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The Mystery of the Missing Choice-of-Law Clause

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The Mystery of the Missing Choice-of-Law Clause

John F. Coyle*

There is widespread agreement among experienced contract drafters that every commercial contract should contain a choice-of-law clause. Among their many virtues, choice-of-law clauses facilitate settlement and reduce litigation costs. While most modern contracts contain these provisions, some do not. In many instances, the absence of these clauses may be attributed to outdated forms, careless drafting, inattentive lawyers, or some combination of the three. In a few instances, however, it appears that sophisticated contract drafters purposely omit choice-of-law clauses from their agreements. If these clauses add value to a contract — and there is near-universal agreement that they do — then this decision raises a perplexing question. Why would any experienced contract drafter ever consciously choose not to write a choice-of-law clause into an agreement?

This Article seeks to answer this question with respect to one type of agreement where choice-of-law clauses are routinely omitted — insurance contracts. All the available evidence suggests that many insurance contracts lack choice-of-law clauses. This is surprising because insurance companies are the epitome of the sophisticated contract drafter. To unravel the mystery of why so many insurance contracts do not contain choice-of-law clauses, the Article draws upon more than thirty interviews and email exchanges with industry experts. It argues that the absence of these provisions is attributable to a complex amalgam of legislative and regulatory hostility, judicial skepticism, standard forms, and strategic maneuvering on the part of insurers. The Article argues further that manuscript policies — which

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are negotiated between insurers and policyholders — sometimes lack choice-of-law clauses due to a perceived first-mover disadvantage and the absence of any body of truly neutral insurance law within the United States.

Solving the mystery of the missing choice-of-law clause in insurance contracts unlocks three important insights for contracts scholars. First, it sheds useful light on how regulatory intervention can influence the contract production process. Second, it calls into question whether insurance companies are, in fact, sophisticated contract drafters whose agreements invariably further their own interests. Third, it has the potential to change the way that contracts scholars think about the “stickiness” of absent contract terms.

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INTRODUCTION

Carlton Gunn was angry. Years before, while working as an attorney in Washington, he had purchased a long-term care insurance policy from Continental Casualty Company (“Continental”).¹ At the time, Continental had promised Gunn that his premiums would not rise substantially in the future. In 2017, however, he received a letter informing him that his rates would double over the next three years. In 2018, Gunn, now a resident of the District of Columbia, sued Continental for breach of contract in federal court in Illinois. The district court granted Continental’s motion to dismiss but its decision was vacated by the Seventh Circuit in 2020 because the district court never identified the state whose law created Gunn’s cause of action.² If the policy had contained a choice-of-law clause, this issue would not have arisen.³ Unfortunately, the policy lacked a choice-of-law clause. In its absence, the parties spent more than two years litigating a threshold issue — choice of law — that substantially delayed the final resolution of their dispute.

This case highlights a truth known to all seasoned litigators — choice-of-law clauses reduce the costs of dispute resolution. By clearly identifying the law that will govern the contract, these clauses facilitate settlement by making it easier for each party to assess whether it will prevail in litigation.⁴ They also reduce the costs of litigating cases that do not settle because there is no need for the parties to research and brief the issue of choice of law.⁵ Accordingly, it should come as little

¹ Gunn v. Cont’l Cas. Co., 968 F.3d 802, 804 (7th Cir. 2020).

² *Id.* at 807-08.

³ *Id.* at 808 (“In this case, however, the parties’ contract contains no choice-of-law provision.”). A choice-of-law clause is a contract provision that specifies the law to be applied in the event of a dispute. See John F. Coyle, *A Short History of the Choice of Law Clause*, 91 U. COLO. L. REV. 1147, 1149 (2020) [hereinafter *A Short History*]; John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 631, 633 (2017) [hereinafter *The Canons of Construction*]. A choice-of-law clause serves to “protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. e (AM. LAW INST. 1971).

⁴ See William J. Moon, *Contracting out of Public Law*, 55 HARV. J. ON LEGIS. 323, 356 (2018).

⁵ David Hricik, *Infinite Combinations: Whether the Duty of Competency Requires Lawyers to Include Choice of Law Clauses in Contracts They Draft for Their Clients*, 12 WILLAMETTE J. INT’L L. & DISP. RESOL. 241, 245-50 (2004); Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 403 (2003). The doctrinal rules relating to choice of law are famously obscure. See Lea Brilmayer & Daniel B. Listwa, *A Common Law of Choice of Law*, 89 FORDHAM L. REV. 889, 906 n.74 (2020) (“Judge Jack B. Weinstein’s statement on choice of law in the class action

surprise that virtually every guide to contract drafting recommends that commercial agreements include a choice-of-law clause.⁶ This advice is widely followed. A bevy of academic studies have found that when a contract is prepared by seasoned contract lawyers, and when there is a sizable amount of money at stake, the agreement will almost always contain a choice-of-law clause.⁷ While a combination of outdated forms, careless drafting, and inattentive lawyers sometimes leads to a clause

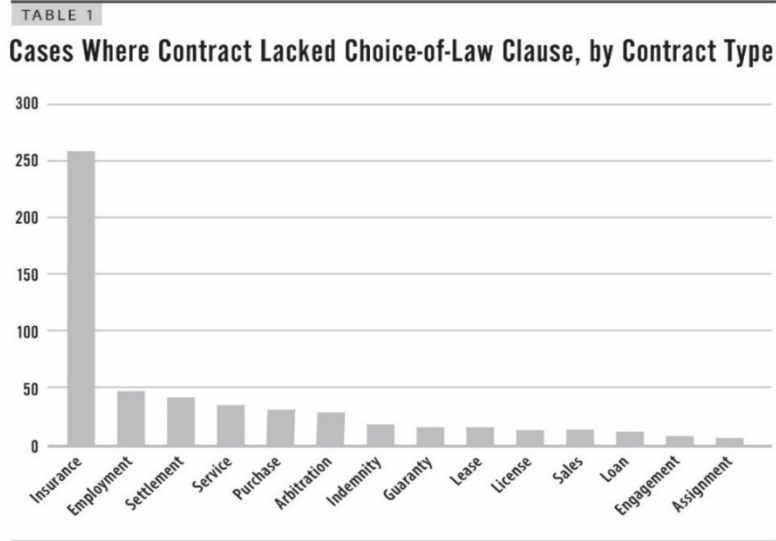
context, though perhaps apocryphal, probably reflects how many feel about conflicts issues more generally: “Whenever I want class action attorneys to settle the case, I call them into chambers and ask them to brief me the choice-of-law issues.”); Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1841 (2006) (“Choice of law is an area that yields few settled expectations except for the predictable frustration felt by practitioners and judges seeking to apply it.”); Telephone Interview with D.C. Ins. Law II (Oct. 19, 2021) (notes on file with author) (“My view on choice of law is that in a lot of contexts, the judge decides what choice of law they want and work backwards. In a grouping of contacts approach, you can identify lots of contacts that favor your position.”).

⁶ 2 JOHN BLOOD & LAUREN E. AGUIAR, *SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL* § 23A:12 (2020) (“The laws under which a case is adjudicated can obviously have a significant effect on the outcome of a case. Therefore, . . . counsel where appropriate, should, where possible, thoughtfully negotiate favorable choice of law provisions.”); ARTHUR J. CIAMPI & LESLIE D. CORWIN, *LAW FIRM PARTNERSHIP AGREEMENTS* § 3.05 (2020) (“[T]he . . . agreement should contain a choice of law provision specifying which jurisdiction’s substantive law is to apply in the event of a dispute.”); JEFF C. DODD, *DRAFTING EFFECTIVE CONTRACTS: A PRACTITIONER’S GUIDE* § 9.06 (3d ed. 2022) (“If there is doubt on [the law applicable to the contract], a choice of law clause should be used.”); 2 JEFFREY J. WONG, *COMMERCIAL LOAN DOCUMENTATION GUIDE* § 20.06 (2020) (“Virtually every loan agreement, guaranty agreement, security agreement, or other document related to a commercial lending transaction contains a governing law clause, and all should.”).

⁷ See Stephen J. Choi, Mitu Gulati & Eric A. Posner, *The Evolution of Contractual Terms in Sovereign Bonds*, 4 J. LEGAL ANALYSIS 132, 139-40 (2012) (sovereign debt); John F. Coyle & Christopher R. Drahozal, *An Empirical Study of Dispute Resolution Clauses in International Supply Contracts*, 52 VAND. J. TRANSNAT’L L. 323, 335 (2019) (international supply contracts); John F. Coyle, *Choice-of-Law Clauses in U.S. Bond Indentures*, 13 CAP. MKTS. L.J. 152 (2018) [hereinafter *Choice-of-Law Clauses in U.S. Bond Indentures*] (bond indentures); Jeffrey Manns & Robert Anderson, *Contract Design, Default Rules, and Delaware Corporate Law*, 77 WASH. & LEE. L. REV. 1197, 1226-27 (2020) (discussing prevalence of such clauses in merger agreements); Julian Nyarko, *We’ll See You in . . . Court! The Lack of Arbitration Clauses in International Commercial Contracts*, 58 INT’L REV. L. & ECON. 6, 11 (2018) (noting that 75% of contracts filed by public companies with the Securities and Exchange Commission between 2000 and 2016 contained a choice-of-law clause); W. Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, 2014 U. ILL. L. REV. 67, 86 n.120 (sovereign debt); see also W. Mark C. Weidemaier, *Customized Procedure in Theory and Reality*, 72 WASH. & LEE L. REV. 1865, 1913-18 (2015) (reviewing a sample of commercial agreements of various types filed with the SEC between 2000 and 2012 and reporting that 95.7% of these agreements contained a choice-of-law clause).

being omitted from a given agreement, the evidence shows that sophisticated actors almost always write choice-of-law clauses into their agreements.⁸

There is, however, an important exception. Insurance companies routinely omit choice-of-law clauses from their agreements. A recent survey of 759 U.S. cases decided between 2010 and 2020 reveals that, among decisions where a court expressly or implicitly noted the absence of a choice-of-law clause, the number of insurance cases is significantly higher than the number of cases involving other types of contracts.⁹



⁸ See Michael Gruson, *Governing Law Clauses in Commercial Agreements — New York’s Approach*, 18 COLUM. J. TRANSNAT’L L. 323, 324 (1980) (“Today, nearly all major commercial agreements which have contacts with more than one jurisdiction, be it with several states or several nations, contain a *stipulation juris*, a choice-of-law provision or governing law clause.”).

⁹ In the spring and summer of 2021, I worked with a team of research assistants to identify published cases involving contracts that lacked choice-of-law clauses. In order to identify these cases, we deployed two search techniques. First, we searched for cases decided between 2010 and 2020 where the judge specifically commented on the fact that the contract at issue lacked a choice-of-law clause. Second, we searched for cases decided between 2015 and 2020 where the court applied Section 188 of the Restatement (Second) of Conflict of Laws to determine the law to govern a contract while making no mention of Section 187. When the search was complete, we had a collection of 759 cases involving contracts that did not contain a choice-of-law clause. This is the body of cases reported in Table 1.

While this disparity in numbers could potentially be chalked up to the fact that there are simply more litigated cases involving insurance contracts, this is not the case. In interviews and email exchanges with more than thirty industry experts conducted over the course of 2021, I was repeatedly told that insurance agreements frequently do not contain choice-of-law clauses.¹⁰ Insurance companies, it would seem, are that rarest of rare birds — sophisticated drafters who choose not to write choice-of-law clauses into their contracts. In light of the known ability of these provisions to reduce the costs of dispute resolution, this omission presents something of a puzzle. One might even go so far as to call it a mystery.¹¹

¹⁰ I conducted interviews and engaged in structured email exchanges with 31 insurance company lawyers, consultants who advise insurance companies, brokers who sell policies, law professors who study insurance law, and lawyers who litigate insurance coverage cases over the course of 2021. The arguments set forth in this Article are largely based on information gleaned during these interviews and email exchanges. In a perfect world, these arguments would be supplemented by a review of actual insurance contracts. There is a company — Verisk — that publishes forms that many insurers use as templates for their policies. When I contacted Verisk to ask if I could review these forms to determine if they contained choice-of-law clauses, however, I was told that it would cost \$14,225 for me to gain access to a subset of forms for just a single state. In light of this exorbitant cost, the Article relies primarily on the interviews and email exchanges referenced above in its attempt to solve the mystery of the missing choice-of-law clause. See Steven M. Klepper, *Choice of Law for Coverage Disputes*, in 1 GENERAL LIABILITY INSURANCE COVERAGE: KEY ISSUES IN EVERY STATE (5th ed., Randy Maniloff, Jeffrey Stempel & Margo Meta, eds., 2021) (“Sometimes, albeit rarely, a liability policy will contain a clause specifying which state’s law governs the interpretation of the policy.”); Marc S. Mayerson, *Conflict of Laws and Insurance Disputes: Choice of Law or Choice of Outcomes?*, 5 INS. COVERAGE L. BULL. 1, 1 (2006) (“Most insurance policies are silent as to which state’s substantive law governs their terms.”); Symeon C. Symeonides, *Choice of Law in the American Courts in 2009: Twenty-Third Annual Survey*, 58 AM. J. COMPAR. L. 227, 266 (2010) (“Except for insurance conflicts, which are discussed later, the number of contract conflicts in which the contract does not contain a choice-of-law clause is decreasing every year.”).

¹¹ Insurance treatises shed little light on possible solutions to this mystery. To be sure, most treatises include some discussion of these provisions. See 1 J. RANDOLPH EVANS, STEFAN C. PASSANTINO, J. STEPHEN BERRY, SETH F. KIRBY & P. MICHAEL FREED, NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION §§ 6.02-.07 (2021); BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 3.01 (20th ed. 2020); 2 STEVEN PLITT, DANIEL MALDONADO, JOSHUA D. ROGERS & JORDAN R. PLITT, COUCH ON INSURANCE §§ 24:21-.23 (3d ed. 2022). The focus in these treatises is, however, overwhelmingly on the issue of enforcement. None of them address the underlying question of why insurance contracts routinely omit choice-of-law clauses. The fact that insurance contracts frequently omit choice-of-law clauses has attracted occasional criticism among practicing insurance lawyers. See, e.g., E-mail from Ins. Consultant I to author (May 9, 2021) (on file with author) (“I will say that as someone that has litigated insurance coverage disputes for almost four decades, I have always found it a problem that the insurance contracts lack choice of law provisions. It

This Article seeks to solve the mystery of the missing choice-of-law clause in insurance contracts. In lieu of magnifying glasses, deerstalker hats, and the Baker Street Irregulars, it draws upon interviews and email exchanges with industry experts to explain why insurance policies so often omit these provisions.¹² At the outset, it should be emphasized that there is no single explanation. In 2019, there were 5,965 insurance companies doing business in the United States.¹³ In 2020 alone, the net premiums written by these insurance companies totaled \$1.28 trillion.¹⁴ The sheer size and variety of the insurance industry makes it impossible to draw definitive conclusions about why a particular contract term appears (or fails to appear) in each and every policy.

Solving the mystery is also a challenge because it is far more difficult to prove a negative than to prove a positive. If the goal was to explain why so many insurance contracts contain a particular piece of language, the process would be straightforward. One would need only call up the insurance company and ask it to explain the purpose of a given clause. When the goal is to explain why a term was omitted, by contrast, the inquiry is more complex. Was the omission an oversight? Or was it a strategic decision? The text of the contract cannot provide answers to these questions. The only way to unearth the answers is to ask the contract drafters what they had in mind. This line of research calls to mind the classic film, *Rashomon*, where different characters provide conflicting and contradictory accounts of the samurai's murder.¹⁵ It also bears a passing resemblance to the far superior film, *Clue*, which offers three different endings with three different solutions to the mystery as

introduces a really unwelcome level of uncertainty not only into the litigation, but actually into the fundamental coverage analysis. It is not uncommon for the choice of law issue to be outcome determinative, but if there is more than one jurisdiction's law potentially applicable, it can be hard to resolve a dispute without litigation.”); Dan A. Bailey, *Choice of Law Provisions: The Value of Certainty and Consistency*, BAILEY CAVALIERI, http://baileycav.com/site/assets/files/1458/choice_of_law_provisions.pdf (last visited June 25, 2022) [<https://perma.cc/45EV-T8QZ>] (“[T]he selection of which state law to apply when interpreting and enforcing D&O policies can be a very important issue, yet too many insureds, brokers and insurers ignore that issue until a claim is made. A more prudent approach is to address the issue in the policies, thereby creating certainty and consistency within the insurance program before the claim is made and thus avoiding potentially costly and time-consuming disagreements on this issue after the claim is made.”).

¹² See *supra* note 10 (discussing data collection methods).

¹³ *Employment in Insurance, 2012-2021*, in *Facts and Statistics: Industry Overview*, INS. INFO. INST., <https://www.iii.org/fact-statistic/facts-statistics-industry-overview> (last visited June 25, 2022) [<https://perma.cc/LSB4-HZDP>].

¹⁴ *Id.*

¹⁵ *RASHOMON* (Daiei Motion Picture Company 1950).

to who killed Mr. Boddy.¹⁶ While there were a number of common themes voiced by the industry experts as to why insurance contracts do not contain choice-of-law clauses, they did not always agree on the particulars. While it is possible to provide a *satisfactory* solution to the mystery of the missing choice-of-law clause, it is probably not possible to provide a *definitive* solution due to the vast size of the industry and differing views among the many individuals who work within it.

Even a partial solution to the mystery of the missing choice-of-law clause, however, offers a number of important insights to contracts scholars. First, it sheds useful light on how regulatory intervention can influence the contract production process. While state regulators are indifferent to the terms of most private agreements, they take an active interest in the substantive terms written into many insurance policies. These regulations cast a long shadow on how insurance contracts are made and help to explain why choice-of-law clauses are frequently omitted from these contracts. Second, solving the mystery calls into question whether insurance companies are, in fact, contract drafting experts who invariably draft their policies to effectively further their own interests. There is evidence that, at least when it comes to choice of law, insurance companies are less sophisticated than one might expect. Third, and finally, the solution to the mystery has the potential to change the way scholars think about “sticky” contract terms. Scholars have long recognized that *existing* contract language can be stubbornly resistant to change. To date, however, the question of whether this stickiness operates to keep *new* terms from coming into a contract has attracted much less attention.¹⁷ The absence of choice-of-law clauses from many insurance contracts suggests that contracts can be sticky in both directions.

The Article proceeds as follows. Part I surveys the process by which insurance contracts are made and offers seven distinct explanations for why so many insurance contracts omit choice-of-law clauses. Part II examines the relatively small number of insurance contracts that contain choice-of-law clauses in an attempt to determine why these policies are different. Part III then draws upon the foregoing account to offer several theoretical insights that may be of interest to contracts scholars.

¹⁶ CLUE (Paramount Pictures 1985).

¹⁷ Cf. W. Mark C. Weidemaier, *Disputing Boilerplate*, 82 TEMP. L. REV. 1, 48 (2009) (“Some contract terms may be stickier than others.”).

I. THE MYSTERY OF THE MISSING CHOICE-OF-LAW CLAUSE

The goal of any insurance contract is to protect against the risk of loss.¹⁸ One party (the insurer) promises to pay a sum of money to the other party (the insured) if a risk identified in the contract comes to pass. There are many different types of insurance. Some policies are purchased by natural persons to guard against the risk of death, personal injury, or property damage. Life insurance, automobile insurance, and homeowners' insurance are good examples of such policies. Other policies are purchased by entities to guard against risks arising in the ordinary course of business. The most common form of such insurance is commercial general liability ("CGL") policies.

The contract production process for insurance contracts is different from that of many other types of agreements. Although these contracts involve significant sums of money, there is typically no possibility of negotiation between the policyholder and the insurer.¹⁹ The insurance company offers the contract to the policyholder on a take it or leave it basis.²⁰ The policyholder's only decision is whether to accept the terms of the policy as offered. In many cases, the policyholder is not even provided with a copy of the actual insurance contract in advance; it is merely given a general description of the nature of the coverage. At the outset, therefore, it is important to recognize that the presence or absence of a choice-of-law clause in most insurance contracts cannot be attributed to dickering between the parties. In the overwhelming

¹⁸ *Esparza v. Scott & White Health Plan*, 909 S.W.2d 548, 551 (Tex. App. 1995).

¹⁹ *Kroeger v. Geico Gen. Ins. Co.*, No. 19-CV-00050-NBB-JMV, 2020 U.S. Dist. LEXIS 74385, at *9-10 (N.D. Miss. Apr. 28, 2020) ("The insured has only two choices in 'negotiating' the terms of his policy — he may accept the terms offered by his insurance company, or he may reject them and go to a different insurance company."); Telephone Interview with D.C. Ins. Law. II (Oct. 19, 2021) (notes on file with author) ("These policies are typically not negotiated even by the biggest companies in the world.").

²⁰ See Christopher C. French, *Understanding Insurance Policies as Non-Contracts: An Alternative Approach to Drafting and Construing these Unique Financial Instruments*, 89 TEMP. L. REV. 535, 546 (2017) [hereinafter *Understanding Insurance*] ("Insurance policies, almost without exception, are lengthy, complex standard form contracts of adhesion drafted by insurers and sold on a take-it-or-leave-it basis with respect to their terms. Indeed, insurance policies were the first type of standardized form agreements to be described as contracts of adhesion. Consequently, purchasers have no input regarding the policy language. The only negotiations between a policyholder and an insurer typically relate to the policy limits, premium, deductible, and endorsements added in some circumstances. Except for clerical matters, even the endorsements are drafted by insurers and use standard form policy language."); Telephone Interview with Midwest Ins. Law. I (May 17, 2021) (notes on file with author) ("Consumer policies are not negotiated. They're form-approved by state insurance regulators.").

majority of cases, the insurer dictates the terms of the policy to the policyholder.

In light of these bargaining dynamics, the insured must rely on state regulators — and, to a lesser extent, on the reputation of the broker who serves as an intermediary between the insurer and insured — to ensure that the policy purchased adequately covers the insured risk.²¹ Each U.S. state requires any insurer seeking to sell standard policies first to apply for admission to the state’s insurance market.²² The terms of the policies sold by these carriers must then be approved by state regulators. This regulatory regime seeks to protect local policyholders against unfair terms in insurance contracts. It is also motivated by the reality that states will cover the insured’s losses (up to a point) if an admitted carrier becomes insolvent. The overwhelming majority of personal and commercial insurance policies sold in the United States — including virtually all automobile policies, general commercial liability policies, homeowner policies, life insurance policies, and property and casualty policies — are thus non-negotiated contracts of adhesion sold by admitted carriers whose substantive terms are extensively regulated by the state.²³

There is, however, a separate class of insurers that sells policies to protect against risks that are not adequately addressed by the standard market.²⁴ These insurance companies, which have not been formally admitted to a state’s insurance market, sell excess and surplus lines policies. Cyber insurance and representations and warranties insurance

²¹ See Steven M. Klepper, *Whose Conception of Insurance?*, 162 U. PA. L. REV. ONLINE 83, 83 (2013) (“[B]rokers, large and small, play an important role in deciding which available insurance a policyholder purchases.”).

²² See Peter I. Dysart, *The Nonadmitted and Reinsurance Reform Act and Its Unintended Consequences on the Vermont Captive Insurance Industry: Violating Due Process and Holding Premium Taxes “Captive”*, 38 VT. L. REV. 775, 782 (2014).

²³ See Christopher C. French, *The Butterfly Effect in Interpreting Insurance Policies*, 82 L. & CONTEMP. PROBS. 47, 47 (2019) [hereinafter *The Butterfly Effect*] (“[M]ore than [99%] of the contracts entered today are standard form contracts.”). In 2020, premiums paid on standard policies comprised 90.9% of the total U.S. direct premiums written by insurance companies within the U.S. property and casualty market. The premium volume on surplus lines, by comparison, represented only 9.1% of the market. Andy Daleo, *Surplus Lines*, NAT’L ASSOC. OF INS. COMM’RS https://content.naic.org/cipr_topics/topic_surplus_lines.htm (last updated May 11, 2022) [<https://perma.cc/VFM6-HAEV>].

²⁴ NAT’L TRADE ORG., AN INTRODUCTION TO THE SURPLUS LINES MARKET 1 (“The surplus lines industry generally serves as the innovator for new and emerging risks and related insurance products Surplus lines insurers do this by focusing on underwriting for the specific risk to be insured. In order to ensure new or unique risks are underwritten appropriately, surplus lines insurers are highly specialized and conduct specific research to understand the underlying exposure.”).

are examples of policies sold by these non-admitted carriers.²⁵ While non-admitted carriers are subject to some degree of regulation, the regulatory touch is considerably lighter than with admitted carriers.²⁶ Non-admitted carriers are not required to submit their policies to state regulators for approval and, as a result, have much more freedom to draft those policies as they see fit.²⁷ State regulators have adopted this more permissive regime for two reasons. First, most purchasers of excess and surplus lines policies are large companies or sophisticated actors that do not rely on the state for protection. Second, the state is not obligated to cover the insured's losses if a non-admitted carrier becomes insolvent.

A very small number of insurance policies are actively negotiated by the policyholder.²⁸ Whether a policy is negotiated depends on the type of policy, the sophistication and risk profile of the policyholder, market dynamics, and the nature of the requested amendment, among a host of other variables.²⁹ At the level of concept, however, one may usefully divide the world of insurance contracts into two buckets. The first bucket contains non-negotiated insurance contracts of adhesion that are extensively regulated by the state. The Article refers to such policies as "standard" policies. The second bucket contains insurance policies

²⁵ Surplus lines may also be sold to guard against unusual risks, e.g., the possibility that a golfer will make a hole-in-one at a charity golf tournament or that a professional athlete will suffer a career-ending injury.

²⁶ Christopher C. French, *America on Fire: Climate Change, Wildfires & Insuring Natural Catastrophes*, 54 UC DAVIS L. REV. 817, 837 (2020) ("Surplus insurers are not regulated with the same rigor as admitted insurers."); Telephone Interview with N.Y. Ins. Law. I (May 11, 2021) (notes on file with author) ("The big ones writing primary layers of insurance are subject to different rules and regulations. Excess and surplus lines, for example, aren't subject to state regulations.").

²⁷ JOHN F. DOBBYN & CHRISTOPHER C. FRENCH, *INSURANCE LAW IN A NUTSHELL* 513 (5th ed. 2016) ("In addition to admitted insurers, there are 'non-admitted' insurers known as 'surplus line' insurers that are not licensed in the state. Surplus line insurers are permitted to do business in the state only when a prospective purchaser of insurance is unable to obtain coverage from an insurer in the admitted market.").

²⁸ Telephone Interview with N.C. Law. I (Sept. 13, 2021) (notes on file with author) ("There are manuscript policies — real estate, for example — concluded with really big businesses with market power to negotiate terms. Where a fund is managing thousands of buildings across the United States, you may see negotiated terms. It's definitely the exception.").

²⁹ Telephone Interview with Tenn. Broker I (Sept. 29, 2021) (notes on file with author) ("Whether a policy is negotiable or not depends on risk profile. If you've got a super clean account, there's tons of room for negotiation. If you're lucky to get a quote because of the risk profile, then it's different. If you're a dynamite manufacturer, there are probably only one or two companies who will cover you. In those cases, the terms aren't really negotiable.").

negotiated by sophisticated policyholders and that are subject to substantially less state regulation. The Article refers to such policies as “manuscript” policies.

This Part first explains why insurance companies frequently omit choice-of-law clauses from their standard policies. It then explores the reasons why choice-of-law clauses are sometimes omitted from manuscript policies.

A. Standard Policies

Standard insurance policies that are sold to individuals and companies on a take it or leave it basis frequently do not contain choice-of-law clauses.³⁰ This Section identifies five possible explanations for this absence. First, it suggests that the omission may be attributable in part to rules enacted by state legislators and regulators. Second, it considers the possibility that the omission stems from judicial hostility to choice-of-law clauses in insurance contracts. Third, it notes that certain model forms upon which many insurers rely when drafting their policies routinely omit choice-of-law clauses. Fourth, it identifies several strategic reasons why insurers may prefer to omit choice-of-law clauses from their policies. Finally, the Section considers the possibility that lack of choice-of-law clauses in insurance contracts may be chalked up to simple inattention on the part of insurers.

1. Legislators and Regulators

Outside of the insurance industry, it is common to see companies select the law of their home jurisdiction in contracts where they have the leverage to dictate terms.³¹ Choosing the law of the drafter’s home jurisdiction gives the drafter a home-field advantage in the event of a

³⁰ Standard insurance policies typically do not include forum selection or arbitration clauses for many of the same reasons that they do not include choice-of-law clauses. See John F. Coyle & Katherine C. Richardson, *Enforcing Outbound Forum Selection Clauses in State Court*, 96 IND. L.J. 1089, 1111 (2021) (listing states that ban the enforcement of forum selection clauses in insurance agreements). For a rare exception, see *RZQ, LLC v. McClelland & Hine, Inc.*, No. 13-19-00471-CV, 2021 WL 1418226, at *2 (Tex. App. Apr. 15, 2021) (noting existence of forum selection clause in commercial surplus lines policy).

³¹ Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies’ Contracts*, 30 CARDOZO L. REV. 1475, 1494 (2009) (showing a strong association between the contracting party’s place of business and choice of law).

dispute.³² That party's attorneys are already familiar with the chosen law. The out-of-state counterparty's attorneys are probably less familiar with that same law. This home-field advantage is reinforced when the choice-of-law clause is paired with a forum selection clause or arbitration clause requiring disputes to be resolved in the drafter's home jurisdiction.³³ As a general rule, contract drafters crave the familiar.³⁴ Consequently, they generally prefer the law and courts of their home jurisdiction to the law and courts of their counterparty's home jurisdiction.³⁵

In principle, the party drafting a choice-of-law clause could also select a jurisdiction whose law is unfamiliar but substantively favorable to its interests. A manufacturer could select the law of a state with weak product liability laws. A law firm could select the law of a state with weak malpractice laws. An employer could select the law of a state that offers fewer protections to employees. In practice, it is rare for contract drafters to select laws that are substantively favorable to them.³⁶ This is partly because the law limits the ability of drafters to select jurisdictions with no connection to the dispute.³⁷ Most of the obstacles standing in the way of this practice are, however, purely practical.³⁸ Identifying the

³² See John M. Doroghazi & David J. Norman, *What's Left to Litigate About Forum Selection Clauses?* *Atlantic Marine Turns Four*, 36 *FRANCHISE L.J.* 581, 581 (2017) ("It is no secret that home turf is an advantage. Plants grow best in their native soil and climate. Sports teams win more often on their home court or field. This trope remains true in litigation. An attorney litigating in his or her home court knows the judges and can tailor litigation strategy to the assigned judge's preferences and proclivities.").

³³ Telephone Interview with Midwest Ins. Law. I (May 17, 2021) (notes on file with author).

³⁴ See E-mail from Bermuda In-House Law. to author (May 21, 2021) (on file with author) ("[G]iven a choice [we] will choose English law or Bermuda (where the applicable common law is generally English law), mainly because that's what we know best.").

³⁵ This preference also holds true in insurance contracts where there are no regulatory constraints on the ability of the insurer to select the law of their home jurisdiction. Nebraska specialty insurers selling policies in California, for example, will choose the law of Nebraska. *Applied Underwriters, Inc. v. A&I Steel Fabricators, Inc.*, No. 13CV25, 2013 U.S. Dist. LEXIS 200270, at *3 (D. Neb. May 8, 2013). California specialty insurers selling policies in Missouri will choose the law of California. *Sturgeon v. Allied Pros. Ins. Co.*, 344 S.W.3d 205, 209 (Mo. Ct. App. 2011).

³⁶ The drafter's ability to select the law of a particular jurisdiction is not unlimited. It is in many cases constrained by the limitations set forth in Section 187 of the Restatement (Second) of Conflict of Laws, which are discussed at greater length below. See *infra* notes 64–65 and accompanying text.

³⁷ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (AM. LAW INST. 1971).

³⁸ See Gruson, *supra* note 8, at 325 ("Why do parties to an agreement select a particular governing law? It has been frequently said that parties like to stipulate the

law of a favorable jurisdiction requires a tremendous amount of work. The company must first determine which issues are most likely to arise in future litigation. It must then research the law of many different states in order to determine which one is most likely to prove helpful — on net — across the many issues identified, recognizing that each state is likely to present a mix of favorable and unfavorable rules.³⁹ It is time-consuming and expensive to research the law of many different jurisdictions.⁴⁰ Accordingly, most companies rationally decide not to invest the resources into this line of research. They select the law of their home jurisdiction and call it a day.

Every now and then, however, a company will devote significant time and energy to the project of identifying a favorable substantive law. These companies have the resources to research the law of many states, tend to litigate the same issues over and over again, and have the leverage to insist that their preferred law be selected in the choice-of-law clause. Insurance companies are the quintessential example of such a party.⁴¹ The ability of insurers to select a law that gives them a home-

law which gives them the most advantages. This is a fiction . . . [P]arties tend to prefer the law of the jurisdiction in which they reside or in which they customarily do business. This desire is usually not based on any deep knowledge of this law, but rather on a vaguely felt preference for dealing with what appears to be familiar rather than with the unfamiliar.”); Note, *Commercial Security and Uniformity Through Express Stipulations in Contracts as to Governing Law*, 62 HARV. L. REV. 647, 657 (1949) (“[B]usiness men dealing in accepted trade channels seldom stipulate an unreasonable or wholly foreign law.”); Telephone Interview with Midwest Ins. Law. III (May 17, 2021) (notes on file with author) (“There’s just no way that an insurer doing nationwide business can just select the law of a place with no connection.”).

³⁹ E-mail from Cal. Ins. Law. I to author (Oct. 15, 2021) (on file with author) (“A problem for insurers is that no jurisdiction is more pro-insurer on all issues – for example, in the ordinary course, I would greatly prefer to have California law apply to the interpretation of an insurance policy rather than NY law, but there are some issues for which NY law is more pro-policyholder (e.g., coverage for a disgorgement remedy). Likewise, Delaware law is generally more pro-insured than NY law, but not on everything.”).

⁴⁰ See Telephone Interview with Ins. Consultant II (Aug. 19, 2021) (notes on file with author) (“Insurance companies should, in theory, choose New York in a non-admitted form. But it’s hard to know in advance what side you want to be on. At the time you issue the policy, you don’t necessarily know what the issue will be. New York may be best for one issue. Illinois law for another. Florida law for a third. It becomes more complicated to figure out what law I want to govern specific issues.”); Telephone Interview with N.C. Law. I (Sept. 13, 2021) (notes on file with author) (“On some issues, North Carolina is great. On other issues, North Carolina is not great. Ex ante, it’s hard to know what you want.”).

⁴¹ Telephone Interview with Midwest Ins. Law. III (May 17, 2021) (notes on file with author) (“We had a major client that came to us — we’d been doing coverage work — and asked if we wanted to have a choice-of-law clause, what would be the best one.

field advantage, on the one hand, or to select a law that gives them a substantive advantage in litigation, on the other, helps to explain why policymakers in the United States frequently limit the ability of insurers to select the law to govern their policies via a choice-of-law clause.⁴²

On the legislative front, fifteen states have passed laws that specifically invalidate choice-of-law clauses in insurance contracts that select the law of another state.⁴³ In a number of states, the invalidating statute applies broadly to all admitted policies: “No insurance company shall issue in this state any policy or contract of insurance containing a provision, stipulation or agreement that such policy shall be construed according to the laws of any other state or country . . . unless otherwise prescribed by this chapter.”⁴⁴ In a few states, the invalidating statute applies more narrowly. In Maryland, for example, the statute stating that choice-of-law clauses selecting the law of another state are unenforceable applies only to policies for life insurance or health

We tried to answer it for them in a way that was meaningful. If you want us to take the four or five or six most significant issues that you face over and over — and the states where you face it the most in — we can try our best to give you answers as to whether a choice-of-law provision would be enforceable and helpful. Once we narrowed the question down, they said that we can figure that out on our own.”)

⁴² Telephone Interview with Ins. Consultant II (Aug. 19, 2021) (notes on file with author) (“A huge percentage of policies in force must be filed and approved by regulators in specific states. I know that state insurance commissioners are unlikely to approve a form that states that some other state’s law would govern the interpretation of the contract.”).

⁴³ ARIZ. REV. STAT. § 20-1115(A)(1) (2022); HAW. REV. STAT. § 431:10-221(a)(1) (2022); LA. STAT. ANN. § 22:868(A)(1) (2021); MASS. MD. CODE ANN., INS. § 12-209(1) (2022); MASS. GEN. LAWS ch. 175, § 22; NEB. REV. STAT. § 44-357 (2022); N.Y. INS. LAW § 3103 (2022); OKLA. STAT. tit. 36, § 3617(1) (2022); OR. REV. STAT. 742.018 (2022); S.D. CODIFIED LAWS § 58-15-48 (2022); TEX. INS. CODE ANN. § 21.42 (2021); UTAH CODE ANN. § 31A-21-314(2)(a) (2022); VA. CODE ANN. § 38.2-312(1) (2022); WASH. REV. CODE § 48.18.200(1)(a) (2022); W. VA. CODE § 33-6-14 (2022). To date, no state has expressly mandated that policies sold in the state contain a choice-of-law clause selecting the law of the enacting state. It is not entirely clear, however, whether such a reform is in the interest of local policyholders. On the one hand, mandating that all policies sold in a state contain a clause selecting the law of that state would reduce the overall costs of insurance litigation. On the other hand, such a mandate may result in a reduction in the size of the expected recovery by in-state policyholders. Litigators representing policyholders report that they prefer it when policies omit choice-of-law clauses because this allows them to shop for favorable law that will, presumably, allow them to obtain a larger recovery for their clients. If states were to mandate that every policy contain a choice-of-law clause selecting the law of the policyholder’s home jurisdiction, this ability to shop for law would be lost.

⁴⁴ NEB. REV. STAT. § 44-357 (2022); *see also* *Neon Constr. Enters. v. Int’l Bonding & Constr. Servs., Inc.*, No. ST-11-CV-13, 2012 V.I. LEXIS 34, at *6 (V.I. July 25, 2012) (discussing U.S. Virgin Islands statute that invalidates choice-of-law clauses in insurance contracts).

insurance.⁴⁵ In South Dakota, the applicable statute applies only to policies for life insurance.⁴⁶

In a similar vein, eight states have passed laws stating that insurance contracts shall generally be governed by the laws of the enacting state without specifically referencing choice-of-law clauses.⁴⁷ The language in the North Carolina statute is representative: “All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein, and all contracts of insurance the applications for which are taken within the State shall be deemed to have been made within this State and are subject to the laws thereof.”⁴⁸ Since such statutes do not specifically reference choice-of-law clauses, there is some disagreement as to how they should be construed. Some courts have held that these statutes bar the enforcement of choice-of-law clauses selecting the law of other states.⁴⁹ Other courts have held that these statutes merely announce a background default rule that may be altered by a choice-of-law clause.⁵⁰ The result of these conflicting

⁴⁵ MD. CODE ANN., INS. § 12-209(1) (2022) (“A life insurance or health insurance policy . . . may not be delivered or issued for delivery in the State if the policy . . . states that the policy or contract is to be construed according to the laws of another state or country.”).

⁴⁶ S.D. CODIFIED LAWS § 58-15-48 (2022) (“No policy of life insurance shall be delivered or issued for delivery in this state if it contains any provision that the contract is to be construed according to the laws of any other state or country.”).

⁴⁷ ALA. CODE § 27-14-22 (2022); COLO. REV. STAT. § 10-3-122 (2022); MINN. STAT. § 60A.08(4) (2022); MISS. CODE ANN. § 83-5-7 (2022); N.C. GEN. STAT. § 58-3-1 (2022); S.C. CODE ANN. § 38-61-10 (2022); TENN. CODE ANN. § 56-7-102(a) (2022); WIS. STAT. § 632.09 (2022).

⁴⁸ N.C. GEN. STAT. § 58-3-1 (2022).

⁴⁹ See *Lawson v. Fed. Ins. Co.*, No. 17-cv-01387-SGC, 2018 U.S. Dist. LEXIS 199163, at *8 (N.D. Ala. Nov. 26, 2018) (“Alabama law applies to all insurance contracts arising from applications submitted from within the state [citing Alabama Code § 27-14-22]. Thus, the location of the application for insurance governs and overrides any contrary choice of law provisions included in a policy.”); *Smith v. Penn Mut. Life Ins. Co.*, 14 So. 2d 690, 693 (Ala. 1943) (“The statute is not directory only, or subject to be set aside by the company with the consent of the assured; but it is mandatory and controls the nature and terms of the contract into which the company may induce the assured to enter.”); *Johnston v. Com. Travelers Mut. Accident Ass’n of Am.*, 131 S.E.2d 91, 93 (S.C. 1963) (citing state statute in applying South Carolina law to insurance policy containing a New York choice-of-law clause).

⁵⁰ See, e.g., *Certain Interested Underwriters v. Am. Realty Advisors*, No. 5:16-CV-940-FL, 2017 U.S. Dist. LEXIS 185842, at *1112 (E.D.N.C. Nov. 9, 2017) (concluding that the North Carolina statute only controls in the absence of a choice-of-law clause); *Rockhill Ins. Co. v. Se. Cheese Corp.*, No. 18-cv-268-KD-B, 2020 U.S. Dist. LEXIS 60995, at *12 (S.D. Ala. Apr. 7, 2020) (“[T]he parties’ contractual choice of law in the Policy is not overridden by the choice of law provision in Section 27-14-22 unless the provision would violate Alabama public policy.”); *Diocese of Superior v. Swan &*

decisions is lingering uncertainty as to whether these statutes prohibit insurers from selecting the laws of another state via a choice-of-law clause.

Formal enactments by state legislatures are, however, only a part of the story. Insurance regulators generally have broad authority to refuse to approve policies if they contain terms that they deem unfair or contrary to public policy.⁵¹ The regulators in a number of states report that they will sometimes refuse to approve policies that contain an outbound choice-of-law clause even if there is no statute directly on point.⁵² As a lawyer at the Georgia Insurance Commission explained: “The state of Georgia does not allow insurance policies to be written that contain a choice-of-law provision outside of Georgia. I do not believe there is a statute on this; however, the department has never permitted such clauses to be inserted as a matter of policy.”⁵³ Insurance regulators in Alabama, Connecticut, Maryland, Nevada, North Carolina, Rhode Island, South Carolina, and Vermont report that their respective positions on this matter are broadly similar to that of Georgia.⁵⁴

Assoc., No. 2009AP531, 2010 Wis. App. LEXIS 414, at *5-6 (Wis. Ct. App. June 2, 2010) (“Section 60A.08(4) . . . does not, by its plain terms, prohibit choice-of-law agreements.”).

⁵¹ Daniel Schwarcz, *Coverage Information in Insurance Law*, 101 MINN. L. REV. 1457, 1492 (2017).

⁵² 2 CARRIE E. COPE, *NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION* § 10.01 (2021) (observing that Michigan eliminated the form filing and approval requirements for most type of policies as of February 1, 1997); E-mail from Gray Allen Turner, Assoc. Couns., Ark. Ins. Dep’t to author (June 30, 2021) (on file with author) (“Arkansas has no rule, statute, or official interpretation that prohibits an insurance policy from containing a choice of law provision. That being said — (1) I would not look favorably on such a clause for a policy filing aimed at Arkansas residents or Arkansas risks, but that doesn’t mean it would be denied to be sure. (2) it really hasn’t been addressed and no one can remember seeing it in a policy or requested to be in a policy.”).

⁵³ E-mail from Gregg Conley, Exec. Couns. at Ga. Dep’t of Ins. & Safety Fire to author (July 8, 2021) (on file with author).

⁵⁴ E-mail from Geoffrey Bonham, Assoc. Gen. Couns., S.C. Dep’t of Ins. to author (July 14, 2021) (on file with author) (As regulators, we really don’t see the use of choice-of-law provisions in forms submitted to the Department for pre-approval . . . From our perspective as regulators, if we did encounter such a provision, we would be more apt to question a choice-of-law provision in a policy form prepared for personal lines coverage (i.e., that protects families or individuals against financial losses) as opposed to commercial lines.”); E-mail from Fred Fuller, Deputy Comm’r, N.C. Dep’t of Ins. to author (June 23, 2021) (on file with author) (the North Carolina Department of Insurance “would not knowingly approve an insurance policy contract that contains a choice of law provision for another jurisdiction other than North Carolina”); Letter from Tim Ghan, Assistant Chief, Prod. Compliance/Prop. & Cas., Nev. Div. of Ins. to author (Nov. 10, 2021) (on file with author) (“[T]he division has taken the position

The first explanation as to why insurance contracts frequently do not contain choice-of-law clauses, in summary, is that state legislators and regulators discourage the use of clauses that select the laws of other states.⁵⁵

2. Judges

When a judge is called upon to resolve an issue relating to a choice-of-law clause, she will frequently consult the rules set forth in the Restatement (Second) of Conflict of Laws. As a general matter, the Restatement (Second) is broadly supportive of such clauses.⁵⁶ It sounds

that any policy issued to a Nevada resident must be governed under Nevada law.”); E-mail from Ronald Main, Principal Exam’r, Consumer Aff. Div., Conn. Ins. Dep’t to author (July 2, 2021) (on file with author) (“[I]n the personal lines context . . . the Connecticut Insurance Department would not consider any law other than Connecticut to apply to insurance on homes and autos for Connecticut residents.”); E-mail from J. Fairley McDonald, III, Chief Couns. – Legal Div., Ala. Dep’t of Ins. to author (July 12, 2021) (on file with author) (“To my knowledge, our Rates and Forms reviewers attempt to apply § 27-14-22 and would not permit an insurer to file a policy form trying to apply a State’s laws instead of those of Alabama given this statutory requirement. That said, there may be a deviation relating to group policies.”); E-mail from Rosemary A. Raszka, Assistant Dir. of Rates & Forms, Prop. & Cas., Vt. Dep’t of Fin. Regul. to author (July 16, 2021) (on file with author) (“The department does not allow choice of law provisions [selecting the law of another state] in contracts issued in Vermont. There is not a specific law or citation, but we view it as unfair and inequitable.”); E-mail from J. Van Lear Dorsey, Assistant Att’y Gen., Md. Ins. Admin. to author (July 8, 2021) (on file with author) (“[I]f [a policy] has a choice of law provision that lists a State other than Maryland, it will not be approved.”); E-mail from Beth Vollucci, Chief of Consumer & Filing Servs, R.I. Ins. Div. to author (July 21, 2021) (on file with author) (“[T]he Department would generally allow a choice-of-law clause as long as the choice was left up to the insured and not the insurer. If choice is not allowed, then the laws of RI should apply.”). These statements — and the fact that so many insurance contracts omit choice-of-law clauses — cut against the notion that state regulators merely “rubber stamp” policies submitted by insurance companies. See French, *Understanding Insurance*, *supra* note 20, at 553 (“During the policy form review process, only insurers are represented by attorneys, and the state regulators are typically former employees of insurers (who will return to work for insurers after serving as regulators). In short, insurance regulators do not rigorously scrutinize or police policy language. Consequently, the approval process essentially amounts to a rubber stamp.”).

⁵⁵ Private groups have also criticized the use of outbound choice-of-law clauses in personal lines policies. See, e.g., Bulletin from Nat’l Ass’n of Ins. Comm’rs to Prop. and Cas. Insurers Writing Pers. Lines Ins. Prods. (June 25, 2018), https://content.naic.org/sites/default/files/inline-files/legal_bulletin_arb_clauses_choice_of_law_provisions_personal_lines_ins_bulletin.pdf [<https://perma.cc/B5XV-MB9C>] (stating that outbound choice-of-law clauses are “unfair and injurious to the insurance buying public” for “personal lines insurance,” which includes home and “other property and casualty insurance”).

⁵⁶ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. L. INST. 1971).

a skeptical note, however, regarding the use of choice-of-law clauses in insurance contracts. With respect to life insurance policies, for example, Section 192 of the Restatement (Second) provides:

[E]ffect will not be given to a choice of law provision in a life insurance contract designating a state whose local law gives the insured less protection than he would receive under the otherwise applicable law. One factor serving to explain disregard in this instance of the chosen law is that life insurance contracts are drafted unilaterally by the insurer, and the insured is then given the opportunity on a “take-it-or-leave-it” basis of adhering to their terms.⁵⁷

Section 193 takes a similar position with respect to choice-of-law clauses in contracts for fire, surety, or casualty insurance:

Effect will frequently not be given to a choice-of-law provision in a contract of fire, surety or casualty insurance which designates a state whose local law gives the insured less protection than he would receive under the otherwise applicable law for the same reasons that effect is not given to such a provision in a life insurance contract. Effect is more likely to be given such choice-of-law provision in a situation where the insured enjoys a relatively strong bargaining position, and particularly where in addition one or more of the insured risks is principally located in the state of the chosen law.⁵⁸

The position taken by the Restatement (Second), in short, is that choice-of-law clauses are disfavored in insurance contracts when the chosen law provides relatively less protection to the insured or there is a significant bargaining disparity between the contracting parties (which is usually the case).⁵⁹

⁵⁷ *Id.* § 192 cmt. e. The Restatement specifically notes that choice-of-law clauses in group life insurance policies are generally enforceable because the person or entity who procures such a policy usually has a stronger bargaining position. *See id.* § 192 cmt. h; *Kubes v. Am. Med. Sec., Inc.*, 895 F. Supp. 212, 215 (S.D. Ill. 1995) (“The prevailing view is that a choice of law made in the basic group policy will be honored by the courts, particularly where that selection is the State of the group policyholder. We believe that to be the better view, and the one to be followed in this State so long as the particular statutory provision to be applied does not conflict with the public policy of this State, and so long as the certificate received by the insured does not contain conflicting provisions.”).

⁵⁸ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 193 cmt. e (AM. L. INST. 1971).

⁵⁹ Where neither of these conditions is satisfied, the courts will enforce choice-of-law clauses in insurance contracts. *See, e.g., George K. Baum & Co. v. Twin City Fire*

A review of cases cited by the Restatement (Second) in support of this position reveals that this common-law hostility to choice-of-law clauses in insurance contracts grew out of a series of legal battles between insurance companies and policyholders in the first half of the twentieth century.⁶⁰ In the late nineteenth century, life insurance companies were among the first in the United States to write choice-of-law clauses into their standard-form agreements.⁶¹ The clauses in these early policies invariably selected the laws of the insurer's home jurisdiction. When the policies wound up in litigation, state courts frequently refused to give effect to these choice-of-law clauses on the grounds that they were contrary to local public policy.⁶² Over the years, these decisions coalesced into a set of common-law rules that subject choice-of-law clauses in insurance policies to a higher degree of scrutiny than is the case for clauses in other types of contracts.⁶³

In the years since the Restatement (Second) was first published in 1971, some state courts have had occasion to reconsider the proposition that choice-of-law clauses in insurance contracts warrant special treatment. These courts evaluate the enforceability of such clauses by applying the general rule for clause enforceability laid down in Section

Ins. Co., 760 F.3d 795, 800 (8th Cir. 2014) (enforcing New York choice-of-law clause when insured specifically requested that New York law be applied to avoid Missouri law); Gemini Ins. Co. v. Kukui'ula Dev. Co., 855 F. Supp. 2d 1125, 1141 (D. Haw. 2012) ("KDC voluntarily purchased the Indian Harbor Policy with a New York choice of law clause, and the Court will uphold the clear expectations of the contracting parties."); St. Paul Travelers Cos., v. Corn Island Shipyard, Inc., 437 F. Supp. 2d 837, 842 (S.D. Ind. 2006), aff'd on other grounds, 495 F.3d 376 (7th Cir. 2007) ("Corn Island has not overcome the presumption that the choice-of-law provision in the St. Paul policy is valid and enforceable. The St. Paul policy was struck between two sophisticated business entities through an arms-length transaction. Corn Island was represented through an insurance broker who managed the company's policies and had experience in the industry. Nothing in the record reflects that the transaction was anything but arms-length, nor was the contract itself unconscionable. Indiana law would honor the New York choice-of-law provision contained in the policy.").

⁶⁰ These cases played an important role in helping to ensure that insurance policies drafted in subsequent decades did not contain choice-of-law clauses. See Daniel Schwarcz, *The Role of Courts in the Evolution of Standard Form Contracts: An Insurance Case Study*, 46 BYU L. REV. 471, 477 (2020) [hereinafter *The Role of Courts*].

⁶¹ Approximately 66% of a collection of life insurance policies published in 1902 contained choice-of-law clauses selecting the law of the state where the insurer was headquartered. See Coyle, *A Short History*, *supra* note 3, at 1163 n.49.

⁶² *Id.* at 1160-61.

⁶³ See, e.g., Caldwell v. Geico Gen. Ins. Co., No. 09-cv-01015, 2010 U.S. Dist. LEXIS 29418, at *18 (D. Colo. Mar. 8, 2010) (citing unequal bargaining power in declining to enforce Pennsylvania choice-of-law clause); Scarpone v. Empire Blue Cross Blue Shield, No. C-95-2094, 1996 U.S. Dist. LEXIS 23686, at *12 (N.D. Cal. Apr. 29, 1996) (citing unequal bargaining power in declining to enforce New York choice-of-law clause).

187 rather than the special rules for insurance contracts in Sections 192 and 193.⁶⁴ Section 187 states that a choice-of-law clause shall be enforced if (1) the chosen jurisdiction has a substantial relationship to the parties or the dispute or there is a reasonable basis for the parties' choice, and (2) applying the law of the chosen jurisdiction is not contrary to a "fundamental policy" of a jurisdiction with a materially greater interest in having its law applied and whose law would have been applied in the absence of the choice-of-law clause.⁶⁵ The reported decisions suggest, however, that those courts that apply the general rules laid down in Section 187 make regular use of the "fundamental policy" exception to decline to enforce choice-of-law clauses in insurance contracts.

In *Wingard v. Lansforsakringar AB*,⁶⁶ for example, a federal district court in Alabama refused to enforce a choice-of-law selecting the laws of Sweden because enforcement would violate a fundamental Alabama policy barring insurers from excluding punitive damages from coverage. In *Pitzer Coll. v. Indian Harbor Ins. Co.*,⁶⁷ the California Supreme Court refused to enforce a New York choice-of-law clause in a pollution control policy on the grounds that requiring an insurer to show that it was prejudiced by the fact that an insured provided late notice of a claim was contrary to California's fundamental policy. There are other cases where the courts reached similar results.⁶⁸ These cases suggest choice-

⁶⁴ See *Smith v. Lincoln Benefit Life Co.*, No. 08-01324, 2009 U.S. Dist. LEXIS 24941, at *17 (W.D. Pa. Mar. 23, 2009) ("Under Pennsylvania choice of law rules, a choice of law provision in an insurance contract will be given effect.").

⁶⁵ The comments to Section 187 specifically note that the fundamental policy exception may be applied to strike down choice-of-law clauses in insurance contracts. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g (AM. L. INST 1971) ("[A] fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power. Statutes involving the rights of an individual insured as against an insurance company are an example of this sort.").

⁶⁶ No. 11-CV-45, 2013 U.S. Dist. LEXIS 141572, at *44 (M.D. Ala. Sept. 30, 2013).

⁶⁷ 447 P.3d 669, 677 (2019); see also *id.* at 674 ("California's notice-prejudice rule requires an insurer to prove that the insured's late notice of a claim has substantially prejudiced its ability to investigate and negotiate payment for the insured's claim.").

⁶⁸ See, e.g., *Maritz Holdings v. Certain Underwriters at Lloyd's London*, No. 18-CV-00825, 2020 U.S. Dist. LEXIS 222400, at *11 (E.D. Mo. Nov. 30, 2020) (refusing to enforce New York choice-of-law clause because it would deprive the plaintiff of a remedy under a Missouri statute allowing claims for the insurance company's "vexatious refusal" to pay in contravention of Missouri public policy) (cyber insurance policy); *Kroeger v. Geico Gen. Ins. Co.*, No. 19-CV-00050, 2020 U.S. Dist. LEXIS 74385, at *14 (N.D. Miss. Apr. 28, 2020) (refusing to enforce West Virginia choice-of-law clause because the law of West Virginia did not allow stacking in contravention of fundamental policy of Mississippi) (automobile policy); *Tri-Union Seafoods, LLC v.*

of-law clauses in insurance contracts may be subjected to greater scrutiny under the “fundamental policy” exception than clauses in other types of contracts even when they are evaluated under Section 187.⁶⁹

A second possible explanation for why many standard policies lack choice-of-law clauses, therefore, stems from the common-law rules that direct courts to think twice before enforcing these provisions in insurance contracts.⁷⁰ In the face of this judicial skepticism, some insurance companies may decide to omit choice-of-law clauses from their policies altogether.

3. ISO Forms

Many insurance companies in the United States consult form policies promulgated by the Insurance Services Organization (“ISO”) for guidance when preparing their own policies.⁷¹ This reliance on standard

Starr Surplus Lines Ins. Co., 88 F. Supp. 3d 1156, 1170-71 (S.D. Cal. 2015) (refusing to enforce a New York choice-of-law clause because New York’s refusal to recognize a tort action for an insurer’s breach of the implied covenant of good faith and faith dealing was contrary to fundamental policy of California) (product contamination policy); *Ingalls v. Gov’t Emps. Ins. Co.*, 903 F. Supp. 2d 1049, 1059-61 (D. Haw. 2012) (refusing to enforce California choice-of-law clause because it was contrary to Hawaii fundamental policy relating to stacking) (automobile policy); *Harleysville Mut. Ins. Co. v. Gate Precast Co.*, No. 05-CV-228, 2006 U.S. Dist. LEXIS 116278, at *18 (E.D.N.C. Oct. 3, 2006) (refusing to enforce Georgia choice-of-law clause because to do so would be contrary to fundamental policy of North Carolina barring provisions in contracts requiring one party to pay the other’s attorney fees) (policy relating to construction project); *Sturgeon v. Allied Pros. Ins. Co.*, 344 S.W.3d 205, 210 (Mo. Ct. App. 2011) (refusing to enforce California choice-of-law clause because it was contrary to Missouri fundamental policy relating to arbitration clauses in insurance policies) (professional liability policy).

⁶⁹ The choice-of-law issue represents only the smallest tip of the iceberg when it comes to public policy restrictions on the terms set forth in insurance policies. See KENNETH S. ABRAHAM & DANIEL SCHWARCZ, *INSURANCE LAW AND REGULATION* 98-110 (7th ed. 2020).

⁷⁰ Telephone Interview with Ins. Consultant II (Aug. 19, 2021) (notes on file with author) (“We didn’t have a choice-of-law clause in there, in part, because we thought it was futile. When we had them and tried to enforce, the courts would refuse to enforce.”).

⁷¹ See Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263, 1264-65 (2011) [hereinafter *Reevaluating Standardized Insurance Policies*]; Schwarcz, *The Role of Courts*, *supra* note 60, at 488 (“In 1971, the insurance industry founded ISO as a national, non-profit, unincorporated association of insurers to replace the prior patchwork of rate-making bureaus, including the MLIRB.”); Marianne Bonner, *Insurance Services Office (ISO)*, BALANCE SMALL BUS., <https://www.thebalancesmb.com/insurance-services-office-iso-462706> (last updated May 16, 2019) [<https://perma.cc/2WQV-RP8M>] (“Some insurers issue insurance policies using ISO forms and endorsements ‘as is’ (without any alterations). Other insurers use ISO language as a starting point for

forms encourages insurers to compete with each other on price. If all the policies being offered in the market are functionally the same with respect to coverage, consumers will be incentivized to seek out the least expensive policy. The widespread use of standard forms also creates efficiencies when it comes to contract interpretation. As judicial decisions construing provisions in the standard form policies accumulate, the meaning of those provisions will become clearer to all users. While the ISO updates its standard forms at periodic intervals to account for legal, social, and economic changes, most terms in these forms carry over basically unchanged from one revision to the next.⁷²

The ISO Policy Forms library on Lexis Advance contains more than 10,000 policies and endorsements developed by ISO. Virtually none of these forms contain choice-of-law clauses.⁷³ This is surprising because it would be easy and uncontroversial to add a clause to the policy stating that it will be governed by the law of the policyholder's home jurisdiction.⁷⁴ A review of many of these forms, however, reveals that virtually all of them omit choice-of-law clauses.⁷⁵

developing their own policy forms. Many forms and endorsements found in the marketplace contain a combination of standard ISO language and insurers' proprietary wording.”).

⁷² Timothy Stanton, *Now You See It, Now You Don't: Defective Products, the Question of Incorporation and Liability Insurance*, 25 LOY. U. CHI. L.J. 109, 114 (1993); see Ian Ayres & Peter Siegelman, *The Economics of the Insurance Antitrust Suits: Toward an Exclusionary Theory*, 63 TUL. L. REV. 971, 977 (“A further cost savings from the use of ISO forms arises from the regulatory context. In most states, regulatory authorities must approve insurance forms: companies wishing to use nonstandard forms must secure regulatory approval from multiple jurisdictions rather than relying on the ISO to do so for them. This extra effort makes it considerably more expensive for any single company to use non-ISO forms.”). *But see* Schwarcz, *Reevaluating Standardized Insurance Policies*, *supra* note 71, at 1266 (noting that some insurers use policies that substantially deviate from ISO policies).

⁷³ A search through these 10,000 policies for the term “choice of law” generated just 20 hits. All of these hits were in policies prepared for use in North Carolina. A search for the phrase “governed by” in the same sentence as “laws” generated only 32 hits. All of these hits were in policies prepared for use in North Carolina or West Virginia. These limited empirical findings are consistent with anecdotal evidence from practicing attorneys. *See* Telephone Interview with Midwest Ins. Law. II (May 17, 2021) (notes on file with author) (“A lot of U.S. policies are based on the standard ISO forms that don't have a choice-of-law clause.”).

⁷⁴ *See, e.g., Progressive Select Ins. Co. v. McKinley*, No. 20-CV-03229, 2021 U.S. Dist. LEXIS 98930, at *6 (N.D. Cal. May 24, 2021) (“Here, the language of the Policy is clear and explicit in requiring that any disputes as to the coverages provided or the provisions of the Policy are to be governed by the law of the state of residence listed on McKinley's application.”).

⁷⁵ *See, e.g., Arnone v. Aetna*, 860 F.3d 97, 107 (2d Cir. 2017) (clause stating that it “will be construed in line with the law of the jurisdiction in which it is delivered”

A third possible explanation as to why insurance contracts frequently lack outbound choice-of-law clauses, therefore, is that the standard form policies prepared by ISO lack these provisions. Since many insurers rely on these model forms when drafting, their policies may similarly omit choice-of-law clauses.

4. Strategy

The foregoing analysis suggests that insurance contracts generally lack choice-of-law clauses for three reasons. First, legislators and regulators in many states are hostile to these provisions. Second, judges in many states are reluctant to enforce these provisions. Third, the standard industry forms omit these provisions. Upon close examination, however, each explanation is revealed to be only partially satisfactory.

The hostility on the part of legislators, regulators, and judges for example, cannot explain the near-absence of choice-of-law clauses in insurance contracts. This hostility is not directed at choice-of-law clauses *generally*. Instead, it is directed at choice-of-law clauses that *select the law of a different jurisdiction*. Neither legislators nor regulators nor judges have any objection to choice-of-law clauses that select the law of the policyholder's home jurisdiction.⁷⁶ It follows that insurance

(emphasis added)). Agreements in collections of standard-form non-insurance contracts generally do contain placeholder choice-of-law clauses. JACOB RABKIN & MARK H. JOHNSON, FORMS FROM CURRENT LEGAL FORMS WITH TAX ANALYSIS (1381 contracts; 69% contained placeholder choice-of-law clauses).

⁷⁶ The choice-of-law clauses that appear in automobile policies, for example, generally specify that the policy shall be governed by the law of the state where the policyholder resides. *See, e.g., Progressive Select Ins. Co.*, 2021 U.S. Dist. LEXIS 98930, at *6 (“[A]ny disputes as to the coverages provided or the provisions of this policy shall be governed by the law of the state listed on McKinley’s application.”); *Ingalls v. Gov’t Emps. Ins. Co.*, 903 F. Supp. 2d 1049, 1052 (D. Haw. 2012) (“The policy and any amendment(s) and endorsement(s) are to be interpreted pursuant to the laws of the state of California.”); *Geico Indem. Co. v. Crawford*, 36 F. Supp. 3d 735, 737 (E.D. Ky. 2014) (“The policy also contains a choice-of-law provision stating that ‘[t]he policy and any amendment(s) and endorsement(s) are to be interpreted pursuant to the laws of the state of Ohio.’”); *Moses v. Baker*, 798 F. Supp. 2d 863, 866 n.1 (E.D. Ky. 2011) (“The insurance policy in question contains a choice of law clause which states that Ohio law will govern all claims or disputes related to the policy.”); *Kroeger v. Geico Gen. Ins. Co.*, No. 19-CV-00050, 2020 U.S. Dist. LEXIS 74385, at *6-7 (N.D. Miss. Apr. 28, 2020) (“The West Virginia policy provides that it ‘and any amendment(s) and endorsement(s) are to be interpreted pursuant to the law of the state of West Virginia.’”); *Progressive Gulf Ins. Co. v. Faehnrich*, 327 P.3d 1061, 1062 (Nev. 2014) (“Any disputes as to the coverages provided or the provisions of this policy shall be governed by the law of the state listed on your application as your residence.”); *Miller v. Allstate Ins. Co.*, 763 A.2d 401, 403 (Pa. Super. Ct. 2000) (“The contract chooses the substantive law of New Jersey

companies could easily write a choice-of-law clause selecting the law of the insured's domicile into all their policies.⁷⁷ Such an act would serve to reduce the costs of litigation by eliminating any uncertainty as to the governing law for the agreement. This fact notwithstanding, many standard policies do not contain choice-of-law clauses.

With respect to the ISO forms, there can be no question that the language in these forms is laden with history. The origins of the modern forms can be traced back to efforts by two industry trade groups to promulgate model commercial general liability policy forms at a time when choice-of-law clauses were rarely written into contracts of any stripe.⁷⁸ It is possible, therefore, that the original forms developed in the 1940s and 1950s served as the templates for later forms, which in turn served as templates for still-later forms, with the result being that virtually all ISO forms lack choice-of-law clauses due to simple path dependence.⁷⁹ On this account, contemporary policies lack choice-of-law clauses because the original forms drafted eighty years ago lacked choice-of-law clauses. The problem with this explanation is that ISO revises its forms all the time.⁸⁰ Indeed, it has revised its GCL form four times in the past ten years.⁸¹ There is no reason why the ISO could not have added a choice-of-law clause selecting the policyholder's domicile

to apply to the policy.”). The existence of these clauses makes clear that state legislators and state regulators are not uniformly hostile to choice-of-law clauses in standard policies. So long as the choice-of-law clause selects the law of the policyholder's domicile, legislators and regulators will not raise any objection to its inclusion in a standard automobile policy.

⁷⁷ See, e.g., *Sprint Terms and Conditions*, SPRINT, <https://www.sprint.com/en/legal/terms-and-conditions.html> (last visited June 25, 2022) [<https://perma.cc/Y2EH-8RHF>] (“The law of your home state (as printed on your bill) applies to this Agreement.”); cf. *Schutte v. Geico Cas. Co.*, No. 16CV0374, 2016 U.S. Dist. LEXIS 194977, at *2 (W.D. Pa. May 10, 2016) (“[T]he dispute shall be resolved in a court of competent jurisdiction in the county or federal district where the insured resided at the time of the accident.”).

⁷⁸ See Jeffrey W. Stempel, *Rediscovering the Sawyer Solution: Bundling Risk for Protection and Profit*, 11 RUTGERS J.L. & PUB. POL'Y 170, 183 (2013).

⁷⁹ See E-mail from Md. Ins. Law. I to author (May 10, 2021) (on file with author) (“When ISO started drafting CGL forms in the 1940s, choice of law simply wasn't an issue. At the time of the major revisions in 1966 and 1973, it still wasn't much of an issue. The modern CGL form is, more than anything, tweaks to the 1973 form. If the 1973 CGL form didn't address an issue, more recent forms are unlikely to do so.”).

⁸⁰ See Schwarcz, *The Role of Courts*, *supra* note 60, at 486-89. Some of these revisions have been very significant, as when the insurance industry was forced to switch to “plain language” policies in the 1980s. E-mail from Cal. Ins. Law. I to author (Oct. 15, 2021) (on file with author).

⁸¹ The industry revised its GCL form in 1943, 1947, 1955, 1966, 1973, and 1986. Stanton, *supra* note 72, at 114.

to its standard forms.⁸² Nor is there any reason why insurance companies couldn't have added a choice-of-law clause selecting the policyholder's domicile to an amendatory endorsement to a policy derived from the ISO forms. To date, however, they have generally declined to do so.

All of this suggests that the mystery of the missing choice-of-law clause cannot be solved solely by looking to hostility on the part of legislators, regulators, and judges, on the one hand, or to ISO forms, on the other. Instead, the solution to the mystery may be far more interesting. It is possible that insurance contracts do not contain choice-of-law clauses selecting the law of the insured's domicile because the insurers believe it is in their strategic interest to omit them.

When large companies draft contracts of adhesion, they will frequently choose the law of the state where the company is headquartered. Choice-of-law provisions are frequently paired with arbitration clauses or forum selection clauses that require any litigation to occur in the state where the company is headquartered.⁸³ The combined effect of these provisions, when enforceable, is to give the drafting company a significant home-field advantage in any litigation arising out of the contract. Insurance companies are, however, limited in their ability to partake of this home-field advantage by the legal and regulatory constraints discussed above. These same constraints make it difficult for insurers to select the law of a jurisdiction whose law is perceived to be substantively pro-insurer.⁸⁴ Since insurance companies litigate the same issues over and over again, they would like nothing better than to identify the law of the jurisdiction that favors their interests, write a choice-of-law clause selecting that law into their agreement, and then ride the clause to victory in case after case. The same legal rules that prevent insurers from choosing the law of their home jurisdiction, however, also keeps them from choosing the law of an advantageous jurisdiction. To borrow a line from Henry Ford, insurance companies issuing standard policies can select the law of any

⁸² See, e.g., *Progressive Gulf Ins. Co. v. Faehnrich*, 327 P.3d 1061, 1062 (Nev. 2014) (“Any disputes as to the coverages provided or the provisions of this policy shall be governed by the law of the state listed on your application as your residence.”).

⁸³ See, e.g., *Jorgenson Forge Corp. v. Ill. Union Ins. Co.*, No. 13-CV-01458, 2014 U.S. Dist. LEXIS 193585, at *3 (W.D. Wash. June 17, 2014).

⁸⁴ Telephone Interview with Midwest Ins. Law. III (May 17, 2021) (notes on file with author) (“There’s just no way that an insurer doing nationwide business can just select the law of a place with no connection.”).

jurisdiction they want . . . so long as it is that of the policyholder's domicile.⁸⁵

With their options limited in this way, the evidence suggests that many insurance companies have chosen to take their choice-of-law ball and go home. These companies draft policies that are wholly silent on the issue of choice of law. This silence provides two potential advantages to the insurer. First, the lack of a choice-of-law clause creates uncertainty and, in so doing, serves to increase the costs of resolving the dispute. In many cases, the insurance company will be better positioned to bear these additional costs than the policyholder.⁸⁶ As one lawyer explained: "If I'm representing the insurer, I would want no choice of law. I would want to introduce risk and uncertainty."⁸⁷ Second, the lack of a choice-of-law clause gives the insurer the opportunity to shop for law by strategically filing a lawsuit seeking a declaratory judgment in a jurisdiction whose law is favorable to it.⁸⁸ To

⁸⁵ See, e.g., *Ingalls v. Gov't Emps. Ins. Co.*, 903 F. Supp. 2d 1049, 1055 (D. Haw. 2012) (selecting California law in automobile policy issued to California resident); *Moses v. Baker*, 798 F. Supp. 2d 863, 866 n.1 (E.D. Ky. 2011) (selecting Ohio law in automobile policy issued to Ohio resident); *Progressive Gulf Ins. Co.*, 327 P.3d at 1063 (selecting Mississippi law in automobile policy issued to Mississippi resident).

⁸⁶ 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, 742-43 (2009).

⁸⁷ Telephone Interview with Midwest Ins. Law. I (May 17, 2021) (notes on file with author); see Telephone Interview with Ins. Consultant II (Aug. 19, 2021) (notes on file with author) ("Without the certainty, it leaves the parties free to argue about what law would be more advantageous. That can be complicated. What's the place of the contracting? It's not obvious. And the insurers like the flexibility to argue for something that might succeed."); Telephone Interview with Midwest Ins. Law. II (May 17, 2021) (notes on file with author) ("Fighting over choice of law is expensive, time consuming, and really unpredictable. That suggests insurers should add a choice-of-law clause to the contract. But it is what insurance companies have done forever."); Telephone Interview with Wash. D.C. Ins. Law. II (Oct. 19, 2021) (notes on file with author) ("It's because they want to play two ends against the middle. If they wanted to do write choice-of-law clauses into the policies, they'd do it.").

⁸⁸ See Mayerson, *supra* note 10, at 2 ("The court's selection of a given state's law can change the result, which introduces great instability in the relationship between insureds and carriers given that a race to the courthouse may lead to one result (coverage) or the other (none)."); R. Steven DeGeorge, *Venue Selection Is Key to Determining Coverage*, ROBINSON BRADSHAW (Sept. 13, 2016), <https://www.robinsonbradshaw.com/newsroom-publications-384.html> [<https://perma.cc/C6WQ-B5EA>] ("Like it or not, venue often determines governing law, and thereby dictates outcomes. Failing to take account of this reality can be a costly mistake."); see also Christopher C. French, *Forum Shopping COVID-19 Business Interruption Insurance Claims*, 2020 U. ILL. L. REV. ONLINE 187, 194-95 ("An empirical study regarding choice of law decisions for torts cases reveals that, in the forty-two states that do not use the *lex loci* choice of law rule, the court chose to apply the laws most favorable to the plaintiff eighty-six percent of the time, and those laws

the extent that insurance companies are better informed than many of their policyholders as to the content of the law across several states, this ability to shop for law may also work to their advantage.⁸⁹

In summary, it may well be that the insurance companies have run the numbers and concluded that the tactical benefits to be gained from strategically omitting choice-of-law clauses outweigh any cost savings from certainty and predictability ordinarily conferred by these clauses.⁹⁰ A fourth explanation as to why so many admitted policies lack a choice-of-law clause, even one that selects the law of the insured's domicile, is that the omission advances the interests of the insurance companies. If the Carlton Gunns of the world are forced to spend two years litigating the threshold issue of choice of law before they reach the merits, they may decide to drop the case or settle it for less than its expected value.

5. Inattention

Insurance companies are among the most sophisticated contract drafters in modern society. They are keenly aware of the rules — interpretive and otherwise — applied by judges in different jurisdictions to resolve insurance disputes. They can and do revise their policies to account for judicial decisions that they perceive to be unfavorable to their interests. In light of this reality, it is reasonable to believe that the

usually were also the laws of the state in which the case was filed. Indeed, the ability to litigate in a forum that will apply the laws most favorable to the plaintiffs is one of the primary reasons why plaintiffs should forum shop.”).

⁸⁹ See *Liggett Grp. Inc. v. Affiliated FM Ins. Co.*, 788 A.2d 134, 143 (Del. Super. Ct. 2001) (“The insurers may believe that given the volatility in the law their interests are better served by the lack of a choice of law provision, which allows them to argue the application of the law of that jurisdiction most favorable to them at the time of suit.”); E-mail from Ins. L. Professor II to author (May 6, 2021) (on file with author) (“[I]nsurers want to preserve the flexibility to make self-serving choice of law arguments when they need to.”); Telephone Interview with Ins. Consultant II (Aug. 19, 2021) (notes on file with author) (“Without the certainty, it leaves the parties free to argue about what law would be more advantageous. There are some jurisdictions where the law is so bad for insurers that they would prefer never to write a policy there. The law of Florida and West Virginia, for example, is really anti-insurer on bad faith.”).

⁹⁰ One strategy that insurers may wish to consider involves a differentiated approach to choice-of-law. When a company sells policies in jurisdictions whose law is comparatively favorable to the insurer, these policies should *include* choice-of-law clauses selecting the law of that jurisdiction. This will allow the insurer to lock in a relatively favorable law in the event of a dispute with the policyholder. When a company is selling policies in jurisdictions whose law is comparatively favorable to the policyholder, by comparison, it should *omit* the choice-of-law clause from the policy. This will provide the insurer with the flexibility to shop for more favorable law by filing a declaratory judgment action elsewhere.

decision by many insurance companies to omit choice-of-law clauses from their admitted policies is conscious and strategic.⁹¹ It is possible, however, that this omission is at least partly attributable to inattention.⁹²

As discussed above, the absence of a choice-of-law clause in many insurance policies gives the litigants the opportunity to shop for law by filing suit in a forum whose law favors their interests.⁹³ While this flexibility benefits insurers, who can shop for law by filing a declaratory judgment action, it is arguably more beneficial to policyholders because most lawsuits are initiated by policyholders.⁹⁴ Indeed, lawyers who represent sophisticated policyholders report that they *prefer* to litigate cases where the policy lacks a choice-of-law clause because this gives them the ability to seek out a forum whose law is favorable to their client.⁹⁵ If every admitted policy contained a choice-of-law clause selecting the law of the policyholder's domicile, the policyholder's ability to shop for a favorable law would be dramatically curtailed.⁹⁶ In

⁹¹ E-mail from Ins. Consultant I to author (May 9, 2021) (on file with author) (“[P]olicyholder side advocates have continued to resist choice of law provisions, preferring to keep the choice of law question as an open matter for argument or negotiation later, rather than allowing insurers to dictate that the law of an insurer-friendly jurisdiction will govern.”).

⁹² E-mail from Md. Ins. Law. I to author (Nov. 13, 2021) (on file with author) (expressing doubt that “choice-of-law is even on [the] mind” of insurance underwriters).

⁹³ See CHRISTOPHER FRENCH, INSURANCE LAW AND PRACTICE 32 (2d ed. West 2020) (“In conducting the choice of law analysis, courts also often conclude that their own state’s substantive law should apply to resolve the parties’ dispute. Consequently, which party files an insurance coverage lawsuit first and in which state the action is filed can be case dispositive.”); Telephone Interview with Midwest Ins. Law. II (May 17, 2021) (notes on file with author) (“If there is no choice-of-law clause, and there’s an indemnity issue, it depends on where you file. Because that state is going to want to apply its law.”).

⁹⁴ Telephone Interview with Ga. Ins. Law. I (Aug. 3, 2021) (notes on file with author) (“The absence of a choice-of-law clause sometimes benefits policyholders. We do a lot of venue analysis looking a choice of law and law in states where we can get jurisdiction and venue, we look at law on ambiguities and bad faith. If we have three different states where we can get venue, we’re going to choose the one with the law that is most favorable to us.”).

⁹⁵ E-mail from Cal. Ins. Law. II to author (May 7, 2021) (on file with author) (“[M]y strategy is almost always to leave the choice of law blank or silent, UNLESS I am negotiating for a company where there is a strong hometown connection AND insurers are fighting for New York choice of law.”).

⁹⁶ When the choice-of-law clause is paired with a forum-selection clause selecting the courts of the policyholder's domicile, this flexibility is further curtailed. A number of states have enacted statutes directing their courts not to enforce forum selection clauses in insurance contracts. See *supra* note 43. These statutes only apply, however, when the forum selection clause requires the suit to be brought in the courts of another

light of this fact, it is reasonable to ask whether the decision on the part of many U.S. insurers not to write choice-of-law clauses into their policies is an oversight.

It is certainly possible that the insurance companies have collectively decided that the benefits they derive from omitting a clause — creating uncertainty and driving up the overall costs of litigation — outweigh the costs that flow from giving policyholders the ability to shop for law. It is also possible that the insurance companies exclude choice-of-law clauses because choice-of-law issues are simultaneously difficult to understand and easy to overlook.⁹⁷

The idea that insurance companies pay too little attention to choice of law at the drafting stage is plausible for three reasons. First, the choice-of-law clauses that do sometimes appear in standard policies are sloppily drafted. In some cases, the choice-of-law clause states that the policy should be “interpreted” or “construed” in accordance with the law of a particular state but omits the word “governed.”⁹⁸ Including the word “governed” in the clause would give the clause a broader scope and operate to select more of the law preferred by the insurer. The omission of the word “governed” thus constitutes a curious drafting choice on the part of the insurers. Second, the choice-of-law clauses that appear in standard policies sometimes contain typos. In one recent case, the choice-of-law clause provided that: “The policy shall be subject interpretation [sic] under the law of the State of New York.”⁹⁹ This is not a clause drafted by an entity that is paying close attention. Third,

state. A forum selection clause selecting the courts of the policyholder’s home jurisdiction would, in all likelihood, pass regulatory muster. *See, e.g., Matthews v. Erie Ins. Grp.*, 244 A.3d 844, 846 n.4 (Pa. Super. Ct. 2021) (noting existence of forum selection clause requiring suit to be brought in the legal domicile of the insured).

⁹⁷ Outside of insurance context, there are many examples of cases where drafters have similarly failed to maximize their advantages when preparing choice-of-law clauses. *See Coyle, A Short History, supra* note 3, at 1205-06.

⁹⁸ *Id.* at 1191; *see, e.g., Arnone v. Aetna Life Ins. Co.*, 860 F.3d 97, 104 (2d Cir. 2017) (clause stating that it “[will] be construed in line with the law of the jurisdiction in which it is delivered”); *Geico Indem. Co. v. Crawford*, 36 F. Supp. 3d 735, 737 (E.D. Ky. 2014) (clause stated that it “[t]he policy and any amendment(s) and endorsement(s) are to be interpreted pursuant to the laws of the state of Ohio”); *Kroeger v. Geico Gen. Ins. Co.*, No. 19-CV-00050, 2020 U.S. Dist. LEXIS 74385, at *6-7 (N.D. Miss. Apr. 28, 2020) (“The West Virginia policy provides that it ‘and any amendment(s) and endorsement(s) are to be interpreted pursuant to the law of the state of West Virginia.’”). These drafting issues are not limited to insurance contracts. A recent study found that many mergers and acquisitions agreements also omit important words and phrases from their choice-of-law clauses. *See Stephen J. Choi, Mitu Gulati & Robert E. Scott, Investigating the Contract Production Process*, 16 *CAP. MKTS. L.J.* 414, 423 (2021).

⁹⁹ *Catlin Specialty Ins. Co. v. J.J. White, Inc.*, 309 F. Supp. 3d 345, 353 (E.D. Pa. 2018).

there is anecdotal data that insurers pay scant attention to choice-of-law clauses when drafting their policies. As one lawyer who has worked for an insurance broker for twenty years put it: “Many insurance companies have no idea what they’re doing when it comes to choice-of-law.”¹⁰⁰

To illustrate this point, consider the following choice-of-law clause in the automobile policy litigated in *Powell v. Systems Transportation, Inc.*:

This policy is issued in accordance with the laws of Utah and covers property or risks principally located in Utah. Subject to the following paragraph, any and all claims or disputes in any way related to this policy shall be governed by the laws of Utah.

If a covered loss to the auto, a covered auto accident, or any other occurrence for which coverage applies under this policy happens outside Utah, claims or disputes regarding that covered loss to the auto, covered auto accident, or other covered occurrence may be governed by the laws of the jurisdiction in which that covered loss to the auto, covered auto accident, or other covered occurrence happened, only if the laws of that jurisdiction would apply in the absence of a contractual choice of law provision such as this.¹⁰¹

This lengthy choice-of-law clause, distilled to its essence, accomplishes remarkably little. When an accident occurs in Utah, the clause states that claims shall be governed by the law of Utah. This is the outcome that would almost certainly obtain absent the clause. When an accident occurs outside of Utah, the clause states that the contract shall be governed by the laws of the jurisdiction where the accident occurred *if* the laws of that jurisdiction would be applied in the absence of a choice-of-law clause. When an accident occurs outside of Utah, in short, the clause directs the court to perform a conflict-of-laws analysis. If that analysis points to the law of the place of the accident, the court should apply the law of the place of the accident. If this analysis does not point to the law of the place of the accident, the court should apply Utah law. This is, again, the outcome that would almost certainly obtain absent the clause.

The only scenario where the clause has any real effect is where (1) the accident takes place outside of Utah, and (2) the choice-of-law

¹⁰⁰ Telephone Interview with Ins. Broker Law. (Sept. 13, 2021) (notes on file with author); see Telephone Interview with Ins. Consultant II (Aug. 19, 2021) (notes on file with author) (“The reality is that these things are boilerplate. And there’s an aversion to change.”).

¹⁰¹ *Powell v. Sys. Transp., Inc.*, 83 F. Supp. 3d 1016, 1023 (D. Or. 2015).

analysis points to the laws of *neither* Utah *nor* the place of the accident. In this state of the world, the clause directs the court to apply the law of Utah. In the overwhelming majority of cases, however, the choice-of-law analysis will not result in the selection of any third state. In the overwhelming majority of cases, therefore, this particular clause will simply direct the court to *proceed as though the contract did not contain a choice-of-law clause*. This is a puzzling drafting choice that calls into question the sophistication of the insurance company that drafted it vis-à-vis choice-of-law issues.

It is possible, in other words, that choice-of-law clauses are not always omitted from regular policies due to some Machiavellian master plan devised by the insurance companies. Instead, the solution to the mystery may be more prosaic — insurer ignorance and inattention.

B. Manuscript Policies

The contract production process for manuscript policies is different than the contract production process for regular policies.¹⁰² The manuscript policyholder is almost always a large corporation. State regulators are, as a rule, less concerned about protecting large corporations in the insurance market, particularly in the context of excess or surplus lines policies. Judges have fewer qualms about enforcing choice-of-law clauses in manuscript policies because disparities in bargaining strength are less pronounced. And the language set forth in the typical ISO form is less significant; an omitted term may easily be added as an endorsement to the policy as part of party negotiations.¹⁰³ In light of these differences, it is necessary to consider two separate explanations as to why manuscript policies sometimes omit choice-of-law clauses. The first is the absence of any “neutral” law in the insurance space. The second is the first-mover disadvantage.

¹⁰² See E-mail from Md. Ins. Law. I to author (May 10, 2021) (on file with author) (“It’s not terribly helpful to view insurers as unilaterally drafting the policies, because of the major market power wielded by mortgage companies and large policyholders and brokers.”).

¹⁰³ See SURPLUS LINE ASS’N OF WASH., CASUALTY IN SURPLUS LINES 1 (2011) <https://www.surpluslines.org/wp-content/uploads/2014/03/Casualty-in-Surplus-Lines-Rev-3.2015.pdf> [https://perma.cc/WE6K-SE3U] (“[T]here is no such thing as a standard form for coverage written in the surplus line market.”).

1. Absence of Neutral Law

When the parties to a contract do not choose the law of a jurisdiction where one of them is domiciled, headquartered, or incorporated in their choice-of-law clause, they will sometimes choose the law of a neutral jurisdiction with a well-developed body of law.¹⁰⁴ The jurisdiction chosen is viewed as neutral, first, because neither party obtains a home-field advantage by virtue of the choice and, second, the substance of the law in question is not perceived to favor one party at the expense of the other. The parties are most likely to agree to the law of a neutral jurisdiction when they have roughly equal bargaining power. Party A refuses to agree to the law of the home jurisdiction of Party B. Party B refuses to agree to the law of the home jurisdiction of Party A. They compromise by selecting a neutral jurisdiction whose substance is perceived to favor neither party.¹⁰⁵

When the parties to a non-insurance contract need a neutral law to write into their choice-of-law clause, they usually select the law of New York.¹⁰⁶ The popularity of New York law as a neutral jurisdiction is attributable in significant part to its extensive body of case law and a judiciary that is well-versed in business law.¹⁰⁷ In principle, the parties to an insurance contract could follow suit and select New York to govern their agreement. The problem is that the insurance law of New York is widely perceived to be pro-insurer.¹⁰⁸ Policyholders are

¹⁰⁴ *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 11-12 (1972) (“Not surprisingly, foreign businessmen prefer, as do we, to have disputes resolved in their own courts, but if that choice is not available, then in a neutral forum with expertise in the subject matter.”).

¹⁰⁵ This analysis assumes, of course, that the parties actually care enough about choice of law to negotiate the issue. In many instances, the policyholder may fail to appreciate the significance of this issue. E-mail from Ins. L. Professor IV to author (May 6, 2021) (on file with author) (“I’m just not impressed with the insurance law acumen of many risk managers. They may simply fail to realize the degree of differentiation between some jurisdictions (over the same policy language) and hence do not think to bargain on this front.”).

¹⁰⁶ Coyle, *Canons of Construction*, *supra* note 3, at 634.

¹⁰⁷ See N.Y. GEN. OBLIG. LAW § 5-1401 (2018).

¹⁰⁸ Telephone Interview with Midwest Ins. Law. II (May 17, 2021) (notes on file with author) (“New York law is generally more favorable to insurers.”); Telephone Interview with N.Y. Ins. Law. I (May 11, 2021) (notes on file with author) (“If you’re an insurer, there’s no better state than New York. It’s the lesser of all evils because all the other states are so bad. New York is more pro-insurer than most other jurisdictions.”); E-mail from Bermuda In-House Law. to author (May 21, 2021) (on file with author) (“NY . . . has a well-developed system of (re)insurance law, so we will accept NY and NY would be our preferred choice out of all U.S. state governing laws.”); E-mail from Ins. L. Professor IV to author (May 6, 2021) (on file with author) (observing that “[insurers]

therefore reluctant to agree to have their contract be governed by New York law.¹⁰⁹

As an alternative to New York, the parties to non-insurance contracts seeking a neutral jurisdiction sometimes select the law of Delaware. Like New York, Delaware boasts sophisticated judges and a robust body of case law. In principle, the parties to an insurance contract could follow suit and select Delaware to govern their agreement. The problem is that the insurance law of Delaware is widely perceived to be pro-

like NY law because it's an article of faith in the business community that NY law is solid and dependable unlike that crazy, Marxist, indeterminate California law (which I would tend to want in most every policy if a risk manager"); see Christopher C. French, *English Justice for an American Company?*, 97 TEX. L. REV. ONLINE 1, 6 (2018) ("New York law is generally perceived as the most favorable for insurers in the United States."). But see E-mail from Ins. L. Professor II to author (Nov. 5, 2021) (on file with author) ("New York may be slightly right of center but that's all. There are lots of conservative states — probably two dozen — that don't have as much insurance case law as New York, but which would be much more conservative in ruling on substantive coverage issues if asked to rule on them."); E-mail from Cal. Ins. Law. I to author (Oct. 15, 2021) (on file with author) ("NY law is, to say the least, opaque. As far as I can gather, after nearly 40 years of litigating NY law issues, one can find NY courts taking the opposite sides of scores of issues — as far as I can gather, NY appellate courts don't particularly care what other NY appellate courts have said on an issue. Plus, many NY appellate decisions are one or two paragraphs long, with virtually no reasoning, and even NY Court of Appeals decisions can be impossible to follow."). There are a number of cases where insurers chose New York law to govern policies issued by non-admitted carriers. In *Catlin Specialty Insurance Company v. J.J. White, Inc.*, for example, an insurer headquartered in Delaware sold a professional and pollution legal liability policy to a policyholder headquartered in Pennsylvania. That policy contained a choice-of-law clause selecting the law of New York. *Catlin Specialty Ins. Co. v. J.J. White, Inc.*, 309 F. Supp. 3d 345, 354-55 (E.D. Pa. 2018). In *Berkley Assurance Company v. Macdonald-Miller Facility Solutions*, a Michigan-based insurer sold a professional liability policy to a construction company based in Washington. *Berkley Assurance Co. v. Macdonald-Miller Facility Sols.*, No. 19-CV-7627, 2019 U.S. Dist. LEXIS 217761, at *2-3 (S.D.N.Y. Dec. 16, 2019). That policy also contained a choice-of-law clause selecting New York. *Id.*; see *Nat'l Frozen Foods Corp. v. Berkley Assurance Co.*, No. C17-339, 2017 U.S. Dist. LEXIS 141002, at *2 (W.D. Wash. Aug. 31, 2017) (selecting New York law).

¹⁰⁹ See E-mail from Ins. Consultant I to author (May 9, 2021) (on file with author) ("In the U.S., policyholders and their representatives (the big brokers — Marsh, AON, etc.) resist the inclusion of choice of law provisions because they are perceived as onerous devices by the insurers — the belief is that the insurers will try to use the provisions to ensure that the contracts will be interpreted according to the laws of jurisdictions that are perceived as insurer friendly (e.g., New York or Connecticut).").

policyholder.¹¹⁰ Insurers are therefore reluctant to agree to have the contract be governed by Delaware law.¹¹¹

If the laws of both New York and Delaware are perceived to favor one side or the other, there is no obvious body of neutral law upon which the parties might agree as a compromise in a manuscript policy.¹¹² If there can be no agreement on a neutral jurisdiction, and if neither party has the leverage to force its preferred choice upon the other, then the logical thing to do is to omit the choice-of-law clause from the contract altogether.¹¹³

These dynamics help to explain why many director & officer (“D&O”) policies do not include choice-of-law clauses. In the early 1980s, as it happens, most D&O policies contained choice-of-law clauses selecting New York law.¹¹⁴ In the ensuing years, policyholders lobbied their brokers to encourage the insurance companies to eliminate these clauses.¹¹⁵ The policyholders did not demand that a different jurisdiction’s law be chosen.¹¹⁶ They just wanted to avoid New

¹¹⁰ See Telephone Interview with Midwest Ins. Law. I (May 17, 2021) (notes on file with author) (“Delaware law is not actually all that great for insurers.”); E-mail from Ins. Consultant I to author (May 9, 2021) (on file with author) (“Over the last 24-36 months, there has been a steady stream of decisions out of the Delaware courts that have not only been overwhelmingly policyholder friendly but that have in fact set aside years of well-established precedent from other jurisdictions.”); see also Telephone Interview with Wash. D.C. Ins. Law. II (Oct. 19, 2021) (notes on file with author) (“Washington State is the best jurisdiction for policyholders in the entire country right now.”).

¹¹¹ See E-mail from Bermuda In-House Law. to author (May 21, 2021) (on file with author) (“[W]e are often asked to concede governing law and to go with the reinsured’s choice which we may do as part of the negotiation (and accepted market practice) even though that may well bring less certainty — and more enforceability risk.”).

¹¹² In principle, the parties could select the law of some other state whose law strikes a better balance between the interests of the insurance companies and the policyholders. In practice, even if an insurer were to propose that they settle on the law of an ostensibly neutral jurisdiction — Colorado, for example — there is no guarantee that the policyholder would go along. The policyholder would suspect, not without reason, that the insurance company knew something they didn’t about the law of the chosen jurisdiction and would reject the offer.

¹¹³ See E-mail from Bermuda In-House Law. to author (May 21, 2021) (on file with author) (“I think the policyholder resistance comes from the fact that when the insurers try to designate a forum they do so in a transparently self-interested way, but trying to designate New York or Connecticut law or other law that policyholders regard as disadvantageous. The insurers typically don’t want the policyholders’ preferred law either, so . . . they compromise by leaving the contract silent.”).

¹¹⁴ Telephone Interview with N.Y. Ins. Law. II (Sept. 28, 2021) (notes on file with author).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

York.¹¹⁷ Eventually, the policyholders prevailed and the clause was removed from most D&O policies.¹¹⁸ The parties addressed the choice-of-law issue by deleting the choice-of-law clause from the agreement altogether.

One possible reason why manuscript policies sometimes do not contain choice-of-law clauses, therefore, is that parties of roughly equal bargaining power cannot agree on a law that is acceptable to both sides.¹¹⁹ When this happens, they resolve the issue by omitting the clause.

2. First-Mover Disadvantage

One additional constraint on an insurer's willingness to add a choice-of-law clause to a manuscript policy is a desire not to be the *first* company to add choice-of-law clauses out of a fear of losing business. Consider the following scenario. A large U.S. corporation has reached out to a number of insurance companies through a broker to ask for price quotes and draft terms on a commercial general liability policy.¹²⁰ Historically, these policies have not contained any choice-of-law clauses. If three of the potential insurers put forward contracts that omit this provision, and the fourth puts forward a contract that contains it, then the policyholder may draw a negative inference from its inclusion in the fourth proposal. In particular, the policyholder may conclude that the insurance company has added the choice-of-law clause selecting the law of a particular state because that state's law is advantageous to the insurer. This inference may be completely unfounded. Nevertheless, the policyholder rejects the fourth proposal out of hand because it lacks the time or the resources to adequately research the law of the jurisdiction named in the clause. The insurance companies submitting proposals do not want to lose the business due to a minor provision like a choice-of-law clause. Accordingly, they purposefully omit the clause from the contract to ensure that this does not happen.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See E-mail from Wash. D.C. Ins. Law. I to author (Sept. 10, 2021) (on file with author) (“[G]eneral COL clauses are relatively rare even in these surplus lines [cyber insurance] forms. I don’t know whether that’s because most insurers like to hedge their bets (as I do), or because they know their relatively sophisticated customers won’t let them get away with choosing unfriendly law from a jurisdiction that otherwise has little relationship to the insured risk.”).

¹²⁰ See E-mail from Md. Ins. Law. I to author (Nov. 13, 2021) (on file with author) (“If you’re dealing with a Fortune 500 company and its insurers, the policyholder and their broker write the policy and shop it around for the best price.”).

This particular explanation has little traction in the market for standard policies because, by stipulation, policyholders in that market are unaware of the specific terms of the policies that they are purchasing. In the market for manuscript policies, by comparison, the scenario sketched out above is plausible.¹²¹ Insurance companies, like any other business, want to attract customers. Accordingly, they will refrain from adding language to policies that may prompt those customers to choose a package offered by a competitor.¹²² The logic of this position is strengthened by the fact that choice-of-law clauses are viewed as relatively unimportant in the grand scheme of things.¹²³ Most policies do not result in litigation. And most state laws do not conflict with one another.¹²⁴ Although adding a choice-of-law clause to the policy may result in lower litigation costs on net, it is possible that insurance companies shy away from adding these provisions to manuscript policies due to a fear of losing business to a competitor.

II. POLICIES WITH CHOICE-OF-LAW CLAUSES

The foregoing account provides an array of possible explanations as to why many insurance policies omit choice-of-law clauses. Viewed collectively, these explanations offer a plausible solution to the mystery

¹²¹ See Telephone Interview with Ins. Consultant II (Aug. 19, 2021) (notes on file with author) (“[T]here are market and competitive pressures. If one insurer started to add choice of law clauses, brokers would sell against you. Everyone wants to sell product. But they’re pretty risk averse. They don’t want to put a new feature into a product that nobody else has . . . especially if the new feature is perceived to be pro-insurer.”); E-mail from Ins. L. Professor II to author (May 6, 2021) (on file with author) (“[U]nless everyone inserts the same type of clause, sophisticated buyers are going to be suspicious of the policies that contain a clause. So, insurers who sell policies with such clauses will be at a competitive disadvantage.”); see also Telephone Interview with N.J. Broker Law. (Sept. 13, 2021) (notes on file with author) (“When I was a baby lawyer at insurance company, I was asked to sit in on meeting where talking about making changes to a company’s umbrella policy. We got to the point of considering whether it would exclude punitive damages. They said they didn’t want it to cover punitive damages. But they didn’t want to say that explicitly because nobody else did. They muttered: ‘Adverse selection. If we do it, nobody will buy our policy anymore.’ And they ultimately left the language out.”).

¹²² See Telephone Interview with Tenn. Broker I (Sept. 29, 2021) (notes on file with author) (“If I’m competing against another broker, and my policy says apply the most favorable law, and his policy says apply New York law, I can use that against him.”).

¹²³ Cf. E-mail from Md. Ins. Law. I to author (Nov. 13, 2021) (on file with author) (“Lawyers don’t understand choice of law, and 90% of the time they miss the issue.”).

¹²⁴ Telephone Interview with Ins. Consultant II (Aug. 19, 2021) (notes on file with author) (“There are differences between specific issues between states and state law, but on the subject of the most commonly litigated issues, the law tends to be pretty similar.”).

of the missing choice-of-law clause. It is important to acknowledge, however, that some insurance contracts do contain choice-of-law clauses. A convincing solution to the mystery must therefore account for the *presence* of choice-of-law clauses in some policies as well as the *absence* of such clauses in others.

This Part undertakes just such an inquiry. It seeks to explain why some insurance contracts contain choice-of-law clauses when others do not. It first examines choice-of-law clauses in representations and warranties policies. It then considers the widespread use of choice-of-law clauses in excess liability policies. It concludes by noting the routine use of such clauses in reinsurance policies. A review of these policies provides additional insights into the contract production process with respect to insurance contracts. It also serves to buttress the solutions identified above with respect to the mystery of the missing choice-of-law clause.

A. Representations and Warranties

Representations and warranties insurance (“RWI”) is a relatively new product in the U.S. insurance marketplace.¹²⁵ When one company purchases another, the seller will typically make a number of representations about the company to the buyer. The seller will also typically agree to indemnify the buyer if any of these representations and warranties are later determined to be materially untrue. To ensure that there is a pool of funds available to make these indemnification payments, a portion of the proceeds payable to the seller will generally be set aside in escrow for a period of time after the deal closes. Over the past decade, a number of transaction participants — usually buyers — have purchased RWI to protect against losses arising out of the breach of a representation or warranty by a seller. The buyer benefits from this arrangement because there is no need to haggle with the seller about the terms of the escrow agreement. The seller benefits because the risk of any contract breach will be borne principally by the insurer. And the insurance company benefits by charging a hefty premium for taking on a risk that may never come to pass. In contrast to many other types of insurance contracts, RWI policies almost always contain a choice-of-law clause.¹²⁶ There are four reasons why.

¹²⁵ See Sean J. Griffith, *Deal Insurance: Representation and Warranty Insurance in Mergers and Acquisitions*, 104 MINN. L. REV. 1839, 1898 (2020).

¹²⁶ Lisa M. Campisi, *Buying Rep & Warranty Insurance? Be Sure to Watch Your Language!*, POLICYHOLDER INFORMER (Oct. 24, 2016), <https://policyholderinformer.com/2016/10/24/buying-rep-warranty-insurance-be-sure-to-watch-your-language/> [https://perma.cc/46QY-

First, RWI policies are frequently sold by non-admitted carriers. Since the terms of these policies are only lightly regulated by the state, the parties are generally free to write a clause into their agreement selecting any jurisdiction they wish.

Second, the physical process by which RWI policies are drafted is different than other insurance policies. In most cases, changes to an insurance agreement are not made by adding and deleting words from the policy itself. Instead, these amendments take the form of a long list of endorsements that are tacked on to the end of the policy. This is not the case in RWI policies. As one lawyer familiar with the process explained:

In reps and warranties insurance, which is a newer product, the policies are drafted differently than older types of insurance. They send you a Microsoft Word doc. You edit and send it back. And they revise and send it back. I've never seen anyone ever do that for more traditional insurance products.¹²⁷

By allowing policyholders to tinker directly with the language in the policy itself, insurance companies made it easier for contract provisions that are standard in other types of agreements — like choice-of-law clauses — to find their way into RWI policies.

Third, the lawyers tasked with revising and negotiating RWI policies are frequently not insurance lawyers. They are mergers-and-acquisition (“M&A”) lawyers.¹²⁸ Virtually all M&A contracts contain choice-of-law clauses. One of the enduring truths of contract drafting is that when a lawyer is presented with an unfamiliar agreement, she will generally revise it to resemble something more familiar. M&A lawyers are accustomed to seeing choice-of-law clauses in every agreement they touch. It is therefore no surprise that RWI policies regularly include choice-of-law clauses.¹²⁹

4FAT] (“[U]nlike many other insurance policies which do not specify which state's law will apply to the interpretation of the policy in the event of a dispute, Rep & Warranty Insurance policies frequently include a choice of law provision. Specifying the law most favorable to coverage in the body of the policy is critical.”).

¹²⁷ Telephone Interview with Ga. Ins. Law. I (Aug. 3, 2021) (notes on file with author).

¹²⁸ *But see* Telephone Interview with N.C. Law. I (Sept. 13, 2021) (notes on file with author) (“Most insurance companies aren't getting an M&A level lawyer to deal even with manuscript policy. They're getting a broker and they're not wordsmithing everything.”).

¹²⁹ *See* Telephone Interview with Ga. Ins. Law. I (Aug. 3, 2021) (notes on file with author) (“M&A policies almost always have choice-of-law clauses.”).

Fourth, and finally, RWI policies are so new that there is very little case law interpreting the language in these clauses.¹³⁰ Accordingly, nobody believes that choosing the law of New York or Delaware will favor one side or the other.¹³¹ Most RWI policies choose New York or Delaware for all the same reasons that many non-insurance contracts regularly select the law of those states — a substantial body of case law and a judiciary that is well versed in contact law.¹³²

When a policy sold by a non-admitted carrier is brand new, and when policyholders are permitted to edit it directly, and when the people doing the editing are all accustomed to having choice-of-law clauses in their agreements, and when there is no case law to suggest that a given state is pro-insurer or pro-policyholder, in summary, the contract is much more likely to contain a choice-of-law clause. These dynamics serve to explain why virtually all RWI policies contain choice-of-law clauses.

B. Excess Liability

Excess liability insurance provides coverage for damages at limits higher than those covered by the underlying policy. If an underlying policy covers \$1 million in losses, for example, the policyholder may purchase a separate excess policy that covers an additional \$4 million in losses. The excess policy typically does not expand the coverage terms of the underlying policy. It merely covers losses that go above and beyond the limits set forth in that policy. Many excess liability policies contain choice-of-law clauses selecting the law of New York. To understand why, it is instructive to trace the history of one of the best-known excess liability policies — the Bermuda Form.

The story of the Bermuda Form begins in the early 1980s. At that time, large U.S. companies found it increasingly difficult to obtain excess liability insurance to protect against “long tail” claims stemming from environmental contamination and other mass tort claims.¹³³ Sensing a market opportunity, a consortium of U.S. policyholder companies led by Marsh & McLennan created two new companies —

¹³⁰ *Id.* (“I think you see COL in reps and warranties because they’re such a new product they have very little developed case law.”).

¹³¹ *Id.* (“Delaware is top state for corporate law and New York is top state for commercial law. It makes sense in M&A world that these are the states where you would look.”).

¹³² *See id.* (“In the reps and warranties world, there is almost always a COL provision and it’s almost always NY or Delaware.”).

¹³³ *See* Lorelie S. Masters, John Jay Range & Paul Moura, *The Bermuda Form and Arbitration of Disputes in London*, 73 DISP. RESOL. J. 67, 71 (2018).

Ace Insurance Company, Ltd. and XL Insurance Company Ltd. — to sell excess liability policies.¹³⁴ These new companies, which were incorporated in Bermuda, developed new policy language that sought to revive the excess liability market after its near-collapse. This policy language eventually became known as the Bermuda Form.

The most salient feature of the Bermuda Form for present purposes is that it contains a choice-of-law clause and an arbitration clause. The choice-of-law clause selects New York law to govern substantive issues (minus the rule that the policy be construed against the drafter). The arbitration clause mandates that all disputes arising out of or relating to the policy be resolved by arbitration in London. The choice of New York law is unsurprising given the widespread belief that New York law is favorable to insurers. The provision calling for mandatory arbitration in London is more novel.

Insurance disputes in the United States are generally resolved in court rather than by arbitration. The drafters of the Bermuda Form decided to require arbitration in London for two reasons. First, they believed that English arbitrators (typically barristers or retired judges) would be “less influenced by what the insurers perceived as undesirable outcomes in insurance disputes in the United States.”¹³⁵ Second, the fact that disputes relating to the Bermuda Form would be resolved by arbitration ensured that the policy would not be interpreted by courts in the United States.¹³⁶ The lack of published case law meant that the policyholder would operate at a relative disadvantage to insurers. Since policyholders would not have access to prior arbitral decisions interpreting the policy, the insurers who *did* have access to these decisions would have a tactical advantage.¹³⁷

The reasons why the dispute resolution terms in the Bermuda Form are so favorable to insurers are easy to grasp. First, the consortium that created the Bermuda Form had significant bargaining strength. Companies in the 1980s were desperate to obtain excess liability coverage. The Bermuda Form offered that coverage on substantive terms that were relatively favorable to policyholders. In exchange, the insurers demanded insurer-friendly dispute resolution provisions. Second, the insurance companies selling excess policies were non-

¹³⁴ *Id.* at 67-68.

¹³⁵ *Id.* at 75; see E-mail from N.Y. Ins. Law. II to author (Nov. 15, 2021) (on file with author) (“[S]ome might suggest that there is an inherent pro-insurer bias among the neutral umpires due to the fact that the Bermuda insurers are always the repeat players in that forum.”).

¹³⁶ See Masters et al., *supra* note 133, at 75.

¹³⁷ *Id.*

admitted carriers. In many cases, the companies using the Bermuda Form were incorporated abroad and operated at a significant level of remove from state regulators.¹³⁸ This combination of bargaining power and lack of regulatory constraint produced dispute resolution provisions — including a choice-of-law clause selecting New York law — that were as favorable to the insurer drafting the policy as one would expect given the circumstances.

C. Reinsurance

Insurance carriers based in Bermuda and England dominate the U.S. reinsurance market.¹³⁹ Policies issued by these carriers almost always contain choice-of-law clauses. As the general counsel for a Bermuda-based reinsurance company explained: “When a policy or reinsurance contracts comes to the legal department to review, we will always recommend a choice of law clause, for all the well-known reasons to do with contract certainty and avoiding disputes around choice of law.”¹⁴⁰ With respect to the choice of jurisdiction, this counsel made the following observation:

New York as you will know has a well-developed system of (re)insurance law, so we will accept New York and New York would be our preferred choice out of all U.S. state governing laws. However[,] given a choice will choose English law or Bermuda (where the applicable common law is generally English law), mainly because that’s what we know best. That said we are often asked to concede governing law and to go with the reinsured’s choice which we may do as part of the negotiation (and accepted market practice) even though that may well bring less certainty – and more enforceability risk.¹⁴¹

¹³⁸ See, e.g., *Weiss v. La Suisse, Societe D’Assurances Sur La Vie*, 154 F. Supp. 2d 734, 736 (S.D.N.Y. 2001) (Swiss insurance company choosing Swiss law); *Breeden v. Sphere Drake Ins. PLC (In re Bennett Funding Grp., Inc.)*, No. 97-70049A, 1999 Bankr. LEXIS 1857, at *64 (Bankr. N.D.N.Y. Aug. 6, 1999) (Bermuda insurance company choosing Bermuda law).

¹³⁹ Foreign entities collect 63% of all U.S. reinsurance premiums. *The U.S. Reinsurance Market Dominated by Foreign Companies*, ATLAS MAG. (Feb. 5, 2019, 5:42 PM), <https://www.atlas-mag.net/en/article/the-us-reinsurance-market-dominated-by-foreign-companies> [https://perma.cc/CE2V-PCET].

¹⁴⁰ E-mail from Bermuda In-House Law. to author (May 21, 2021) (on file with author).

¹⁴¹ *Id.*

This lawyer further observed that reinsurers had more flexibility to choose the law to govern their agreements than other insurers because these agreements — where one insurer is purchasing insurance from another — are “less regulated than direct insurance contracts.”¹⁴²

This explanation provides robust support for many of the explanations outlined above about why many standard insurance policies lack choice-of-law clauses. When the state is not actively involved in regulating these policies, an insurance company exhibits the same preferences as other companies. It wants the familiar law of its home jurisdiction (England or Bermuda). Alternatively, it wants the law of a U.S. state (New York) that is perceived to be substantively favorable to insurers. When the policyholder has significant bargaining strength, however, and when that policyholder chooses to contest the issue of choice of law, the insurer may agree to the law preferred by the policyholder to lock in the deal.¹⁴³

Many reinsurance policies issued by Bermuda-based companies have taken another page from the Bermuda Form and call for all disputes to be resolved by mandatory arbitration in London. This method of dispute resolution frequently means choice-of-law clauses play a less prominent role than they might in traditional court proceedings. As a lawyer who works at a reinsurance brokerage explained:

Choice of law doesn't really matter because there is not a lot of law on reinsurance issues. If there's a dispute in arbitration, the parties will take a kitchen sink approach. They'll cite cases from everywhere. In addition, normally arbitrators are not judges — they are industry experts — and are generally less focused on issues like choice of law.¹⁴⁴

¹⁴² *Id.*

¹⁴³ See E-mail from Ins. L. Professor IV to author (May 6, 2021) (on file with author) (“Reinsurers have consistently told me that they are at the mercy of ceding insurers in terms of choice of law (if the reinsurer wants the business, it has to accept the law desired by the prospective reinsured), which suggests to me that insurers are not just stumbling into policies without choice-of-law clauses but instead are making a considered decision.”).

¹⁴⁴ Telephone Interview with N.Y. Broker Law. I (Sept. 9, 2021) (notes on file with author). In a similar vein is the comment of one reinsurance attorney anonymously quoted in Jeffrey W. Stempel, *Notes from a Quiet Corner: User Concerns About Reinsurance Arbitration – and Attendant Lessons for Selection of Dispute Resolution Forums and Methods*, 9 ARB. L. REV. 93, 101 n.18 (2017) (“[W]e might accept Russian law, but Russian courts? Never.”). The eclectic nature of arbitration regarding strict application of law, its preference for invocation of insurance custom and practice, and the importance of other tactical considerations have tended to reduce the importance of

When there is virtually no published case law on a given topic, and where disputes are resolved by industry experts in arbitration, it stands to reason that the presence or absence of a choice-of-law clause will be less salient than in situations where neither of these things is true. Nevertheless, virtually all reinsurance contracts contain choice-of-law clauses. In this respect, policies for reinsurance closely resemble contracts concluded by sophisticated contract drafters in other industries.

The presence of choice-of-law clauses in reinsurance policies is, in summary, not particularly surprising in light of the fact that these policies are prepared by foreign companies over whom state regulators have limited power, are rarely litigated in U.S. courts, are not derived from ISO forms, are routinely negotiated, and frequently select the law of a non-U.S. jurisdiction. When one strips away many of the factors that make U.S. insurance contracts outliers with respect to choice-of-law clauses, in other words, it stands to reason that these clauses would reemerge. And, in fact, they do reemerge.

III. IMPLICATIONS FOR THE CONTRACT PRODUCTION PROCESS

The process by which contracts are made is highly variable.¹⁴⁵ At one end of the spectrum, there are online contracts of adhesion concluded between consumers and technology companies like Apple and Google. At the other end, one finds bespoke merger agreements concluded between large companies with the active involvement of legal counsel. These variations make it difficult to develop a general theory of the contract production process. Over the past decade, however, scholars have attempted to describe and explain how this process plays out in specific contexts.

Perhaps the most thorough and ambitious contribution to the literature is a book — *The Three and a Half Minute Transaction* — by Mitu Gulati and Robert Scott.¹⁴⁶ These scholars sought to explain why so many multi-billion-dollar sovereign debt agreements contain a contract provision — the *pari passu* clause — that no one really

choice of law in reinsurance contracts, which typically contain arbitration clauses. *Id.* at 115-19.

¹⁴⁵ Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489, 1493 (2010) (Although some bemoan the supposed degree to which insurance law diverges from contract law, the *Grundnorm* remains that insurance law is largely contract law.”).

¹⁴⁶ MITU GULATI & ROBERT E. SCOTT, *THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN* 9-17 (2013); see Barak Richman, *Contracts Meet Henry Ford*, 40 HOFSTRA L. REV. 77, 79-82 (2011).

understands. To answer this question, Gulati and Scott interviewed more than a hundred lawyers. They found that the continued use of the *pari passu* clause in sovereign debt agreement was more attributable to institutional constraints imposed by the contemporary “big law” business model than any inattention or oversight on the part of individual lawyers.¹⁴⁷ They also observed that “mechanization and commoditization of professional services imposed substantial barriers to undertaking the necessary legal research that would precede any intelligent effort to remove a potentially flawed piece of standard boilerplate.”¹⁴⁸ In the final analysis, however, Gulati and Scott found that the refusal to revise or delete the *pari passu* clause defied easy explanation.

This Part seeks to build on work of Gulati, Scott, and others to advance the literature relating to the contract production process in three ways. First, it argues that existing accounts of this process have largely overlooked the role played by the state in regulating the content of private agreements. Second, it argues that drafter sophistication is not an on/off switch. Some “sophisticated” drafters prepare choice-of-law clauses that are state of the art. Other “sophisticated” drafters prepare clauses that are anything but. This disparity suggests the need to develop a more refined definition of drafter sophistication. Third, and finally, the Part contributes to the existing literature on “sticky” contract terms. It argues that the continued absence of choice-of-law clauses from many insurance contracts suggests that absent terms can be just as sticky as terms that have been in the contract for decades. Terms that are in tend to stay in. Terms that are out tend to stay out.

A. *State Regulation of Contracts*

The process by which contracts are drafted inevitably has an impact on the content of those agreements. Most contracts are not custom tailored to the needs of each individual transaction.¹⁴⁹ Instead, they are mass produced. This means that contracts frequently contain boilerplate terms that may or not be relevant to the needs of the parties to a particular transaction. Even when contracts are carefully negotiated, moreover, the dynamics of the production process inevitably shape the language in these agreements. Junior lawyers are,

¹⁴⁷ GULATI & SCOTT, *supra* note 146, at 108.

¹⁴⁸ *Id.*

¹⁴⁹ See Stephen J. Choi, Mitu Gulati & Eric A. Posner, *The Dynamics of Contract Evolution*, 88 N.Y.U. L. REV. 1, 2 (2013).

for example, famously reluctant to make significant changes to high-dollar value contracts for fear of making a costly mistake.

To date, the scholarship in this area has generally focused on the contract production process through the lens of private actors operating in an unregulated marketplace. If the parties want to alter the definition of what constitutes a “material” breach in a merger agreement, for example, they may do so without first checking with any state regulator. In a seminal article, Claire Hill framed the academic debate as one between path-dependence scholars who believe that history “matters” when it comes to contract drafting, on the one hand, and efficiency scholars who believe that history is largely irrelevant, on the other.¹⁵⁰ To date, however, scholars who write in this area have generally overlooked a third variable. This is the role played by the state in the contract production process.

Consider the presence or absence of choice-of-law clauses in insurance policies. Regular policies are extensively regulated by the state and generally *do not* contain choice-of-law clauses. Surplus and excess lines policies are subject to less state regulation and sometimes *do* contain choice-of-law clauses. Policies issued by reinsurers in England and Bermuda are subject to minimal state regulation and their policies almost *always* contain choice-of-law clauses. Whether a given insurance policy contains a choice-of-law clause is, in short, clearly affected by the regulatory regime to which the agreement is otherwise subject. A full and complete account of the contract production process must therefore account for the role played by the state in regulating the terms of private agreements.

While insurance contracts are subject to a uniquely burdensome regulatory regime, the terms in other types of private agreements are regulated to a surprising extent. The terms of passenger cruise contracts, for example, are subject to a range of limitations under federal law.¹⁵¹ States have also enacted laws that regulate the terms of franchise contracts,¹⁵² construction contracts,¹⁵³ consumer leases,¹⁵⁴ employment contracts,¹⁵⁵ and student loan agreements,¹⁵⁶ among others. When

¹⁵⁰ Claire A. Hill, *Why Contracts Are Written in “Legalese”*, 77 CHI.-KENT L. REV. 59, 61 (2001).

¹⁵¹ See John F. Coyle, *Cruise Contracts, Public Policy, and Foreign Forum Selection Clauses*, 75 U. MIA. L. REV. 1087, 1087-88 (2021).

¹⁵² See ARK. CODE ANN. § 4-72-603(c) (2022).

¹⁵³ See 815 ILL. COMP. STAT. ANN. 665/10 (2022).

¹⁵⁴ See S.C. CODE ANN. § 36-2A-106(1) (2022).

¹⁵⁵ See CAL. LAB. CODE § 925(a)(2) (2022).

¹⁵⁶ See WASH. REV. CODE ANN. § 28B.85.140 (2022).

drafting these agreements, the parties must abide by rules laid down by the state to ensure that their agreed-upon terms will be given effect. To date, these rules have generally been overlooked by scholars of the contract production process. The foregoing discussion of choice-of-law clauses in insurance contracts thus provide a timely reminder that the state can (and does) shape the content of boilerplate contract terms.

B. *Differentiated Sophistication*

The conventional wisdom holds that insurance companies are sophisticated contract drafters.¹⁵⁷ As a Pennsylvania judge once observed: “It cannot be expected that [the policyholders] fully comprehend and understand the complex issues presented in any insurance contract drafted by experts for the insurance companies.”¹⁵⁸ The conventional wisdom further holds that the complexity of insurance policies generally serves to advance the interests of the insurer at the expense of the policyholder.¹⁵⁹ Daniel Schwarcz has, for example, shown that insurance companies regularly revise their homeowners’ policies to reduce the amount of coverage provided to the homeowner.¹⁶⁰ Chris French has shown that insurance companies regularly revise the pollution exclusion in their policies to make the exclusion less favorable to the insured.¹⁶¹ This line of scholarship tends to confirm the conventional wisdom that insurance companies are sophisticated drafters who frequently draft and revise complex policies to advance their own interests.

¹⁵⁷ See French, *Understanding Insurance*, *supra* note 20, at 576 (“Insurers have decades of experience honing the current policy language, which courts have already interpreted and allows for a certain level of actuarial predictability.”); Stanton, *supra* note 72, at 133 n.146 (“[F]inding direct evidence of the drafters’ intent is a painstaking and complex matter. As already noted, insurance companies concede that materials relating to drafting history are not published or released, and their content can thus only be ascertained by deposing the drafters This allows insurers to play both sides of the fence. On the one hand, insurers know that deposing drafters or otherwise acquiring first-hand evidence can be cost-prohibitive. On the other hand, insurers can attack secondary sources, even those widely used and generally accepted, as irrelevant to the drafting.”).

¹⁵⁸ *Eddystone Fire Co. No. 1 v. Cont’l Ins. Cos.*, 425 A.2d 803, 808 (Pa. Super. Ct. 1981).

¹⁵⁹ See *S.C. Ins. Co. v. Fid. & Guar. Ins. Underwriters, Inc.*, 489 S.E.2d 200, 206 (S.C. 1997).

¹⁶⁰ Schwarcz, *Reevaluating Standardized Insurance Policies*, *supra* note 71, at 1265-66.

¹⁶¹ French, *The Butterfly Effect*, *supra* note 23, at 61; see, e.g., Michelle E. Boardman, *The Unpredictability of Insurance Interpretation*, 82 *LAW & CONTEMP. PROBS.* 27 (2019) (discussing general examples of this phenomenon).

When it comes to choice-of-law clauses, however, this conventional wisdom is suspect. As previously discussed, insurance companies do not always take full advantage of their ability to select the law of a jurisdiction perceived to be pro-insurer even when their freedom to choose the law of such jurisdictions is not limited by rule or statute. Instead, they frequently fail to select any law at all. Insurers also sometimes make head-scratching decisions when it comes to the way their choice-of-law clauses are drafted.¹⁶² By way of example, compare the two choice-of-law clauses below. The first was drafted by a well-known insurance company (Aetna) to be included in one of its group life insurance policies. It reads as follows:

This Plan . . . will be construed in line with the law of the jurisdiction in which it is delivered.¹⁶³

This clause fails to address a host of interpretive issues that frequently arise in litigation. The second clause appears in a lending agreement between Hostess Brands, on the one hand, and Morgan Stanley, Citibank, Nomura Securities, and Credit Suisse, on the other:

This Agreement and any claims, controversy, dispute or causes of action (whether in contract or tort or otherwise) based upon, arising out of or relating to this Agreement shall be construed in accordance with and governed by the laws of the State of New York, without regard to any principle of conflicts of law that could require the application of any other law.¹⁶⁴

This clause addresses virtually every interpretive issue that could possibly arise with respect to the meaning of the choice-of-law clause. It is demonstrably more sophisticated than the clause prepared by Aetna for its group life insurance policy even though everyone ordinarily thinks of Aetna as a sophisticated contract drafter.

These differences suggest that a more nuanced account of drafter sophistication is warranted. The mere fact that a drafter is sophisticated with respect to *some parts* of a contract does not mean that it is sophisticated with respect to *all parts* of that same contract. Insurance companies may be experts when it comes to coverage definitions and exclusions, but the available evidence suggests that they are sometimes

¹⁶² See *supra* note 102 and accompanying text.

¹⁶³ *Arnone v. Aetna Life Ins. Co.*, 860 F.3d 97, 104 (2d Cir. 2017).

¹⁶⁴ Incremental Assumption and Amendment Agreement No. 5, dated as of January 3, 2020, among HB Holdings LLC, Hostess Brands, LLC, Credit Suisse Loan Funding LLC, Citibank, N.A., Morgan Stanley Senior Funding, Inc. and Nomura Securities International, Inc.

less sophisticated when it comes to choice-of-law clauses.¹⁶⁵ To be sure, insurance companies are not unique in this regard; studies have shown that large corporations across a range of industries fail to take full advantage of choice-of-law clauses.¹⁶⁶ It is merely to point out that a drafter may be sophisticated with respect to one set of contract terms and unsophisticated with respect to another.

C. *Sticky Omitted Terms*

There is a vast literature analyzing the relative “stickiness” of contract terms. The basic idea is that contracts are “sticky” in that they are resistant to change.¹⁶⁷ Contract drafters routinely decline to update or revise a specific term even in the face of an external shock that alters the accepted meaning of that term.¹⁶⁸ To date, the literature has focused almost exclusively on the relative stickiness of terms that are written *into* these contracts. The mystery of the missing choice-of-law clause provides a unique opportunity to evaluate whether the phenomenon of sticky contracts applies to terms that are *omitted* from these same agreements.

The evidence from insurance contracts suggests that, in fact, stickiness runs in both directions. If a choice-of-law clause is absent from a contract, it will tend to remain absent — even if there is an external shock that highlights the need for revision.¹⁶⁹ Consider *Allstate*

¹⁶⁵ See generally Coyle, *Choice-of-Law Clauses in U.S. Bond Indentures*, *supra* note 7 (documenting numerous drafting mistakes in choice-of-law clauses in bond indentures prepared by companies across a wide range of industries).

¹⁶⁶ See Coyle, *A Short History*, *supra* note 3, at 1206.

¹⁶⁷ See GULATI & SCOTT, *supra* note 146, at 11; see also John F. Coyle & Joseph M. Green, *Contractual Innovation in Venture Capital*, 66 HASTINGS L.J. 133, 138-40 (2014); Erik F. Gerding, *Contract as Pattern Language*, 88 WASH. L. REV. 1323, 1353-54 (2013); Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or “The Economics of Boilerplate”)*, 83 VA. L. REV. 713, 728 (1997); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 768-69 (1995); Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240, 241 (2013).

¹⁶⁸ See Choi et al., *supra* note 98, at 431.

¹⁶⁹ Other studies have found that companies similarly declined to write arbitration clauses into their contracts after Supreme Court decisions perceived to have enhanced the attractiveness of arbitration. See, e.g., Peter B. Rutledge & Christopher R. Drahozal, “Sticky” Arbitration Clauses? *The Use of Arbitration Clauses After Concepcion and Amex*, 67 VAND. L. REV. 955 (2014) (discussing that after Supreme Court’s ruling on *Concepcion*, only a handful of companies switched to arbitration clauses). The case for universal arbitration clauses is, however, much weaker than the case for universal choice-of-law clauses.

Insurance Company v. Hague,¹⁷⁰ a case decided by the United States Supreme Court in 1981. The widow of a man who had died in an accident on the Wisconsin side of the Minnesota/Wisconsin border filed a claim with his insurance company. She sought payment on a policy covering three automobiles owned by the decedent which insured against loss incurred from accidents with uninsured motorists. The widow argued that the \$15,000 uninsured motorist coverage on each of the decedent's three automobiles could be stacked to provide total coverage of \$45,000. The insurance company argued that stacking was not permitted. Under the law of Minnesota, the limits could be stacked. Under the law of Wisconsin, they could not. The question was whether the policy was governed by the law of Minnesota or Wisconsin.

If the automobile policy at issue had contained a choice-of-law clause, this would have been an easy question to answer. Unfortunately, it did not. Accordingly, the Minnesota state trial court engaged in a choice-of-law analysis. The court concluded that Minnesota law applied even though the decedent had been domiciled in Wisconsin, the insurance contracts had been made in Wisconsin, and the accident had occurred in Wisconsin. The insurance company appealed the decision to the Minnesota Supreme Court. The Minnesota Supreme Court affirmed the lower court decision. The insurance company petitioned for the Minnesota Supreme Court to rehear the case. The Minnesota Supreme Court reheard the case and upheld its earlier decision. The insurance company then appealed to the U.S. Supreme Court. In a 6-3 decision, that Court affirmed the judgment against a due process challenge, thereby bringing an end to five years of costly litigation that could have been avoided entirely if the policy had contained a choice-of-law clause in the first place.¹⁷¹

While this case is unusual in that it ultimately wound up before the U.S. Supreme Court, the issue presented — whether stacking is permitted when a policy covers multiple vehicles — is still routinely presented to modern courts in insurance disputes.¹⁷² One might think that the sheer volume of litigation on this topic, when combined with

¹⁷⁰ 449 U.S. 302 (1981).

¹⁷¹ *Id.* at 320.

¹⁷² See, e.g., *Day v. Pers. Serv. Ins. Co.*, No. 14-cv-120, 2014 U.S. Dist. LEXIS 168872, at *4 (E.D. Ky. Dec. 5, 2014) (court discusses whether Kentucky or Ohio law would apply and involve anti-stacking provisions); *Kissinger v. Am. Fam. Mut. Ins. Co.*, 563 S.W.3d 765, 776 (Mo. Ct. App. 2018) (court considers whether applying Missouri law would allow stacking of the UIM coverage); *Young v. USAA Gen. Indem. Co.*, No. 2017-CP-23-04630, 2018 S.C. C.P. LEXIS 467, at *9 (S.C. Ct. App. Oct. 8, 2018) (court considers whether California stacking policy would apply).

the bevy of other choice-of-law issues presented in the insurance context, would have led insurance companies, at a minimum, to write choice-of-law clauses into all of their automobile policies.¹⁷³ This has not happened.¹⁷⁴ More than forty years after *Hague* was decided, many insurance contracts of all stripes continue to omit choice-of-law clauses.¹⁷⁵ In the face of a seismic external shock — a U.S. Supreme Court decision upholding the application of a policyholder-friendly law whose selection could easily have been avoided via a choice-of-law clause selecting the law of the policyholder’s home state — many automobile insurance policies continue to omit choice-of-law clauses.

This inaction suggests that the phenomenon of “sticky” contract terms is not limited to provisions that actually appear in the agreement. It shows that terms that appear in an agreement tend to stay in. Terms that are omitted from that agreement, by comparison, tend to stay out. The stickiness of contract provisions, in other words, would appear to run both ways.

CONCLUSION

This Article set out to solve the mystery of the missing choice-of-law clause in insurance contracts. It did so by drawing upon more than thirty interviews and email exchanges with industry experts. It first explained that non-negotiated standard policies typically do not include these clauses because state legislators and regulators generally do not allow policies to be sold if they contain an out-of-state choice-of-law clause, because judges are quick to invoke the fundamental policy exception to deny enforcement of choice-of-law clauses, and because industry forms upon which many insurance companies rely generally do not contain choice-of-law clauses. The Article then pointed out that none of these arguments fully explain why insurance contracts do not contain choice-of-law clauses selecting the policyholder’s home jurisdiction. It observed

¹⁷³ This is surprising because *Allstate v. Hague* is widely regarded as a decision that excessively strained choice of law principles in order to benefit a sympathetic insured. See Thomas O. Main, *On Teaching Conflicts and Why I Dislike Allstate Insurance Co. v. Hague*, 12 NEV. L.J. 600, 600-03 (2012) (discussing *Hague* as part of symposium of opinions on the “Worst Supreme Court Decisions”).

¹⁷⁴ My research assistant identified 33 cases decided between 2010 and 2020 where an automobile insurance policy omitted a choice-of-law clause.

¹⁷⁵ Outside the choice-of-law context, it is not uncommon for insurers to retain traditional language in their policies even when they could clarify that language in a way that would benefit them in litigation. See Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1124-25 (2007). The failure on the part of insurance companies to add choice-of-law clauses to their policies may be seen as part of a broader reluctance to clarify these policies.

that omitting a choice-of-law clause from a standard policy may in some cases be a strategic move on the part of insurance companies designed to generate uncertainty and to impose additional litigation costs on policyholders. The Article also considered the possibility that this omission may be the result of insurer inattention in that it gives policyholders greater flexibility to shop for a favorable law.

The Article then turned its attention to manuscript policies that are negotiated between insurers and policyholders. It argued that these policies may omit choice-of-law clauses because there is no obvious body of neutral law to select when the parties are of roughly equal bargaining strength. In the absence of such law, the parties compromise on the choice-of-law issue by omitting the clause from their agreement altogether. The Article further argued that insurance companies may be wary of adding choice-of-law clauses to policies that have historically omitted them because they are concerned about losing customers. If a company is trying to decide between four possible insurers, and one policy contains a choice-of-law clause while the others do not, the company may choose not to purchase the policy with the clause because it believes that it was included to give the insurer an unknown advantage in future litigation. To guard against this possibility, insurance companies may omit choice-of-law clauses from their manuscript policies altogether.

The Article next reviewed those insurance contracts that *do* contain choice-of-law clauses to see if solutions to the mystery outlined above held up. It showed that RWI policies generally contain choice-of-law clauses due to the distinctive process by which these policies are drafted. With respect to excess liability and reinsurance policies, the Article showed that foreign insurers not subject to state regulation frequently choose New York law and require that disputes be resolved via arbitration in London. All of these findings are fully consistent with the various solutions to the mystery of the missing choice-of-law clause set forth above.

Finally, the Article made the case that the solution to the mystery of the missing choice-of-law clause in insurance contracts has a great deal to teach legal scholars. First, it highlights the important role that state regulation can play in shaping the terms of private agreements. Second, it showcases the need for scholars to adopt a more nuanced view of sophistication in contract drafting. Third, and finally, the solution to the mystery makes clear that absent terms can be just as sticky and resistant to change as terms that are written into the text of the existing contract.