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To Impute or Not to Impute: Independent Insurance Adjuster Liability in Louisiana

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INTRODUCTION: A DISASTROUS SITUATION

Louisiana is a hotbed for insurance claims because of both its high automobile-accident rate—1,790 severe and fatal crashes in 2018[1]—and its high risk for property damage from natural disasters, such as hurricanes and flooding.[2] High rates of property and automobile damage lead to a larger quantity of insurance claims, which in turn lead to more instances of and claims against insurance companies for behavior that is knowing, arbitrary, capricious, or lacking probable cause.[3] Insurance companies often rely on independent adjusters to promptly and properly investigate, adjust, and settle insurance claims.[4] Thus, the determination of whether

1. *Louisiana SHSP Crash Dashboard*, CTR. FOR ANALYTICS & RES. IN TRANSP. SAFETY, http://datareports.lsu.edu/SHSPCrash.aspx (last visited June 16, 2020) (select "2018" from the year drop-down menu to view crash statistics for 2018) [https://perma.cc/TD6L-H6TZ].

2. *See* Dean A. Sutherland, *Insurance "Bad Faith" Law After Hurricanes: Duties Owed by Insurance Companies and Potential Penalties for Violation of Those Duties*, 54 LA. BAR JNL. 90, 90 (2006).

3. Insurance Handbook, *Spotlight On: Catastrophes - insurance issues*, INS. INFO. INST., https://www.iii.org/publications/insurance-handbook/insurance-and-disasters/spotlight-on-catastrophes-insurance-issues (last visited Sept. 26, 2019) [https://perma.cc/4F8C-9NEE]. Bad faith claims against insurers are those claims providing penalties for insurers investigating and paying insurance claims in such a way that is arbitrary, capricious, or lacking probable cause. *See* LA. REV. STAT. §§ 22:1973, 22:1892 (2019).

4. *See generally* La Louisiane Bakery Co. v. Lafayette Ins. Co., 61 So. 3d 17 (La. Ct. App. 5th Cir. 2011) (discussing an insurance company that hired an independent adjuster to handle wind-damage claim after Hurricane Katrina); Leslie Scism, *Irma's Riches: $30,000 for a Few Days of Work*, WALL STREET J.

insurers may be liable for the acts or omissions of independent adjusters is vital to Louisiana's insurance industry—especially in times of natural disaster when there are a large number of claims.[5]

For example, in 2005 Hurricane Katrina devastated Louisiana and left absolute destruction in its wake.[6] Insurance companies faced an unprecedented amount of property damage claims, and some insurers hired independent adjusters to assist in the evaluation of claims and to meet the increased demand.[7] This system of insurers hiring independent adjusters traditionally involves an independent adjuster evaluating the claim and providing the insurer with satisfactory proof of loss, with the insurer paying the claim to the insured within the statutorily-required time period or facing liability for a failure to do so.[8] The relationship between insurers and hired adjusters raises two important questions: What would happen if the independent adjuster received satisfactory proof of loss but never provided that proof to the insurer or notified them to pay the claim? Should courts impute liability for an independent adjuster's acts or omissions to the insurer when the insurer was completely diligent and not knowing, arbitrary, capricious, without probable cause, or negligent in its selection of the independent adjuster and monitoring of the claim?[9] The answers to these questions have colossal impacts on the insurance industry in Louisiana.[10] Not only do the answers determine whom the insured may sue when the claims process goes awry, but they also determine whether

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(Sept. 14, 2017, 11:50 AM), https://www.wsj.com/articles/irmas-riches-30-000-for-a-few-days-of-work-1505381404 ("[A] friend, who happens to own an independent adjusting firm, is desperately recruiting help.") [https://perma.cc/FQ72-DD37].

5. *See Spotlight On: Catastrophes – insurance issues, supra* note 3.

6. *See* Pelican Hosp. Grp. v. United Nat. Ins. Co., No. 06-618, 2006 WL 3313721, at *1 (E.D. La. Nov. 13, 2006).

7. *See generally La Louisiane Bakery Co.*, 61 So. 3d at 17 (discussing an insurance company that hired an independent adjuster to handle wind-damage claim after Hurricane Katrina); *see* Scism, *supra* note 4 ("[A] friend, who happens to own an independent adjusting firm, is desperately recruiting help.").

8. *See generally La Louisiane Bakery Co.*, 61 So. 3d at 17 (discussing an insurance company that hired an independent adjuster to handle wind-damage claim after Hurricane Katrina).

9. The facts above are derivative of those in *Pelican Hospitality Group v. United National Insurance Co.*, a 2006 case from the Eastern District of Louisiana. *Pelican Hosp. Grp*., 2006 WL 3313721, at *1.

10. *See generally* 1 STEVEN PLITT & JORDAN ROSS PLITT, PRACTICAL TOOLS FOR HANDLING INSURANCE CASES § 7:41, Westlaw HANDINS (database updated June 2019) (discussing independent-adjuster liability).

insurance companies should face penalties and attorney's fees for actions they did not commit.[11]

Louisiana Revised Statutes § 22:1973 and § 22:1892 recognize that insurance companies owe a duty of good faith and fair dealing to their insureds.[12] Additionally, the statutes authorize penalties when insurers knowingly perform various activities[13] or when their failure to pay timely or to make written settlement offers is "arbitrary, capricious, or without probable cause."[14] Hiring independent adjusters complicates this liability scheme, as it leaves much unclear, such as whether insurers can delegate their statutory duties to independent adjusters, whether such adjusters owe any duty to insureds, and whether independent adjusters are considered independent contractors for liability purposes.[15]

Therefore, the answer to the question of whether courts should impute liability from independent adjusters to the insurers that hired them hinges upon the answer to three subquestions: (1) whether independent adjusters owe a duty to insureds;[16] (2) whether the law of agency provides for vicarious liability of insurance companies based on their independent adjusters;[17] and (3) whether policy considerations support or oppose the imputation of liability from independent adjusters to insurance companies.[18]

To dispel the confusion among Louisiana courts' treatment of independent adjusters, Louisiana should adopt a statute encompassing a balanced approach to whether independent adjusters owe an independent

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11. *See* LA. REV. STAT. §§ 22:1973, 22:1892 (2019).

12. *Id.*

13. For example, under 22:1973, insurers are liable for knowingly "(1) misrepresenting pertinent facts or insurance policy provisions; (2) failing to pay a settlement within thirty days after an agreement is reduced to writing; (3) denying coverage or attempting to settle a claim on the basis of an application which the insurer knows was altered without notice to, or knowledge of consent of, the insured; and (4) misleading a claimant as to the applicable prescriptive period." *Id.* § 22:1973.

14. *Id.* §§ 22:1973, 22:1892.

15. *See* Richard K. O'Donnell, *Imputation of Fraud and Bad Faith: The Role of the Public Adjuster, Co-insured and Independent Adjuster*, 22 TORT & INS. L.J. 662 (1987); PLITT & PLITT, *supra* note 10.

16. *See* Loehn v. Hardin, No. 02-257, 2002 WL 922380, at *2 (E.D. La. May 6, 2002); Motin v. Travelers Ins. Co., No. 03-2487, 2003 WL 22533673, at *4 (E.D. La. Nov. 4, 2003).

17. *See* Franklin v. Fountain Grp. Adjusters LLC, 249 So. 3d 84, 86 (La. Ct. App. 3d Cir. 2018); Hickman v. S. Pac. Transp. Co., 262 So. 2d 385, 390 (La. 1972).

18. *See* Sanchez v. Lindsey Morden Claims Servs., Inc., 84 Cal. Rptr. 2d 799, 802 (Ct. App. 1999).

duty to insureds. Given the intricacies associated with the analysis and the number of factors affecting the status of adjuster duties—including the delegation of such duties, agency law, policy, and legislative intent—the Louisiana Legislature should develop a statute providing a general rule that independent adjusters owe no duty to insureds. Additionally, courts should impute liability for the actions of independent adjusters to insurers, with the exception of situations where independent adjusters are independent contractors and have assumed a duty through the actions discussed in case law.[19]

Further, the Louisiana Legislature should amend Louisiana Revised Statutes § 22:1892 and § 22:1973 to specifically clarify that courts should only hold insurers statutorily liable when the insurance adjuster is an employee or the actions of the insurer itself are knowing, arbitrary, capricious, or without probable cause.[20] In general, Louisiana courts have ruled that the statutory duties of insurers are non-delegable.[21] Accordingly, insurance companies cannot escape liability under § 22:1973 and § 22:1892 by delegating duties to an independent adjuster.[22] While courts should enforce this general rule to deter insurance companies from attempting to insulate themselves from liability, the Louisiana Legislature should amend § 22:1892 and § 22:1973 to clarify that insurance companies are not liable for the bad faith actions of an independent adjuster when the adjuster qualifies as an independent contractor and the insurer did not behave in a way that was knowing, arbitrary, capricious, or without probable cause.[23] The purpose of this amendment is to avoid discouraging insurance companies from utilizing independent adjusters in good faith through the imposition of penalties on conduct that is not knowing, arbitrary, capricious, or without probable cause.[24]

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19. For a discussion of the exceptions to the general rule, see Dillon v. Lincoln Gen. Ins. Co., No. 06-7354, 2006 WL 3469554, at *3 (E.D. La. Nov. 30, 2006); Pelican Hosp. Grp. v. United Nat. Ins. Co., No. 06-618, 2006 WL 3313721, at *1 (E.D. La. Nov. 13, 2006); Alarcon v. Aetna Cas. & Sur. Co., 538 So. 2d 696 (La. Ct. App. 5th Cir. 1989); Pellerin v. Cash Pharmacy, 396 So. 2d 371 (La. Ct. App. 1st Cir. 1981).

20. *See infra* Part V.

21. *See* Hoffman v. Ellender, No. 15-309-JWD-RLB, 2015 WL 4873342 (M.D. La. July 23, 2015); Rosinia v. Lexington Ins. Co., No. 05-6315, 2016 WL 3141247 (E.D. La. Oct. 31, 2006).

22. Eldridge v. Northwest G.F. Mut. Ins. Co., 221 N.W.2d 16 (S.D. 1974).

23. *See* Richard B. Graves III, Comment, *Bad-Faith Denial of Insurance Claims: Whose Faith, Whose Punishment? An Examination of Punitive Damages and Vicarious Liability*, 65 TUL. L. REV. 395, 396 (1990).

24. *Id.*

Part I of this Comment will provide background information on insurance companies, independent adjusters, the importance of duties in general, and the duties of insurance companies in Louisiana under Revised Statutes § 22:1892 and § 22:1973. Additionally, Part I will introduce the question of whether courts should impute liability from independent adjusters to insurance companies, as well as the majority and minority views on independent adjuster liability.[25] Part II will examine Louisiana's treatment of independent adjuster liability and the duties that courts typically ascribe to insurers versus adjusters. Part II will also include a discussion of the legislative intent behind § 22:1892 and § 22:1973 to determine the scope, extent, and nature of the duties imposed and conduct discouraged.[26] Part III will analyze agency law, its limitations on independent contractors, and the categorization of independent adjusters in this scheme, including an examination of the differences between employee adjusters and independent adjusters.[27] Part IV will study the potential policy implications for Louisiana from the imputation of liability to insurers from independent adjusters and that imputation's cohesiveness in the state's system of duty-risk.[28] Finally, Part V will explore different legislative and judicial remedies for this ambiguity in Louisiana law, examine the implications of each solution, and propose that courts should generally impute liability from independent adjusters to insurers, subject to some exceptions.

I. DUTIES, AND INSURANCE COMPANIES, AND INDEPENDENT ADJUSTERS, OH MY!

Insurance companies often hire independent adjusters to evaluate claims on their behalf.[29] Independent adjusters are non-employee insurance adjusters whom insurance companies contractually hire to represent the company's interest.[30] While insurance companies are responsible for the ultimate decision of whether to approve or deny a claim and the amount of payment,[31] independent adjusters are only responsible

25. *See infra* Part I.
26. *See infra* Part II.
27. *See infra* Part III.
28. *See infra* Part IV.
29. *See* Dupree v. Lafayette Ins. Co., 51 So. 3d 673 (La. 2010); La Louisiane Bakery Co. v. Lafayette Ins. Co., 61 So. 3d 17 (La. Ct. App. 5th Cir. 2011).
30. LA. REV. STAT. § 22:1704(b) (2012).
31. *See, e.g.*, Sanchez v. Lindsey Morden Claims Servs., Inc., 84 Cal. Rptr. 2d 799 (Ct. App. 1999).

for determining coverage liability and the economic value of a claim for loss.[32]

All adjusters, whether independent or employee, must become certified and licensed in compliance with the licensing provisions of the particular state in which they are adjusting.[33] Independent adjusters, however, differ from employee adjusters in that the latter are in-house employees of an insurance company, whereas the former generally work in independent adjusting firms that insurance companies hire on a contractual basis.[34] Regardless of classification as independent or employee, an adjuster and an adjustment firm may only be individually liable if they owe a duty to insureds.[35]

A. Duties in General

There are many types of duties in Louisiana law, but one of the most common is a duty derived in tort.[36] Louisiana Civil Code article 2315(A) provides, "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."[37] One way that such damage occurs is through negligence, or a failure to exercise reasonable care.[38] The primary consideration in determining liability in a negligence action is whether the alleged tortfeasor owed a duty to exercise reasonable care under the circumstances and whether the alleged tortfeasor breached that duty.[39] Furthermore, the issue of whether an individual owes a duty that derives from either a statutory or jurisprudential source is "a question of law."[40] Thus, duties can stem from contractual relationships, statutes,

32. PLITT & PLITT, *supra* note 10.

33. *See* Adam Gardiner, *How to Become an Insurance Claims Adjuster in 5 Steps*, ADJUSTERPRO (July 31, 2018), https://www.adjusterpro.com/blog/how-to-become-an-insurance-claims-adjuster-in-5-steps/ [https://perma.cc/WQ3E-2W2E].

34. *Id.*; *Sanchez*, 84 Cal. Rptr. 2d 799.

35. *See generally* Roberts v. Benoit, 605 So. 2d 1032 (La. 1991) (discussing how a municipal officer owes a duty to exercise reasonable care in hiring and training deputies, the breach of which resulted in potential liability in an action for negligence).

36. *See, e.g.*, LA. CIV. CODE art. 2315 (2019).

37. *Id.*

38. *Id.* art. 2316.

39. *See generally Roberts*, 605 So. 2d at 1032 (discussing how a municipal officer owes a duty to exercise reasonable care in hiring and training deputies, the breach of which resulted in potential liability in an action for negligence).

40. *Id.* at 1043. Since duty is a question of law, a judge determines it. *Id.*

jurisprudence, or circumstance, but they are necessary for liability in tort claims.[41]

B. Duties Under Louisiana Revised Statutes § 22:1892 and § 22:1973

While some duties stem from tort, others derive directly from statutes and require a contractual relationship.[42] For example, Louisiana Revised Statutes § 22:1973 and § 22:1892 recognize a contractual duty of good faith and fair dealing that insurance companies owe in the evaluation, settlement, and payment of insurance claims.[43] The first of these statutes, § 22:1973, provides that:

> An insurer . . . owes to his insured a duty of good faith and fair dealing. The insurer has an affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured or the claimant, or both. Any insurer who breaches these duties shall be liable for any damages sustained as a result of the breach.[44]

Further, the statute details several acts constituting a breach of the insurer's duties, including the failure to pay an amount due to an insured under the contract "within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause."[45] Louisiana courts have consistently defined "satisfactory proof of loss" as notice sufficient to fully inform the insurer that it has "some liability to the insured."[46] The arbitrary or capricious standard, however, is more flexible and depends on the context of the case.[47]

Louisiana courts have defined "arbitrary, capricious, or without probable cause" in a variety of ways regarding an insurer's failure to pay.[48] An arbitrary or capricious failure to pay occurs when there is no good faith defense for the failure to pay a claim, or if the lack of payment is

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41. *Id.*

42. *See* LA. REV. STAT. §§ 22:1973, 22:1892 (2019); Smith v. Citadel Ins. Co., 285 So. 3d 1062, 1069–70 (La. 2019).

43. LA. REV. STAT. §§ 22:1973, 22:1892.

44. *Id.* § 22:1973(A).

45. *Id.* § 22:1973(B)(5).

46. La. Bag Co. v. Audubon Indem. Co., 999 So. 2d 1104, 1115 (La. 2008).

47. Shelton v. Williams, 277 So. 3d 834, 842 (La. Ct. App. 2d Cir. 2019).

48. *Id.*; Sher v. Lafayette Ins. Co., 988 So. 2d 186, 206 (La. 2008); *La. Bag Co.*, 999 So. 2d at 1114.

unreasonable or without probable cause.[49] Furthermore, an arbitrary act is one "based on random choice or personal whim, rather than reason or system," while "capricious" means "given to sudden and unaccountable changes in behavior."[50] Both § 22:1892 and § 22:1973 require behavior to be knowing, arbitrary, capricious, or without probable cause in order for courts to hold an insurer liable.[51]

Insurers have similar duties under Louisiana Revised Statutes § 22:1892, which states, "All insurers issuing any type of contract . . . shall pay the amount of any claim due any insured within thirty days after receipt of satisfactory proofs of loss from the insured or any party in interest."[52] The provisions of § 22:1892 and § 22:1973 are almost identical, except for the description of the duty in § 22:1973 as one of good faith with a 60-day period to pay and the description of the duty in § 22:1892 as one to timely pay within 30 days.[53]

More importantly, the penalties that each statute allows are one of their greatest differences.[54] When insurers violate the good-faith duty and 60-day period under § 22:1973, the court may impose penalties of no more than double the damages or $5,000, whichever is greater.[55] Contrastingly, the penalties for failure to pay within 30 days under § 22:1892 are half the amount due from the insurer to the insured or $1,000, whichever is greater, combined with reasonable attorney's fees and costs.[56] Because of the similarity of the statutes, courts have allowed for recovery under the statute providing the greater penalty when the requirements for recovery under both are met.[57] Additionally, an individual may recover penalties and damages under § 22:1973 while also recovering attorney's fees under § 22:1892 because the former does not provide for the recovery of attorney's fees.[58] While the examination of the sources of duties is

49. *Shelton*, 277 So. 3d at 841–42.

50. *La. Bag Co.*, 999 So. 2d at 1114 (citing Reed v. State Farm Auto. Ins. Co., 857 So. 2d 1012, 1020 (La. 2003)).

51. *See* LA. REV. STAT. §§ 22:1973, 22:1892 (2019).

52. *Id.* § 22:1892(A)(1).

53. *See* Leland v. Lafayette Ins. Co., 77 So. 3d 1078 (La. Ct. App. 3d Cir. 2011); Calogero v. Safeway Ins. Co. of La., 735 So. 2d 170, 174 (La. 2000).

54. LA. REV. STAT. §§ 22:1973, 22:1892.

55. *Id.* § 22:1973(C).

56. *Id.* § 22:1892(B)(1).

57. XL Specialty Ins. Co. v. Bollinger Shipyards, Inc., 954 F. Supp. 2d 440, 444 (E.D. La. 2013).

58. *Id.*

important, the parties to which such duties apply also require examination and understanding.[59]

C. Independent Adjusters—Generally

Courts and legislatures define independent insurance adjusters similarly in all states, but such adjusters receive disparate treatment throughout the country.[60] There are two opposing viewpoints in the United States concerning whether independent adjusters owe a duty to insureds that may lead to liability if breached.[61] The majority view is that such adjusters do not owe a duty to insureds and thus cannot be liable.[62] In contrast, the minority view holds that independent adjusters owe a duty to insureds and therefore can be liable.[63] While the Louisiana Supreme Court has not definitively discussed whether independent adjusters owe any duty to insureds, at least one Louisiana federal court has found that such adjusters owe no duty to insureds under Louisiana Revised Statutes § 22:1892 and § 22:1973.[64] Therefore, in determining whether independent adjusters could be independently liable to insureds, it is helpful to examine the national majority and minority views on the issue.[65]

1. Majority View on Independent Adjuster Duties

The national majority view is that courts should not hold independent insurance adjusters individually liable for negligence to policyholders because adjusters lack an independent duty to insureds.[66] Thirteen states[67] have reached this conclusion based upon the lack of an independent duty of insurance adjusters.[68] Courts that adopt this majority view depend on

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59. PLITT & PLITT, *supra* note 10.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Riley v. Transamerica Ins. Grp. Premier Ins. Co., 923 F. Supp. 882, 888 (E.D. La. 1996).

65. *See* PLITT & PLITT, *supra* note 10.

66. *Id.*

67. The thirteen states are as follows: Alabama, Arizona, California, Florida, Mississippi, Nevada, New York, North Carolina, Pennsylvania, South Carolina, Texas, and Vermont. *Id*.

68. *Id*.; *see also* Silon v. Am. Home Assur. Co., No. 25715, 2009 WL 1090700 (D. Nev. Apr. 21, 2009); Icasiano v. Allstate Ins. Co., 103 F. Supp. 2d 1187 (N.D. Cal. 2000); Vargas v. Cal. State Auto. Ass'n Inter-Ins. Bureau, 788 F. Supp. 462 (D. Nev. 1992); Akpan v. Farmers Ins. Exch., Inc., 961 So. 2d 865

two principal justifications for rejecting independent negligence claims against adjusters: (1) lack of contractual privity and (2) public policy considerations.[69] Further, most states only allow for claims against independent adjusters based on bad faith or breach of insurance policy because of the controlling nature of the policy itself and the general lack of a negligence cause of action.[70] In support of its finding of no duty, the majority view cites several policy considerations.[71]

In *Sanchez v. Lindsey Morden Claims Services, Inc*., the California Second Circuit Court of Appeal discussed the majority view's public policy considerations in detail.[72] In *Sanchez*, the insured filed suit against its cargo insurer and the insurer's adjuster for the adjuster's negligence in causing a delay in resolving its claim for damage to a commercial dryer during delivery to a customer.[73] Such delay allegedly resulted in the insured being liable to the buyer for a judgment of $1.32 million.[74] The California Second Circuit outlined several relevant policy considerations in determining whether adjusters should owe an independent duty to insureds, including (1) the blameworthiness of adjuster conduct relative to the decision-making power given to said adjuster in the context of the relationship with the claimant; (2) whether a duty would create conflicting obligations for the adjuster; (3) a cost-benefit analysis of imposing an adjuster duty; (4) whether such a duty would contradict existing case law concerning insurer liability; (5) whether the creation of an adjuster duty

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(Ala. Civ. App. 2007); Meineke v. GAB Bus. Servs., Inc., 991 P.2d 267 (Ariz. Ct. App. 1999); Sanchez v. Lindsey Morden Claims Servs., Inc., 84 Cal. Rptr. 2d 799 (Ct. App. 1999); King v. Nat'l Sec. Fire and Cas. Co., 656 So. 2d 1338 (Fla. Dist. Ct. App. 1995); Bass v. Cal. Life Ins. Co., 581 So. 2d 1087 (Miss. 1991); Haney v. Fire Ins. Exch., 277 S.W.3d 789 (Mo. Ct. App. 2009); Velastequi v. Exch. Ins. Co., 505 N.Y.S.2d 779 (Civ. Ct. 1986); Koch v. Bell, Lewis & Assocs., Inc., 627 S.E.2d 636 (N.C. Ct. App. 2006); Hudock v. Donegal Mut. Ins. Co., 264 A.2d 668 (Pa. 1970); Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co., 586 S.E.2d 586 (S.C. 2003); Dagley v. Haag Eng'g Co., 18 S.W.3d 787 (Tex. Ct. App. 2000); Dear v. Scottsdale Ins. Co., 947 S.W.2d 908 (Tex. Ct. App. 1997); Hamill v. Pawtucket Mut. Ins. Co., 892 A.2d 226 (Vt. 2005).

69. PLITT & PLITT, *supra* note 10.

70. *Id.*; *see also Meineke*, 726 P.2d 267 (citing Miel v. State Farm Mut. Auto. Ins. Co., 912 P.2d 1333, 1340 (Ariz. Ct. App. 1995) (finding no claim for insurer's negligent mishandling of an insurance claim)); King. v. Nat'l Sec. Fire & Cas. Co., 656 So. 2d 1338, 1340 (Fla. Dist. Ct. App. 1995) (finding that only actions for bad faith or breach of contract were valid against insurer).

71. *Sanchez*, 84 Cal. Rptr. 2d at 802; *see also* PLITT & PLITT, *supra* note 10.

72. *Sanchez*, 84 Cal. Rptr. 2d at 802; *see also* PLITT & PLITT, *supra* note 10.

73. *Sanchez*, 84 Cal. Rptr. 2d at 800.

74. *Id.*

would cause the judiciary to overstep into the legislative arena; and (6) whether an adjuster duty would fit into the principles of agency law.[75] The court then explained each of these factors in detail.[76]

The first factor weighed in favor of independent adjusters not owing a duty to insureds because the contract between the adjuster and the insurer does not include the insured, and the contract grants the ultimate power to grant or deny coverage to the insurer.[77] Because the adjuster did not have a contract with the insured, exposing her to a greater duty would create an unfair balance because she does not have the ability to limit her exposure to liability, resulting in liability greater than that of the insurer.[78] Further, the second factor weighed against a duty because conflicting loyalties may arise between the insurer and insureds—over things like coverage or amount of loss—that would create an obligation for the adjuster to argue both sides of such a dispute.[79]

A cost-benefit analysis of imposing a duty on independent adjusters, the third policy factor, demonstrated that the deterrent effect of such a duty would be low because of pre-existing liability to the insurer that hired the adjuster for breach of contract.[80] Therefore, a new duty would only mildly increase deterrence of improper adjuster conduct.[81] Additionally, only a small benefit would accrue by imposing such a duty because insureds already have an avenue of recovery against insurers for unreasonable investigation or claims handling, which is the equivalent of recovery for statutory bad faith in Louisiana.[82] In contrast to the small benefits, assigning a duty to independent adjusters would produce several substantial costs, including increased risks or liabilities of independent adjusters to insureds and a potential increase in insureds' premiums as a result of the new need for insurance for independent adjusters.[83] Although

75. PLITT & PLITT, *supra* note 10 (citing *Sanchez*, 84 Cal. Rptr. 2d at 801–03).
76. *Sanchez*, 84 Cal. Rptr. 2d at 802.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. The full list of costs reads as follows: (1) adjusters would lack a contract with insureds and thus lack a means of describing their potential risks or liabilities to insureds; (2) adjusters would turn to in-house options to protect themselves from liability to insureds for negligence, thus decreasing the supply of independent adjusters; (3) the remaining independent adjusters would suffer increased costs because of the need for liability insurance; and (4) insureds'

the California Second Circuit found that the costs of imposing a duty upon independent adjusters outweighed the potential benefits, it still went on to examine several other policy considerations.[84]

In discussing the fourth policy consideration, the court found that no California case had held independent adjusters liable to insureds for negligence, and therefore the assignment of the new duty would depart from existing state law.[85] The court's analysis of the fifth consideration weighed against a duty because adjusters rely on the law as it is now—holding that adjusters owe no duty to insureds—and do not take any steps to protect against liability for negligence.[86] Therefore, the court found that changing this standard would create an entirely new body of law, which would take a considerable amount of time to fully develop.[87] Finally, the court's policy analysis ended with a discussion of the sixth factor, agency law.[88] The court stated that adjusters are agents and insurers their principals, and the general laws of agency provide, "Agents are not liable to third parties for economic loss."[89] Therefore, the court found that the sixth and final policy consideration also weighed against the assignment of a duty to independent adjusters, resulting in unanimous support for the lack of any duty on the part of independent adjusters.[90] Although this case reflects one state's rationale, it is indicative of the perspective of other majority-view states—that courts should not hold independent insurance adjusters individually liable for negligence to policyholders.[91]

2. Minority View

Notwithstanding a majority of states finding that independent adjusters owe no duty to insureds, some states have adopted an opposing view.[92] A minority of states, including New Hampshire and Alaska, have

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premiums may increase if adjusters pass on the cost of such insurance to the insurance companies employing their services. *Id.*

84. *Id.*
85. *Id.* at 803.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 802; *see also* PLITT & PLITT, *supra* note 10.
92. PLITT & PLITT, *supra* note 10; Morvay v. Hanover Ins. Cos., 506 A.2d 333, 334 (N.H. 1986); Cont'l Ins. Co. v. Bayless & Roberts, Inc., 608 P.2d 281, 288 (Alaska 1980).

found that independent adjusters owe a duty to insureds, even without contractual privity.[93] For example, in *Morvay v. Hanover*, the insureds filed suit against independent adjusters hired by the insurer for nonpayment of an insurance claim.[94] The Supreme Court of New Hampshire, drawing on the importance of compliance with state regulations for licensing purposes, found that independent adjusters have a general duty to perform their work using due care.[95] The duty was identical to that owed in negligence actions—a duty to protect against reasonably foreseeable harm.[96] The court ultimately found that the independent adjusters could be liable to the insureds in an action for negligence because the adjusters were fully aware the Morvays could suffer economic harm if the insurer denied their claim as a result of a negligent investigation.[97] Therefore, the minority view is that independent adjusters owe a duty to both the insured and the insurer to "conduct a fair and reasonable investigation of an insurance claim."[98] Thus, although a contract only existed between the insurer and the independent adjusters in *Morvay*, the insured was a foreseeably affected third party.[99] By focusing on the foreseeability of the damage caused and the allowance of recovery in the absence of privity of contract, the law of minority-view states shares some similarities with Louisiana law.[100] The concept of foreseeability is an important aspect of liability in Louisiana law, particularly with respect to recovery for purely economic loss in the absence of privity of contract.[101]

3. Louisiana: No Contract, No Problem

Louisiana allows recovery in tort for pure economic loss as a result of negligent misrepresentation, even in the absence of privity of contract, as

93. PLITT & PLITT, *supra* note 10. The states adopting the minority view include New Hampshire and Alaska. *See Morvay*, 506 A.2d 333 (finding independent adjusters owe a duty to insureds without requiring contractual privity); *Cont'l Ins. Co*., 608 P.2d 281 (finding an independent adjusting firm owed duty to insured).

94. *Morvay*, 506 A.2d at 334.

95. *Id.*

96. *Id.*

97. *Id.* at 335.

98. *Id.*

99. *Id.*

100. *See* Barrie v. V.P. Exterminators, Inc., 625 So. 2d 1007, 1014 (La. 1993); *Morvay*, 506 A.2d at 335.

101. *See Barrie*, 625 So. 2d at 1014.

long as a duty exists.[102] Therefore, although no contract exists between independent adjusters and insureds, recovery against an independent adjuster is possible, unlike majority-view states that require privity of contract.[103] In this respect, Louisiana law is more akin to the minority view because of the possibility of recovery in the absence of privity of contract.[104] Given the possibility for recovery in the absence of privity of contract in Louisiana, the next question is whether independent adjusters owe any duty to insureds, and thereafter whether Louisiana falls within the majority view, the minority view, or somewhere in between.[105]

II. DO INDEPENDENT ADJUSTERS OWE A DUTY TO INSUREDS UNDER LOUISIANA LAW?

Louisiana courts and the state legislature must determine whether courts should hold independent adjusters individually liable.[106] The question of the liability of independent adjusters depends directly on whether independent adjusters owe any duty to insureds and, if so, where such a duty originates.[107] Further, there are several types of duties that independent adjusters may owe to insureds, including a statutory duty of good faith, a common-law duty of good faith and fair dealing, a contractual duty, and a general duty to exercise reasonable care.[108] Each of these duties originates from a different source, such as a contract, the relationship between the parties, a statute, or case law.[109]

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102. *Id.*

103. *See generally id.* (finding economic recovery allowable even in the absence of privity of contract). *See also* PLITT & PLITT, *supra* note 10.

104. *See generally Barrie*, 625 So. 2d at 1014 (finding economic recovery allowable even in the absence of privity of contract). *See also* PLITT & PLITT, *supra* note 10.

105. *See generally Barrie*, 625 So. 2d at 1014 (finding economic recovery allowable even in the absence of privity of contract). *See also* PLITT & PLITT, *supra* note 10.

106. *See* Dillon v. Lincoln Gen. Ins. Co., No. 06-7354, 2006 WL 3469554, at *3 (E.D. La. Nov. 30, 2006); Pelican Hosp. Grp. v. United Nat. Ins. Co., No. 06-618, 2006 WL 3313721, at *4 (E.D. La. Nov. 13, 2006); Alarcon v. Aetna Cas. & Sur. Co., 538 So. 2d 696 (La. Ct. App. 5th Cir. 1989); Pellerin v. Cash Pharmacy, 396 So. 2d 371 (La. Ct. App. 1st Cir. 1981).

107. *See Dillon*, 2006 WL 3469554, at *3; *Pelican Hosp. Grp.*, 2006 WL 3313721, at *4; *Alarcon*, 538 So. 2d at 696; *Pellerin*, 396 So. 2d at 371.

108. *See Dillon*, 2006 WL 3469554, at *3; *Pelican Hosp. Grp.*, 2006 WL 3313721, at *4; *Alarcon*, 538 So. 2d at 696; *Pellerin*, 396 So. 2d at 371.

109. *See Dillon*, 2006 WL 3469554, at *3; *Pelican Hosp. Grp.*, 2006 WL 3313721, at *4; *Alarcon*, 538 So. 2d at 696; *Pellerin*, 396 So. 2d at 371.

A. Insurers' Duties Under Louisiana Revised Statutes §§ 22:1892, 22:1973

Louisiana's duty of good faith differs from the common-law duty of good faith and fair dealing, as the former is recognized in statutes rather than case law.[110] Revised Statutes § 22:1892 and § 22:1973 recognize the good-faith duties of insurance companies, but the duties actually derive from the contract itself.[111] A reading of the plain language of the statutes provides that both statutes recognize duties belonging distinctively to "insurers," as they are the only party the statutes mention as owing a duty to insureds.[112] It is necessary to examine case law on the matter, however, because a plain-language reading alone is insufficient to prove that an insurer's duties under Louisiana Revised Statutes § 22:1892 and § 22:1973 are non-delegable.[113]

Few Louisiana courts have spoken specifically on the nature of the insurer's statutory duties of good faith, but those courts that have done so hold that such duties are non-delegable.[114] Two cases decided in the federal district courts of Louisiana demonstrate as much: *Hoffman v. Ellender* and *Rosinia v. Lexington Insurance Co*.[115] In *Hoffman*, State Farm assigned Cindy Ellender, an employee adjuster, rather than an independent adjuster, to adjust the plaintiff's homeowner's insurance claim regarding a burned down house.[116] During the investigation of the claim, Ellender asked inappropriate questions that led to an argument and ultimately to threats from Ellender to retaliate against the homeowner through her investigation of the claim.[117] State Farm denied the claim, and the plaintiff alleged bad faith for an arbitrary and capricious failure to pay.[118] The Middle District of Louisiana found that the plaintiff had no

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110. *See, e.g.*, LA. REV. STAT. §§ 22:1973, 22:1892 (2019); *see* Smith v. Citadel Ins. Co., 285 So. 3d 1062, 1069–70 (La. 2019).

111. *See* LA. REV. STAT. §§ 22:1973, 22:1892; *see also* Smith v. Citadel Ins. Co., 285 So. 3d 1062, 1069–70 (La. 2019).

112. *See, e.g.*, LA. REV. STAT. §§ 22:1973, 22:1892. Section 1892 provides that "all insurers issuing any type of contract" owe a duty, whereas § 1973 provides "an insurer . . . owes to his insured a duty of good faith and fair dealing." *Id.*

113. *See* Hoffman v. Ellender, No. 15-309-JWD-RLB, 2015 WL 4873342 (M.D. La. 2015); Rosinia v. Lexington Ins. Co., No. 06-6315, 2006 WL 3141247 (E.D. La. 2006).

114. *See generally Hoffman*, 2015 WL 4873342; *Rosinia*, 2006 WL 3141247.

115. *See Hoffman*, 2015 WL 4873342; *Rosinia*, 2006 WL 3141247.

116. *See Hoffman*, 2015 WL 4873342, at *1.

117. *Id.*

118. *Id.*

basis of recovery against Ellender because insurance companies cannot delegate their duties of care to an employee adjuster.[119]

Similarly, in *Rosinia*, Lexington Insurance Company hired Central Claims Service to adjust the plaintiff's claims, and then Central assigned the claim to Integrity Adjusters, creating an independent-adjuster relationship.[120] In a very short opinion, the Eastern District of Louisiana found that the plaintiffs had no claim against the independent adjuster because there was no statutory support demonstrating that the Louisiana Legislature intended the duties to be delegable to insurance adjusters.[121] The *Rosinia* court considered the important principle of legislative intent—a staple in Louisiana law.[122] The Louisiana Revised Statutes provide that when the meaning of a statute is unclear, courts should examine the legislative intent surrounding the enactment of the statute.[123] Although the Eastern District and the Middle District mention legislative intent, they fail to provide a detailed explanation of that intent and the non-delegable nature of the duties.[124] Because Louisiana courts do not provide a detailed explanation of legislative intent surrounding Revised Statutes § 22:1892 and § 22:1973 and why the statutory duties of insurers are non-delegable, it is helpful to look at additional areas where Louisiana courts have found duties to be non-delegable.[125]

1. Non-Delegable Duties and Where to Find Them

In general, individuals other than those who owe a non-delegable duty cannot, as a principle of law, perform such a duty.[126] The main policy

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119. *Id.* at *6.
120. *Rosinia*, 2006 WL 3141247, at *1.
121. *Id.*
122. *See* LA. REV. STAT. § 24:177 (2019).
123. *See id.*
124. *See Hoffman*, 2015 WL 4873342; *Rosinia*, 2006 WL 3141247.
125. *See Hoffman*, 2015 WL 4873342; *Rosinia*, 2006 WL 3141247.
126. *See, e.g.*, Foster v. Destin Trading Corp., 700 So. 2d 199, 209 (La. 1997) (noting that owner of vessel has a non-delegable duty to furnish a seaworthy vessel, which duty "extends to a defective condition of the ship, its equipment, or appurtenances," even when caused by third parties and not known by the owner); Olsen v. Shell Oil Co., 365 So. 2d 1285, 1293 (La. 1978) (holding that building owner owes non-delegable duty to "keep his building in repair and free of defects constituting an unreasonable risk of injuries to others" and cannot exculpate himself from liability by hiring a contractor to perform these duties); McLin v. Breaux, 950 So. 2d 711 (La. Ct. App. 1st Cir. 2006) (finding a surgeon has a non-delegable duty to account for all sponges and could not escape liability by discharging such duty to nurses. Any action performed by nurse was a remedial

reason behind non-delegable duties is "that the responsibility is so important to the community that the employer should not be permitted to transfer it to another."[127] Conceptually, non-delegable duties are essential to this argument because Louisiana courts have consistently held that individuals or entities possessing non-delegable duties cannot escape liability by hiring a third party to perform the assigned duty.[128]

Louisiana courts have found that the following parties owe non-delegable duties: surgeons, vessel owners, and building owners.[129] Such non-delegable duties derive from different sources, and through an examination of those sources, a comparison may be drawn to the statutory duties of insurance companies.[130] For example, the Louisiana Supreme Court in *Grant v. Touro Infirmary* established a jurisprudential rule that the duty of surgeons is non-delegable.[131] In *Grant*, the Court held that surgeons have a non-delegable duty to account for all surgical supplies, reasoning that the accounting of sponges was a procedure adopted by the hospital and its doctors as a safety measure.[132] Therefore, the Court held that the surgeon is the one responsible for inserting, and later removing, the sponges.[133] Similarly, the non-delegable duty of vessel owners arises from its longstanding acceptance in the law of admiralty and in its consistent jurisprudential repetition.[134] In the context of the insurer's statutory duties of good faith, there is neither precedent from the Louisiana Supreme Court nor consistent jurisprudential repetition of the principle

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measure that could not relieve the surgeon of his duty or liability for breach of such duty).

127. O'Donnell, *supra* note 15 (citing PROSSER AND KEETON, THE LAW OF TORTS (W. Page Keeton 5th ed. 1984)).

128. *See Foster*, 700 So. 2d at 209; *Olsen*, 365 So. 2d at 1293; *McLin*, 950 So. 2d at 711.

129. *See Foster*, 700 So. 2d at 209; *Olsen*, 365 So. 2d at 1293; *McLin*, 950 So. 2d at 711.

130. *See Hoffman*, 2015 WL 4873342; *Rosinia*, 2006 WL 3141247; *Foster*, 700 So. 2d at 209; *Olsen*, 365 So. 2d at 1293; *McLin*, 950 So. 2d at 711.

131. *McLin*, 950 So. 2d at 715.

132. Grant v. Touro Infirmary, 223 So. 2d 148, 155 (La. 1969), *overruled on other grounds*, Garlington v. Kingsley, 289 So. 2d 88 (La. 1974).

133. *Id.*

134. *See* Seas Shipping Co. v. Sieracki, 328 U.S. 85, 95 n.11 (1946); *Foster*, 700 So. 2d at 209; Fl. Fuels, Inc. v. Citgo Petroleum Corp., 6 F.3d 330, 332 (La. Ct. App. 5th Cir. 1993); Brister v. A.W.I. Inc., 946 F.2d 350, 355 (La. Ct. App. 5th Cir. 1991).

that the insurer's statutory duties of good faith are non-delegable.[135] Not all non-delegable duties derive from case law, however.[136]

In contrast to the duties of surgeons and vessel owners, the non-delegable duty of building owners to keep their buildings and their appurtenances in repair derives from Louisiana Civil Code article 2322.[137] Article 2322 provides that the owner of a building is responsible for the damage caused by it but is only liable for damages when she knew or should have known of the damage-causing defect and fails to exercise reasonable care in preventing the damage.[138] The Louisiana Supreme Court case *Olsen v. Shell Oil Co.* demonstrates this codal duty.[139]

In *Olsen v. Shell Oil Co.*, the Louisiana Supreme Court addressed the statutory duty of building owners by discussing two competing theories of non-delegable duties: the fault theory and the risk theory.[140] The fault theory states that liability is based on the owner's fault in failing to attend to the building.[141] By contrast, the risk theory focuses on the concept that although an owner may have a right to indemnification against another party, the owner is primarily responsible for damage caused by the building as an exchange for the advantages of owning the building.[142]

2. Insurers' Duties: Non-Delegable By Analogy

The risk theory applies directly to the relationship between insurance companies and adjusters because insurance companies hold all of the power in their relationships with insureds.[143] Therefore, insurers can easily

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135. *See Hoffman*, 2015 WL 4873342; *Rosinia*, 2006 WL 3141247.

136. *See, e.g.*, LA. CIV. CODE art. 2322 (2019); Olsen v. Shell Oil Co., 365 So. 2d 1285, 1291 (La. 1978).

137. *See Olsen*, 365 So. 2d at 1291; *see also id.* art. 2322.

138. *Id.* art. 2322 ("The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice or defect in its original construction. However, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known of the vice or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care.").

139. *See Olsen*, 365 So. 2d at 1291 n.13.

140. *Id.*

141. *Id.*

142. *Id.*

143. *See id*. Insurers hold all of the power in their relationships with insureds because of the necessity of insurance. *See* Natividad v. Alexsis, Inc., 875 S.W.2d 695, 697 (Tex. 1994).

take advantage of insureds through contracts.[144] While insurance companies have a right to indemnification against independent adjusters through contract, insurance companies must still bear the burden of the damage in exchange for the powers they possess.[145] Therefore, Louisiana courts' analyses of non-delegable duties suggest that Louisiana courts should consider the duties of insurers under Louisiana Revised Statutes § 22:1892 and § 22:1973 non-delegable.[146]

Although the non-delegable nature of the statutory duties limits the situations in which an insurance company is not liable for the acts of its independent adjusters, it does not completely eliminate the possibility of such a situation.[147] Furthermore, insurers' non-delegable statutory duties do not prevent independent adjusters from having a concurrent duty.[148] For example, the duty of surgeons to patients is particularly noteworthy—as Louisiana courts have found nurses concurrently liable despite the non-delegable nature of the surgeon's duty.[149] In *Johnston v. Southwest Louisiana Ass'n*, the court found that although the duty of a surgeon to account for surgical sponges is non-delegable, nurses have an independent duty to perform the same task for which "they can be *concurrently* at fault with the surgeon."[150] Applying this logic to the case of independent adjusters and insurers means that if the duty of insurers under Louisiana Revised Statutes § 22:1892 and § 22:1973 is non-delegable, then independent adjusters may still have a concurrent duty—from a non-statutory source—allowing courts to hold such adjusters individually liable.[151] Therefore, although insurance companies may not be able to

144. *Natividad*, 875 S.W.2d at 697.

145. *See generally Olsen*, 365 So. 2d at 1291 n.13; *Natividad*, 875 S.W. 2d at 697 (analyzing non-delegable duties in reference to the risk theory and the fault theory).

146. *See* Hoffman v. Ellender, No. 15-309-JWD-RLB, 2015 WL 4873342 (M.D. La. July 23, 2015); Rosinia v. Lexington Ins. Co., No. 05-6315, 2006 WL 3141247 (E.D. La. Oct. 31, 2006); Foster v. Destin Trading Corp., 700 So. 2d 199, 209 (La. 1997); *Olsen*, 365 So. 2d at 1293 (La. 1978); McLin v. Breaux, 950 So. 2d 711 (La. Ct. App. 1st Cir. 2006).

147. *See generally* Johnston v. Sw. La. Ass'n, 693 So. 2d 1195 (La. Ct. App. 3d Cir. 1997) (finding nurses can have a concurrent duty to that of surgeons).

148. *See generally id.*

149. *See id.*

150. *Id.* at 1198; *see also McLin*, 950 So. 2d at 717; Grant v. Touro Infirmary, 223 So. 2d 148, 155 (La. 1969), *overruled on other grounds*, Garlington v. Kingsley, 289 So. 2d 88 (La. 1974).

151. *See generally Johnston*, 693 So. 2d 1195.

delegate their statutory duties to independent adjusters, such adjusters may owe a duty of their own.[152]

B. Do Insurance Adjusters Generally Owe a Duty to Insureds?

There is a dichotomy of views in the Eastern District of Louisiana regarding the circumstances in which adjusters owe a duty to insureds.[153] The cases of *Loehn v. Hardin* and *Motin v. Travelers Insurance Co.* demonstrate this disagreement.[154] In *Loehn,* the plaintiffs filed suit against State Farm and its employee adjuster.[155] State Farm argued that there was diversity jurisdiction because Kelly Hardin, the employee adjuster who destroyed diversity, was not a proper party to the suit.[156] This argument was based on the plaintiff lacking a cause of action against the adjuster.[157] The Eastern District of Louisiana used a four-part test from *Dufrene v. State Farm Fire and Casualty Co.* to determine whether an employee owes an independent duty to a customer: (1) the employer must owe a duty to the claimant; (2) the employer must delegate that duty to a particular employee; (3) the employee must breach this duty; and (4) individual liability may only be imposed when the employee has an individual duty to the plaintiff, not when the employee only has a general responsibility for the performance of a function of their employment.[158] The court ultimately held that State Farm delegated its duty to the adjuster and that the adjuster was a proper party because her alleged conduct was sufficient to breach State Farm's duty.[159] The court found that the plaintiff's allegations of a breach of the duty of proper claim handling because of an insufficient investigation and misrepresentation of policy coverages were sufficient to support a cause of action against the adjuster.[160] Despite this finding, the Eastern District later contradicted its own view in *Motin*.[161]

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152. *See, e.g.*, Loehn v. Hardin, No. 02-257, 2002 WL 922380, at *2 (E.D. La. May 6, 2002).

153. *Compare id.*, *with* Motin v. Travelers Ins. Co., No. 03-2487, 2003 WL 22533673, at *4 (E.D. La. Nov. 4, 2003).

154. *Compare Loehn*, 2002 WL 922380, at *2, *with Motin*, 2003 WL 22533673, at *4.

155. *Loehn*, 2002 WL 922380, at *2.

156. *Id.*

157. *Id.*

158. *Id.*; *see also* Dufrene v. State Farm Fire & Cas. Co., No. 92-3470, 1993 WL 35128 (E.D. La. Feb. 5, 1993).

159. *Loehn*, 2002 WL 922380, at *2.

160. *Id.*

161. *Motin*, 2003 WL 22533673, at *4.

Nearly six months later, the Eastern District of Louisiana expressly disagreed with the *Loehn* court's holding that adjusters owe a duty to insureds.[162] In *Motin*, Bonnie Motin sued her homeowner's insurer, Travelers Insurance Company, and its employee adjuster, Folse, for intentional breach of contract and bad faith claims in violation of the Louisiana Revised Statutes.[163] Motin alleged that Folse failed to provide her with a copy of her insurance policy after Folse notified her that she might not be covered and that the insurer failed to accept or deny coverage within 60 days from proof of loss.[164] The court found that the duty to properly handle insurance claims derived from the Louisiana Revised Statutes, which impose a duty only upon insurers and lack legislative intent for allowing delegation of such a duty to adjusters.[165] This reasoning focused on the principle that courts should strictly construe penal statutes[166]—or those imposing penalties.[167] The Eastern District in *Motin* did, however, note that some circumstances may exist in which insurance adjusters owe a duty to insureds, but those circumstances were not present in *Motin* or in *Loehn*.[168] Despite the confusion on this issue, Louisiana federal and state case law suggests that there is a general rule concerning the duty of insurance adjusters, subject to a few exceptions.[169]

1. "We Don't Need No [Delegation]": Another Brick in the Wall[170]

In determining when Louisiana courts should hold independent adjusters individually liable based on an independent duty, it is first

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162. *Id.*

163. *Id*. at *3.

164. *Id*.

165. *Id*. at *4.

166. Both Louisiana Revised Statutes § 22:1973 and § 22:1892 are penal statutes because they provide for penalties against insureds. *See* LA. REV. STAT. §§ 22:1973, 22:1892 (2019).

167. *Motin*, 2003 WL 22533673, at *4 (citing Yates v. Sw. Life Ins. Co., No. 97-3204, 1998 WL 61033, at *4 (E.D. La. Feb. 12, 1998)); *see also In re* Hannover Corp., 67 F.3d 70 (5th Cir. 1995); Nero v. La. Indep. Ins. Agencies, Inc., No. 03-3317, 2003 WL 203145, at *2 (E.D. La. Jan. 29, 2003).

168. *Motin*, 2003 WL 22533673, at *4.

169. *See, e.g*., Pelican Hosp. Grp. v. United Nat. Ins. Co., No. 06-618, 2006 WL 3313721, at *4 (E.D. La. Nov. 13, 2006); Loehn v. Hardin, No. 02-257, 2002 WL 922380 (E.D. La. May 6, 2002); Alarcon v. Aetna Cas. & Sur. Co., 538 So. 2d 696 (La. Ct. App. 5th Cir. 1989); Pellerin v. Cash Pharmacy, 396 So. 2d 371 (La. Ct. App. 1st Cir. 1981).

170. To hear the famous lyrics, "We don't need no education," *see* PINK FLOYD, ANOTHER BRICK IN THE WALL (PART II) (Columbia Records 1979).

necessary to examine the general rule against such a duty.[171] The general rule that insurance adjusters do not owe a duty of good faith and fair dealing or a duty to exercise reasonable care toward insureds is demonstrated through several Louisiana cases, including *Westmoreland v. Wright National Flood* and *St. Marie v. State Farm Fire and Casualty Co*.[172] The general no-duty rule set forth by Louisiana courts is, however, subject to some exceptions.[173] Louisiana federal and state courts have referenced such exceptions in a variety of cases, such as *Pelican Hospitality Group v. United National Insurance Co.*, *Alarcon v. Aetna Casualty and Surety Co.*, *Pellerin v. Cash Pharmacy*, *Dillon v. Lincoln General Insurance Co.*, and *Loehn v. Hardin*.[174]

The Supreme Court of Louisiana has not spoken on the issue; however, the general consensus among Louisiana federal courts and some Louisiana circuit courts is that insurance adjusters do not owe a duty of good faith and fair dealing or a duty to exercise reasonable care toward insureds.[175] In a case from the Middle District of Louisiana, *Westmoreland v. Wright National Flood*, the plaintiff sued both her insurer and the independent adjusting company hired by the insurer, asserting a tort claim against both parties and a breach of contract claim against the insurer.[176] The plaintiff alleged that the independent adjusting firm mishandled her property damage claim following Hurricane Isaac through negligent misrepresentation and the underestimation of her claims, thereby breaching the adjuster's duty of good faith and fair dealing.[177] In response to these claims, the Middle District noted that Louisiana federal courts applying state law "have consistently held that an insurance adjuster does not owe a legal duty to an insured to properly investigate or handle claims, advise an insured on coverage issues or engage good faith dealing."[178]

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171. *See, e.g.*, Westmoreland v. Wright Nat. Flood, No. 13-564, 2014 WL 1343387, at *1 (M.D. La. Apr. 3, 2014); St. Marie v. State Farm Fire & Cas. Co., No. 06-8725, 2007 WL 1017588, at *3 (E.D. La. Mar. 28, 2007).

172. *Westmoreland*, 2014 WL 1343387, at *1; *St. Marie*, 2007 WL 1017588, at *3.

173. *See, e.g.*, *Pelican Hosp. Grp.*, 2006 WL 3313721, at *4; *Alarcon*, 538 So. 2d 696; *Pellerin*, 396 So. 2d 371; *Loehn,* 2002 WL 922380.

174. *See, e.g.*, *Pelican Hosp. Grp.*, 2006 WL 3313721, at *4; *Alarcon*, 538 So. 2d 696; *Pellerin*, 396 So. 2d 371; *Loehn,* 2002 WL 922380.

175. *See Westmoreland*, 2014 WL 1343387, at *1; *St. Marie*, 2007 WL 1017588, at *3; *Pellerin*, 396 So. 2d 371.

176. *Westmoreland*, 2014 WL 1343387, at *1.

177. *Id*. at *2.

178. *Id.* (citing *St. Marie*, 2007 WL 1017588, at *3) ("With regard to insurance adjusters, Louisiana courts have consistently held that, as a general rule, an insurance adjuster owes no duty to an insured to properly investigate or handle

Additionally, in *Westmoreland*, the court distinguished the case from the exception in *Dillon v. Lincoln General Insurance Co.*,[179] stating that the facts of *Dillon* differed from *Westmoreland* because the duty alleged in *Dillon* was based on self-dealing.[180] Further, the Middle District noted that the Eastern District's holding in *Loehn v. Hardin*, finding that an insurance company had delegated its duty to an adjuster, was baseless because of the lack of case law supporting this stance.[181] Finally, the Middle District provided that it was "unable to find any case law that supports [the *Loehn* court's] conclusion."[182] This view, however, ignores the *Loehn* court's use of the four-part *Dufrene* test for the determination of whether an employee owes an independent duty to a customer in conjunction with the *Pellerin* and *Alarcon* exceptions.[183] Despite this oversight, the Middle District may not be entirely incorrect in its conclusion, because other Louisiana courts have agreed.[184]

For example, in *St. Marie v. State Farm Fire and Casualty Co.*, the plaintiffs filed suit against State Farm and its employee adjusters.[185] The plaintiffs alleged that the adjusters arbitrarily and capriciously denied their claims for hurricane damage and failed to adjust the claims in good faith.[186] In finding that the adjusters owed no duty to the plaintiffs, the Eastern District outlined the different situations contemplated by the general rule

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claims, or advise an insured on coverage issues."); RDS, Inc. v. Gab Robins N. Am., Inc., No. 2:03 CV 1786, 2005 WL 2045956, at *3 (W.D. La. Aug. 23, 2005) ("It is well settled in Louisiana law that a claims adjuster has no duty to an insured."); Rich v. Bud's Boat Rentals, Inc., No. 96-3279, 1997 WL 785668, at *3 (E.D. La. Dec. 18, 1997). ("This Court has found no case imposing a duty on an independent insurance adjuster to an insured to conduct a proper investigation . . . ."); Pac. Emp'rs Ins. Co. v. United Gen. Ins. Co., 664 F. Supp. 1022, 1024 (W.D. La. 1987) ("Louisiana courts have consistently held that an adjuster owes no implied duty of good faith to an insured when not a party to the contract of insurance.").

179. *See* discussion *infra* Part II.B.2 on the *Dillon* exception.

180. *Westmoreland*, 2014 WL 1343387, at *3 n.1.

181. *Id.*

182. *Id.*

183. *See* Loehn v. Hardin, No. 02-257, 2002 WL 922380, at *2 (E.D. La. May 6, 2002); *see also* Dufrene v. State Farm Fire & Cas. Co., No. 92-3470, 1993 WL 35128 (E.D. La. Feb. 5, 1993); Alarcon v. Aetna Cas. & Sur. Co., 538 So. 2d 696 (La. Ct. App. 5th Cir. 1989); Pellerin v. Cashway Pharmacy, 396 So. 2d 371 (La. Ct. App. 1st Cir. 1981).

184. *See, e.g.*, St. Marie v. State Farm Fire & Cas. Co., No. 06-8725, 2007 WL 1017588, at *1, *3 (E.D. La. Mar. 28, 2007).

185. *Id*. at *1.

186. *Id*.

that insurance adjusters do not owe a duty to an insured for the proper investigation and handling of claims.[187] First, the concept that there is generally no duty of an insurance adjuster to advise a claimant of the proper prescriptive period derives from *Pellerin v. Cash Pharmacy*, which also provides for an exception to the general rule.[188] Further, the Eastern District of Louisiana's decision in *Rosinia v. Lexington Insurance Co*. stands for the principle that an insurance adjuster does not owe a general tort duty to an insured.[189] Finally, in *Rich v. Bud's Boat Rentals, Inc*., the Eastern District held that the facts of the case did not indicate that the independent adjuster owed the insured any duty to protect against negligent and careless claims investigation.[190] Therefore, much of the support for the general rule that insurance adjusters do not owe a duty to insureds derives from decisions by the Eastern District of Louisiana, the Middle District of Louisiana, and the Louisiana First Circuit Court of Appeal.[191]

2. Exceptions to the General Rule—Situations in Which Adjusters Assume a Duty

Although adjusters, both employee and independent, owe no general duty to insureds according to Louisiana courts, most courts acknowledge that adjusters may assume a duty to insureds under certain circumstances.[192] In *Pellerin v. Cash Pharmacy*, a case from the Louisiana First Circuit Court of Appeal, Gladys Pellerin filed suit against Tidelands, the insurer of Cash Pharmacy, and its adjuster, Glenn Tanner.[193] Pellerin alleged that the adjuster failed to inform her of her claim's prescriptive period, causing the claim to prescribe.[194] After finding that the adjuster owed no duty to advise Pellerin of the prescriptive period, the court listed several examples of circumstances in which an adjuster may assume a duty to the insured, including "[1] the relative education of the parties, [2] the diligence of the claimant in seeking the facts, [3] the actual or apparent

187. *Id*. at *3.
188. *Id.*; *see also Pellerin*, 396 So. 2d 371.
189. *St. Marie*, 2007 WL 1017588, at *3; *see also* Rosinia v. Lexington Ins. Co., No. 06-6315, 2006 WL 3141247, at *1 (E.D. La. Oct. 31, 2006).
190. *St. Marie*, 2007 WL 1017588, at *3; *see also* Rich v. Bud's Boat Rentals, Inc., No. 96-3279, 1997 WL 785668 (E.D. La. Dec. 18, 1997).
191. *See, e.g*., *St. Marie*, 2007 WL 1017588, at *3; *Rosinia*, 2006 WL 3141247, at *1; *Rich*, 1997 WL 785668; *Pellerin*, 396 So. 2d 371.
192. *See Pellerin*, 396 So. 2d at 373; *see also St. Marie*, 2007 WL 1017588, at *3.
193. *Pellerin*, 396 So. 2d at 372.
194. *Id*. at 373.

authority of the adjuster, [4] the content of his promises to the claimants, [5] misrepresentation or [6] fraud."[195] The court's use of language such as "may" and "examples" shows that it is unlikely that the court intended for these circumstances to be an exclusive list.[196] Therefore, other circumstances may give rise to adjusters owing a duty to insureds.[197] Additionally, as the adjuster in *Pellerin* worked for an independent adjusting firm hired by the insurance company, this principle applies to independent adjusters.[198] Since the *Pellerin* decision, numerous Louisiana courts have relied upon and expanded the exception set forth by the Louisiana First Circuit Court of Appeal.[199]

Five years after *Pellerin*, the Louisiana Fifth Circuit Court of Appeal reinforced the First Circuit's holding that an insurance adjuster may owe a duty to an insured in certain situations.[200] In *Alarcon v. Aetna Casualty and Surety Co.*, the plaintiffs filed suit against the insurance company Aetna and its employee adjuster on the basis that the adjuster grossly undervalued their claim for property damage, causing mental anguish to and serious medical problems for the plaintiffs and thus entitling them to tort damages.[201] The Louisiana Fifth Circuit held that the petition failed to allege the specific circumstances under which the adjuster assumed a duty to the insureds and that as a result, the insureds did not state a valid cause of action against the adjuster.[202] Although the insureds in this case did not provide a sufficient basis for the assumption of a duty by the adjuster, the court acknowledged that such a basis might exist in circumstances like those set forth in *Pellerin* and allowed the insured to amend their petition to this end.[203]

In more recent cases, the federal district courts of Louisiana have applied the exceptions discussed by *Pellerin* and *Alarcon*, finding that the

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195. *Id*.
196. *Id.*
197. *Id.*
198. *Id.*
199. *See, e.g*., Pelican Hosp. Grp. v. United Nat. Ins. Co., No. 06-618, 2006 WL 3313721, at *4 (E.D. La. Nov. 13, 2006); Dillon v. Lincoln Gen. Ins. Co., No. 06-7354, 2006 WL 3469554, at *3 (E.D. La. Nov. 30, 2006); Alarcon v. Aetna Cas. & Sur. Co., 538 So. 2d 696 (La. Ct. App. 5th Cir. 1989); *Pellerin*, 396 So. 2d 371.
200. *Alarcon*, 538 So. 2d at 699.
201. *Id*. at 697.
202. *Id*. at 699.
203. *Id*. at 697; *see also*, St. Marie v. State Farm Fire & Cas. Co., No. 06-8725, 2007 WL 1017588, at *1, *3 (E.D. La. Mar. 28, 2007); *Pellerin*, 396 So. 2d at 373.

insurance adjuster owed a duty.[204] For example, in *Dillon v. Lincoln General Insurance Co.*, the Dillons filed suit in the Eastern District of Louisiana against General Insurance Company and its employee adjuster, Randy Ramsey, alleging Ramsey misrepresented the value of the vehicles in an attempt to later acquire the vehicles at a discounted rate.[205] The Eastern District of Louisiana held that insurance adjusters may assume an independent tort duty to investigate and adjust an insured's claim.[206] The court noted that unlike in *Motin*, the plaintiff here alleged sufficient facts demonstrating that the adjuster assumed a duty to the insured.[207] Relying on *Pellerin* and *Loehn,* the Eastern District found that the plaintiff made a sufficient showing by alleging that the adjuster committed fraud and misrepresented the policy.[208] Intending to eventually acquire the vehicles at a discounted rate, the adjuster first lied that the vehicles were totaled and later gave conflicting estimates of the value of the vehicles.[209] The adjuster's blatant self-dealing was the central element of the court's reasoning.[210] The plaintiff's pleading the independent actions of the adjuster was sufficient to establish the exception set forth in *Pellerin*, namely, "the actual or apparent authority of the adjuster, the content of his promises to the claimants, misrepresentation or fraud."[211]

The Eastern District applied *Dillon*'s logic to a case involving independent adjusters, *Pelican Hospitality Group v. United National Insurance Co*.[212] In *Pelican*, the plaintiff's restaurant suffered damage from hurricanes Katrina and Rita.[213] The insurance company hired an independent adjuster to act on its behalf in inspecting and adjusting the claim.[214] Thereafter, the independent adjuster inspected the restaurant but never reported his findings to the insurance company; consequently, the insurer never paid claim.[215] The plaintiffs then filed suit against the insurance company and the independent adjuster, seeking penalties and

204. *See, e.g.*, *Dillon*, 2006 WL 3469554, at *3; *Pelican Hosp. Grp.*, 2006 WL 3313721, at *1.
205. *Dillon*, 2006 WL 3469554, at *3.
206. *Id.*; *see also St. Marie*, 2007 WL 1017588, at *3.
207. *Dillon*, 2006 WL 3469554, at *3 n.2.
208. *Id*. at *1.
209. *Id*.
210. *See id*.
211. *Id*. at *3; *see also*, *St. Marie*, 2007 WL 1017588, at *1, *3.
212. *See, e.g.*, Pelican Hosp. Grp. v. United Nat. Ins. Co., No. 06-618, 2006 WL 3313721, at *1 (E.D. La. Nov. 13, 2006).
213. *Id*.
214. *Id*.
215. *Id*.

attorney's fees for breach of contract and failure to properly handle the claim.[216] Specifically, the plaintiffs alleged that the adjuster misrepresented coverages and terms of coverage, failed to properly investigate the claims, or acted negligently through his failure to adequately or timely investigate the claims.[217] Relying on the *Pellerin*, *Alarcon*, and *Loehn* decisions, the Eastern District again held that the plaintiffs sufficiently pled "the actual or apparent authority of the adjuster and his misrepresentations," indicating the adjuster may have assumed an independent tort duty to the insured.[218] Additionally, as with each of the cases discussed in this section, the court in *Pelican* failed to discuss the principles of agency law and whether the court should impute the adjuster's liability to the insurer.[219]

Although insurance adjusters do not owe an independent duty in a majority of cases, the above cases demonstrate that insurance adjusters can owe a duty to exercise reasonable care to insureds under certain circumstances, such as those described in *Pellerin*.[220] If such adjusters owe an independent duty, then courts may hold them independently liable to insureds.[221] Despite this possibility of independent adjusters owing a duty to insureds, the analysis does not end here, as there are other areas in which such a duty to insureds may exist.[222]

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216. *Id*.

217. *Id*. at *2.

218. *Id*. at *4; *see also* Loehn v. Hardin, No. 02-257, 2002 WL 922380, at *1 (E.D. La. May 6, 2002); Alarcon v. Aetna Cas. & Sur. Co., 538 So. 2d 696 (La. Ct. App. 5th Cir. 1989); Pellerin v. Cash Pharmacy, 396 So. 2d 371 (La. Ct. App. 1st Cir. 1981).

219. *See, e.g*., Westmoreland v. Wright Nat. Flood, No. 13-564, 2014 WL 1343387, at *2 (M.D. La. Apr. 3, 2014); St. Marie v. State Farm Fire & Cas. Co., No. 06-8725, 2007 WL 1017588, at *3 (E.D. La. Mar. 28, 2007); *Pelican Hosp. Grp.*, 2006 WL 3313721, at *2; Dillon v. Lincoln Gen. Ins. Co., No. 06-7354, 2006 WL 3469554, at *3 (E.D. La. Nov. 30, 2006); Rosinia v. Lexington Ins. Co., No. 06-6315, 2006 WL 3141247, at *1 (E.D. La. Oct. 31, 2006); RDS, Inc. v. Gab Robins N. Am., Inc., No. 2:03 CV 1786, 2005 WL 2045956, at *3 (W.D. La. Aug. 23, 2005); Rich v. Bud's Boat Rentals, Inc., No. 96-3279, 1997 WL 785668, at *3 (E.D. La. Dec. 18, 1997); Pac. Emp'rs Ins. Co. v. United Gen. Ins. Co., 664 F. Supp. 1022, 1024 (W.D. La. 1987); *Alarcon*, 538 So. 2d 696; *Pellerin*, 396 So. 2d 371.

220. *See Pelican Hosp. Grp.*, 2006 WL 3313721, at *4; *Dillon*, 2006 WL 3469554, at *3; *Alarcon*, 538 So. 2d 696; *Pellerin*, 396 So. 2d 371.

221. *See Pelican Hosp. Grp*, 2006 WL 3313721, at *4; *Dillon*, 2006 WL 3469554, at *3; *Alarcon*, 538 So. 2d 696; *Pellerin*, 396 So. 2d 371.

222. *See* LA. CIV. CODE art. 1759 (2019); PLITT & PLITT, *supra* note 10; Nero v. La. Indep. Ins. Agencies, Inc., No. 03-3317, 2003 WL 203145, at *2 (E.D. La. Jan. 29, 2003) (citing LA. CIV. CODE art. 3016).

C. Contractual Duties and Relationships

Under Louisiana Civil Code article 1759, every contractual relationship comes with a duty of each party to act in good faith in all acts pertaining to the obligations created by the contract.[223] It is, however, unlikely that the duty of good faith applies to the adjuster-insured relationship.[224] The contract between an independent adjuster and an insurance company creates an obligation to adjust the claim and determine whether such claim is paid.[225] Therefore, as provided by code article, the independent adjuster would have a good-faith duty to adjust the claim and determine whether it should be paid.[226] The article appears, on its face, to imply that the adjuster owes this duty to the insurance company, as the insurer is the other party to the contract with the independent adjuster.[227] Because the contract calls for the adjustment of an insured's claim, however, the contract may stipulate a benefit for a third party—the insured—through the evaluation of the insured's claim.[228]

Louisiana courts require three criteria to be met for a third-party beneficiary to exist: (1) the stipulation for the third party is clear; (2) the benefit to be provided is certain; and (3) the benefit is not incidental to the agreement between the primary parties of the contract.[229] Because the stipulation must be clear, the contract between the insurer and the independent adjuster must describe the benefit to the insured in the contract; otherwise, the independent adjuster owes no good faith duty under article 1759.[230] Even if the contract expressly stipulates a benefit for the insured, it is likely that there would still be no independent duty or liability for the independent adjuster because of the Louisiana Civil Code articles[231] regarding principals and mandataries.[232]

Nero v. LA Independent Insurance Agencies, Inc., a case from the Eastern District of Louisiana, demonstrates the impact of the code articles

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223. LA. CIV. CODE art. 1759.

224. *See id.*; *see also* PLITT & PLITT, *supra* note 10; *Nero*, 2003 WL 203145, at *2 (citing LA. CIV. CODE art. 3016).

225. *See* LA. CIV. CODE art. 1759; PLITT & PLITT, *supra* note 10.

226. *See* LA. CIV. CODE art. 1759; PLITT & PLITT, *supra* note 10.

227. *See* LA. CIV. CODE art. 1759; PLITT & PLITT, *supra* note 10.

228. *See* LA. CIV. CODE art. 1978; PLITT & PLITT, *supra* note 10.

229. Maggio v. Parker, 250 So. 3d 874, 880 (La. 2018).

230. *See generally* Nero v. La. Indep. Ins. Agencies, Inc., No. 03-3317, 2003 WL 203145, at *2 (E.D. La. Jan. 29, 2003) (citing LA. CIV. CODE art. 3016).

231. *See* LA. CIV. CODE arts. 2989–3023.

232. *See generally Nero*, 2003 WL 203145, at *2 (citing LA. CIV. CODE art. 3016).

regulating principals and mandataries[233] on the potential contractual duties of independent adjusters.[234] In *Nero*, the plaintiffs alleged that Independent Insurance Agencies, Inc., a mandatary of the main defendant Unitrin, breached its duty by advising plaintiffs to purchase insurance from Unitrin, an allegedly suspicious company.[235] Citing Louisiana Civil Code article 3016, the Eastern District held that courts may hold agents of a principal individually liable for breach of contract only if such agents exceed their authority or personally bind themselves.[236] Additionally, Louisiana Civil Code article 3016 provides that a mandatary operating within the limits of his authority, as provided by the principal, does not individually obligate himself for the performance of the contract.[237] A mandatary who exceeds his authority or personally binds himself to a third person can be held individually liable, however.[238] Thus, it is unlikely that independent adjusters owe any contractual good-faith duty to the insured based on article 1759 because such adjusters are not parties to the contract with insureds and can only be held individually liable as mandataries through exceeding authority or personally binding themselves—both of which fall outside of the scope of the contract between insurer and insured.[239]

Despite independent adjusters owing no contractual good-faith duty to insureds, courts may still hold independent adjusters independently liable, as duties come from a wide variety of sources besides contracts.[240] Statutes are one of those sources, but courts have held that independent adjusters do not owe any duty to insureds under Louisiana Revised Statutes § 22:1982 and § 22:1973, because such duties are non-delegable duties of insurers.[241] Moreover, the only duties independent adjusters owe to insureds are those set out in the cases discussing exceptions to the general no-duty rule, and thus the circumstances giving rise to such exceptions are the only situations in which independent adjusters may incur individual liability.[242]

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233. For reference, the mandatary is an individual upon whom the principal confers authority to perform certain tasks on behalf of the principal. LA. CIV. CODE art. 2989.

234. *Nero*, 2003 WL 203145, at *2 (citing LA CIV. CODE art. 3016).

235. *Id*.

236. *Id.*

237. LA. CIV. CODE art. 3016.

238. *See id.* art. 3019.

239. *See generally Nero*, 2003 WL 203145, at *2 (citing *id.* art. 3016).

240. *See* discussion *supra* Part II.

241. *See* discussion *supra* Part II.A.

242. *See* Pelican Hosp. Grp. v. United Nat. Ins. Co., No. 06-618, 2006 WL 3313721, at *4 (E.D. La. Nov. 13, 2006); Dillon v. Lincoln Gen. Ins. Co., No. 06-

III. AGENCY LAW: SHOULD COURTS IMPUTE LIABILITY?

Although independent adjusters may assume an independent duty and thus have the potential for liability to insureds, courts must also consider the principles of agency law in determining whether to impute such liability from independent adjusters to insurers.[243] Agency law treats independent contractors differently than employees of a business.[244] Therefore, it is first important to determine whether independent adjusters are classified as employees or independent contractors.[245]

A. Independent Adjusters vs. Employee Adjusters

A comparison of independent adjusters and employee adjusters demonstrates that independent adjusters are, on the surface, more like independent contractors than employees.[246] There are several basic differences between independent adjusters and employee adjusters.[247] To begin, independent adjusters generally work for independent firms that insurance companies hire on a contractual basis as necessary.[248] This often results in independent adjusters traveling around the country to meet the demand that damaging events like natural disasters cause.[249] Additionally, insurers often treat independent adjusters as contractors because they can work for different insurance companies on a contractual basis.[250]

In contrast, employee adjusters are salaried employees of an insurance company, usually only operating in a specific region because of their ties

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7354, 2006 WL 3469554, at *3 (E.D. La. Nov. 30, 2006); Alarcon v. Aetna Cas. & Sur. Co., 538 So. 2d 696 (La. Ct. App. 5th Cir. 1989); Pellerin v. Cash Pharmacy, 396 So. 2d 371 (La. Ct. App. 1st Cir. 1981).

243. *See generally* Olsen v. Shell Oil Co., 365 So. 2d 1285, 1294 n.16 (La. 1978) (finding that employers are not liable for the torts of independent contractors).

244. *See generally id*.

245. *See generally id*.

246. *See What is the Difference Between an Independent Adjuster and a Staff Adjuster?*, ADJUSTERPRO, https://www.adjusterpro.com/faq/what-is-the-difference-between-an-independent-adjuster-and-a-staff-adjuster/ (last visited Sept. 24, 2019) [https://perma.cc/G7MT-8QLE].

247. *See id.*

248. *Id.*

249. *Id.*

250. TheBestIRS Blog, *Independent Insurance Adjuster vs. Claims Adjuster: What's the Difference?*, THEBESTIRS, https://thebestirs.blog/independent-vs-claims-adjuster/ (last visited Sept. 24, 2019) [https://perma.cc/9JQ2-SDN5].

to the company.[251] Employee-adjuster jobs offer more stable schedules and benefits, whereas independent adjusters are contractors and thus enjoy less predictable schedules and no benefits.[252] The distinction between the types of adjusters is particularly important when determining liability because employers may be vicariously liable for the actions of their employees that fall within the course and scope of their employment,[253] but companies are not vicariously liable for the actions of independent contractors.[254] Therefore, the question of whether courts should impute liability from independent adjusters to the insurance companies that hired them depends upon the classification of independent adjusters.[255]

B. Agency Law and Independent Contractors

Louisiana courts have failed to explicitly determine whether independent adjusters are employee agents of insurance companies or independent contractors, despite the necessity of such a determination.[256] The lack of discussion of agency law principles in cases such as *Pellerin*, *Dillon*, *Alarcon*, and many others demonstrates that Louisiana courts generally do not treat independent adjusters differently than employee adjusters when considering whether adjusters owe a duty to insureds.[257] The lack of agency discussion in Louisiana jurisprudence is concerning

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251. *What is the Difference Between an Independent Adjuster and a Staff Adjuster?*, *supra* note 246.

252. TheBestIRS Blog, *supra* note 250.

253. Orgeron *ex rel.* Orgeron v. McDonald, 639 So. 2d 224, 226 (La. 1994).

254. Olsen v. Shell Oil Co., 365 So. 2d 1285, 1294 n.16 (La. 1978).

255. *See generally id.* (finding employers are not liable for the torts of independent contractors).

256. *See generally id.*; *see, e.g.*, Westmoreland v. Wright Nat. Flood, No. 13-564, 2014 WL 1343387, at *2 (M.D. La. Apr. 3, 2014); St. Marie v. State Farm Fire & Cas. Co., No. 06-8725, 2007 WL 1017588, at *3 (E.D. La. Mar. 28, 2007); Dillon v. Lincoln Gen. Ins. Co., No. 06-7354, 2006 WL 3469554, at *3 (E.D. La. Nov. 30, 2006); Rosinia v. Lexington Ins. Co., No. 06-6315, 2006 WL 3141247, at *1 (E.D. La. Oct. 31, 2006); RDS, Inc. v. Gab Robins N. Am., Inc., No. 2:03 CV 1786, 2005 WL 2045956, at *3 (W.D. La. Aug. 23, 2005); Rich v. Bud's Boat Rentals, Inc., No. 96-3279, 1997 WL 785668, at *3 (E.D. La. Dec. 18, 1997); Pac. Emp'rs Ins. Co. v. United Gen. Ins. Co., 664 F. Supp. 1022, 1024 (W.D. La. 1987); Alarcon v. Aetna Cas. & Sur. Co., 538 So. 2d 696 (La. Ct. App. 5th Cir. 1989); Pellerin v. Cash Pharmacy, 396 So. 2d 371 (La. Ct. App. 1st Cir. 1981).

257. *See, e.g.*, *Westmoreland*, 2014 WL 1343387, at *2; *St. Marie*, 2007 WL 1017588, at *3; *Rosinia*, 2006 WL 3141247, at *1; *RDS, Inc*, 2005 WL 2045956, at *3; *Rich,* 1997 WL 785668, at *3; *Pac. Emp'rs Ins. Co.*, 664 F. Supp. at 1024; *Pellerin*, 396 So. 2d 371; *Dillon*, 2006 WL 3469554, at *3; *Alarcon*, 538 So. 2d 696.

because the general principles of agency law treat independent contractors much differently than employees.[258] Demonstrating this difference, the Louisiana Supreme Court's holding in *Olsen v. Shell Oil Co*. provides the general rule that employers are not vicariously liable for the torts of independent contractors hired by them.[259] Nonetheless, an employer may be liable for damage caused by an independent contractor in the performance of a non-delegable duty owed by the employer.[260] Therefore, a court's determination of whether an independent adjuster is an independent contractor or an employee has a direct effect on whether courts should impute liability from the adjuster to the insurer.[261]

The principal consideration in determining whether an individual is an independent contractor or an employee is the level of control the employer reserves over the individual's work.[262] This determination does not depend on the employer actually exercising such supervision and control but rather upon whether the right to do so exists based on the nature of the relationship.[263] Additionally, courts consider other important factors, such as (1) the freedom of action and choice in the performance of the task; (2) the independent nature of the contractor's business; (3) whether the employer has control over only the final result or the methods used to accomplish it; and (4) whether the duration of the work is set for a specific time or is instead terminable at will.[264] For example, an employment-at-will relationship in which the parties may terminate the employment relationship at any time without cause is one of the most telling signs of an employer-employee relationship.[265] Applying these considerations to the context of independent adjusters will assist in determining the proper treatment of independent adjusters according to the principles of agency law.[266]

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258. *Olsen*, 365 So. 2d at 1294 n.16.
259. *Id*.
260. *Id*.
261. *See generally id.* (finding that employers are not liable for the torts of independent contractors).
262. Hickman v. S. Pac. Transp. Co., 262 So. 2d 385, 390 (La. 1972).
263. *Id*.
264. *Id*.
265. *Id*.
266. *See generally id.* (setting forth the independent-contractor test); *Olsen*, 365 So. 2d at 1294 n.16 (finding employers are not liable for the torts of independent contractors).

C. *Independent Here, Independent There, Independent Everywhere?*

Louisiana courts have made some cursory comments on whether independent adjusters are independent contractors, but courts have failed to engage in any concrete analysis or discussion of the issue.[267] For example, in *Franklin v. Fountain Group Adjusters, LLC*, the Louisiana Third Circuit Court of Appeal identified an independent adjuster as an independent contractor to the adjusting company that hired him.[268] In *Franklin*, the adjusting company hired an independent adjuster to provide adjusting services after Hurricane Sandy, and the contract described him as an independent contractor.[269] The parties made no issue of the independent-contractor status of the adjuster, however, making it a straightforward case with no need for an application of the independent-contractor test.[270] Despite its clarity, *Franklin* does not set forth a general rule classifying independent adjusters as independent contractors, as the court's classification is a mere cursory mention and not a full agency-law analysis.[271] Ultimately, the terms of each individual contract determine whether a particular independent adjuster qualifies as an employee or an independent contractor because of the importance of the contractual balance of power in categorizing employees and independent contractors.[272]

Louisiana courts consistently fail to discuss the characterization of independent adjusters when determining the liability of such adjusters to insureds.[273] The characterization of independent adjusters, however,

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267. *See, e.g.*, Franklin v. Fountain Grp. Adjusters LLC, 249 So. 3d 84, 86 (La. Ct. App. 3d Cir. 2018).

268. *Id*.

269. *Id*.

270. *Id*.

271. *See id*.

272. *See generally* Hickman v. S. Pac. Transp. Co., 262 So. 2d 385, 390 (La. 1972) (setting forth the independent-contractor test).

273. *See, e.g.*, Westmoreland v. Wright Nat. Flood, No. 13-564, 2014 WL 1343387, at *2 (M.D. La. Apr. 3, 2014); St. Marie v. State Farm Fire & Cas. Co., No. 06-8725, 2007 WL 1017588, at *3 (E.D. La. Mar. 28, 2007); Dillon v. Lincoln Gen. Ins. Co., No. 06-7354, 2006 WL 3469554, at *3 (E.D. La. Nov. 30, 2006); Rosinia v. Lexington Ins. Co., No. 06-6315, 2006 WL 3141247, at *1 (E.D. La. Oct. 31, 2006); RDS, Inc. v. Gab Robins N. Am., Inc., No. 2:03 CV 1786, 2005 WL 2045956, at *3 (W.D. La. Aug. 23, 2005); Rich v. Bud's Boat Rentals, Inc., No. 96-3279, 1997 WL 785668, at *3 (E.D. La. Dec. 18, 1997); Pac. Emp'rs Ins. Co. v. United Gen. Ins. Co., 664 F. Supp. 1022, 1024 (W.D. La. 1987); Alarcon v.

directly impacts the question of whether courts should impute liability from independent adjusters to insurers.[274] Thus, Louisiana courts should apply the independent-contractor test to the facts of each independent-adjuster case to determine whether they should impute liability to the insurer, as the classification of independent adjusters is fact-specific.[275]

Louisiana courts should classify independent adjusters as employees when: (1) the contract between the independent adjuster and the insurance company creates an employment-at-will relationship; (2) the insurer has the right to control the work of the adjuster; (3) the insurer controls the methods used to achieve the result; and (4) the adjuster lacks freedom of action during work.[276] When employers exhibit more control over the work of individuals, the individuals have less freedom in their work and thus are more like employees.[277] Because employers hold all of the bargaining power, they should also bear all of the responsibility for the actions of employees.[278]

Conversely, courts should classify independent adjusters as independent contractors when: (1) the contract between the parties does not allow for the at-will termination of the relationship without legal consequences; (2) the insurance company does not have the right to control the work of the adjuster; (3) the insurer controls only the result but not the methods used to achieve it; and (4) the adjuster has the freedom to act as the work requires.[279] When independent adjusters possess more power and more control over their work, they have more freedom in the choices made during the performance of such work.[280] An increase in adjuster autonomy also means both an increase in responsibility and a decrease in liability for insurers because of their lessened control over the actions of the adjusters.[281] Accordingly, courts should not impute liability to insurers for the conduct of independent adjusters classified as independent contractors.[282]

Aetna Cas. & Sur. Co., 538 So. 2d 696 (La. Ct. App. 5th Cir. 1989); Pellerin v. Cash Pharmacy, 396 So. 2d 371 (La. Ct. App. 1st Cir. 1981).

274. *See generally Hickman*, 262 So. 2d at 390 (setting forth the independent-contractor test).

275. *See generally id*.

276. *See generally id*.

277. *See generally id*.

278. *See generally id*.

279. *See generally id*.

280. *See generally id*.

281. *See generally id*.

282. *See generally id*.

Therefore, in determining the liability of independent adjusters, their status as either independent contractors or employees depends upon the contract entered into between the adjuster and the insurer.[283] Further, agency law does not completely answer the question of whether courts should hold independent adjusters individually liable or impute such liability to insurers, as there are additional policy dynamics worth considering, such as Louisiana's duty-risk scheme and a cost-benefit analysis.[284]

IV. POLICY IMPLICATIONS AND THE LOUISIANA DUTY-RISK APPROACH

In determining whether insurance adjusters are individually liable when they assume a duty to the insured, courts should first consider the Louisiana duty-risk approach and then the general policy implications of the national majority view on this issue.[285] Applying the duty-risk approach and the policy factors used by the national majority view will help to determine whether Louisiana's treatment of independent-adjuster liability falls in line with the national majority or minority view, or somewhere in between.[286] Therefore, in drafting new legislation, the Louisiana Legislature should first examine the Louisiana-specific factors to compare with the national scheme.[287]

A. Duty-Risk Approach

In Louisiana, courts use a duty-risk approach in conducting a negligence analysis, examining not only the duty owed to the plaintiff, but also the scope of the risk associated with that duty.[288] The duty-risk analysis examines factors such as foreseeability of harm, the ease of association between the duty owed and the injury, and public policy[289] to

283. *See generally id*.

284. *See* Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151 (La. 1988); Hill v. Lundin & Assocs., Inc., 256 So. 2d 620, 622 (La. 1972); Morvay v. Hanover Ins. Cos., 506 A.2d 333, 335 (N.H. 1986); Sanchez v. Lindsey Morden Claims Servs., Inc. 84 Cal. Rptr. 2d 799, 802 (Ct. App. 1999).

285. *See Pitre*, 530 So. 2d 1151; *Hill*, 256 So. 2d at 622; *Morvay*, 506 A.2d at 335; *Sanchez*, 84 Cal. Rptr. 2d at 802.

286. *Compare Sanchez*, 84 Cal. Rptr. 2d at 802, *with Morvay*, 506 A.2d at 335.

287. *See Hill*, 256 So. 2d at 622; *Pitre*, 530 So. 2d 1151; *Morvay*, 506 A.2d at 335; *Sanchez*, 84 Cal. Rptr. 2d at 802.

288. *See* Roberts v. Benoit, 605 So. 2d 1032, 1052 (La. 1991).

289. *See Pitre*, 530 So. 2d 1151. The policy factors include: (1) deterrence of undesirable conduct; (2) whether it is fair to compensate the victim; (3) whether deciding the issue would open the floodgates to litigation; (4) satisfaction of the

determine if an injury falls within the scope of the duty owed.[290] In applying the duty-risk formula to liability between adjusters and insurers, there is an ease of association between the improper conduct of an independent adjuster and the economic injury of the insured because of the denial or delay of an insurance claim, and this injury is foreseeable.[291] Therefore, the duty-risk approach supports independent liability for independent adjusters and opposes the imputation of liability from adjusters to insurers when such adjusters owe a duty to insureds, as the scope of the duty extends to economic injury of insureds from adjuster misconduct.[292] This conclusion aligns with the national minority view of allowing for recovery against independent adjusters for economic injury in the absence of contractual privity.[293] As such, the duty-risk analysis suggests that Louisiana's treatment of independent adjusters may align more closely with the national minority view than with the majority.[294]

B. Application of Policy Factors from Majority View to Louisiana Law

There are additional policy factors, however, that are relevant in characterizing Louisiana's treatment of independent adjusters.[295] In addition to Louisiana-specific factors like duty-risk, it is helpful to examine the national policy factors utilized by majority-view states in determining whether courts should hold independent adjusters independently liable.[296] Therefore, the policy factors cited by the national majority view, as set forth by the California Second Circuit Court of Appeal in *Sanchez v. Lindsey Morden Claims Services, Inc.*, are relevant to the treatment of independent adjusters in Louisiana insofar as they indicate whether society is willing to hold independent adjusters independently liable.[297]

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community's sense of justice; (5) whether the decision would lead to efficient administration of the law; and (6) whether the decision exercises deference to the legislative will. *Id.*

290. *See Hill*, 256 So. 2d at 622; *Pitre*, 530 So. 2d 1151.

291. *See Morvay*, 506 A.2d at 335.

292. *See Hill*, 256 So. 2d at 622; *Morvay*, 506 A.2d at 335.

293. *See Morvay*, 506 A.2d at 335.

294. *See id*.

295. *See* Sanchez v. Lindsey Morden Claims Servs., Inc. 84 Cal. Rptr. 2d 799, 802 (Ct. App. 1999).

296. *See generally id.* (discussing the policy considerations behind a rule of no duty for independent adjusters).

297. *See generally id*.

First, examining the blameworthiness of adjuster conduct relative to the decision-making power granted through the contractual relationship with the insured supports the exceptions discussed in *Alarcon*, *Dillon*, *Pelican Hospitality Group*, and *Pellerin*.[298] The first factor depends entirely upon the adjuster's conduct; if such conduct falls within one of the exceptions discussed by Louisiana courts, such as the self-dealing of the adjuster in *Dillon*, then the adjuster likely owes a duty to the insured, and the insurer is not liable for the adjuster's bad acts as a matter of public policy.[299] The opposing argument is that adjusters do not have the power to limit their liability through a contract like the insurer does; hence, the imposition of a duty would expose them to greater liability.[300] In further support of this counterargument, insurers have contracts with both insureds and independent adjusters.[301] Thus, insurers can limit their liability through contractual provisions, such as indemnity clauses.[302] Independent adjusters, however, do not have a contract with the insured and are therefore incapable of limiting their liability to insureds through contractual provisions.[303]

Moving to the second policy factor, courts should consider whether a duty would create conflicting obligations for the adjuster.[304] It is unlikely that imposing a duty upon adjusters when their acts are sufficient to assume a duty under the exceptions from Louisiana case law would create conflicting loyalties because both the adjuster and the insurer should have the same goal: evaluating the claim in a just and equitable way.[305] There

298. *See* Dillon v. Lincoln Gen. Ins. Co., No. 06-7354, 2006 WL 3469554, at *3 (E.D. La. Nov. 30, 2006); Pelican Hosp. Grp. v. United Nat. Ins. Co., No. 06-618, 2006 WL 3313721, at *4 (E.D. La. Nov. 13, 2006); Alarcon v. Aetna Cas. & Sur. Co., 538 So. 2d 696 (La. Ct. App. 5th Cir. 1989); Pellerin v. Cash Pharmacy, 396 So. 2d 371 (La. Ct. App. 1st Cir. 1981).

299. *See Dillon*, 2006 WL 3469554, at *3; *Pelican Hosp. Grp.*, 2006 WL 3313721, at *4; *Alarcon*, 538 So. 2d 696; *Pellerin*, 396 So. 2d 371.

300. *See generally Sanchez*, 84 Cal. Rptr. 2d at 802 (discussing the policy considerations behind a rule of no duty for independent adjusters).

301. *See generally id*.

302. *See generally id*.

303. *See generally id*.

304. PLITT & PLITT, *supra* note 10 (citing *Sanchez*, 84 Cal. Rptr. 2d at 801–03).

305. *See* Dillon v. Lincoln Gen. Ins. Co., No. 06-7354, 2006 WL 3469554, at *3 (E.D. La. Nov. 30, 2006); Pelican Hosp. Grp. v. United Nat. Ins. Co., No. 06-618, 2006 WL 3313721, at *4 (E.D. La. Nov. 13, 2006); Alarcon v. Aetna Cas. & Sur. Co., 538 So. 2d 696 (La. Ct. App. 5th Cir. 1989); Pellerin v. Cash Pharmacy, 396 So. 2d 371 (La. Ct. App. 1st Cir. 1981); *see generally Sanchez*, 84 Cal. Rptr. 2d at 802 (discussing the policy considerations behind a rule of no duty for independent adjusters).

is no concern of conflicting loyalty if the adjuster and insurer both follow the statutory requirements and proper procedure in fairly evaluating a claim.[306]

The third policy consideration requires an examination of all the potential costs and benefits of a proposed rule on adjuster liability.[307] The costs of imposing a duty on independent adjusters would include an increase in potential liability for adjusters because of the lack of a contract with insureds to insulate themselves and a decrease in the supply of adjusters as a result of an increased number of adjusters going in-house to protect themselves from such liability.[308] Additionally, placing liability on independent adjusters would lead to increased premium costs because of the need for liability insurance for independent adjusters.[309] Increased liability may also lead to a potential increase in insureds' premiums if adjusters pass on the cost of this new insurance to insurers hiring them.[310] The majority view, however, overlooks several key benefits to the imposition of a duty on independent adjusters.[311]

One of the greatest benefits is that insurance companies would save the costs incurred while litigating claims for which they are not to blame and while trying to recoup some of those costs from the adjuster in a subsequent breach-of-contract action.[312] Allowing recovery directly from independent adjusters would also increase judicial efficiency by decreasing the amount of cases heard, as insurers would no longer have to subsequently sue independent adjusters.[313] The benefits for courts and insurers are the most important arguments for the imputation of liability for all actions of independent adjusters because insureds do not stand to gain much benefit at all, as they already possess a right of action against the insurance

306. *See Pelican Hosp. Grp.*, 2006 WL 3313721, at *4; *Dillon*, 2006 WL 3469554, at *3 (E.D. La. Nov. 30, 2006); *Alarcon*, 538 So. 2d 696; *Pellerin*, 396 So. 2d 371; *see generally Sanchez*, 84 Cal. Rptr. 2d at 802 (discussing the policy considerations behind a rule of no duty for independent adjusters).

307. *See generally Sanchez*, 84 Cal. Rptr. 2d at 802 (discussing the policy considerations behind a rule of no duty for independent adjusters).

308. *Id*.

309. *Id*.

310. *Id*.

311. *Compare id.*, *with* Graves, *supra* note 23.

312. *See generally* Graves, *supra* note 23 (discussing the policy considerations behind Louisiana's bad-faith insurance statutes).

313. *See generally id*.

company.[314] Creating a solution here, however, would establish an equitable remedy for insurance companies and insureds alike.[315]

As to the fourth factor, courts must determine whether imposing such a duty would contradict existing case law concerning insurer liability.[316] The majority view provides that assigning a duty to independent adjusters would contravene prior case law, but this is not the case in Louisiana, as both state and federal courts there provide for situations where adjusters may assume a duty to insureds.[317] Next, the fifth factor concerns whether the creation of an adjuster duty would lead to the judiciary overstepping into the legislative arena.[318] This factor weighs against the assignment of a duty to independent adjusters because of the implications of such a duty on insurance law as a result of potential new treatment of both bad-faith and general claims against insurers, in addition to the legislature's intent to make the good-faith duties non-delegable.[319] Therefore, a statute is the most appropriate remedy here, as it can both concisely state the situations in which adjusters owe a duty to insureds and definitively provide a clear remedy for such situations.[320]

Finally, the sixth factor asks whether an adjuster duty would fit into the principles of agency law.[321] An application of the sixth factor demonstrates that the imposition of a duty on independent adjusters is consistent with agency law regardless of the classification of such adjusters as independent contractors or agents, as Louisiana allows for the recovery of economic loss without privity of contract.[322]

Therefore, an application of the majority view's policy factors to Louisiana law indicates that the factors are almost evenly balanced in favor

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314. *See generally Sanchez*, 84 Cal. Rptr. 2d at 802 (discussing the policy considerations behind a rule of no duty for independent adjusters).

315. *See generally id*.

316. *Id*.

317. *See* Dillon v. Lincoln Gen. Ins. Co., No. 06-7354, 2006 WL 3469554, *3 (E.D. La. Nov. 30, 2006); Pelican Hosp. Grp. v. United Nat. Ins. Co., No. 06-618, 2006 WL 3313721, at *4 (E.D. La. Nov. 13, 2006); Alarcon v. Aetna Cas. & Sur. Co., 538 So. 2d 696 (La. Ct. App. 5th Cir. 1989); Pellerin v. Cash Pharmacy, 396 So. 2d 371 (La. Ct. App. 1st Cir. 1981).

318. *Sanchez*, 84 Cal. Rptr. 2d at 802.

319. *See* Hoffman v. Ellender, No. 15-309-JWD-RLB, 2015 WL 4873342 (M.D. La. July 23, 2015); Rosinia v. Lexington Ins. Co., No. 05-6315, 2006 WL 3141247 (E.D. La. Oct. 31, 2006).

320. *What is the Civil Law?*, LSU LAW, https://www.law.lsu.edu/clo/civil-law-online/what-is-the-civil-law/ (last visited Oct. 19, 2019) [https://perma.cc/A3G4-Y4Q9].

321. *Sanchez,* 84 Cal. Rptr. 2d at 802.

322. *See* Barrie v. V.P. Exterminators, Inc., 625 So. 2d 1007, 1014 (La. 1993).

of and in opposition to the assignment of an independent duty to independent adjusters.[323] Thus, Louisiana does not fit squarely within either the national majority or minority views.[324] However, the issue of the non-delegable statutory duties of insurers and the policy considerations behind that rule remain to analyze.[325]

C. Bad Faith Without Bad Conduct

Even if an adjuster's actions are knowing, arbitrary, capricious, or without probable cause, when an insurer exercises due care in the hiring of the adjuster and the investigation of the claim, the insurer's behavior is not knowing, arbitrary, capricious, or without probable cause.[326] Therefore, penalizing insurers does not serve the policy of punishment behind Louisiana Revised Statutes § 22:1892 and § 22:1973.[327] By creating a limitation on bad-faith liability for the actions of independent adjusters in response to this policy consideration, Louisiana would adopt a middle-ground approach between both the majority and minority views.[328]

Because of its unique nature, Louisiana does not fit squarely within either the national majority or minority views.[329] Louisiana law, however, contains many of the necessary building blocks for addressing the liability of independent adjusters, including the general rule that adjusters owe no duty to insureds, the exceptions to that rule, duty-risk and the importance of public policy factors, and the inability to delegate good-faith statutory

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323. *See* application of majority-view policy factors to Louisiana law *supra* Part IV.B.

324. *See* application of majority-view policy factors to Louisiana law *supra* Part IV.B.

325. *See* Graves, *supra* note 23.

326. *See generally id.* (discussing the policy considerations behind Louisiana's bad-faith insurance statutes).

327. *See generally id*.

328. *See generally id.*; Morvay v. Hanover Ins. Cos., 506 A.2d 333, 335 (N.H. 1986) (finding a duty for independent adjusters); Sanchez v. Lindsey Morden Claims Servs., Inc. 84 Cal. Rptr. 2d 799, 802 (Ct. App. 1999) (discussing majority-view policy considerations).

329. *See* application of policy factors and Louisiana's duty-risk approach *supra* Part IV; discussion *supra* Part II.B on general rule of no duty of adjusters and exceptions; discussion *supra* Part II.A on non-delegable duties.

duties.[330] Therefore, as a whole, Louisiana would benefit from a hybrid system combining elements of both the majority and minority views.[331]

V. AN EQUITABLE SOLUTION

Ultimately, the adoption and amendment of statutes are the most effective ways to clarify how courts should treat independent-adjuster liability in Louisiana, as statutes provide courts with a framework to decide cases.[332] Louisiana courts have generally held that independent insurance adjusters owe no duty to insureds.[333] The law is still not fully developed in this area, however, because of some disagreement among Louisiana courts,[334] the lack of guidance from the Louisiana Supreme Court, and the absence of significant discussion accounting for all relevant factors in the analysis.[335] Accordingly, Louisiana courts need guidance concerning the duties of independent adjusters.[336] Therefore, the Louisiana Legislature should adopt a statute establishing that there is no general duty of independent and employee insurance adjusters to insureds and enumerating the exceptions to that general rule—that is, the situations in

330. *See* application of policy factors and Louisiana's duty-risk approach *supra* Part IV; discussion *supra* Part II.B on general rule of no duty of adjusters and exceptions; discussion *supra* Part II.A on non-delegable duties.

331. *See* application of policy factors and Louisiana's duty-risk approach *supra* Part IV; discussion *supra* Part II.B on general rule of no duty of adjusters and exceptions; discussion *supra* Part II.A on non-delegable duties.

332. *What is the Civil Law?*, *supra* note 320.

333. *See* Westmoreland v. Wright Nat. Flood, No. 13-564, 2014 WL 1343387, at *1 (M.D. La. Apr. 3, 2014); St. Marie v. State Farm Fire & Cas. Co., No. 06-8725, 2007 WL 1017588, at *3 (E.D. La. Mar. 28, 2007); Pellerin v. Cash Pharmacy, 396 So. 2d 371 (La. Ct. App. 1st Cir. 1981).

334. *Compare* Loehn v. Hardin, No. 02-257, 2002 WL 922380, at *2 (E.D. La. May 6, 2002), *with* Motin v. Travelers Ins. Co., No. 03-2487, 2003 WL 22533673, at *4 (E.D. La. Nov. 4, 2003).

335. *See, e.g.*, *Westmoreland*, 2014 WL 1343387, at *1; Dillon v. Lincoln Gen. Ins. Co., No. 06-7354, 2006 WL 3469554, at *3 (E.D. La. Nov. 30, 2006); *St. Marie*, 2007 WL 1017588, at *3; *Pellerin*, 396 So. 2d 371. Although the courts in these cases discuss exceptions to the general rule, they never fully consider all applicable factors. The main failing is the consistent absence of agency-law principles in the consideration.

336. *See* application of majority-view policy factors to Louisiana law *supra* Part IV.B.

which an adjuster can assume a duty to insureds and thus be subject to independent liability.[337] The proposed statute should read:

> (A) Insurance adjusters, whether independent or employee, owe no duty to insureds in an insurance claim. Accordingly, insurers are liable for the acts or omissions of the independent adjusters and employee adjusters that the insurer hires.
> (B) Exceptions to the general rule:
> (1) Insurance adjusters may assume an independent duty to an insured under certain circumstances, such as:
> (a) A disparity in the relative education of the parties;
> (b) The diligence of the claimant in seeking the facts;
> (c) The actual or apparent authority of the adjuster;
> (d) The content of the adjuster's promises to the insured;
> (e) Misrepresentation;
> (f) Fraud; or
> (g) Self-dealing.[338]
> (2) When the adjuster assumes a duty to the insured, it is possible for the adjuster to be independently liable to the insured in the event that the insurer employing or contracting with the adjuster has no knowledge of the behavior giving rise to the assumption.

A single statute providing for no general duty of independent adjusters with some exceptions, however, does not fully answer the question of whether courts should then impute liability to insurers.[339] If an independent adjuster is found to owe a duty under the above statute, then courts must determine if the independent adjuster is an independent contractor or an employee to ultimately decide whether to impute liability to the insurer.[340]

Despite the adoption of a statute regarding the duties of adjusters, promulgating a statute that defines independent adjusters as employees or independent contractors would not create an efficient or equitable result.[341] The classification of individuals as employees or independent contractors

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337. *See, e.g.*, *Westmoreland*, 2014 WL 1343387, at *1; *St. Marie*, 2007 WL 1017588, at *3; *Dillon*, 2006 WL 3469554, at *3; *Pellerin*, 396 So. 2d 371.

338. *See generally Pellerin,* 396 So. 2d 371 (discussing the exceptions to the general rule of no duty for independent adjusters); *Dillon*, 2006 WL 3469554, at *3 (discussing the exceptions to the general rule of no duty for independent adjusters).

339. *See generally* Hickman v. S. Pac. Transp. Co., 262 So. 2d 385, 390 (La. 1972) (setting forth the independent-contractor test).

340. *See generally id*.

341. *See generally id*.

depends directly upon the power granted to the individuals in their contract with their employers.[342] Therefore, Louisiana courts should apply the independent contractor factors on a case-by-case basis, weighing the effect of each specific contract on the relationship of the parties to determine whether any particular independent adjuster is an independent contractor or an employee.[343] A statute adopting an absolute statement definitively categorizing independent adjusters as either employees or independent contractors is not appropriate because it would create a far too rigid standard, blind to the flexibility of contractual relationships between insurance companies and independent adjusters.[344] Generally, when independent adjusters owe a duty under the statute, their liability is imputed to the insurer when they qualify as employees, whereas their liability is not imputed to the insurer when classified as independent contractors.[345]

One of the main implications of providing for the independent liability of independent adjusters is its effect on the applicable prescriptive periods.[346] For claims sounding in breach of contract, such as insureds' claims against insurers for the violation of duties under Louisiana Revised Statutes § 22:1892 and § 22:1973, a ten-year prescriptive period applies.[347] Conversely, for tort-based claims against independent adjusters, insureds would only have one year from the date of injury to file suit.[348] Therefore, by holding adjusters independently liable and not imputing such liability to the insurer, courts will also decrease the amount of time insureds have to file suit.[349] As the applicable prescriptive period is extremely important to all parties involved in a case, this consideration will likely heavily influence the court's application of the above proposed statute and accompanying agency-law analysis.[350]

Additionally, the legislature should amend Louisiana Revised Statutes § 22:1892 and § 22:1973, or draft a new statute, to clarify that insurers are

342. *See generally id*.
343. *See generally id*.
344. *Id*.
345. *See generally id*.
346. The prescriptive period is the length of time in which an insured has to bring a claim. *See* Smith v. Citadel Ins. Co., 285 So. 3d 1062, 1069–70 (La. 2019).
347. *Id.*
348. LA. CIV. CODE art. 3492 (2019).
349. *See generally Smith*, 285 So. 3d at 1069–70 (finding that statutory claims against insurers are subject to a ten-year prescriptive period); LA. CIV. CODE art. 3492 (tort claims are subject to a one-year prescriptive period); *see* proposed statute and discussion of agency law *supra* Part V.
350. *See generally Smith*, 285 So. 3d at 1069–70; LA. CIV. CODE art 3492.

not liable for actions of the independent adjuster that are knowing, arbitrary, capricious, or without probable cause when the insurer itself exercises due care. According to Louisiana case law, the good-faith statutory duties of insurers are non-delegable; therefore, independent adjusters are not liable for violations of these duties.[351] The practice of penalizing only insurers for the bad-faith actions of independent adjusters, however, creates a policy issue by punishing innocent insurer behavior.[352] The Louisiana Legislature should directly address and solve this concern by amending Louisiana Revised Statutes § 22:1892 and § 22:1973.[353] A draft of such amendment should read:

> Limitation of Liability. Under this section, an insurer is not liable for penalties when the insurer can demonstrate, by clear and convincing evidence, affirmative acts taken on its part to ensure that its duty of care was properly exercised and such behavior was not knowing, arbitrary, capricious, or without probable cause. An insurer is not liable for such penalties under this section when the conduct of an independent adjuster, classified as an independent contractor and hired by the insurer, constitutes actions that are *knowing*, arbitrary, capricious, or without probable cause and that result in a breach of the insurer's duties, unless the insurer exhibits conduct of the same kind.

The proposed amendment to the good-faith statutes relies on the classification of independent adjusters as independent contractors.[354] In contrast with independent-adjuster duties in general, independent adjusters do not owe a statutory good-faith duty, so there is no liability to impute regardless of the classification of such adjusters as independent contractors or employees.[355] Here, the only issue is whether insurers are liable for others' actions that are knowing, arbitrary, capricious, or without

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351. *See generally* Hoffman v. Ellender, No. 15-209-JWD-RLB, 2015 WL 4873342 (M.D. La. July 23, 2015) (finding that insurers' good-faith duties are non-delegable); Rosinia v. Lexington Ins. Co., No. 06-6315, 2006 WL 3141247 (E.D. La. Oct. 31, 2006) (finding that insurers' good-faith duties are non-delegable).

352. *See* Graves, *supra* note 23.

353. *Id.*

354. *See generally* Hickman v. S. Pac. Transp. Co., 262 So. 2d 385, 390 (La. 1972) (setting forth the independent-contractor test).

355. *See Hoffman*, 2015 WL 4873342; *Rosinia*, 2006 WL 3141247; *see also* McLin v. Breaux, 950 So. 2d 711 (La. Ct. App. 1st Cir. 2006); Foster v. Destin Trading Corp., 700 So. 2d 199, 209 (La. 1997); Olsen v. Shell Oil Co., 365 So. 2d 1285, 1293 (La. 1978).

probable cause.[356] As employers are vicariously liable for the actions of their employees and agents, insurers are liable under Revised Statutes § 22:1892 and § 22:1973 for actions of employees because of the level of control exerted over their work.[357] Employers do not exert as much power and control over independent contractors; therefore, courts should not find insurers statutorily liable for the actions of independent adjusters classified as independent contractors that are knowing, arbitrary, capricious, or lacking probable cause when the insurer does not violate its own duty.[358] Although this proposal appears to contradict the exception to the independent-contractor rule that employers are liable for the actions of independent contractors for the performance of a non-delegable duty, the contradiction is justified because the bad-faith statutes are penal in nature, and courts should strictly construe them.[359] Ultimately, such statutory provisions in conjunction with courts' application of the independent-contractor test would greatly assist in the efficient, economical, and equitable resolution of disputes involving insurance companies, independent insurance adjusters, and insureds.

CONCLUSION

The question began simply as whether to impute or not to impute, but it developed into much more. Such a seemingly straightforward question raised many more questions, including whether independent adjusters owe a duty to insureds; whether such adjusters are classified as independent contractors or employees under agency law principles; and whether public policy reasons support independent liability for adjusters in certain circumstances.[360] The answers to each of these questions support the imputation of liability from independent adjusters to the insurers that hired them; however, there are some situations in which this rule does not apply.[361] In order to clarify the ambiguities surrounding the treatment of independent-adjuster liability in Louisiana, the state legislature should adopt a statute providing for a general rule that independent adjusters have

356. *See* Graves, *supra* note 23.

357. *See generally Hickman*, 262 So. 2d at 390.

358. *See generally id*.

359. *See generally* Nero v. La. Indep. Ins. Agencies, Inc., No. 03-3317, 2003 WL 203145, at *2 (E.D. La. Jan. 29, 2003) (finding that penal statutes must be strictly construed); *Olsen*, 365 So. 2d at 1294 n.16 (finding that employers are liable for the actions of independent contractors in the performance of a non-delegable duty).

360. *See* discussion *supra* Introduction.

361. *See* discussion *supra* Parts II–IV.

no duty and thus no independent liability to insureds.[362] The statute should also provide for some exceptions to this general rule, as outlined by the Louisiana case law.[363]

Additionally, the legislature should amend Louisiana Revised Statutes § 22:1892 and § 22:1973 to clarify that insurers are not liable for the conduct of independent adjusters that is knowing, arbitrary, capricious, or lacking probable cause unless the behavior of the insurer itself is knowing, arbitrary, capricious, or without probable cause.[364] The analysis under these statutes, however, is not complete until courts classify the independent adjuster as an independent contractor or an employee and thus determine whether any liability of the independent adjuster can be imputed to the insurer.[365] Therefore, when faced with the question of whether to impute or not to impute, the answer is not life or death, but rather impute, with some exceptions.[366]

362. For a discussion of the exceptions to the general rule, see Dillon v. Lincoln Gen. Ins. Co., No. 06-7354, 2006 WL 3469554, at *3 (E.D. La. Nov. 30, 2006); Pelican Hosp. Grp. v. United Nat. Ins. Co., No. 06-618, 2006 WL 3313721, at *4 (E.D. La. Nov. 13, 2006); Alarcon v. Aetna Cas. & Sur. Co., 538 So. 2d 696 (La. Ct. App. 5th Cir. 1989); Pellerin v. Cash Pharmacy, 396 So. 2d 371 (La. Ct. App. 1st Cir. 1981).

363. For a discussion of the exceptions to the general rule, see *Pelican Hosp. Grp.*, 2006 WL 3313721, at *4; *Dillon*, 2006 WL 3469554, at *3; *Alarcon*, 538 So. 2d 696; *Pellerin*, 396 So. 2d 371.

364. *See* Graves, *supra* note 23.

365. *See generally* Hickman v. S. Pac. Transp. Co., 262 So. 2d 385, 390 (La. 1972) (setting forth the independent-contractor test).

366. For a discussion of life and death, rather than of the imputation of insurance-adjuster liability, see WILLIAM SHAKESPEARE, HAMLET.