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THE MISCEGENETIC UNION OF LIABILITY INSURANCE AND TORT PROCESS IN THE PERSONAL INJURY CLAIMS SYSTEM*

Allen E. Smith†

I

THE PERSONAL INJURY CLAIMS SYSTEM AND SOCIAL GOALS

Liability insurance is a pervasive fact of contemporary American life which increasingly has become associated with almost all our social ills. And we are kept aware of its existence and its problems by the constant coverage of the mass media. Although not proven definitely, it seems eminently safe to assume (1) that most people living in the United States think that if a person wants to insure against liability from risky conduct, he can do so, and (2) that most jurors, claimants' attorneys, and judges assume that the defendant in a given personal injury lawsuit is covered by insurance.¹ Put another way, our society assumes that most personal injury claims are paid or will

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¹ The following discussion is limited to consideration of the system which we have for dealing with claims for damages resulting from personal injuries. For the most part the principles of the tort process are the same for personal injury and property damage, but addition of the relationship of liability insurance makes treatment of the two kinds of claims somewhat different. Most of what is said here may apply as well to either kind of interest, but each deserves its own consideration and discussion. Nor does this discussion purport to cover the full range of sources of reparations, including Blue Cross-Blue Shield, cooperative group health plans, hospitalization and disability insurance, Social Security, military disability systems, medicare, welfare plans, or non-occupational and occupational disability systems, all of which surely are a part of the personal injury claims system in any realistic sense.
be paid by an insurance company. Even though few among us understand the liability insurance business, its goals, or its problems, when it happens that an insurance company does not pay, for whatever reason, our usual reaction is frustration and anger. In short, we have entrenched liability insurance firmly in our national attitude toward personal injury claims.

The relationship of liability insurance and the tort process is difficult to characterize in a pithy phrase. Biological metaphors spring to mind. Has the union produced a hybrid? Is it a symbiotic relationship? Or is insurance simply a harmful parasite? For reasons discussed more fully in the following pages, a “miscegenetic union”—like that of fish and fowl—incapable of producing social welfare as its offspring, seems most apt as a shorthand description.

When we consider the significance of the miscegenetic union for social life, we find that although lawyers and judges recognize the close relationship of liability insurance and the tort process, they have not considered and are not aware of the full implications of the relationship. If its importance is realized, it is not stressed; remarkably little has been written on the subject. It is common, even for those of us who know better, to continue to talk of “tort law” as if the process to which personal injury claims were subjected in the nineteenth century still were in effect. Our analysis of our claims system follows a bifurcated path. On the one hand we examine the tort process, and on the other we examine the liability insurance institution. When we consider proposals for reform in the one or the other we rarely ask how changes in the one will affect the other. The presumed “goals of tort law” are the standards by which we judge what happens to claims today.

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2 Unless a legislator is “himself an attorney or in the insurance business, he may find himself without even the most basic understanding of how the existing system works. And he is not alone . . . .” Dukakis, Legislators Look at Proposed Changes, in Crisis in Car Insurance 222, 230 (R. Keeton, J. O'Connell & J. McCord eds. 1968) [hereinafter the references to this collection of essays is cited as Crisis]. Currently a major insurer advertises on television that “all you need to know about insurance is the name of our company.”

3 This probably is the product of the traditional law school approach to the subject. Cf. T. Jison, The Forensic Lottery 214-15 (1967).

4 The Automobile Reparations Committee of the American Bar Association presently is studying automobile accident claims systems. Its study outline in connection with proposals for improvement of the “Present Total System” recognizes that liability insurance exists to the extent of providing a solvent defendant and recognizes the need for a few basic improvements in liability insurance, but the total relationship of tort process and insurance is on the whole ignored. Committee letter “To All Interested Parties, July 3, 1968 and Outline of Study.”
Most of us fail to recognize that liability insurance and the tort process have combined to produce a unique system, which for better or worse is greater than the sum of its parts. In practice the tort process and liability insurance function as a unit, and it is the unit, not its individual components, which we must examine and understand.

There are several important reasons for recognizing that it is not tort law alone that controls the disposition of personal injury claims. One of these is simply to be realistic with ourselves. Another reason is that an understanding of the existing tort process will help us to evaluate its progress in achieving "social goals." This understanding is essential if we want to do a good job of reform. It is particularly important for us to be sufficiently sensitive to discover whether some of the cherished assumptions of the tort process and of the insurance institution hold true under a combined system. For example, as we shall see, the assumption that a litigant can and will be represented by counsel who will give him his full fidelity and allegiance is not true of many insured defendants under the existing system. If many assumptions as important to us as the relationship of attorney and client are violated, we probably will want to consider some alterations in the system. Still another reason for keeping our systems straight is to recognize costs of all kinds. Operating the court system always is expensive for taxpayers and litigants; it also can be expensive to payers of insurance premiums. Ultimately, all of our society is concerned in some way, for many losses that are not shifted by the system frequently are shifted to others in more haphazard ways, such as public welfare costs, the costs of crime, lowered productivity, lowered consumption, and the other social effects that can grow out of un-


6 One question which might be raised is whether our claims system is even a "legal" one. The combination with liability insurance, which is motivated almost wholly by the desire for increased profits, may have converted the system, notwithstanding its use of rules, to a model of the laissez-faire market in which a bargaining process determines results.

7 Professor Kalven seems to miss the importance of the assumptions of our claims system when he suggests that the current controversy regarding problems of automobile accident reparations inappropriately mixes "a series of popular issues about auto insurance with what had been the traditional problems of tort law in the auto compensation area." Kalven, A Schema of Alternatives to the Present Auto Accident Tort System, 1 Conn. L. Rev. 33 (1968). To the extent that our system assumes that liability insurance is available to the public, the system necessarily is disrupted by the "popular issue" regarding cancellation and non-renewal of insurance. The mixture of issues is not the product of mental lapse but of the union of liability insurance and the tort process.
tended injury. Examination of the combined system also may reveal whether it is in fact possible that the two components are capable of achieving society's goals in combination. Perhaps neither component can survive the union in its traditional form, and if the union is to be preserved society may have to alter both.

It was suggested above that we tend to evaluate our claims system in light of what we consider the "goals of tort law." It is important for us to understand at the outset the part that social goals or objectives play in analyzing the claims system. By goals I mean calculated policy decisions that given results are socially desirable. When the policymaking process has produced goals, new systems presumably can be devised and old systems modified to achieve them. But if we have not decided on our goals, or if we simply do not know what they are, students of our claims system are relegated to mere observation of interesting facts, and evaluation is limited to registry of subjective approval or disapproval. In such circumstances, use of the term "goals" necessarily refers only to rationalizations of the existing system in terms of its observed effects. For example, if it should be observed that tort rules seem to deter dangerous conduct, it might be said that deterrence is a goal of tort law.8

Since claims systems usually are evaluated in relation to the way in which they achieve goals, the relevance of the distinction between the use of the term to signify policy objectives and its use to rationalize the status quo is apparent. It is particularly relevant because there has been so much confusion of policy and apology in use of the terms. For example, the "goals" of the liability insurance component of our system, in the sense of policy decisions, have been left almost entirely in private hands to be formulated for private interest. To those who operate the business, its only goal is to make money.9 Statements regarding other goals, such as "providing a solvent defendant," or "spreading losses," or "protecting the insured from liability," simply change to "goals" effects that it is thought insurance produces, or that it would be desirable if it produced.10 In fact,
however, our society has not yet adopted policy goals for liability insurance. Even if the mentioned effects were in fact our policy goals, they might be found to be mutually inconsistent with insurers' private goals of higher profits.\textsuperscript{11} It is interesting to speculate about what would happen to our claims system if action to effectuate deliberate policy goals should be taken and insurers should decide to withdraw from the field.

To the extent that the tort process has conscious policy goals,\textsuperscript{12} they are quasi-public, largely inarticulate (\textit{e.g.}, "compensation for harm"), and at times inconsistent.\textsuperscript{13} It would be disingenuous to suggest and naive to believe that many of the rules of the tort process were deliberately designed to achieve pre-determined social goals. Like all human creations, the rules have been created for a variety of reasons. For some rules there seemed at the time to be good reasons, reasons which may or may not now exist. Some were designed solely to protect the narrow interests of a few. Others were products of accident or irrationality. For the most part the history of tort rules in personal injury cases has been one of regression from the early strict liability law of trespass and trespass on the case, fashioned piece-meal by lobbyists in the courts. In short, like liability insurance, when the tort process has accomplished public good it has more often been its effect rather than its purpose.

One conclusion that might follow from recognition of the virtual absence from our claims system of conscious policy goals as statutory liability for industrial accidents . . . .” James, \textit{History of the Law Governing Recovery in Automobile Accident Cases}, 14 U. Fla. L. Rev. 321, 324 (1962). In fact, of course, it was invented for the profit of insurers, who simply took advantage of the need.\textsuperscript{11} See Workshop, supra note 9, at 259.

\textsuperscript{12} The system which consists in part of the tort process, with its widespread network of substantive rules and complex procedures designed to implement them, can be viewed as having one primary function: the shifting of some losses from an injured person to some other person or group. This is not a self-justifying objective. Whether it shifts losses in order to achieve goals or whether its operation merely \textit{results} in a net social gain or loss is another question.

\textsuperscript{13} Professor Ison points out that a primary defect of negligence liability is that "just compensation for the plaintiff and just condemnation of the defendant are mutually exclusive objectives." Ison, \textit{supra} note 3, at 14. Professor Calabresi correctly observes that in such a case the system must be evaluated in terms of its ability to maximize achievement of several social goals, even though they are inconsistent with each other to some extent. Calabresi, \textit{Fault, Accidents and the Wonderful World of Blum and Kalven}, 75 Yale L.J. 216, 220-24 (1965).

For some representative statements of "the goals" of a system, see Ison, \textit{supra}, at 7 (prevention; medical care and rehabilitation; income security; fair allocation of costs), and id. at 55-56; R. Keeton & J. O'Connell, \textit{Basic Protection for the Traffic Victim} 241-72 (1965) [hereinafter cited as Keeton & O'Connell]; Calabresi, \textit{supra}, at 238; Co-ward, \textit{The Economic Treatment of Automobile Injuries}, 63 Mich. L. Rev. 279, 326 (1964).
opposed to salutary effects is that it is impossible to evaluate the existing system or any other by any but subjective criteria. This probably is too extreme, although it is well to recognize that the system has no mechanism for achieving consensus regarding goals and that most published statements of goals represent only the policy choices of the writer. However, for purposes of the following consideration of our claims system, sensitivity to the limitations of analysis in terms of goals should be helpful. For one thing, we should recognize that we know little about the desirability of various goals or of the possibility of their achievement. Nor can we be confident that we have considered the full range of goals.\footnote{14} Most importantly for our purposes, we cannot fail to see that our evaluation of our existing system or any other must necessarily be tentative and imprecise in the absence of definite standards. Although I would not suggest that we throw up our hands, we should be aware that our evaluation is based on a combination of subjective preference and guessed-at consensus regarding desirable social goals. For this reason I have not undertaken to compare the system that is described with other possible systems. For the moment understanding what we have may be more important.\footnote{15}

II

THE LIABILITY INSURANCE COMPONENT OF THE PERSONAL INJURY CLAIMS SYSTEM

In order to appreciate subsequent sections, some understanding of the liability insurance business and of the relationship of insurer

\footnote{14} Cf. Conard, \textit{supra} note 13, at 282-84.

\footnote{15} It was recently observed that there are two major trends in personal injury compensation: the development of negligence doctrine and the development of new methods of compensation which threaten negligence. \textit{Ison}, \textit{supra} note 3, at 5-6. Certainly the majority of recent proposals for reform of the existing system fall in the latter category, although it is not really negligence law but the system—the combination of negligence law and tort procedure with liability insurance—which necessarily is the focal point of attack. Although it is not possible to review these proposals here, it is germane to this discussion to refer to a certain ambivalence or inconsistency in many of them. On the one hand, their authors are sensitive to weaknesses of the present system in relation to supposedly desirable social goals, and to the relationship of liability insurance to many such weaknesses. Yet at the same time some of them seem not to be troubled by preserving the present system as part of their proposals. \textit{See generally Keffon \& O'Connell}, at 124-89, 299-482. One of my purposes in the following pages will be to present facts from which the wisdom of doing so can be judged. These facts seem to raise the question whether the effects of the union of liability insurance with the tort process have been fully recognized. For a report on each of the automobile compensation plans advanced to date and a comparison of their provisions, see King, \textit{The Insurance Industry and Compensation Plans}, 43 \textit{N.Y.U.L. Rev.} 1137 (1968).
to insured is essential, although it will not be necessary to do more than sketch the outline. A basic familiarity with the tort process is assumed.\textsuperscript{16}

With these limitations in mind, looked at quite narrowly, liability insurance is simply a private exchange of mutually advantageous promises: the insured promises to pay the insurer a premium, and the insurer promises to discharge legal liability that might be imposed on the insured as a result of certain occurrences. "Accident" insurance, in comparison, is payable to the insured upon the occurrence of a specified event without regard to legal responsibility for it. The narrow view is too narrow, of course, for it is clear that the public has an interest in this relationship and its social consequences. For the moment, however, it is enough to focus on the small picture.

The "policy" of insurance is the written expression of the contractual obligations of the parties, although a considerable gloss of case law has been added to many of its terms. Naturally the collection of premiums is of central concern to the insurer, whose principal object is the amassing of profits. The insurer's initial or organization capital is obtained from the same sources as those drawn upon by other businesses. Thereafter, as insurance contracts are sold by salesmen or "agents" in the field, cash receipts from premiums begin to accumulate. Particularly because most states regulate some of the financial aspects of the insurance industry, specific funds to provide for claims that may be made under the policies commonly must be established and maintained or conservatively invested;\textsuperscript{17} other funds are allocated to unearned premium accounts and to operating expenses. All funds that are not required to be maintained in cash are invested in income-producing activities and properties. It is investment income that primarily fulfills the profitmaking objective of liability insurers. Premiums provide the funds for investment.\textsuperscript{18}

\textsuperscript{16} For more complete current treatment of the organization of the insurance industry, of its regulation, and of the ratemaking process, see King, \textit{supra} note 15, at 1147-69.

\textsuperscript{17} Loss reserves frequently are established on the basis of full estimated or "incurred losses" even before a particular claim is investigated. A. \textsc{Levin} & E. \textsc{Woolley}, \textsc{Dispatch and Delay} 398 (1961). To err on the high side increases both non-taxable liabilities and the amount which can be invested without discovery of produced income.

\textsuperscript{18} Whether or not liability insurers find their enterprises profitable currently is a matter of some dispute, although frankly much of the dispute seems spurious. The subject does deserve further consideration; but unfortunately limitations of space preclude full discussion here. It is important to recognize that there is no standard terminology for insurance company accounting. And this fact enables insurers to insist to some that they are operating at a loss while showing handsome profits to most others. According to a congressional subcommittee report, automobile insurers claimed "underwriting" losses of 301 million dollars in 1965, and of 1.67 billion dollars for the 1956-
Although premium rates as a whole have risen sharply in recent years, because the insurance industry is highly competitive, premium charges vary only slightly from insurer to insurer for the same kind of policy. Moreover, insurance premium rates are often established by state authorities as an exercise of their general regulatory powers. As it works out, competition provides the rate ceiling and regulation usually provides the floor. The method by which the rate is established varies from state to state, but where rates are subject to regulation it often is based upon some notion of a fair return to the investor—the same kind of formula employed to determine the rates charged by public utilities that are given monopoly positions by the

1966 decade. Antitrust Subcomm. of the House Comm. on the Judiciary, Automobile Insurance Study, H.R. Rep. No. 815, 90th Cong., 1st Sess. 59 (1967). The basis for this claim becomes clearer when it is understood that insurers adamantly refuse to consider investment income in connection with underwriting experience, and do everything possible to obscure their true financial pictures. See Ames, The Automobile Accident Commission Proposal: An Irrational Concept, 14 U. Fla. L. Rev. 398, 414-16 (1962); Maldenberg, Remarks, in Crisis 252, 253. This is accomplished in part by using two sets of books, one for insurance regulatory bodies and taxing authorities, and another for stockholders. Another technique is the illegitimate combination of the cash method of accounting for expenses (see the preceding note) and the accrual method for income, thus reflecting continuing losses in periods of increasing premium volume. Wilson, How to Get Rich While Losing Money, Trial Lawyers F. 11 (May-June 1967). Profits are hidden in policy surplus and reserve funds. Ames, supra, at 419-31. Moreover, some normal expense items, such as attorneys' fees, are charged to underwriting losses even in connection with successfully resisted claims. R. Lewiston, Hit From Both Sides 38 (1967). Another such questionable item is the "good will" settlement expense, which is not a "loss" because it is not a legal liability of the insured. According to an industry organ, a recent "professional study" showed only a 4.4% rate of return for property and liability insurance, even when investment income and earnings on reserves were included. Insurance Prices and Profits, 29 J. Ins. Information 21 (Mar.-Apr. 1968).

These practices have not wholly escaped the scrutiny of the courts (see Wilson, supra, at 28), or of the commentators. See generally Lewiston, supra, at 158-59, 162-64, 171-76; Birkinsha, Investment Income and Underwriting Profit: "And Never the Twain Shall Meet", 8 B.C. Ind. & Com. L. Rev. 713 (1967); Norgaard & Shick, Auto Insurance is Profitable, Trial 24 (Oct.-Nov. 1968); Sharp, Remarks, in Crisis 256; 58 Texas Observer, Dec. 30, 1968, at 1-5, 13; The Business With 103 Million Unsatisfied Customers, Time, Jan. 26, 1968, at 20.

A study commissioned by a congressional committee showed that insurers earn greater "risk adjusted rates of profit" than 90% of U.S. businesses, defining "risk adjusted rate of profit" as the "average annual return including interest, dividends and security appreciation that the suppliers of capital receive, divided by the initial market value of all the firm's securities" over a period of fifteen years, and defining "risk" as "the variability of the rate of profit over the period" of the study. Congressional Study, Trial 46 (Aug.-Sept. 1968).

19 See Conard, supra note 15, at 317 n.126. The rate established by regulation is not always the lowest rate actually charged. If large and efficient companies can obtain rate increases on the basis of the needs of the marginal companies they can present the appearance of a bargain by charging a rate lower than that permitted by the regulations.
state. Oddly enough, however, investment income usually is not considered in determining rates. For this reason, insofar as the amount of profit is dependent upon the premium rate, the factors employed in the formula used to determine a fair rate of return and for making and adjusting rates are of considerable importance. In particular, it is important to know the percentage of the premium dollar that actually is used to pay policy claims.

Theoretically, if insurers could be assured of a fixed margin of profit beyond expenses and payouts on behalf of insureds, they should not be disturbed by the total amount of claims payouts; the important thing would be to ensure that the amount did not exceed the premium-setting formula's "loss ratio"—the ratio of losses paid to premiums brought in within a given period. However, like most other businesses, insurers want more than a fixed minimum profit. They want to increase both the profits that result from gross increases in premium dollars and the amount of each premium dollar that can be invested and that can itself yield profits. Thus the premium rate is of primary importance throughout the industry, and intense efforts are directed toward producing rate increases. These efforts are aimed at winning public acceptance of the need for a higher rate, and, where necessary, at obtaining legislative and administrative authorization for higher rates. There is also strong and continuing pressure for total abolition of rate regulation. Not surprisingly, industry pleas for higher rates or abolition of regulation often are based on presentation of a rather bleak picture of the health of the tort process, which in turn presents a bleak loss-ratio picture to enlist the sympathies of the public and of rate-making bodies.

The amassing of profit for investment requires, in addition to high premium rates, minimal claims payouts. For accomplishing this purpose every insurance company has a claims department or division, usually headed by a manager who may be assisted by claims attorneys.

20 See note 18 supra.
21 The rate-making process is not nearly as certain as its use of formulae would suggest. For some understanding of the process see Bailey, Remarks, in Crisis 197; Cabbe, Rate Making and Rate Litigation, 16 Fed'n Ins. Counsel 67 (Spring 1966); Harwayne, Insurance Costs of Basic Protection Plan in Michigan, in Crisis 119; McNamara, Automobile Liability Insurance Rates, 35 Ins. Counsel J. 398 (1966); Rose, State Regulation of Property and Casualty Insurance Rates, 28 Ohio St. L.J. 669 (1967); Spencer, A Comparative Economic Analysis of the Current Rate Regulation Laws, 1965 Ins. L.J. 369; S. Rep. No. 881, 87th Cong., 1st Sess. (1961). Its complexities recently have been studied by the federal government with a possible view toward federal regulation.

It is a frequent claim of insurers that they are powerless to reduce premiums, due to general inflationary increases and in particular to the present legal system and the costs of litigation. Workshop, supra note 9, at 261.
and claims adjusters, as well as by independent claims adjusters and inter-company claims adjustment bureaus. The task of the claims department is to keep the premium-loss ratio below or at a level with the ratio upon which the existing premium rates were established. To understand fully how this can be done, it is necessary to consider the nature of the insurer's obligations under a liability policy.

The provisions of most liability insurance policies have been carefully developed by one or the other of the two national associations of which almost all liability insurers are members—the Insurance Rating Board and the Mutual Insurance Rating Bureau. Although only a few states actually prescribe the terms of liability policies, insurers find that substantial uniformity is in their interest. Most liability policies, including those insuring the owners and operators of automobiles, have come to include two principal promises by the insurer which have been particularly significant in the development of our personal injury claims system. First, the insurer promises to pay on behalf of an insured person "all sums which the insured shall become legally obligated to pay" as a result of the occurrence of certain specified risks, up to the monetary limits specified in the policy. Second, the insurer promises "to defend any suit against the insured" in which it is asserted by the plaintiff that the insured is legally obligated to pay him damages by virtue of the occurrence of a covered risk (usually the insurer obligates itself to defend even groundless suits of this nature), and to pay all costs of suit and investigation.22 Both promises are conditioned on timely notice of a claim, on cooperation by the insured person with the insurer, and on the absence of action by the insured that prejudices the subrogation rights of the insurer. Automobile liability protection usually focuses upon operation of a particular vehicle while driven by a member of a defined class of persons, or on some other particularized operation, but there are general liability policies as well.23

These two provisions have dual significance. The first promise limits the obligation of the insurer to make payment to those cases in which the insured would himself be "legally obligated" to make payment; that is, with respect to a tort action, to those cases in which


the tort process would permit recovery. This makes the insurer's fundamental concern with the tort process plain. Since payment by the insurer increases its expense and minimizes profits, it is vitally interested both in identifying and crystallizing the principles of tort doctrine and procedure (particularly of negligence law, the chief theory of action involved in most cases covered by insurance), in decreasing the scope of all potential tort liability, and in increasing the reach of various defensive theories. Fortuitously for the industry, the policy provision obligating the insurer to defend suits against the insured necessarily puts insurers in the center of the litigation arena, in a position to advocate the adoption and application of legal doctrines that will protect not only the interests of a particular insured in a particular case before the court, but also their own long-range business interests.

The public desire that there be a financially responsible defendant in automobile accident cases has led all jurisdictions to the adoption of either financial responsibility laws or compulsory liability insurance laws. Many states have "assigned-risk" laws requiring automobile insurers (with concurrent premium increases) to insure all applicants, irrespective of the undesirability of the risk because of past safety record, age, and the like. Most automobile insurers have found it profitable and many states recently have required them by law to add to their lines a kind of accident insurance that compensates the insured himself (rather than indemnifies him as liability insurance does) when he has received bodily injury (and sometimes property damage) at the hands of an "uninsured motorist." It also is common for an automobile liability policy to provide for "medical payments" and "collision" coverage, which is in reality accident, not liability, insurance.

After this brief sketch we can now consider the ways in which

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24 Only three states, Massachusetts, North Carolina, and New York, presently have compulsory automobile liability insurance laws. The insurance industry is bitterly opposed to them, in part because of alleged adverse underwriting loss experience under the Massachusetts law. See Deschamp, Compulsory Automobile Insurance a Failure, 6 FOR THE DEFENSE 33 (1965); Rotgin, Problems with Compulsory Automobile Insurance in New York, 17 CHARTERED PROP. & CAS. UND. ANNALS 245 (1964). See also KEETON & O'CONNELL, at 76-123; Comment, The Financially Irresponsible Motorist: A Survey of State Legislation, 10 VILL. L. REV. 545 (1965).

Automobile liability insurance is compulsory on a nationwide basis in Canada and England.

the liability insurance component of our personal injury claims system interacts with the tort process.

III

CONFLICTS BETWEEN INSURERS AND THEIR POLICYHOLDERS

It is amazing to realize the many important ways in which the vital interests of insurers and their policyholders often come into practical conflict. The heart of every conflict of this nature is the familiar and persistent hope of the insurer to be able to avoid payment to or on behalf of its insured in order to protect its profits. Naturally enough, the insurer is interested neither in defending a suit nor in paying a settlement or judgment unless the terms of the contract absolutely require it. As a result the insured frequently is confronted on the one hand with a tort claim against him which he believes is within the scope of the insurance contract and with a disagreeable and recalcitrant insurer on the other. The root significance of this insurer-insured conflict of interest is that it negates many of the fundamental assumptions upon which the tort process component of the system builds its rules. For example, it is a frequent assumption that liability insurance is available and in existence as to certain kinds of risks (and these are increasing in number) at understood costs. Also, it is generally assumed that everyone is either aware of his rights or can know them by resort to counsel, and that everyone will either assert his rights or will knowingly fail to do so. It is further assumed that all who secure the services of counsel will be ably, honestly, ethically and fully represented. It is assumed that the parties before the court are there honestly, and not as straw men to be manipulated for the interests of others. And it is assumed that the disposition of the court will secure the rights of all parties and all claims. As the following discussion reveals, all of these assumptions are to some extent rendered false by the conflicts engendered by the liability insurance component of the claims system.

The first occasion for conflict arises soon after a claim against the insured is asserted. At this time, before investigation expense has been incurred, the insurer makes it its business to decide whether any defenses exist under the terms of the policy, such as the defense that the policy does not cover the accident that gave rise to the claim.

At this stage the already-shaken insured may find himself in another painful predicament. While the claim against him has not gone away, his "coverage" may have; the insurer may simply deny coverage, disclaim liability, and leave the defense of the claim to its erstwhile insured.27 Or, to compound the injury, it may be able to make the insured the defendant in an action for a declaratory judgment of "no coverage."28 If the insurer is successful in this action, the insured must pay the cost of defense of both actions in addition to any judgment entered against him. But if the insured is lucky in this situation, the insurer will give him the option either to provide his own defense or to execute a so-called "non-waiver" or "reservation of right" agreement by which the insurer is authorized to investigate and defend "the insured," yet still refuse to indemnify him if its defense is unsuccessful.29

Even if there should be no question regarding coverage, the following weeks may see other policy defenses raised, such as failure to give the insurer timely notice of the claim (even if the alleged liability of the named insured was only vicarious, as through an omnibus insured). And this is so in some states regardless of whether the insurer was prejudiced or not by the delay or failure to cooperate.30

The insured is not out of peril once the defense is undertaken. A particularly deplorable conflict often occurs when a liability in-

28 See Phillips, Declaratory Judgment and the Insured's Dilemma, 51 ILL. B.J. 232 (1962); 41 Ind. L.J. 87 (1965). Anomalously, the insurance company will attempt to prove the existence of a state of facts different from that asserted by the insured (including facts upon which the insured would be liable to the claimant), and the claimant will align himself with the insured who will attempt to prove the existence of a state of facts within the coverage of the policy. The temptation for the insurer to resort to non-waiver of coverage defenses is particularly great, obviously, when defenses to the claim against the insured are marginal or worse. This only exacerbates the dilemma of the insured.

Of course, an even more basic conflict may exist. While the insured may know that he was at fault and not wish to defend, he has no choice under the usual policy. Under some professional liability policies, however, the insurer has some voice in the matter.
surer provides the defense and procedural compulsory counterclaim rules (requiring a defendant to assert or waive all claims that he has against the plaintiff arising out of the transaction that is the subject matter of the plaintiff's suit) are applicable. An example is a property damage claim in an automobile case also involving personal injury. In the ordinary course of events any defendant's attorney would be expected to be aware of such a rule and to inform his client of the necessity of filing his counterclaim. But the insurance relation creates a different situation. The stated contractual obligation of the insurer is only to "defend" claims, not to assert them, and important rights have been lost by the disposition of claims by speedy and literal-minded defense counsel before an insured defendant was aware of the peril to his own claim against the plaintiff, perhaps even before he was aware that he had a claim.\(^3\) Conversely, when a plaintiff-insured's own claim has been settled by him, his insurers have refused to defend the defendant's counterclaim against him.\(^3\) The harm to the interests of the insured which results from these actions of the insurers and their defense counsel does not inhere in the procedural rules themselves but from pragmatic awareness by insurer-employed counsel that his real client is the insurer, even though the system assumes that the insured is his client.\(^3\) It is also possible for unscrupulous counsel simply to use the insured's counterclaim as another of the pawns to be bargained with in settlement negotiations. The possibility of a judicial remedy for the insured in such situations does not improve the personal injury claims system, even if it minimizes some of the disadvantages to the insured.\(^3\)


\(^3\) See generally Keeton, Liability Insurance and Reciprocal Claims From a Single Accident, 10 Sw. L.J. 1, 16-19 (1956); Wright, Estoppel By Rule: The Compulsory Counterclaim Under Modern Pleading, 38 Minn. L. Rev. 425 (1954); The Cross Complaint Problem, 6 For the Defense 58 (1965).

\(^3\) At the least the insured should be permitted to maintain an action for negligent destruction of his claim against the insurer, on the analogy of the action for failure to settle within policy limits. In the counterclaim situation all the insurer need do to fulfill its duty is inform the insured that if he wishes to ascertain if he has a claim or to assert a claim of which he is aware, he should employ independent counsel to aid him, and that his failure to do so will destroy the claim. The insured also should have a cause of action against defense counsel, whose duty would be the same as that of the insurer, although the standard of liability probably should be higher because of the attorney-client relationship which gives rise to the duty. See generally State Bar of Texas, Personal Injury Litigation in Texas 503-53 (1961); Keeton, Liability Insurance and Responsibility for Settlement, 67 Harv. L. Rev. 1136 (1954).
Another kind of conflict is that which arises between insurer and insured when the same insurer insures both plaintiff and defendant, or two or more co-defendants with adverse interests. This can be expected to occur with increasing frequency if underwriting should become more highly concentrated in a few companies, as it may if group policies become widely available. In such cases it is not unusual to find the insurer controlling or attempting to control all sides of the litigation pursuant to its contractual rights to defend. If there is resistance on the ground of conflicting interests the complaints of the insured can be met with pointed reminders of the contractual duty of cooperation and with refusal to pay the fees of independently retained counsel. A variation on this theme arises when the defense of several parties with conflicting interests is assigned to different members of the same law firm. A third variation of the multiple numbers tactic is the joinder by the insurer of an insured individual as a straw-man co-defendant with an insured business organization defendant, to make it appear to judge and jury that liability will fall on an individual. As usual, the only discernible interest of the insurer is to avoid payment.

In contrast to the conflict resulting when one insurer covers several adverse insureds is the situation in which several insurers have issued policies covering the same realized risk. It is the natural inclination of each insurer to try to avoid liability under its policy by shifting it to someone else (preferably to an uninsured individual, but if not, to another insurer) or at least by paying as little as possible. Obviously, to the extent that any insurer is successful, the danger to the insured, to the claimant, and to the public that the remaining insurers will not cover the entire claim is materially increased and not infrequently realized.

It is common now for various forms of first party or "accident" insurance coverage—medical payments, uninsured motorist, and collision—to be written along with personal injury and property damage

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38 See generally Marcus, Overlapping Liability Insurance, 16 Def. L.J. 549 (1967).
39 See generally Employers Mut. Cas. Co. v. MFA Mut. Ins. Co., 384 F.2d 111 (10th Cir. 1967); Marcus, supra note 38, at 549; Watson, The "Other Insurance" Dilemma, 16 Fed'n Ins. Counsel 47 (Summer 1966); Note, The "Other Insurance" Clause Conflict, 46 N.C.L. Rev. 433 (1968). This kind of conflict is painful to insurers as a class as well as to others. See Risjord, Other Insurance or the Tortuous Channels of Litigation Between Fortuitous Adversaries, 29 Ins. Counsel J. 612 (1962).
automobile liability insurance. And it also is common for the policy to provide that the insurer is subrogated to the rights of the insured in his name with respect to such first party insurance. Similar subrogation provisions are common in fire insurance policies. Since exercise of subrogation rights makes an insurer the plaintiff, the likelihood that an insurer will be the real party in interest on both sides is great. This situation is so common that insurers have entered into informal agreements which provide for arbitration rather than suit as a means of resolving such disputes among themselves. While settling their own disputes the insurers often disregard the interest of the insured in his own claim for amounts not covered by the policy, such as the common "deductible" amount in the usual automobile collision coverage. When this is the case, common assumptions regarding the range and availability of financial protection for accident victims again are in error.

In the past few years another significant occasion for conflict of interest has arisen from an attempt to remedy the defect of the personal injury claims system that is presented when a tortfeasor is unable to pay a judgment entered against him. Conflict arises because the insured in addition to having liability insurance also has a relatively new type of first party insurance called "uninsured motorist" insurance which he purchases from his liability insurer. Under the terms of this coverage, the insurer is required to pay the insured when a person who would be liable to the insured for bodily injury under the principles of tort law is driving an uninsured automobile (and is thus, it is assumed in the usual case, unable to pay a judgment against him). Although this new kind of coverage, which is compulsory in many states and is available in most others, theoretically was designed for the protection of the insured, in practice it exposes him to almost every conflict-of-interest hazard that can be imagined.

Suppose, for example, that an uninsured motorist and the insured are involved in an automobile collision, and that the uninsured motorist sues the insured, who then becomes the defendant. The in-

40 The policy commonly provides that the subrogation suit may be maintained in the name of the insured. Insurers are not at all averse to such profit as might result from the confusion of the jury in the belief that an individual rather than an insurer is the real party in interest. Cf. Annot., 157 A.L.R. 1261 (1945).

41 See generally R. HORN, SUBROGATION IN INSURANCE THEORY AND PRACTICE (1964); Kircher, Set-Off and Subrogation in Automobile Medical Payments Coverage, 7 FOR THE DEFENSE No. 10 (1966); 45 N.C.L. REV. 1064 (1967); Annot., 19 A.L.R.3d 1054 (1968).

42 It has been estimated that 15% of the motorists currently using the highways, or about 4,750,000, are uninsured. Aksen, Arbitration of Automobile Accident Cases, 1 CONN. L. REV. 70, 72 (1968).
sured defendant calls upon his insurer to provide a defense, and the insurer responds as usual by selecting an attorney to do so. The attorney analyzes the case that the uninsured motorist has against the insured. He then analyzes the position of the insured vis-à-vis the plaintiff. He notes that the insured has suffered substantial damage and in the normal situation would have a counterclaim against the plaintiff. It is at this point that the first conflict of interest arises. If the insured does not know of his uninsured motorist coverage, or has forgotten it, or does not mention it, or does not know what it means,\(^{43}\) the attorney must first decide whether to make this information available to the insurer; if the attorney decides to notify the insurer, the insurer must decide whether or not to inform or remind him. If it does not do so, the attorney retained by the insurer to defend its insured must decide whether with fidelity to the insurer he can inform the insured of his uninsured motorist coverage and whether, with fidelity to his "client," he can fail to inform him of such coverage.

But the insured may be in trouble even if he is informed. The socially-assumed position of the attorney is that of a defender of the insured. There are several ways of defending him. One is to prove that the defendant was not negligent. Another is to prove that although the defendant was negligent, the plaintiff was contributorily negligent. Either defense is equally efficacious to defeat the claim of the plaintiff. The problem is that, should the defendant-insured be found to be negligent, he would not be able to recover for his own injuries against the plaintiff because of his own contributory negligence, and thus cannot recover for them against his own insurer on his uninsured motorist coverage. Naturally it is to the financial advantage of the insurer that he not recover on such coverage. And this places the neck of the insurer on the block. For whom should the defense attorney act? For the insurer, who hired him? Or for the insured, to whom his professional obligations supposedly run? If the insurer insists that the attorney attempt to prove negligence of the insured as well as of the plaintiff, what should he do? Withdraw? Most defense counsel know that if they should withdraw the insurer would simply assign the case to another attorney who would not be so scrupulous.

The problem of a conflict with the rights of the insured under the "cooperation clause" of the standard liability policy is relevant also in connection with the uninsured motorist coverage. Suppose that the insured recognizes or is informed of his rights under the uninsured

motorist protection, somewhat recognizes the inherent conflict with his insurer with respect to it, and decides to act in his own interest rather than in the interest of the insurer. He risks breach of the cooperation clause of the liability policy, thus justifying the insurer in refusing to provide a defense or to pay a judgment.

Yet another conflict arises when, added to the situation described above, the insured has collision coverage with the same insurer on a policy giving the insurer a right of subrogation to the extent of the collision claim. If an "uninsured motorist" sues the insured, is the insurer under any obligation to file a counterclaim for its subrogation? Added to the usual counterclaim problems is the consideration that, when uninsured motorist coverage is present, pursuance of a subrogation claim is likely to prove the facts upon which the insured will rely to substantiate his uninsured motorist claim. The problem remains even if the uninsured motorist does not sue the plaintiff first: is the insurer bound to make a claim for subrogation? To inform the insured of his rights? If the insurer does make a claim, what is the obligation of the attorney it has hired to the insured? Bear in mind that in both situations, as in the case of defense under liability insurance, the subrogation claim is pursued in the name of the insured under the terms of the insurance contract. Under the procedural rules in some jurisdictions, the litigation of a property damage claim alone would bar the later assertion of a claim by the insured for personal injuries arising out of the same accident. For final measure, it has been reported to the writer by insurance defense counsel that uninsured motorist coverage problems have become so much a part of the insurance scheme that in some cases the "liability-uninsured motorist" insurer actually has taken over the defense of the uninsured motorist against its own insured, so as to prevent a finding of liability to the insured and thus bar a recovery by the insured on his uninsured motorist provision. This is conflict of interest refined to perfection. In all of these examples the existence of insurance leads us to question who the attorney really is representing and to whom he owes his obligation of loyalty, notwithstanding the rather clear official assumptions.

It would be difficult, of course, for insurers to ignore all of these

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possibilities of conflict, and it is for that reason that policies commonly provide for arbitration of disputes regarding liability and amount of damages between the insurer and the insured. In this way a method is provided by which at least open conflicts can be resolved in a different forum from the court in which the insurer may be defending the insured.\textsuperscript{47}

Probably the most widely publicized conflict of interest arises in the instance of a claim in excess of policy limits followed by an offer by the claimant to settle within policy limits. Although the insurer usually has the right to settle by the terms of the policy, it has a chance to pay nothing if it declines the offer and successfully defends the suit; it risks only the difference between the settlement offer and the policy limits if it defends and loses. The insured, on the other hand, has an obvious and vital interest in seeing the claim settled within policy limits. A variation of this problem which has not been given much attention is the situation in which the offer to settle is not within the policy limits but is in an amount at which the insured is willing to settle and is willing to contribute the amount in excess of the policy limits if the insurer will contribute the face amount of the policy. In these conflicting interest dilemmas, the insurer is in control of both interests; whichever way it acts the interest of one party will suffer to some extent. Not surprisingly, insurers sometimes act in their own interests, refusing to settle within policy limits, and upon losing the gamble leaving their insureds with staggering judgments in excess of policy limits.\textsuperscript{48}

A small body of rules gradually has been developed to deal with this narrow situation. Since many insureds are relatively insolvent beyond their policy limits and customary limits are rather low in relation to current expenses of the kind created by personal injuries, resolution of the conflict is of extreme interest to claimants and their attorneys as well as to insurers. So great is the concern of the latter, that to avoid liability, attorneys representing insurance carriers are warned by their professional associations to conduct their efforts from

\textsuperscript{47} Still other conflict problems remain. Among these is one discussed earlier but compounded in this situation, that of "other insurance." This problem arises if an insured who has insurance on more than one vehicle with different insurers, or who is also covered under someone else's policy, is injured by an uninsured automobile and his insurer refuses to pay on the ground that he has recovered under another policy. See Kraft v. Allstate Ins. Co., 6 Ariz. App. 276, 431 P.2d 917 (Ct. App. 1967), for an example of resolution of this conflict against the insurer.

\textsuperscript{48} It has been reported that insurers also discourage their insureds from retaining independent counsel by telling them that the appearance of two lawyers will make it seem to the jury that the defendant is a person of wealth. Lewiston, supra note 18, at 90.
the moment of receiving notice of an *ad damnum* clause in excess of policy limits so as to protect the insurer in any subsequent action against it to recover the excess claim. 49 Obviously, since the interests of insurer and insured are both important, a rule that either requires that the insurer settle all claims or permits it to refuse to settle any of them is unsatisfactory. It is difficult to know what standard should be developed. The most commonly used standards require the insurer to exercise either good faith 50 or ordinary care.51

But establishment of legal standards does not necessarily relieve the insured of the pain of conflicts of interest. Additional problems are raised when a settlement has been wrongfully refused and a judgment in excess of policy limits has been rendered against the insured. For example, what damages should the insured be able to recover against the insurer? Only the amount of the judgment against him? If more, is there a limit on the amount of the excess for which the insurer may be held liable?52 What if the insured has suffered great mental anguish?53 Should the measure of damages be different if the insurer has simply refused to defend, in which case it has no opportunity to settle?

The most important question to the claimant, of course, is whether he or the insured can recover an excess judgment directly against the insurer, assuming that the latter is legally liable for the excess to its insured. In this situation insurers have often refused to pay the claimant on the ground that their obligation is to indemnify the insured and consequently they have no obligation unless the insured has been damaged; that is, until he has paid or has been requested and is able to pay the judgment rendered against him. There is no good reason why this defense should be permitted by the courts.54 When it is permitted the claimant simply loses his claim to any excess if the insured is insolvent or bankrupt, and some insurers are willing to assist their

insureds in going through bankruptcy in order to avoid a payout. To avoid some of the difficulties, some courts have permitted the insured to assign his claim against the insurer to the claimant. Where assignment is not permitted the difficulty should be avoidable by the insured, as a practical matter, simply by giving the claimant five dollars or some other nominal sum in partial payment of the judgment against him.

Still another opportunity for conflict between the insurer and its insured occurs in jurisdictions that permit the recovery of an award of punitive damages against an insured defendant from an insurer whose policy covers such liability. This is illustrated by the facts in Northwestern National Casualty Co. v. McNulty, in which the insurer (1) advised the insured of the possibility of excess liability in general terms without mentioning the possibility of punitive damages; (2) refused a settlement offer within policy limits, without telling the insured; (3) decided to disclaim coverage liability for punitive damages, but failed to mention this to the insured until after the trial; and (4) elected to concede liability for compensatory damages, even though this might have been used as a bargaining point on the issue of punitive damages. The court said that it was “shocked” by the conduct of the insurer in failing to put the insured on notice of its intention to deny liability for punitive damages, but held that there could be no recovery of punitive damages against the insurer, partly on the ground that the opposite holding would produce conflicts of interest.

58 307 F.2d 432, 433, 436-37 n.11 (5th Cir. 1962). The opinion presents a scholarly history and philosophy of punitive damages, as well as a discussion of its relationship to liability insurance.
59 Id. at 441.
60 Id. at 443. The court in Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 383 S.W.2d 1 (1964), in reaching the opposite result, noted the possibility of conflict, but did not consider it determinative.
Obviously the attorney employed by the insurer to defend the insured is deeply implicated in all of these conflicts. Although this is not the place to consider the ethical obligations of attorneys in detail, it is relevant to observe that it is a necessary basic assumption of the tort process that the defendant will be fully represented by counsel. However, when the tort process is seen as but one component of a personal injury claims system in which the other component, liability insurance, provides the defense, the assumption of full representation obviously is defeated when the insurer betrays the defendant in order to protect its own interest. Such a claims system is a much different one from that which popular and professional lore commonly assume, and one would suppose that it suffers qualitatively. Yet as long as private insurance with its predominant private profit motive remains wedded to tort rules, whose only justification can be promotion of the public welfare, it is difficult to see how these dysfunctional conflicts can be avoided.

IV

WHAT LIABILITY INSURANCE HAS DONE TO TORT DOCTRINE

A frequently made claim for the effect of liability insurance on tort law proceeds as follows: Insurance company settlement practices ignore tort principles; the great majority of cases are settled by insurance companies; thus tort law is largely irrelevant as a practical matter. Or as Dean Landis put it in a memorable phrase: "Taught law is not tort law." Naturally, this thesis has been vigorously dis-

61 Although small steps are being taken to deal with the schizophrenic role of insurance company defense counsel, see, e.g., State Farm Mut. Auto Ins. Co. v. Walker, 382 F.2d 548 (7th Cir. 1967), cert. denied, 389 U.S. 1045 (1968) (an attorney employed by an insurance company to defend a liability action against its insured must protect the insured from revelation of information which, if known to the insurer, would void coverage), it is unlikely that this approach can remedy the problems of the system as a whole. See generally COUNTRYMAN & FINMAN, supra note 30, at 96; MATTHEWS, supra note 57, at 165; Appleman, The Relation of Trial Counsel to the Public, 61 W. Va. L. Rev. 260 (1959).

62 Of course the effects of insurance on tort doctrine are not limited to those of liability insurance. We know, for example, that the availability of fire insurance to the property owner has been partially responsible for a narrowing of the scope of duty of a negligent fire starter, and thus of his liability, through the use of proximate cause doctrines. See Ryan v. N.Y. Central R.R., 35 N.Y. 210, 13 N.Y.S. 870 (1865) (limited to precise facts in Frace v. N.Y., Lake Erie & Western R.R., 143 N.Y. 182, 189 (1894)); cf. Lynch v. Fisher, 34 So. 2d 518 (La. App. Ct. 1947).

Of course, what happens to a claim is the important thing, and it is true that most claims are settled. Yet it would be a misleading exaggeration to suggest that tort doctrine is irrelevant to what happens to claims—even claims that are settled, even though the refinements of “taught law” or doctrine are probably considerably blurred in the determination of the question of ultimate importance in the evaluation of any claim: can either the claimant or the insurer raise a jury issue based on some tort doctrine? If the answer is “yes,” there is more than a possibility of settlement if an amount can be agreed on. In short, as we shall see, insurance company and claimants’ settlement practices usually disregard doctrinal refinements, but they do not make tort doctrine irrelevant.

There also is a substantial body of opinion that the addition of liability insurance to the tort process has created a system in which the keystone of tort doctrines—the doctrine of fault—is virtually eliminated in importance in other ways. One argument in support of this opinion is that the assumption of the availability of insurance causes judges and juries to ignore traditional doctrine in making a liability decision. Our folklore has it that this assumption, as well as actual knowledge of insurance coverage, tends to produce results not contemplated by the tort process. There is much speculation that it results both in a greater number of verdicts for plaintiffs and in higher verdicts. It can also be argued, of course, that most jurors are themselves policy holders and that their sensitivity to insurance would tend to make them protective of their own premium rates and thus defendant-oriented. Both arguments suggest that in cases in which


65 KEETON & O'CONNELL at 24-27. However, Keeton and O'Connell refer to settlement practices as “[p]erhaps the most important effect of tort liability insurance in reducing the significance of fault in automobile claims.” Id. at 254.

66 See, e.g., L. GREEN, TRAFFIC VICTIMS—TORT LAW AND INSURANCE 66-68 (1958); ISON, supra note 3, at 8; KEETON & O'CONNELL at 15-24, 244-46, 252-56; Conard, supra note 13, at 306; Pretzel, Do We Need the Collateral Source Rule?, 17 DEF. L.J. 1, 5 (1968). Contra, Maryott, Remarks, in CRISIS 27, 32.

67 KEETON & O'CONNELL at 27, 73, 292-95. To Dean Leon Green, “The greatest changes in negligence law, including many of the changes in the doctrines themselves, are the products of liability insurance.” GREEN, supra note 66, at 77; cf., Franklin, Replacing The Negligence Lottery: Compensation and Selective Reimbursement, 53 VA. L. REV. 774, 782 (1967).

68 See KEETON & O'CONNELL at 22-24.

69 Id. See also Appleman, Jury Verdicts and Insurance Rates, 1962 INS. L.J. 714.
the assumption is made, the questions raised by the facts in relation to various legal doctrines and submitted to the jury for its determination actually are not answered, but that cases are decided on some ad hoc basis. If this were correct the effect of the combination of insurers' success in hiding the real party in interest and the blind assumption that the defendant is insured would be virtually to eliminate the doctrinal component of the tort process. But the actual effects are uncertain. The assumption could lead either to more or fewer insurers' verdicts, or to more or fewer claimants' verdicts; it also could lead either to higher or lower verdicts for either party. Under the theory that juries tend to "sock it to" insurers, the effect obviously is disastrous in a case in which the jury wrongly assumes that the defendant is insured. As Professor Ison recently has put it:

While theoretically, fault is always the criterion, in practice, there has been a strong tendency for liability to follow the incidence of insurance. . . . [I]n its social impact, liability is quantitatively significant only in areas in which it is customary for liability insurance to be carried. The point is not whether a particular claim is insured, but whether it is of a class that is usually covered by insurance.

All these possibilities, if they have a basis in fact, support Dean Green's observation that "[I]t becomes more and more difficult to mix insurance with negligence law and retain the law's integrity." A more pointed way of looking at the situation is that the mixture produces an entirely different system, with characteristics different from those of the tort process alone.

Another common assertion is that the assumed availability of insurance injects into the tort litigation process cases that are not susceptible of being judged by its rather simple traditional standards and procedures and which therefore necessarily are judged by other and unknown standards. Automobile accident litigation is a familiar example. Professional malpractice is another.

How much has insurance influenced tort doctrine? Almost twenty years ago it was suggested that whatever its direct impact, the existence and availability of liability insurance had produced "a climate of opinion in which extension of liability is inevitable." No one could deny, of course, that sweeping changes have taken place throughout

70 Keeton & O'Connell at 23.
71 Ison, supra note 3, at 8 (footnote omitted).
72 Green, supra note 66, at 78.
tort law in the twentieth century, but undoubtedly many factors have contributed to those changes, and the assertion that liability insurance has greatly altered the common law tort process does not go unchallenged. There are those who say that the contribution of insurance has been very much overstated—even "amazingly slight."74 Professor Kalven, one of the most vigorous champions of the status quo in personal injury reparations, asserts that it is a basic characteristic of the tort system that it regards third party insurance as irrelevant,75 and he purports to describe the system without mention of anything about insurance but its irrelevance.76

As is always the case when many causes contribute to produce a result, it is difficult in retrospect to assess the amount of the contribution of each with precision. Although appellate courts have not made much mention of liability insurance in explaining the results they reach, this does not mean that they have not been influenced by it. It is certain that some are. In a notable recent opinion the California Supreme Court stated expressly that "the availability, cost, and prevalence of insurance for the risk involved"77 is a major consideration in determining the duty of a defendant to a plaintiff in a negligence case. Moreover, appellate cases represent only a small portion of all decided cases, and we don't know for sure how much the existence of liability insurance affects the thinking of trial judges. But when proof is or seems to be lacking, the party having the burden of proof loses. Perhaps it is for this reason, lack of proof, that the official assumption that the same old tort standards are being applied does not seem to be wavering. Nonetheless, further inquiry is warranted. It would seem that if rules are worth having it would be well to know what they are, which we may not know if the traditional fault doctrine really has been blurred or destroyed. This is particularly true in light of another official assumption, discussed earlier, that fault rules are designed for achievement of social goals. If we no longer have the rule perhaps we should inquire as to whether its supposed goals are in fact being achieved by any other means.

One of these traditional "goals" is the deterrence of dangerous conduct. As mentioned earlier, there is doubt as to whether deterrence is best described as a goal or an effect (if it is an effect). Whether tort law is an adequate means for achieving it also is questionable. I have

74 Prosser, supra note 57, § 84, at 569.
75 Kalven, supra note 7, at 35.
76 Id. at 34-36.
always thought it strange that anyone could think that doctrines of which at most only a tiny fraction of the populace is aware could affect conduct in the slightest.\textsuperscript{78} This is not the place, however, to consider fully the question of deterrence. Presumably the deterrence of harmful conduct is desirable, if it is possible, and obviously courts and others concerned with the system usually assume that tort rules in fact serve a deterrent function. If so, as discussed hereafter, the necessary effect of liability insurance even for compensatory damages is to minimize deterrence. Thus liability insurance may tend to make drivers less careful.\textsuperscript{79} It might be suggested in reply that the threat of increased premiums steps in to reinforce safe conduct.\textsuperscript{80} This may be true as to some insureds, but on the whole it has not been demonstrated. It is clear that some insurers have worked diligently to reduce their losses by promoting safe driving, conducting studies and publicity campaigns, and instituting safety incentive systems such as merit premium rating practices. In some areas, such as in elevator operation, and in the trucking industry, they seem to have been quite successful. Whether they have had any more success with respect to automobile driving than have the liability rules of the tort process alone or with the criminal process is unknown. Lack of knowledge has only served to free proponents of opposing views to issue dogmatic pronouncements in support of their own positions.\textsuperscript{81} The subject is complex, partly because lack of empirical verification makes it almost wholly theoretical. Professor Calabresi has called attention to distinctions that seem useful in trying to reach sound conclusions. One is the distinction between "specific" deterrence, or the equivalent of coercive commands, and "general" deterrence, or the equivalent of the influence of market pressures. With respect to the latter, he also distinguishes "bargain" (contractual) transactions, which lend themselves to deliberate decisions regarding safe or unsafe conduct, and other "non-bargain" conduct.\textsuperscript{82} He also has demonstrated the difficulty of making economic cost allocations on the basis of incomplete data.\textsuperscript{83}

In light of the importance to human beings of non-economic and even irrational sources of satisfaction, the importance of economic

\textsuperscript{78} Cf. Keeton & O'Connell at 248.
\textsuperscript{79} Consider the reported conduct of the insured in Herschensohn v. Weisman, 80 N.H. 557, 119 A. 705 (1923), cited in Prosser, supra note 57, § 83, at 564. Is it representative? It seems unlikely that many are that foolhardy.
\textsuperscript{80} Cf. Keeton & O'Connell at 265.
\textsuperscript{81} For a persuasive and non-dogmatic opinion, see Kimball, supra note 5, at 14.
\textsuperscript{82} Calabresi, supra note 13, at 221-27.
\textsuperscript{83} Calabresi, Transaction Costs, Resource Allocation and Liability Rules—A Comment, 11 J. Law & Econ. 67 (1968).
theory to deterrence can be overstated. Some human behavior may even be motivated by altruistic concern for other humans. Although all the ramifications of the relationship of economic and other factors cannot be considered here, it is relevant to note that if economic considerations told the whole story of deterrence, the problem of the compatibility of the goal of deterrence with other goals, such as full compensation and optimal risk spreading, would remain. It would seem, for example, that perfect risk spreading could be achieved only at a cost of complete loss of general deterrence. This indicates that even after current economic theories are verified, compromises will have to be effected. What is needed is further study of both the "specific" effect of tort rules and of "general" deterrence. Insurance company sloganeering which reinforces the judicial assumption of "specific" effect rules tends both to inhibit needed investigation of that assumption and to divert attention from the area in which it is needed most, that of general deterrence.

The point upon which we want to concentrate here, however, is not simply that liability insurance has had some effect upon tort doctrines or upon their supposed goals. After all, virtually all changes in the environment affect tort law. The question is whether liability insurance has had an overall impact so great as to change the personal injury claims system from what at one time could have been called "the tort system" to something entirely different. It is this difference and its significance that is our greatest concern for the present. It is for this reason that we should give attention to some of the specific tort doctrines and problem areas most directly affected by liability insurance: governmental and other immunity doctrines and defenses; the liabilities of automobile drivers to their passengers; the liabilities of manufacturers and their legal counterparts; the liabilities of dispensers of liquor; the liabilities of infants and mental incompetents; and others.

It is commonly thought that some of the principal effects of liability insurance have been felt in the gradual narrowing of the various im-

84 Cf. id. at 69-70.
85 On the subject of deterrence generally, see Blum & Kalven, supra note 64, at 75; Keeton & O'Connell at 13-15, 46 and authorities there cited; Calabresi, The Decision for Accidents: An Approach to Nonfault Allocation of Costs, 78 Harv. L. Rev. 713 (1965); Calabresi, supra note 13, at 216; Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L.J. 499 (1961); Conard & Jacobs, New Hope for Consensus in the Automobile Injury Impasse, 52 A.B.A.J. 533 (1966); Kalven, supra note 7, at 40.
86 See James, Accident Liability Reconsidered: The Impact of Liability Insurance, 57 Yale L.J. 549 (1948); James & Thornton, supra note 73, where the impact of liability insurance on tort doctrine is carefully considered.
munities from liability, all of which are predicated on the poverty of the defendant. The leading case establishing the governmental immunity doctrine reasoned from the absence of a municipal treasury, and the charitable immunity doctrine has a similar rationale. Intra-family immunity usually is predicated upon the desire to avoid disruption that might be expected to result when one member of a family is required to pay his own money to another member. Obviously, the availability of an insurance fund from which to satisfy legal liability eliminates the "bankruptcy" and "disharmony" reasons for immunity in each of these kinds of cases. Although it is difficult to say what effect an assumed increase in the availability of insurance actually has had on the demonstrable fact that these judicially conferred immunities seem to be on the wane, there would seem to be more than a coincidental connection between them. Governmental bodies certainly are purchasing more liability insurance now than they did formerly.

It would be nice at this point to say that insurance has thus had the effect of widening the protection of the tort process. But unfortunately even the actual existence of an insurance policy does not guarantee liability, even if the facts and available theories would seem to compel it. Immunities are remarkably persistent. Although one would not usually expect that a governmental body could purchase liability insurance with its citizens' tax dollars and still claim immunity, many courts have permitted this defense to stand in the face of existing insurance covering the claim. A few, however, have begun to call the purchase of insurance a "waiver" of the immunity. The defense of governmental immunity in these circumstances seems the more anomalous when it is remembered that it is the insurer that asserts the immunity defense when the defendant has a liability insurance policy.

87 See generally James, supra note 86, at 553; James & Thornton, supra note 73, at 437-40.
89 Williams' Adm'r v. Church Home for Females and Infirmary for Sick, 223 Ky. 355, 3 S.W.2d 753 (1928). See James & Thornton, supra note 75, at 439, 440.
90 Thompson v. Thompson, 218 U.S. 611 (1910).
93 E.g., City of Knoxville v. Bailey, 222 F.2d 520, 526 (6th Cir. 1955).
Although this is not necessarily improper, it does raise questions. Do governmental bodies pay the same premium as others purchasing similar "protection?" It would seem that the availability of the immunity defense should vary with the answer. Although the courts have not yet considered this an important factor, many governmental policies now specifically provide that the insurer will not avail itself of the insured's immunity; some provide that immunity will not be asserted without the permission of the insured.94

Insurance is the only reasonable explanation for the filing of almost all intra-family tort suits.95 Its existence does, therefore, lead to litigation in jurisdictions where the immunity is abolished. But it does not follow, as claimed by supporters of the immunity, that the intra-family immunity rule precludes litigation, or that its abandonment increases litigation. It may merely change the parties to a suit. In the two car accident case, for example, it merely forces the passenger-spouse to sue the non-settling driver of the other car instead of his spouse;96 in other kinds of cases the offending spouse's employer or principal may come to be the defendant. Some courts have predicated intra-family immunity upon the possibility of collusion against the insurer,97 although it seems no more likely that spouses would collude than any others. The effect of this argument simply is to expand the reach of the unconscionable guest statutes98 or doctrines to yet another area in which collusion, while possible, is likely only under a rather paranoid view of human nature. Of course, insurers are not content to urge retention of intra-family immunities on this single ground. They also are in favor of maintaining domestic harmony within the family unit as against the threat of impersonal litigation. Apparently insurers are unaware of the domestic discord and misery created by accidents that go uncompensated because of the immunity. The public policy "family disharmony" argument has been neatly disposed of by some courts,99 and it has been shown empirically that insurance rates

98 These statutes are discussed at pp. 675-76 infra.
99 E.g., Lo Galbo v. Lo Galbo, 138 Misc. 485, 246 N.Y.S. 565 (Sup. Ct. 1930); Bogen v. Bogen, 219 N.C. 51, 12 S.E.2d 649 (1941). In Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969), a suit by a parent against her child, the New York Court of Appeals said:
are no higher in states without the immunity than in those with it.\textsuperscript{100}

Quite recently the California Supreme Court abolished the immunity of one in control of land for negligence in maintaining a latent, dangerous condition which causes injury to a social guest. In \textit{Rowland v. Christian}\textsuperscript{101} the court declared that "the availability, cost, and prevalence of insurance for the risk involved" are major considerations in determining the duty of the landowner-controller, and in rejecting the traditional "licensee" status of the social guest as determinative of duty gave weight to the absence of proof that to do so would reduce the prevalence or increase the cost of insurance.\textsuperscript{102}

The survival of some immunity rules despite their lack of merit can be explained only by the power of persistent advocacy in the courts. While liability insurance has made the immunities anachronisms, ironically its union with the tort process also has kept them alive.\textsuperscript{103}

Consideration of the system created by liability insurance and tort doctrine would not be complete without mention of other kinds of defensive doctrines. Although the availability of insurance probably has not influenced the development of other traditional defenses as significantly as it has immunities, the existence of \textit{insurers} has probably been the most important factor in the retention of several defenses that have outlived their usefulness. Contributory negligence is a prime example. There is little, if anything, to recommend it, and much to be said for other ways of taking the plaintiff's fault into account. However, for obvious reasons insurers and the organized defense bar lobby tirelessly, both in litigation and extra-judicially, for retention of contributory negligence, which they extoll as if it had been designed in heaven. The far superior comparative negli-
gence doctrine they treat as akin to legalized incest. There can be no doubt of their success. Despite reports that it operates effectively under a well-drawn statute, comparative negligence has been adopted in only six states. Ironically, the efforts of insurers may be self-defeating. If the public becomes familiar with the contributory negligence defense and its effects, and if jurors always assume that the defendant is insured, they may tend to find the plaintiff negligent only in extreme cases.

If the contributory negligence doctrine seems unwise there is another, favored by insurers, which is even more questionable. This is the doctrine of imputed contributory negligence. Under ordinary circumstances insurers could be expected to deplore extensions of liability through various vicarious liability doctrines and statutes whose very existence is attributable to the assumption that liability insurance is available. However, when an insurer provides the defense for the driver of an automobile that allegedly struck an automobile in which the plaintiff was a passenger (or defends some third party who allegedly caused a plaintiff's harm), it is only too happy to impute the negligence of the plaintiff's driver (or companion, in a non-auto case) to the plaintiff, to transmute it to "contributory negligence," and to interpose it as a defense to the claim. In a few cases it has even been applied like a guest statute to bar suits by a passenger against his own driver. Although this defense almost always is limited to the "joint enterprise" doctrine of vicarious liability, a few community property states still retain an anachronistic "domestic relations" imputation of contributory negligence, ostensibly on moralistic grounds, although reasons related to the insurance business are apparent.

In automobile accident litigation, where the negligence doctrine almost always is relied on by the plaintiff, the guest statutes enacted

104 Examples are too numerous to mention. For a recent one, see Rule of Comparative Negligence Could Lead to Parade of Horrors, 69 INSURANCE 50 (1968).
106 Cf. KEETON & O'CONNELL at 253, citing Jaffe, Damages for Personal Injury: The Impact of Insurance, 18 LAW & CONTEMP. PROB. 219, 221, 230 (1953).
107 See PROSSER, supra note 57, § 68, at 471 and authorities cited.
108 Good examples are the "family car" doctrine, id. § 72, at 496-99, and "consent" statutes, id. at 499-501.
109 Id. § 71, at 493-94.
110 Id.
111 Id. § 73, at 503.
by many states preclude recovery by a "guest" passenger against his
driver "host" (and sometimes by the owner against the driver) ex-
cept when there has been a high degree of misconduct. The prin-
cipal rationale of these statutes is that they protect insurance com-
panies from collusion by an insured driver and his guest. Another
claimed justification is avoidance of a result of such collusion—in-
creased rates charged to the motoring public.\textsuperscript{112} Since the traditional
tort process is virtually helpless at every point against the deliberate
lie, it seems anomalous, to say the least, that this particular situa-
tion should have been singled out by public policy makers for such
drastic treatment. However, if the reason for guest statutes is not to
eliminate falsehood but to reduce potential liability, they are more
understandable. These statutes have been "largely the work of in-
surance companies in the legislatures,"\textsuperscript{113} and the courts have been
similarly cooperative. Whatever the merits of these defensive doc-
trines, guest statute questions and imputed contributory negligence
questions have been the cause of a great deal of litigation at public
expense, and there often has been the denial of claims for no reason
that the tort process alone would have recognized as sound. In other
words, the union of insurance and tort process has produced diam-
etrically different and illogical results.\textsuperscript{114}

A number of cases suggest that at least one of the justifications
for "strict" or enterprise liability doctrines is the notion that a person
who is in the business of providing products or services to others
usually is in a better position than a person injured by the product or
service to bear the loss because the enterpriser can insure and distri-
bute the costs of the insurance premium among all those with whom
he deals as a cost of the goods and services.\textsuperscript{115} It is not clear what

\textsuperscript{112} But cf. McConville v. State Farm Mut. Auto. Ins. Co., 15 Wis. 2d 374, 382-84,
113 N.W.2d 14, 19 (1962).
\textsuperscript{113} Prosser, supra note 57, § 83, at 566. See Naudzius v. Lahr, 253 Mich. 216, 225-26,
234 N.W. 581, 584 (1931); Allen, Why Do Courts Coddle Automobile Indemnity Com-
panies?, 61 Am. L. Rev. 77 (1927); White, The Liability of an Automobile Driver to a
Guest Statutes, 12 Texas L. Rev. 303 (1934).
\textsuperscript{114} See generally Comment, Private Insurance as a Solution to the Driver-Guest
\textsuperscript{115} Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963); Greenman
v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (See
also Seely v. White Motor Co., 53 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965));
opinion); Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 248, 218 N.E.2d 185, 199
(1965) (dissenting opinion); Prosser, supra note 57, § 70, at 481.
impact this reasoning really has had on the courts in the undoubted
trend toward strict liability in this area. As Dean Prosser correctly
points out, it is not generally referred to by the courts as a reason for
imposing strict liability.\textsuperscript{116} Why is this so? With regard to appellate
courts, one explanation for failure to mention it more often may be
simply that it is not one of their reasons. And since trial courts usually
are not required to articulate their decisions, it is impossible to know
with certainty what motivates them in advancing strict liability. But
failure to mention insurance does not mean that insurance does not
strongly influence judicial thought. One judge has suggested persuas-
ively that although courts suspect that an enterprise can pass the
costs of claims to the consuming public, they do not know for sure.\textsuperscript{117}
This would tend to inhibit articulation of the insurance rationale
as the \textit{ratio decidendi} even if it were the real basis for decision.
Of course, we are no longer shocked at the suggestion that unarticu-
lated and merely intuited economic theories provide the basis for
judicial action. Real or imagined political hazards may also inhibit
judges from expressing what to many influential people in the com-
munity is still a radical doctrine. Thus judicial timidity may well
provide the answer to Dean Prosser.

As far back as 1921 Dean Pound thought he observed in the
courts a growing tendency to ask "who can best bear the loss[?]"\textsuperscript{118}
It seems likely to me that the fantastically increased availability and
use of liability insurance in the succeeding years has affected the
judicial mind greatly in the development of strict liability. Indeed,
it is difficult to think of any other rational explanation.\textsuperscript{119} Perhaps
the doctrine promotes safety to some extent, but the careful manu-
facturer is no more safe from liability when his product is defective
than the careless one.

Needless to say, strict liability is opposed by insurers at every op-
portunity for the obvious reason that, under strict liability, liability
insurance is almost the equivalent of accident insurance from the
standpoint of the insurer's risk. Thus, for example, the insurance in-

\textsuperscript{116} \textit{Prosser, supra} note 57, § 84, at 575-76; \textit{Prosser, The Assault Upon the Citadel, 69
Yale L.J. 1099, 1121 (1960).}
\textsuperscript{117} \textit{Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 248, 218 N.E.2d 185, 199
(1966) (dissenting opinion).}
\textsuperscript{118} \textit{R. Pound, The Spirit of the Common Law} 189 (1921).
\textsuperscript{119} For interesting discussions of the theory of loss distribution through liability
insurance, see C. \textit{Morris, Torts} 248-53 (1953); Douglas, \textit{Vicarious Liability and the Ad-
ministration of Risk} pts. I & II, 38 Yale L.J. 584 (1928), 38 Yale L.J. 720 (1929); Morris,
industry has even opposed Professor Cavers' modest suggestion\textsuperscript{120} for improving the financial protection of the public against nuclear risks.

As is true of every area of the tort process touched by liability insurance, the final word has not yet been said. "Strict" liability of sorts is now with us, and by hypothesis it is founded at least in part upon the assumption of the availability of liability insurance. One interesting question is what happens to the tort doctrine if liability insurance should no longer be available?\textsuperscript{121} The question is not purely hypothetical, for whatever impact insurance has had in the past on the development of manufacturers' tort liability for harm caused by their products, development of new theories of liability has affected insurance coverages. The redesigned 1966 standard comprehensive general policy deliberately excludes from its coverage many of the most severe risks encountered in the use of products. For example, design defects or failures to perform to standard (as opposed to malfunction) of the kind encountered in Santor v. Karaghelusian, Inc.\textsuperscript{122} are not covered under the new policy.\textsuperscript{123} How the courts will in turn respond remains to be seen. If the official myth is correct, they are not concerned with the availability of insurance. Even if they are concerned, they merely assume the availability of insurance, and the trial process affords no means of ascertaining whether or not there actually is coverage in a given case. Moreover, even if potential coverage exists, there presently is no way to guarantee that a given defendant or potential defendants as a class will take advantage of the opportunity to insure, that they will insure adequately, or that they

\textsuperscript{120} In connection with the problem of the tremendous damages which might be suffered as the result of the use of nuclear energy as a source of electric power, Congress has required nuclear reactor operators to carry liability insurance in amounts prescribed by the Atomic Energy Commission. Cavers, \textit{Wanted: Better Financial Protection for the Public Against Nuclear Risks}, TRIAL 12 (Apr.-May 1968). But as Professor Cavers has pointed out, and as we know, liability insurance does not guarantee liability. Consequently, Professor Cavers has proposed several conceptual methods for imposing a standard of strict liability which, together with liability insurance, would guarantee liability in the event of a nuclear accident. \textit{Id.} at 13.

\textsuperscript{121} In the related area of professional responsibility, it has been suggested that the availability of liability insurance might provide the basis for a change to a strict standard of liability. COUNTRYMAN & FINNAN, supra note 90, at 73-74. Such a change obviously would assume the continued availability of coverage. As an illustration of such an assumption, in a recent medical malpractice case, Judge J. Skelly Wright stated that "today, with insurance, financial responsibility is not one of the dangers to the doctor in a malpractice suit." Brown v. Keaveny, 326 F.2d 660, 663 (D.C. Cir. 1960) (dissent).

\textsuperscript{122} 44 N.J. 52, 207 A.2d 305 (1965).

will be able to pass the costs of insurance on to consumers as a class.\textsuperscript{124} At present the withdrawal of coverage for certain kinds of liability remains a real possibility throughout the spectrum of tort doctrine. This inescapable fact dramatizes the miscegenetic relationship of the tort process and liability insurance in the claims system. For although the rules of the tort process have been oriented largely toward the interest of the public (which includes the interests of particular litigants as well as of the insurance industry), the liability insurance side of the union is concerned with its own financial interest alone. That difficulty would be encountered in making the two work in harness over a long haul is not surprising.

Insurance for dispensers of liquor exemplifies a problem shared by all high-risk enterprises and their consumers. Although the common law and statutory liabilities of tavern (dram shop) owners and other dispensers of liquor represent an expansion of liability rather than a limitation, it cannot be doubted that this expansion was also influenced by the actual or assumed availability—albeit limited and expensive—of liability insurance by means of which a dispenser can, if he wishes, protect himself and theoretically spread the cost to his customers.\textsuperscript{125} As in the case of the manufacturer, one wonders what happens to that rationale under the usual products and premises policies, as well as the 1966 standard comprehensive general liability policy, all of which exclude dram shop liability coverage.\textsuperscript{126} When such insurance is available, the premium rates are high compared to other kinds of liability risks. If the price of special dram shop liability coverage is so high that it cannot be passed on to the consuming public, this may well mean that the injured victim of a dram shop patron must in practical effect bear the loss irrespective of liability theories. If so, as far as the victim is concerned there is no \textit{practical} difference from the situation at pre-insurance common law if the tavern owner is insolvent or relatively so. Of course, if he is solvent


\textsuperscript{125} See 1954 \textit{U. ILL. L.F.} 503, 504.

\textsuperscript{126} See generally Tarpey, \textit{supra} note 123, at 118.
there is a big practical difference. This is a big practical difference to the uninsured owner, too. For if his business constitutes his principal asset, he may have to liquidate it in order to pay the judgment. Even if liability insurance should be made compulsory, prohibitive premium rates may put dram shops out of business. The net result of such insurance-influenced liability rules may be a drastic decrease in this kind of economic and social activity, and in any other kind of high-risk activity to which they are applied. It would seem preferable that this sort of policy decision be made explicitly on accurate empirical grounds, with full consideration of the stakes and the alternatives. The continued assumption of the practical availability of insurance is beginning to seem too undependable a basis.127

Although at first glance the liability of infants and mental incompetents may seem an unlikely area in which to find the influence of insurance, that insurance has in fact resulted in the imposition of liability where none would otherwise exist under the principles of the tort process is well documented.128. The assumed availability of and resort to insurance is the only explanation for the recent appearance of minors in the appellate reports as defendants with respect to “adult” activities, including but not limited to the driving of automobiles. But again the question of the effect on these new doctrines of the non-availability of insurance arises. We know, for example, that automobile insurance may be virtually unavailable to a person under twenty-five because of high premium cost or unwillingness of the insurer to contract. Although the imposition of liability on youthful drivers may be justified, it may not be justified on the grounds upon which it is in fact imposed—that the youthful driver is protected by insurance.

Mention should also be made of the way in which insurance, both liability and accident, has converted virtually all fire cases into litigation between a subrogated fire insurer and a liability insurer, and the way in which the combination of contractual indemnity agreements and insurance guaranteeing them between owner-employers, contractors, and subcontractors in the building industry has rendered moot the efforts of courts to allocate the losses.

In summary, there is reason to believe that the addition of liability insurance to the tort process has had considerable effect on the resulting system. The necessities of the insurance business dictate that

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almost all claims be settled, rather than litigated. And in settlement practice tort rules are suggestive rather than determinative. Even as to cases that are litigated, the assumption, true or false, that insurance is available and that the defendant is insured leads to decision by standards other than the official standards of the tort process. Moreover, the assumption of insurance brings into the courts great numbers of cases with which the tort process simply is not equipped to deal, but which it disposes of nonetheless.

Our personal injury claims system makes assumptions about insurance which are often false, sometimes contradictory, and sometimes both. It falsely assumes the absence of funds when it immunizes governments, charities, and family members from liability. And insurers fight stoutly to maintain the false assumption. On the other hand, where an assumption about the existence of insurance probably is correct, as in guest statute litigation, it assumes that because there is insurance the insurer should not have to pay. Then in three other areas it assumes the availability of insurance (perhaps wrongly) and bases liability upon that assumed fact; manufacturers, contractors, dispensers of alcoholic beverages, infants and mental incompetents are held to standards of conduct higher than those which the tort process alone would impose. Other examples probably will occur to the reader.

Although the diligent and serious efforts of judges, lawyers, and scholars to improve the public welfare by improving tort doctrine are praiseworthy, their efforts may be futile in a system in which liability insurance is an integral component. So long as control of the actual availability of insurance lies almost wholly in the hands of the insurers, reality is subject to daily change and all assumptions are precarious. Any rule that relates liability to insurance is as likely to harm as to improve the public welfare.129

129 In the significant case of Rowland v. Christian, 69 Cal. 2d 89, 443 P.2d 561, 70 Cal. Rptr. 97 (1968), the supreme court took what the writer believes to be two important and unprecedented steps, quite apart from its rejection of the traditional categorical status of a social guest as a test of liability in a negligence case. First, the court specifically held that insurance is a “major consideration” in determining the duty of the defendant to the plaintiff in an ordinary negligence case. But more importantly, the court did not stop with a general reference to the relevance of insurance. To it the important factors were “the availability, cost, and prevalence of insurance for the risk involved.” Id. at 94, 443 P.2d at 564, 70 Cal. Rptr. at 100. Obviously, the writer shares the court's view of the significance of these factors. But how a court is to obtain the needed information, and how it can be assured of stasis are open questions. The court in Rowland was not badly troubled by these problems. It said, “... the cost of insurance, will, of course, vary depending upon the rules of liability adopted, but there is no persuasive evidence that applying ordinary principles of negligence law to the land
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WHAT LIABILITY INSURANCE HAS DONE TO TORT PROCEDURE

The effect of the liability insurance institution on the procedures by which tort cases are determined has been at least as great as its impact on the substance of tort law. Highly active insurance industry research and public relations staffs, devoted to influencing the courts, the public, and the legislatures in the interest of higher profits for insurance companies, have not neglected the procedural aspects of the tort process. Thus the insurance industry has been the staunch and vocal defender of the civil jury system, of the unanimous jury verdict, of the "adversary process," and of the special issue, special verdict, or interrogatory methods of obtaining jury verdicts, which hide from the jury the effect of its answers. As is usual regarding anything affecting its interests, it has not hesitated to carry the arguments for the procedures it prefers directly to the courts by means of published literature which it disseminates. Recently claimants' attorneys' groups have increased similar activities in their own interests.

Some of the strongest efforts have been directed toward procedures affecting the deliberations of the jury. Even though almost all jurors and all judges probably now assume that the defendant is occupier's liability will naturally reduce the prevalence of insurance due to increased cost or even substantially increase the cost. Id. at 99, 443 P.2d at 567-68, 70 Cal. Rptr. at 103-04. As this article shows, the court's optimism probably is misguided.

130 It is not immediately apparent why insurers should want to preserve trial by jury; it would seem that they would fare better with judges. But it must be remembered that the interest of the insurer is not revealed during trial. It is believed that the most important thing to insurers is not the jury but the common-law trial, which is strongly an emotional peg upon which to plead for retention of the status quo. In addition, jury trial offers benefits to insurers. One of these is the chance to obscure the issues and win on that basis in a marginal case; the same interest that the claimant has in such a case. Furthermore, the use of a jury increases the chances for error fantastically. It is very difficult to reverse the judgment of a judge sitting without a jury, but appellate courts are only too willing to second-guess juries. And as noted earlier, the chance to appeal is very much to the advantage of the insurer for reasons of delay and financial leverage. With regard to possible prejudice, the jury may only suspect that the defendant is insured, while the judge usually would know it by reasons of the counsel appearing. Lastly, insurers and their counsel seem genuinely to have convinced themselves that "fault" and its trappings, including the jury, are so akin to religion that, like religion, they must be preserved.

131 Although defense attorneys, because of their close relationships with insurers, frequently are cast in the "bad guy" role, it should not be overlooked that claimants' attorneys are at least as great incidental beneficiaries of the personal injury claims system, and they are equally strident in its defense.
covered by liability insurance in most personal injury suits, particularly those arising from automobile accidents, insurers continue to think it particularly important that juries and judges not know that a particular defendant is insured. This concern really is not for the welfare of the defendant, of course. In most cases in which the defendant is insured, the insurer both provides the defense and is the only loser in the event of an adverse judgment. It is the insurer, not the insured, therefore, that is the real party in interest. Unless it is assumed that juries and judges will disregard the rules of the tort process, disclosure of the identity of the real party in interest would seem harmless, while failure to do so would be unconscionable dissimulation. Even so, insurers have been successful in obtaining rules and rulings that if the real party in interest is an insurance company its identity may not be disclosed. The introduction of evidence or the suggestion that the defendant is insured, unless it is relevant on some ground other than his solvency, generally is held to be so prejudicial and inflammatory that no instruction to disregard it will suffice to avoid a mistrial or later reversal.\textsuperscript{132} This rule may be softening somewhat, however.\textsuperscript{133} A parallel development brought on by the addition of liability insurance to the tort system is the rule adopted by some courts that makes reversible error the disclosure that the defendant is not insured, on the ground that in light of such information the jury is less likely to return a plaintiff’s verdict or to

\textsuperscript{132} In Northwestern Nat. Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962), the rule which prohibits reference to the defendant’s insurance coverage was given as one reason for not permitting liability insurance to cover awards of punitive damages, on the ground that the rule which permits evidence of the financial standing of the defendant necessarily would reveal his insurance coverage. The lengths to which courts carry the rule is revealed in Jamison v. A.M. Byers Co., 330 F.2d 657 (3d Cir. 1964), in which a plaintiff’s verdict in a death action was reversed on the sole ground that a written contract relevant to the issue of liability which had been admitted in evidence and examined by the jury revealed that the defendant corporate contractor had liability insurance coverage. For undisclosed reasons the remedy imposed by the appellate court was remand for new trial on the issue of damages only. \textit{Id.} at 662.

The really surprising thing about the general rule is its survival in light of the kinds of gross irrelevancies which usually are held by the courts to be cured by instructions to disregard.


make a high award of damages. Once again we see a rule that assumes that the effect of insurance is to create a lawless jury.

This sort of thinking is carried to even greater lengths in the rules that avoid anticipated prejudice by prohibiting claimants from joining contract claims (such as that the claimant is a third-party beneficiary of the policy) with tort claims, and by prohibiting joinder of a liability or indemnity company as a defendant unless it is liable by statute or contract to the plaintiff. However effective these rules once may have been, it seems likely that they are undone by the pervasive assumption of insurance. The straightforward tactic of telling the jury exactly what the insurance situation is would probably only remove the element of chance from whatever juries in fact do with insurance information.

Another way in which insurance can affect juries both in their makeup and their decisions is through its injection into the jury selection process. A few well-chosen questions on voir dire aimed at disclosing bias toward or against insurance companies quickly transmit the suggestion that the defendant is insured to the veniremen, and similar problems occur during trial in connection with the examination of witnesses. The familiar supposition of prejudice has divided the courts on the issue of whether to permit such examination. A strange thing about the adoption of these non-disclosure of insurance rules is that although distrust of the jury is at their foundation, the good sense of the jury is the argument most frequently advanced by insurers for preservation of the status quo. Even if judges and juries are influenced by knowledge that an insurer will pay any judgment rendered, it does not follow that the necessary remedy is to befog the insurance issue. (One equally efficacious remedy would be to adopt an entirely different claims system that would make "nondisclosure" unnecessary.)

134 Ex parte Jones, 160 Tex. 321, 325, 331 S.W.2d 202, 204 (1960); cf. White v. Evansville American Legion Home Ass'n, 247 Ind. 69, 210 N.E.2d 845 (1965).

135 See the series: Green, Blindfolding the Jury, 33 Texas L. Rev. 157 (1954), 33 Texas L. Rev. 273 (1955); Gay, "Blindfolding" the Jury: Another View, 34 Texas L. Rev. 368 (1956); Green, A Rebuttal, 34 Texas L. Rev. 382 (1956); Gay, A Rejoinder, 34 Texas L. Rev. 514 (1956); Green, A Reply to Mr. Gay's Rejoinder, 34 Texas L. Rev. 681 (1956).


Whether or not judges and juries actually become “lawless” to the extent of returning higher verdicts even when an insurer is known (rather than assumed) to be the real party in interest remains to be verified. Two states, Wisconsin and Louisiana, have statutes permitting direct action against insurers in most instances. It has been reported that the result in Louisiana has been that the quantum of damages recovered for comparable harms is actually lower than in other states, although the relative infrequency of jury trials in Louisiana has been suggested as an explanation. However, the same result also has been reported in federal court direct-action cases involving jury trials in Louisiana. In Wisconsin, on the other hand, it was thought by the Supreme Court at an early time that not only the effect of its direct-action statute, but also its purpose, was to reveal the insurer as real party in interest in order to increase the size of the damage award. It has been suggested that this effect has been experienced and also has resulted in an increase in insurance premium rates in Wisconsin, although the existence of a comparative negligence doctrine in Wisconsin may also be a factor. In truth there does not seem to be any reliable evidence one way or the other, nor is there any real certainty concerning what happens when the judge and jury only assume that the defendant is insured. Nonetheless the assumption and the fear of lawlessness persist.

Attention is not limited to trial courts. The insurance industry with its enormous financial resources has had a great and largely overlooked impact in the appellate courts. The effect of insurance often is realized in the very decision to appeal, just as it is in the decision to defend, since insurance companies, because their interests as professional litigants transcend the facts of a particular case, may appeal where even financially strong individual litigants would not. It often is well worth an insurer's time and effort to obtain favorable pronouncements on the law by appellate courts which thereafter will serve as precedents as well as to fight specific trial court rulings that threaten the industry's premium-loss ratios. In addition, persuading an appellate court simply to review the facts and to second-guess the  

138 See Lassiter, Direct Actions Against the Insurer, 1949 Ins. L.J. 411.
139 Id. at 415. Apparently some attorneys feel that their chances for obtaining and retaining higher awards of damages for claimants are better in the federal courts; if they are correct, the direct-action statutes at least have had the frequent effect of making an alternate forum available to claimants because of the diversity jurisdiction of the federal courts.
trial judge and jury by means of proximate cause and similar doctrines may be relatively inexpensive if the increased risk of loss is slight and the possible saving great because the potential recovery is thought to be near the policy limits. Another important effect of appealing cases is the effectuation of appellate control over the size of damage awards.\textsuperscript{142} Thus a substantial part of the employment of appellate courts is directed solely to the service of the insurance industry.

Whether thought of as "procedure" or "substance," questions concerning damages—the kinds of interests for which awards of money should be recovered in court as well as the amounts of such awards—have been emphasized greatly by the union of the tort process with liability insurance.\textsuperscript{143} An example is the damage award for conscious physical pain and suffering.\textsuperscript{144} Under the traditional principles of the tort process alone, this is an interest for which an award may be recovered in any amount decided on by the decision makers provided by the process, since no conceivable evidence could relate physical pain to economic value in the context of market-determined value. Although this may be an acceptable (if debatable) rule in a personal injury claims system that does not have a liability insurance component, it becomes more difficult to accept when the insurance ingredient is added. From the insurers' standpoint it is an actuarial nightmare. From that of the public interest the question is raised whether the insurer or the injured person himself is the better distributor of this risk of harm. The insurer is the better distributor only if the loss may be spread through an insurance pool composed of people among whom it is thought to be "fair" to spread it. It is clear that these conditions are not present in connection with much activity that creates risks of physical pain and suffering to others; the cost is spread to the public at large through higher premium payments. The only tenable theory for retaining the award beyond an amount necessary to relieve pain is that the ostensible shifting of such losses indirectly pays the claimant's expenses of litigation, which expenses otherwise would reduce more legitimate items of damages. Aside from the absence of any necessary correspondence between the amount of the award and the amount of collection expense,


\textsuperscript{143} See Williams, \textit{How Do Insurance Companies View Damages?}, 38 \textit{Wis. B. Bull.} 14 (1965).

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this argument alone might suffice to recommend its retention. It would be more persuasive if it were not a simultaneous general principle of the system to refuse to permit the shifting of litigation costs directly.\textsuperscript{145}

Another question concerning damages is how liability insurance does and should relate to awards of so-called punitive damages. If it is assumed that the rules of the tort process deter conduct, an objection to insurability is obvious: Since the burden of paying falls on the shoulders of the insurer, not the insured, it does not deter the conduct that gave rise to the award.\textsuperscript{146} Thus on grounds of public policy some courts have refused to permit the insured indemnity for judgments awarding punitive damages.\textsuperscript{147} It is relevant of course to ask if punitive damages or damages of any kind really do serve a deterrent function. They may deter the particular defendant (although the failure of more severe criminal sanctions to achieve much of a reduction in the crime rate makes this questionable),\textsuperscript{148} but because civil verdicts are not much publicized it is doubtful that they have much of what Professor Calabresi refers to as a "general deterrence"\textsuperscript{149} effect. In any event, we usually assume that if a defendant is not insured he is insolvent for practical purposes. If this is correct, refusal to permit insurance coverage does not enhance deterrence of any kind, but simply deprives the claimant of this element of damages. To the extent that he might have looked to this source for payment of litigation expenses, he is further frustrated. Some courts, noting this, have required the insurer to pay a punitive damage award.\textsuperscript{150} It is perhaps too facile, however, to assume that so long as the "deterrence" policy ground is absent, as it surely is in

\textsuperscript{145} In Connecticut, awards of punitive damages are specifically designed to pay litigation expenses and may not exceed them, less taxable costs. See Tedesco v. Maryland Cas. Co., 127 Conn. 533, 18 A.2d 357 (1941), and discussion of punitive damages therein.

\textsuperscript{146} One wonders why this argument apparently is not as significant when an admittedly guilty tortfeasor is given one of the many immunities referred to in text at pp. 671-74 supra.

\textsuperscript{147} See Annot., 20 A.L.R.3d 343 (1968). Theoretically this could be accomplished as well by construing the language of the policy, but the courts generally have not been sympathetic to insurers' claims of this kind. When they have precluded coverage, it has usually been on the ground of the policy referred to in the text. American Surety Co. v. Gold, 375 F.2d 523 (10th Cir. 1966). Contra, Lazenby v. Universal Underwriters Ins. Co., 214 Tenn. 639, 883 S.W.2d 1 (1964).


\textsuperscript{149} See text at pp. 669-71 supra for discussion of deterrence in connection with the discussion of what liability insurance has done to tort doctrine.

the case of solely vicarious liability such as respondeat superior for punitive damages,\textsuperscript{151} liability insurance automatically should be permitted or required to cover the award. The considerations mentioned above in connection with damages awards for pain and suffering apply to punitive damages as well, with the additional consideration that the award is not designed to compensate and is of dubious efficacy for any other purpose.\textsuperscript{162}

The effect of liability insurance on the punitive damages doctrine is likely to be even greater in the future. Needless to say, insurers actively oppose the principle of punitive damages. Unless required to provide complete coverage by statute,\textsuperscript{153} most exclude punitive damages from policy coverage.\textsuperscript{154} The 1966 standard comprehensive general liability policy appears to attempt such exclusion indirectly by covering only accidents not intended by the insured.\textsuperscript{155} If "gross negligence" and "reckless" conduct can be converted to "intentional" conduct, it appears that, as to punitive damages, insurance as a means of providing a financially responsible defendant has been eliminated indirectly. But to the extent that courts continue to hold insurers liable for any punitive damages, their public relations and litigation staffs can be expected to persist in the effort to obtain abandonment of the doctrine itself.\textsuperscript{156} They have good reason for wanting it abandoned apart from the chance that they might have to pay punitive damages awards. The doctrine is employed by claimants' attorneys as a tactical device, ostensibly to bring before the jury outrageous facts that might entitle their clients to punitive damages awards, but actually in order to play upon the emotions of

\textsuperscript{151} Ohio Cas. Ins. Co. v. Welfare Fin. Co., 75 F.2d 58 (8th Cir. 1934), cert. denied, 295 U.S. 734 (1935).
\textsuperscript{152} See Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173 (1931).
\textsuperscript{155} Ghiardi, Liability Insurance Protection From Punitive Damages, 8 For the Defense (Defense Memo) (Apr. 1967).
\textsuperscript{156} Although the adoption of the "deterrence" theory of insurer non-liability is a tribute to such efforts, its full significance cannot be appreciated until one asks why liability insurance for "compensatory" damages does not also eliminate the assumed deterrent effect of tort rules. If the premise is not questioned too closely and if the other assumed functions of "compensatory" damages are not weighed too heavily, the insurers' logic could put them out of business. For a representative insurers' view, see \textit{id}.
jurors to enhance the compensatory damages award even if no award of punitive damages is made. The punitive damages doctrine has little in reason to support it, particularly when it is used in conjunction with liability insurance. The insurers may be right in their push to abandon the doctrine, but, as usual, for the wrong reasons from the standpoint of the public interest.\footnote{157}

An additional effect of insurance is on the way in which damages are paid. The tort process decrees that damages be paid in perhaps the worst way possible in most cases—in lump sum. Yet the need is for periodic payment at times when needed.\footnote{168} Periodic payment is actively opposed by insurers, and the increased cost to them of a periodic-payment rule suggests their motives.

Probably the most significant effect of liability insurance on money damages is that in practical effect it has eliminated both the tort damage rules and the policies behind them in the vast majority of personal injury cases. Although the tort rules envision an all-or-nothing recovery of damages, the addition of insurance converts the system to "part-recovery most-of-the-time."\footnote{159} And this new system is further refined since such recovery is confined by the limits of the defendant's policy. As Professor Conard has pointed out, this commonly restricts settlement in over ninety percent of the personal injury cases in which claims are made to "an amount that is consumed by less than a year of hospitalization."\footnote{160} This may be almost inevitable under a tort-insurance regime. Insurers have only one interest and only one way in which to relate to the system—money. Because of this, the language of the marketplace has come to be the language of tort theory. One assumes that not all human interests

\footnote{157 On the subject of punitive damages generally, see Long, Insurance Protection Against Punitive Damages, 32 Tenn. L. Rev. 573 (1965); Morris, supra note 152; Williams, Pain and Suffering—A Practical Approach, 19 Okla. L. Rev. 269 (1966); Comment, Insurer's Liability for Punitive Damages, 14 Mo. L. Rev. 175 (1949); Comment, Automobile Liability Insurance and Punitive Damages, 39 Temple L.Q. 459 (1966); Note, Insurance Coverage and the Punitive Award in the Automobile Accident Suit, 19 U. Pitt. L. Rev. 144 (1957); Annot., 20 A.L.R.3d 320 (1968); Annot., 20 A.L.R.3d 343 (1968).


159 Kimball, supra note 5, at 10.

160 See Franklin, Chanin & Mark, supra note 8, at 32.
are expressable in these terms, but to the extent they are not, the existing system may be incapable of protecting them.

Insurance also has had considerable influence on pleading procedures in the courts. In pre-insurance days pleaders were concerned primarily to state “a cause of action” as judged by tort doctrinal requirements. Although pleading requirements have not been abandoned, the real problem of the modern pleader is to draw a complaint that states a cause of action covered by the defendant’s insurance policy. Thus, for example, even if the plaintiff’s cause of action at common law would have been for battery, the pleading may take an altogether different turn on the same facts if the defendant’s policy excludes coverage for intentional torts. Of course, the plaintiff is also interested in the amount of defendant’s coverage. Although both solvency and the terms of insurance coverage would have been irrelevancies in the early tort process, procedures have been modified in several jurisdictions to make both facts discoverable prior to trial, to aid in pleading and pretrial negotiation, to determine the existence of liability insurance for preparation of questions on voir dire, and to allow further discovery of investigative reports and the like. The majority of jurisdictions, however, adhere to the old rules. Insurers have been less than enthusiastic about these developments, but concern for their own interests has led to use of some interesting pleading procedures by insurance counsel. Since the tort process requires that few pleadings be under oath, the way has

161 See id. at 282, where the author points out that “[t]he results of the new research make it possible to view injury treatment as a problem of human suffering and deprivation, rather than as a problem of tort theory, judicial administration, or professional ethics.”


been left open for employment by insurers of sham defenses and denials of matters as to which there is no dispute for the purpose of delay and increase of expense to the claimant, both of which can be weathered much better by insurers than by claimants. Oddly enough these practices are most refined in suits on the policy brought by the insured himself or by a claimant. It is not unusual for an insurer to deny coverage by pleading the applicability of every single exclusionary clause in the policy, leaving it to the plaintiff to prove, for example, that an allegedly covered automobile accident injury did not result from a hazard of war.

Another procedural area touched by insurance, that of calendar control, also should be considered. It frequently is alleged that liability insurance is responsible for bringing the tort process to a virtual halt in many courts. Critics blame not only the abstract influence of insurance but also insurers themselves for the widely reported congestion of the courts. Although congestion is for the most part a serious problem only in the large metropolitan centers (and this alone makes it a serious national problem), there is evidence that cases in which an insurer is the real party in interest contribute heavily to congestion, wherever it exists.\textsuperscript{167} Once cases are docketed, insurers demand juries more frequently than other classes of litigants do,\textsuperscript{168} increasing congestion and delay. As population increases the amount of litigation naturally should be expected to increase proportionately. Yet the growing volume of discussion and smatterings of statistical proof concerning mountainous litigation backlogs suggest that we are becoming a disproportionately litigious people. One explanation is the ever-increasing availability or assumed availability of a financially responsible defendant through insurance. Although litigiousness itself may be unobjectionable, if insurance has the effect of first promoting the institution of tort litigation, then delaying its disposition, the public, which both pays the largest share of the bill for the costs of so-called private litigation and ultimately bears the brunt of failure of the courts to perform, has a vital interest in knowing about it and in seeking solutions.

Even though it would be a mistake to exaggerate the fact of congestion and delay in the courts, and whether or not insurers are deliberately responsible for such as there is or for the massive and complicated network of negligence doctrines employed in the courts,

\textsuperscript{167} A. Levin & E. Woolley, Dispatch and Delay 13-14 (1961); Rosenberg & Sovern, Delay and the Dynamics of Personal Injury Litigation, 59 Colum. L. Rev. 1115 (1959).

\textsuperscript{168} Cf. Levin & Woolley, supra note 167, at 397.
congestion, delay, and complexity undoubtedly work to their advan-
tage and to the corresponding disadvantage of policyholders and 
claimants. For one example, although insurers earn interest on the 
money that they hold between premium collection and claim pay-
ment, a claimant often must borrow money to replace lost wages 
while his claim is unpaid. Professor Conard has suggested that in-
surers be required to pay successful claimants the actual interest paid 
by them in such cases, rather than the usual “legal rate.” Other 
solutions can be suggested. Under the present legal rules of the tort 
process, insurers have as much right to use the court system and to 
demand juries as individual litigants, but this is not a logical neces-
sity. If the combination of tort process and liability insurance has 
produced a system in which insurers are permitted to pervert and 
impede the procedures and purposes of the tort process in order to 
amass private profit, surely some remedy is available.

VI

MARKETING, CLAIMS, AND PUBLIC RELATIONS: CONFLICTS 
WITH THE PUBLIC INTEREST

Our principal concern to this point has been with the ways in 
which liability insurance and the tort process interact to form a per-
sonal injury claims system and with the kind of system they form. 
We have seen how the interests of insurers in maximizing profits 
affect the system in regard both to the determination of liability and 
the actual availability of protection to one who has purchased a 
liability policy. But obviously this does not exhaust the interest of 
the public in the system. To the extent that the assumption of the 
general availability of insurance is basic to the operation of the sys-
tem, the public is interested in having it actually available, and at a 
cost that the public can afford. It is interested in the social conse-
quences of loss-shifting, and in the manner in which the system 
touches individual lives. The public also is interested in accurate 
feedback concerning the operation of the system for purposes of 
evaluation. The depth of these interests becomes clearer as the in-
surance industry comes under the closer scrutiny of lawmakers, 
journalists and other critics. Although no doubt some criticism

169 Letter from Alfred F. Conard to the Editor, in 3 TRIAL 2 (Apr.-May 1967).
170 See GREEN, supra note 66, at 87-101.
is merely scapegoating, many insurance company practices are open to serious question when viewed from the standpoint of the public interests mentioned.

Looking at these briefly, we should consider first the question of the actual availability of insurance. It seems to be becoming less available. In order to advance their financial interests, automobile liability insurers have begun to compete fiercely to insure only "preferred risk" drivers—people between thirty and fifty years of age with good driving records (about thirty percent of the driving population). The result is that persons who are not "preferred risks," and this includes many of the more economically unfortunate members of our society, racial and ethnic minorities, the very young and the very old, increasingly find themselves unable to obtain insurance, or find their contracts cancelled, or find that they cannot renew. These results are not limited to the downtrodden. It is reported that a number of insurers have ceased writing professional liability insurance for accountants, and that those who continue to do so have raised premium rates drastically. Military personnel also are the victims of discrimination. Nor are the grounds for cancellation uniformly related to the risk of the venture. In one recent case the professional liability coverage of a physician was cancelled because he testified under subpoena against another physician who was covered by the same insurer. One insurer has demonstrated the irrationality of discrimination against all male drivers under twenty-five by developing an effective rating plan for that group which includes psychological testing for attitudinal maturity. Testimony before Congress revealed that another company with only four rating classifi-

171 The problems of the poor with respect to property insurance recently have been well documented. See generally Report of the National Advisory Commission on Civil Disorders, ch. 14 (1968); Report of the President's National Advisory Panel on Insurance in Riot-Affected Areas (1967); Ribicoff, Federal Role in Riot Insurance Protection, 4 Trial 25 (Apr.-May 1968).

172 For one view of these problems, see Ghiardi & Wienke, Recent Developments in the Cancellation, Renewal and Rescission of Automobile Insurance Policies, 51 Marquette L. Rev. 219 (1967). See also The Business With 103 Million Unsatisfied Customers, Time, Jan. 26, 1968, at 20. The list could be expanded to divorcees, unemployed persons, painters—anyone who may be "unstable." Ridgeway, No Risks Preferred, New Republic, Feb. 22, 1969, at 18.


174 L'Orange v. Medical Protective Co., 394 F.2d 57 (6th Cir. 1968); 47 Texas L. Rev. 152 (1968).

175 Haney, Anticipating the Bad Driver, in Cars, Drivers, and Accidents: The Environment of Automobile Insurance 45 (Wickerman ed. 1966).
cations and which never cancels a policyholder on grounds of age has not experienced an underwriting loss in forty-three years. Under the pressure of federal investigation, members of the National Underwriters Association and the National Bureau of Casualty Underwriters (now the Insurance Rating Board), insuring about forty percent of the nation's insured drivers, began in 1968 to modify their cancellation policies, limiting their grounds to non-payment of premiums and to suspension of driver's license or auto registration, and limiting cancellation for misrepresentation to the sixty-day period following issuance of a policy.

The risk classifications made by insurers largely are without statistical foundation—they are simply the insurers' hunches concerning desirable risks. Because automobiles or other vehicles rather than persons are the insured units under most automobile liability policies, insurers do not have enough information upon which to make such risk judgments. Most of them do not seriously claim that their classifications are anything but arbitrary. But they are profitable. When insurance policies are modified to exclude certain kinds of risks, the premium seldom is lowered. In New Jersey this led the insurance commissioner to prohibit certain exclusions.

Those unable to insure otherwise must insure if at all with "high risk" automobile insurers which have sprung up to take advantage of the high premium rates usually permitted for such risks. Many of these insurers have failed financially in recent years, causing suffering to both claimants and insureds. When this happens policyholders sometimes find themselves both unprotected and assessed to meet the liabilities of the company. A problem similar to that of insolvency arises when there are multiple claimants against an insured whose aggregate claims exceed the policy limits. The problem arises in part from the concept of the limited policy, just as the insolvency problem arises from the concept of an entity with limited financial resources. If the insurer pays someone his full claim, someone else does not get paid. The same may be true if the insurer settles some of the claims, but not others. One solution would be simply to let

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177 Ridgeway, supra note 172, at 18.
the insurer settle as many claims as possible. Another alternative is a rule precluding exhaustion of the fund by settlement, together with priorities in chronological order of judgment or simply pro rata. The former puts a premium on simple and thus quickly-disposed-of claims, which may give the insurer a windfall, while the latter may be very slow. Both may burden the courts unduly. As in many other areas of life touched by liability insurance, the ability of insurers to limit their liability to the face amount of the policy places great strain on the public purposes of the claims system. It is for this reason that recent insurance reform proposals have included unlimited liability policies.\footnote{The AIA proposal referred to in text at pp. 697-98 \textit{infra} includes unlimited coverage as to total dollar amounts, with a limit on recoverable benefits in any given month.}

Insurer refusal to insure many risks, translated as "inability" to do so, also is used as a means of applying pressure for rate increases with state regulatory bodies. The subterfuge often is successful. Premium rates for all risks, established on the basis of industry-provided figures, seem to have increased at rates which are alarming to persons of modest means, although insurers continue to show profits when investment as well as underwriting experience is considered.\footnote{See note 18 \textit{supra}. Sharply increased automobile repair bills and doctors' bills have been attributed to the easy availability of insurance money. Whether or not there is a causal connection is difficult to know. At the time of this writing the cost of living generally has been rising for several years. On the other hand, insurers also have been faulted for encouraging the use of unsafe autos by reason of their niggardly appraisal and repair allowance practices.}

The true financial picture often is difficult to ascertain both because of the reticence of insurers in making the financial situation known and of the intricacy of their accounting principles when they do. The growing phenomenon of difficulty in obtaining liability insurance underlines the point that insurance does not distribute the costs of torts \textit{unless} a policy has been issued \textit{and} the policy covers the tort. As simple as it is, this point is easy to overlook.\footnote{See, \textit{e.g.}, James, \textit{supra} note 86, at 552 \& n.5.}

Insurers have not been much more eager to pioneer in the development of new kinds of coverage—liability or accident—or new marketing techniques that would better serve the public.\footnote{Ison, \textit{supra} note 3, at 215-16. Professor Ison attributes the development of tort liability to failure to develop accident insurance coverage. \textit{Id.} at 44. For an example of one possible change, note that although dealers find it advantageous to require each automobile purchaser to obtain collision coverage at the time of purchase, we as a society have not yet seen fit to use the same marketing technique to require the purchase of liability coverage with the purchase of every car. Friedman, \textit{Taken for a Ride}, \textit{New Republic}, May 25, 1968, at 18.}

\footnote{181}{The AIA proposal referred to in text at pp. 697-98 \textit{infra} includes unlimited coverage as to total dollar amounts, with a limit on recoverable benefits in any given month.}

\footnote{182}{See note 18 \textit{supra}. Sharply increased automobile repair bills and doctors' bills have been attributed to the easy availability of insurance money. Whether or not there is a causal connection is difficult to know. At the time of this writing the cost of living generally has been rising for several years. On the other hand, insurers also have been faulted for encouraging the use of unsafe autos by reason of their niggardly appraisal and repair allowance practices.}

\footnote{183}{See, \textit{e.g.}, James, \textit{supra} note 86, at 552 \& n.5.}

\footnote{184}{Ison, \textit{supra} note 3, at 215-16. Professor Ison attributes the development of tort liability to failure to develop accident insurance coverage. \textit{Id.} at 44. For an example of one possible change, note that although dealers find it advantageous to require each automobile purchaser to obtain collision coverage at the time of purchase, we as a society have not yet seen fit to use the same marketing technique to require the purchase of liability coverage with the purchase of every car. Friedman, \textit{Taken for a Ride}, \textit{New Republic}, May 25, 1968, at 18.}
more akin to fear of an uncertain future than to complacence with
the present situation seems to motivate the insurance industry to
resist change, even in the face of mounting criticism, although the
status quo does serve the industry well.\textsuperscript{185} There has been little
imaginative effort in the development of insurance that will answer
such criticism. The political efforts of claimants' attorneys probably
have resulted in greater changes in coverage and policy limits—
through legislative action—than have voluntary insurer actions. Al-
though there is an actuarial base of sorts for the present coverages,
there obviously would be none for new kinds. This, of course, would
present significant marketing problems in the realm of risk classi-
fication and premium rating. These problems, however, probably do
not fully explain the reluctance to innovate. As usual, the explana-
tion is to be found in threatened profits. Many of these problems
could be surmounted by the use of some kind of group insurance.
This has proved workable in the area of automobile rentals, where
the lessor obtains insurance to cover lessees who individually are
uninsurable.\textsuperscript{186} There is good reason to believe that opposition to
group liability insurance by independent insurance agents and by
insurers who fear invasion of insurance markets by companies now
selling in or easily capable of moving into the group field has been
responsible for much of the paralysis.\textsuperscript{187}

\textsuperscript{185} One view of the approach of the insurance industry to change is found in \textsc{Green},
\textit{supra} note 66, at 83:

\textit{It is interesting to observe the attitude of the insurance carriers and those who
speak for them towards any suggestion to change the status quo. Most of them
oppose compulsory liability insurance; they oppose being brought out in the
open as litigants though they are the real parties at interest and enjoy an
immunity denied to any other litigant, individual or corporate; they belittle the
need and efforts to find a better solution; they oppose the development of
something akin to workmen's compensation or other utilization of the insurance
principle. They seem to think they have a proprietary interest in liability
insurance; that it is their money that is involved; and that the advantages
gained from the difficulties in administering negligence law are for their special
benefit and should not be changed to meet the problems of the day. Sometimes
they even imply, if not openly charge, that substitutes proposed are communistic
in origin and purpose. In short they seem perfectly satisfied with things as
they are. In this attitude they are of course no different from any other group
invested with the privilege to profit from a public service.}

\textsuperscript{186} \textsc{Lewis}, \textit{supra} note 18, at 76-77.

\textsuperscript{187} \textit{See Kemper, The Basic Protection Plan: Reform or Regression? in \textsc{Crisis} 99, 108;}
\textit{Mass Merchandising Shakes Insurance Establishment, \textsc{Trial}, Apr.-May, 1968, at 57. For
another example of an application of group liability insurance, see Denenberg & Murray,
\textit{The Market for Attorneys Group Malpractice Insurance—A Case Study}, 73 \textsc{Case & Com.
9 (Sept.-Oct. 1968). Group automobile policies now are prohibited in 34 states, according
to testimony offered before the Senate Antitrust Subcommittee. The Austin Texas

The Defense Research Institute attack on the AIA automobile insurance plan
One development to which insurers have been able to point with some real basis for pride has been "advance payment" techniques by means of which claimants against an insured are given a rather sizeable immediate cash payment in cases of personal injury in which the insurer thinks the claimant has a valid legal claim.\(^{188}\) Although the formalization of this procedure is novel, quick payment when the insured clearly is at fault is not. Nor are the advance payment plans without their own defects.\(^{189}\) Also, the first party insurance principle has achieved some extension in the creation of a coverage that pays an insured victim of a tortfeasor with low insurance coverage the difference between the amount of the insured's personal injury and the tortfeasor's insurance limits.\(^{190}\)

Quite recently the members of one of the large national groups of stock liability underwriters, the American Insurance Association, voluntarily began sponsorship of a shift away from the liability concept of insurance for automobile accident victims toward a kind of compulsory first party or accident insurance covering the victim rather than the person who harmed him. Although the proposal retains a few of the questionable aspects of the existing insurance system, its adoption would create immunity from tort law (and thus would divorce tort law from insurance) in the automobile area, and it appears to be a very attractive answer to the current difficulties with automobile-related claims.\(^{191}\) Predictably, it has been met with im-

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\(^{189}\) See Moore, *Extended Uninsured Motorist Coverage, 9 FOR THE DEFENSE* 57 (1968).


\(^{191}\) For discussion of the drawbacks of one such plan, see O'Connell, *The Road Ahead: For Automobile Insurance, 1 CONN. L. REV.* 22, 30-31 (1968).
mediate and vigorous denunciation by industry spokesmen,\textsuperscript{192} as well as rejection by the American Bar Association.\textsuperscript{193}

The next major area of public concern to be considered is that of claims practice. Usually when an insured reports a collision to his insurer or notifies the insurer of a claim against himself, the claims department assigns a claim adjustor or investigator to the case. He may be an employee of the insurer, an employee of an independent contractor, or an independent contractor. He usually has authority to pay a claimant up to a sum specified by his principal. His job is to obtain the facts, to evaluate them, and if necessary to dispose of the matter through compromise and the execution of a release by the claimant.\textsuperscript{194} If this proves to be impossible, and if the claimant files suit, the claim and investigation file are assigned to an attorney employed by the insurer for the defense of its insureds, who then evaluates the case and recommends a course of action.\textsuperscript{195} This recommendation is made to the insurer, not to the insured. Although the defense attorney is provided ostensibly for the insured, his contacts with the insured usually are very limited. He may see the insured for further investigation of the claim, if necessary, or when the claim is in excess of policy limits, or in the courtroom. He frequently fails even to advise him of the outcome of the case, whether it is tried to conclusion or settled.\textsuperscript{196}

The availability of insurance company money has led to increased prosperity for attorneys; prosperity has attracted better minds to this facet of the profession, and this in turn has led to better preparation

\textsuperscript{192} DRI Board Opposes All No-Fault Plans, 9 For the Defense 73 (1968); TIME, Nov. 1, 1968, at 94.

\textsuperscript{193} 37 U.S.L.W. 2441 (1969).

\textsuperscript{194} For an insider's view of current claims-adjusting practice, see generally R. CONSTANTIN, Sue or Settle (1968).

\textsuperscript{195} The legal representatives for the insurance companies are compensated time-wise. Continued retention relationship is predicated upon success in resisting recovery. All claims are evaluated by experienced and knowledgeable home-office personnel, and reserves accordingly are entered upon the ledgers. The ratio between eventual disbursements and the reserves is the measure of the worth of the attorney to the company. The principle is as simple as the calculation of a batting average.

\textsuperscript{196} A. CONARD, J. MORGAN, R. PRATT, JR., C. VOLTZ & R. BOMBAUGH, Automobile Accident Costs and Payments 296-99 (1964) [hereinafter cited as CONARD].
and more skillful representation of clients’ interests. Unfortunately, it also has led to an antagonistic dichotomy within the legal profession. The influence of the insurers’ business interests has affected insurance defense counsel, many of whom develop such antipathy to all claimants that they refuse to represent them under any circumstances. This attitude works to the benefit of the insurer, and may incidentally benefit the insured. In most instances the insured receives a more skillful attorney, and at a cost (the premium) far less than if he had to hire an attorney directly to represent him in this situation. The higher the policy limits, the more vigorous and skillful the attorney is likely to be. The problem, as we have seen earlier, is that very often the skill of the insurer-employed attorney is devoted to interests adverse to those of his ostensible client.

Public relations considerations of a particular insurer greatly influence its claims practice. Some insurers believe it best to settle almost all claims, while others refuse to pay in most cases unless suit is filed. Whatever the motivations of insurers, studies by the Columbia Committee, by Morris and Paul, and by Conard et al. summarized by Keeton and O’Connell, all reveal that claimants tend to be overpaid when the amounts of their claims are relatively small and underpaid when their claims are large. This effect is due in large part to the interest of insurers in disposing of small claims, even unfounded ones, at inflated costs, and in denying liability and refusing to pay anything in the large cases whose impact on the premium-loss ratio would be extreme. The hoped-for net result is a smaller aggregate payout. Of course, it is the large claims which represent the more serious social problems.

If the personal injury claims system is of any importance to the

197 See Green, supra note 66, at 78-79.
198 See Lewiston, supra note 18, at 81. It may be extreme, but not too much so, to say that the plaintiff and his lawyer “are objects of hatred to the insurer, its adjuster, and its counsel.” Id. at 37.
199 Liability insurance company claims procedures are briefly summarized in Levin & Woolley, supra note 167, at 394-97. For an excellent and succinct description of the attorney’s role in tort litigation, see G. Morris, Torts § 1 (1953). For a summary of English claims practice, see Isom, supra note 3, at 109-16.
200 Report by the Committee to Study Compensation for Automobile Accidents to the Columbia University Council for Research in the Social Sciences 63 (1952).
202 Conard, supra note 196, at 197.
203 Keeton & O’Connell at 34-69.
204 See Lewiston, supra note 18, at 10. Although the usual automobile and general liability policy puts settlement in the hands of the insurer, many professional malpractice policies require the approval of the insured prior to settlement.
public welfare, it follows that the actual dispositions that insurers make of tort claims are of crucial importance. It is for this reason largely that the effects of claims practice have so attracted the attention of reformers. At the same time, the general public also has begun to take an interest in the manner in which claims are handled on a day-to-day basis. There seems to be a growing revulsion toward what has been referred to as the "poker table mentality" which many consider characteristic of the practitioners in the personal injury claims area: The object of the tort game is simply to win (or save) as much money as possible. This pervasive mentality underlies odious investigative practices, interminable delay, and high-pressure settlement tactics. It is responsible for "package" settlements which are negotiated for the benefit of insurers and attorneys alone, despite the merits of the cases settled. It is blamed for trickery in the courtroom. There can be little doubt that it plays a large role in outright deception, such as is often involved in ensuring settlement of the claim of an injured minor by deliberately securing appointment of an attorney ad litem for him who, because of financial need or other reasons, is unlikely to question the propriety or terms of any settlement the insurer asks a court to approve.

Despite all these shortcomings, it is in the arena of public debate concerning their role that insurers have shown themselves at their worst. For whether or not liability insurance actually is becoming conceptually repugnant to the public interest, the industry ineptly has done almost everything that could be done to make it appear to be by demonstrating a complete disdain for the welfare of the public at large. In my opinion this has been in large part the result of permitting ill-informed public relations men and members of the bar who have a financial interest in the status quo to speak for the industry on matters of such great public concern. The tragedy is that the public positions these people have taken all too often have come to be the policies of the industry. Claimants' and defendants' attorneys associations have also taken public positions in behalf of their own special interests, which are frequently at odds with the interests of both the premium-paying and potential-victim public. The interests of attorneys may well run counter to those of the industry as well, although the industry apparently does not recognize

205 Kimball, supra note 5, at 19.
206 Id. at 19-20.
207 See Lewiston, supra note 18, at 88.
208 Cf. Sharp, Remarks, in Crisis 254, 257.
209 See KEETON & O'CONNELL at 4. Examples are too numerous to mention.
Well-planned and financed publicity campaigns by these groups and by the industry have attempted to influence and persuade the public, the bar, the potential jurors, and even the judiciary that substantive and procedural rules that advance their interests should be adopted, or, as is more often the case, retained. At times efforts to influence the courts have become so flagrant that attempts (unsuccessful) have been made to halt them by court action. It is difficult fully to assess the actual effect of such public relations activities, but as mentioned earlier the existence of limitations on liability such as guest statutes and the persistent defeat of most reform attempts testify to the potency of the industry in the legislatures. The disproportionate influence of liability insurance on the system becomes clearer when it is recalled that many legislators are lawyers who derive substantial income from the existing claims system, and that the courts have traditionally shown deference to “legislative wisdom.”

A good example of public relations ineptitude is in the area of safety promotion where insurers, albeit in their own interests, can in fact point to some real accomplishments. Nonetheless, certain of their spokesmen have given credence to the charge that instead of supporting federally-sponsored safety measures the insurance industry has opposed them in fear of “socialistic” government action. If the industry is opposed to strong federal government it could certainly find a better issue on which to fight the question. Not only does it lose credit to which it is entitled, but in bemoaning federal regulation it exposes one of its most vulnerable flanks, for all the facts seem to point to a need for increased regulation. Nonetheless, having been virtually self-regulating under impotent state commis-

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212 This is particularly so when courts refuse to permit prospective jurors to be questioned concerning the extent to which they have been influenced by them. E.g., Kiernan v. Van Schalk, 347 F.2d 775 (2d Cir. 1965). It has been suggested that insurers' constant public declamations of fraud and high verdicts have made jurors more sensitive to the relevance of insurance than would actually informing them about insurance in a given case.

213 See Keeton & O'Connell at 105; Moynihan, Changes for Automobile Claims?, in Crisis I, 2-3; Dukakis, Legislators Look at Proposed Changes, id. at 222, 227, 230; Scariano, Remarks, id. at 236.

sions for years, the antitrust-exempt industry lashes out at anything federal, apparently without recognition of the fact that the federally-regulated industries also have for the most part come to regulate their regulators. The real merits of federal as opposed to state regulation never are reached; instead they are obscured in clouds of slogans.

The same is true of other issues. The usual response of the insurers has not been to deal with the problems mentioned by their critics, but shrilly to blame unscrupulous claimants' attorneys for all of them and to press for retention of the status quo or for regression to even more restrictive substantive and procedural rules. Proposals for change "which spread the thesis of compensation regardless of fault" are said to involve grave danger to "the morale, mores, and morals of the people."\(^{215}\) Texas newspapers in 1968 reported attacks by insurer representatives on a proposal for mandatory uninsured motorist coverage on the ground, inter alia, of its unconstitutionality as a denial of due process of law\(^{216}\). Amazingly, its own self-interest so blinds the industry that it is virtually unable to recognize the validity of complaints about its role in the claims system. At a recent conference on the problems of insurance in which representatives of the industry participated, the solution to the recognized "crisis in car insurance" most favored by insurers was increased public relations or "education" efforts, on the premise that aside from defects attributable to claimants' attorneys and tort rules that promote claimants' awards unduly, all that is wrong with the system is that the public is misinformed about it.\(^{217}\)

But the industry does not put all its eggs in a single public relations basket. It also appeals directly to the selfish interest of the attorneys who profit from the maintenance of the status quo. Both claimants' and defendants' attorneys are warned that if drastic reforms are made in the liability insurance industry the income of both groups will be cut by as much as fifty per cent. Unfortunately this crass plea strikes a very responsive chord from the bar, which professes to have the interest of the public at heart while joining the propaganda of the insurers.\(^{218}\) The ultimate threat is simply the collapse of the economy.

\(^{215}\) A defense bar organ appeals for the aid of "real lawyers" in defending fault as a "religious and moral principle." Martin, 1968—the Year of the Plans, 10 FOR THE DEFENSE 1 (1969).

\(^{216}\) See The Austin Texas Statesman, Nov. 2, 1968, at 34.


Referring to itself modestly as "the backbone of the economy" and "the indispensable industry," the industry points out that it is responsible for assets of over 188.3 billion dollars and employs over 1.2 million people, and predicts "chaos" if it were to be abandoned.

Some of the industry's arguments may be deserving of careful consideration, but on the whole the industry does its public relations job so badly that it actually reinforces the widely-held public opinion that it is opposed to the public welfare, making it more difficult for important arguments to gain consideration. The result is that the public is unable properly to evaluate the role of liability insurance in the system. Thus much insurers' propaganda can itself be seen as opposed to the public interest.

CONCLUSION

As we have seen, our claims system is not the familiar tort process that is taught in the law schools and portrayed in the official mythology. Apparently this disparity between myth and reality is due largely to failure to recognize the ways in which liability insurance has changed the system. Even those who recognize the importance of a changing environment to law and legal institutions seem to have overlooked the importance of insurance as an environmental factor. Unfortunately, when insurance has been recognized as important, there has been an

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220 7 For the Defense 17 (1966).
221 Insurance, supra note 219, at 36.
222 The latest reaction of the Defense Research Institute to the problems of liability for automobile accidents was to adopt a "positive action program" consisting of (1) combating abuse of contingent fees by claimants' attorneys, (2) supporting the Wisconsin comparative negligence rule "where the [contributory negligence] rule is to be changed," "a matter for local determination," (3) approval of a highway safety program "through concentration upon driver error" including wider recognition of the "safety belt defense," (4) publicity to relieve such congestion as exists, (5) improved claims policies, which includes: discouraging of false, exaggerated and nuisance claims; settlement based on fault; consideration of methods of improving the utility of settlement discussions, study of the use of the Ad Damnum clause "and its unwarranted impact on judgments and interference with settlements"; discouraging legislation unfavorable to defense interests; encouraging courts to be firmer in granting motions for summary judgments, non-suits, and directed verdicts. 10 For the Defense 16, 19, 20 (Mar. 1969). In other words, with the exception of a "local-option" concession to comparative negligence, not one of the current complaints of abuses by the industry and by its lawyers was acknowledged. One can only be amazed at such ostrich-like reactions.
223 This was the view taken by the State Insurance Commission of South Carolina, which sought court authority to restrain insurers from issuing deceptive and misleading propaganda on public issues affecting the industry.
erroneous tendency to consider the presently existing insurance picture as a static one, when in reality it is much more flexible and changeable than the tort process to which it is joined.

It is not surprising that we find ourselves in this situation. Although private enterprise knows full well its interests and has managed rather well to continue to achieve higher profits, the tort process has had only the most rudimentary mechanism—the common-law courts—for ascertaining and articulating public interests in dealing with personal injury claims. We have seen the results. The system is dysfunctional, even from the standpoint of the premium-paying insured; he wants protection, while his insurer wants to save money. The insurer is in a position to realize its interest, while the insured is largely helpless. Naturally enough, the public doesn't understand this conflict.224

Even though our goals may not be clear to us, at least it is possible for us to recognize elements of our claims system that could not possibly serve public goals. We have seen ways in which liability insurance has become so intimately intertwined with tort doctrine and tort procedure that it seems impossible that reforms of either could be used to make the system serve the public interest. Insurance is not as generally available to our citizenry as the system has assumed it is, and availability vel non is determined not by public need but by insurers' determinations of profitmaking potential. Coverage of various kinds of risky activity is controlled by the same consideration. There is no reason to suggest that the profit motive is an unworthy one in the context of the dominant political and economic ideologies extant in the United States today. The questionable thing is whether we can afford to let profit subvert the public interest and defeat many of the basic assumptions of the pre-insurance or non-insurance tort process.225 The effect of insurance on the legal profession, for example, ought to be of particular importance to us. It is clear that the profit motive has so infected the personal injury bar and profession that the credibility of the legal profession as an ethical and service-oriented social institution is becoming increasingly suspect.226 The deluge of false and misleading propaganda sponsored by the bar and the industry do not help improve the image of either. We are therefore brought to consideration of two questions. One question is whether we are prepared to


225 Cf. Moynihan, Changes for Automobile Claims? Id. at 1, 8.

226 Id. at 9: "[T]he ethics of the American bar are at stake." See generally M. Bloom, The Trouble With Lawyers 125-56 (1968).
recognize our claims system for what it is and to live with it either as it is or with modification. This is a much more realistic question than whether we would willingly return to our system if we presently were using another one. 227 Secondly, unless we decide to reject the use of private insurance entirely, we also will want to know what, if anything, can be done to improve the claims system we have. Our previous discussion here suggests a few conclusions, both negative and positive. The most urgent necessity, it seems to me, is to face facts—to recognize the system for what it is. Once we do that, we must by some means decide on the social goals we wish a claims system to achieve and ask whether the one we have is achieving or is capable of achieving them. In this connection we must also decide explicitly whether the public interest or the private interests of insurers are to predominate when they are found to conflict, and we must decide on the means of resolving such conflicts. Perhaps we will conclude that it is impossible to employ private insurance consistently with the public interest. 228

Just how these policy decisions are to be made is itself a problem. Society traditionally has permitted a policy-making role to the common-law courts, but as we have seen they seem not to have been outstandingly successful in creating a workable claims system. This is almost inevitable in view of the limitations of the litigation process as a means of furnishing relevant policy-making data; intuition and ad hoc policy-making may not suffice for such important decisions. 229 More importantly, because courts and insurers have become to some extent partners in the system, the courts seem to have become incapable of standing apart from the system, as it were, in order to evaluate the relationship and the system. This is not to say that courts cannot make decisions and changes regarding the claims system, even sound ones, but simply that they are not the best equipped institutions to do so. The job therefore should be left to the legislatures, if they will undertake it, and to the courts only by default.

Regardless of who makes the policy decisions, it is difficult to imagine anyone suggesting public maintenance of a personal injury claims system that is not dedicated primarily to advancing the public welfare. On this assumption, it is possible to exclude several possible means of improving the system. One of these is the insurers' favorite:

228 This possibility recently has been recognized in a personal injury organ. See Consumer Takes Over Controls, TRIAL, Dec.-Jan., 1967-68, at 39. One Congressman has proposed a form of federal government automobile insurance. Wall St. J., Feb. 6, 1968, at 11, col. 3.
improved and increased public relations. Nor do changes in tort doctrine and procedure alone promise much improvement. The insurance industry is too flexible and the tort process is too rigid. Insurance can adapt itself to any change in tort process, but the latter cannot hope to meet every new tactic of the insurers. Plans, such as Keeton-O’Connell, that retain liability insurance as a partner free to pursue its private interests are subject to the same objection. And an additional objection is that the plans are easily subverted by claimants’ attorneys who want to bring tort law and insurance back into the picture.

The most logical way of dealing with the problems created by insurance would be complete and vigorous government regulation of the industry. If liability insurance is to be permitted to participate in and profit from our personal injury claims system, it seems both fair and wise that we regulate it to ensure at the least that it does not impair the public goals of the system and, preferably, that it helps to achieve them. Of course, if the industry participates it should be adequately compensated. This means that regulation of virtually every aspect of the insurance industry would be required, including decisions regarding who is to be insured, the terms of the insurance contract, including coverage, rates, claims practice, the attorney-client relation, and permissible propaganda activity. Perhaps regulation could be used to maintain minimum standards, leaving improvement on them to competitive forces. Because the complexities of doing interstate business require more uniformity than state regulation by fifty states is likely to afford, and also because of the traditional disproportionate political influence of the insurance industry in most state governments, such regulation probably would have to be at the federal level. Like all centripetal shifts of power, this one would have its regrettable aspects. No doubt the necessity for any regulation is regrettable, particularly to the industry, but the need seems compelling. The industry has no legitimate claim to a vested interest in the status quo. On the contrary, if governmental regulation is in fact necessary, it is accurate to say that the

231 It has been pointed out by one who sees the need as reform of the legal system that “[t]he automobile insurance system can accommodate itself to whatever those laws may be . . . .” Mann, Remarks, in CRisis 115.
233 Apparently the AIA non-fault plan does not retain liability insurance. See materials cited, note 191 supra.
234 See Kimball, Automobile Accident Compensation Systems—Objectives and Perspectives, in CRisis 10, 22-23.
industry has "asked for it." At least it can find some comfort in accepting regulation in light of other alternatives; probably the industry would find regulation more tolerable than resort to social insurance.

A regulated liability insurance industry, as I envision it, would be an industry devoted primarily to service of the public interest with profit secondary, in the theoretical model of a private monopoly. Since it would be joined to a tort process having the same primary public welfare ends, the union would no longer be a miscegenetic one, and some of the built-in conflicts could be expected to disappear. Regulation would not guarantee perfection, of course. But unlike the present system, a system incorporating a regulated insurance industry would be one in which at least changes in tort doctrine and procedure could be considered without the confusion of selfish propaganda, and once made could be employed with some hope of success in achieving social goals. Regulation is also superior to most reform plans because it does not, as they do, require virtual abandonment either of the tort process or of the industry itself, with the political, emotional, and economic difficulties that necessarily would attend efforts to do so.

I do not expect the industry as a whole to greet the modest suggestion of increased regulation with greater enthusiasm than it has other proposals that interfere with its ability to make money in any way it pleases. But the adoption of a non-fault insurance plan in Puerto Rico and the proposal for a shift to accident insurance by a substantial segment of the industry are indications that the winds of change will soon be upon the insurance industry.

If the liability insurance industry is worth saving, it may be well-advised not only to refrain from opposing regulation but also actively to seek it at the earliest opportunity. If the tort system is worth saving, regulation seems imperative.

236 Maidenberg, Remarks, in Crisis 252, 253.
237 In his The Forensic Lottery, supra note 3, Terence Ison has made a very persuasive case for a social insurance solution to problems with the existing system. Admittedly, the difference between regulation and public ownership can be one of degree alone; the point at which sufficient regulation is reached may also be the point at which the industry becomes public rather than private. So regulation may not be a wholly satisfactory escape from social insurance, if an escape is thought necessary or desirable.
238 Cf. Conard, supra note 196.
239 52 Judicature 127 (1968).
240 See materials cited in notes 182 & 183 supra; Bailey, Remarks, in Crisis 197, 201.
241 At the time of this writing the Department of Transportation of the United States government is engaged in a thoroughgoing study of accident compensation insurance systems, including fundamental re-evaluation and review of the role of effectiveness of insurance and the existing law governing liability. The study is to culminate with a report of findings, conclusions, and recommendations to the President and Congress in the spring of 1970. Unless drastic changes in our claims system occur in the meantime, regulation such as that here suggested would not be a surprising recommendation.