

LAW AND CONTEMPORARY PROBLEMS

VOLUME 15

SUMMER, 1950

NUMBER 3

FOREWORD

More than one response to our inquiries for advice in planning this series of insurance issues contained an inquiry in return: What has happened in insurance so startling as to bring on this spotlight? It has been six years since *South-Eastern Underwriters*¹ was decided and two since the McCarran Act² "moratorium" expired. No event of comparable earth-shaking proportions has rocked the insurance world within those six years; no planning or re-ordering effort comparable to the drafting and enacting of state legislation during the moratorium period now appears on the horizon. What do you have in mind?

The very absence of such visible milestones, either before or immediately behind us, is at least part of the answer. We do not stand still between milestones. *SEUA* and the McCarran Act seem now to have receded far enough to be viewed in perspective; at least the authors of our next succeeding symposium, "Regulation of Insurance" (Autumn, 1950), have undertaken to try so to view it. Meanwhile, other facets of insurance have rocked along at a seemingly more even pace, and they promise to continue to move. The business of making insurance really insure has moved forward on many fronts; nor is it finished yet. Ideas, coverages, uses of insurance, and understanding on the part of those who provide it and those who use it have grown; legal concepts, rules and regulations applicable to insurance are in process of modification; consequences upon other aspects of our social economy have appeared or broadened. The thinker in statistics will register just one manifestation of such development by noting that insurance salesmen, inflation, and the medical profession have joined to double the assets held by life insurance companies in a period of ten years.³ (More of this and related phenomena will be reserved for a still later issue, "Institutional Investment," tentatively planned for 1951.)

The present issue is devoted to this "rocking-along" movement. It is here that unspectacular changes add up to an impressive total of developments, affecting the

¹ *United States v. South-Eastern Underwriters Ass'n*, 322 U. S. 533 (1944).

² 59 STAT. 33 (1945), as amended, 61 STAT. 448 (1947), 15 U. S. C. §§1011-1015 (Supp. 1949).

³ See, e.g., JOINT COMMITTEE ON THE ECONOMIC REPORT, FACTORS AFFECTING VOLUME AND STABILITY OF PRIVATE INVESTMENT (Committee Print), 81st Cong., 1st Sess. 235 (1949); JOINT COMMITTEE ON THE ECONOMIC REPORT, REPORT OF THE SUBCOMMITTEE ON INVESTMENT, VOLUME AND STABILITY OF PRIVATE INVESTMENT, SEN. DOC. NO. 149, 81st Cong., 2d Sess. 12 (1950).

individual or business buyer of insurance far more immediately than the *SEUA* explosion ever could. Here the lawyer who is not an insurance attorney meets these developments in advising clients in business and personal transactions, in claims matters, and in occasional litigation. (Two of our contributors remark on the small extent to which lawyers, in the past, have advised insurance buyers when entering into transactions which are at least as complicated as the usual, lawyer-navigated land transaction, will, or business association agreement. Greater, and better-informed, lawyer participation in the future is promised by the discovery, Professor Fahr notes, that some of those services can amount to quite profitable law business.) Here the scholar, the legislator, and the voting citizen will observe the impact of insurance developments upon law and the social order, and assess the adequacy of these developments to keep pace with felt needs.

Professors Fahr and Wilson demonstrate the responsiveness of the insurers, and the adaptability of the insurance device, to current needs. The recent extensions in the use of life insurance (and annuity) contracts—certainly not new in idea or design—to implement numerous business purchase agreements and employee pension plans, adequately indicate that neither the business nor the law of insurance has remained static. Both articles underscore an observation that the adaptation of the ordinarily “ready-to-wear” insurance contract to such uses requires a careful job of “custom tailoring.”

The public's most general impressions of the insurance business arise from two contacts: one at the time of buying and the other at the time for claims. That there should be a high degree of correspondence between the two impressions—between the protection one thinks he is buying and the protection one later discovers he got—may be the insurer's most important public relations task.⁴ In any event, it is the public's most reasonable demand. Professor Hedges provides an excellent and broad picture of the progress that has been made by the property and casualty insurers in bringing about increasingly greater correspondence between protection bought and protection obtained—and between both of these and protection needed. He also points to several significant gaps that still remain.

But another, and an intensely interesting, side of this problem of correlation lies wholly within the lawyer's traditional domain. Professor Schultz's observations on the special nature of the insurance contract indicate that the ordinary buyer's naïveté about policy terms and their legal consequences has long received *some* tacit judicial recognition tending to award him the reality of what he bought. But the way lies open for more explicit recognition of the special insurance bargain, so as to take the matter out of the fortuitousness of litigational advocacy based upon chance, or even forced, “ambiguities.” Mr. Harnett takes up an area of insurance law—concealment—in which a historic departure from *ordinary* rules of contract law has produced traps for the unwary and rendered the insurance bargain less secure.

⁴ Consider Davis, *What Is Your Fire Insurance Policy Worth? The Evils of the Standard Insurance Form*, 36 A. B. A. J. 275 (1950).

A third legal area, in which insurance esoterics may leave gaps in the desired correlation between the bargain and the "protection," concerns recoveries by owners of less than the whole interest in particular property—mortgagors and mortgagees, vendors and purchasers, landlords and tenants, bailors and bailees. Professor Godfrey inquires whether the recoveries by these owners may be limited because of their limited ownership, whether what they recover will inure to the benefit of their co-owning opposite numbers, and whether multiple recoveries exceeding the whole value of the property insured may result.

The closely similar, but distinct, legal problem of insurable interest in property was omitted from the discussion because of its thorough treatment elsewhere by two of our present contributors.⁵

Drawing upon the notable work which Professor James has already done in the field of accident compensation,⁶ Mr. Thornton and he discuss the impact of insurance on the law of torts. Our curious compound of doctrines of liability based upon fault and the device of liability insurance perform a function which might have been, and in the field of industrial accidents frequently is, performed by a system of social insurance. The admixture of the two elements of this compound has produced interesting results upon each, though they have been perhaps less dramatic on the tort liability side, and certainly inadequate to remedy the defects which the authors find still remaining. Professor Ehrenzweig proposes a novel doctrine for the tort liability side arising out of the insurance element in the compound. His article, addressed both to the civilians and the common lawyers, draws upon a principle of liability without fault which has a limited applicability in civil law systems, suggests extensions (and appropriate limitations) based upon the availability of insurance, and presents indications that the common law is already anticipating this development in particular instances.

Professor Gardner's approach to the cosmology of the law invites the interest of every lawyer willing to back off and contemplate from a distance the nature of things legal. Phenomena which are "familiar not only to lawyers but to all sorts of persons occupied with the world's work" have made entirely too little impression upon the traditional, curriculum-indorsed division of the bases for legal liability into contract and tort. Restating these phenomena to the moulders of law school curricula in their own (that is, the lawyer's) language, Professor Gardner then proposes revisions in legal theory which are necessary groundwork for practical solutions to some very puzzling, practical problems.

The three contributions in the insurance and tort liability field point up the significance of the first word in the title of this symposium, "Private Insurance."

⁵ Harnett and Thornton, *Insurable Interest in Property: A Socio-Economic Reevaluation of a Legal Concept*, 48 COL. L. REV. 1162 (1948).

⁶ See, e.g., James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L. J. 549 (1948); James, *Accident Liability: Some Wartime Developments*, 55 YALE L. J. 365 (1946); James and Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769 (1950). See also HARRY SHULMAN AND FLEMING JAMES, JR., *CASES AND MATERIALS ON THE LAW OF TORTS* 604-729 (1942).

There is a singleness in the compensation function performed by the compound of tort law and liability insurance that can be defeated by their diverse backgrounds and, in any event, demands the correction of the demonstrable inadequacies touched on by the authors. That the substitution of a social insurance program, modeled on workmen's compensation experience, is a distinct possibility, Professor James and Mr. Thornton will not let us forget.⁷ That there are unexplored possibilities in the present compound, all four authors demonstrate.

But the issue of accident compensation does not stand alone. Social risk-bearing in many forms has, during the past two decades, entered the field where private means might have been left to supply the need: national service life insurance, social security, RFC lending, the Federal Tort Claims Act, crop and mortgage insurance illustrate. Pressures for extension of social insurance into new fields—notably, medical and hospital care—are part of the current picture. The pressures suggest that there is at least relationship between the business of dealing with present inadequacies in private insurance and these extensions of social risk bearing. This symposium is not a survey of the entire risk-bearing field (it does not, of course, even purport to be an exhaustive survey of currently significant private insurance developments); but our authors record, and have themselves made, significant contributions to the urgent problems of private insurance. In doing so, what they write is a real part of the larger picture.

JOHN DEJ. PEMBERTON, Jr.

⁷ Compare Professor James's remarks elsewhere on the growth of social insurance in the unemployment and old age assistance field without corresponding growth in the accident liability field: "This fact may have been due in part to the greater ability and willingness of the courts to make so many more of the needed changes in this field than in providing for the vicissitudes of illness, old age, unemployment and the like." See James, *Accident Liability: Some Wartime Developments*, 55 *YALE L. J.* 365, 400 (1946).