other Entities	70.0	30.0	(N = 40)
"DEFENDANTS OF RECORD"			
Primary Liability Insurers	57.8 ***	42.2	(N = 2,287)
Excess Liability Insurers	47.7	52.3 ***	(N = 107)
Corporations	60.7 ***	39.3	(N = 89)
Employers	53.3	46.7	(N = 30)
Utility Companies	83.6 ***	16.4	(N = 67)
Mixed Entities	72.3	27.7	(N = 47)
TYPES OF INSURANCE COVERAGE:			
"Hybrid" Auto Insurance	68.6	31.4	(N = 382)
"First-Party" Fire Insurance	85.6 ***	14.4	(N = 451)
"First-Party" Property Insurance	65.6	34.4	(N = 119)
"Third-Party" Liability Insurance	55.2 ***	44.8 ***	(N = 1,227)
Others—Health & Workers' Comp	57.6	42.4	(N = 448)
UNDERLYING CAUSES OF ACTION:			
Negligence-Based Actions	63.0 ***	37.0	(N = 1,025)
Contract-Based Actions	47.8	52.2 ***	(N = 159)
Mixed—Statutory & Common Law	56.3	43.7	(N = 1,443)

Levels of statistical significance for Chi Square tests: *** $p \leq .0001$ ** $p \leq .02$ |

†These percentages are based on subsets of *strictly* subrogation and indemnification cases (N = 1,107)

However, in the Southwest, state courts are statistically and substantially more likely to decide insurance-related controversies than federal courts. The corresponding percentages are 62.6% and 37.4%. Table 1 also reveals that the overwhelming majority of subrogation and indemnification actions are more likely to be decided in state trial and appellate courts—75.8% and 63.6%, respectively. But state and federal courts are likely to resolve approximately equal percentages of common-law and statutory lawsuits—51.7% and 48.3%, respectively.

At this point, it is important to stress: Confusion frequently arises about

who is the "plaintiff of record" or the "real" plaintiff in a subrogation lawsuit. In some insurance subrogation and indemnification cases, various insured residential and commercial entities or property owners are listed as the "plaintiffs of records." And, in other cases, the insureds' underwriters—subrogated property insurers—are the "plaintiffs of record."

However, to remove any uncertainty, courts apply the "real party in interest" rule.[329] Generally, the rule states that after an insurer indemnifies an insured or satisfies a first-party contractual, equitable or statutory obligation, the insurer-subrogee becomes the real party in interest.[330] Thus, the insurer-subrogee-plaintiff may commence an independent suit—in its own name—against the tortfeasor who actually caused the insured's property damage or injury.[331] Also, determining who are the actual "defendants of record" can be problematic. Generally, depending on the facts in subrogation-indemnification cases, the tortfeasors—allegedly negligent utility companies or other business entities—are the "defendants of records."[332] Or, the purported tortfeasors' liability insurers are the "defendants of record."[333]

Table 1 identifies the "plaintiffs of record" in the present study. At this juncture, it is enough to observe: roperty insurers are more likely (75.8%) to file subrogation actions in state courts. And small businesses, personal-property owners, and landowners are also more likely to commence duty-to-indemnify claims in state courts. The respective percentages are 71.0%,

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[329] *See, e.g.*, Safeway Ins. Co. v. Collins, 963 P.2d 1085, 1089 (Ariz. App. Ct. 1998); Orejel v. York Int'l Corp., 678 N.E.2d 683, 692 (Ill. App. Ct. 1997); Liberty Mut. Ins. Co. v. Nat'l Consol. Warehouses, Inc., 609 N.E.2d 1243, 1246 (Mass. Ct. App. 1993).

[330] Smith v. Travelers Ins. Co., 362 N.E.2d 264, 265 (Ohio 1977) (applying the real party in interest rule, citing cases in numerous jurisdictions, and reaffirming that a right of subrogation only changes the owner of a cause of action, rather than the character of the acquired theory of recovery).

[331] *Id.*

[332] *Cf.* Associated Aviation Underwriters v. Wood, 98 P.3d 572, 615 (Ariz. Ct. App. [Div. 2] 2004) (citing Peterson v. Superior Bank FSB, 611 N.E.2d 1139, 1141 (Ill. 1993) ("Generally, an action on a judgment can only be brought against the *defendant of record* in the judgment and not against an entity or person not named in the original judgment"). Also, *compare* Allegheny Ludlum Industries, Inc. v. Lloyd's of London, 472 F.Supp. 42, 43 (W.D. Pa. 1979) (noting that original underwriters-defendant at Lloyd's of London accepted the substituted *defendant of record* in the suit), *with* O'Brien v. Government Emp. Ins. Co., 251 F.Supp. 318, 322 (E.D. Pa. Mar. 9, 1966) (rejecting the plaintiff's assertion that the insurer was the *defendant of record* and stressing, "If the plaintiff were permitted to sue the insurance company in *its own name,* there would be no purpose for the restriction on the use of [an insurance] pleading.") (emphasis added).

[333] *Cf.* Bingle v. Liggett Drug Co., 11 F.D.R. 593, 593–94 (D. Mass. 1951) ("The action is . . . for personal injuries allegedly received . . . when she fell in [the assured] defendant's store . . . . [T]he attorney of the insurance company. . . is defending the action on behalf of its assured . . . . As a practical matter the insurer is a *real litigant* here, and one whose *interests* are closely connected with those of the *defendant of the record.* It is in fact defending the case on behalf of defendant.") (emphasis added).

77.9%, and 91.4%. Conversely, large corporate plaintiffs are statistically and significantly more likely (63.0%) to litigate indemnification claims in federal courts.

Once more, in their pleadings, alleged subrogees and indemnitees—real parties in interest—may list various entities and/or their liability insurers as "defendants of record." Table 1 illustrates that utility companies and/or their primary liability insurers are statistically and substantially more likely to be defendants in state courts. The corresponding percentages are 83.6% and 57.8%.

C. *Bivariate Relationships Between Predictors and the Disposition of Property Insurers', Investors-owned Utilities' and Liability Insurers' Subrogation Disputes in Trial and Appellate Courts*

Earlier, we discovered that *some* state and federal courts are split over two questions: 1) whether property insurers have standing to file subrogation actions against allegedly grossly negligent utility companies, and 2) whether utilities' liability insurers have a contractual, equitable or statutory duty to indemnify subrogated property insurers. Are the splits just minor peculiarities? What causes the divided decisions? To find answers, consider Table 2—which displays the bivariate relationships between various predictors and the disposition of subrogation disputes.

TABLE 2. DISPOSITIONS OF PROPERTY INSURERS' SUBROGATION ACTIONS AGAINST ALLEGEDLY NEGLIGENT UTILITIES' AND OTHER ENTITIES' LIABILITY INSURERS IN STATE AND FEDERAL TRIAL AND APPELLATE COURTS

Independent or Predictor Variables	Probative and/or Stipulated Facts or Factors in the Records	Dispositions of Subrogation Disputes in State Trial & Federal District Courts: Plaintiff Prevailed	Plaintiff Did Not Prevail	(N = 359)	Dispositions of Subrogation Disputes in State and Federal Appellate Courts: Plaintiff Prevailed	Plaintiff Did Not Prevail	(N = 320)
		Percent	Percent		Percent	Percent	
PROPERTY INSURERS SUE	Contractual-Subrogation Action	34.5	65.5	(N = 258) ***	53.9	46.1	(N = 232)
LIABILITY INSURERS AND	Equitable-Subrogation Action	54.4	45.6	(N = 68) ***	49.1	58.9	(N = 59)
THEIR INSUREDS	Statutory-Subrogation Action	30.3	69.7	(N = 33) ***	41.4	58.6	(N = 29)
	Primary Liability Insurers	40.7	59.3	(N = 148)	48.9	51.1	(N = 137)
TYPES OF DEFENDANTS	Excess Liability Insurers	45.0	55.0	(N = 20)	16.7	83.3	(N = 18) **
STATED IN THE RECORDS	Corporations	35.0	65.0	(N = 80)	53.1	46.9	(N = 64) **
OR IN THE CASES' NAMES	Employers	39.3	60.7	(N = 28)	50.0	50.0	(N = 18)
	Utility Companies	37.3	62.7	(N = 67)	63.5	36.5	(N = 63) **
	Mixed Entities	25.0	75.0	(N = 24)	50.0	50.0	(N = 20)
DEFENDING UTILITIES	Utility Companies, Only	37.3	62.7	(N = 67)	63.5	36.5	(N = 63) **
VERSUS OTHER PARTIES	All Other Entities	38.0	62.0	(N = 292)	49.0	51.0	(N = 257)
SPECIFIC TYPES OF	Electricity Utilities	33.3	66.7	(N = 36)	60.6	39.4	(N = 33)
UTILITIES VERSUS		Gas & Water Utilities'	41.9		58.1	(N = 31)	66.7 (N = 30) 33.3
OTHER DEFENDANTS	All Other Entities	38.1	61.9	(N = 292)	49.0	51.0	(N = 257)
LIABILITY INSURERS',	No Subject-Matter Jurisdiction	35.7	64.3	(N = 14)	75.0	25.0	(N = 8)
UTILITY COMPANIES'	No Standing to Sue	48.7	59.3	(N = 27) **	60.0	40.0	(N = 25)
AND OTHER INSURED	Failure to State a Valid Claim	37.7	62.3	(N = 69)	45.0	55.0	(N = 60)
ENTITIES' TRADITIONAL	Statute of Limitation Defense	23.8	76.2	(N = 21)	61.1	38.9	(N = 18)
AFFIRMATIVE DEFENSES	Equitable and Preemption Defenses	66.7	33.3	(N = 30) **	51.8	48.2	(N = 27)
	Mixed or Non-Traditional Defenses	34.8	65.2	(N = 198) **	51.1	48.9	(N = 182)
	No Proof of Insurance Coverage	49.1	50.9	(N = 55)	48.2	51.8	(N = 54) ***
LIABILITY INSURERS',	Failure to Give a Timely Notice	56.2	43.8	(N = 16) ***	50.0	50.0	(N = 16)
UTILITY COMPANIES' AND	Breach of a Condition Subsequent	44.4	55.6	(N = 18)	76.5	23.5	(N = 17)
OTHER INSURED ENTITIES'	Contractual Exclusion	26.2	73.8	(N = 42) ***	43.6	56.4	(N = 39) ***
INSURANCE-SPECIFIC	No Proof of Proximate Cause	37.1	62.9	(N = 62)	63.5	36.5	(N = 52) ***
AFFIRMATIVE DEFENSES	Waiver of Subrogation Right	20.4	79.6	(N = 54) ***	29.8	70.2	(N = 47) ***
	Mixed or Non-Insurance Defenses	42.0	58.0	(N = 112) ***	57.9	42.1	(N = 95)

Chi square statistic's levels of significance: **** $p \leq .001$ *** $p \leq .01$ ** $p \leq .05$ [1]This category comprises 24 natural-gas and 7 water utilities disputes.

First, the "prevailed" and "did not prevailed" percentages in Table 2 should be viewed from the property insurers' perspective. They are the

plaintiffs. Now, review the two columns of percentages that appear under the heading, Dispositions of Subrogation Disputes in State Trial & Federal District Courts. The percentages suggest: Some probative evidence and case-specific factors are statistically and significantly more likely to influence property insurers' likelihood of winning subrogation disputes against investors-owned utility companies and liability insurers. For example, in state and federal lower courts, property insurers are statistically and significantly less likely to prevail when they file contractual and statutory subrogation actions. The respective percentages are 65.5% and 69.7%. In contrast, they are more likely to prevail (54.4%) when they commence equitable subrogation actions.

In contrast, types of defending utility companies—electric, gas, and water—and types of defendants generally do not have any meaningful or unexpected influence on the disposition of property insurers' subrogation claims. Quite simply, in state trial and federal district courts, property insurers are less likely to prevail—regardless of utility companies' or other defendants' legal status. The reported percentages vary between 55.0% and 75.0%.

On the other hand, utility companies', liability insurers', and other defendants' traditional defenses are likely to increase or decrease property insurers' likelihood of winning. For instance, in state trial and federal district courts, property insurers are statistically and significantly more likely to prevail (66.7%) when liability insurers or utilities raise an equitable-estoppel or preemption defense. However, property insurers are less likely to prevail when utilities or liability insurers raise other traditional defenses—"no subject-matter jurisdiction," "no standing to sue," "failure to state a claim," and "statute-of-limitation" defenses. The respective percentages vary between 59.3% and 76.2%.

Also, some of the liability insurers' and utility companies' insurance-specific defenses influence property insurers' likelihood of prevailing in state and federal lower courts. In particular, property insurers have a greater probability of prevailing (56.2%) when a failure-to-notify defense is advanced. But, property insurers are statistically and markedly less likely to prevail when utilities and liability-insurance companies raise waiver-of-subrogation, no- proximate-cause, and contract-exclusion defenses. The percentages are 79.6%, 69.2%, and 73.8%, respectively.

To be sure, the statistically significant findings among state and federal trial courts are important and informative. But, it is generally accepted that appellate courts' analyses and holdings are more persuasive, "controlling," or authoritative.[334] And, without knowing more, that awareness probably explains why 320 (89%) of the 359 litigants appealed the lower courts'

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[334] *See, e.g.*, St. Paul Fire & Marine Ins. Co. v. Charles H. Lilly Co., 286 P.2d 107, 109 (Wash. 1955) ("[The] authorities are divided on this question . . . [but] the weight of authority and the more persuasive decisions of appellate courts support a conclusion contrary to that reached by the majority.") (Weaver, J., dissenting); Florida East Coast Ry. Co. v. Beaver Street Fisheries, Inc., 537 So.2d 1065, 1067–68 (Fla. Dist. Ct. App. 1989) (reaffirming that a "trial court's theories or reasoning are not controlling [for an] appellate court").

subrogation rulings. Consider the two columns of percentages in Table 2 under the heading, Dispositions of Subrogation Disputes in State & Federal Appellate Courts. Briefly put, the statistically significant relationships between predictors and outcome—among appellate courts' cases—do not precisely mirror the significant relationships among lower courts' cases.

Unlike lower courts, appellate courts allow wittingly or unwittingly defendants' legal statuses to influence the outcome of subrogation disputes. More specifically, in courts of appeals, property insurers are statistically and significantly more likely to prevail against corporations and investors-owned utility companies. The percentages are 53.1% and 63.5%, respectively. Moreover, although types of utility companies do not have any noteworthy effects on the dispositions of subrogation disputes, property insurers still have a greater likelihood of prevailing when the defendants are utility companies rather than any other entity. Specifically, property insurers are statistically less likely to prevail when defendants of record are primary and excess liability insurers. The corresponding percentages are 51.1% and 83.3%.

Finally, among courts of appeals, types of subrogation claims and defendants' traditional defenses have no statistically meaningful effects on the dispositions of cases. However, some of the liability insurers' and utility companies' insurance-specific defenses influence property insurers' likelihood of prevailing. In appellate courts, the waiver-of-subrogation and contract-exclusion defenses also decrease property insurers' likelihood of winning. The respective percentages are 70.2% and 56.4%. Conversely, defendants' "beach of condition" and "no proof of proximate cause" defenses do not decrease property insurers' ability to prevail in appellate courts. The corresponding percentages are 76.5% and 53.5%.

D. *Bivariate Relationships Between Predictors and the Disposition of Both Subrogation and Indemnification Claims in Trial and Appellate Courts*

At this point, it is necessary to restate three important principles: 1) an insurer's subrogation cause of action is essentially a "hybrid" action—involving a procedural standing-to-sue dispute well as a substantive duty-to-indemnify claim; [335] 2) an insurer may commence a stand- alone or an independent duty-to-indemnify action—without becoming a contractual, statutory, or equitable subrogee;[336] and 3) in subrogation and indemnification

[335] *See, e.g.*, Estate of Kriefall v. Sizzler USA Franchise, Inc., 343 Wis.2d 29, 55, 816 N.W.2d 853, 865 (Wis. 2012) (reaffirming that subrogation is "akin to indemnification," because a subrogee attempts to recoup money that was spent to cover an injury or a loss); Great Am. Ins. Co. v. Bureau Veritas, 478 F.2d 235, 236 (2nd Cir. 1973) (reporting that the insurers filed a *subrogation* claim seeking indemnification for the amounts paid to cover lost ship).

[336] *See generally* McEvoy v. Waterbury, 104 A. 164, 165 (Conn. 1918) (reaffirming that an *independent* indemnity cause of action may proceed against a third-party

lawsuits, the insurer is the real party in interest and may "sue in its name or in the name of its insured."[337]

Now, reconsider the substantive question: whether utilities' liability insurers have a duty to indemnify subrogated property insurers who compensate residential and commercial owners—after the utilities damage the owners' persons or property interests. As stated earlier, this indemnification question is generating split rulings among state and federal courts. Why? Perhaps, the information in Table 3 will provide some insight.

utility company after a final judgment has been entered against the municipality-defendant); Horn v. Transcon Lines, Inc., 898 F.2d 589, 594 (7th Cir. 1990) (concluding that a *stand-alone,* duty-to-indemnify action may proceed); Avemco Ins. Co. v. Cessna Aircraft Co., 11 F.3d 998, 1000 (10th Cir. 1993) (citing California law and declaring that an insurer "might have a right to commence a *duty-to-indemnify action* against a tortfeasor as well as a right to sue in its own name, if the insurer pays the insured's loss," and "steps into the shoes of its insured").

[337] *Cf.* Franks v. Sematech, Inc., 936 S.W.2d 959, 960 (Tex. 1997) (declaring that an insurer may commence an "independent" subrogation lawsuit—suing "in its own name or in the insured's name"); Pennsylvania Gen. Ins. Co. v. Austin Powder Co., 502 N.E.2d 982, 984–85 (N.Y. 1986) ("Bison Ford has no indemnification claim in its own right against Austin Powder . . . [because] Bison Ford has not and will not sustain any actual out-of-pocket loss . . . . To the extent Bison Ford is seeking *indemnification,* [the claim is] asserted on behalf of the insurer—the *real party in interest.*"); Employers Ins. of Wausau v. Bishop Hendricken High Sch., No. 73–68, 1975 WL 169933, at *1 (R.I. Super. Ct. Feb.7, 1975) (reaffirming that under Rhode Island statute, a subrogated insurer may sue in its own name or in name of its insured).

TABLE 3. BIVARIATE ANALYSES — DISPOSITION OF PROPERTY INSURERS' AND OTHER ENTITIES' DUTY-TO-INDEMNIFY CLAIMS AGAINST UTILITY COMPANIES, VARIOUS OTHER DEFENDANTS AND VARIOUS LIABILITY INSURERS IN COURTS OF APPEALS

		Disposition of Insurance Duty-to-Indemnify Causes of Action From Property Insurers' And Various Other Entities' Viewpoints		
Predictors-Attributes	**Subcategories**	**Favorable**	**Unfavorable**	**(N = 997)**
		Percent	Percent	Number
TYPES OF UNDERLYING FIRST- & THIRD-PARTY CLAIMS OR ACTIONS	Negligence-Based Actions	52.1	47.9	(N = 403)
	Contract-Based Actions	63.8	36.2	(N = 69)
	Mixed-Statutory & Common Law	52.8	47.2	(N = 525)
TYPES OF PROCEDURAL SUBSTANTIVE ACTIONS	Insurers' Subrogation Action	51.9	48.1	(N = 320)
	Entities' Indemnification Action	54.0	46.0	(N = 677)
PLAINTIFFS OF RECORD: ALLEGEDLY & VARIOUS INSURANCE SUBROGEES AND/OR INDEMNITEES	Subrogees—Property Insurers	52.0 **	48.0	(N = 320)
	Indemnitees—Property Insurers	41.7	58.3 **	(N = 24)
	Indemnitees—Corporations	47.4	52.6 **	(N = 175)
	Indemnitees—Small Businesses	60.2 **	39.8	(N = 113)
	Indemnitees—Property Owners	51.4	48.6	(N = 140)
	Indemnitees—Real Estate Owners	64.2 **	35.8	(N = 120)
	Indemnitees—Financial Entities	68.8 **	31.3	(N = 16)
	Indemnitees—Third Parties	53.3	46.7	(N = 30)
	Indemnitees—Governments	65.0 **	35.0	(N = 20)
	Indemnitees—Other Entities	38.5	61.5 **	(N = 39)
TYPES OF DEFENDING UTILITY COMPANIES & OTHER ENTITIES	Utilities—Electricity	60.6	39.4	(N = 33)
	Utilities—Gas & Water	66.7	33.3	(N = 30)
	Other Business Entities	52.6	47.4	(N = 934)
TYPES OF FIRST-PARTY AND THIRD-PARTY INSURANCE CONTRACTS	"Hybrid" Auto Insurance	51.0	49.0	(N = 149)
	"First-Party" Fire Insurance	57.5 *	42.5	(N = 407)
	"First-Party" Property Insurance	41.3	58.7 *	(N = 63)
	"Third-Party" Liability Insurance	49.6	50.4	(N = 276)
	Others–Health &Workers Comp	56.9 *	43.1	(N = 102)
DEFENDANTS OF RECORD: LIABILITY INSURERS OR THEIR INSUREDS --UNDER LIABILITY INSURANCE CONTRACTS	Primary Liability Insurers	53.2	46.8	(N = 763)
	Excess Liability Insurers	38.0	62.0	(N = 50)
	Insured Corporations	56.2	43.8	(N = 73)
	Insured Employers	50.0	50.0	(N = 20)
	Insured Utility Companies	63.5	36.5	(N = 63)
	Insured Mixed Entities	53.6	46.4	(N = 28)
LIABILITY INSURERS', UTILITIES', AND OTHER INSURED TORTFEASORS' INSURANCE-SPECIFIC AFFIRMATIVE DEFENSES	No Proof of Insurance Coverage	51.5	48.5	(N = 132)
	Failure to Give Timely Notice	50.0	50.0	(N = 18)
	Breach of a Condition Subsequent	56.9 **	43.1	(N = 109)
	Contractual Exclusion	51.6	48.4	(N = 157)
	No Proof of Proximate Cause	62.3 **	37.7	(N = 69)
	Waiver of Subrogation	29.8	70.2 **	(N = 47)
	Mixed or Non-Insurance Defenses	54.6	45.4	(N = 465)

** Chi square test statistically significant at $p \leq .03$
* Chi square test statistically significant at $p = .06$

The simple statistics in the table are derived from an analysis of "hybrid" subrogation cases and stand-alone indemnification decisions (N = 997). Additionally, the percentages illustrate the bivariate relationships between several categorical variables and the disposition of duty-to-indemnify claims in state and federal appellate courts. First, the percentages reveal that four variables do not influence statistically or significantly property insurers' and other plaintiffs' likelihood of prevailing in a duty-to-indemnify action.

For example, the underlying tort- or contract-based claims—that insured customers file against utilities and other third parties—have no meaningful influence on the outcome of duty-to-indemnify disputes. In addition, raising a duty-to-indemnify claim in a "hybrid" subrogation proceeding or in a stand-alone indemnification trial does not improve or reduce a plaintiff's likelihood

of prevailing. Quite simply, a plaintiff's probability of winning or losing a duty-to- indemnify dispute is about 50%-50% on appeal.

Even more interesting, the simple bivariate statistics also indicate: The types of utility services—electric, gas, and water—have no statistically meaningful effect on property insurers' likelihood of winning. Briefly stated, subrogated insurers rather than utility companies win the overwhelming majority of duty-to-indemnify disputes. The reported percentages vary from 60.6% to 66.7%. Other plaintiffs, however, have nearly equal probabilities of winning or losing against various other business entities—54% versus 46%.

There are two variables in Table 3 which influence statistically and significantly one's likelihood of winning a duty-to-indemnify dispute. Consider the "plaintiffs of record" variable. It reveals that some property insurers file an indemnification claim as a subrogee a subrogation proceeding. And others property insurers filed a claim as an alleged indemnitee in a stand-alone indemnification trial. Furthermore, various other insured persons and businesses also filed independent or stand-alone indemnification actions. And the findings strongly suggest: State and federal appellate courts are intentionally or unintentionally allowing plaintiffs' legal status to influence the outcome of duty-to-indemnify suits. In particular, subrogated property insurers and some alleged indemnitees—small businesses, real-estate owners, financial entities, third parties ,and governments—are more likely to prevail. The respective percentages vary from 51.4% to 68.8%. But, other alleged indemnitees—other property insurers, corporations, and various entities—are statistically and substantially less likely to prevail in a duty-to-indemnify trial. The corresponding percentages are 58.3%, 52.6%, and 61.5%.

Finally, property insurers and other plaintiffs are substantially more likely to win a duty-to-indemnify dispute when defendants—insured utility companies, liability insurers, and other insured entities—raise certain insurance-specific defenses: "No insurance coverage," "breach of a condition subsequent," "exclusion" and "failure to prove efficient proximate cause." The percentages in Table 3 are 51.5%, 56.9%, 51.6%, and 62.3%, respectively. However, when liability insurers and other defendants raise a waiver-of-subrogation defense, property insurers' and other plaintiffs' likelihood (70.2%) of losing a duty-to-indemnify suit dramatically increases. If plaintiffs' legal statuses and insurance-specific affirmative defenses are conclusively influencing the disposition of duty-to-indemnify disputes, those variables are also helping to foster split duty-to-indemnify rulings among appellate courts. But, to repeat, the simple and bivariate statistics in Table 3 cannot provide a definitive answer. Therefore, a more powerful statistical procedure must be applied.

E. *A Two-Stage Multivariate Probit Analysis—The Concurrent and Unique Effects of Predictors on Appellate Courts' Disposition of Utilities', Property Insurers' and Other Entities' Subrogation and Indemnification Disputes*

Earlier, we discovered that numerous interconnected subrogation and indemnification questions are producing judicial splits: 1) whether the made whole doctrine precludes subrogated property insurers' commencing actions against utilities and their liability insurers[338]; 2) whether the subrogation immunity defense precludes property insurers' filing ordinary and gross negligence actions against utilities[339]; and 3) whether a waiver-of-subrogation defense precludes property insurers' standing to sue their insured customers' utility companies.[340]

Unquestionably, legislators and jurists are strongly encouraged to evaluate the plausible implications of the previously discussed bivariate and statistically significant findings, before enacting legislation to address the judicial splits. But, again, it must be stressed: Statistically significant bivariate relationships do not conclusively or persuasively establish that certain predictors cause courts to decide a controversy one way or another. Moreover, bivariate findings do not prove that courts are "illogically biased" against or in favor of, say, investors-owned utilities, utility customers, or utilities' liability insurers.[341]

As explained in other publications, to increase the dependability as well as the inferential value of a researcher's findings, two indispensable questions must be answered: 1) whether a sample of only published judicial decisions accurately and completely describes courts' propensity to accept or reject, say, defendants' insurance-specific defenses;[342] and 2) whether state and federal appellate courts allow extralegal facts as well as probative facts

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[338] *See supra* notes 152–55 and accompanying text.

[339] *See supra* notes 190–211 and accompanying text.

[340] *See supra* notes 212–50 and accompanying text.

[341] *Cf. Truth versus Truisms*, THE ECONOMIST (Feb. 7, 2014), http://www.economist.com/blogs/freeexchange/ [https://perma.cc/5Z8K-FJ84] (last visited July 28, 2022) (accepting that the r-squared score was *statistically significant*, but stressing that the bivariate relationship did not have any "*predictive power*").

[342] *See generally* Willy E. Rice, *Insurance Contracts and Judicial Discord over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct: A Historical and Empirical Review of Federal and State Courts' Declaratory Judgments 1900-1997*, 47 AM. U.L. REV. 1131, 1208–09 (1998) (explaining the inferential limitations associated with a researcher's analyzing *reported* decisions and using only *simple percentages* to explain judicial outcomes and stressing that unreported decisions must be included in the statistical analysis); Willy E. Rice, *Insurance Contracts and Judicial Decisions over Whether Insurers Must Defend Insureds that Violate Constitutional and Civil Rights: An Historical and Empirical Review of Federal and State Court Declaratory Judgments 1900-2000*, 35 TORT & INS. L. J. 995, 1088–89 nn.431–32 (2000).

and legal doctrines to determine the disposition of procedural or substantive disputes.[343] Debatably, case-study findings are significantly more persuasive and beneficial when investigators 1) test for "selectivity bias" in a sample of cases,[344] 2) use more "powerful" inferential statistics, and 3) assess the independent, combined and simultaneous effects of multiple factors on the disposition of disputes.

As discussed elsewhere,[345] a researcher must test for "selectivity bias" in sample data because some litigants accept trial courts' adverse rulings and decide not to seek appellate review. Other litigants, however, reject trial or federal district courts' adverse decisions and seek a better outcome in a state or federal court of appeals. Stated briefly, a "selectivity bias" analysis asks whether a statistically significant difference exists between litigants who "decide to appeal" lower courts' unfavorable decisions and those who "decide not to appeal." And, if a substantial difference exists between the two groups, a researcher may sensibly conclude that the appealers' unique attributes—rather than various predictors—explain the appealers' likelihood of winning or losing in courts of appeals.

As stated before, the present database comprises numerous "case specific" and "probative facts" about various types of utilities, insurers and other litigants who appealed adverse subrogation and duty-to-indemnify decisions. Therefore, the author performed a multivariate, two-staged probit analysis.[346] Among other reasons, a multivariate-probit analysis is superior

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[343] *Insurance Contracts and Judicial Discord over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct: A Historical and Empirical Review of Federal and State Courts' Declaratory Judgments 1900-1997*, *supra* note 342.

[344] The computation of this statistical test and its relevance have been discussed elsewhere. *See* G.S. MADDALA, LIMITED-DEPENDENT AND QUALITATIVE VARIABLES IN ECONOMETRICS, 257–71, 278–83 (1983) (discussing "self-selectivity bias" and "other-selectivity bias"); Willy E. Rice, *Unconscionable Judicial Disdain for Unsophisticated Consumers and Employees' Contractual Rights?—Legal and Empirical Analyses of Courts' Mandatory Arbitration Rulings and the Systematic Erosion of Procedural and Substantive Unconscionability Defenses Under the Federal Arbitration Act, 1800-2015*, 25 B.U. PUB. INT. L.J. 143, 229 n.560 (2016); Willy E. Rice, *Federal Courts and the Regulation of the Insurance Industry: An Empirical and Historical Analysis of Courts' Ineffectual Attempts to Harmonize Federal Antitrust, Arbitration and Insolvency Statutes with the McCarran-Ferguson Act - 1941-1993*, 43 CATH. U. L. REV. 399, 445–49 nn.213–19 (1994).

[345] *Supra* note 344 and accompanying text.

[346] In several published law review articles, the author explains and applies probit analysis to uncover the exclusive, combined and simultaneous effects of multiple factors on the dispositions of various insurance law disputes in courts of appeals. *See* Willy E. Rice, *Insurance Contracts and Judicial Decisions over Whether Insurers Must Defend Insureds that Violate Constitutional and Civil Rights*, 35 TORT & INS. L. J., at 1088–94 nn.431–32; Willy E. Rice, *Insurance Contracts and Judicial Discord over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct*, 47 AM. U.L. REV., at 1208–14 n.386–387; *see also* Willy E. Rice, *Judicial and Administrative Enforcement of Title VI, Title IX,*

to an analysis that examines a series of simple bivariate tests. Why? The former procedure tests for "selectivity bias" and determines the unique, collective and simultaneous effects of multiple extralegal and legal factors on the outcomes of subrogation and indemnification disputes in appellate courts.[347]

Table 4 presents the results of a multivariate-probit analysis—focusing primarily on the 1891 appellate-court decisions in the sample.[348] Seven (7) clusters of case-specific and probative facts are illustrated. In addition, two distributions of probit values—along with their robust standard errors—appear in the table.

and Section 504: A Pre- and Post- Grove City Analysis, 5 REV. LITIG. 219, 286–88 nn.406–09 (1986). In addition, the author used StataCorp's STATA STATISTICAL SOFTWARE to analyze the data, compute robust standard errors, and generate multivariate-probit coefficients.

[347] *Supra* note 346 and accompanying text.

[348] *See* Table 4 at the bottom for additional information.

TABLE 4. PROBIT ANALYSIS — THE COMBINED AND UNIQUE EFFECTS OF LEGAL & NON-LEGAL FACTORS ON APPELLATE COURTS' DISPOSITIONS OF INSURERS', UTILITIES', AND OTHER ENTITIES' SUBROGATION AND INDEMNIFICATION DISPUTES (N = 1891)†

Unique and Combined Effects of Legal and Non-Legal Factors on Choosing to Appeal and Dispositions	Litigants' Deciding Whether To Appeal Adverse Rulings			Results of Litigation in State and Federal Appellate Courts		
	Probit Values	Robust Std. Errors	Z	Probit Values	Robust Std. Errors	Z
APPELLATE COURTS' LOCATIONS						
Eastern States	-.1466	.0746	1.96 **	.0048	.0341	0.14
Southwestern States	.7860	.1524	5.16 ***	.1834	.0539	3.40 ***
TYPES OF APPELLATE JURISDICTIONS						
State Courts	.1792	.0607	2.95 ***	.0666	.0261	2.55 ***
Fifth Circuit	.3448	.1522	2.27 **	-.0775	.0511	1.52
Seventh Circuit	.6590	.1164	5.66 ***	-.1177	.0468	2.51 ***
Ninth Circuit	-.0795	.0835	0.95	-.0549	.0377	1.46
TYPES OF INSURANCE CONTRACTS						
First-Party Property Insurance	-.2060	.1502	1.37	-.1592	.0556	2.86 ***
Hybrid Homeowners' Insurance	-.2417	.1257	1.92 **	-.1410	.0571	2.47 ***
Third-Party Liability Insurance	-.2419	.0708	3.41 ***	-.0794	.0296	2.68 ***
PROCEDURAL AND SUBSTANTIVE DISPUTES						
All Stand-Alone Subrogation Claims	-.0234	.4865	0.05	-.3368	.1786	1.89 **
Equitable Subrogation Claims	.0783	.2515	0.31	.0974	.0821	1.19
Underlying Negligence Claims	-.0044	.0717	0.06	.0540	.0279	1.94 **
Underlying Employees' Claims	-.0873	.0847	1.03	.0172	.0344	0.05
"PLAINTIFFS OF RECORD"						
Subrogees—Property Insurers	.4756	.4548	1.05	.4106	.1647	2.49 **
Indemnitees—Property Insurers	-.4793	.0964	0.33	-.0002	.0465	0.99
"DEFENDANTS OF RECORD"						
Electric & Gas Utilities	.4304	.2715	1.05	.1488	.0694	2.14 **
Primary Liability Insurers	.0557	.1681	1.94 *	-.0479	.0671	0.71
LIABILITY INSURERS' AND UTILITIES' DEFENSES						
Waiver of Subrogation Right	-.1747	.2617	0.67	-.2641	.0751	3.51 ***
No Third-Party Standing to Sue	-.1535	.2287	0.67	-.0977	.0799	1.22
Failure to State A Valid Claim	-.1650	.1611	1.02	-.1094	.0582	1.88 *
No Insurance Coverage	.1191	.1082	1.10	-.0538	.0380	1.42
Failure to Give Timely Notice	7.6726	.4272	17.95 ***	-.0941	.1264	0.74
Breach of Condition Subsequent	.0572	.1229	0.47	-.0439	.0416	1.06
Contractual Exclusion	-.0557	.0660	0.84	-.0565	.0275	2.05 **
No Proof of Proximate Cause	-.1736	.1979	0.88	-.0060	.0646	0.09
— CONSTANT	.6568	.0855	7.67 ***	.4424	.0592	7.47 ***

Wald test for independent equations ("selectivity bias"): Chi square = 1.97, p-value = .16

Levels of statistical significance for the Chi Square test: *** $p \leq .01$ ** $p \leq .05$ * $p = .06$

†These findings are based on an analysis of 1891 "uncensored" insurance-related, appellate-court decisions — comprising the following: 320 subrogation, 677 stand-alone- duty-to-indemnify, and 894 joint-duty-to-defend-and-indemnify cases.

First, examine the probit values which appear under the heading Litigants' Deciding Whether to Appeal Adverse Rulings. The probit coefficients illustrate the predictors' independent, combined and simultaneous effects on litigants' deciding to appeal adverse subrogation and duty-to-indemnify rulings. The asterisks describe the probit values' levels of statistical significance.[349] And the findings strongly suggest that some factors are significantly more likely to increase or decrease utility companies', property and liability insurers', and other litigants' decision to appeal or not appeal.

Consider a few examples. Litigants who reside in eastern states are less likely (-.1466) to appeal. The probit coefficient is negative. In contrast, litigants in southwestern jurisdictions are more likely (.7860) to appeal adverse subrogation and indemnification rulings. Moreover, a significant number of litigants are generally more likely (.1797) to appeal unfavorable outcomes to state appellate courts rather than to federal courts of appeals. However, among federal cases, significant proportions of litigants are more likely to appeal unsatisfactory rulings to the Fifth and Seventh Circuits. The positive probit coefficients are .3448 and .6590, respectively.

Still, an extremely important sampling question remains: whether or not the sample "selectivity bias" undermines the quality of the sample. Stated slightly differently, the inquiry is whether extraordinary differences exist between, say, property and liability insurers or utility companies—who decided to appeal adverse indemnity and subrogation rulings—and similar litigants who decided not to appeal. To find the answer, a "test for similarities" between the two distributions of probit values or two equations was needed. At the bottom of Table 4, a Wald test for independent equations appears. The Chi-square value is not statistically significant. Consequently, it implies and only implies that the sample does not contain any significant self- or other-selection bias.

Again, reconsider the study's overriding question: whether courts of appeals—intentionally or unintentionally—allow legal and extrajudicial factors' independent, collective and simultaneous contributions to influence the outcomes of duty-to-indemnify disputes. The brief answer is yes. To illustrate, examine the probit values in Table 4 under the heading, Results of Litigation in State and Federal Appellate Courts. Twelve of the positive and negative probit values are statistically significant.

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[349] *See, e.g.*, Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 100 n.144 (2011) (reporting probit coefficients, t-statistics, standard errors, the marginal effects of independent and control predictors on individuals' likelihood of voting, and the representative indicators for the 1%, 5%, and 10% levels of statistical significance); *see also* Dettori, Norvell, & Chapman, *P-Value Worship: Is the Idol Significant?*, 9 GLOBAL SPINE 357–59 (May 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6542161/ [https://perma.cc/6MBH-KJ2C] (asserting that "[an almost] statistically significant p-value of .06 . . . supports a trend toward statistical significance [and is] . . . inappropriate and betrays a misunderstanding of the p-value").

To remain in any court proceeding and litigate the merits of a substantive dispute, plaintiffs must initially overcome various procedural defenses. Therefore, we begin our examination by focusing on the cluster of variables under the label, Liability Insurers' and Utilities' Defenses.

Once more, negative and statistically significant probit coefficients suggest: The predictors decrease plaintiffs-appellants' likelihood of winning procedurally or remaining in court. Therefore, consider the negative -.2641 and -.0565 probit coefficients. Respectively, they strongly indicate that plaintiffs-appellants are less likely to prevail procedurally when waiver-of-subrogation and coverage-exclusion defenses are raised. Additional support for this conclusion appears under the heading Procedural and Substantive Disputes. The negative -.3368 probit coefficient suggests: When compared to other procedural and substantive claims, stand-alone subrogation claims are statistically and substantially more likely to decrease plaintiffs' chances of prevailing in courts of appeals.

Moreover, we have learned that waiver-of-subrogation and exclusion clauses appear in various property, homeowners', and liability insurance contracts. Therefore, the three statistically significant and negative -.1592, -.1410, and -.0794 probit values—under the heading Types of Insurance Contracts—are not surprising. A commonsensical explanation of the findings is consistent with what other coefficients revealed: Certain exclusionary or limitation-of-liability clauses in various property and liability insurance contracts greatly decrease plaintiffs' likelihood of prevailing procedurally in subrogation and indemnification trials.

We also learned that the made whole doctrine, subrogation-immunity and waiver-of-subrogation defenses, as well as direct-action claims, have generated judicial splits involving insurance-related indemnification disputes. Three additional and unsurprising findings in Table 4 partially explain the splits. In particular, the positive .1834 value—under the heading, Appellate Courts' Locations—suggests: Southwestern courts of appeals—rather than courts in other regions—are statistically and substantially more likely to decide in favor of appellants. And the positive .0666 coefficient—under the heading Types of Appellate Jurisdictions—indicates that plaintiffs are exceedingly more likely to prevail in state appellate courts rather than in federal courts of appeals. On the other hand, the negative -.1177 value—under the same heading—implies: Plaintiffs are statistically and substantially less likely to win subrogation and indemnification disputes in the Seventh Circuit.

Reconsider the earlier discussion of the "simple" bivariate statistics in Table 3. We learned that subrogated property insurers—rather than other insurers—are statistically and significantly more likely to win subrogation and indemnification disputes. But, the bivariate statistics also suggest: 1) residential and commercial property owners' underlying negligence claims have no statistically significant effect on appellate courts' disposition of disputes; and 2) types of investors-owned utilities do not have any meaningful influence on appellate courts' decisions.

Now, examine the probit values in Table 4 and consider the multivariate effects of the same three predictors on the disposition of disputes. The

positive and multivariate probit value (.0540)—under the heading, Procedural and Substantive Disputes—suggests: when appellate courts' weigh insured homeowners' or commercial-property owners' underlying negligence claims, both subrogees and indemnitees are statistically and substantially more likely to prevail procedurally and/or on the merits. In addition, the positive .1488 multivariate coefficient—under the heading, Defendants of Records—indicates: when defendants are investors-owned electric and gas utility companies, subrogated property insurers and other plaintiffs are exceedingly more likely to win subrogation and duty-to-indemnify disputes in courts of appeals. And the last positive

.4106 multivariate coefficient in Table 4—under the heading, Plaintiffs of Records—supports the bivariate finding in Table 3: when compared to other classes of plaintiffs, subrogated property insurers are statistically and significantly more likely to win subrogation and indemnification disputes.

Debatably, the last three findings are the most enlightening and persuasive. But they suggest a bigger problem that all state legislatures should consider and resolve. Again, investors-owned utilities fashion tariffs which contain limitation-of-liability clauses.[350] In theory, courts construe ambiguous words and phrases in such provisions against utilities when determining whether injured customers have a right to file an ordinary-negligence action against a utility.[351] However, factually, only a few appellate courts have construed limitation-of-liability clauses against utilities and allowed customers to commence a negligence action.[352] On the other hand, both "liberal" and "conservative" supreme courts in extremely large and small states have construed ambiguous liability-limiting clauses and

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[350] David Pizzica, *The Filed Rate Doctrine*, SUBROGATION RECOVERY LAW BLOG, https://www.subrogationrecoverylawblog.com/2013/03/13/the-filed-rate-doctrine/ [https://perma.cc/APN5-CD6T] (last visited July 29, 2022) ("The filed rate doctrine . . . [or] the filed tariff doctrine . . . treats tariffs as a matter of contract . . . between [a] customer and [a] utility . . . . [Applying] the filed rate doctrine, courts have limited the liability of a public utility for simple negligence whose tariffs contain limitation of liability clauses.").

[351] *See* Uncle Joe's Inc. v. L.M. Berry & Co., 156 P.3d 1113, 1118 n.15 (Alaska 2007) (presenting a long list of state and federal appellate courts proclaiming that ambiguous tariffs must be construed against the utilities).

[352] *See, e.g.*, National Union Ins. Co. of Pittsburgh, Pa. v. Puget Sound Power & Light, 972 P.2d 481, 482 (Wash. Ct. App. 1999) (concluding that the tariff's limitation on liability did not block the subrogated insurer's negligence action, alleging that the electric utility's failure to provide backup service during a severe windstorm caused the insured's business-interruptions loss); Virginia Elec. & Power Co. v. Carolina Peanut Co., 186 F.2d 816, 820 (4th Cir. 1951) (rejecting the electric utility's tariff-exclusion defense and allowing the customer to sue the utility for negligently failing to shut off electricity which threatened the ratepayer's plant); Michigan Basic Property Ins. Ass'n v. Detroit Edison Co., 618 N.W.2d 32, 38–39 (Mich. Ct. App. 2000) (distinguishing Michigan Supreme Court's *Rinaldo* holding and concluding that the disclaimer-of-liability provision did not preclude plaintiffs' allegations that Edison negligently designed, installed, inspected, and maintained transmission equipment).

blocked customers' ordinary-negligence actions.[353]

Yet, the outlined multivariate analysis reveals: state and federal appellate courts are statistically and exceedingly more likely to allow injured customers' subrogated property insurers to file negligence actions against investors-owned electric, gas, energy, and water utilities.

Therefore, here is a question for state legislators and jurists: should the judicially created filed-rate or file-tariff doctrine be abrogated or modified—as it pertains to regulated utilities? Alternatively, should state legislatures prevent investors-owned utilities from adding arguably procedurally unconscionable and anti-consumers "negligence exclusion" provisions to utility tariffs?

VII. SUMMARY-CONCLUSION

Between 2000 and 2022, extreme weather, natural disasters, and investors-owned utilities' negligence concurrently caused widespread personal injuries, hundreds of deaths, and billions-of-dollars in property losses.[354] As time passed, some injured homeowners and small businesses sued the utilities.[355] However, arguably, the filed-tariff or filed-rate doctrine prevented the overwhelming majority of devastated homeowners and businesses from commencing ordinary- and gross-negligence actions against the utilities.[356]

Therefore, after natural disasters, homeowners and other insureds are forced to settle their property-loss claims under highly unfavorable conditions.[357] Some property insurers totally compensated utility customers

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[353] *See* Rinaldo's Const. Corp. v. Michigan Bell Telephone Co., 559 N.W.2d 647, 660 (Mich. 1997) (applying a tariff-procedural defense and preventing the customer from suing a telephone utility whose allegedly negligent installation and poor telephone service caused business-interruption losses); Waters v. Pacific Telephone Co., 523 P.2d 1161, 1197 (Cal. 1974) (enforcing the tariff's liability-limiting clause and preventing a customer's negligence action against a utility who allegedly failed to provide adequate telephone service); Brown v. United Water Delaware Inc., 3 A.3d 253, 254 (Del. 2010) (applying the filed-rate doctrine and blocking the homeowners' negligence action, alleging the water utility's failure to provide adequate water pressure prevented fire fighters from opening hydrants near the owners' fire-damaged house); Maryland Cas. Co. v. NSTAR Elec. Co., 30 N.E.3d 105, 107–09 (Mass. 2015) (applying the tariff's limitation-of-liability clause and blocking the subrogee-insurer's ordinary and gross negligence actions—alleging that the gas utility's poorly maintained building equipment and trained crew caused the gas explosion at MIT); Houston Lighting & Power Co. v. Auchan USA, Inc., 995 S.W.2d 668, 675 (Tex. 1999) (applying the filled rate doctrine and blocking a negligence action against an electric utility, who allegedly improperly designed an underground electrical vault that collapsed after a heavy rain storm flooded a fifty-story office tower).

[354] *See supra* note 99 and accompanying text.

[355] *Id.*

[356] *See supra* notes 141–48 and accompanying text.

[357] *Cf. The Eleven Worst Insurance Companies,* THE NAT'L L. REV (Feb. 10,

and property owners.[358] A majority of insurers, however, did not cover or only partially covered insureds' property losses.[359] More troublesome, following the massive losses, unapologetic property insurers increased the homeowners' and small businesses' insurance premiums.[360]

But, even more troublesome, after raising insurance premiums, hundreds of the same property insurers filed contractual subrogation actions against utility companies.[361] In fact, as of this writing, a group of 131 extremely profitable and sophisticated property insurers is suing the Electric Reliability Council of Texas (ERCOT) and approximately 40 energy companies. Arguing that they are contractual subrogees, the property insurers want Texas utilities and energy supplies to reimburse billions of dollars that the insurers paid to cover utility-caused losses during the 2021 *Winter Storm Uri*. Put simply, property insurers are filing subrogation actions to obtain greater profits and indemnification for the total appraised value of their partially compensated insureds' property-loss claims and uncompensated personal-injury claims.[362]

2021), https://www.natlawreview.com/article/11-worst-insurance-companies [https://perma.cc/XG89-Z2XF] (stressing that "the insurance industry in America makes a staggering one trillion dollars annually from premiums" and reporting that Allstate, AIG, State Farm, Farmers and Liberty Mutual rank among the very worse property insurers because they factually or allegedly engage numerous egregious and anti-consumer activities: (1) offering or compensating many injured claimants "far less than they deserved or nothing at all," (2) attempting to increase insurance premiums after a catastrophe, (3) altering engineers' property-damage reports after Hurricane Katrina as well as "forging signatures on earthquake waivers . . . to delay and deny claims," (4) training and incentivizing insurance adjusters to offer "lowball" payments to claimants, and (5) abandoning and refusing renewal to clients in high-risk areas which are "susceptible to hurricanes or floods"); Jarome Gautreaux, *What to Know About Insurance Claims After Natural Disasters in Georgia,* PERS. INJ. L. BLOG. (Sept. 19, 2017), https://www.gautreauxlawfirm.com/insurance-claims-after-natural-disasters/ [https://perma.cc/VBE2-WGWN] (emphasizing that property insurers search for "any loophole or vague terms . . . to limit or deny claims" and may only cover some personal injuries and/or property damage after "Acts of God").

[358] *See supra* notes 29–31 and accompanying text. *See also* Mitch Galloway, *Dairy Death Devastation: The Butlers Mourn the Loss of 100 Cows Due to Windstorm,* MICH. FARM NEWS, Jan. 11, 2022 (reporting that property insurance covered only a part of a claim after category-one-hurricane winds caused a utility pole to fall on a barn—sending electricity through the walls and electrocuting cattle), https://www.michiganfarmnews.com/dairy-death-devastation-the-butlers-mourn-the-loss-of-100-cows-due-to-windstorm [https://perma.cc/43R2-ZGX7] (last visited June 24, 2022).

[359] *See supra* note 29.

[360] *See supra* note 30 and accompanying text.

[361] *See supra* note 46, at ¶ 10.

[362] *Cf.* In re Katrina Canal Breaches Consol. Litigation, 263 F.R.D. 340, 356 (E.D. La. 2009) ("[T]he court received expert testimony and documentary evidence establishing that the total tort claims for property damage reach $19 billion. This estimate does not include those claims for personal injury and wrongful

To be sure, many investor-owned utilities' actions and inactions are equally objectionable after severe weather and natural disasters occur. Prolonged outages, poorly maintained equipment, compromised infrastructure, or utility-triggered perils contribute to ratepayers' property losses and personal injuries.[363]

Even more questionable, many equally unapologetically investors-owned utilities asked public utility commissions (PUC) to raise consumers' rates—ostensibly to ensure that bondholders receive a "reasonable rate of return on equity."[364] On numerous occasions, PUCs approved the substantial increases—which forced some ratepayers to file "price gouging" regulatory complaints and lawsuits.[365]

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death/survival."); Instant Replay Sports, Inc. v. Allstate Ins. Co., 104 So.3d 419, 420 (La. 2012) (insureds' alleging that the property insurer failed to pay for hurricane-related personal injury within 30 days of a settlement agreement).

[363] *See supra* notes 46, at ¶135, ¶138, ¶147.

[364] *See, e.g.*, Southwest Gas Corp. v. Pub. Utilities Comm'n. of Nev., 504 P.3d 503, 512 (Nev. 2022) (rejecting the gas utility's "arbitrary and capricious" complaint and stressing that the PUC selected a reasonable *return on equity* between 9.10% and 9.70%); State ex rel. Utilities Comm'n v. Cooper, 739 S.E.2d 541, 548 (N.C. 2013) (overturning Duke Energy's rate hike and stressing that the PUC must take customers' interests into account when selecting a return on equity); Thomas Elias, *Customers Pay Tab For Utility Negligence*, DAILY REPUBLIC, (Apr. 21, 2022), https://www.dailyrepublic.com/all-dr-news/opinion/state-nationalcolumnists/%e2%80%a8%e2%80%a8customers-pay-tab-for-utility-negligence/ [https://perma.cc/XFS6-XKFJ] (stressing that utilities' profits are based in part on a "reasonable rate of return"—11.35 percent—and the PUC focuses primarily on "keeping the utilities profitable" rather than stopping utilities from ripping of captive customers).

[365] *See* Michelle Lewis, *An Arizona Utility Just Lost In Appeals Court For Price Gouging Rooftop Solar Customers*, ELECTREK (Feb. 1, 2020), https://electrek.co/2022/02/01/an-arizona-utility-just-lost-in-appealscourt-for-price-gouging-rooftop-solar-customers/ [https://perma.cc/3J2P-ZCVS] (referencing Ellis v. Salt River Project, 224 F.4th 1262, 1278 (9th Cir. 2022)); Shannon Handy, *Rancho Bernardo Man Who Sued SDG&E Over High Bills Appears in Court*, CBS8 NEWS (Apr. 28, 2022), high-bills-appears-court/509-4babd96d-fd60-4fc9-8284-47e5196ef3fc [https://perma.cc/A3XV-REPG] (reporting that college professor sued San Diego Gas & Electric after his utility rates "skyrocketed"—raising price-gouging and emotional distress claims) https://www.cbs8.com/article/money/amped/rancho-bernardo-man-sued-sdge-over-high-bills-appears-court/509-4babd96d-fd60-4fc9-8284-47e5196ef3fc [https://perma.cc/7XB7-4GAV]; Karlee Weinmann, *CenterPoint boosts CEO Pay to $37.8 Million, Blowing Past Other Utilities*, ENERGY & POL'Y INST. (Apr. 19, 2022), https://www.energyandpolicy.org/centerpoint-raises-ceo-pay/ [https://perma.cc/6JBP-PG36] (reporting that ratepayer advocates raised concerns about a Minnesota utility's rate hike and an allegedly "price gouging" energy company that rated during the deadly 2021 Winter Storm Uri); and Robert Walton, *"Anecdotal Evidence" Points to Price Gouging During Winter Storm Uri, NERC Official Says*, UTIL. DIVE, (Dec. 22, 2021), https://during-winter-storm-uri-nerc/616463/www.utilitydive.com/news/anecdotal-evidence-points-to-

Barring very few exceptions,[366] state supreme courts embrace and apply the common-law, anti-subrogation rule: property insurers may not file indemnification lawsuits against their insureds—attempting to recoup funds that were spent to cover the insureds' property losses.[367] But, a dated and controversial anti-subrogation question has reappeared: whether state legislatures should fashion anti-subrogation statutes to prevent property insurers from bringing subrogation actions against utility companies and their liability insurers.[368]

The author's empirical study reveals: an overwhelming majority of state

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pricegouging-during-winter-storm-uri-nerc/616463/ [https://perma.cc/TCZ7-V3QR]
(reporting that "anecdotal evidence" exist of utilities' and natural-gas suppliers' price gouging in Texas during Winter Storm Uri").

[366] *Compare* Benge v. State Farm Mut. Auto. Ins. Co., 697 N.E.2d 914, 918 (Ill. App. Ct. 1998), *appeal denied*, 179 Ill. 2d 576 (1998) (declaring that the anti-subrogation rule applies only when co-insureds share coverage under the same insurance contract), *with* Control Specialists Co. v. State Farm. Mut. Auto. Ins. Co., 228 Neb. 642, 423 N.W.2d 775, 776–77 (Neb. 1988) (concluding that the rule applies to any situation when an insurer covers two insureds and the latter have separate or unrelated insurance contracts).

[367] James v. State Farm Mut. Auto. Ins. Co., 929 N.W.2d 541, 543 (S.D. 2019) ("[T]he anti-subrogation rule is widely recognized."); *see also* N. Star Reinsurance Corp. v. Cont'l Ins. Co., 624 N.E.2d 647, 653–54 (N.Y.1993); 1700 Lincoln Ltd. v. Denver Marble & Tile Co., 741 P.2d 1270, 1271 (Colo. App.1987).

[368] *See, e.g.*, Gary L. Wickert, *It Is Time To Raise Premiums In Anti-Subrogation States*, MWL SUBROGATION NEWSL. (Oct. 12, 2013), www.mwl-law.com/wp-content/uploads/2013/04/OCT12-NEWSLETTER.pd [https://perma.cc/B8BJ-5UFW] ("Sadly, despite its many benefits, subrogation has been under *attack by uninformed judges and lawmakers* — on both sides of the aisle—across the country . . . . States such as Pennsylvania and New York continually propose legislative bills banning subrogation outright . . . . *It is time to fight back* . . . . Protecting the right of subrogation and its many benefits actually protects our insureds and our customers.") (emphasis added); *AIA Applauds Rejection of South Dakota Anti-Subrogation Measure*, TARGETED NEWS SERV. Feb. 25, 2011 (reporting that the American Insurance Association applauded the state's judiciary committee's rejecting anti-subrogation legislation that would have prevented insurers' timely recovering funds from liable parties and *unfairly and unnecessarily increased insurance costs* for South Dakotans.) (emphasis added); Daran Kiefer, *Understanding Anti-Subrogation Legislation Trends*, CLM MAG. (May 11, 2011), https://www.theclm.org/Magazine/articles/understanding-anti-subrogation-legislation-trends/302 [https://perma.cc/M2P6-NPCW] (arguing that anti-subrogation legislation is designed to codify the made-whole doctrine—leaving terms open for a court's interpretation, eliminating subrogation rights and effectively reducing the insurance companies' subrogation-recovery dollars); Daran Kiefer, *Anti-Subro Laws*, CLM MAG. (May 21, 2010), https://www.theclm.org/Magazine/Home/Editions/13 [https://perma.cc/92C8-SCA5] ("Subrogation has been around for nearly 2,000 years and . . . a legal right for insurers for hundreds of years . . . [However, it] has been under increasing attack since 2000 . . . [Opponents have proposed a flurry of anti-subrogation statutes, which would] reduce, restrict or eliminate subrogation recoveries across all lines of business.").

and federal courts apply the make-whole doctrine and allow subrogated property insurers to commence negligence and gross-negligence actions against utilities—which allegedly destroy owners' property or person. Furthermore, the investigation reveals that subrogated property insurers are statistically and significantly more likely to win indemnification disputes than any other class of litigants. Yet, a majority of property insurers do not indemnify or only partially indemnify their insureds, who file weather- and utility-related property-damage and personal-injury claims.[369] And, to repeat, both insurers and utilities raised property owners' rates and premiums after natural disasters.[370]

Certainly, a few states have enacted or updated anti-subrogation statutes in recent years.[371] But, those statutes are not insurance-specific statutes. Moreover, they do not address utility customers' major concern about "paying twice"—after utility companies' negligence damages customers' property or persons and after the customers' insurers become subrogees and raise insurance premiums. Perhaps, the best explanation of utility consumers' concern appears in Weinberg—which the New Jersey Supreme penned thirty-five years ago:

> [T]he legislature has expressly barred subrogation claims in suits against public entities—[recognizing] that profit-making insurance companies are . . . better [positioned] to withstand losses . . . than already economically burdened public entities . . . . [Predominantly, customers pay water utilities'] operating costs . . . . [Carriers promise to pay losses if a utility's negligent failure to maintain adequate water pressure causes a fire] . . . . [I]mposing subrogation-claim liability on water companies . . . [would] shift the risk from the fire-insurance company to the water company, and, ultimately, to the consumer in the form of increased water rates. Thus, the consumer would pay twice—first for property insurance premiums, and then in the form of higher

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[369] *See supra* notes 29–30 and accompanying text.

[370] *See supra* notes 29–31 and accompanying text.

[371] *Cf. Anti-Subrogation States –Defeating a Lien Before it Exists* GOMASSIVE (July 11, 2017), https://gomassive.com/anti-subrogation-states-defeating-a-lien-before-it-exists/ [https://perma.cc/L7KT-3RMT] (identifying the states that have enacted anti-subrogation statutes involving health, auto, disability or workers' compensation insurance: Arizona, Connecticut, Kansas, Missouri, New Jersey, New York, North Carolina). *See also* Summerlin v. Ga.-Pac. Life, Health and Acc. Plan, 366 F. Supp. 2d 1203, 1208–09 (M.D. Ga. 2005) (determining the enforceability of Georgia's anti-subrogation statute); Humana Health Plans, Inc. v. Powell, 603 F. Supp. 2d 956, 958 (W.D. Ky. 2009) (observing that Kentucky's anti-subrogation statute was not enacted strictly for the insurance industry); Ill. Farmers Ins. Co. v. Schmuckler, 603 N.W.2d 138, 141 (Minn. Ct. App. 1999) (interpreting the Minnesota's anti-subrogation statute); FMC Corp. v. Holliday, 498 U.S. 52, 65 (1990) (declaring rights and exclusions under Pennsylvania's anti-subrogation statute).

> water rates to fund the cost of the water company's liability insurance. We find this result contrary to public policy . . . . [Thus,] we hold that the carrier's subrogation claims are unenforceable against the water company[—which would be essentially] a second cost [for] the consumer.[372]

Finally, as discussed earlier, utility tariffs contain liability-limitation clauses which prevent subrogated insurers from filing negligence actions against utilities and/or their liability insurers.[373] Yet, some state courts allow the negligence-based lawsuits, and some federal courts do not. Thus, another equally important question is generating a heated debate between investors-owned utilities investors and their critics: whether state legislatures should abrogate or amend the judicially created filed-rate or filed-tariff doctrine and allow dissatisfied utility customers to commence ordinary- and gross-negligence actions directly against utilities?

Again, an empirical study reveals: courts generally allow subrogated property insurers to commence negligence actions against investors-owned utilities. But, even more importantly, the study shows: When controlling for the simultaneous and multiple effects of numerous legal and extralegal factors, subrogated property insurers win statistically and significantly an overwhelming majority of negligence-based indemnification cases against utilities generally and against electric utilities specifically. Should utility customers have the same right to commence negligence-based, duty-to-indemnify actions directly against utilities? Given a century of allowing customers and third parties to file negligent-maintenance actions against utility companies, supreme courts in both politically "conservative" and "liberal" states are likely to say yes.[374]

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373 *See supra* notes 141–48 and accompanying text.

374 *See List of Blue States and Red States In U.S.—2023 Update*, GK GIGS (last updated Jan. 2, 2023), https://www.gkgigs.com/list-of-blue-states-and-red-states/ [https://perma.cc/4EK6-6SZA] (providing a detailed listing of states and explaining that the terms "Red" or "Blue" have been expanded to differentiate between perceived "conservative" and "liberal" states—respectively—in the lexicon of American journalism); *see also* Lowman v. Wilbur, 309 P.3d 387, 391 (Wash. 2013) (reaffirming the principle that utilities are liable for negligently maintaining utility poles and infrastructures that cause personal injuries); McCleery v. Consol. Edison of N. Y., Inc., 11 N.Y.3d 778, 779 (N.Y.S.2d, 2008) (New York Court of Appeals' allowing a worker to commence a negligence action against the utility for allegedly crushing the worker's foot); Scanlon v. Conn. Light and Power Co., 782 A.2d 87, 96 (Conn. 2001) (agreeing that the utility's negligent installation and maintenance of certain electrical equipment and high voltage injured the plaintiffs' dairy herd); Harris v. Northwest Nat. Gas Co., 588 P.2d 18, 23 (Or. 1978) (allowing a homeowner to file a failure-to-warn, negligence action alleging that the utility); Gelinas v. New England Power Co., 268 N.E.2d 336, 339 (Mass. 1971) (concluding that the electric power company had a duty to exercise ordinary prudence and care when maintaining and using of its power lines); Wood v. Pub. Serv. Co. of N. H., 317 A.2d 576, 577 (N.H. 1974)

(reaffirming that an electric utility has an ordinary duty to construct and maintain power lines in a reasonable manner); Gerberich v. Southern Calif. Edison Co., 53 P.2d 948, 951 (Cal.2d, 1935) (reaffirming that an electric utility is liable for negligently installing a pole too close highways); Traxler v. Entergy Gulf States, Inc., 376 S.W.3d 742, 751–52 (Tex. 2012) (declaring that the utility company had a duty to protect employees from the risks associated with high voltage lines); Iglehart v. Bd. of Cnty. Comm'rs of Rogers Cnty., 60 P.3d 497, 502 (Okla. 2003) (declaring that a utility company has a duty to remove tree hazards along adjoining roads for the benefit of motorists); Gunnell v. Arizona Pub. Serv. Co., 46 P.3d 399, 401 (Ariz. 2002) (permitting an injured excavator to commence a negligence per se action against an electric utility for failing to identify and mark hidden powers lines); Hebert v. Gulf States Utilities Co., 426 So.2d 111, 114 (La.1983) (allowing an ordinary negligence action and declaring that electric transmission companies must "exercise the utmost care to reduce hazards to life as far as practicable" and guard against perilous situations which can be reasonably expected or contemplated); Hetrick v. Marion–Rsrv. Power Co., 48 N.E.2d 103, 107 (Ohio 1943) (embracing the principle that an electric utility must exercise the highest degree of care when constructing, maintaining and inspecting its equipment); and Escambia County Elec. Light & Power Co. v. Sutherland, 55 So. 83, 91 (Fla. 1911) (allowing a negligence action and stressing that electric company has "an obligation to do exercise reasonable care, vigilance and foresight—which are consistent practical plant operations—to protect its customers from harm).