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SYNOPSIS

THE PRESENCE OF INSURANCE AND THE LEGAL ALLOCATION OF RISK

James M. Fischer

Do courts take into consideration the presence and availability of insurance in individual case disposition, and, if so, is such consideration proper? This is the question explored in Professor Fischer's survey of American case law. This Article examines the modern judicial trend of matching liability with the party who can most efficiently absorb the loss as opposed to the party who created the risk of loss. Professor Fischer analyzes a variety of mechanisms through which courts match liability for loss with the insured party. He argues that the presence of insurance influences case specific risk allocation decisions by courts and considers whether this approach is sound public policy. Professor Fischer then offers guidelines to lead decision makers toward justifiable resolutions of disputes where risk and insurance are not in alignment.

FRAUD AND THE INCONTESTABLE CLAUSE: A MODEST PROPOSAL FOR CHANGE

Robert R. Googins

The incontestable clause in life and health insurance contracts has consistently been interpreted by courts as a bar to insurers' defenses based on material misrepresentations in the insurance application, even if the insured committed fraud in the application process. The Article reviews the case of *Paul Revere Life Insurance Co. v. Haas*, which overturned this long-standing interpretation of the incontestable clause, along with its ancestors and progeny, and discusses arguments frequently made in support of the applicability of incontestable clauses with respect to the fraudulent procurement of policies. Notwithstanding the cases that support the application of the incontestable clause regardless of the

insured's fraud, Professor Googins reviews the available equitable judicial tools that can help quell fraud in the application of insurance without detracting from the principal role of the incontestable clause—protecting insureds. In light of the increasing awareness of the fraud problem in today's society, Professor Googins concludes that the Supreme Court of New Jersey made the right decision and that instances of fraud should not routinely be shielded by the incontestable clause in life and health insurance contracts, even though the incontestable period has run.

THE INTERACTION OF THE TORT SYSTEM AND LIABILITY INSURANCE REGULATION:
UNDERSTANDING MORAL HAZARD

Seth J. Chandler

The tort law system and the insurance regulatory system constantly interact to determine welfare of injurers and victims in society. The tort system attempts to deter injurers from engaging in behavior that will result in accidents, inflicting injuries on innocent victims. Injurers may purchase insurance to cover their liabilities in the event of an accident, effectively spreading cost of compensating their victims. Moral hazard is the tendency of parties that have purchased insurance to behave in a riskier fashion than they did before. Control of moral hazard is necessary to prevent an insurance regulatory system from dissipating any deterrent force that the tort system possesses. In this Article, Professor Chandler uses an innovative mathematical technique known as "simulated annealing" to study the interaction of liability insurance regulation and tort systems. Numeric optimization theory is used to analyze the behavior of "rational" human beings under representative systems of tort law. In a series of computer-aided thought experiments, Professor Chandler explores the possibilities of regulatory intervention in the liability insurance market that will most effectively compensate for deficiencies in the tort system. On the basis of the results of these experiments, Professor Chandler suggests specific factors that should be considered by courts and legislators when regulating liability insurance within the tort system.