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Comparative Analysis of European Union and United States Insurance Law Systems – With Emphasis on Consumer Protection Law

Very little vigorous, scholarly comparison has been made between the insurance law systems of the European Union and the United States. This oversight is likely due to the industry players, i.e. insurance companies, on both sides of the Atlantic already knowing their own markets extremely well, and not having an interest in revealing the competitive landscape to outsiders. However, insurance law scholars are naturally interested in the wisdoms which can be gained through comparative analysis, and governmental architects of state legal structures will be interested in any useful revelations these comparisons can bring, so they may take new ideas back to the legislative drafting board, and ultimately improve or discard the regulations which are not working as well as they had hoped. As the U.S. Chamber of Commerce wrote, 'the most useful product of comparison is often the questions it causes one to ask about one's own [insurance] system which, until after comparison, tends to seem a part of the natural order of things.'[1]

Perhaps another reason a useful comparative analysis has not been made is that it is a massive undertaking. Until relatively recently, simply accessing the laws of foreign countries was incredibly difficult, and even then, the English-speaking scholar was faced with steep language barriers. Of course, the United States and the United Kingdom share a language, but they also share legal systems of the same roots, so this tends to make comparisons of their legal systems slightly less revealing. However, comparisons of the relatively new European Union legal structure and its member states (which are based in civil law systems) with the legal framework of the United States will reveal significantly contrasting procedures – and more importantly for the consumer, vastly different regulatory results.

Taken one step further, we also find a chasm of comparative studies specifically focused on insurance consumers. As well-known EU insurance law scholar and professor Helmut Heiss explains, while the modern concept of insurance has its origins in commercial activity (meaning, insurance provided for businesses and corporations) – today, statistics show that the premium income of insurers in non-commercial insurance equals or outweighs the premium income of commercial insurance.[2] 'Insurance can no longer be characterized as a solely or even just predominantly commercial transaction.'[3] In the United States, 75% of the insurance market is consumer-oriented.[4]

The lack of consumer-based studies is also partly due to the various nature of the world's legislative systems. For example, on one end of the spectrum of consumer protection we have the Netherlands, where consumer input is mandatory and channels exist which allow it to flow directly to government officials.[5] However, this is not historically typical for the European Union.[6] A recent study of insurance consumer protection by the University of St. Gallen, Switzerland discovered that 'those at the center of … the discussions' – the consumers – 'have hardly been asked or analyzed yet'.[7]

In the United States, the government receives the vast majority of its insurance market information from insurance industry insiders and their economic lobbyists. When American consumer advocacy groups do manage to be heard, such as when successfully aiding in the drafting of model consumer protection legislation, there are still no guarantees that drafted legislation will actually be adopted. Then, if the legislation *is* adopted, enforcement is rare. We will outline adoption and enforcement rates in the United States. Unfortunately, despite all the efforts of consumer advocates, by the time legislation has trickled down to the consumers, they rarely feel any

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1. Spencer L. Kimball & Werner Pfennigstorf, *The Regulation of Insurance Companies in the United States and the European Communities: A Comparative Study*, p. 98; International Insurance Advisory Council Chamber of Commerce of the United States, 1981.
2. Leaving reinsurance aside.; *Insurance Contract Law between Business Law and Consumer Protection*, 'General Report', Helmut Heiss, p. 38; Helmut Heiss, editor, Dike Zurich 2012.
3. *Id.*
4. *Insurance Contract Law between Business Law and Consumer Protection*, 'USA', Jeffrey Thomas, p. 375; Helmut Heiss, editor, Dike Zurich 2012.
5. The Government of the Netherlands includes an economic advisory panel with three branches: Employer, Employee Unions, Academics/Experts.
6. Although efforts are being made at the EU level to increase consumer participation through a mandatory increase of stakeholder participation – stakeholders being the companies, organizations, and consumers who will be affected by potential legislation.
7. Dr. Thomas Loesler, *Insurance Europe Annual Report 2016-2017*, p. 17, https://www.insuranceeurope.eu/annual-report-2016-2017.

substantial protective effects at all.[8] This will be addressed more fully in later sections.

History: From Mutuals to Corporate Shareholders

Before we delve into the idiosyncrasies of world legal systems, the history of the concept of insurance is worth some exploration. Insurance today is quite different than it was during during its infancy over a millennium ago.[9]

Insurance was originally a fund held by the leaders of a town or a community and used only to help townspeople who were struck by unpredictable bad luck – such as an untimely death of a primary breadwinner, the destruction of their home by a natural disaster, unexpected theft, or the loss of livestock.[10] Insurance funds which are pooled and solely held for the use of the insureds are called 'mutuals'.

In ancient Greece and Rome there were mutual associations formed to provide benefits for the burial of the poor or to provide special benefits for military expenses.[11]

When mutual insurance funds held by community leaders were not used because the anticipated misfortune had not occurred, leaders began to employ the funds as a source of finance for the municipalities – bringing them closer to the modern concept of insurance in which the corporations hold the funds, now called the float, until the insureds make a claim, but simultaneously invest the float for their own benefit.

The origins of commercial insurance date back to 14th Century Italy. The first known commercial insurance contract was written in 1343 in Genoa, to insure sea cargo.[12] The first insurance policies trace back to Palermo in 1350, and the first insurance laws were developed in the mid to late 1300's in Genoa and Florence.[13] Life insurance was first recorded in 1399, in Barcelona.[14]

The United Kingdom created its own life insurance and fire insurance during the late 1500's to late 1600's. In 1688, the now-famous Lloyd's insurance exchange was born in London when captains, shipowners, and merchants began regularly meeting at Lloyd's coffeehouse to negotiate insurance contracts for sea cargo. Also during the 17th century, insurance branched out from its municipal origins and merchants began to underwrite business endeavors on local stock exchanges.

It wasn't until the 18th century that the modern concept of insurance as a profit-driven, corporate enterprise was born. The first formal regulation of the insurance industry in the United States wasn't established until 1851, and rates would not be standardized until 1866.[15]

Mutuals

Mutuals began flourishing in the late 1600's,[16] and continued to be dominant up to the onset of the modern, corporate shareholder-driven concept of insurance in the 18th century. While today the corporate shareholder insurance model dominates nearly every insurance economy around the world, mutuals are still quite common in the European Union, and even experienced a recent boom.

In 2007 the EU insurance market was composed of just over 24% mutuals and cooperatives. This increased to 31% by the year 2015.[17] A 2018 report by European Union based organizations AMICE (Association for Mutual Insurers and Insurer Cooperatives in Europe) and ICMIF (Mutual Insurance Federation) explains that while mutuals were beginning to be viewed as anachronous when the market was becoming more dominated by shareholder-driven insurance models, the global economic recession of the years 2007-2009 caused a shift back to the trusted, time-tested, quality format of mutual insurance.[18]

In the United States, the first insurance company was a mutual established even before the Declaration of Independence was signed.[19] Less than twenty years later, Benjamin Franklin would co-found a mutual society called the Philadelphia Contributionship for the Insurance of Houses from Loss by Fire. Mutuals dominated

8. American consumers are largely unaware there is any insurance law at all, much less that any of it may help them protect their own legal rights. For reasons which will be explained – even when American consumers *are* aware of regulations or judicial principles which may protect them, they are surprised and dismayed to find that solutions available are either grossly inadequate or too expensive to present a viable course of action – or both. A similar lack of awareness of insurance law has been reported in the European Union, although the level of protection in many EU states tends to be much higher.
9. Research tentatively suggests that insurance, in a mutual form, existed during the times of Confucius (551 B.C. to 479 B.C.) and Mencius (372 B.C. to 289 B.C.). Z. Kang, *Assurances modern en Chine: Une continuité interrompue (1801-1949)*; *Risques*, 31 (1997), pp.103-120, at 103; Ancient Phoenician merchants reduced their shipping risks by dividing cargoes and placing them on different ships, and the 4th Century B.C. Greeks loaned money tied to ships and their cargoes, only to be paid back when the ships arrived safely at their destinations – if the ship was lost, the debt was forgiven. Abraham, Kenneth S., *Insurance Law and Regulation: Cases and Materials*, 4th Edition (2005), p. 1.
10. Karel W. Brevet, *The Netherlands*, in Association Internationale de droit des Assurances Insurance Law Supplement 8 (Jan 1996), p. 27 (Kluwer Law International, 1995).
11. *The Fascinating History of Insurance: Posters, Books, Fire Marks and Policies/L'Affascinante storia dell'assicurazione: Manifesti, libri, targhe, polizze*, Fondazione Mansutti, p. 13 (2015).
12. *Id*, p. 15.
13. *Id*, p. 21, 19.
14. For the lives of free persons. Slaves had been insured as sea cargo for many years before. *Documents on the History of Insurance/Quaderni di Sicurtá*, editor Marina Bonomelli, Fondazione Mansutti, p. 22 (2011).
15. *The Insurance Fact Book 2016*, Insurance Information Institute, p. 213 (2016).
16. There are records of German mutual fire insurance funds in Hamburg in 1676, and several British mutual funds in the 1600s and 1700s. Bonomelli, *supra* note 14, p. 23-24.
17. Market percentages indicate overall market share. *Facts and Figures: Mutual and Cooperative Insurance in Europe, Vol. 2*, AMICE aisbl for Mutual Benefit and International Cooperative & Mutual Insurance Federation (ICMIF), p. 2, May 2018.
18. *Id*.
19. The Friendly Society, established 1735.

the American insurance landscape for approximately one hundred years, and continued to flourish for nearly another hundred.[20]

However, in the United States today, mutuals are declining to the brink of disappearance. A cursory review of publicly-available data seems to indicate that the U.S. mutual market continues to thrive, and even leads the world in market share. This is wildly misleading. Exact statistics vary, but the ICMIF cites a 37% market share for mutuals in North America, and the National Association of Mutual Insurance Companies (NAMIC) indicates that the U.S. percentage of mutuals is approximately 50%.[21] These figures point to the U.S. containing *more* mutuals than Europe (at 31%).[22]

These U.S. statistics are not directly comparable to those of the EU, because NAMIC's definition of 'mutual' includes legal entities which are not considered mutuals in the European Union[23] – namely: (1) 'mutual holding companies' which were previously mutuals but have been converted into stock (shareholder-held) insurance companies in which the policyholders become voting members of the stock company, and (2) mutuals which hold 'downstream holding companies or wholly owned insurance subsidiaries' which have shareholders and are managed for capital gain.[24] Including these two 'forms' of mutuals is problematic, because the introduction of shareholders to the insurance transaction introduces a conflict of interest which a mutual insurance company does not inherently have. Adding a profit motivation completely alters the structure and operations of the company. The conflict of interest is detailed further under the heading 'Today: Corporate Shareholders'.

For comparative statistics between the EU and U.S. to be useful, the definition of 'mutual' must have a more direct correlation. A U.S.-based insurance consumer organization called ValChoice compiled statistics for the auto insurance industry, defining 'mutual' as a mutual insurance company that pays dividends to its policyholders.[25] They found the true market share of U.S. mutual auto insurers to be 7.9%.[26] When compared to the NAMIC's estimate of 50% market share for auto mutual insurance, this shows a marked and significant difference.

Insolvencies

The slow conversion of insurance from the small, community-based mutual format to the current corporate structures was not a smooth one. The primary difficulty, as insurance organizations continued to grow, was the frequent bankruptcies – called insolvencies in the insurance industry – of new, inexperienced insurance companies.

As insurance transactions grew beyond the individual coverages provided for singular merchants or ships in early Italy and at Lloyd's coffeehouse, and beyond the small community-based mutuals, the progressively larger organizations began to take on thousands of risks at a time, and soon found themselves in a more complicated and precarious financial position. For example, an organization which agrees to insure a large group of homes against fire, all located in the same city, has taken on the risk that the city has a large fire that destroys every one of the homes at once. And naturally, this did happen throughout history, and more than once.[27]

When an insurers risk portfolio is not diversified, they are vulnerable to receiving too many claims at once, and may not have the ability to pay every claim in full – leading to insolvency. Numerous fire insurance mutuals and corporate-driven insurance companies fell to this vulnerability throughout the 18th and 19th centuries. Insolvencies were further more likely because new entrants to the insurance market would price their products low in order to gain market share, and then not have enough float to pay for the claims – particularly the claims which were not diversified by location or type, as in the example above.

Insurance company executives were aware that underpricing was causing the market to be unstable and making it impossible for even the reputable companies to make reliable profit, because they were forced to compete with the under-pricing of coverages. Therefore, in the 1880s the fire insurance sector established several locally-based cartels with the aim to curb competition and maintain high premiums. Their cooperative efforts were successful, and by the time of the great fires of Baltimore in 1904 and San Francisco in 1906, only a few insurance companies were unable to pay claims and went bankrupt.[28] Since

20. Bainbridge, John, *Biography of an Idea: The Story of Mutual Fire and Casualty Insurance*, Doubleday & Company, Inc., p. 21 (1952).
21. This is an estimated figure from publicly-available data – the NAMIC attributes 40% of the property/casualty market, 60% of the homeowner's market, and 50% of the auto insurance market to mutuals. *The Mutual Factor: How Performance, Structure, and Focus Sets Mutual Insurance Companies Apart*, Hartwig, Robert and Alldredge, Neil, p. 1; National Association of Mutual Insurance Companies 2018.
22. ICMIF *Global Mutual and Cooperative Infographic* 2017, https://www.icmif.org/publications/infographics/global-mutual-and-cooperative-market-infographic-2017.
23. For definitions of what AMICE considers a 'mutual' in the EU, consult *Mutual Insurance in Figures: Executive summary from the 2007 study produced by AMICE's predecessor association, AISAM*, Association of Mutual Insurers and Insurance Cooperatives in Europe aisbl, p. 19-20 (2007).
24. *Focus on the Future: Options for the Mutual Insurance Company*, NAMIC, https://www.namic.org/policy/futureMutualAlts.
25. While not all mutual insurance companies pay dividends to policyholders, this is a helpful statistic for consumers who are searching for an insurer which truly has their best interests at heart, as the insurer is issuing profits back to the policyholders rather than reinvesting them – or, like a shareholder-driven insurer, sending the profits to the shareholders.
26. *Market Report: Lack of Transparency Cost Consumers $101 Billion for Car Insurance: State of the Auto Industry*, ValChoice, LLC 2016, p. 2; ValChoice: *The Type of Car Insurer That Delays and Denies Insurance Claims*, Dan Karr, September 17, 2017, https://www.valchoice.com/consumer-insurance-information/delay-deny-insurance-claims/#_edn1.
27. In the American insurance landscape, the fires in Chicago in 1871 and in Boston in 1872 put a total of 100 insurance companies out of business; Dalit Baranoff, *A Policy of Cooperation: The Cartelisation of American Fire Insurance, 1873-1906*, Financial History Review 119-136, 119 (2003).
28. *The Fascinating History of Insurance*, *supra* note 11, p. 39.

then, insolvencies have been relatively uncommon, barring a rash of insolvencies in the U.S. in the 1960's and 1980's, which were quickly addressed by modern governmental structures created to monitor rates and prevent future insolvencies.

Cartels and Collusion

The formation of cartels in the 19th Century brought a host of other market problems. The insurance industry was banding together to set their own rates, and in the case of fire insurance, the process was quite unscientific.[29] Rate-setting boards began throttling competition amongst insurance agents and fining and expelling members who undercut their rates. Local boards also began using their collective strength to lobby the government for industry-friendly legislation.[30]

In the 1880's, U.S. policyholders complained about the large rate increases and the greed of insurance companies. This marked a sudden shift away from the previously prevailing concerns about devastating insolvencies, toward an awareness that insurance rates had quickly spiked to what consumers considered 'excessive' and 'needlessly high.'[31] The Kansas City Board of Trade insisted on tough state regulation, and suggested 'an anti-compact law' or a switch to 'German municipal insurance, or businessmen's or private dwelling owners' mutuals, anything to improve the all-embracing plight of property holders.' They also demanded a full-scale investigation of the industry.[32]

These early demands by Americans for a return to the 'mutual' model of insurance prompt an important question – is the modern, corporate-structured and profit-driven model of insurance so deeply flawed that it can never yield equitable results for policyholders? Robin Pearson, Professor of Economic History at the Hull University Business School in the UK, tackles this question in *The Development of International Insurance*:[33]

> [I]nsurance is a business based entirely on trust and expectation. Money is handed over in return for a promise to pay back a larger sum in the future, contingent upon the occurrence of an uncertain event, or in one unique case – death – contingent upon a certain event occurring at an uncertain point in time. In the case of whole-term life assurance, for example, the insured by definition will not be around to ensure that his or her claim is paid. Trust in the individual or institution selling the insurance product therefore has to run deep. The purchaser has to have confidence that the product is fairly priced – a much more complicated problem than the pricing of most commodities… Why, therefore, should such a business ever take place beyond the boundaries of local communities or outside close-knit groups characterized by high levels of transparency and reputational knowledge?

The answer to Pearson's query (which he answers himself), is that in many cases, insurance *must* operate on a larger stage than the local community level, due to the inability of small groups to diversify risk broadly enough to avoid wholesale insurer bankruptcies such as the widespread, devastating insolvencies that plagued the insurance industry in the late 1800's and early 20th century. In both the United States and Europe, governments attempt to prevent the disappointment of consumers' expectations through the regulation of insurers' financial holdings and pricing structures, which we will address in the following sections.

Today: Corporate Shareholders

Today insurance is run primarily under the large-scale, cross-community, profit-motivated corporate shareholder format. Insureds from various communities around their country – or even from around the world – pay premiums to the insurance corporation, and the corporation uses profits (after claims payouts) to pay dividends to shareholders. The higher an insurance company's profit margin, the more money that goes to the company executives and the shareholders. This modern incentive structure has altered the original social insurance concept beyond recognition – no longer is an insurance collective created and maintained only for the greater good of the community. The corporate shareholder model also creates a troubling conflict of interest within the insurance corporation, and with it, a continuous supply of chances for insurers to act opportunistically.

When corporations act opportunistically, they promote the company's welfare by taking advantage of the trust being extended to them by the individual policyholder.[34] An insurance company is a more financially and politically powerful player than the insureds, and it possesses superior knowledge both during the point of the policy sale and at the time the insurance claim is filed. Because a long period of time lapses between the time of sale and the filing of a claim, there are further occasions for the insurance company to engage in opportunism by changing the coverages, cancelling the policy, increasing premiums beyond the insured's ability to pay, or many other strategies which ultimately increase the insurer's profit and deny the policyholder their full contractual benefits.

Internally, modern corporate insurers confront a constant push and pull between allocating insurance company monies to pay valid claims, or, converting those monies to profits for executives and shareholders. This creates a serious conflict of interest - a conflict which ultimately leaves insurers facing the ideological choice between fully honoring their contracts with their policyholders and maintaining a relationship of trust – or – depriving the policyholders out of some, or all, of their benefits so the company's profit margin grows larger.

29. Actuarial science was not yet developed, and had only appeared, in early stages, in life insurance; Baranoff, *supra* note 27, p. 119-136, 129.
30. Baranoff, *supra* note 27, p. 129, 132.
31. Roger H. Grant, *Insurance Reform: Consumer Action in the Progressive Era*, The Iowa State University Press, p. 76 (1979).
32. *Id.* at p. 78, quoting *The Kansas City Times*.
33. Robin Pearson, *The Development of International Insurance*, Pickering & Chatto Publishers Ltd., p. 1 (2010).
34. Definition of 'opportunism' applied from: David C. Rose, *The Moral Foundation of Economic Behavior*, Oxford University Press, p. 21 (2011).

This conflict of interest has created an incredible motivation for corporate insurers to reject valid claims, and results in a great deal of unfair claims adjusting within the companies' claims administrations. So much, in fact, that about 60 years ago in the United States, an entirely new field of law was created to address these unfair behaviors[35] – insurance bad faith law.[36] In other jurisdictions, insurance bad faith is addressed more effectively by regulations which are proactively enforced by the government authorities, pre-violation, i.e. preventing the unfair behavior from occurring at all.[37] Therefore, far fewer instances of bad faith arise.

Between the inherent opportunism available to the insurer in the insurer-insured contractual relationship and the conflict of interest which is rooted deeply into the corporate insurance structure, it is highly unlikely that an unregulated insurance market could produce optimal results for an economically healthy society.[38] In fact, what we can observe in the history of insurance demonstrates exactly the opposite. Regulation is absolutely necessary for a healthy, productive insurance market and a wealthier society.

Comparative Statistics for Insurance Markets

Let us analyze the capital success of the modern, for-profit insurance model. In the United States, *more than half of all U.S. bank-held assets belong to insurance companies.* As of the end of 2012, the Life/Health and Property/Casualty insurance industries held $7.3 trillion in total assets.[39] When one industry is in control of half of a country's banking assets, that industry most definitely has earned heightened scrutiny from regulators and academics.[40] Besides the potential impact this incredible industry power has on the markets of the United States, more research is necessary to fully understand the profound collective impact this power has on the hundreds of millions of consumers who purchase insurance.[41]

Using the data publicly available, here is a breakdown of the insurance markets of the United States and the European Union. These statistics are from 2016 (and before, as indicated), which means the United Kingdom was still counted as a part of the EU insurance market (pre-Brexit). In the United States, insurance premiums accounted for 7 percent of the Gross Domestic Product in 2013,[42] and rose to 7.3% in 2014. In the European Union, 7.19% of GDP was spent on premiums in 2016.[43]

Table 1: Comparative Insurance Statistics for U.S. and EU[44]

	United States (2014)	**European Union (2016)**
Premium Volume / Premiums Written	$1.1 trillion[45]	€1.189 trillion or $1.345 trillion
Total Claims Paid/ 'Losses'[46]	$810.7 billion	€963 billion or $1.089 trillion
Average spent per capita by policyholders (on premiums, per year)	$4,017	€1981 or $2,241
Insurance premium expenditures as a percentage of GDP	7.3%	7.19%
Number of Insurance Companies	6,118	3,486

American insurance consumers spend a noticeably greater amount of their income on insurance, expending about $4,000 while their European counterparts only spend about $2,200.

To create further insight, if you subtract the claims paid from the premiums written in a given year, you can roughly estimate how much the industry profits (gross, or before taxes and expenses). In the U.S., $1.1 trillion minus $810.7 billion equals $289.3 billion. In the EU, €1.189 trillion minus €963 billion equals €226 billion. This reveals that the American insurance industry keeps 26.3% of the premiums it brought in for that year, and

35. *Comunale v. Traders & General Ins. Co.*, 50 Cal. 2d 654 (1958); *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566 (1973).
36. Insurance bad faith is defined as the insurance company's violation of the inherent obligation to act with good faith and fair dealing during interactions with policyholders. Policyholders also owe a duty of good faith and fair dealing to the insurance company, but the field of law referred to as 'bad faith insurance' refers to the obligation of the insurer. The covenant of good faith and fair dealing requires that a party does not hinder the other party (or parties) from receiving their rightful benefits of the contract.
37. Often the body of regulations in a country as a whole have a net deterrent effect on unfair behaviors market-wide, and therefore the burden to prevent insurance bad faith is not pinned entirely on specific regulations directed toward specific bad faith actions.
38. Tom Baker and Kyle Logue, *Insurance law and Policy: Case and Materials*, Wolters Kluwer Law & Business, p. 580 (2013).
39. *How to Modernize and Improve the System of Insurance Regulation in the United States*, Federal Insurance Office, U.S. Department of the Treasury, p. 1, December 2013. The total amount of assets held by FDIC-insured institutions in 2012 was $14.5 trillion.
40. Despite the protests by insurance companies. *MisInsured: Insurance Companies Struggle to Argue They Are Not Important*, Kathleen M. Defever, April 20, 2013, https://misinsured.net/2013/04/20/insurance-companies-struggle-to-argue-they-are-not-important/; *Politico: Insurance Industry – We're Not AIG!*, https://www.politico.com/story/2013/04/rest-of-insurance-industry-were-not-aig-090249; *Morning Consult: The Fed and Figuring Out Insurance*, https://morningconsult.com/2014/06/01/the-fed-and-figuring-out-insurance/.
41. Most Americans purchase some form of insurance – particularly auto insurance, which is required by law.
42. All US insurance figures in Table 1 are for the year 2014, and do not include health insurance. *The Insurance Fact Book 2016*, Insurance Information Institute.
43. All EU insurance figures in Table 1 are for the year 2016. *European Insurance in Figures – 2016 Data*, Insurance Europe at http://www.insuranceeurope.eu.
44. Monetary Unit conversions derived from prevailing rates of December 2018, OANDA Currency Converter, OANDA Corporation.
45. Incidentally, this figure remained unchanged, and in 2016 was also $1.1 trillion.
46. Interestingly, in EU financial reports, the term "claims paid" is used, but in U.S. publications, they are more sinisterly characterized as 'losses' (in the Property/Casualty industries), further highlighting the mentality of the American corporate shareholder-driven environment.

the European insurance industry keeps only 19% of the premiums it brought in for that year (again, gross,[47] not net).[48] The reader should note that this simple math does not speak to the individual experiences of any particular insurance company, and the figures will vary widely from year to year, depending on the amount and value of claims.[49]

However, what we can take away from these numbers is that the American insurance industry is, recently, 7.3% more profitable than the European insurance industry. U.S. insurers are managing to retain, and thus profit, 7.3% more on their policy sales than their European counterparts. As the data and analysis provided here strongly suggests, this is primarily due to the weaker state of the U.S. insurance industry consumer legal protections, when compared to the EU.

Law and Legal Systems – Introduction to Legal Terms and Concepts of the U.S. and EU

Laws and regulations derive from many different sources. The U.S. is known for having a common law system, which, at its core, means laws derive from court decisions. Continental Europe is largely known for the civil law system, meaning laws derive from the drafting of legislators. Of course this is an oversimplification, as in the U.S. there are also codes and statutes written by legislators, and in the E.U. there are also court decisions which are adapted into the codified law.

What is important to understand when comparing U.S. and EU laws is that terms vary, even when they are used to describe the same subject, and laws are grouped under categories with different parameters. For example, European Union laws are classified as either private or public law. For the most part, there is no such distinction in the American legal system.[50] Instead, American law is mostly divided between legislatively-created law and judicially-created law (although this is not a division popularly employed in discussions). Legislatively-created law roughly correlates with the European concept of public law, because it entails statutes and administrative codes. Judicially-created law, or case law written by the courts, loosely correlates with EU private law.[51]

European attorneys also speak of differences between contract law and commercial law. In the American system, this distinction is never used. In fact, the laws which apply to commercial endeavors, such as the Uniform Commercial Code, also address principles of contracts within the body of the text. Contracts and commercial law are considered inextricably intertwined concepts.

U.S. Legislative Drafted Law: Codes, Statutes, Regulations

United States Codified Law and Insurance

In the U.S., insurance law derives from both court decisions (also called case law) and legislation. American law is broken down into hierarchical categories. At the top, there are international treaties. Second are the Federal Regulations. Next are the state codes and statutes of each individual state of the union. Then there are smaller units at the county, city, municipal, and township level, but these do not directly regulate insurance and therefore are not useful for discussion here. American codified insurance law derives from U.S. Federal Regulations and State Codes.

The impact of Federal Regulations on the U.S. insurance law system is minimal, which is an anomaly in the American legal system, where existing federal regulations always supersede state regulations. There are two reasons for this – first, the U.S. Constitution provides that unless the federal government has an overriding reason to take control of a particular field of regulation, the states have the automatic power to manage as they like.[52] The federal government does frequently regulate commerce when that commerce has significant interstate impacts.[53] For example, federal gun laws had to be rewritten so they impacted only the guns that moved in interstate commerce (i.e. they are regularly sold across state lines).[54] The same reasoning applies to the federal highway system and federal farming regulations (crops are sold across state lines).[55]

U.S. Federal Regulations have little impact on the business of insurance, despite the obvious significant contacts insurance has with interstate commerce. The second reason for little federal regulation is that the Supreme Court has granted an exception to the insurance industry. At one time, insurance was a local product. Policies were sold to local residents and covered their local properties, typically in the mutual insurance format. At the time, the federal government was content to let the states monitor

47. For our purposes, the gross figures are more important than net figures. To understand the impact insurance costs have on consumers, we need to understand how much the consumers' costs are, per capita, in comparison to their counterparts in the EU or U.S. The amount of taxes or expenses an insurance company incurs does not change the fact that they are making a higher or lower per capita, percentage profit from individual policyholders.
48. This is oversimplified because the very nature of insurance is that the investments over the years garner significant income that offsets particularly unprofitable years, and the role these investments play in yearly profit/loss ledgers depends heavily on the type of insurance. The numbers provided here are overall averages for all insurance lines (not including reinsurance).
49. Especially in the more unpredictable property insurance industry, where one natural disaster can turn an expected profitable year into a loss.
50. Except in the realm of International Law, where the international laws applying to individuals are considered 'public' international law, i.e. Universal Declaration of Human Rights and the Torture Victim Protection Act, and the international laws applying to commerce are not, i.e. the United Nations Convention on Contracts for the International Sale of Goods.
51. Thomas *supra* note 4, p. 379.
52. 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people.' U.S. Const. amend. X.
53. *Gibbons v. Ogden*, 22 U.S. 1 (1824).
54. *United States v. Lopez*, 514 U.S. 549 (1995), Gun-Free School Zones Act of 1990 overturned and rewritten as Federal Gun Free School Zones Act.
55. *Wickard v. Filburn*, 317 U.S. 111 (1942).

insurance. Over the years, court decisions confirmed that insurance was a traditionally state-regulated industry.[56]

By the time the federal government noticed that insurance had grown into a mostly interstate product, the states had already been monitoring the industry for nearly a century. The federal government was at a crossroads – should they create regulations to harness this growing industry, or should they just bow to the state statutes which were already being applied? The federal government (ultimately) chose to let the states continue to regulate the insurance markets.

In 1944, the first time the Supreme Court considered regulation of the insurance industry, they determined it was definitely interstate commerce and Congress did have the ability to regulate the transactions that crossed state lines.[57] However, in response to this decision, Congress passed the McCarran Ferguson Act,[58] which created a new rule: when the federal government decides to regulate insurance, those laws will preempt any state laws which are written to address the same specific purpose. However, for any topic the federal government has *not* addressed – which is the vast majority of all insurance law – the state rules have precedence. Since then, the U.S. Congress has only addressed a few topics of insurance, such as terrorism insurance, flood insurance, employee retirement plans, and group health and disability coverages. But for the most part, insurance continues to be regulated entirely at the state level.

The Supreme Court's decision in *South-Eastern Underwriters* and the subsequent passage of the McCarran Ferguson Act had another crucial, significant impact on the insurance law landscape of the United States – effectively, they created an industry-wide exemption to the Sherman Act, or the U.S. anti-trust laws. Insurance companies are still allowed to trade data with the purpose to increase market stability and prevent insolvencies, which has been a helpful and positive process. However, this naturally raises very grave concerns about the potential for illegal market manipulation.

After the financial crisis in 2007-2009, during which American International Group (AIG), the world's largest insurance firm, nearly collapsed, the Congress stepped in once more and enacted the Dodd-Frank Act. Dodd-Frank was intended to strengthen U.S. Federal supervision of the financial sector, including the business of insurance. The Act created the Federal Insurance Office (FIO) and granted it the authority to monitor all aspects of the insurance industry and report regulatory gaps. However, the FIO is only authorized to act in an advisory capacity, and has not yet had any significant impact on the current state of the American insurance law landscape.

State Regulations and Insurance Codes

The first comprehensive state insurance code was passed in 1849 in New York. In 1855 Massachusetts established an independent insurance department managed by life and fire insurance company managers, and endorsed by consumers. Four years later New York would be the first state to create a government insurance department.[59] In 1871 all of the state insurance regulators began meeting in a group called the National Convention of Insurance Commissioners (NCIC), which would later become known as the National Association of Insurance Commissioners (NAIC).[60]

Since then, states' insurance regulations have evolved at different speeds and with varying levels of success. The individual states of the U.S. have vastly divergent insurance regulation schemes.[61] Drawing meaningful comparisons is quite difficult, because even if you manage to locate the insurance codes of every state and study them, this will do nothing to reveal how and to what extent these codes are actually enforced. Enforcement depends upon the existence of the State Insurance Commissioner (not all states and territories have one[62]), the level of funding and resources the Commissioner's office receives, the willingness of policyholders to report their grievances to the Commissioner or bring their complaint to court, and the pro-consumer activities of the Commissioner. Further, as illustrated in a side-by-side state comparison in Table 2, the field of consumer protection law, viewed as a whole, is weak.[63]

State Enforcement of Insurance Regulations

In the early days of corporate-shareholder insurance companies, state legislatures failed to enact laws that provided enhanced insurance consumer protection. Consumers were constantly sold worthless policies by illegal insurance operations and overcharged for poor coverage. In the late 1800's, many concerned insureds and government officials advocated for a switch to government insurance programs like those in western Europe. While ultimately those programs would not be created, a sort of compromise was reached when numerous mutual insurance programs became available.[64] Called 'fraternals' at the time, they employed few salaried employees, the policyholders participated in the company's

56. *Paul v. State of Virginia*, 75 U.S. 168 (1868).
57. *United States v South-Eastern Underwriters Association*, 322 U.S. 533 (1944).
58. '[N]o act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance… unless such Act specifically relates to the business of insurance.'; 15 U.S.C. §1012(b).
59. Grant *supra* note 31, p. 4.
60. National Association of Insurance Commissioners (NAIC), https://www.naic.org/index_about.htm.
61. Despite the fact that state officials generally adopt model insurance codes from the National Association of Insurance Commissioners (NAIC), which is tasked to promote uniformity.
62. Or, not one that is dedicated solely to the administration of insurance.
63. '[The reason consumer insurance law had not been significantly developed is] the fact that small and medium-sized enterprises are in just as weak a position as are consumers.' Heiss, *supra* note 2, p. 39; 'The NAIC has been quite successful in promoting uniformity for financial solvency and the requirements for filing of financial information, but has not achieved much uniformity in the area of consumer protection.'; Thomas *supra* note 4, p. 384.
64. Corporate insurers worked to ensure that mutuals would not become popular, as they were worried their creation would hurt their profits. They also fretted about the possibility of the government creating publicly-sponsored insurance programs. Grant *supra* note 31, p. 44.

operations, and the overhead costs were low – hence, the coverage was very affordable.[65]

At the turn of the twentieth century, the newspaper industry published several searing exposés about the greed and mismanagement of life insurers, detailing their false marketing schemes, revealing their lavish spending on legislative lobbying, and uncovering their threats to sue policyholders who would not accept settlement offers.[66] In 1905 lawmakers launched what was the largest insurance industry investigation to date, called the New York Armstrong investigation.[67] The investigation was widely-publicized and resulted in legislative reforms in many states, particularly mandatory insurance contract terms and controls on internal insurance company operations. Prior to the New York Armstrong investigation, State Insurance Commissioners were only concerned with 'mundane procedural matters,' and 'did not view their office as a tool to advance reform'.[68] Commissioners were not motivated to advocate for consumer protection because they were often insurance industry managers who took on the Commissioner's post for a short time, only to return to the industry for a prestigious and high-paying job.[69] Commissioners were more focused on solvency than consumer affairs. In the early 1900's – particularly during the presidency of Theodore Roosevelt – who was known as the 'trust-busting' president because he initiated reforms to break up monopolies which were manipulating the market and taking advantage of consumers – some notably consumer-oriented Commissioners appeared. Unfortunately, they were few in number, and unable to exact long-lasting change.

Today, Insurance Commissioners continue to play a major and important role in the enforcement of state insurance regulations, but the vast majority of their proactive enforcement focuses on solvency, rate regulations, and fraudulent claim prosecution.[70] Commissioners rarely extend their actions past these main subjects, despite their explicit, codified ability to do so. Often scholars and industry analysts view the American insurance consumer protection landscape as a well-saturated model[71] upon which to base new regulatory structures, i.e. See Chinese consumer insurance law which is largely based on the American model. However, the mere existence of well-developed U.S. consumer protections is misleading, due to the system-wide failure of enforcement.

State solvency regulations do in fact protect customers from unreliable insurance companies becoming insolvent and leaving policyholders with no value to show for their payments. However, while insolvency was historically a serious economic concern, it has rapidly decreased over the years to the point that fewer than ten insurers face potential insolvency during any given year – to add perspective, this is less than 1% of the industry.[72] Rate regulation is an equally important task, although the effectiveness of insurance commissioners regulating unreasonable premium increases is questionable in most U.S. states, due to most commissioners regulating excessive rates only after the rates have already been in use and negatively impacted millions of consumers.[73]

While insurance commissioners do have the ability to pursue insurance companies for their violations of the state codes which protect the consumer, it is unusual for them to do so.[74] Some states adopt model rules drafted by the National Association of Insurance Commissioners (NAIC) for consumer protection, such as the Unfair Trade Practices Act (UTPA) and the Unfair Claim Settlement Practices Act (UCSPA). While this is positive progress toward protection of consumers, it should not be assumed that mere adoption of these model laws translates into protected American consumers.

For example, in the year 2010, despite 130,000 complaints being received by Insurance Commissioners nationwide,

65. Grant *supra* note 31, p. 26.
66. This writer found these complaints remarkable similar to the very same grievances which are heard repeatedly in the United States today.
67. Grant *supra* note 31, p. 30-32.
68. Grant *supra* note 31, p. 134.
69. *Id.*
70. 'The NAIC has been quite successful in promoting uniformity for financial solvency and the requirements for filing of financial information, but has not achieved much uniformity in the area of consumer protection… Insurance regulation in the US historically has been concerned about insurer solvency.'; Thomas *supra* note 4, p. 384; An overview of the NAIC's table of model regulations reveals 2.5 times more model regulations drafted to address insurance company and market administration (including solvency), than regulations which touch on consumer protections. Only a handful of the model rules are dedicated solely to consumer issues. In comparison, there are approximately 43 regulations primarily addressing solvency, and an additional 149 addressing market/company administration.
71. Thomas *supra* note 4, p. 390.
72. *The Guide to Understanding The Insurance Industry 2009-2010*, AM Best, p. 7 (2009); *Insurance Facts and Stats: An Introduction to the Insurance Industry*, AM Best, p. 51-55 (2012).
73. Rate regulation originated as a means to ensure insurer solvency and the insurer's ability to pay claims. Today, however, it is mostly used to curtail unreasonable rate increases. The majority of state commissioners practice 'use and file' regulation, meaning the insurer can use the rate before the commissioner has the opportunity to review it, so long as they eventually file it with the Office of the Insurance Commissioner. In file-and-use regulation, the commissioner requires the rate is filed before it is used, but the Commissioner will not necessarily review it before it automatically becomes available for use. The third method is 'prior approval', which requires the rate be approved before it can be used - this is obviously more protective of the consumer, but unfortunately is the most rarely employed.
74. There are exceptions, but the Commissioners who do occasionally enforce consumer protection provisions typically only do so when private litigation on a particular issue becomes so overwhelming that the issue cannot be ignored. Then, the one-time sanctions imposed on insurers in these situations are, over the long term, merely a minor inconvenience to the insurance company. This is evidenced by a historical trend of sanctioned insurers temporarily ceasing the cited offensive behavior, only to then reengage in the behavior again a decade or so later. This cyclical behavior tends to indicate that the punishment was not a severe enough deterrent for the complete cessation of the profitable behavior.

only 85 of those complaints resulted in the imposition of fines.[75] In 2017, only 46 fines were imposed.[76] Further, if you consult an attorney specializing in consumer insurance claims, they will report 1) most consumers do not file their complaint with the Insurance Commissioner, and therefore the reported statistics are deceivingly low and 2) those who do file receive little attention to their grievance. If complaints are not receiving their due attention, it is a natural result that they will not be developed and investigated to the point where a fine is imposed.[77]

While the Insurance Commissioner does help to create a more fair landscape for the consumer at the macroeconomic, market level by monitoring solvency and rates, the remainder of the active regulation of the insurance contract between the insurer and the policyholder is left entirely to the insured/policyholder who is forced to file a lawsuit to receive redress. This default position – which leaves the regulation of the contractual relationship between the insured and insurer entirely to the courts and application of judicially-created case law – is a critical weakness in the American regulation structure.

Jurisprudence, or Common Law Created by the Courts

Judicially-created law in the United States, otherwise known as 'case law', is a key part of the U.S. regulatory system. While American attorneys do consult legislatively-drafted statutes and regulations, the specific directions on how these laws are meant to be applied are found in the case law. Every jurisdiction has different case law it is bound to follow, and when there is a lack of interpretive cases for a specific regulation or legal principal, the court has the option to either borrow from other jurisdictions or create their own, new case law. Lower courts are bound to follow higher courts – for example, a U.S. Supreme Court decision is binding on all courts in the United States.

When an insured is considering filing suit in a court of law, the first thing their attorney must analyze is which jurisdiction (i.e. U.S. state) is appropriate based on contacts with the dispute, and which jurisdiction is likely to reach a favorable result based on the current state of case law/ jurisprudence. Often there is not much flexibility, such as with property insurance claims, since the property is located in a specific jurisdiction. However, with health or disability claims, the claimant may have moved between two or more jurisdictions during the medical treatment or disability period. There is a great deal of 'gamesmanship' during this process, with both the consumer attorney and the insurance defense attorney seeking to secure a favorable jurisdiction for his/her client. If insurance regulation was handled at the federal level rather than the state, this step in the process could be eliminated and the litigation timeline would often be shortened by weeks or months.

When insurance regulations are not enforced by the government regulators, the insurance consumer is faced with the reality that they must hire an attorney and file a lawsuit. This 'forcing' of the insureds to file suit in an attempt to trigger the enforcement of regulations is particularly problematic due to the extreme expense of the U.S. judicial system and the incredible wealth inequities of American society. Statistics show that the vast majority of Americans have some form of insurance, most particularly auto and homeowners insurance.[78] The high insurance market saturation rate means the statistical odds of an American having an insurance claim, and then dispute, are very high. However, the median household income in the U.S. is $57,617,[79] and the average cost of insurance litigation is between $10,000 and $35,000 per year.[80] Consequently, for nearly every household in America, except perhaps the upper 0.5% of income earners, paying for costly litigation 'out of pocket' is simply not an option.

There is one alternative to costly hourly litigation - some grieved insureds do manage to locate and hire a contingency attorney. Plaintiff's contingency attorneys work on the premise that they will not get paid for their services unless they bring the dispute to a positive result (whether a monetary settlement for the insured or a verdict/decision in the insured's favor). However, this option is not readily available to the majority of insurance policyholders because plaintiff's insurance attorneys are only able to accept the suits which exhibit the most egregious behavior by the insurer, so they can maximize their odds of success and the ability of the settlement or verdict monies to reimburse them fully for their services.

Even in the event that a policyholder manages to locate a willing contingency attorney, they remain incredibly reticent to file suit, because they are already suffering the stress of some ill which has befallen them (for which they had purchased insurance,[81] and the added stress of a lawsuit is overwhelming). When insureds have not received the insurance benefits they paid for to 'make them whole again', they are experiencing elevated stress levels due to the unfortunate event and the inability to recover financially, mentally, physically, and emotionally. To a consumer so-situated, the idea of pro-

75. Thomas *supra* note 4, p. 383.
76. *Dispositions Regarding Closed Confirmed Consumer Complaints as of November 29, 2018*, National Association of Insurance Commissioners 1990-2018.
77. Insurance Commissioners focus on regulating the insurer claims processing which is either non-responsive to the consumer or takes an unreasonable amount of time, because these aspects of a claim are more simple to regulate without a time-consuming, fact-intensive investigation.
78. Despite comprising only 4.4% of the world population, Americans buy nearly 36% of all the insurance sold in the world in one year. *MisInsured: Who in the World Buys the Most Insurance?*, Kathleen M. Defever, December 31, 2014, https://misinsured.net/2014/12/31/who-in-the-world-buys-the-most-insurance.
79. United States Census Bureau, 2016.
80. Assuming the case is not settled in less than one year, and assuming active attorney litigation for each year. Figure based on research by the University of Denver's Institute for the Advancement of the American Legal System and author's own observations; *Excess and Access: Consensus on the American Civil Justice Landscape*, p. 16.
81. I.e. disabling condition, destruction of home by fire, auto accident which leaves them injured, etc.

tracted[82] litigation is often too unbearable to contemplate, particularly with no guarantee of success.

Comparing the States

As mentioned above, the National Association of Insurance Commissioners (NAIC) is the non-governmental, regulatory-support organization tasked with the creation of model insurance codes (which the states may then decide to adopt). The NAIC is composed of each state's Insurance Commissioner. The primary insurance consumer protection laws which have been drafted by the NAIC are the Unfair Trade Practices Act (UTPA) and the Unfair Claim Settlement Practices Act (UCSPA). The Unfair Trade Practices Act has been largely adopted by the states, with some exceptions. The UTPA addresses unfair, misleading, or fraudulent insurer actions both before and during the contracting process, i.e. policy marketing and sales. The UCSPA addresses 'Unfair claims settlement practices', such as insurers repeatedly denying valid claims based on unfair or incomplete investigations. Both the UTPA and the UCSPA address not only singular insurer actions, but also larger, industry-wide patterns which become established business practices. State adoption and implementation of the UTPA and UCSPA varies widely, but unfortunately the low enforcement rates result in overall disappointing results for the consumer.

In California, the insurance code is the most extensive of all the states. There are 5 divisions[83] and one section of general rules, totaling 509 clauses. The California Insurance Commissioner is an elected[84] official who is nationally-known for a higher likelihood to keep large corporate interests in check and actively monitor the costs of policies sold within the state. California courts have considered more insurance law cases than any other state, so the jurisprudence is vast and often consulted by courts based throughout the United States (and territories).

Table 2: Comparative Insurance Statistics for California, Alabama, and Mississippi: The Unfair Claims Settlement Practices Act (UCSPA)

	California	Alabama	Mississippi
UCSPA Adopted?	Yes + additional regulations	No, but some similar regulations adopted	No, and the Miss. Consumer Protection Act has also been held *not* to apply to insurance claims adjusting, leaving insurance consumers with no specific protections
'Unfair Competition and Practices Defined' Introductory Language	The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance.	The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance.	None
Unfair Claims Settlements which constitute a General Business Practice	(h) Knowingly committing or performing with such frequency as to indicate a general business practice any of the following unfair claims settlement practices: (1) Misrepresenting to claimants pertinent facts or insurance policy provisions relating to any coverages at issue. (2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.	No insurer shall, without just cause, refuse to pay or settle claims arising under coverages provided by its policies in this state and with such frequency as to indicate a general business practice in this state, which	None

82. If a case cycles through the entire process from initial filing to the end of every likely appeal, the plaintiff is facing stressful litigation for approximately seven to nine years – with no guarantee of ever receiving an award.
83. 1 General Rules Governing Insurance, 2 Classes of Insurance, 3 Insurance Commissioner, 4 Affordable Housing Entities Risk Pool, 5 Insurance Adjusters; see leginfo.legislature.ca.gov.
84. Elected by California voters; http://www.insurance.ca.gov/0500-about-us/01-commissioner/index.cfm.

(3) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies.
(4) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss requirements have been completed and submitted by the insured.
(5) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.
(6) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by the insureds, when the insureds have made claims for amounts reasonably similar to the amounts ultimately recovered.
(7) Attempting to settle a claim by an insured for less than the amount to which a reasonable person would have believed he or she was entitled by reference to written or printed advertising material accompanying or made part of an application.
(8) Attempting to settle claims on the basis of an application that was altered without notice to, or knowledge or consent of, the insured, his or her representative, agent, or broker.
(9) Failing, after payment of a claim, to inform insureds or beneficiaries, upon request by them, of the coverage under which payment has been made.
(10) Making known to insureds or claimants a practice of the insurer of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.
(11) Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either, to submit a preliminary claim report, and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.
(12) Failing to settle claims promptly, where liability has become apparent, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.
(13) Failing to provide promptly a reasonable explanation of the basis relied on in the insurance policy, in relation to the facts or applicable law, for the denial of a claim or for the offer of a compromise settlement.
(14) Directly advising a claimant not to obtain the services of an attorney.
(15) Misleading a claimant as to the applicable statute of limitations.
(16) Delaying the payment or provision of hospital, medical, or surgical benefits for services provided with respect to acquired immune deficiency syndrome or AIDS-related complex for more than 60 days after the insurer has received a claim for those benefits, where the delay in claim payment is for the purpose of investigating whether the condition preexisted the coverage. However, this 60-day period shall not include any time during which the insurer is awaiting a response for relevant medical information from a health care provider.

general business practice is evidenced by:
(1) A substantial increase in the number of complaints against the insurer received by the Insurance Department;
(2) A substantial increase in the number of lawsuits against the insurer or its insureds by claimants; and
(3) Other relevant evidence.

By contrast, Guam[85] has no insurance code, the Insurance Commissioner is an appointed official who also acts as the Banking Commissioner, and Guam is not known for active regulation of the state's insurance market.[86] When insurance case law is needed for consultation, they look to the jurisprudence of states like California.

Table 2 illustrates that in some states, like Mississippi, there are no regulations protecting insurance consumers from the deceptive and unfair practices of insurance companies. While Alabama, like Mississippi, has not adopted the UCSPA – the state has generally forbidden unfair and deceptive practices in the business of insurance. However, the state of Alabama failed to specifically define these practices. Instead, they provide that unfair practices can be recognized by 'a substantial number of complaints' or 'a substantial increase in the number of lawsuits'.[87] Therefore, in effect, the State of Alabama has adopted a purely reactionary policy.

While the state of California has adopted a detailed version of the definition of 'general unfair business practices,' and is widely recognized as the most protective state, California courts have held that only the Insurance Commissioner can enforce the UCSPA. Individual consumers cannot bring lawsuits based on the UCSPA, and a plaintiff's citing to the language of the Act in a lawsuit will not result in a judgment based on a violation of the UCSPA, no matter how clearly the defendant insurer is in violation. Instead, the consumer must rely on the precedential judicially-created case law and common principles of law (addressed in Table 3).

Further, the California Insurance Commissioner traditionally only enforces the UCSPA when – as stated in the Alabama code – a substantial number of complaints or lawsuits become apparent. This nationwide reactionary policy renders the adopted NAIC model codes illusory, and most unfortunately, leaves consumers unprotected.

Comprehensive Sample State Insurance Law Landscape: Comparing States

Due to the lack of federal regulations, an American insurance consumer is only as protected as his or her state provides. Despite the artful drafting of detailed insurance consumer codes, American insurance consumer protection has made little to no progress since the Roosevelt Era, due to the lack of enforcement mechanisms. Consequently, the American insurance consumer must look to judicially-created common law for protection.

Table 3 provides insight into why some states have more developed insurance bad faith case law than others – when the court allows for more types of recoverable damages, the local attorneys are more likely to accept the risk of litigating an expensive insurance contingency claim. For example, when suits for tort are allowed in addition to suits for breach of contract, awards for economic damages are 13.7% higher, and awards for noneconomic damages are 5.6% higher.[88] In states which allow punitive damages, which are money damages awarded to the plaintiff in

Table 3: Comparative Insurance Statistics for California, Alabama, Mississippi, Michigan, and District of Columbia: Judicially-Created Rights / Case Law

	California	Alabama	Mississippi	Michigan	District of Columbia
Recognizes the Insurer's Duty of Good Faith and Fair Dealing[89]	YES	YES	YES	YES	NO
Allows Suit for Breach of Contract	YES	YES	YES	YES	NO
Allows Suit for Tort	YES	YES	NO	YES	NO
Extracontractual Damages Available	YES	YES	NO	NO	NO
Punitive Damages Available	YES	NO	Only in Extraordinary Circumstances	NO	NO
Attorney's Fees Available to be Awarded to Plaintiff/Consumer	YES	YES	NO	NO	NO

85. Guam is an island territory of the United States located in the Pacific Ocean.
86. Of the 56 State/Territory Insurance Commissioners, only 12 are elected. The remainder are appointed by other government officials. http://www.naic.org/documents/members_state_commissioners_elected_appointed.pdf.
87. Alabama Administrative Code r. 482-1-124 to 482-1-125 (2003/2014); 482-12-24 (1971).
88. Baker and Logue *supra* note 38, p. 117-118, *citing* Browne, Mark J., Pryor, Ellen S., and Puelz, Bob, *The Effect of Bad-Faith Laws on First-Party Insurance Claims Decisions*, 33 J. Legal Stud. 355 p. 385 (2004).
89. Violation of this duty is called 'bad faith'.

order to enact a financial punishment on the offending insurance company, attorneys are much more likely to accept risky contingency cases.[90]

To summarize – When an American insurance consumer has been wronged by an insurance company, they 1) are unlikely to receive adequate assistance from their state insurance Commissioner, 2) encounter great difficulty locating an attorney willing to litigate their case, due to the excessive hourly cost of litigation and the high risk of insurance bad faith cases, 3) face disappointing settlement opportunities, due to the unregulated state of the insurance industry which emboldens insurers,[91] and 4) encounter an average of eight years of intense litigation which adds to their post-loss levels of stress.[92] The consumer's view of the American insurance law landscape is grim, and additional attention to these systemic problems is long overdue. As Kenneth S. Abraham, Distinguished Professor of Law at the University of Virginia very aptly stated, '[G]iven the social role and importance of insurance, we may need standards regulating the behavior of private insurers that neither existing common law contract rules nor conventional administrative regulation of insurance have yet shown themselves capable of developing.'[93]

European Union Legislative Drafted Law: EU Directives, Member State Specific Codified Law

European Union Directives

While the United States suffers from an almost entirely decentralized body of insurance law which is inconsistently applied to the American insurance market by the individual states, the Commission of the European Union has diligently, over the past few decades, promulgated successions of Directives which have created a centralized, controlling body of insurance regulations and a primary advisory body called the European Insurance and Occupational Pensions Authority (EIOPA).[94] In 2002, during the EU's earlier stages of creating a central financial supervisory authority, the European Parliament stated that:

'In light of the series of financial scandals in the United States evidenc[ing] the failure of the US regulatory network to eliminate the risk of sudden and unexpected financial crises… there was absolutely nothing to suggest that Europe was immune to these dramatic crises, especially considering that Europe was in a transitional stage while in the process of moving from a fragmented system of individual national markets to a single unified financial market.'[95]

The EU has worked very diligently during the recent decades to create a body of financial regulations that offer protection to European citizens from economic instability, and has looked to the failures of the United States to regulate appropriately – and most recently the resulting economic crash of the great recession of 2007-2009 – as warning signals and instructive lessons.

The developing, centralized body of insurance law correlates with the EU's objective of achieving a single, harmonized European insurance market.[96] Currently, insurance company activity is subject to any situationally-applicable EU discipline, which typically entails Solvency II, the Insurance Distribution Directive (IDD), all 'delegated acts' connecting to and resulting from EU Directives, and EU provisions on consumer protection such as the Unfair Commercial Practices Directive (UCPD) and Packaged Retail and Insurance-based Investment Products Regulation (PRIIPs).[97]

The EU laws which apply to insurance are promoted by the insurance supervisors of the EU member states, which collectively comprise the International Association of Insurance Supervisors (IAIS). The IAIS acts in a consultative capacity for member states during this transition period in which the states regulators are tackling the integration of the relatively new EU Directives with their own existing applicable regulations.[98] While the individual EU states have been generally welcome to employ additional law which enhances the Directives, they cannot enact new law which changes or weakens the effect of any provision of a Directive.

In the area of insurance consumer protection law, the European Court of Justice had previously allowed more stringent consumer protections enacted by individual states, concluding that additional protective regulations are justified on the grounds of consumer protection.[99] The insurance sector has long been recognized as an area

90. Punitive damages are a significant financial motivation because they can be up to nine times the compensatory award, *See State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003).
91. Unregulated as regarding consumer protections.
92. When a plaintiff insured wins at trial, insurers routinely appeal the award to the highest level possible.
93. Abraham, Kenneth S., *Insurance Law and Regulation: Cases and Materials*, 4th Edition, p. 5 (2005).
94. EIOPA, formed in 2010 adopts implementing measures and rules addressed to the national supervisory authorities. EIOPA's mission is to 'protect the public interest by contributing to the short, medium, and long-term stability and effectiveness of the financial system, for the EU economy, its citizens and businesses.'
95. Language quoted from: Vercher-Moll, Javier, *Towards a European Supervisory Authority*, Connecticut Insurance Law Journal Volume 21.1 (Fall 2014), p. 173-208, 180. Notably, the quote was issued before the Great Recession of 2007-2009.
96. Raymond Cox, Louise Merrett, & Marcus Smith, *Private International Law of Reinsurance and Insurance* 25 (2006).
97. *Insurance Regulation in the European Union*, 'Sources and Tools of the Insurance Regulation in the European Union', Pierpaolo Marano, p. 10-11; Marano, Pierpaolo, and Siri, Michele, eds., Palgrave Macmillan 2017.
98. The IAIS' stated objective is 'to promote the maintenance of a fair, safe, and stable insurance sector for the benefit and protection of policyholders'. https://www.iaisweb.org/page/about-the-iais. Note that the IAIS membership is not restricted to Supervisors of the EU, but includes all insurance supervisors and regulators from around the world, and encourages dialogue and collaboration toward the improvement and strengthening of worldwide insurance markets.
99. *See Commission v Germany* (The Insurance Cases), C-205/84 [1986] ECR 3755; *Id.*

of the market which requires extra consumer protection.[100]

Recently, however, as more comprehensive Directives applicable to the insurance market are being drafted and applied – and 'delegated acts' are created to have direct effect within the member states – the local member state regulations are slowly being pre-empted. The value of local regulations will not be lost or discarded, however, because a large-scale project is underway with the final objective to catalog and account for every member state's existing insurance regulations, and then blend them into a new, comprehensive act. The new act will specifically address the challenges of an insurance contract formed within the European Union – the draft comprehensive set of rules is called the Principles of European Insurance Contract Law (PEICL).[101]

Unfair Commercial Practices Directive

In 2005, the Unfair Commercial Practices Directive (UCPD) – a 'total harmonization Directive' – was created with the intention to bring more uniformity to the EU financial markets.[102] In 2009, during a dispute over specific regulations enacted in Belgium which arguably enhanced the UCPD, the European Court of Justice determined that 'the Directive fully harmonises the rules on unfair commercial practices at Community level. Accordingly, Member States may not adopt stricter rules than those provided for in the Directive, even in order to achieve a higher level of consumer protection.'[103] As the EU Directives have become more exhaustive, the Court of Justice is becoming less tolerant of additional state regulations – even those specifically designed to protect consumers.

However, it is unclear how fully the UCPD has 'harmonized' commercial practices regulations in the EU. The UCPD language explicitly provides an escape clause for circumstances in which a court may decide that a local rule should not be overruled: 'in the case of a conflict between the provisions of the Unfair Commercial Practices Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.'[104] This appears to leave authorization for any state regulations that *specifically* protect *insurance* consumer rights. Indeed, while the Directive applies broadly to all sectors of economic life, the language does allow EU states to enact more restrictive regulations for 'financial services', which includes the business of insurance.[105]

Other Directives Regulating Insurance / Upcoming Legislation

The primary body of legislation targeted specifically at the EU insurance industry is Solvency II, which regulates insurance company solvency. Insurance intermediaries (brokers, agents, and similar) are also highly regulated at the European Union level. Applicable Regulations and Directives include: General Data Protection Regulation, Insurance Distribution Directive (IDD), and the Packaged Retail and Insurance-based Investment Products Regulation (PRIIPs). Member states have additional regulatory requirements which require informational transparency.[106]

The IDD[107] requires the member states to ensure that insurance distributors always act honestly, fairly and professionally in accordance with the best interest of customers, including both independent agents and those working directly for insurance companies.[108] The term 'distribution' encompasses not only traditional direct sales, but also insurance sales websites. This Directive was drafted in the midst of the great recession. When revising the predecessor directive of the IDD[109] in 2012, EU Commissioner Michel Barnier remarked, 'the EU will not truly have learnt from the crisis unless it adopts strong measures to restore investors' and consumers' trust.'[110]

To that end, the EU and its advisory bodies are actively working to increase the involvement of consumers in the legislative drafting process. There are initiatives to ensure better inclusion of 'stakeholders', or all the entities who are regulated by the insurance Directives, including insurance corporations, organizations, ancillary companies/groups like intermediaries, and consumers. Stakeholders have the opportunity to be involved in rule drafting through providing feedback to expert groups which answer to the EU Commission and other EU supervisory authorities, or participating in public consultations. Ultimately, regulators would like the Directives to be increasingly the result of a negotiated process between the EU bodies and the stakeholders affected by corresponding rules.[111]

Also, a set of harmonized insurance contract rules called the Restatement of European Insurance Contract Law, and the corresponding Principles of European Insurance

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100. Cox, Merrett, and Smith, *supra* note 96, p. 56.
101. The PEICL is found at http://www.restatement.info.
102. *The Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market: What's the Impact on the Insurance Industry?*, Pierpoalo Marano, p. 5.
103. *VTB-VAB NV v Total Belgium NV and Galatea BVBA and Sanoma Magazines Belgium NV*, C-261/07 and C-299/07 [2009].
104. Directive 2005/29/EC (Unfair Commercial Practices Directive), Article 3(4).
105. Marano, *supra* note 102, p. 6.
106. For example, Austria, the Netherlands, the UK, and Italy. *See* European Commission – DG Justice, *Study on the Application of Directive 2005/29/EC on Unfair Commercial Practices in the EU*, Conducted by Civil Consulting, 22.12.2011, p. 55-56.
107. Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast)Text with EEA relevance.
108. Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution, 2016, Article 17.
109. Insurance Mediation Directive, Directive (EU) 2016/97.
110. *Insurance Regulation in the European Union*, 'The Insurance Distribution Directive: What Does it Change for Intermediaries and For Others?', Nic De Maesschalck, p. 59; Marano, Pierpaolo, and Siri, Michele, eds., Palgrave Macmillan 2017.
111. Marano and Siri, *supra* note 97, p. 19.

Contract Law (PEICL) are being developed for adoption by the EU Commission as a Directive. The PEICL has been assembled after a detailed comparative analysis of the regulations of the individual member states. These Principles would be applicable to all insurance contracts made in the EU – at first on a voluntary basis, and then eventually, mandatory.

Adoption and Integration of EU Directives at the Member State Level

While the adoption of EU Directives is mandatory for states, and each Directive must be integrated into the state law by a set deadline, the actual application of the Directives tends to be a much slower process. The slow pace of application garners a great deal of criticism from consumers, academics, and even the European agencies tasked with assisting their implementation (the European Supervisory Authorities (ESAs), i.e. European Insurance and Occupational Pensions Authority (EIOPA)).[112] It may take many years, or even a decade or more before consumers realize the benefits from a particular EU Directive. Another criticism often heard is that while the Commission continues to issue multiple, specific Directives which are intended to protect insurance consumers, they are neither anticipating the burden those directives will collectively have on the insurers (or insurance intermediaries) nor the duplicative rules and inadvertent regulatory 'holes' which are missed by the current process of issuing a patchwork of regulations. This piecemeal method of legislation is highly inefficient and results in wasted resources, and economists are concerned it could have a destabilizing effect on the entire market.[113]

Member State Regulations and Insurance Codes

Insurance is typically categorized as a 'financial service' and governed by the same body of law and the same agency that is tasked with financial market controls, as in Germany and Ireland. However, Portugal maintains a separate Portuguese Insurance and Pension Funds Supervisory Authority, and Luxembourg established the Commissariat aux Assurance.[114] France has separated the industries between two agencies, one monitors financial markets and the other, banks and insurance companies.[115]
The Netherlands has created what is called the 'twin peaks' model, in which the Dutch Central Bank supervises the solvency-related aspects of all financial companies, and the Financial Markets Authority supervises their conduct toward consumers.
EU member states employ various methods for the enaction of Directives at the individual state level. Some states integrate Directives into their pre-existing codes which target the same or similar subjects, for example the Unfair Commercial Practices Directive (UCPD) can be integrated into other acts addressing unfair competition, or into consumer law regulations. Other states embed Directives into their civil codes, and the remainder simply implement the Directive by approving a new regulation which is essentially an independent copy of the language of the Directive.[116]
While the UCPD serves as a primary umbrella of insurance consumer protection, most states have additional regulations aimed to protect the insurance consumer. States remain hesitant to apply the UCPD due to the breadth of the Act and the open nature of the provisions (the provisions have not yet been subject to member state court jurisprudence, which can provide clarification). Authorities are unsure exactly how to enforce the UCPD.[117] The language of the Directive also imposes an additional burden of a new 'transactional decision-making test' on whichever state body or individual that wishes to bring suit directed at enforcement.[118]
Additionally, member states report that state-created legislation is more advantageous than sole reliance on Directives because 1) it increases consumer protections, and 2) resolutions are easier to obtain under local codes.[119]
Both the United Kingdom[120] and Italy[121] have highly developed bodies of insurance regulation. Due to the complexity of insurance products, a number of member states have restricted the direct selling of insurance,[122] and many states forbid the combination of insurance products with other financial products (or other insurance coverages) during sales.[123] France imposes several detailed pre-contractual duties on insurers selling health insurance, providing social security benefits, and other insurance products.[124] The Netherlands has introduced an outright ban on a wide range of insurance products.

Member State Enforcement of Insurance Directives

The majority of EU member states look to their own public authorities to enforce newly-enacted Directives.[125]

112. ESAs have complained of not having any legal enforcement abilities to ensure their interpretive guidelines are applied.
113. Insurance Europe Insight Briefing, *EU Consumer Protection Rules Must Avoid Duplication and be Future Proof*, http://www.insuranceeurope.eu.
114. European Commission – DG Justice, *Study on the Application of Directive 2005/29/EC on Unfair Commercial Practices in the EU*, Conducted by Civil Consulting, 22.12.2011, p. 37.
115. Autorite des Marches Financiers and Autorite de Controle Prudentiel, respectively.
116. European Commission Study, *supra* note 114, p. 6 and 24-32.
117. European Commission Study, *supra* note 114, p. 13.
118. European Commission Study, *supra* note 114, p. 39.
119. European Commission Study, *supra* note 114, p. 10.
120. The UK is no longer a member of the European Union, after Brexit. The UK publishes an exhaustive 'Insurance Handbook'.
121. See generally, *The Fascinating History of Insurance: Posters, Books, Fire Marks and Policies/L'Affascinante storia dell'assicurazione: Manifesti, libri, targhe, polizze*, Fondazione Mansutti (2015).
122. Poland and Denmark being notable examples.
123. This practice is called 'tying', and is prohibited in Italy, France, and Portugal. European Commission Study, *supra* note 114, p. 45.
124. European Commission Study, *supra* note 114, p. 55.
125. For the UCPD, these states include Denmark, Sweden, Finland, Norway, Iceland, the UK, Ireland, and most of the Central and Eastern EU states.

Table 4: Member State Comparison of Enforcement of Financial Services Regulations

	Belgium[126]	Bulgaria[127]	Italy[128]	Netherlands[129]
Financial Services Enforcement Authorities	Federal Public Service Economy, SMEs (small and medium-sized enterprises), Self-Employed and Energy Authority; DG (general director of applicable authority) Enforcement and Mediation	Commission for Consumer Protection	Competition and Market Authority	The Netherlands Authority for the Financial Markets and the Department of Finance
Methods of Enforcement	Public law Criminal law ADR (required before pursing legal remedies) Private law	Public Law	Public Law	Public Law Private Law
Who has Standing to Bring an Action	Public authorities, organizations representing consumer interests, competitors, trade associations, the ombudsman, and individual consumers	Public authorities, organizations representing individual consumers, and individual consumers	Public authorities, organizations representing consumer interests, competitors, trade associations, the ombudsman, and individual consumers	Public authorities, organizations representing consumer interests
State-Specific Insurance Codes / Trade Rules (Similar to UCPD financial services provisions, but which do not significantly overlap)[130]	Code of conduct applicable to insurance advertising, code of conduct applicable to life insurance advertising, trade rules of conduct regarding the running/functioning of an insurance company, rules of conduct for intermediaries, rules of conduct specific to hospitalization insurance and legal protection insurance	None	None	None

However, the roles and forms of 'public authorities' throughout the European Union vary widely. In some states, government authorities work alongside consumer organizations, and in other states, the majority of the enforcement falls to the consumer organizations.[131] Public authorities have the ability to issue desist orders and fines, whereas consumer organizations have the standing to bring lawsuits in the state courts.[132]

Other enforcement methods include the granting of special remedies to individual consumers – for example, in Belgium, consumers have the right to withdraw from a contract if they were subject to an unfair commercial practice,[133] and some member states have Ombudsman programs in which the ombudsman can petition for relief on behalf of a class action of consumers (otherwise known as ADR, or Alternative Dispute Resolution).[134] More rare forms of enforcement are triggered by the special standing of business organizations or commercial competitors which have been damaged by the offending company's unfair practices. In a few member states, these entities are able to bring suits or file administrative complaints. In Belgium and France, a commercial entity's

126. Belgium Fact Table, European Commission – DG Justice, *Study on the Application of Directive 2005/29/EC on Unfair Commercial Practices in the EU*, Conducted by Civil Consulting, 22.12.2011, Annex I: Country Fact Sheets.
127. Bulgaria Fact Table, European Commission – DG Justice, *Study on the Application of Directive 2005/29/EC on Unfair Commercial Practices in the EU*, Conducted by Civil Consulting, 22.12.2011, Annex I: Country Fact Sheets.
128. Italy Fact Table, European Commission – DG Justice, *Study on the Application of Directive 2005/29/EC on Unfair Commercial Practices in the EU*, Conducted by Civil Consulting, 22.12.2011, Annex I: Country Fact Sheets.
129. Netherlands Fact Table, European Commission – DG Justice, *Study on the Application of Directive 2005/29/EC on Unfair Commercial Practices in the EU*, Conducted by Civil Consulting, 22.12.2011, Annex I: Country Fact Sheets.
130. These do not include member state-specific insurance codes which cover subjects other than the scope of financial services regulation found in the UCPD, i.e. specific codes addressing particular types of insurance.
131. European Commission Study, *supra* note 114, p. 7.
132. European Commission Study, *supra* note 114, p. 33.
133. Belgium Fact Sheet, *See* European Commission – DG Justice, *Study on the Application of Directive 2005/29/EC on Unfair Commercial Practices in the EU*, Conducted by Civil Consulting, 22.12.2011, p. 34.
134. Finland; For an excellent discussion on the Ombudsman program in the United Kingdom, *see* Daniel Schwarcz, *Redesigning Consumer Dispute Resolution: A Case Study of the British and American Approaches to Insurance Claims Conflict*, 83 Tul. L. Rev. 735 (2009).

unfair commercial practices can be considered a criminal offense.[135]

Finally, there are several different forms of Alternative Dispute Resolution (ADR) across the European Union. While most ADR programs are available to individual consumers, some ADR programs are available to only businesses and consumer organizations. While many ADR programs have government involvement, such as the United Kingdom's Financial Ombudsman Service, others have been established by businesses and are privately managed.[136]

The actual procedures available to European insurance consumers filing a complaint against their insurer varies widely. 'Administrative decisions' are the most frequent consumer remedy across the EU, with approximately 40% of consumers employing this method. Approximately 22% of the complaints result in a judicial action. The remainder of the cases result in either governmental guidance to the offending business or an official warning to cease the illegal behavior.[137]

Consumers of the various EU member states are generally well-protected by the mandatory Directives of the European Union. While enforcement is inconsistent and some member state citizens may not have access to an efficient and direct remedy through their judiciary, administrative organizations, or an ADR/Ombudsman service, the comprehensiveness of regulations at the EU and state levels, when combined, provide an excellent proactive deterrent effect which generally curbs unfair industry behaviors in the EU insurance market *before* the bad behaviors can be inflicted upon the consumers. Nonetheless, complaints of unfair contracting behavior and the undersettling of claims remain common, and the EU would be well-advised to adopt (and enforce) a body of law similar the U.S. NAIC's UTPA or UCSPA. Fortunately, the ongoing drafting and consideration of the PEICL, which is specific to the nuances of insurance contracts, is likely to enhance insurance consumer protections.

Protecting the Consumer: EU vs. US Overview

In both the United States and the EU, insurance regulations fall into two broad categories – those meant to protect the consumers from insurance company defaults, otherwise known as solvency or market regulations, and those meant to ensure fairness in the transactions between insureds and insurance companies.

Solvency regulations in both jurisdictions are exhaustive and straightforward. After some significant historical defaults by insurance companies in the late 19th and early 20th century, governments were forced to cover the defaulting insurers' liabilities or face significant societal and economic upheaval. To prevent future insolvencies, regulators enacted rules that protect consumers from companies that are poorly funded or carry too much risk. As recently as 2016 the European Union adopted an even more stringent body of rules called Solvency II.

Regulations enacted to ensure fairness for the consumer get far less attention than solvency.[138] In the United States, consumer protections are left to the individual states. Despite fairly widespread state adoption of consumer protection acts such as the Unfair Trade Practices Act (UTPA) and the Unfair Claim Settlement Practices Act (UCSPA), these regulations are very rarely enforced. The additional availability of relevant American case law such as insurance bad faith principles does not even begin to properly or comprehensively address the widespread failure of regulatory enforcement.

In the European Union, what was previously an area of law addressed by the individual states is just recently being handled by new EU Directives and regulations. There is not yet a comprehensive insurance law code at the European Union level which specifically addresses the peculiarities of a contract between an insurance company and an insurance consumer,[139] nor is there a comprehensive act addressing the unfair business practices of insurance companies. These issues continue to be left to the member states, which are welcome to maintain more strict insurance regulations. Like in the U.S., these regulations are only upheld if they do not compromise the effectiveness of the higher-level body of law, i.e. EU Directives, or, in the U.S., the Federal law. Table 5 provides a comparative overview of U.S. and EU insurance regulations.

Conclusory Remarks

Overall, the United States has established a decentralized, reactive strategy of insurance consumer protection, while the European Union has created – and continues to refine – a more centralized, proactive approach. After a review of the history of insurance in both the U.S. and the EU, we begin to understand why these significantly divergent approaches have developed. As Tom Baker and Kyle Logue succinctly and elegantly explain –

The principle of social solidarity – which is much stronger in Europe than in the United States – holds that insurance exists for the benefit of the group … [and] the principle of distributional equality suggests that society should seek to eliminate or at least reduce certain arbitrary differences in opportunities or economic well-being that

135. European Commission Study, *supra* note 114, p. 35-36.

136. *See* Daniel Schwarcz, *Redesigning Consumer Dispute Resolution: A Case Study of the British and American Approaches to Insurance Claims Conflict*, 83 Tul. L. Rev. 735 (2009); European Commission Study, *supra* note 114, p. 36. Notably, in the United States ADR programs are rarely employed by consumers, other than to serve as a chance for private mediation during settlement negotiations – concurrent to litigation. The cost of ADR in the United States is prohibitive for the majority of consumers.

137. European Commission Study, *supra* note 114, p. 11.

138.' [Solvency] regulation involves continuous monitoring of insurers' financial situations and the authority to remove them from the market if their resources become inadequate. Concern with fairness is more variable, both in depth of commitment to the goal and in methods used.' Kimball & Pfennigstorf, *supra* note 1 at 99.

139. A Restatement of the Principles of European Insurance Contract Law (PEICL) is currently being drafted and the EU Commission is considering adopting it for advisory purposes only. http://www.restatement.info.

Table 5: Comparative Insurance Regulations: The United States and The European Union

	United States	European Union
Solvency	Individual solvency regulations voluntarily adopted by the majority of states	Solvency II Directive,[140] mandatory and must be followed by every state
Unfair Contract Terms	– Unfair Trade Practices Act, specifically targeting insurance company contracts and sales, voluntarily adopted by the majority of U.S. states – Common law principles of Contract Law	Unfair Contract Terms Directive,[141] mandatory and must be followed by every state
Advisory Compilations of Insurance Laws	Restatements of Contract Law and/or Insurance Law; all NAIC Model Laws	Principles of European Insurance Contract Law (PEICL)[142]
Insurance Financial Market Conduct	Individual regulations adopted by the states to monitor the insurance markets	Solvency II Directive,[143] mandatory and must be followed by every state
Regulations of Insurance Brokers, Agents, and Intermediaries	Individual regulations adopted by states, either through NAIC agent/broker/producer model legislation or independent Business and Professions Codes	General Data Protection Regulation[144] Insurance Distribution Directive (IDD)[145] and Delegated Acts Packaged Retail and Insurance-based Investment Products Regulation (PRIIPs)[146] Distance Marketing Directive[147]
Unfair Insurance Company Practices Which Have Impact on the Insurance Consumer	– Unfair Claims Settlement Practices Act, voluntarily adopted by nearly every U.S. state – Unfair Trade Practices Act, voluntarily adopted by the majority of U.S. states	Unfair (Business to Consumer) Commercial Practices Directive[148]

exist between individuals, especially where those differences are not the result of voluntary, informed choices but rather are the result of 'brute luck'...[149]

When one considers that Europeans wish their society to be cohesive and provide a safety net for those who may be weaker, unwary, or merely unlucky, both the more frequent European use of mutual insurance organizations and the stronger EU regulations of corporate, for-profit insurance companies begins to make complete sense – showing an alignment with European ideals and socio-economic principles.

The United States, on the other hand, has been historically well-known for a dedication to the 'free market' economy of lesser regulation, and American society has traditionally been very individualistic in nature. The lack of insurance regulations (and enforcement thereof) within the United States exhibits an adherence to those traditional, less socially cohesive principles.

The more important takeaway from this U.S./EU comparative analysis is not a determination that one insurance law system is 'better' than the other, or that one socio-economic ideology is more superior – but which system, and hence which regulatory structure, is ultimately better

140. COMMISSION DELEGATED REGULATION (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II). (2015). European Union.
141. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.
142. *See generally* note 139 (PEICL).
143. *See generally* note 140.
144. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).
145. *See generally* note 107.
146. Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) (Text with EEA relevance).
147. Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC.
148. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (Text with EEA relevance).
149. Baker and Logue, *supra* note 37, p. 638, *citing generally* Dworkin, Ronald, *What Is Equality? Part 1: Equality of Welfare*, 10 Phil. & Pub. Affairs 185 (1981) and *What Is Equality? Part 2: Equality of Resources*, 10 Phil. & Pub. Affairs 283 (1981).

for the consumer welfare and more healthy for the economy as a whole?

The mutual insurance programs which are far more common in the EU require far less regulation than the modern corporate shareholder insurance companies, and they benefit the insureds with low costs and high benefits. This falls directly in line with the European goal of social solidarity, and provides stabilizing economic benefits for all of society. However, many scenarios are not conducive to mutual insurance, such as the insuring of commercial endeavors or insurance needed for isolated or concentrated areas at high risk for natural disaster. Therefore, large corporate insurance companies do also serve important purposes in societies.

The American insurance market is composed primarily of corporate insurers. When corporate, shareholder-driven companies are deemed necessary, very close attention must be made to their inherent conflict of interest and their chronic acts of opportunism which harm the insureds. When policyholders are harmed and they cannot fully recover from the insured misfortune which has befallen them, the economy suffers a redistribution of wealth to the already-powerful corporation when the benefits are not paid, but withheld by the company. Society as a whole then suffers a decrease in quality of life and well-being, because the policyholders are not able to repair their damages and the insurance monies they were denied are not placed back into the stream of commerce to benefit their communities, but are held in a large corporate fund or amassed in a wealthy shareholder's bank account. The insureds are also likely to become less productive due to the effects of their misfortune, whether because their property is damaged and they have lost utility, or because they have suffered ill health and are unable to afford appropriate treatment.

The damages inflicted upon individuals and their communities when they have been denied their full insurance coverages are socio-economically less than ideal and this becomes increasingly more evident as time passes and insurance regulations fail to evolve appropriately. A tangible example is currently manifesting in the United States, in which insured homeowners affected by natural disasters – such as hurricanes in the South or the fires in California – are either not rebuilding their homes or are rebuilding a structure which is much simpler and smaller. Evidence is strongly suggestive that this phenomena is caused by the aggressive claims handling of corporate shareholder insurance companies.[150]

The consumer-protective insurance regulations of the European Union are currently undergoing a major transition from the splintered system of state-by-state regulation to the unification of law under the PEICL. Although the EU market is composed of a higher concentration of mutuals than the U.S. market, it would be a wise preventative move for EU regulators to draft insurance consumer protections with an awareness of a possible drift toward the corporate shareholder model. While U.S. insurance consumer protections remain under individual state control, resulting in weak and inconsistent results for the consumers, the EU is moving toward centralization of these regulations, and a resultant strengthening and unification of consumer protections. EU regulators may wish to consider creating a separate and independent enforcement body tasked with implementing the new EU insurance contract laws, with an eye toward proactive protection of the less-powerful consumer who may find themself in an adhesion contract with a corporate insurer tempted by opportunism.

A careful study of the history of insurance leads to the conclusion that a corporate insurance company is a less-than-ideal vehicle for providing insurance coverages to individual, less financially- and politically-powerful consumers, and can only be capable of promoting the highest benefits for society as a whole if it is strictly regulated. Improvements can be made in the insurance regulations of both the United States and the European Union which will benefit not only the individual insurance consumer, but their greater societies as a whole.

150. United Policyholders, *Data Collection Surveys*, https://www.uphelp.org/roadmap-recovery-surveys.