If You Give a Shop a Claim: The Unsustainable Inequity of Pennsylvania's Unbridled Post-Loss Assignments

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ABSTRACT

Insurance policies ("policies") are complicated contracts with a simple purpose: to protect insureds from loss. To fulfill that purpose, insurers must calculate risk with reasonable certainty to collect sufficient premiums to cover their pool of insureds *and* make a profit. Unsustainable inequity arises, however, when policies succeed in protecting insureds but expose insurers to unaccounted-for risk. Such exposure can occur when insureds "assign," or transfer, their policy rights to contractors, who can then sue the insurer and inflate the recovery. Insurers, aware of the risks inherent in assignment to unvetted third-parties, routinely draft policies to include anti-assignment clauses ("AACs"). AACs require insureds to obtain insurer consent before assigning policy rights. Most courts, however, simply refuse to enforce AACs "post-loss"—after the loss giving rise to liability has already occurred.

Post-loss disregard for AACs stems from society's well-intentioned desire to protect unsophisticated and vulnerable insurance consumers. The same concerns prompt courts to construe policy ambiguities against insurers and award insureds the coverage they reasonably expected from their policies. Courts also generally favor allowing parties to freely assign contractual rights unless doing so would increase the *other* party's risk. Accordingly, the Pennsylvania Supreme Court follows the majority rule in refusing to enforce AACs post-loss, reasoning that post-loss assignment cannot increase insurer risk because such assignment amounts to the mere transfer of a fixed money claim. Recently, however, the Pennsylvania Superior Court twice enforced AACs post-loss in the

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policyholder-contractor context. This Comment argues that these Superior Court cases should govern similar future cases, for three reasons.

First, Pennsylvania's majority-rule case law is inconsistent, offering conflicting rationale for its rulings. Second, Pennsylvania's majority-rule cases are factually differentiable from the contractor cases and, thus, the former should not govern the latter. Last, post-loss AAC enforcement in the contractor context actually reconciles with the majority rule's underlying rationale because such assignments *do* increase insurer risk.

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I. INTRODUCTION

Insurance policies may be complicated,[1] but their primary purpose, to protect insureds from loss, is not.[2] Insurance policies are contracts,[3]

1. As described by the South Carolina Supreme Court, "[a]mbiguity and incomprehensibility seem to be the favorite tools of the insurance trade in drafting policies. Most are a virtually impenetrable thicket of incomprehensible verbosity." S.C. Ins. Co. v. Fid. & Guar. Ins. Underwriters, 489 S.E.2d 200, 206 (S.C. 1997) (quoting Universal Underwriters Ins. Co. v. Travelers Ins. Co., 451 S.W.2d 616, 622–23 (Ky. Ct. App. 1970)).

requiring at least two parties to arrive at a "meeting of the minds"[4] as to the terms of their bargain.[5] Insurers, to subsist, must be able to account for their risks and liabilities with reasonable certainty.[6] An inequity arises, however, when insurance policies succeed in protecting insureds but expose insurers to risk they neither accounted for nor knowingly assumed.[7] This protection-exposure dilemma can easily arise when an insured prefers a repair contractor to deal directly with an insurer for payment and thus "assigns"[8] his[9] claim to the contractor.[10]

In practice, assignment allows the contractor to both write the bill *and* collect the check.[11] Take the following hypothetical situation as a practical example of an assignment.[12] A car owner, "Mr. Safe," may damage his vehicle and take it to a repair shop, "The Shop."[13] Amidst all the usual small talk and paper-signing, The Shop may compel Mr. Safe to assign to it all of his rights under his auto insurance policy.[14] After Mr.

2. *See* CHRISTOPHER C. FRENCH (ED.), LEXISNEXIS PRACTICE GUIDE: NEW APPLEMAN PENNSYLVANIA INSURANCE LAW § 1.04 (2019) [hereinafter FRENCH, LNPG]. An "insured" is "the person who obtains insurance on his property, or upon whose life an insurance is effected." *Insured*, BLACK'S LAW DICTIONARY (2d ed. 1910). This Comment occasionally uses the term "policyholder" to specifically refer to one who controls a policy, whether or not he or she was ever personally covered by the policy. *See* Barbara Marquand, *Who's Who on a Life Insurance Policy*, INSURE.COM, https://bit.ly/2Hu3Cqe (last updated Nov. 19, 2020).

3. "A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981).

4. The parties' outward agreement as to the contract's terms is often referred to as a "meeting of the minds." *See id.* § 17 cmt. c.

5. *See* FRENCH, LNPG, *supra* note 2, § 2.03.

6. *See* Kevin Poll, *Assignment of Benefits: A Growing Concern*, VERISK: VISUALIZE (Feb. 21, 2018), https://vrsk.co/2HtLo8k.

7. *See id.*

8. An assignment is "a transfer or setting over of property, or of some right or interest therein, from one person to another, and unless in some way qualified, it is properly the transfer of one whole interest in an estate, chattel, or other thing." Fran & John's Doylestown Auto Ctr., Inc. v. Allstate Ins. Co., 638 A.2d 1023, 1025 (Pa. Super. Ct. 1994) (quoting *In re* Purman's Estate, 56 A.2d 86, 88 (Pa. 1948)).

9. Contract law is simplest when explained as between just two parties. Accordingly, this Comment periodically uses singular-masculine pronouns to refer generally to a hypothetical individual.

10. *See* Poll, *supra* note 6.

11. *See id.*

12. This hypothetical is drawn principally from Pennsylvania's minority-rule cases, discussed in Section II.D.2, *supra*. *See, e.g.*, High-Tech-Enters. v. Gen. Accident Ins. Co., 635 A.2d 639, 641 (Pa. Super. Ct. 1993).

13. *See infra* Section II.D.2.

14. *See* Fran & John's Doylestown Auto Ctr., Inc. v. Allstate Ins. Co., 638 A.2d 1023, 1024–25 (Pa. Super. Ct. 1994).

Safe, the assignor,[15] executes the assignment, The Shop can repair the vehicle and deal *directly* with the insurer to obtain payment, which could entail suing the insurer for unpaid fees.[16] The Shop, as the assignee, is thus said to "stand[] in [Mr. Safe's] shoes"[17] and pursues any cause of action as if The Shop were the original policyholder.[18]

An opportunistic contractor, however, can exploit its newly acquired rights by inflating estimates and suing the insurer for payment.[19] Such assignment abuse, though still obscure in Pennsylvania, is burgeoning in Florida, where inflated estimates are leading to burdensome litigation for insurers and to consequently rising premiums for policyholders.[20] Aware of the risks associated with the assignment of insurance-policy rights to unknown third parties, insurers routinely include "anti-assignment clauses" ("AACs") in their policies.[21] Some courts, appropriately, refer to these clauses as "consent-to-transfer"[22] clauses because AACs require insurer consent to execute any assignment.[23]

Courts nationwide recognize AACs as a valid exercise of contracting.[24] Courts differ, however, on whether to enforce AACs after the event or loss triggering the insurer's liability occurs—the period

15. *See* RESTATEMENT (SECOND) OF CONTRACTS § 317 cmt. a (AM. LAW INST. 1981) ("[T]he actor is referred to as the 'assignor' and the transferee or intended or purported transferee is referred to as the 'assignee.'").

16. *See Fran & John's*, 638 A.2d at 1025.

17. *See* Crawford Cent. Sch. Dist. v. Commonwealth, 888 A.2d 616, 619–20 (Pa. 2005).

18. *See* Hedlund Mfg. Co. v. Weiser, 539 A.2d 357, 358 (Pa. 1988) ("[T]he assignee stands in the shoes of the assignor and does not pursue the cause of action in the assignee's own right."); *see also Crawford*, 888 A.2d at 619–20 (citing *Hedlund* to emphasize that assigned rights are equivalent to the assignor's original rights).

19. *See* Poll, *supra* note 6.

20. *See* Jackie Callaway, *Assignment of Benefits Abuse Driving Up Cost of Home, Car Insurance in Florida*, WFTS TAMPA BAY, https://bit.ly/2Fn8RXP (last updated Apr. 20, 2017, 6:08 AM) ("AOB abuse occurs when contractors and attorneys inflate claims then sue the insurance companies for payment. Insurers often settle to avoid costly court fights."); Jim Sams, *Insurers and Others Urge Supreme Court to Limit Assignment of Benefits*, CLAIMS JOURNAL (Mar. 27, 2019), https://bit.ly/2StaZEy ("Insurers say that assignment of benefits agreements are often abused by shady contractors who sue insurers for inflated repair costs despite shoddy work and sometimes no work at all.").

21. *See* FRENCH, LNPG, *supra* note 2, § 5.05; *see also In re* Katrina Canal Breaches Litig., 613 F.3d 504, 507 (5th Cir. 2010) (calling such clauses "anti-assignment clauses"). This term will be used for the remainder of this Comment.

22. *See, e.g.*, Fluor Corp. v. Superior Court, 354 P.3d 302, 303 (Cal. 2015); *see also* Egger v. Gulf Ins. Co., 903 A.2d 1219, 1224 (Pa. 2006) ("non-assignment clause"); Ins. Adjustment Bureau v. Allstate Ins. Co., 905 A.2d 462, 470 (Pa. 2006) ("non-transfer" clauses and provisions).

23. *See Egger*, 903 A.2d at 1227 (discussing the function of AACs generally).

24. *See id.*

known as "post-loss."[25] Under the majority rule, The Shop could sue the insurer for unpaid fees, even if Mr. Safe's policy contains an AAC and he does not obtain his insurer's consent before executing the assignment.[26] In short, most courts refuse to enforce AACs post-loss.[27] Conversely, a minority of courts treat AACs like conventional contract provisions that, when unambiguous, can be enforced pre- or post-loss.[28]

Pennsylvania appears to hold firmly with the majority, consistently refusing to enforce AACs post-loss.[29] However, in two fairly recent cases, the Pennsylvania Superior Court expressly sided with the *minority*,[30] holding that unambiguous AACs are enforceable post-loss.[31] The Superior Court's minority rule should govern contractor-assignee situations.[32] In contrast to the one-size-fits-all majority rule, the minority rule more properly balances society's interest in compensating injured parties and protecting vulnerable insurance-policy applicants with the traditional, party-intent-centered principles of contract enforcement.[33]

Part II of this Comment provides a broad outline of contract law, insurance law, and assignment.[34] Next, Part II discusses post-loss-assignment law nationally and narrows in on Pennsylvania's conflicting case law.[35] Part III then argues that Pennsylvania courts should apply the minority rule to situations like Mr. Safe and The Shop's for three reasons: (1) Pennsylvania's majority-rule case law is inconsistent;[36] (2) Pennsylvania's majority-rule cases are factually differentiable from cases addressing assignment to contractor-assignees;[37] and (3) applying the minority rule to contractor-assignee situations is, in fact, consistent

25. *See id.* at 1226 (discussing assignment "post-loss" and noting that "a 'loss' is 'the occurrence of the event, which creates liability of the insurer'"); *infra* Section II.C.

26. *See id.* at 1226–27 (discussing various courts' application of the majority rule).

27. *See* 3 STEVEN PLITT ET AL., COUCH ON INSURANCE § 35.8 (3d ed. 2020).

28. *See* Fran & John's Doylestown Auto Ctr., Inc. v. Allstate Ins. Co., 638 A.2d 1023, 1025 (Pa. Super. Ct. 1994).

29. *See infra* Section II.D.

30. The Pennsylvania Supreme Court is the highest court in Pennsylvania. *See Learn*, THE UNIFIED JUDICIAL SYS. OF PA., https://bit.ly/2HoEq4u (last visited Apr. 23, 2021). The Pennsylvania Superior Court is one of two equally authoritative intermediate appellate courts, the other being the Pennsylvania Commonwealth Court, which is primarily responsible for matters involving state and local governments and regulatory agencies. *See id.* The Courts of Common Pleas are Pennsylvania's general trial courts. *See id.* At the bottom are minor courts, which conduct preliminary arraignments and hearings, set bail, and decide whether serious criminal cases will advance to the Court of Common Pleas. *See id.*

31. *See infra* Section II.D.

32. *See infra* Part III.

33. *See infra* Section II.B.

34. *See infra* Sections II.A–B.

35. *See infra* Sections II.C–D.

36. *See infra* Section III.A.

37. *See infra* Section III.B.

with the majority rule's underlying rationale and comports with public policy.[38]

II. BACKGROUND

Pennsylvania courts' selective enforcement of anti-assignment clauses ("AACs") stems from a combination of traditional contract law and unique rules tailored to insurance contracts.[39] Courts ordinarily defer to parties' agreed-upon contract terms.[40] Nonetheless, courts treat insurance policies as a special species of standardized contracts to protect relatively powerless insurance consumers[41] and reinforce society's overriding interest in compensating injured parties.[42] To bulwark those interests, courts temper the effect of insurance-policy terms with protective contract-law principles and specially tailored rules of contract interpretation that can overrule explicit—indeed, even unambiguous—contractual terms.[43]

Post-loss assignment implicates at least three such boundaries.[44] First, the doctrine of *contra proferentem*, as applied in the insurance context, provides that any unclear or ambiguous policy language is construed against the insurer-drafter.[45] Second, the "reasonable expectations doctrine" directs courts to construe policies to fulfil insureds' reasonable expectations of their coverage, regardless of what the policy actually provides.[46] Third, public policy prefers that insureds be free to assign their contractual rights, regardless of contract provisions that say otherwise, because the right to payment is considered an alienable property right.[47]

38. *See infra* Sections III.C–D.

39. *See infra* Section II.B.

40. *See* Ins. Adjustment Bureau, Inc. v. Allstate Ins. Co., 905 A.2d 462, 468 (Pa. Super. Ct. 2006) (emphasizing that ascertaining the intent of the contracting parties is *the* "fundamental rule" in contract interpretation).

41. "Insurance policies, almost without exception, are lengthy, complex standard form contracts of adhesion drafted by insurers and sold on a take-it-or-leave-it basis with respect to their terms." Christopher C. French, *Understanding Insurance Policies as Noncontracts: An Alternative Approach to Drafting and Construing These Unique Financial Instruments*, 89 TEMP. L. REV. 535, 546 (2017) [hereinafter French, *Understanding Insurance Policies*].

42. *See id.* at 535–37, 553–54 (describing insurance policies as "instruments" rather than contracts).

43. *See id.* at 537.

44. *See infra* Section II.B.2.

45. *See* French, *Understanding Insurance Policies*, *supra* note 41, at 556.

46. *See id.* at 564, 560.

47. *See* Cont'l Cas. Co. v. Diversified Indus., 884 F. Supp. 937, 946 (E.D. Pa. 1995); 3 STEVEN PLITT ET AL., *supra* note 27, § 35.8.

These rules compensate for several important differences between insurance law and traditional contract law.[48] Broadly speaking, courts treat insurance policies specially to protect policyholders, who lack many of the benefits and protections inherent in the formation and execution of traditional contracts.[49] Insureds are almost always bound to, without the opportunity to alter, the boilerplate language in their policies.[50] In fact, insureds must usually purchase policies before even having the opportunity to review the policy terms.[51] And even when given the opportunity to review the terms, laymen are unlikely to understand complex policy language.[52] To worsen the situation for insureds, they may very well be required by law to purchase the policy.[53] The rationale behind the majority's refusal to enforce AACs post-loss is to allow insureds to retain what little control they have over their contractual rights.[54] Nevertheless, both the minority and majority views purport to align with basic contract-law fundamentals.[55]

A. Contract Law Overview

A brief overview of contract-law basics will contextualize both the majority and minority's reasoning. A contract is a promise,[56] at its core, and therefore necessarily involves the interaction of at least two parties.[57] Given the inherent uniqueness of promises between parties, American contract law was developed ad hoc, on a case-by-case basis through judge-made common law.[58] Although certain types of contracts have since been made to conform to statutes and regulations,[59] the beauty of American contract law lies in the fact that its story "is essentially told

48. *See* French, *Understanding Insurance Policies*, *supra* note 41, at 565.

49. *See id.* at 537.

50. *See id.* at 553.

51. *See id.*

52. *See id.*

53. *See id.* at 539. For example, anyone wishing to drive an automobile must have auto insurance. *See id.* at 551–52. "Anyone who wants to purchase a house using a bank to finance a mortgage must have homeowners insurance adequate to cover the mortgage amount." *Id.* at 539. For a time, Americans were required to purchase health insurance. *See id.* And every state except Texas requires employers to carry workers' compensation insurance. *See id.*

54. *See* Cont'l Cas. Co. v. Diversified Indus., 884 F. Supp. 937, 946 (E.D. Pa. 1995); *see also infra* Section II.A.

55. *See infra* Section II.C.

56. *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981) ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.").

57. *See id.* § 9.

58. *See* TIMOTHY MURRAY & JON HOGUE, CORBIN ON PENNSYLVANIA CONTRACTS § 1.01 (2020).

59. For example, Article 2 of the Uniform Commercial Code (U.C.C.) governs contracts for the sale of goods. *See id.* § 1.01 (2019).

through the cases,"[60] resulting in law that has adapted over time to evolving concerns.[61]

1. Contract Formation

Generally, an enforceable contract must include an offer,[62] an acceptance of that offer,[63] and an exchange of consideration.[64] Pennsylvania law states the requirements somewhat differently, requiring: "(1) a mutual manifestation of an intention to be bound, (2) terms sufficiently definite to be enforced, and (3) consideration."[65] Nonetheless, Pennsylvania courts sometimes distill the entirety of the requirements to only a "meeting of the minds"[66] and consideration.[67]

"Consideration," perhaps the least intuitive element, is embodied in a "bargained-for exchange" between the parties.[68] In return for the *promisor's* promise, the *promisee* exchanges either performance or a return promise, traditionally categorized as either a "benefit to the promisor or a detriment to the promisee."[69] Whereas conferring a benefit on the promisor is like a traditional payment, a promisee's *detriment* may take the form of his foregoing some legal right or limiting his freedom of future action in exchange for the promise.[70] Both scenarios can satisfy the consideration requirement.[71]

But a benefit or detriment must also be "bargained for."[72] In a bargained-for exchange, the promisor's promise and promisee's benefit

60. *See id.*

61. *See infra* Section II.B.2.

62. An offer is a "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." RESTATEMENT (SECOND) OF CONTRACTS § 24 (AM. LAW INST. 1981).

63. "Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer." *Id.* § 50.

64. *See* McIlwain v. Saber Healthcare Grp., Inc., LLC, 208 A.3d 478, 485 (Pa. Super. Ct. 2019).

65. Kirleis v. Dickie, McCamey & Chilcote, P.C., 560 F.3d 156, 160 (3d Cir. 2009).

66. *McIlwain*, 208 A.3d at 485; *see also* Moser Mfg. Co. v. Donegal & Conoy Mut. Fire Ins. Co., 66 A.2d 581, 582 (Pa. 1949) ("[A]n offer and an acceptance . . . results in a meeting of the minds.").

67. *See* Bair v. Manor Care of Elizabethtown, PA, LLC, 108 A.3d 94, 96 (Pa. Super. Ct. 2015) ("The touchstone of any valid contract is mutual assent and consideration.").

68. *See* MURRAY & HOGUE, *supra* note 58, § 5.02(1) (2019).

69. Pennsy Supply, Inc. v. Am. Ash Recycling Corp., 895 A.2d 595, 600 (Pa. Super. Ct. 2006) (quoting Weavertown Transp. Leasing, Inc v. Moran, 834 A.2d 1169, 1172 (Pa. Super. Ct. 2003)).

70. *See* Hamer v. Sidway, 27 N.E. 256, 257 (N.Y. 1891) (finding plaintiff's promise to refrain from the use of alcohol and tobacco, his legal right, sufficient consideration to support a contract).

71. *See id.*

72. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (AM. LAW INST. 1981).

or detriment must purport to induce each other,[73] a true quid pro quo.[74] If, on the other hand, someone merely intends to give a gift to someone else for completing some *condition*, completion of the condition does not satisfy the consideration requirement.[75]

But despite requiring the satisfaction of certain elements, courts are remarkably accommodating in finding enforceable contracts.[76] Parties may even form implied contracts.[77] In reality, the distinction between express and implied contracts is not a question of *if* the parties express their mutual assent but *how*.[78] No implied contract can form between two parties who do not manifest an intent to form a contract.[79] Thus, implied contracts are "implied-in-fact"; the contract is enforceable if mutual assent can be implied from the facts,[80] a question for a jury to decide based on the circumstances of the parties' interactions.[81]

Implied contracts are thus the epitome of practicality, "aris[ing] under circumstances which, according to the *ordinary course of dealing and the common understanding* of men, show mutual intention to contract."[82] The offer and acceptance need not be identifiable and "the moment of formation need not be pinpointed."[83] Still, whether express or implied, contract formation depends exclusively on parties' objective, manifested intent,[84] not their subjective, hidden intent[85]—a principle known as the "objective theory" of contract formation.[86] After contract

73. *See* MURRAY & HOGUE, *supra* note 58, § 5.02(1).

74. *See Pennsy Supply*, 895 A.2d at 600.

75. *See id.* (citing Weavertown Transp. Leasing, Inc. v. Moran, 834 A.2d 1169, 1172 (Pa. Super. Ct. 2003)).

76. *See* MURRAY & HOGUE, *supra* note 58, § 1.04(5) ("A knowing wink may be sufficient to manifest . . . agreement.").

77. *See id.* § 26.01(1).

78. "The manifestation of agreement is typically by words (i.e., an express contract), but it can be by conduct or conduct in combination with words . . . A knowing wink may be sufficient to manifest such an agreement." *Id.* § 1.04(5).

79. *See id.*

80. *See id.*

81. *See* Ingrassia Constr. Co. v. Walsh, 486 A.2d 478, 482 (Pa. Super. Ct. 1984) (noting that "when the parties mean [a transaction] to be complete" is a matter of "interpretation of their expressions to each other, a question of fact").

82. Hertzog v. Hertzog, 29 Pa. 465, 468 (1857) (emphasis added).

83. *See Ingrassia*, 486 A.2d at 483 (citing RESTATEMENT (SECOND) OF CONTRACTS § 22(2) (AM. LAW INST. 1981)).

84. In fact, A's genuine belief that no contract was formed does not matter if A's manifested intent suggested the contrary to B. *See Ingrassia*, 486 A.2d at 483.

85. *See* Williams v. Metzler, 132 F.3d 937, 947 (3d Cir. 1997) ("In the oft quoted words of Justice Oliver Wendell Holmes, 'the making of a contract depends . . . not on the parties' having *meant* the same thing, but on their having *said* the same thing.'" (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 463 (1897))).

86. *See* MURRAY & HOGUE, *supra* note 58, § 24.02; *see also Ingrassia*, 486 A.2d at 483 (acknowledging the centrality of "outward and objective manifestations of assent").

formation, courts must often interpret,[87] construe,[88] and enforce contracts.[89]

2. Contract Interpretation

The essence of contract interpretation is this: once honed in on the parties' objective manifestations, the court must decide what to make of them.[90] Under Pennsylvania law, contracts are interpreted according to the "plain meaning rule."[91] According to the plain meaning rule, when contract language is clear, courts look to the contract's express language as a reflection of the parties' intent.[92] Unambiguous language eliminates the need for any "extrinsic aids or evidence."[93]

But even when there is no *written* language to interpret, such as when a courts enforce implied contracts, courts take care to neither make nor rewrite contracts the parties did not intend.[94] Rather, party intent still steers interpretation.[95] Accordingly, the Pennsylvania Supreme Court has cautioned that contracting parties are free to deal and conduct business, and that courts are to "find out and apply the pattern by which they act, and not to furnish it."[96]

Nonetheless, favoring enforceable contracts, courts and the law sometimes imply contractual terms the parties did not express.[97] For example, when the parties' actions show intent to create an agreement but the agreement lacks certainty as to particular terms, courts will endeavor to "attach a sufficiently definite meaning to the bargain."[98] Courts routinely seek to fill in these contractual gaps by consulting, in hierarchical order, the parties' "course of performance,"[99] "course of

87. "[I]nterpretation is . . . a process by which the court seeks the meaning intended by the parties from their words, their conduct, and all surrounding circumstances." MURRAY & HOGUE, *supra* note 58, § 24.01(3) (italics omitted).

88. "Construction is a process by which a court determines . . . [the] legal effect [of the parties' intended meaning]." *Id.*

89. *See generally id.* § 55.01 (describing three traditional categories of judicial remedies to breach of contract: damages, restitution, and specific performance).

90. *See* MURRAY & HOGUE, *supra* note 58, § 24.01(1).

91. *See id.*

92. *See* Steuart v. McChesney, 444 A.2d 659, 661 (Pa. 1982); *see also* Miller v. Fichthorn, 31 Pa. 252, 259 (Pa. 1858) (stating that, when free of mistake and fraud, "the express contract . . . is the paramount law of the parties").

93. *See Steuart*, 444 A.2d at 661.

94. *See* MURRAY & HOGUE, *supra* note 58, § 24.06.

95. *See id.* ("Innumerable cases . . . have proclaimed that a court's function is to ascertain and enforce the intention of the parties.").

96. *See Miller*, 31 Pa. at 256.

97. *See* MURRAY & HOGUE, *supra* note 58, § 24.06.

98. *See* RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. a (AM. LAW INST. 1981).

99. A course of performance is "a sequence of conduct *with respect to the contract at issue* that involves repeated occasions for performance by a party, and the other party, with knowledge and opportunity to object, acquiesces in that performance without

dealing,"[100] and "usage of trade."[101] Still, if the "essential terms"[102] are so uncertain that a court has no basis for deciding whether the agreement has been kept, the court will not find an enforceable contract.[103]

3. Assignment

Before venturing into the turbulent waters of insurance law, an overview of traditional contract assignment will provide helpful background for understanding the core rationale for the rules of insurance assignment.[104]

Defined broadly by the Restatement (Second) of Contracts, assignment occurs when an *assignor*, one of the original contracting parties, transfers to the *assignee*, a third party, the assignor's rights under the contract.[105] Post-transfer, the assignor's rights disappear, and the assignee then wields the same rights the assignor originally possessed.[106] This definition explains how The Shop may stand in Mr. Safe's shoes and has standing to sue Mr. Safe's insurer.[107]

But while the Restatement's definition helps to describe the framework of assignment, Pennsylvania common law more clearly illustrates the precise contours of the rights being transferred to the assignee.[108] According to the Pennsylvania Supreme Court in *In re Purman's Estate*,[109] an assignment is "a transfer or setting over of property, or of some right or interest therein, from one person to another, and unless in some way qualified, it is properly the transfer of one whole interest in an estate, chattel, or other thing."[110] Crucially, the assignee

objection." MURRAY & HOGUE, *supra* note 58, § 24.05(1) (emphasis added) (citing 13 PA. CONS. STAT. § 1303(a) (2019)).

100. A course of dealing is "a sequence of previous conduct between the parties that is fairly regarded as establishing a common basis of understanding for interpreting their [present] expressions and other conduct." *Id.* (citing 13 PA. CONS. STAT. § 1303(b) (2019)).

101. A trade usage is "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." 13 PA. CONS. STAT. § 1303(c) (2019).

102. Essential terms fall into two broad categories: (1) terms necessary to enforce certain agreements; and (2) terms the parties have manifested are necessary for the particular transaction. *See* MURRAY & HOGUE, *supra* note 58, § 2.06(1).

103. *See* RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. a (AM. LAW INST. 1981).

104. *See* Sections II.B.2, II.C.

105. *See* RESTATEMENT (SECOND) OF CONTRACTS § 317(1) (AM. LAW INST. 1981).

106. *See id.*

107. *See supra* Part I.

108. *See* Fran & John's Doylestown Auto Ctr., Inc. v. Allstate Ins. Co., 638 A.2d 1023, 1025 (Pa. Super. Ct. 1994) (relying on Pennsylvania's traditional definition of "assignment" to rebut argument that one may assign policy rights piecemeal).

109. *In re* Purman's Estate, 56 A.2d 86, 88 (Pa. 1948).

110. *Id.*

obtains no greater rights than the assignor,[111] nor are the assigned rights inferior to those the assignor originally had; assignment is the transfer of an equivalent right—the assignee is stepping into the same size "shoes."[112]

Generally, courts and legislatures favor the principle of free assignability, the presumption that contractual rights are assignable.[113] Free assignability, however, is subject to a few significant limitations[114] that generally aim to protect the obligor.[115] For example, absent a statutory or contractual prohibition,[116] contractual rights are assignable unless the assignment would materially change the obligor's duty,[117] materially increase the risk the obligor undertook when the contract was formed,[118] or materially impair the obligor's chance of obtaining return performance from the obligee.[119]

However, contractual protections for the obligor—AACs, for example—similarly have limits.[120] One federal court has said that Pennsylvania courts "scrutinize [AACs] carefully by examining both the specific language used and the purposes for which [the AACs] have been inserted."[121] Pennsylvania law also allows an assignee to pursue damages for breach of contract, despite contractual language barring such suits, further illustrating courts' emphasis on the free assignability of contractual rights.[122]

111. *See* Pa. Higher Educ. Assistance Agency v. Devore, 406 A.2d 343, 344 (Pa. Super. Ct. 1979) ("An assignment does not confer upon the assignee any greater right, power, or interest than that possessed by the assignor.").

112. *See* Crawford Cent. Sch. Dist. v. Commonwealth, 888 A.2d 616, 619–20 (Pa. 2005).

113. *See* MURRAY & HOGUE, *supra* note 58, § 49.01 (emphasis added).

114. *See* RESTATEMENT (SECOND) OF CONTRACTS § 322 (AM. LAW INST. 1981) (describing exceptions to the general rule).

115. An obligor is "[s]omeone who has undertaken an obligation." *Obligor*, BLACK'S LAW DICTIONARY (11th ed. 2019).

116. *See* 13 PA. CONS. STAT. § 2210(b) (2019).

117. *See id.*; MURRAY & HOGUE, *supra* note 58, § 49.01 (2019).

118. *See* MURRAY & HOGUE, *supra* note 58, § 49.01.

119. *See* 13 PA. CONS. STAT. § 2210(b) (2019).

120. *See generally* CGU Life Ins. Co. of Am. v. Metro. Mortg. & Secs. Co., 131 F. Supp. 2d 670, 678 (E.D. Pa. 2001) (discussing Pennsylvania's insurance-AAC case law).

121. *Id.* However, the court in *CGU* presented no Pennsylvania insurance cases in which an AAC was "scrutinize[d]" and thereafter enforced post-loss. *See id.*

122. *See* 13 PA. CONS. STAT. § 2210(b) (2019); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 322(1) (AM. LAW INST. 1981) ("[A] contract term prohibiting assignment of 'the contract' bars only the delegation to an assignee of the performance by the assignor of a duty or condition.").

B. Insurance Policies as Special Contracts

Insurance policies are contracts,[123] but they fill a special remedial role in society.[124] Accordingly, insurance policies are governed by unique rules that bolster public policy concerns such as the protection of "uninformed" and "powerless" consumers and the compensation of injured parties.[125] The primary purpose of insurance policies is to protect insureds from loss.[126] Insurers accomplish this protection by assuming the insureds' risk and distributing any losses among a larger group of other insureds.[127] However, doing so requires a contractual relationship, whereby one party indemnifies the risk of another in exchange for the payment of a premium.[128] Thus, insurance policies generally mirror the traditional contract-law framework: offer, acceptance, and consideration.[129]

1. Traditional Contract Law Principles Apply to Insurance Contract Formation, Interpretation, and Enforcement

Pennsylvania courts characterize insurance policies as contracts[130] and generally consider the policyholder-insurer relationship a traditional contractual relationship.[131] Consequently, traditional contract principles largely govern these policies.[132]

123. *See* FRENCH, LNPG, *supra* note 2, § 1.04.

124. *See* O'Donnell v. Indep. Life & Accident Ins. Co., 323 A.2d 387, 388 (Pa. Super. Ct. 1974) (citation omitted) ("An insurance policy is of course a contract . . . . However, with insurance contracts additional considerations obtain . . . ."); French, *Understanding Insurance Policies*, *supra* note 41, at 537.

125. *See* French, *Understanding Insurance Policies*, *supra* note 41, at 537–41.

126. *See* FRENCH, LNPG, *supra* note 2, § 1.04 ("In insurance terms, a loss is 'any injury or damage that the insured suffers because of a covered accident or misfortune.'" (citation omitted)).

127. *See id.* ("Generally, five elements are present in an insurance contract: an insurable interest; a risk of loss; an assumption of the risk by the insurer; a general scheme to distribute the loss among the larger group of those bearing similar risks; and payment of a premium for the assumption of risk.").

128. "A premium is the agreed exchange for the promise of the insurance company to provide coverage under its policy." FRENCH, LNPG, *supra* note 2, § 2.08.

129. *See id.* §§ 2.03, 2.08 .

130. *See* O'Donnell v. Indep. Life & Accident Ins. Co., 323 A.2d 387, 388 (Pa. Super. Ct. 1974).

131. *See* Zayc v. John Hancock Mut. Life Ins. Co., 13 A.2d 34, 38 (Pa. 1940); FRENCH, LNPG, *supra* note 2, § 2.03 ("[T]he relationship between an applicant for insurance and the insurance company is fundamentally the same as that between parties negotiating any type of contract, and is governed by the principles applicable to contracts in general.").

132. *See* FRENCH, LNPG, *supra* note 2, § 2.03.

For example, a valid insurance contract must have an offer and acceptance resulting in a meeting of the minds.[133] Even where a policyholder may otherwise imply the existence of an insurance-contract relationship,[134] there must still have been a meeting of the minds as to the contract's provisions.[135] Thus, in all relevant respects, insurance policies track with the broad framework within which conventional contracts are formed and enforced.[136]

2. Special Rules Apply to Insurance Policies as Atypical Contracts

Nonetheless, courts treat insurance policies like atypical contracts due to certain societal interests and public policy.[137] Insurance policies also depart from the traditional contract-formation process in notable ways.[138]

First, the origins and purpose of "mutual" insurance[139] illustrate how insurance has come to implicate so many societal interests and, thus, requires special legal governance.[140] The public first relied on insurance as a social safety net in late-eighteenth-century Philadelphia to compensate community members for losses stemming from fires; the concept later expanded to cover other types of losses.[141] Today, insurance has become embedded in all aspects of daily life[142] and is all but necessary for a modern industrial society.[143] Among the reasons for such integration is that certain lines of insurance are mandatory, such as

133. *See* Moser Mfg. Co. v. Donegal & Conoy Mut. Fire Ins. Co., 66 A.2d 581, 582 (Pa. 1949); *see also supra* Section II.A.1.

134. "[T]he payment of an insurance premium is not sufficient to create a contract of insurance." W. O. Hickok Mfg. Co. v. Unigard Mut. Ins. Co., 15 Pa. D. & C.3d 593, 598 (1979) (citing *Zayc*, 13 A.2d at 36).

135. *See* Ludwinska v. John Hancock Mut. Life Ins. Co., 178 A. 28, 30 (Pa. 1935) ("In all insurance policies, as in other contracts, there must be some point where the minds of the parties meet in contractual relation . . . ."); *see also supra* Section II.A.1.

136. *See* FRENCH, LNPG, *supra* note 2, § 2.03; *see also supra* Section II.A.1.

137. *See* FRENCH, LNPG, *supra* note 2, § 2.03; French, *Understanding Insurance Policies*, *supra* note 41, at 536–37.

138. *See* French, *Understanding Insurance Policies*, *supra* note 41, at 536–37; FRENCH, LNPG, *supra* note 2, § 2.03.

139. *See* French, *Understanding Insurance Policies*, *supra* note 41, at 539.

140. *See id.*

141. *See id.* at 538–39 ("The first of these 'mutual' companies was the Philadelphia Contributorship for Insuring Houses from Loss by Fire, established in Philadelphia in 1752, with Benjamin Franklin as one of its first directors.").

142. *See* Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489, 1503 (2010) ("If the insurance industry were a nation, it would have the world's third largest gross national product.").

143. *See id.* at 1497 (discussing insurance as a "social instrument" in shaping society).

homeowners insurance, auto insurance, and—at one time—health insurance.[144]

Second, all contracts must comport with public policy, and insurance policies are no exception.[145] However, absent blatant violations of established public policy, Pennsylvania courts usually defer to the legislature to explicitly define public policy's outer bounds.[146] That said, society's interest in compensating injured parties *is* established public policy.[147] Without the insurance safety net, a passing storm or freak car crash could entail the average person's financial ruin,[148] and courts rule accordingly.[149]

Third, insurance-policy formation differs in key respects from traditional contract formation.[150] Mutual assent, a key element of contract formation,[151] relies on voluntary choice and is often essentially absent from the insurance-policy-purchasing process.[152] Almost without exception, insurance policies are "lengthy, complex standard form contracts of adhesion drafted by insurers and sold on a take-it-or-leave-it basis with respect to their terms."[153] And as mentioned above, policyholders often have no choice whether to even purchase certain lines of insurance because the insurance is mandatory.[154] Thus, the insurance-policy-formation process is far from the tidy checklist one envisions when pinpointing offer, acceptance, and consideration.[155] Almost all policyholders purchase policies without taking part in drafting them, without seeing them, and without ever *really* understanding them.[156] In response, courts have developed and applied both traditional contract-law principles and special interpretive rules to govern insurance policies—three of which are especially relevant to Mr. Safe and The Shop.[157]

144. *See* French, *Understanding Insurance Policies*, *supra* note 41, at 539; *see also* Patient Protection and Affordable Care Act of 2010, 26 U.S.C. § 5000A (2012).

145. *See* Burstein v. Prudential Prop. & Cas. Ins. Co., 809 A.2d 204, 206 (Pa. 2002) ("Generally, courts must give plain meaning to a clear and unambiguous contract provision unless to do so would be contrary to a clearly expressed public policy.").

146. *See id.* at 207.

147. *See* French, *Understanding Insurance Policies*, *supra* note 41, at 540 (collecting cases).

148. Most Americans are "judgement proof," lacking the resources to pay out of pocket for their own injuries, let alone court-imposed judgments for others' injuries. *See id.*

149. *See id.* (collecting cases).

150. *See id.* at 541.

151. *See supra* Section II.A.1.

152. *See* French, *Understanding Insurance Policies*, *supra* note 41, at 542–43.

153. *Id.* at 546.

154. *See id.* at 565.

155. *See id.* at 565–67.

156. *See id.* at 546–50.

157. *See id.* at 565.

First, because contract drafters are apt to protect their own interests over the interests of other parties, courts will interpret "ambiguous or doubtful" terms against the drafting parties.[158] This maxim, known as *contra proferentem*, is typically used as a tiebreaker in contract disputes when extrinsic evidence cannot otherwise clarify ambiguity.[159] But in insurance law, courts will *automatically* construe any ambiguities in favor of coverage for the policyholder.[160] This approach applies even when the ambiguous provision could not have been drafted less ambiguously.[161] The result is a form of strict liability for the insurer.[162]

Second, the "reasonable expectations doctrine" directs courts to construe insurance policies such that policyholders receive the coverage they reasonably expected, even when a policy *unambiguously* precludes coverage.[163] Courts use the doctrine to reach equitable results when insurers rely on complex policy language to avoid compensating policyholders.[164]

Third, the principle of free assignability still applies in the insurance context.[165] Thus, when there is no provision forbidding assignment, insurance-policy rights may generally be assigned without issue.[166] Free assignability, however, may yet expand in the insurance context to allow assignment even when a policy contains an AAC.[167] Consequently,

158. *See* MURRAY & HOGUE, *supra* note 58, § 24.12(1); *see also* New Castle Cty. Del. V. Nat'l Union Fire Ins. Co. of Pittsburgh, 243 F.3d 744, 750 (3d Cir. 2001) ("The settled test for ambiguity is whether the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." (quoting New Castle Cty. Del. V. Nat'l Union Fire Ins. Co. of Pittsburgh, 174 F.3d 338, 344 (3d Cir. 1999))).

159. *See id.*

160. *See* O'Donnell v. Indep. Life & Accident Ins. Co., 323 A.2d, 387, 388 (Pa. Super. Ct. 1974).

161. *See* Kenneth S. Abraham, *A Theory of Insurance Policy Interpretation*, 95 MICH. L. REV. 531, 538 (1996).

162. *See id.*; *see, e.g.*, Hecla Mining Co. v. N.H. Ins. Co., 811 P.2d 1083, 1092 (Colo. 1991) ("Although 'sudden' can reasonably be defined to mean abrupt or immediate, it can also reasonably be defined to mean unexpected and unintended. Since the term 'sudden' is susceptible to more than one reasonable definition, the term is ambiguous, and we therefore construe the phrase 'sudden and accidental' against the insurer to mean unexpected and unintended.").

163. *See* Francis J. Mootz III, *Insurance Coverage of Employment Discrimination Claims*, 52 U. MIAMI L. REV. 1, 22 (1997); French, *Understanding Insurance Policies*, *supra* note 41, at 561; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f (AM. LAW INST. 1981) ("[Customers] are not bound to unknown terms which are beyond the range of reasonable expectation.").

164. *See* French, *Understanding Insurance Policies*, *supra* note 41, at 564.

165. *See* 3 STEVEN PLITT ET AL., *supra* note 27, § 35.1.

166. *See id.*

167. *See* Nat'l Mem'l Servs., Inc. v. Metro. Life Ins. Co., 48 A.2d 143, 144 (Pa. 1946), *aff'd per curiam*, 49 A.2d 382 (Pa. 1946) ("[G]eneral stipulations in policies prohibiting assignment thereof, except with the consent of the insurer, applies [sic] to

whether insurers can use AACs to limit assignments—even assignments that materially alter their risk under the traditional free-assignability principle—is uncertain and contested in state courts.[168] The majority of courts respond by holding that *post-loss* assignment of insurance claims cannot materially increase the insurer's risk, and thus, does not run afoul of traditional limits on free assignability.[169]

C. Majority and Minority Views of Post-Loss Assignment

Nationally, courts differ on the issue of whether to enforce AACs after the loss triggering insurer liability has occurred.[170] The majority's reasoning relies on two related premises.[171]

First, majority-rule courts reason that AACs, which are meant to protect insurers from *unaccounted-for* liability, serve no purpose after the loss event has "fixed and vested" the insured's right to recover and the insurer's liability is known.[172] This line of reasoning relies on differentiating "policies" and "claims."[173] Textually, the majority argues that prohibiting the assignment of a "policy" is not intended to restrict the assignment of a "claim."[174] Whereas pre-loss assignment involves shifting policy rights to a potentially riskier third party, post-loss assignment transfers only the insured's purportedly fixed right to a money claim.[175] Therefore, the majority argues, a post-loss change in the

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assignments before loss only, and do not prevent an assignment after the insured's death."); 3 STEVEN PLITT ET AL., *supra* note 27, § 35.8.

168. *See* 3 STEVEN PLITT ET AL., *supra* note 27, § 35.8 ("Although there is some authority to the contrary, the great majority of courts adhere to the rule that general stipulations in policies prohibiting assignments of the policy, except with the consent of the insurer, apply only to assignments before loss."). *But see* MURRAY & HOGUE, *supra* note 58, § 49.01 ("[C]ontract rights are assignable unless the assignment would . . . materially increase the risk the obligor undertook when the contract was formed."); *infra* Sections II.C–D.

169. *See* 3 STEVEN PLITT ET AL., *supra* note 27, § 35.8; *see also Nat'l Mem'l*, 48 A.2d at 144 ("After a loss has occurred, the right of the insured or his successor in interest to the indemnity provided in the policy becomes a fixed and vested right." (citation omitted)).

170. *See* Fluor Corp. v. Superior Court, 354 P.3d 302, 326–27, 327 n.46 (Cal. 2015) (discussing major majority and minority rule decisions).

171. *See generally id.* at 326–27 (providing an overview of majority-rule cases nationwide).

172. *See Nat'l Mem'l*, 48 A.2d at 144.

173. *See* 3 STEVEN PLITT ET AL., *supra* note 27, § 35.8; *see also Fluor*, 354 P.3d at 326–27.

174. *See* 3 STEVEN PLITT ET AL., *supra* note 27, § 35.8.

175. In this context, courts describe this right as a "chose in action." *See Nat'l Mem'l*, 48 A.2d at 144. A chose in action is the "right to receive or recover a debt, demand, or damages on a cause of action," including "debts of all kinds, tort claims, rights to recover possession or ownership of real or personal property, various types of instruments that embody property rights, and rights to intangible property." MURRAY & HOGUE, *supra* note 58, § 49.01.

identity of the policyholder merely amounts to a change in recipient and cannot increase insurer risk.[176]

Second, the majority contends that AACs can violate public policy.[177] This view posits that enforcing AACs post-loss amounts to restricting a creditor-debtor relationship.[178] Post-loss, the policyholder's right to coverage becomes a "fixed and vested" property right—a debt due from the insurer to the policyholder.[179] Enforcing AACs post-loss, the majority argues, would subject a creditor's rights to the debtor's control.[180]

A minority of courts take the alternative view that AACs are an appropriate exercise of contractual agreement, pre- and post-loss.[181] These courts refuse to impose *any* post-loss caveat, opting instead to rely on the unambiguous language agreed upon by the insurer and policyholder.[182] And while the majority characterizes the minority as defending insurers' rights "above" policyholders' rights,[183] in reality the minority courts simply emphasize the import of two parties bilaterally agreeing to certain contractual terms.[184]

D. Pennsylvania Case Study

Within the past 70 years, Pennsylvania has had its own split on the post-loss-assignment issue.[185] The Pennsylvania Supreme Court

176. *See* 3 STEVEN PLITT ET AL., *supra* note 27, § 35.8; *see also* Egger v. Gulf Ins. Co., 903 A.2d 1219, 1224 (Pa. 2006) ("[A]fter events giving rise to the insurer's liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity.").

177. *See Nat'l Mem'l*, 48 A.2d at 144.

178. *See id.*

179. *See id.*

180. *See id.*

181. *See e.g.*, Ins. Co. of Pa. v. Hutter, No. 01-10768, 2002 U.S. App. LEXIS 28200, at *2–3 (5th Cir. Apr. 4, 2002) (per curiam) (holding that courts "generally" enforce anti-assignment clauses under Texas law and that such clauses are also enforced "so as to preclude the assignment of a claim under an insurance policy"); Del Monte Fresh Produce, Inc. v. Fireman's Fund Ins. Co., 183 P.3d 734, 747 (Haw. 2007) (enforcing an AAC where state law allows insurers to "impose whatever conditions they please on their obligation" provided they do not violate statute or public policy); Holloway v. Republic Indem. Co. of Am., 147 P.3d 329, 333–34 (Or. 2006) (enforcing an AAC post-loss where its plain meaning prohibited all assignment without the insurer's consent and the AAC contained no language differentiating between pre- and post-loss); *see also In re* Katrina Canal Breaches Litig., 63 So. 3d 955, 963 (La. 2011) (holding that AACs are enforceable post-loss so long as they "clearly and unambiguously express" that they apply to post-loss assignments).

182. *See* Fluor Corp. v. Superior Court, 354 P.3d 302, 327 n.46 (Cal. 2015); Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co., 151 A.3d 576, 590 (N.J. 2017) (collecting cases).

183. *See Givaudan*, 151 A.3d at 590.

184. *See infra* Part III.

185. *See infra* Part III.

articulated Pennsylvania's majority rule in 1946 in *National Memorial Services, Inc. v. Metropolitan Life Insurance Co.*,[186] and in 2006 affirmed the rule in *Egger v. Gulf Insurance Co.*[187] and *Insurance Adjustment Bureau, Inc. v. Allstate Insurance Co.*[188] In each case, the Pennsylvania Supreme Court held AACs unenforceable post-loss.[189] In 1993 and 1994, however, the Pennsylvania Superior Court took a decidedly different route, bucking the majority rule and enforcing AACs post-loss in the auto-insurance context.[190] The result of Pennsylvania's split is anything but a coherent body of law.[191]

1. Pennsylvania's Majority-Rule Cases

In 1946, the Pennsylvania Supreme Court in *National Memorial Services, Inc. v. Metropolitan Life Insurance Co.*[192] articulated Pennsylvania's now long-held position on post-loss assignment.[193] Notably, *National Memorial* dealt with the assignment of life insurance benefits.[194] After the insured died, the beneficiary, the insured's wife, assigned the proceeds of her husband's life insurance policy to the local undertaker, who in turn assigned his interest in the policy to National Memorial Services, Inc., the plaintiff.[195] Metropolitan Life Insurance company thereafter refused to pay National, based on a provision in the insured's policy declaring void the assignment of "any of its benefits to an assignee other than" a bank or trust company.[196] National subsequently sued for payment and won in the Court of Common Pleas.[197]

On appeal, the Superior Court affirmed, refusing to enforce the AAC.[198] First, the court noted that prohibiting pre-loss assignments is justified because "some improvident or undesirable assignee might allow the policy to lapse for the nonpayment of premiums," jeopardizing the

186. Nat'l Mem'l Servs., Inc. v. Metro. Life Ins. Co., 48 A.2d 143 (Pa. Super. Ct. 1946), *aff'd per curiam*, 49 A.2d 382 (Pa. 1946).

187. Egger v. Gulf Ins. Co., 903 A.2d 1219 (Pa. 2006).

188. Ins. Adjustment Bureau, Inc. v. Allstate Ins. Co., 905 A.2d 462 (Pa. 2006).

189. *See Nat'l Mem'l*, 48 A.2d at 144; *see also Egger*, 903 A.2d at 1229 (Pa. 2006).

190. *See* High-Tech-Enters. v. Gen. Accident Ins. Co., 635 A.2d 639, 641–42 (Pa. Super. Ct. 1993); Fran & John's Doylestown Auto Ctr. v. Allstate Ins. Co., 638 A.2d 1023, 1025–27 (Pa. Super. Ct. 1994).

191. *See infra* Part III.

192. Nat'l Mem'l Servs., Inc. v. Metro. Life Ins. Co., 48 A.2d 143 (Pa. Super. Ct. 1946), *aff'd per curiam*, 49 A.2d 382 (Pa. 1946).

193. *Nat'l Mem'l*, 48 A.2d at 144.

194. *See id.* at 143.

195. *See id.*

196. *See id.*

197. *See id.*; *see also supra* note 30 (describing Pennsylvania's court structure).

198. *See Nat'l Mem'l*, 48 A.2d at 144.

insured's rights under the life insurance policy.[199] However, the court could envisage no justification for limiting assignment by a *beneficiary* of the amount due him or her after the insured's death.[200] Curiously, the court seemed to grant leeway in its holding, stating that "[i]f the company had intended to [restrict post-loss assignment by the beneficiary], the language is not as clear and unambiguous as it should be. That purpose could have been readily expressed in plain and specific language."[201]

Second, the court applied the general majority positions: (1) that after loss occurs, the insured's right is "fixed and vested," mooting the AAC's purpose; and (2) that public policy forbids restricting the creditor-debtor relationship.[202] *National Memorial*, especially its "fixed and vested" reasoning, is the foundation from which Pennsylvania's majority-rule cases, like *Egger v. Gulf Insurance Co.*, have been built.

Decided nearly 60 years later, *Egger v. Gulf Insurance Co.* reaffirmed *National Memorial*, and numerous courts in other states have cited *Egger* as a reference for the majority stance.[203] *Egger* arose when widow Patricia Egger sued her deceased husband's employer, Foulke Associates, Inc., for failing to administer timely first aid to her husband after the work-related injury that led to his death.[204] Foulke's excess general liability policy,[205] issued by Gulf Insurance Company,[206] contained an AAC.[207]

Shortly before a jury verdict, Gulf denied excess insurance coverage to Foulke.[208] Immediately thereafter, and still before a jury verdict, Foulke and Egger entered into a settlement agreement whereby Foulke assigned to Egger its rights under its Gulf insurance policy.[209] Egger then sued Gulf, alleging breach of contract and bad faith in denying

199. *See id.* A life insurance policyholder is entitled to certain benefits even before death, such as "cash surrender value," a sum of money an insurance company pays to a policyholder if the policy is voluntarily terminated before the insured's death. *See* Adam Barone, *Cash Surrender Value*, INVESTOPEDIA, https://bit.ly/3ewv20f (last updated Apr. 22, 2020).

200. *See Nat'l Mem'l*, 48 A.2d at 144.

201. *See id.*

202. *See id.*

203. *See* Egger v. Gulf Ins. Co., 903 A.2d 1219, 1222 (Pa. 2006).

204. *See id.* at 1220.

205. Under this policy, Gulf would provide coverage in the event of damages exceeding the limits of Foulke's general policy. *See id*. at 1224, 1229.

206. *See id.* at 1220.

207. *See id.* The AAC stated, "[y]our rights and duties under this policy may not be transferred without our prior written consent, except in the case of death of an individual 'Named Insured.'" *Id.* (alteration in original).

208. *See id.* at 1221.

209. *See id.*

coverage.[210] The trial court determined, *inter alia*, that Foulke's assignment to Egger was valid.[211] The Superior Court affirmed while acknowledging that "Pennsylvania law is anything but 'well settled'"[212] on the issue.[213] The Pennsylvania Supreme Court affirmed.[214]

As to post-loss assignments in general, the Pennsylvania Supreme Court restated *National Memorial*'s general rule.[215] The court rejected Gulf's argument that, because Foulke assigned the policy before the jury's damages verdict, the assignment was technically pre-loss.[216] Expanding upon the reasoning in *National Memorial*, the Court addressed whether, alternatively, the assignment to Egger could have increased Gulf's risk.[217] The court concluded, however, that the uncertainty of the jury's pending damages verdict did not constitute a risk of increased loss.[218]

Gulf's argument hinged on differentiating the fixed life-insurance-policy award in *National Memorial* from the pending damages verdict on its own excess liability policy.[219] But in the court's eyes, Gulf confused loss with the "subsequent fixing of a precise amount of damages for that loss."[220] In the end, the court equated Gulf's risk with its obligation to pay, which was, "in principle,"[221] already triggered by the injury itself.[222] Consequently, the assignment changed only the identity of the party entitled to sue under the policy and left Gulf's risk unchanged.[223] In

210. *See id.*

211. *See id.*

212. Egger v. Gulf Ins. Co., 864 A.2d 1234, 1238 (Pa. Super. Ct. 2004).

213. *See id.* at 1246.

214. *See* Egger v. Gulf Ins. Co., 903 A.2d 1219, 1222 (Pa. 2006).

215. *See id.* at 1224 ("[A] non-assignment clause in an insurance contract is not enforceable after the loss has occurred.").

216. *See id.* at 1226–27 (granting that the policy was ambiguous concerning when "loss" occurred, but noting that courts construe ambiguities against the insurer and, under *National Memorial*, "loss" is "the occurrence of the event, which creates liability of the insurer").

217. *See id.* at 1227; MURRAY & HOGUE, *supra* note 58, § 49.01 (2019) ("[C]ontract rights are assignable unless the assignment would materially change the duty of the obligor or materially increase the risk the obligor undertook when the contract was formed.").

218. *See Egger*, 903 A.2d at 1227–28; *id.* at 1228 ("[After loss, the] risk was realized and was not changed by the assignment of rights to Appellee. The loss had occurred, and it remained only for that loss to be liquidated through legal proceedings.").

219. *See id.* at 1227. Gulf argued that the "assignment in this case was necessarily invalid because it was made before the jury's verdict and hence before the loss was 'fixed' or made a 'debt due' under the plain text of the policy, which is wholly in accord with the increased risk principles espoused in *Nat'l Mem'l Services*." *Id.*

220. *See id.*

221. *Id.* at 1229 (quoting Egger v. Gulf Ins. Co., 864 A.2d 1234, 1242 (Pa. Super. Ct. 2004)).

222. *See Egger*, 903 A.2d at 1229.

223. *See id.*

closing, the court revealed its guiding thesis: "We cannot let the language of the Policy outweigh the clear policy embodied . . . in [*National Memorial*]."[224] *Egger* served to reaffirm for a new era Pennsylvania's position on post-loss assignment.[225]

In *Insurance Adjustment Bureau, Inc. v. Allstate Insurance Co.*, decided the same day as *Egger*, the Pennsylvania Supreme Court attempted to explain its AAC jurisprudence. Peculiarly, its proffered explanation echoed a 2011 Louisiana decision to adopt a formulation of the *minority* rule.[226]

In *Insurance Adjustment Bureau*, the insureds hired Insurance Adjustment Bureau (IAB) to adjust their fire-damage claim and, as payment, assigned to IAB a commission and all monies that were due under the policy.[227] When the defendant, Allstate Insurance, challenged the assignment on the ground that it violated the policy's AAC,[228] the Pennsylvania Supreme Court analyzed the "threshold question" of whether the AAC was intended to prohibit the assignment of the entire policy or just the post-loss assignment of insurance benefits.[229]

A strict application of the majority rule would have allowed the assignment.[230] The court reasoned alternatively, however, that if the clause was *intended* to bar the post-loss assignment of benefits, then (1) the AAC was "enforceable in the post-loss timeframe," (2) the assignment was void, and (3) the purported assignee would have no case.[231] Consequently, the court refused to enforce the AAC *not* because the assignment occurred post-loss, but because the clause was not evidently intended to prohibit such an assignment—an unexpected homage to unambiguous contractual language.[232]

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224. *Id.* (quoting *Egger*, 864 A.2d at 1242).

225. *See id.*

226. *See* Ins. Adjustment Bureau v. Allstate Ins. Co., 905 A.2d 462, 470 (Pa. 2006); *see also In re* Katrina Canal Breaches Litig., 63 So. 3d 955, 962–64 (La. 2011) (finding "no public policy in Louisiana favoring free assignability of claims over freedom of contract" and holding that "parties may contract to prohibit post-loss assignments . . . [but] the contract language must clearly and unambiguously express that the non-assignment clause applies to post-loss assignments").

227. *See Ins. Adjustment Bureau*, 905 A.2d at 465.

228. *See id.* at 470. The AAC read: "You may not transfer this policy to another person without our written consent." *Id.*

229. *See id.*

230. *See Egger*, 903 A.2d at 1224 ("[A] non-assignment clause in an insurance contract is not enforceable after the loss has occurred.").

231. *See Ins. Adjustment Bureau*, 905 A.2d at 470 ("[If the AAC] was additionally intended to exclude an assignment of insurance benefits after a loss . . . and the provision is enforceable in the post-loss timeframe . . . then the assignment is void, and IAB's case would fail.").

232. *See id.* ("As it is not evident that this was the intent of the non-transfer clause . . . it should be assumed . . . that only a transfer of the entire policy to a new owner was precluded . . . .").

In the 60 years between *National Memorial* in 1946 and *Egger* and *Insurance Adjustment Bureau* in 2006, the Pennsylvania Superior Court decided two cases, *High-Tech-Enterprises v. General Accident Insurance Co.*[233] and *Fran & John's Doylestown Auto Center v. Allstate Insurance Co.*,[234] in a span of less than six months.[235] These cases starkly contradicted Pennsylvania's highest court, embodying a "hiccup" in Pennsylvania law.[236]

2. Pennsylvania's Minority-Rule Cases

In 1993, in *High-Tech-Enterprises*, the Pennsylvania Superior Court dismissed an auto-repair shop's complaint against an insurer for the insurer's refusal to tender unpaid repair costs.[237] High-Tech-Enterprises was an automotive collision-repair shop.[238] One of General Accident Insurance Company's policyholders was involved in an accident that resulted in damage covered under his policy.[239] The policy contained an AAC.[240]

The policyholder contracted with High-Tech to repair his vehicle, but before repairing the vehicle, High-Tech compelled him to execute a "Repair Authorization and Power of Attorney" form.[241] The form granted High-Tech the right to sue General for unpaid costs.[242] The policyholder, however, never obtained General's consent to assign his claim.[243] When High-Tech sued to recover unpaid costs, General asserted that the policy's AAC rendered the purported assignment invalid.[244]

On appeal, the Pennsylvania Superior Court affirmed the dismissal of High-Tech's complaint, concluding that High-Tech had no standing to maintain the cause of action.[245] The court applied the insurance policy's

233. High-Tech-Enters. v. Gen. Accident Ins. Co., 635 A.2d 639 (Pa. Super. Ct. 1993).

234. Fran & John's Doylestown Auto Ctr. v. Allstate Ins. Co., 638 A.2d 1023 (Pa. Super. Ct. 1994).

235. *See High-Tech-Enters.*, 635 A.2d at 639; *Fran & John's*, 638 A.2d at 1023.

236. *See High-Tech-Enters.*, 635 A.2d at 639; *Fran & John's*, 638 A.2d at 1023.

237. *See High-Tech-Enters.*, 635 A.2d at 641.

238. *See id.*

239. *See id.*

240. *See id.* ("Your rights and duties under this policy may not be assigned without our written consent.").

241. *See id.*

242. In consideration for the repair, the Authorization granted High-Tech "all of [the insured's] right, title and interest to collect and retain any and all damages by law against [his] insurance carrier or any other party to which [he] may be entitled by reason of damage to [his] insured motor vehicle, including but not limited to bad faith penalties, if any, attorney's fees, interest and costs of collection." *Id.*

243. *See id.*

244. *See id.*

245. *See id.*

"clear and unambiguous" AAC and held that lack of insurer consent rendered the assignment void.[246] The court concluded by confirming that only the insured had a contractual relationship with General and, thus, he was the only party who could maintain an action arising from that relationship.[247]

About six months later, the Superior Court in *Fran & John's Doylestown Auto Center v. Allstate Insurance Co.* ruled in favor of an insurer seeking to enforce its AAC.[248] The suit arose after Fran & John's Doylestown Auto Center repaired vehicles belonging to Allstate insureds.[249] Allstate's policies contained an AAC.[250] Before repairing the vehicles, Fran & John's requested that each insured execute an "Assignment" document.[251] By doing so, the insureds assigned their policy rights to Fran & John's without Allstate's consent.[252]

Allstate's adjustor prepared an estimate for each damaged vehicle and issued checks in the amount of its estimates.[253] Fran & John's, still repairing the vehicles, later requested from Allstate supplemental sums the shop claimed were necessary to complete the repairs.[254] Following failed negotiations with Allstate's adjustor, Fran & John's sued to recover the difference between the conflicting estimates.[255]

Rather than challenging the post-loss validity of the policies' AAC, Fran & John's argued that the assignments did not violate the AAC because they transferred only the insureds' *right to payment* under the policies, not the policies themselves.[256] The court rejected the distinction, citing the Pennsylvania Supreme Court's traditional definition of "assignment" as the transfer of "whole interest[s]," not singular rights and isolated claims.[257] The court concluded by enforcing the AAC's

246. *See id.* at 641–42.

247. *See High-Tech-Enters.*, 635 A.2d at 643.

248. *See* Fran & John's Doylestown Auto Ctr. v. Allstate Ins. Co., 638 A.2d 1023, 1024 (Pa. Super. Ct. 1994).

249. *See id.*

250. *See id.* at 1025 ("This policy can't be transferred to another person without our written consent . . . .").

251. *See id.* at 1024. The assignment conveyed to Fran & John's "any and all claims, rights, actions, and causes of action which [the insureds] may have against Allstate Insurance Company." *Id.* at 1025.

252. *See id.* at 1027.

253. *See id.* at 1024.

254. *See id.*

255. *See id.*

256. *See id.* 1025 ("[A]ppellant attempts to argue that a distinction exists between the assignment of a contractual right to receive payment for repair of damage to a covered automobile and the transfer of the policy, itself."). Thus, Fran & John's' argument essentially mirrored the policy/claim distinction relied on in Pennsylvania's majority-rule cases, discussed above. *See supra* Sections II.C, II.D.1.

257. *See Fran & John's*, 638 A.2d at 1025 (quoting *In re* Purman's Estate, 56 A.2d 86, 88 (Pa. 1948)).

unambiguous language, which prohibited *any* assignment without Allstate's consent.[258] Fran & John's argument, the Court concluded, amounted to "semantical gamesmanship."[259]

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In sum, each expression of Pennsylvania's majority-rule rationale has taken one or more of three forms: (1) strictly adhering to a bright line rule prohibiting post-loss AAC enforcement;[260] (2) considering the intent of AACs;[261] or (3) differentiating between (pre-loss) policy assignments and (post-loss) claim assignments.[262] In contrast, Pennsylvania's minority enforces the unambiguous language of AACs where contractor-assignees can write the bill *and* sue to collect the check.[263] At bottom, the question is whether a one-size-fits-all rule should govern every instance of post-loss assignment.[264] Part III answers that question in the negative and argues that a more nuanced approach is warranted.

III. ANALYSIS

Insurance policies are contracts at their core and must adhere to the basic principles of contract law.[265] But insurance policies are also governed by additional rules that protect insurance's role as a social safety net and the relatively powerless consumers that avail themselves of it.[266] Basic principles and special rules collide where courts in Pennsylvania and across the nation split over whether courts may enforce AACs post-loss.[267] The majority of courts refuse to enforce AACs post-loss, citing the axiom of free assignability and arguing that AACs serve no purpose post-loss because nothing can increase an insurer's risk once loss has occurred.[268] The minority of courts recognize AACs as an appropriate exercise of contractual agreement and enforce them post-loss.[269]

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258. *See id.* at 1025.

259. *Id.* at 1026.

260. *See, e.g.*, Nat'l Mem'l Servs., Inc. v. Metro. Life Ins. Co., 48 A.2d 143, 144 (Pa. Super. Ct. 1946), *aff'd per curiam*, 49 A.2d 382 (Pa. 1946); *see infra* Section II.D.1.

261. *See, e.g.*, Ins. Adjustment Bureau, Inc. v. Allstate Ins. Co., 905 A.2d 462, 470 (Pa. 2006).

262. *See* Egger v. Gulf Ins. Co., 903 A.2d 1219, 1228–29 (Pa. 2006).

263. *See, e.g.*, *Fran & John's*, 638 A.2d at 1025.

264. *See infra* Part III.

265. *See supra* Section II.A.

266. *See supra* Section II.B.

267. *See supra* Sections II.C–D.

268. *See* Egger v. Gulf Ins. Co., 903 A.2d 1219, 1224 (Pa. 2006); *see also supra* Section II.C.

269. *See* Fluor Corp. v. Superior Court, 354 P.3d 302, 327 n.46 (Cal. 2015) (collecting cases); *supra* Section II.C.

Pennsylvania is a microcosm of the nationwide split, with the Pennsylvania Supreme Court embracing a majority view and the Pennsylvania Superior Court breaking from that guidance in 1993 and 1994.[270] However, as an initial matter, Pennsylvania's majority-rule reasoning is woefully inconsistent, allowing post-loss assignment as a rule but then contemplating post-loss AAC enforcement if the AAC is drafted unambiguously.[271] *High-Tech-Enterprises* and *Fran & John's*, on the other hand, offer a brief moment of clarity amid the fray.[272] These two Pennsylvania Superior Court cases, rather than impetuously departing from majority-rule law, demonstrate that an inconsistent body of law should not bind factually differentiable cases that actually support the majority rule's underlying goals.[273]

Pennsylvania courts should enforce AACs post-loss because claim inflation by self-interested contractor-assignees leads to unaccounted-for, increased risk for insurers and, consequently, higher costs for policyholders. Far from blind adherence to contractual language where such adherence could be harmful to the policyholder, the minority rule effectively balances the concerns of those who emphasize the unique role insurance contracts play in our society with the rigorous doctrinal view of those who seek to enforce insurance policies under laws of conventional contract interpretation.[274]

Pennsylvania courts should apply the minority rule in contractor-assignee cases because (1) Pennsylvania case law supporting the majority rule is inconsistent;[275] (2) Pennsylvania cases supporting the majority rule are factually differentiable from contractor-assignee cases;[276] and (3) enforcing AACs post-loss in contractor-assignee situations is, in fact, consistent with the majority's underlying rationale.[277] Where assignees have both the ability to inflate claims and the right to sue the insurer, courts must enforce AACs post-loss.

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270. *See, e.g.*, *Egger*, 903 A.2d at 1228–29; *see supra* Section II.D. *But see, e.g.*, High-Tech-Enters. v. Gen. Accident Ins. Co., 635 A.2d 639, 643 (Pa. Super. Ct. 1993).

271. *See, e.g.*, Nat'l Mem'l Servs., Inc. v. Metro. Life Ins. Co., 48 A.2d 143, 144 (Pa. Super. Ct. 1946), *aff'd per curiam*, 49 A.2d 382 (Pa. 1946); *see infra* Section III.A.

272. *See* Fran & John's Doylestown Auto Ctr. v. Allstate Ins. Co., 638 A.2d 1023, 1025 (Pa. Super. Ct. 1994); *Egger*, 903 A.2d at 1228–29.

273. *See supra* Section II.D.2.

274. *See supra* Section II.C.

275. *See infra* Section III.A.

276. *See infra* Section III.B.

277. *See infra* Section III.C.

A. Pennsylvania's Majority-Rule Reasoning Is Inconsistent

Pennsylvania courts purportedly toe the majority-rule line but diverge in two respects.[278] The rule that AACs are not enforced post-loss was expressed in *National Memorial*,[279] championed in *Egger*,[280] and vaguely acknowledged in *Insurance Adjustment Bureau*.[281] These cases demonstrate that the Pennsylvania Supreme Court is inconsistent on the post-loss assignment issue, stating a bright-line rule in one case[282] and relying on drafter intent in another.[283] Furthermore, much of the majority's reasoning rests on a distinction between the assignment of *policies* and *claims* that is foreign to the Pennsylvania Supreme Court's own definition of assignment.[284]

First, the issue of post-loss assignment in Pennsylvania should be recognized as it was by the Pennsylvania Superior Court in *Egger*: unsettled.[285] For example, the Pennsylvania Supreme Court in *Insurance Adjustment Bureau* refused to enforce an AAC because the clause was not evidently intended to prohibit post-loss assignments, citing *National Memorial* for its conclusion.[286] Indeed, the court in *National Memorial* noted that the AAC in that case could have included "clear and unambiguous" or "plain and specific" language specifically prohibiting post-loss assignments of claims.[287] However, in *Egger* and elsewhere,[288] courts follow *National Memorial* for its bright-line rule that AACs are unenforceable post-loss, without exception.[289] These inconsistencies

278. *See supra* Section II.D.

279. *See* Nat'l Mem'l Servs., Inc. v. Metro. Life Ins. Co., 48 A.2d 143, 144 (Pa. Super. Ct. 1946) (holding that an AAC could not be enforced post-loss, once the insured's right to payment was "fixed and vested"), *aff'd per curiam*, 49 A.2d 382 (Pa. 1946).

280. *See* Egger v. Gulf Ins. Co., 903 A.2d 1219, 1229 (Pa. 2006) (holding that an AAC could not be enforced post-loss, when an insurer's risk could not be increased); *supra* Section II.D.

281. *See* Ins. Adjustment Bureau, Inc. v. Allstate Ins. Co., 905 A.2d 462, 470 (Pa. 2006) (citing *Nat'l Mem'l* to support a textual, *intent-based* AAC analysis).

282. *See Nat'l Mem'l*, 48 A.2d at 144.

283. *See Ins. Adjustment Bureau*, 905 A.2d at 470.

284. *See Egger*, 903 A.2d at 1224.

285. *See* Egger v. Gulf Ins. Co., 864 A.2d 1234, 1238 (Pa. Super. Ct. 2004) ("Pennsylvania law is anything but 'well settled' on the issue . . . [of] 'the validity of non-assignment clauses after a loss has occurred.'") (first quoting Brief for Appellant at 24; and then quoting Ins. Adjustment Bureau, Inc., v. Allstate Ins. Co., 860 A.2d 1038, 1042 n.1 (Pa. Super. Ct. 2004)), *aff'd* 903 A.2d 1219 (Pa. 2006).

286. *See Ins. Adjustment Bureau*, 905 A.2d at 470.

287. *See Nat'l Mem'l*, 48 A.2d at 144.

288. *See Egger*, 903 A.2d at 1226–27 (collecting cases).

289. *See* CGU Life Ins. Co. of Am. v. Metro. Mortg. & Secs. Co., 131 F. Supp. 2d 670, 678 (E.D. Pa. 2001) (noting that Pennsylvania courts "scrutinize" the language and intent of AACs, but offering no Pennsylvania insurance cases where a court "scrutinize[d]" an AAC and thereafter enforced it post-loss).

indicate that the Pennsylvania majority contemplates a minority-rule offramp but is unwilling to let it materialize.

Thus, while *Fran & John's* and *High-Tech-Enterprises* appear to flout precedent,[290] neither case contravenes a coherent body of law.[291] Indeed, these Superior Court cases are consistent with the Pennsylvania Supreme Court's own occasional nods to drafter intent and unambiguous contract provisions.[292] Simply stated, *Fran & John's* and *High-Tech-Enterprises* illustrate the proper application of a much-needed minority rule in cases where assignees may take advantage of the majority rule's unjustifiably broad prohibition of post-loss AAC enforcement.[293]

Second, the Pennsylvania Supreme Court is inconsistent on a technical level. The court has justified the majority rule by differentiating between assignments of claims and assignments of policies, as if to create a new legal distinction.[294] The court has done so by describing post-loss assignments as assignments of mere "money claim[s],"[295] "benefits,"[296] or "fixed and vested right[s]"[297] rather than assignments of whole policies. Whole-policy assignments would involve shifting policies between individuals with different risk classifications.[298] And while it is true that post-loss assignments generally involve transferring only the right to collect a vested payment right, the Pennsylvania Supreme Court's traditional definition of assignment does not distinguish between assigning whole policies on the one hand and policy rights

290. *See Egger*, 903 A.2d at 1223 (noting that *Fran & John's* and *High-Tech-Enters.* did not consider the holding in *Nat'l Mem'l*).

291. *See infra* Section II.C.1.

292. *Compare, e.g.*, High-Tech-Enters. v. Gen. Accident Ins. Co., 635 A.2d 639, 641 (Pa. Super. Ct. 1993) ("The non-assignment language of the insurance policy is clear and unambiguous, and therefore must be applied here."), *with Nat'l Mem'l*, 48 A.2d at 144 ("If the company had intended to thus restrict assignments, the language is not as clear and unambiguous as it should be. That purpose could have been readily expressed in plain and specific language.").

293. *See supra* note 20 (recounting Florida's growing problem of assignment-of-benefits abuse).

294. *See* Ins. Adjustment Bureau, Inc. v. Allstate Ins. Co., 905 A.2d 462, 470 (Pa. 2006); *Egger*, 903 A.2d at 1224; Nat'l Mem'l Servs., Inc. v. Metro. Life Ins. Co., 48 A.2d 143, 144 (Pa. Super. Ct. 1946), *aff'd per curiam*, 49 A.2d 382 (Pa. 1946).

295. *See Egger*, 903 A.2d at 1224 ("The logic behind the general rule is that post-loss assignments do not invalidate the policy, thereby changing the risks the insurer undertook to insure; rather, they assign the right to a money claim.").

296. *See Ins. Adjustment Bureau*, 905 A.2d at 470 ("[A] threshold question . . . is whether this non-transfer provision was . . . additionally intended to exclude an assignment of insurance benefits after a loss.").

297. *See Nat'l Mem'l*, 48 A.2d at 144 ("After a loss has occurred, the right of the insured or his successor in interest to the indemnity provided in the policy becomes a fixed and vested right.").

298. *See infra* Section III.C.

piecemeal on the other.[299] But even if the majority's rationale were consistent, its bright-line rule fails under different facts.

B. Pennsylvania's Majority-Rule Cases Are Factually Differentiable from the Minority-Rule Cases

Pennsylvania's majority-rule cases differ factually in significant ways that should preclude them from binding contractor-assignee cases. While analogizing is a fundamental method of legal analysis, the validity of an analogy rests on the existence of common characteristics between the facts or principles in both cases that are relevant to the disputed legal issue.[300] Assuming for the sake of argument that Pennsylvania's majority-rule cases are a consistent body of law,[301] they are nonetheless factually differentiable from cases involving contractor-assignees.[302]

Anti-assignment clauses should not be tossed aside when an insurer's liability remains fluid and subject to an assignee's influence.[303] This analysis focuses on situations where a policyholder assigns to another the right to recover under his policy, where the assignee has the incentive and ability to influence the recovery, and where the insurance policy contains an AAC.[304] Review of the precedent cases reveals a disconnect: *National Memorial*, *Egger*, and *Insurance Adjustment Bureau* are not factually similar enough to address contractor-assignee situations.[305]

The type of insurance at play in each of the discussed cases differs in significant ways and influences the courts' reasoning, even if implicitly. *National Memorial* concerned life insurance policies, for which benefits are predetermined and later disbursed upon the death of the insured.[306] Crucial to *National Memorial*'s reasoning, later relied on

299. *See* Fran & John's Doylestown Auto Ctr., Inc. v. Allstate Ins. Co., 638 A.2d 1023, 1025 (Pa. Super. Ct. 1994) (quoting *In re* Purman's Estate, 56 A.2d 86, 88 (Pa. 1948) (specifically rejecting the policy/claim distinction and noting that, unless qualified, assignment is "properly the transfer of one *whole interest* in an estate, chattel or other thing" (emphasis added))).

300. *See* Grant Lamond, *Precedent and Analogy in Legal Reasoning*, STAN. ENCYC. OF PHIL. (June 20, 2006), https://stanford.io/320Kmdo ("Two doctrines or sets of facts are not analogous in the abstract, but in the context of a legal issue.").

301. *But see supra* Section III.A.

302. *See Fran & John's*, 638 A.2d at 1025 (enforcing an AAC where a repair shop-assignee sought to recover unpaid repair costs from an insurer); High-Tech-Enters. v. Gen. Accident Ins. Co., 635 A.2d 639, 641–42 (Pa. Super. Ct. 1993) (same).

303. *See High-Tech-Enters.*, 635 A.2d at 641; *supra* Section II.D.2.

304. See *supra* Part I, Section II.D.2.

305. *See supra* Section II.D.

306. *See* Nat'l Mem'l Servs., Inc. v. Metro. Life Ins. Co., 48 A.2d 143, 144 (Pa. Super. Ct. 1946), *aff'd per curiam*, 49 A.2d 382 (Pa. 1946).

in *Egger*,[307] was the needlessness of AACs after the insured's *right* to recover and the insurer's *obligation* to pay become "fixed and vested."[308]

Fran & John's and *High-Tech-Enterprises*, on the other hand, dealt with assignments where the insurers' obligations varied with the assignee-repair shops' estimates.[309] So while the court in *National Memorial* placed great emphasis on a loss's triggering "fixed" rights and obligations, its rule does not translate as well to situations in which the policyholder's right to recover is fixed but the extent of the insurer's actual obligation is subject to an assignee's arbitrary adjustment.[310]

This proposition is firmly planted in traditional free-assignability, the principle that limits assignment that materially alters the obligor's duty or increases the obligor's original risk.[311] A post-loss assignment may not be shifting policy coverage to a different risk classification, but an assignee with the ability and incentive to manipulate claims by inflating the recovery would have the same effect.[312] Applying the minority rule in situations where the insurer's risk remains essentially fluid and subject to the assignee's influence better comports with well-established contract-law principles.[313] The minority rule would also protect policyholders from increased premiums and ensure that insurers endure as an important societal institution.[314]

C. Post-Loss AAC Enforcement Comports with the Pennsylvania Supreme Court's Majority-Rule Reasoning

Finally, applying the minority rule in contractor-assignee situations aligns with the majority rule's underlying rationale. The majority and minority rules share a common principle: AACs should protect insurers, and courts should forbid assignments that would increase the insurer's risk.[315] The majority and minority also agree that courts must enforce AACs to bar pre-loss assignments, which involve the shifting of

307. The insurer in *Egger* argued that "loss" did not occur until the jury awarded exact damages in an amount exceeding the insured's primary insurance coverage. *See* Egger v. Gulf Ins. Co., 903 A.2d 1219, 1225 (Pa. 2006). The court, however, considered the triggering of the insured's right to recover sufficient to constitute loss. *See Egger*, 903 A.2d at 1229; *infra* Section III.C.

308. *See Nat'l Mem'l*, 48 A.2d at 144.

309. *See supra* Section II.D.

310. *See, e.g.*, Fran & John's Doylestown Auto Ctr., Inc. v. Allstate Ins. Co., 638 A.2d 1023, 1024 (Pa. Super. Ct. 1994); High-Tech-Enters. v. Gen. Accident Ins. Co., 635 A.2d 639, 641 (Pa. Super. Ct. 1993).

311. *See supra* Section II.A.3.

312. *See supra* note 20.

313. *See infra* Section III.C.

314. *See infra* Section III.C; *see also supra* note 20.

315. *See Egger v. Gulf Ins. Co.*, 903 A.2d 1219, 1229 (Pa. 2006); *see also High-Tech-Enters.*, 635 A.2d at 641–42.

contractual relationships between insurers and policyholders in different risk classifications.[316]

But despite its general refusal to enforce AACs post-loss, the Pennsylvania Supreme Court has acknowledged the strongest practical argument *in favor of* post-loss AAC enforcement: the very real possibility of post-loss risk increase.[317] The court in *Egger* supported its decision to uphold an otherwise AAC-barred assignment of life insurance benefits because the insurer's "risk was not increased following assignment."[318] This reasoning indicates that the Pennsylvania Supreme Court recognizes that risk may sometimes be increased by a post-loss assignment but is simultaneously unwilling to clarify under what circumstances.[319] Instead, the court should hearken back to the well-established limits on free-assignability[320] and apply the minority rule when insurer risk is increased post-loss.

Further, the court's conclusion in *Egger* that the pending damages verdict did not increase the insurer's risk acknowledges that post-loss risk varies depending on who influences the insurer's obligation, and how.[321] Assignment changes the identity of the policyholder but bestows no greater rights under the policy.[322] Yet, where a contractor-assignee augments the right to recover through self-interested claim inflation,[323] the contractor is no longer a neutral post-loss collector—or, like the jury in *Egger*, an impartial arbiter—for he materially alters the insurer's obligation.[324] If the assignee is anything more than a passive recipient,

316. *See* 2 STEVEN PLITT ET AL., *supra* note 27, § 34.2; *see also* CHRISTOPHER C. FRENCH ET AL., INSURANCE LAW AND PRACTICE: CASES, MATERIALS, AND EXERCISES 2 (2018) ("[[I]nsurers can and do] use claims data and risk classifications to charge different premium rates to the people in the various risk classifications or refuse to insure certain people or risks they deem unprofitable or inadequately profitable." (outermost brackets in the original)); *id.* at 7–8 (explaining the practice of classifying insureds according to characteristics that correlate with "more or less claims of more or less severity").

317. *See Egger*, 903 A.2d at 1229.

318. *See id.*

319. *See id.*

320. *See* MURRAY & HOGUE, *supra* note 58, § 49.01 ("[C]ontract rights are assignable unless the assignment would . . . materially increase the risk the obligor undertook when the contract was formed.").

321. *See Egger*, 903 A.2d at 1228–29.

322. *See* Hedlund Mfg. Co. v. Weiser, 539 A.2d 357, 358 (Pa. 1988).

323. *See* Jay M. Levin, *Public Adjusters: Do Their Contracts Create Irrevocable, Enforceable Assignments?*, IRMI EXPERT COMMENTARY (Sept. 2006), https://bit.ly/35yfnW1.

324. The sum of recovery in *Egger* was fluid, but subject to a jury's—not the assignee's—determination, so the majority rule was appropriate in Egger as a mere-right-to-collect case. *See Egger*, 903 A.2d at 1228.

the old maxim that a post-loss assignment cannot increase an insurer's risk—the crux of the majority's reasoning—is rendered absurd.[325]

Insurer risk is not increased only by formally transferring policies to riskier individuals.[326] Assignees with the right incentives, legal authorization, and industry expertise can transform "fixed" claims into blank checks.[327] An insurer may indeed anticipate the general risk that policyholders will need to draw uncertain sums from the account,[328] but artificially inflated claims and legal fees incurred in contesting them will eventually rise far beyond an insurer's reasonably anticipated costs, which influences whom the insurer will insure and for how much.[329]

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The Pennsylvania Supreme Court's AAC jurisprudence is inconsistent both in its reasoning and its characterization of assignment.[330] Further, the majority-rule cases differ factually in significant ways that should preclude them from binding cases involving contractor-assignees.[331] Finally, enforcing AACs post-loss in contractor-assignee situations would be consistent with the Pennsylvania Supreme Court's current justification for *not* enforcing AACs post-loss in other situations: to protect the insurer from unexpected risk.[332] Adopting the minority rule to protect insurers from contractor-assignees would be more coherent than Pennsylvania's current half-in, half-out posture on the issue.[333] In the final analysis, the majority forces a one-size-fits-all prohibition on an important contractual tool well-suited for preventing just the kind of harm the majority claims to appreciate.[334]

IV. CONCLUSION

Insurers include anti-assignment clauses ("AACs") in their policies to avoid unaccounted-for risk resulting from the transfer of policy rights to unvetted third parties.[335] Such risk can arise when policyholders assign their policy rights to contractors who have both an incentive to inflate claims and the right sue for payment of those claims.[336] But Pennsylvania

325. *See supra* note 20; *see also supra* Section II.C.
326. *See supra* note 20.
327. *See supra* note 20.
328. *See Egger*, 903 A.2d at 1228 (noting that the insurer's risk was that someday it would need to pay a claim).
329. *See* FRENCH ET AL., *supra* note 316.
330. *See supra* Section III.A.
331. *See supra* Section III.B.
332. *See supra* Section II.C.
333. *See supra* Section III.A.
334. *See supra* Section II.C.
335. *See supra* Part I; Section II.A.3.
336. *See supra* Part I.

courts are split on whether AACs are enforceable post-loss.[337] The Pennsylvania Supreme Court, upholding the majority rule, refuses to enforce AACs post-loss for two broad reasons: (1) post-loss assignments merely transfer money claims and cannot increase an insurer's risk;[338] and (2) post-loss AAC enforcement subjugates the policyholder-creditor's property rights to the insurer-debtor.[339] The Pennsylvania Superior Court, expressing the minority rule, has enforced AACs post-loss, recognizing them as a valid exercise of contractual agreement.[340] The majority rule, however, fails to account for the contractor-assignee problem, and the minority rule should govern such assignments.[341]

First, the Pennsylvania majority is inconsistent in its reasoning, asserting a bright-line rule nullifying AACs post-loss, but then conceding that AACs might just need to be more explicit.[342] The majority also eschews its own definition of assignment by theorizing that policy rights can be assigned piecemeal, apart from the policy proper.[343] Second, majority-rule cases differ factually in significant ways that dilute their applicability to and should preclude them from binding contractor-assignee cases.[344] Last, enforcing AACs in contractor-assignee situations aligns with the majority's overarching goal of protecting insurers from unaccounted-for risk.[345] Therefore, Pennsylvania courts should enforce AACs post-loss when assignees have the capacity and incentive to alter insurers' policy obligations.[346]

337. *See supra* Section II.C.
338. *See supra* Section II.C.
339. *See supra* Section II.C.
340. *See supra* Section II.C.
341. *See supra* Part I.
342. *See supra* notes 287–88 and accompanying text.
343. *See supra* note 201 and accompanying text (describing the Pennsylvania Supreme Court's discussion of an AAC's intent in *Nat'l Mem'l Servs., Inc. v. Metro. Life Ins. Co.*); *supra* notes 230–32 and accompanying text (describing the Pennsylvania Supreme Court's discussion of an AAC's intent in *Insurance Adjustment Bureau, Inc. v. Allstate Insurance Co.*).
344. *See supra* Section III.B.
345. *See supra* Section III.C.
346. *See supra* Part III.