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America 250: The Nation's Unique Contributions to Insurance Coverage Law and Litigation

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America's 250th anniversary serves as an appropriate occasion to celebrate the nation's unique role in the development of insurance law and coverage litigation, as discussed in the following analysis.* Insurance was not invented or perfected in America, but America has placed its unique imprimatur on insurance coverage law and litigation.

The Critical Role of Insurance and Insurers in Society and the US Economy

Though popular scapegoats and common targets for criticism, insurers have contributed mightily to the economic success, stability, and endurance of our country. Indeed, insurers have contributed to American society and the economy in a variety of ways that extend far beyond issuing insurance policies.

The contribution of insurers to American society and the economy is immeasurable:

- Marine insurers underwrote the United States by shouldering the financial risks of the war for American independence.
- Through risk assessment and loss control services, insurers save lives, prevent injuries, and preserve property.
- Insurers are responsible for a variety of standards, including fire safety standards, stronger building codes, and forest management standards to reduce wildfire risks.
- By championing preventative health, insurers reduce the incidence of preventable diseases. Similarly, in the digital age, insurer underwriting and loss control services assist policyholders in preventing and minimizing

cyber losses.

- Insurers are major institutional investors, supporting corporate issuers, capital markets, and the nation's infrastructure. Insurer capital can be found in the Hoover Dam, the Golden Gate Bridge, and the St. Lawrence Seaway, among so many other landmarks.
- Insurance has been critical for helping communities by rebuilding homes and properties after disasters.
- Insurance fosters economic growth and serves as a backstop for invention and investment.
- Without insurance, airlines would be reluctant to bear the risk of flight, ships may not sail, people would drive less, builders would not break ground on many construction projects, doctors would not perform high-risk procedures, and pharmaceutical and technology companies would not take the risks associated with developing drugs, vaccines, and medical devices.

Simply stated, without insurance, the availability of products and services would be greatly reduced in both quantity and variety. Recent developments in the Straits of Hormuz serve as a reminder of the critical role of insurance.

What Fueled the "Golden Ages" of the Insurance Coverage Litigation Wars

The potential for coverage litigation exists whenever an insurer denies a policyholder's claim for coverage. Yet, for most of recorded world history, coverage litigation was uncommon.

Most individual and corporate policyholder disputes were resolved amicably. When coverage was litigated, the disputes generally were not particularly complex, did not involve many issues or parties, and rarely warranted high-priced legal talent.

Industrialization

Twentieth-century industrialization increased risks, exposures, and liabilities. Legal developments and increasing liabilities, such as the emergence of strict product liability in the 1960s and the enactment of a panoply of environmental laws and the creation of the US Environmental Protection Agency in the 1970s, set the stage for a new breed of insurance coverage litigation. However, it did not lead to a surge in coverage litigation at least until the 1980s.

Long-Tail Claims

In tandem, large asbestos and environmental liabilities introduced "long-tail" claims. Unlike traditional claims, long-tail claims are not limited in time, place, or space; instead, they involve exposures to toxic substances that

can cause continuous or progressive injury or damage over substantial periods of time.

Large "long-tail" claims potentially impact policies spanning several decades, at various attachment points, and implicate new coverage issues (*e.g.*, trigger of coverage, allocation of coverage, priority and coordination of coverage). These claims often involve a range of policies with differing policy terms, conditions, and exclusions.

"Long-tail" claims ushered in the "golden ages" of the insurance coverage wars that began in earnest in the second half of the 1980s and continue to the present day. Large environmental, product, professional liability, directors' and officers' liability, corporate/securities, and toxic tort liabilities and claims fueled waves of coverage litigation. More recently, cybersecurity, forever chemicals, the COVID-19 pandemic, climate change, and artificial intelligence have seen coverage claims abound.

Liberalization of Underlying Liability

The underlying claims and resulting coverage litigation were sufficiently large, complex, and interesting to attract large law firms and highly skilled lawyers to represent insurance companies and policyholders alike.

The involvement of elite legal minds further increased the stakes, the sophistication, and the costs of coverage litigation. Coverage litigation exists in other countries, but the frequency, severity, costs, and complexity of American-style coverage litigation is unmatched anywhere in the world.

America's Unique Contributions to Insurance Law and Coverage Litigation

Broadly speaking, most of the world of insurance coverage disputes fall under three general buckets: "duty to defend," "duty to indemnify," and "bad faith and extra-contractual liability."

Two of these three buckets—"duty to defend" and "bad faith and extra-contractual liability—are creatures of American law. Another contribution is litigation American-style, replete with social inflation, nuclear verdicts, and rising defense and claims-resolution costs.

1. The Duty to Defend

Although the duty to defend also exists under Canadian law, it is most robustly established and closely associated with the United States. Outside of the United States and Canada, other countries generally do not recognize a duty to defend. It is common in other countries for insurers to indemnify policyholders for defense costs under some circumstances, as it is in the United States.

The duty to defend presents a host of issues that have been extensively litigated in the United States in traditional and long-tail claims alike. *See* Scott M. Seaman, Pedro E. Hernandez, and Peter J. Lewis, *America 250: The History*

Of Insurance & Coverage Law & Litigation In The United States (Xlibris, 2026) ("America 250"). *See also Duty To Defend: A Fifty-State Survey* (Hinshaw & Culbertson LLP, 2025).

Suffice it to say, the duty to defend dimension adds greatly to the cost of liability insurers and to the complexity of claims presentation, claims handling, and insurance coverage litigation.

2. Insurer Bad Faith and Extracontractual Liability

Another one of America's unique contributions to insurance law is bad faith and extracontractual liability.

- **Bad faith** is a misnomer and actually refers to a breach of the implied covenant of good faith and fair dealing.
- **Extracontractual liability** is a broader umbrella term that refers to liability that falls outside the terms and limits of the insurance contract. It may include statutory penalties, attorney's fees, and damages from violation of consumer fraud statutes, consumer protection statutes, or insurance codes that impose penalties for "unreasonable and vexatious" conduct (in many states, violations of insurance code provisions do not give rise to a private cause of action), breach of fiduciary duty, fraud, conspiracy, or market conduct.

The existence, basis, and remedies for bad faith vary considerably from state to state, as do the standards and available defenses. In some states, insurers do not face substantial exposure to bad faith liability. In other states, bad faith exposures and damages can be substantial.

Bad faith emerged in American jurisprudence during the mid-twentieth century as some courts recognized that the traditional contract remedy of expectation damages was inadequate to address the unique nature of the insurer-insured relationship. Previously, policyholders who were wrongfully denied coverage were limited to recovering only the policy benefits owed, which some courts believed provided little incentive for insurers to handle claims fairly and promptly.

The seminal case of *Comunale v Traders & General Ins. Co.*, 50 Cal. 2d 654 (1958) decided by the California Supreme Court marked a turning point by recognizing that every insurance contract contains an implied covenant of good faith and fair dealing, the breach of which could give rise to tort liability. This decision acknowledged the inherent imbalance of power between insurers and policyholders and the quasi-fiduciary nature of the insurance relationship, setting the stage for the widespread development of bad faith jurisprudence across various states.

Courts distinguish between first-party and third-party bad faith claims:

- **Third-party bad faith**–which arises in the liability insurance context where an insurer fails to reasonably settle claims against its insured within policy limits – was the initial focus of courts. The original concern was that an insurer could roll the dice in a "heads the insurer wins, tails the policyholder loses" scenario.

- In other words, if the insurer refuses to settle and the judgment turns out to be for less than policy limits, the insurer saves part of its limits. If, on the other hand, the judgment is greater than the applicable limits, the insurer would not be responsible for the amount of the judgment in excess of policy limits.

- Some courts held that insurers owe a duty to give equal consideration to the interests of their policyholders when evaluating settlement opportunities, and failure to do so could expose insurers to liability for excess judgments. In some states, an insurer is required to make the settlement determination based upon an evaluation of the policyholder's liability and the amount of damages likely to be awarded without taking coverage defense into account.

- **First-party bad faith,** involving an insurer's unreasonable denial or delay of benefits owed directly to its policyholder, gained traction shortly thereafter, with the California Supreme Court's decision in *Gruenberg v. Aetna Ins. Co.,* 9 Cal. 3d 566 (1973) holding that insurers could be held liable in tort for the unreasonable handling of first-party claims. The coin, however, has flipped. The high costs of defense make it much more unlikely that an insurer will benefit from refusing to settle on reasonable terms.

  - Given the way that the law has devolved, too often, claimants receive windfalls and recover more than the inherent value of their claims or the damages actually sustained. Further, a wedge between the insurer and policyholder often is created by obliterating the cooperation of the policyholder in defending claims and creating competing interests between the insurer and the policyholder, which is in contravention of a major predicate of liability insurance – that the policyholder and insurer have a common interest and will work together to defeat liability and minimize the amount paid on claims.

  - The availability of enhanced damages in some instances actually incentivizes policyholders to assert bad faith claims (many of which utterly lack merit), increasing the costs of insurance, complicating and lengthening litigation, increasing litigation costs, and fueling social inflation.

Bad faith law expanded further in the 1980s and 1990s, when courts in some jurisdictions permitted the recovery of consequential damages, emotional distress damages, and punitive damages against insurers found to have acted in bad faith. Additional theories of bad faith have emerged, such as **"institutional bad faith,"** in which policyholders seek broad-ranging discovery fishing for insurers' pattern and practice in matters other than the specific claim in dispute.

Bad faith failure to defend has been recognized in a small minority of jurisdictions. Although a finding of bad faith generally implicates issues of fact, a couple of decisions have ruled that an insurer committed bad faith as a matter of law. There are a number of defenses to bad faith claims potentially available to insurers. *See*. *e.g*., *America 250* at 72-74.

Punitive damages are potentially recoverable in some jurisdictions. Other jurisdictions allow double or treble damages. Generally, mere unreasonableness or negligence is not enough to impose punitive damages. There must be proof of aggravated conduct such as malice (despicable conduct, willful and conscious disregard of the

policyholder's rights), oppression, or fraud. A policyholder must have sustained actual damages to recover punitive damages.

Punitive damages, largely a creature of the United States, implicate state and US constitutional and statutory protections and limitations. In some states, a policyholder may be awarded attorneys' fees for seeking insurance policy benefits.

Bad faith is an ever-evolving area. The use and integration of artificial intelligence by insurers will figure prominently in bad faith and coverage litigation for years to come.

3. Litigation American Style

Litigation American-style involves a myriad of endemic underpinnings in the US civil justice system that foster social inflation, which, when combined with modern societal trends that have produced large defense costs, settlements, and nuclear verdicts impacting policyholders as defendants and their insurers alike.

Insurers also face a second level of social inflation from policyholders. This level includes expansive, pro-policyholder interpretations of insurance policies, shifting attorney fees, policyholder aggressiveness in seeking independent counsel, increased bad-faith and extracontractual liability exposures, increased use of time-limited demands, and consumer protection and unfair claim-handling statutes.

Although a small number of other countries have experienced some aspects of social inflation, the full panoply of societal trends and factors endemic to the United States civil justice system simply is not experienced in the same breadth or to the same extent in any other country.

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*This article is based upon a *Law360* "Expert Analysis" written by **Scott Seaman, Pedro Hernandez, and Peter Lewis,** "Notable Contributions From 250 Years Of US Insurance Law," *Law360* (June 30, 2026).

Access the *America 250* Book

Authored by Hinshaw partners Scott Seaman, Pedro Hernandez, and Peter Lewis, their book, ***America 250: A History of Insurance and Insurance Coverage Law and Litigation in the United States,*** examines the critical role of insurance, one of the nation's most influential—yet often overlooked–economic institutions.

The book describes the important role and history of insurance in the United States, provides insights into the "Golden Ages" of the insurance coverage wars, unpacks modern insurance coverage disputes, and much more.

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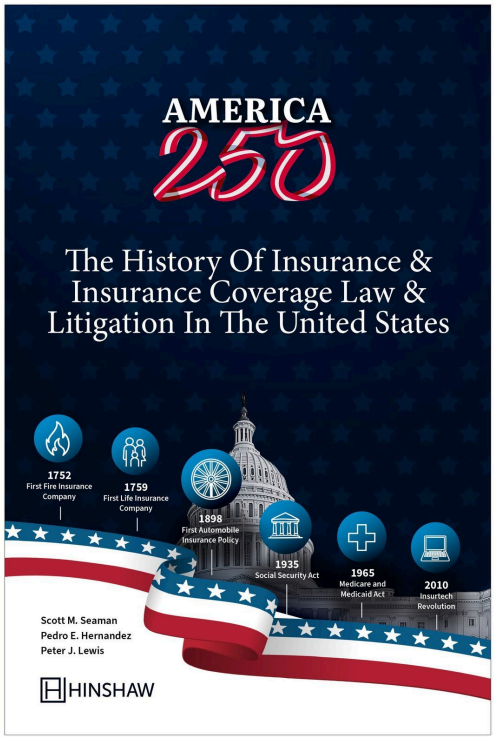

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