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INSURANCE FEATURES OF WORKMEN'S COMPENSATION LAWS†

ARTHUR LENHOFF

I. *Ipso-Jure* INSURANCE AND OBLIGATION TO INSURE

A. *Ipso-jure* Insurance

However much diversity in details¹ the state statutes which create compulsory insurance by means of the employer insuring the risk show, the statutes can be grouped in two principal classes, for each of which one state act, namely Washington² and New York,³ may be submitted as fairly representative of the archetype. The New York compensation law differs from that of Washington in one essential point: By the Washington statute the employee is *ipso-jure* insured upon his entering the service, while by New York law an insurance relationship cannot arise until the employer takes out compensation insurance with the state fund or an insurance company,⁴ except in the exceptional case where he is allowed the status of a self-insurer. Consequently, the problems discussed in this paper, although dealing primarily with New York law, are those of all jurisdictions concerned.

In Washington, the employee is insured by the monopolistic state insurance fund, irrespective of the failure of his employer to pay his premiums or

†This is the first of two installments under this heading. The second part of Professor Lenhoff's article will appear in the March issue of the CORNELL LAW QUARTERLY. [Ed.]

*Where no other reference is made, the provisions of the NEW YORK WORKMEN'S COMPENSATION LAW (cited as W.C.L.) are referred to.

¹For the legislative-historical reasons for that diversity, see DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION (1936) 27-37; HOBBS, WORKMEN'S COMPENSATION INSURANCE (1939) 70-96.

²WASHINGTON INDUSTRIAL INSURANCE ACT (1911), WASH. REV. STAT. ANN. (Remington, 1932) §§ 7673 *et seq.*, amended L. of 1939, c. 135, and L. of 1941, c. 209. The compulsory system created in Washington has been followed in Wyoming, North Dakota, and Ohio. The acts in Oregon and West Virginia, also based upon a monopolistic state fund system, are elective.

³W. C. L. of the same type as New York are, on the one hand, the FEDERAL LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT [53 STAT. 1404 (1939), 45 U. S. C. 51 (1940)] and, on the other hand, the compensation acts of Arizona, Arkansas, California, Delaware, Idaho, Illinois, Maryland, Montana, Oklahoma, and Wisconsin. As for this paper, the statutes of those states which base coverage upon the presumption that in absence of notice given within a prescribed time coverage has been elected, are considered elective and not compulsory. The same holds true of those states by whose statutes compulsory insurance has been provided for only as to public employment. See Steve, *The Application of State Workmen's Compensation Law to Public Employees and Officers* (1932) 17 MINN. L. REV. 162.

⁴Wherever compensation insurance rests upon an insurance contract, the insurance company which paid compensation through an error, no policy having yet been written, is deemed only to have volunteered so that no recovery can be had from the employer. See *Hardware Mutual Cas. Co. v. Lieberman*, 39 F. Supp. 243 (D. N. J. 1941).

even to undertake the steps required in order to determine the class of the employment, a fact determinative of the amount of premiums to be paid. Such failure would give the employee, it is true, a right of choice between the insurance claim and a common-law claim for full damages.⁵ Such a choice, however, is then a choice between two obligees, while in New York failure of the employer to insure the compensation risk results in the choice given the employee only between two remedies directed against the same obligee, the employer. In other words, in Washington by mere operation of law an insurance status is secured for the employee, this status coming into existence independent of the employer's compliance with his statutory duties. The rise of that status and that compliance are not conditioned concurrently.⁶ As a corollary, once the employer's liability for the payment of premiums has been established, his freedom from any liability for workmen's claims for damages results as a matter of law in the same manner as the coverage of the employee.⁷ Consequently, in case the employer's business falls within an insured class, a plaintiff suing the employer for damages for injuries which were suffered in the course of such employment is bound to plead the facts which exempt the case from the scope of the statute.⁸ Even a default of the employer in payment of any premiums does not necessarily bar an insurance claim,⁹ for, as we saw, the employee could insist on compensation in administrative proceedings.¹⁰

B. *Obligation to Insure*

Now, let us turn to New York. There the statute imposes upon the employer the obligation to insure the compensation risk. As long, however, as

⁵Contributory negligence, assumption of risk, or fellow-employee's want of due care are not available as defenses to the employer in these proceedings. WASH. REV. STAT. ANN. (Remington, 1932) § 7676 (11).

⁶By payment of the compensation, the state fund is subrogated to the employee's claim against the employer. *Id.* at §§ 7673, 7676 (11). See *Calvin v. West Coast*, 44 F. Supp. 783, 785 (D. Ore. 1942); *Samarzich v. Aetna Life Ins.*, 180 Wash. 379, 383, 40 P. (2d) 129, 130 (1935).

⁷*Zahler v. Dep't of Labor*, 125 Wash. 410, 217 Pac. 55 (1923). It is noteworthy that the pioneers and models of compensation insurance through the state, the Austrian and German acts, imposed the obligation to reimburse the state fund upon the employer, whether or not he had paid contributions, in case of his causing the injury by premeditation or by gross negligence (by German law, by criminal negligence). See A. MENZEL, *DIE ARBEITERVERSICHERUNG* (Leipzig, 1893) 336.

⁸See *Perry v. Berverage*, 121 Wash. 652, 209 Pac. 1102 (1922), *overruling Acres v. Frederick & Nelson*, 79 Wash. 402, 140 Pac. 370 (1914).

⁹*Gowey v. Seattle Light*, 108 Wash. 479, 184 Pac. 339 (1919); *Freyman v. Day*, 108 Wash. 71, 182 Pac. 940 (1919). There still remains, of course, the state's claim for the arrears in premium and for penalties. See WASH. REV. STAT. ANN. (Remington, 1932) § 7682.

¹⁰*Id.* at § 7676.

that obligation has not yet been complied with, thus leaving the employee without any insurance coverage, he or his dependents can, upon the occurrence of a compensable accident, choose only between the claim for compensation in administrative proceedings on the one side and the common law action for damages before the courts on the other, either one of which must be directed against the employer alone. Electing the latter remedy, the claimant is required to prove the employer's negligence.¹¹ What he does not have to show is the absence of contributory negligence.¹² That means that the end aimed at is the compensation insurance, yet its attainment is placed in the hands of the employer, in the event of whose reluctance to insure the law provides for indirect means of enforcement only.¹³ That this obligation is considered by statute as absolute, one can see from the fact that the failure to perform entails severe sanctions imposed upon the delinquent employer irrespective of the excusability of his failure.¹⁴

This indirect method of enforcing an absolute liability is the only alternative left to a legislature which in setting up a compulsory compensation insurance system balked at founding it upon the monopolistic state fund. Unless he is willing to carry so heavy a burden as that incident to the failure to take insurance, the employer is expected to live up to the statutory command. And if the employer, self-confident of his ability to avoid any accidents due to negligence, failed to insure, that would not help him as the employee

¹¹Clark v. Brown, 206 App. Div. 568, 202 N. Y. Supp. 277 (3d Dep't 1923). Cf. Eker v. Pettibone, 110 Fed. (2d) 451 (C. C. A. 7th, 1940); Schein v. Feder, 154 Misc. 830, 278 N. Y. Supp. 653 (City Ct. 1935).

¹²The three common-law defenses are excluded. W. C. L. § 11. As a result of the comparative-negligence feature of the FED. EMP. LIABILITY ACT, 35 STAT. 66 (1908), as amended, 53 STAT. 1404 (1939), 45 U. S. C. 54 (1940), these defenses are practically no longer good in common-law actions brought under this Act as well.

¹³Failure of the employer to carry out his statutory duty namely to insure his compensation risk, entitles the claimant, if he so chooses, to a common-law action for full damages. W. C. L. § 11. Secondly, such failure constitutes a crime. *Id.* at § 52. See *People v. Donnelly*, 232 N. Y. 423, 134 N. E. 332 (1922). The penalty originally prescribed was equivalent to the pro rata premiums, but that was later abolished. Thirdly, in all those re-opened cases for which the statute provides for payment from special funds (these are the cases described in §§ 25a and 123), the delinquent employer is liable, being deprived of the benefits of those provisions. On the other hand he must, although thus not benefitted, nevertheless contribute to all special funds. *Id.* at §§ 15(8) and (9), and 25a. Fourthly, no appeal is open to him against an award reduced to judgment unless he had deposited the amount awarded within ten days with the Commissioner. *Id.* at § 26.

¹⁴Under the California compensation act, it was held that even if the state commission were negligent in dealing with the employer's application for the privilege of self-insurance, the personal liability of the employer would arise. *Soria v. Cowell-Portland Cement Co.*, 99 Cal. App. 108, 277 Pac. 1061 (1929). Note that in California upon failure of the employer to insure his compensation obligation, he is not only liable under compensation law, but, in addition, under common law. CAL. LAB. CODE (Deering, 1937) § 3706.

could hold him liable as if he were an insurer, thus obviating any question of negligence in the proceedings.¹⁵ Conversely, since this statutory liability eliminates any common-law cause of action,¹⁶ the claimant suing the employer on account of an industrial accident before the courts is required to plead both the failure to insure and the negligence of the employer. Otherwise his complaint would be defective on its face and could be dismissed on motion.¹⁷ A challenge to the jurisdiction of the court might be based upon either ground. The cases which apparently held that the employer's failure to plead the lack of a justiciable case precluded the appellate courts from correcting that failure may clearly be distinguished on the pleadings. At closer examination, the cases do not refute the proposition that lack of jurisdiction in all instances ought to be considered. Clearly, no jurisdictional question even arose in those cases in which the employee's pleadings, for example, did not suggest the industrial nature of the accident¹⁸ or pointed to an intervening independent cause of the injury.¹⁹ Upon such facts, of course, no compensation claim has been established. It may, however, properly be contended that quite a different situation is presented in cases concerning one of the very few types of elective insurance under New York law. Then, the defendant must plead the election made by the employee.²⁰

Once the employer has insured the risk, the insurance status of the employee emerges simultaneously and automatically, regardless of whether the

¹⁵Non-insured employer incurs all obligations created by statute with respect to the insured one. See *Brophy v. Prudential*, 241 App. Div. 306, 271 N. Y. Supp. 819 (3d Dep't 1934). As for payment to be made into special funds in absence of persons entitled to an award in death cases, see W. C. L. §§ 15(8) and (9), and 25a.

¹⁶*Id.* at § 11.

¹⁷Held demurrable: *Nulle v. Hardman*, 185 App. Div. 351, 173 N. Y. Supp. 236 (1st Dep't 1918). See also *Lindebauer v. Weiner*, 94 Misc. 612, 159 N. Y. Supp. 987 (County Ct. 1916), and *dictum* in *Thompson v. International Harvester Co.*, 141 Misc. 757, 253 N. Y. Supp. 190 (Sup. Ct. 1931).

¹⁸Thus, the lack of jurisdiction was held fatal for the action. See *Scherini v. Titanium Alloy Co.*, 286 N. Y. 531, 37 N. E. (2d) 237 (1941) (common-law negligence action, brought on the ground that W. C. L. does not provide for partial disability caused by silicosis, *dismissed*). See also *Volk v. City of New York*, 284 N. Y. 279, 30 N. E. (2d) 596 (1940); *Nilsen v. American Bridge Co.*, 221 N. Y. 12, 116 N. E. 383 (1917); *Mickel v. Althouse*, 38 Cal. App. 321, 176 Pac. 51 (1918).

¹⁹*Robison v. State of New York*, 263 App. Div. 240, 32 N. Y. S. (2d) 388 (4th Dep't 1942) (negligent treatment of injury suffered in employment); *McDonough v. Sears, Roebuck & Co.*, 127 N. J. L. 158, 21 A. (2d) 314 (1941) (while undergoing hospital treatment because of an industrial accident resulting in the amputation of his left index finger, claimant suffered a second accident which occurred when he struck a match to light a cigarette and the alcohol dressing around his wound burst into flame, followed by burns so severe as to require the amputation of all the remaining fingers and thumb). See also *Hull v. Hercules Powder*, 20 N. J. Misc. 168, 26 A. (2d) 164 (Sup. Ct. 1942).

²⁰See, e.g., *Grimm v. Maurocordato*, 191 App. Div. 550, 181 N. Y. Supp. 609 (1st Dep't 1920).

insurance is taken out with an insurance company or with the state fund. Insurance under the state fund, it is true, releases the employer from any further liability, a result not reached through an insurance contract entered into with an insurance company.²¹ When a commercial company writes the policy, the employer's liability survives, although it is restricted to compensation.²² Since, however, the insurance carrier is directly liable for the award, the employer to all practical purposes occupies the position of an indemnitee only.²³ Had he been forced to pay compensation, his right to recover it from his insurer would not be open to any doubt, if the question were of any practical significance at all. The employer's continuing liability may become a reality only upon the carrier's failure to meet his obligations.²⁴ Furthermore, the compensation obligation remains on the employer's hands when there has been the mere appearance, but not the fact, of insurance coverage, as in the case of the carrier's successful denial of his liability upon the ground of the exclusion of some critical operation or location from the coverage of the policy. A discussion of those situations will follow later. Once the class²⁵ and the place of operations is fixed, the policy covers also activities incident to or connected with them.²⁶

²¹W. C. L. § 53. Due to the special nature of the state fund (as seen from *id.* at § 76), a private act of the legislature for the relief of an individual who otherwise could not obtain compensation would amount to an appropriation violative of the trust concept underlying such funds. See, e.g., *State ex rel. Trenholm v. Yelle*, 174 Wash. 547, 25 P. (2d) 569 (1933) and Comment (1934) 47 HARV. L. REV. 888.

²²Also when, as in the case of the contingent liability of the contractor respecting the employees of his subcontractor (see W. C. L. § 56), the former is released from any liability upon the latter's insuring the risk, the decisive point lies in the insuring, and not in the payment of compensation. As a result, that liability does not revive in case of the insurer's bankruptcy. *Sciachitano v. Forbes, Inc.*, 264 N. Y. 324, 190 N. E. 656 (1934).

²³See *Actna Life Ins. Co. v. Moses*, 287 U. S. 530, 541, 53 Sup. Ct. 231, 233 (1932). Cf. 4 WILLISTON, CONTRACTS (Williston & Thompson, rev. ed., 1936) § 1274, p. 3638. See also note 23 *infra* as to one of the practical consequences of that view of the employer-insurer relationship; and see action V of text. (Next installment. [Ed.]

²⁴Naturally, the claimant may share in the assets of the insolvent insurance carrier, which would proportionately reduce the liability of the employer. See W. C. L. § 54(1) and *Sciachitano v. Forbes, Inc.*, 264 N. Y. 324, 190 N. E. 656 (1934). By his payment the employer becomes subrogated to the claimant's preferred creditor position. W. C. L. § 34. See *In re Consolidated Indem. Ins. Co. (In re Coron)*, 255 App. Div. 501, 8 N. Y. S. (2d) 217 (1st Dep't 1938). Obviously, before the claimant has been paid in full, he may prove his entire claim against every one of his debtors, the bankrupt's estate included. When the employer compromised the claim partly, the claimant still may recover dividends from the bankrupt's estate in the full amount of his claim, not only upon the difference, until his claim has been fully satisfied. *Id.*

²⁵See *Neubeck v. Doscher*, 204 App. Div. 617, 199 N. Y. Supp. 203 (3d Dep't 1923) (employer's creamery operations in X, yet not his store in Y, where he distributed the creamery products, held to be covered). See also *Barnard v. Greenberg*, 264 App. Div. 802, 35 N. Y. S. (2d) 285 (3d Dep't 1942); *Worswick Paving Co. v. Ind. Acc. Comm'n.*, 181 Cal. 550, 185 Pac. 953 (1919).

²⁶*Winsen v. Fleischmann*, 252 N. Y. 114, 169 N. E. 108 (1929).

By this token, one becomes immediately aware of the advantage of the *ipso-jure* system over its contractual counterpart with regard to the insurance which either type intends to provide. The defects of the latter type are inherent in a system the practicability of which depends upon private transactions. Does not the contractual insurance system carry with it the proposition that the execution of an insurance contract made by an insurance carrier with the employer must necessarily precede the rise of the employee's insurance status? Insurance has been left in the hands of insurance companies and has remained contingent upon their voluntary acceptance of the employer's application for the issuance of an insurance policy. In that respect workmen's compensation insurance does not differ from other types of insurance. Only when the state itself conducts workmen's compensation through state funds or other agencies is acceptance of an employer's application made obligatory. All private insurance companies retain the freedom to reject any such application.

There is no case in point in New York, but, regarding an analogous statute, the Texas court held that an agency created by the statute solely for the purpose of carrying on compensation insurance cannot be held entitled to select the risk.²⁷ Thus, where a state fund competes with other insurance carriers in the compensation branch, even its insurance differs from the insurance in states of the automatic type and from the state unemployment insurance, as well as from federal old age insurance. The difference lies in the juristic basis indicated by the requirement of a preceding private transaction for the former, and by the self-executing character of the latter. As for insurance companies, legislative attempts made elsewhere, not in New York, to deprive them of the right to reject an application for compensation insurance were frustrated by the judiciary.²⁸ A different view may be taken of those statutory provisions in various states, devoid of state funds, by which rejected risks are required to be distributed under pro-rata liability among all insurance companies. So pooled together, they fulfill the function of a

²⁷*Empl. Ins. Ass'n v. U. S. Torpedo Co.*, 8 S. W. (2d) 266 (1928), *aff'd*, 26 S. W. (2d) 1057 (1930). Note (1928) 7 TEX. L. REV. 187. That the New York Insurance fund has to accept all risks regarded undesirable by the insurance companies seems to be undisputed. HOBBS, *op. cit. supra* note 1, at 621.

²⁸*Empl. Liability Assur. Corp. v. Frost*, 48 Ariz. 402, 62 P. (2d) 320 (1936), *invalidating* ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 1422 as violative of the Fourteenth Amendment by making it mandatory for every insurance corporation authorized to do workmen's compensation insurance business to accept any application. For details regarding compulsory contracts, see Lenhoff, *The Scope of Compulsory Contracts Proper* (1943) 43 COL. L. REV. 586.

state fund.²⁹ Barring such exceptions, nothing short of acceptance of the employer's application by an insurance carrier will render the latter liable for any accident. Accordingly, in *Employer's Liability Insurance Corp. v. Frost*,³⁰ the court found for the insurance corporation and reversed the award, because by the time of the accident the application was not yet accepted, although the employer had already paid the premium to the local agent who, however, was not authorized by the insurance company to accept that application. But since, however, the state fund must carry even undesirable risks under all circumstances, it is submitted that an application made with it must be given an immediate effect, even prior to the formal acceptance.³¹

II. THE WORKMAN'S INSURANCE STATUS

Surely, in the first stage of the insurance relationship, as one may call the stage reached by the employer's application and its acceptance, New York compensation insurance seems to manifest its historical connection with the era of employer's liability insurance. Yet, this first stage must not import the conclusion that the insurance status of the workman is identical with that created for him under a liability or accident insurance policy issued to his employer. That an insurance relationship may arise upon application is not enough to tag it a private insurance. Unemployment insurance law supplies an illustration: Nobody will deny the difference between unemployment insurance and private insurance. And yet, even there, in some situations, coverage will require a previous application on the part of the employer.³² What is the element in common that makes for placing unemployment insurance together with old age insurance and compulsory compensation insurance in a special group as to which the forensic approach differs from that of other insurance branches? That element lies in the creation of the worker's insurance status by operation of law and not by the acts of the employer and the employee. As for the scope and conditions of, or incidents to that relationship, there is no room left for the parties' expressed or implied intention. It will be shown presently that owing to that legal mechanism, the effects of the compensation insurance occur regardless of the employer's compliance with, or failure to perform the contractual

²⁹*E.g.*, MASS. ANN. LAWS (Lawyer's Co-op., 1942) c. 152, § 65A *et seq.*; ARK. ACTS (1939) art. 319, § 9; WIS. STAT. (1941) § 205.30.

³⁰*Empl. Liability Assur. v. Frost*, 48 Ariz. 402, 62 P. (2d) 320 (1936).

³¹See also *dictum* in *Texas Employer's Ins. v. Russell*, 127 Tex. 230, 91 S. W. (2d) 317 (1936), *rev'd* 61 S. W. (2d) 553 (1933).

³²*E.g.*, N. Y. LABOR LAW (McKinney's Supp. 1943) § 502(3) (f) (voluntary coverage).

terms agreed upon between him and the insurance carrier. The employee's status as that of an insured arises out of and in accordance with statutory fiat, without any regard to the employee's consent or dissent.³³

As an additional element of variegation, administrative agencies in New York and in most of the states³⁴ determine all issues incident to his insurance relationship. It is not questioned that those administrative adjudications have developed rules different from those of civil procedure, by which actions of a third injured party against a liability insurer of the tortfeasor have to be pleaded, tried, and decided. Finally, exactly as in unemployment insurance and in old age insurance, the administrative agency has jurisdiction over the carrier of workmen's compensation insurance concerning the former's obligations to the claimant.³⁵ From this analytical viewpoint focussed on the described common characteristics of social insurance, one can heartily subscribe to Mr. Justice Brandeis' statement that there is substantially no difference between the workmen's compensation insurance in New York and that in Washington.³⁶ As it is there, so also here the worker's insurance is an indispensable part of the compensation system.

At this point one can realize how greatly those systems embedded in, and based upon insurance, depart from the English form of compensation founded only upon employer's liability.³⁷ The English employer may or may not insure,³⁸ at his pleasure.³⁹ One who chooses to take out insurance may bar-

³³Farmer's Gin of Manitou Co. v. Jones, 146 Okla. 79, 293 Pac. 527 (1930).

³⁴For the very few states which, following the English pattern, adhere to court administration of workmen's compensation law, see HOBBS, *op. cit. supra* note 1, at 285, and DODD, *op. cit. supra* note 1, at 65.

³⁵W. C. L. § 54(1) (2). Consequently, the duty to report accidents to, and to notify the Commissioner of the assumption of payment or of their stoppage and of the intention to controvert a claim, are incumbent upon the employer and his insurer alike. *Id.* at §§ 25, 110, and *Rules of the Industrial Board* 5 and 6.

³⁶Justice Brandeis dissenting in *N. Y. C. R.R. v. Winfield*, 244 U. S. 147, 167, 37 Sup. Ct. 546, 555 (1916).

³⁷WORKMEN'S COMPENSATION ACT, 1925, 15 & 16 Geo. V, c. 84 (principal liability of the employer; only subordinate liability, if any, of his insurer). This rule is just opposite to that of compulsory compensation insurance. See WILSON-LEVY, *WORKMEN'S COMPENSATION* (London, 1939) 60 (on Asquith's opposition to a system of compulsory insurance in the lengthy debates which preceded the Act of 1897) and *id.* at 70 (on the satisfaction of the employers that a state-operated compulsory insurance system was avoided). As the (London) *ECONOMIST*, cited there, stated as early as 1898, the whole English system rests upon the solvency of the employer.

³⁸In case of his personal negligence, the English employer, whether or not he had insured his obligation, remains subject to a common law liability unless complainant elects a compensation proceeding. WILSON-LEVY, *op. cit. supra* note 36, at 29. That rule is bound to show its inappropriateness progressively with every year bringing more statutory prescriptions and, therefore, more technical breaches of statutory duties which entitle to successful claims for damages. See, for this effect of the English Factory Act, 1937, Hammond, *The Administration of the Workmen's Compensation Act* (1942) *MODERN L. REV.* 215.

³⁹However, the Union of South Africa has quite recently dropped the old system and

gain to his liking because the courts will uphold that to which the parties have agreed. In New York and in Washington, however, compensation insurance is compulsory and no longer are employer and insurance carrier free to avoid by agreement the application of the statutory terms except for the few instances in which the law may allow it.

It will shortly be demonstrated that the relegation of compensation insurance to the same bracket as liability insurance is at striking variance with the policy underlying the rules of law and with the realities of life. There is more than a discernible difference between the statutory position granted the workman and that of third parties in liability insurance. And, consequently, there is a difference in the position of the parties to the insurance. Let us examine the practical effect of that variegation.

The employer has no longer a choice as to whether he will take out insurance or as to the manner of doing it. Exactly as compensation law sanctions and penalizes failure to insure,⁴⁰ so the same adverse consequences must be faced in case his insurance policy would not cover his compensation liability as prescribed by statute.⁴¹ Obviously, but for the undesirability of his risk, the employer might still have the freedom to choose among the available⁴² insurers.⁴³ As for the insurance carrier, the statute prescribes the terms under which his liability as insurer is to be defined. He cannot escape his subjection to the administrative jurisdiction nor avoid the enforceability of "the orders, findings, decisions or awards" against himself.⁴⁴ Even if this were all that characterizes that insurance, one could not reject the conclusion that to put the employee in the position to which in liability insurance the injured third person is assigned with respect to the insurer, would be to carry out the predilection for generalization, a very human trait, to the point of fallacy and arbitrariness. Ordinarily, that third party stands in

has established a system of *ipso jure* compensation insurance, operated by a monopolistic state fund. Act of May 5, 1941, repealing the Act of 1934, 42 INDUSTRY AND LABOUR INF. No. 2, p. 44. It was not until 1934 that England took a step towards compulsory insurance. The Workmen's Compensation (Coal Mines) Act, 1934, 24 & 25 GEO. V, c. 23, declares that the employment of workmen for coal mining is a crime unless it is done after the employer has taken out a compensation insurance policy.

⁴⁰See note 13 *supra*.

⁴¹W. C. L. § 54(4) (clause 1). Had the claimant then chosen, nevertheless, to pursue his claim as a statutory one, the case must be decided by the board. As for the contrary view held by an elective statute, see *Aleck's Case*, 301 Mass. 403, 17 N. E. (2d) 173 (1938).

⁴²See text *supra* at note 27.

⁴³The choice is restricted in twenty-four states to officially recognized private companies. *Down, op. cit. supra* note 1, at 513, n. 10. In other states of the non-monopolistic state fund type, any company authorized to transact compensation insurance business may be the insurance carrier. See *e.g.*, N. Y. W. C. L. § 50(2).

⁴⁴*Id.* at 54(2).

the shoes of the insured and is, therefore, subject to the insurer's defenses against the latter.⁴⁵ His status is derived from the contractual relationship between insurer and insured and is, therefore, analogous to that of the pledgee, assignee, or subrogee.⁴⁶ Exactly the contrary is true of the employee's position with regard to the insurance carrier. Once created, his relationship to the insurer remains completely unaffected by any misrepresentations, misstatements, breaches of warranties, or non-compliance with conditions by the insured employer. In brief, against claims of the employee or his dependents, the insurer cannot set up defenses based upon the employer's breach of the insurance contract, or misstatements, or other courses of conduct before the execution of the policy or thereafter.

Accordingly, delinquencies in the payment of premiums or a breach by the employer of any other condition can in no way prejudice the rights of those claimants whose rights to compensation arose prior to the compliance of the insurer with the statutory provision prescribing the form under, and the time at which a cancellation may come into effect. This will presently be discussed. Moreover, while elsewhere limitations of the insurance coverage by excepting certain perils which otherwise would be deemed to fall within the scope of the insurance risk exempt the insurer from any liability to third persons,⁴⁷ such exclusions, if contained in a compensation policy would render it void just as much as any limitation in the amount.⁴⁸

At this juncture, when the question is to be discussed whether any defenses available to the insurer as against the insured employer are equally available against the claimant under the statute, a new light is shed upon the divergence of compensation insurance from the common private insurance. It was one of the paramount aims of the competitive insurance type of compensation statutes to achieve insurance coverage equal to that of

⁴⁵*E.g.*: *Coleman v. New Amsterdam Cas. Co.*, 247 N. Y. 271, 160 N. E. 367 (1928); *Rusling v. Commercial Cas. Ins. Co.*, 251 N. Y. 302, 167 N. E. 450 (1929); *General Accident Fire & Life Assur. Co. of Perth v. Becker*, 252 App. Div. 556, 300 N. Y. Supp. 638 (1st Dep't 1937); *Stacey v. Fidelity*, 114 Ohio St. 633, 151 N. E. (2d) 718 (1926); *Lorans v. Gethro*, 228 Mass. 181, 117 N. E. 185 (1917).

⁴⁶*Bayley v. U. S. Fidelity*, 185 S. C. 169, 193 S. E. (2d) 638 (1927). The apparent exception in favor of mortgagees under the standard mortgagee clause in fire policies rests upon a private law conception of a contract between the latter and the insurer. See note 81 *infra*; and *Eddy v. London Assoc. Corp.*, 143 N. Y. 311, 38 N. E. 307 (1894).

⁴⁷For the effect of exclusion clauses in liability policies upon the injured third party, see, *Devitt v. Continental Cas. Co.*, 269 N. Y. 474, 199 N. E. 765 (1936). -*Cf.* reasoning in *Taylor v. U. S. Cas. Co.*, 269 N. Y. 360, 199 N. E. 620 (1936).

⁴⁸"Every contract . . . absolutely void, unless it shall cover liability for the payment . . . provided for [by W. C. L.]." W. C. L. § 54(4), as amended L. of 1942, c. 617). Thus, he who took out an invalid policy of that kind is placed on the same level as he who did not insure his risk at all.

exclusive state insurance by disregarding the insurer's familiar safeguards furnished by the law of contracts or erected in the policy through obligations imposed upon the insured, upon the breach of which its forfeiture was to follow.

It is to be noted that the thing to be considered is not the statutory establishment of a direct action of the injured worker or his dependents against the employer's insurer. Many a statute concerning the ordinary liability insurance requires the inclusion of a policy provision that supplies the injured person with such a right.⁴⁹ The effect of a provision of this kind is to give the injured claimant the same relief against the insurer to which the insured would be entitled if he had satisfied the judgment.⁵⁰ To quote Justice Cardozo, "The cause of action is no less but also it is no greater."⁵¹ That is true even where, as in a very few states (not New York), the injured party is given a direct action against the tortfeasor's insurer, without the requirement of a previous judgment against the tortfeasor.⁵² Also in the field of Conflict of Laws such statutes have properly been held remedial only, not creating a new cause of action which could be sued on in another jurisdiction.⁵³ What sets off the status of the worker under compensation insurance in contrast to that of the third person is the independence of the former's right from his employer's rights against the insurer. As statutory law creates the worker's rights against the insurer, it alone defines their measure and specifies the requirements for their termination.⁵⁴ And courts in a state other than that in which the industrial accident occurred have enforced that right to compensation provided that the forum has judicial machinery to handle such compensation claims.⁵⁵ Furthermore, the aim of

⁴⁹See N. Y. INS. LAW § 167(b) (direct action upon the insured's failure to satisfy the judgment within thirty days, "under the terms of the policy or contract for the amount of such judgment not exceeding the amount of the . . . limit of coverage."). For the uninterrupted line of cases holding under this provision that breach of clauses (e.g., notice provision) by the insured affects the rights of the injured person against the insurer, see the New York cases cited in Annotation (1932) 76 A. L. R. 17, 216 *et seq.*

⁵⁰Coleman v. New Amsterdam Cas. Co., 247 N. Y. 271, 275, 160 N. E. 367, 368-369 (1928).

⁵¹*Ibid.*

⁵²Such is the case in Wis., R. I., and La. See *infra* note 53. See, e.g., Stone v. Inter-State Exchange, 200 Wis. 585, 229 N. W. 26 (1930).

⁵³See Wells v. Am. Employers' Ins., 132 F. (2d) 316 (C. C. A. 5th, 1942); and MacArthur v. Md. Casualty Co., 184 Miss. 663, 186 So. 305 (1939) (both cases construing the Act La. No. 55 ex. 1930). See also Oertel v. Williams, 214 Wis. 68, 251 N. W. 465 (1933) [construing Wis. STAT. (1931) § 85.93 and § 260.11].

⁵⁴See Judge Cardozo's opinion in Matter of Smith v. Heine Boiler Co., 224 N. Y. 9, 12, 119 N. E. 878 (1918).

⁵⁵Floyd v. Vicksburg Cooperage Co., 156 Miss. 567, 126 So. 395 (1930).

that law is to secure to employees insurance coverage throughout the duration of their employment. Thus, by administrative control over the coverage, that objective is to be achieved. An adequate control is established over the uninterrupted coverage of the compensation risk by the statutory provision that the cancellation of the policy cannot be given any effect as against the employee until the formal notification to the industrial board and the expiration of a period of ten days thereafter.⁵⁶

The scope of this statutory rule is much wider than it appears at first blush, for it makes all facts other than those referred to by statute inoperative as against the employee.

So, the distinction between a contract which is void at the root and one which is only voidable and rescissible calls particularly for careful notice in compensation insurance. However strongly and materially the fraud by which the employer induced his acceptance as an insured or his unintentional but material misstatements make for the rescission or the forfeiture, they cannot affect the insurer's statutory obligation as against a claimant. His claim stands, although the injury occurred subsequent to the cancellation of the policy, yet prior to the notification to the board and the expiration of the ten-days period.⁵⁷ If the claimant's rights had to be determined by contractual concepts, his right of action could not survive once good cause for rescission or forfeiture had been shown by the insurer against the employer as contracting party.⁵⁸

⁵⁶W. C. L. § 54(5): "No contract . . . shall be cancelled . . . until at least ten days after a notice. . . ." As for the state insurance fund, § 94 *as amended*, Laws of N. Y. 1939 c. 668, determines that the employer may withdraw only upon compliance with § 50, that is, by taking out insurance with another insurance carrier or by being licensed as a self-insurer.

⁵⁷*Ibid.* See dictum in *Royal Indemnity Co. v. Heller*, 256 N. Y. 322, 176 N. E. 410 (1931) and the holding in *Matter of Aioss v. Sardo*, 249 N. Y. 270, 164 N. E. 48 (1928) (fraudulent statements made prior to the issuance of a policy held no defense as against the claimant). *Matter of DiDonato v. Rosenberg*, 256 N. Y. 412, 176 N. E. 822 (1931) (mistaken inclusion of contractor in insured business held immaterial as to injured employee in absence of formal notification). As for other jurisdictions with acts of a similar type, see *Farmer's Gin Co. of Manitou v. Jones*, 196 Okla. 79, 293 Pac. 527 (1930) and *Home Petroleum v. Chipman*, 106 Okla. 225, 233 Pac. 738 (1925) (cancellation clause to operate in case of assignment or transfer of interests, held of no avail as against claimant because of insurer's failure to file notice of cancellation in the office of the Commission). *Continental Cas. Co. v. Industrial Commission*, 61 Utah 16, 210 Pac. 127 (1922) (facts sufficient to make a policy voidable only, such as fraud or mistake, held not to authorize the denial of relief to the dependents of a worker killed by industrial accident). *Kelly v. Howard*, 233 Mo. App. 474, 123 S. W. (2d) 584 (1938) (although at first glance apparently contrary, this case in fact held that award should be rendered against insurer upon a policy, irrespective of the defense of fraudulent procurement of the reinstatement of the policy).

⁵⁸See *RESTATEMENT, CONTRACTS* (1932) § 140; 2 *WILLISTON, CONTRACTS* (Rev. ed. Williston & Thompson, 1936) § 364 A, n. 11.

III. THE SCOPE OF THE INSURER'S DEFENSES IN THE ADMINISTRATIVE PROCEEDING

In order to appraise fully the wisdom of the result reached by the courts in construing the provision, one has to realize only the effects which the opposite rule would necessarily carry with it. Had the question of coverage to await the occurrence of an accident for authoritative answer, one might without any stretch of imagination visualize how much that time factor might invite the insurer's speculation. Yet, worse than that, the trick would be played upon the innocent victim, the worker. To limit the latter solely to a recovery from his employer would add insult to injury, for one may fairly evaluate the employer's probable financial status and the adequacy of the recovery from the employer's conduct against his insurer.

With the view of securing compensation as safely and as promptly as possible, the law has expressly authorized the administrative agency to enforce the compensation liability against the insurer "in the name of the people . . . for the benefit of the person entitled to the compensation."⁵⁹ In a compensation insurance policy there must be included a provision extending the jurisdiction of the Board over the employer to his insurance carrier.⁶⁰ The thought behind the statute was to establish the liability of the insurer in the same proceeding with the compensation claim. Consequently, the courts of New York, as it will be seen later, have rejected attempts on the part of insurance carriers to bring questions of their liability before them because the board has the power of a court of general jurisdiction to have any defense, equitable and non-equitable alike, litigated before, and determined by it.⁶¹ Upon a workmen's compensation law of a similar type, the courts in California have taken the same view.⁶² On the other hand, dealing with an analogous statute, the Wisconsin and Maryland courts have denied the industrial commission the power to pass upon equitable defenses, a holding derived apparently from, and resulting in, the proposition that *quod non apparet* [in the policy] *non est*.⁶³

⁵⁹W. C. L. § 54(1).

⁶⁰W. C. L. § 54(2). See *Matter of Jaabeck v. Crane's Sons Co.*, 238 N. Y. 314, 317, 144 N. E. 625, 626 (1924). Where the act conditions an obligation of the insurance carrier and of the employer upon the consent of either of them, *e.g.*, for the deficiency resulting from a compromise with the third party, that provision does not apply, because it refers to the jurisdiction of the board alone. *Bejman v. Brodie*, 249 N. Y. 175, 163 N. E. 298 (1928).

⁶¹See *Matter of Skoczlois v. Vinocour*, 221 N. Y. 276, 116 N. E. 1004 (1917), *Royal Indemnity Co. v. Heller*, 256 N. Y. 322, 176 N. E. 322 (1931).

⁶²*Employers' Liab. Assoc. v. Ind. Acc. Comm'n*, 177 Cal. 771, 141 Pac. 935 (1918), *Bankers Indemnity Ins. Co. v. Ind. Acc. Comm'n*, 4 Cal. (2d) 89, 47 P. (2d) 719 (1935).

⁶³See dictum in *Kelley v. Minneapolis, St. P. & S. S. M. Ry.*, 206 Wis. 568, 240

However, no matter whether the exclusion of an unnotified cancellation from the class of available defenses is cast in one mold or the other, the result is the same. When the cancellation was not made formally known to the board at the time when the accident occurred, the board has to find against the insurer. In other words, the board will, once the fact of the issuance of the insurance policy has been proved, refuse to give any consideration to questions of fraud or misrepresentation or warranties nor to other facts establishing forfeiture of the contractee's rights, *e.g.*, premium arrears. The attitude of New York and California is more in line with the whole concept of the workmen's compensation laws which, as was discussed above, places the employees' rights exclusively upon statutory ground. True, the statute interlocks the coverage of the employee, at the threshold, with that of his employer; but, that requirement having been met the continuance of the coverage no longer depends exclusively upon that of the employer. And, in the same way, it is not the will of the parties, but rather the law that not only prescribes the scope of the insurer's obligation, but also determines who are the obligees. Since the enactment of the amendment of 1939, all employees are to be deemed to be included in the coverage.⁶⁴

The result is that the insurance carrier may prove before the board that the claimant was not an "employee" at all, or that he was not employed by the insured, because of his having been in the employment of a third person. Yet, a defense based upon an exclusion in the insurance policy of the claimant from the scope of the coverage will no longer lie.⁶⁵

Can the carrier raise the expiration of the policy as a defense? It has been propounded, indeed, that the termination of a policy does not fall within the concept of "cancellation" in the meaning of the statute,⁶⁶ so that the expiration of the specified term or the death of the employer would *ipso jure*

N. W. 141 (1932). The reference made therein to Wisconsin Mutual Liab. Co. v. Ind. Comm'n, 190 Wis. 598, 209 N. W. 697 (1926) is not convincing, because the latter case deals only with the lack of jurisdiction of the Commission in a third-party action. In accord with the same rationale is U. S. Fidelity & Guar. Co. v. Taylor, 132 Md. 511, 104 Atl. 171 (1918).

⁶⁴Prior to that amendment, L. 1939, c. 404, the contracting parties were still given such freedom to contract as to exclude one or more employees or an entire class of them, specifically designated, from the coverage.

⁶⁵A discussion of the thorny distinction between general and special employer would fall beyond the scope of this paper. Likewise, the paper will not discuss the question of the validity of an employment contract as a requisite for the insurance coverage.

⁶⁶See Comment (1919) 19 Col. L. Rev. 79. Note, however, that statutory provisions following the New York lead as, *e.g.*, Michigan, expressly refer to "any termination or cancellation." MICH. COMP. LAWS (1929) § 8460 (f). There has never been any doubt that failure to notify the board continues the liability after the expiration of the specified term. See Maryland Casualty Co. v. Moss, 276 Mich. 219, 267 N. W. 819 (1936).

terminate the coverage, in the latter case even though the term of the policy had not yet expired.⁶⁷ To state that the general concept of the "personal" nature of the insurance contract ought to prevail over the legislative pronouncement, which disentangles the employee's protection from the terms of private negotiation, is to lose sight of the very objective of compensation insurance. The "personal-contract" theory originated in an era when in writing policies the insurance companies were able to live unto themselves. One may question whether this doctrine which has fitted in so nicely with the innumerable erstwhile technical clauses in fire insurance policies, is still justifiable even within the realm of a solely monetary valuation of insured interests.⁶⁸ Why should an insurance company be released from its obligation when the transfer of, or the succession to, the insured business operations does not increase the hazard of the insurer at all?⁶⁹ Is not the hazard of the employment which is inherent in the entire operations of the insured business the factor which determines the risk?⁷⁰ At one glance it seems to be unquestionable that the law applies to the corporate employer with his practically unlimited life and with his business operations conducted by a board of managers shifting from one job to the other just as well as to a physical person who happens to own a business.

Curiously enough, the insurance companies, being deprived of the possibility of declaring the policy forfeited in case of a change in the ownership of the shares in the stock of a corporation as well as in case of a change in the management, were able to hold their own in that doctrine with respect to changes in personally owned business undertakings. One may challenge the soundness of that result all the more when one considers the freedom of the insurance companies to reject risks held undesirable or to condition the acceptance of an application upon the installation of special safety devices. Incidentally, the statutory prescriptions in New York are adequate

⁶⁷Kolb v. Brummer, 185 App. Div. 835, 137 N. Y. Supp. 72 (3d Dep't 1918), (with Kellogg, P. J., vehemently dissenting), *aff'd w. o.* 226 N. Y. 570, 123 N. E. 874 (1919) (accident subsequent to the death of the employer but prior to the expiration of the term of the policy and to its transfer by endorsement to the former employer's wife, who continued his business, *held*, not covered). But see note 72 *infra*.

⁶⁸The New York standard fire insurance policy, in its revised form, as of July 1, 1943, L. 1942, c. 900, eliminates the "change of interest" clause and renders the policy no longer void in case of an assignment. See Note (1942) 42 Col. L. Rev. 1227.

⁶⁹Or does, for instance, the transfer of the rights of the mortgagee whose interest is protected by the mortgagee clause, increase the insurer's risk? See the clear answer in *Central Union Bank v. N. Y. Underwriters Ins. Co.* (C. C. A. 5th, 1931) 52 F. (2d) 823.

⁷⁰See, e.g., *In re Madden*, 222 Mass. 487, 111 N. E. 379 (1916). From the insurer's viewpoint, the risk involved in the person of the employer relates only to his solvency, a risk inherent in any contract.

and severe enough to make employers install all possible safety devices. After all, the insurance companies still may cancel the policy "at any time." With all that in mind, one cannot find any satisfactory reason that an inveterate doctrine should be thrust upon and perpetuated in an insurance field of the most recent type. And what about the construction of the statute? Although the state fund must accept any application, the act provides that the transfer or the assignment of his business by the employer does not automatically terminate his insurance entered into with that fund; it might only occasion him to cancel it.⁷¹ Were an insurance company held to be released from its obligation because of such occurrences, the result would run directly counter to the policy expressed in the provision just noted.

Indeed, the judicial construction as it stands today seeks to be in accordance with the wisdom of the statute. Reading on the one hand in a recent decision the sentence, "The name of the insured in the policy is not always important if the intent to cover the risk is clear,"⁷² one is impressed, for one feels that the drive away from the formalistic "personal-contract" theory in a direction which points to the employing business rather than to its owner, as the insured is well underway.⁷³ On the other hand, the courts

⁷¹W. C. L. § 94(b). See the reference to that provision in Kellogg, P. J.'s dissent in the *Kolb* case, note 67 *supra*.

⁷²*Matter of Lipshitz v. Hotel Charles*, 226 App. Div. 839, 234 N. Y. Supp. 513 (3rd Dep't 1929) (Hotel Charles was the insured party but at the time of the accident it was owned and operated by a partnership). See also *Matter of Cohen v. Buccheri*, 251 App. Div. 765, 295 N. Y. Supp. 515 (3rd Dep't 1937) (change in the ownership of the business held immaterial as to the insurance coverage, although the accident occurred subsequent to that change). It was in the latter case that the appellate division, without any distinction between the state fund and other insurance carriers, indicated that it takes a cancellation to terminate the insurance relationship. In *Matter of Latournerie v. Carney et al.*, 252 App. Div. 713, 298 N. Y. Supp. 1001 (3rd Dep't 1937), the insurance policy itself had provided that it should not be affected by death of the employer under continuation of the business by an executor, administrator, and so on. See to the same effect the present so-called "standard" policy (second page, D) which, however, treats the transfer of the business *inter vivos* differently. ("No assignment of interest . . . shall bind the company unless the consent . . . shall be endorsed hereon.") (second page, I). This policy is also published in *Hobbs, op. cit. supra* note 1 at 662, 664. Compare the holding in the *Buccheri* case *supra*, and *National Automobile Ins. Co. v. Ind. Acc. Comm. et al.*, 29 Cal. App. 336, 84 P. (2d) 201 (1938). In the latter case an award was affirmed which was rendered upon an accident concerning an employee who was hired after the dissolution of the partnership during whose existence the policy was issued.

⁷³At this juncture one may realize how much more compensation insurance has in common with all the modern social laws than with those concerning private business relations. When a back-pay order was countered with the defense that the order lost its force because of the dissolution of the partnership due to the intervening death of one partner, the court answered that it is the business entity, not the members to which the Labor Relations Act refers, so that common law rules on the termination of a partnership have no control. *N. L. R. B. v. Colten*, 105 F. (2d) 179 (C. C. A. 6th, 1939). See also with respect to other problems, *Agwilines, Inc. v. N. L. R. B.*, 87 F. (2d) 146, 151 (C. C. A. 5th, 1936).

are coming to recognize that the provision by which the effect of a cancellation is made to depend upon notification to the Industrial Board calls for a wider construction. Thus, such a construction subsumes the expiration of a specified term under the concept of cancellation, lest the socially desirable objective of a continuous coverage for the employees be rendered nugatory.⁷⁴

However, the courts espousing that concept have been careful to distinguish between effective transactions and ineffective attempts to procure insurance. Naturally, invalid bargains are not open to termination, nor do they need to be, because they never did have any effect. That can be seen from the concealment cases, as where the applicant concealed that the accident had occurred prior to his application, and later reported the date to be one as to which the insurance policy was conveniently antedated. Then, true, the insurer was not able to cancel and to notify of the cancellation. However, it is going a wrong way to place cases of the last mentioned pattern upon the same footing as those pointing to fraudulent representations. Since the fact that each party has to take an unknown risk is essential to the validity of an insurance contract and so constitutes its subject matter, an application made in awareness of the occurrence of an accident cannot lead to a valid policy; a policy issued under such circumstances must be held void *ab initio*.⁷⁵ It is the legal impossibility of the subject of the contract which renders the policy null and void.⁷⁶

Where, however, none of the parties to the insurance contract knew of the happening of the accident which occurred subsequent to the application but prior to the issuance of the antedated policy, the risk was not yet determined at that time and the policy is therefore valid; *ergo*, the insurance carrier has been held liable to make the statutory compensation.⁷⁷ All the

⁷⁴Accordingly, that provision was applied to an insurance which rested only upon a fifteen-day binder after the expiration of which the accident occurred, no definitive contract having been made as yet. *Matter of Kornblatt v. Great Am. Indem. Co.*, 263 App. Div. 770, 30 N. Y. S. (2d) 889 (3rd Dept 1941).

⁷⁵*Matlock v. Hollis*, 153 Kan. 227, 109 P. (2d) 119 (1941) (policy held void and recovery of employee, therefore, denied against the insurance company for an injury suffered prior to the issuance of the policy but within the term fixed therein by antedating the policy, the employer having been found to have concealed the occurrence of the injury at the time of his application). To the same effect: *Lima v. Ind. Acc. Comm'n*, 1 Cal. App. (2d) 43, 36 P. (2d) 223 (1934). Cf. *VANCE ON INSURANCE* (2d ed. 1930) 834: "There can be no valid insurance unless there is something to insure." A quite different view must be taken of the insurance of potential losses unknown to either party, a common feature of marine insurance ("lost or not lost").

⁷⁶*Scott v. Coulson*, [1903] 2 Ch. 252 (insured was dead). One may just as well subsume the situation as described in the text under the head of "fraud in esse," for the effect of the antedating of the contract goes to the substance of, and not only to the motive for making, the contract. See also 2 *REST., CONTRACTS* § 475, illustration 5.

⁷⁷*Orto v. Poggioni*, 245 App. Div. 782, 281 N. Y. Supp. 16 (3d Dep't 1935), *aff'd*

more must this be true where the facts, at the utmost, could give rise only to the avoidance of the contract as in case of misrepresentations. Consequently, fraudulent representations inducive to the issuance of the policy may, if material, render the contract voidable; but, until rescinded, it exists.⁷⁸ To deny the liability of the insurance carrier against the worker who suffered an injury prior to the rescission would frustrate the purpose of the statute in placing the burden of the compensation risk upon the carrier.

IV. COMPENSATION INSURANCE AS PART OF SOCIAL INSURANCE

The insurance of the employer's liability risk is only one of the two objectives of the statute; the other lies in the insurance of the industrial accident risk of the employee. Accordingly, the insurance carrier stands in two different relationships: to the employer on one hand, and to the employee on the other.⁷⁹ And, as noted before, the fundamental distinction between the two lies in their structure, the former being controlled by contractual concepts, the latter by statutory commands. The statutory structure of the employee's insurance makes itself felt with a vengeance in the described immunization of his position from his employer's conduct as against the insurance carrier. Moreover, the statute lays down the rule that the employee's waiver of his rights or an arrangement between employer and the insurance carrier to take away from, or even only to reduce, his statutory rights has no effect at all.⁸⁰

Obviously, the protection which that provision affords connotes a legislative policy which bears out the conclusion reached in various ways. When the employee's rights are declared invulnerable against transactions effected with his consent, they cannot be interfered with by one-sided acts of the employer or the insurance carrier of which the Board has not been notified.

271 N. Y. 551, 2 N. E. (2d) 690 (1936). For an interesting survey of cases, see *Points v. Wills*, 44 N. M. 31, 97 P. (2d) 374 (1939) (the employer having made the application for insurance to take effect on the date of the application, policy held valid upon occurrence of the accident subsequent to that application, although prior to the issuance of the policy). See, furthermore, *General Acc. F. & L. Ins. v. Ind. Acc. Comm'n*, 196 Cal. 179, 237 Pac. 33 (1925) (award upheld, provided that employer at the time of taking out insurance was ignorant of accident which occurred a few hours earlier on the same day).

⁷⁸*Employers' Liability Assur. Co. v. Ind. Acc. Comm'n*, 177 Cal. 771, 171 Pac. 935 (1918). See for that distinction particularly, *Matlock v. Hollis*, 153 Kan. 227, 109 P. (2d) 119 (1941).

⁷⁹The concept of the dual function of workmen's compensation, *i.e.* of the existence of two distinct obligations of the insurer, has supplied guidance in various ways. See, *e.g.*, *Points v. Wills*, 44 N. M. 31, 97 P. (2d) 74 (1939) and *United States Fidelity & Guaranty Co. v. Taylor*, 132 Md. 511, 104 Atl. 171 (1918).

⁸⁰W. C. L. § 32, 54(4).

Naturally, that result cannot be regarded as a propriety of this branch of insurance law. Wherever the community holds the safeguarding of a third party's interest in an insurance to be worth protection, judicial construction will strive to separate the latter's coverage from that of the insured. The factor which distinguishes the status of the employee as an insured from, say, that of a mortgagee protected by the standard mortgage clause, is the character of his rights formed in a different *matrix* from that of the latter's.⁸¹

There is a more fundamental similarity between compensation insurance and compulsory automobile insurance, and it is no casual one, indeed, for the basic concept of such automobile insurance follows closely the suggested concept of compulsory compensation insurance.⁸² As often happens in the process of drafting new bills, the later law took account of that which in the practice of its model proved itself a fertile source of quibbling. In clarification of the status of the protected person, the Massachusetts Compulsory Motor Vehicle Liability Act has improved upon its model.⁸³ The Act provides that "no act or default of the insured, either prior or subsequent to the issue of the policy shall operate to defeat or avoid the policy so as to bar recovery provided in the policy by the judgment creditor."⁸⁴ What this field of insurance has in common with compensation insurance is the

⁸¹For various reasons the "standard" or "union" mortgagee clause in fire insurance policies must be deemed to be of a different nature than in those insurance branches under consideration. The mortgagee clause also gives the mortgagee a status independent from that of the insured mortgagor. *Goldstein v. Nat. Liberty Ins. Co.*, 256 N. Y. 26, 175 N. E. 359 (1931). But the status of the former no less than that of the latter arises upon a contractual basis. *Ibid.* See also N. Y. INSURANCE LAW c. 28, § 168(2)(d). Furthermore, there is no statute which requires the incorporation of the clause into the policy. *Ergo*, in New York the courts balk at reading that clause into the policy. Without its incorporation into the policy, the mortgagee has no status independent from that of the mortgagor. *Hessian Hills Country Club, Inc. v. Home Ins. Co.*, 262 N. Y. 189, 186 N. E. 439 (1933).

⁸²For historical references, see Braun, *The Financial Responsibility Law* (1936) 3 LAW AND CONTEMP. PROB. 505.

⁸³MASS. GEN. LAWS (1932) c. 90, § 34B; c. 175, § 113A.

⁸⁴*Id.* at § 113A(5). For the constitutionality of that section, see *Opinion of the Justices to the Senate and the House of Representatives*, 251 Mass. 569, 147 N. E. 681 (1925). It is noteworthy that this Massachusetts automobile liability insurance law follows up the concepts of the N. Y. W. C. L. also in the requirement of a previous written notice to the other party and to the registrar for cancellation, while the Massachusetts workmen's compensation law does not. There, a cancellation given by one party to the other or agreed upon between the parties stops the insurance coverage immediately, even in the absence of any communication thereof to the Board. See MASS. GEN. LAWS (1932) c. 152, § 22, and *Altinovich's Case*, 237 Mass. 130, 129 N. E. 372 (1921). *Quaere*, is the reason for that divergence to be found in the fact that the former law has been compulsory since its inception, and that the latter has not? Quite recently by the ACTS OF 1941 c. 410, MASS. ANN. LAWS (Lawyers Co-op. 1942) c. 152, § 19B, that divergence has abated somewhat on account of the provision requiring the uninsured employer to post notice of the lack of insurance coverage in his plant.

statutory creation of rights for the victims of accidents resulting from specific sources against the insurance carriers elected by those persons whom the statute has burdened with the cost of the insurance. Naturally, where the law, as in old age and survivor's insurance, in unemployment insurance and in compensation insurance by a monopolistic state fund, has eliminated that element of selection, the independence of the employee's status from the employer's mismanagement and failures has never been open to doubt.

Hence, the qualification of the employees and beneficiaries has not to be tested by proofs either of reports or of contributions which the employers are under a statutory obligation to make.⁸⁵ Moreover, neither here nor there is the amount of benefits or compensation measured by the amount of premiums actually paid.⁸⁶ They are more or less related to previous earnings, whether or not premiums were paid, provided, of course, that at the time when the claim accrued the employee was eligible. In the case of workmen's compensation, eligibility rests, *inter alia*, upon an insurance relationship of the employer which has not yet been rendered inoperative within the meaning of the statute.

At this point, again, we observe that in contrast to liability, annuity, and life insurance, the premiums in all three branches of statutory insurance are not measured by an amount insured, but only by the amount of wages. Furthermore, as the obligation of the insurer is not limited at all by any amount insured, statutory provisions determine and fix the amount due, subject to no modification whatsoever by agreements between the parties concerned. Obviously, this results necessarily from the structure of compensation insurance; for, as it was noted above, the worker's status arises without any regard given to his intention, consent, or even knowledge.⁸⁷ Conse-

⁸⁵See for old age and survivor's insurance the SOCIAL SECURITY ACT OF 1939, 53 STAT. 1365 (1939), 42 U. S. C. §§ 402 (a) (b) (c) (d) (e) (f), 409 (g) (h). As for unemployment insurance, see N. Y. LABOR LAW § 503(3), as amended L. 1942, c. 640. Certainly the reference in the text loses any argumentative force in those countries where the statute itself bases the qualification for old age insurance, although operated by the state, upon the payment of contributions. See the SOCIAL SECURITY ACT of New Zealand, Law of Sept. 14, 1938, 1938 N. Z. STAT. 62, and Stack, *The Meaning of Social Security* (1941) 23 J. COMP. LEGIS. (3d Ser.) 113, 114. The first old age insurance laws, such as the German and Austrian laws, required the payment of contributions of a certain amount for eligibility, so that the continuation of the employment throughout the whole period without the completion of contributions was not sufficient to establish eligibility. As was stated clearly, these laws brought old age insurance closer to the analogous annuity and life insurance types in that respect. See LUTZ RICHTER, *SOZIALVERSICHERUNGSRECHT* (1931) 137, and Austrian *GEWERBLICHES SOZIALVERSICHERUNGSGESETZ* § 250.

⁸⁶See *Gissing v. Liverpool Corp.* [1935] Ch. 1.

⁸⁷Naturally, in jurisdictions where it is left to the employer to elect or to refuse coverage by the compensation act, a different approach to workmen's compensation

quently, his rights cannot be bargained away, neither in advance of nor after the occurrence of the injury.⁸⁸ All this is familiar matter, common to all three branches. Nor is there any difference between them in the rejection of substitutionary schemes of contractual character⁸⁹ nor in the immunity of the claims from any reduction by counterclaims or set-offs.⁹⁰

True, the employer who continued to pay the regular wages to his injured employee during a disability period may in undisputed cases demand reimbursement out of the compensation up to the amount not yet paid.⁹¹ However, these very qualifications mark those payments as compensation advancements.⁹² While formerly the mere fact of the payment of the wages during the disability period led to a denial of any compensation upon the concept of the employee's not having suffered any loss,⁹³ now an amendment has brought about a change.⁹⁴ With that removal of a reminder of the principle inherent in liability insurance, the claimant no longer endangers his claim by not being taken off the payroll. All the less can monies paid

insurance must be found. See *Liberato et al. v. Royer & Herr*, 81 Pa. Super. 402 (1923), *aff'd* 281 Pa. 227 (1924).

⁸⁸W. C. L. § 25(1) (cl. 8) (no closing of a case without a notice and an opportunity for a hearing). The Board itself may compromise in case of the employer's default in the payment due under an award. *Id.* at § 26. Only the Board may inaugurate a lump sum scheme in lieu of an award in installments. *Id.* at § 27.

⁸⁹Under this rule, a private insurance contract for the benefit of the employees or a retirement system, regardless of whether it is based upon contributions of both the employer and the employees or upon the contributions of the employer only, cannot affect the right to, or the amount of, compensation due pursuant to W. C. L. *Id.* at § 30.

⁹⁰That result follows from the exemption of compensation from any execution. *Id.* at § 33. The exemption concerns both the claim and the money already paid, *e.g.*, as a lump sum. It does not matter to whom the payment was due, the employee or his dependents. For the legislative intention evidenced by the history of that provision, see *Surace v. Danna*, 248 N. Y. 18, 161 N. E. 315 (1928). In *Tosti v. Sbrano*, 170 Misc. 828, 11 N. Y. S. (2d) 321 (N. Y. City Ct. 1939), that exemption was deemed to extend to a house purchased by a judgment debtor who made a down payment with part of the award. See also *DeDonato v. Rosenberg*, 221 App. Div. 624, 235 N. Y. Supp. 46 (3d Dep't 1927).

⁹¹W. C. L. § 25(1) (cl. 9). The right to be credited with the advance payments extends to the actual amount of the wage payments made and not only to that of the compensation rate. *Ott v. Greenwood Cemetery*, 262 N. Y. 532, 188 N. E. 52 (1933).

⁹²That is a sequel to the principle covering the payment of compensation, for the employer has to continue paying the periodical rates in like manner as wages without waiting for an award, or to file in time a notice of controversy. W. C. L. § 25(1) (cl. 1 and 4).

⁹³*Matter of Nagy v. Adwol*, 234 App. Div. 903, 254 N. Y. Supp. 961 (3d Dep't 1931); *Matter of Sullivan v. Seely*, 226 App. Div. 629, 236 N. Y. Supp. 377 (3rd Dep't 1929); *Matter of Rasmussen v. Park G. & M. Shop et al.*, 223 App. Div. 591, 229 N. Y. Supp. 161 (3rd Dep't 1928). In the last case cited a dictum was added to the effect that in case the injured employee, while being paid wages, should employ a helper to be paid by him, he might "possibly" be given an award.

⁹⁴L. of N. Y. 1930, c. 316. The words "payments . . . in like manner as wages" were added to the words "advance payments of compensation," so that either payment can be treated as credit only if the employer seasonably claims it at the Board.

to him under a company's pension system or an accident policy taken out by his employer abate his rights.⁹⁵

However, the law allows the state, municipalities, and their political subdivisions to make deductions for benefits payable under a pension system or under a statute, provided they are made without any contributions on the part of the employee; such deductions are allowed only in death cases.⁹⁶

What about payments of pensions from public funds? Public corporations, on an ever increasing scale, provide for funds or pension systems so as to grant their employees a right to a pension in case of their retirement in consequence of accident disabilities. Simultaneously, these corporations act practically as self-insurers for their compensation risks.⁹⁷ Thus, fairness and consideration of the expenses to be passed on to the taxpayers make for an irresistible demand for a sound solution of the conflict between the principle of maintaining the integrity of the award and that of avoiding a duplication of benefits. Indeed, New York's Civil Service Law found such an expedient by providing for a reduction of pensions by the amount of the award.⁹⁸ As the appellate division explained, that concept intends to avoid double payments by the employer for the same disablement.⁹⁹

At this juncture, two important questions arise: First, whether the objects aimed at by the various branches¹⁰⁰ of statutory insurance are not, at least

⁹⁵*Dodd v. The Great Atl. & Pac. Tea Co.*, 247 App. Div. 831 (3d Dep't 1936). From a plan to which he as a member contributed, claimant received \$10 per week and the company added \$30 a week; *held*, those payments cannot be credited to the employer.

⁹⁶W. C. L. § 30. Thus, barring death cases, it may happen that the claimant, when he is paid both a retirement allowance and an unrestricted compensation, receives more than he actually earned while in active service. See *Svec v. City of N. Y.*, 251 App. Div. 758, 295 N. Y. Supp. 393 (3rd Dep't 1937), and *Fasce v. Auburn State Prison*, 239 App. Div. 858, 263 N. Y. Supp. 1009 (3rd Dep't 1933). In other than death cases, there is no set-off. Therefore, when a city had continued paying "home relief" to an unemployed individual who was required to work out such relief but suffered an injury while working, it was not allowed to set off the payments made subsequent to the accident against the payments due under an award. *Matter of Maiceo v. City of Yonkers*, 288 N. Y. 213 (1942).

⁹⁷W. C. L. § 50 (3a).

⁹⁸N. Y. CIVIL SERVICE LAW § 67. However, that reduction concerns only the pension, not the annuity payable from the employee's own accumulated contributions. See *Matter of Dalton v. City of Yonkers*, 262 App. Div. 321, 29 N. Y. S. (2d) 42 (3rd Dep't 1941), *rearg. den.* 262 App. Div. 976, 30 N. Y. S. (2d) 112 (3rd Dep't 1941), *aff'd w. o.* 287 N. Y. 49 (1942).

⁹⁹*Id.* at 324, 29 N. Y. S. (2d) at 45.

¹⁰⁰One aspect of multiplicity of claims out of the same accident is related, of course, to the co-existence of forty-seven compensation laws in this country. That it is society which in social insurance bears the burden, points also here to the very difference between compensation insurance and private accident insurance. As to the latter the amount of insurance payments may vary with the number of insurance policies; as to the former, there can only be one single compensation for one accident. This view is very well expressed in *Hughes v. Ware*, 34 N. M. 29, 276 Pac. 27 (1929). See also *RESTATEMENT, CONFLICTS* (1934) § 403.

partially, similar; second, if so, whether the rule espoused by the Civil Service Law does not imply a concept worth broadening. At first thought, we observe that a fatal accident may establish claims in favor of the wife and the dependent children of the decedent for death benefits under the compensation law as well as survivor's benefits under the Federal Social Security Act.¹⁰¹ In case of a non-fatal accident and a subsequent employment followed by unemployment, such a duplication of benefits can hardly be conceived.¹⁰² Nevertheless, as it happened in *Henry v. Ford Motor Co.*¹⁰³ it might happen again. There a workman, although having been awarded compensation for permanent total disability, was given a light job which he lost as a result of a lay-off. The court found that his right to compensation continued during the period of payments of unemployment benefits.¹⁰⁴ Obviously, a total disability for his pre-injury job does not necessarily disqualify a workman so as to bar his return to the labor market for a relatively minor job.¹⁰⁵ Finally, a person eligible for insurance benefits under the Social Security Act may become unemployed and entitled to unemployment compensation or may be injured and so qualify for workman's compensation.¹⁰⁶

¹⁰¹There is, on the one hand, no dependency requirement in W. C. L. as to claims of a surviving wife or children under 18. On the other hand, neither does the Federal Social Security Act, 49 STAT. 620 (1935), as amended 53 STAT. 1360 (1939), 42 U. S. C. §§ 301-1305 (1940), qualify the eligibility with regard to family benefits for a widow over 65 or a widow having in her care a child eligible to benefits by the dependency factor. 53 STAT. 1360 (1939), 42 U. S. C. § 402(d) (1) and (e) (1940). Furthermore, barring the case of the child's adoption or his support by a stranger or a step-father, the irrefutable presumption of his dependency upon the deceased makes any inquiry unnecessary as to other sources of support. 42 U. S. C. § 402(c) (3) (1940).

¹⁰²Ability to work is a requisite for eligibility to unemployment compensation. See *Comparison of State Unemployment Compensation Laws*, EMPLOYMENT SECURITY MEMORANDUM No. 8 (1940) 85, and N. Y. LABOR LAW § 502 (10), as amended, Laws of N. Y. 1942, c. 640. Loss of employment on account of an industrial accident does, during the period of disability, disqualify the worker for unemployment compensation. DOUGLAS, SOCIAL SECURITY IN THE UNITED STATES (2d ed. 1939) 322.

¹⁰³291 Mich. 538, 289 N. W. 244 (1939).

¹⁰⁴*Ibid.* It is noteworthy that the Michigan unemployment law, like that of thirty other states, but unlike that of New York, disqualifies any individual for the period of his receipt of compensation. However, that disqualification is, in Michigan, limited expressly to compensation for temporary disability. Thus, it could not apply to the instant case. Other state laws have added permanent disability as a disqualifying factor. See, e.g., TEX. ANN. REV. CIV. STAT. (Vernon, Supp. 1943) art. 5221b-3 (e) (3).

¹⁰⁵Although it does not turn upon the question of deductions, *Harrington v. Dep't of Labor*, 9 Wash. (2d) 1, 113 P. (2d) 518 (1941), is instructive. There claimant, after having been compensated for permanent total disability through a lump sum settlement, returned to employment with another employer, in whose service he became the victim of another injury; the denial of compensation was upheld. See also *Sorenson v. Dep't of Labor*, 12 Wash. (2d) 355, 121 P. (2d) 978 (1942).

¹⁰⁶By Social Security Law primary and family benefits are subject to deductions for wages of \$15 and up earned monthly in services rendered by the primary beneficiary or

Disregarding for a moment statutory regulations, one must admit that by paying the benefits due under the appropriate act, the insurance carrier discharges an obligation owed by himself and not by one of the two other functionally different carriers. They remain liable for the payment of benefits due under the laws governing them. Obviously, the former's payment does not enrich them at all, let alone unjustly. In other words, there is no basis for applying the doctrine of subrogation.¹⁰⁷ Undoubtedly, nothing other than legislation is necessary to avoid the socially undesirable result of a duplication of insurance benefits paid for the same risk, namely, the loss or impairment of earning power. Concerning the interrelationship between unemployment insurance on the one side and workmen's compensation and old age benefits on the other, something has already been done by the various state legislatures. They have resorted to the aforementioned scheme of deductions for the one class of benefits from the other.¹⁰⁸ However, one may wonder whether it is advisable to extend that method of deduction so as to reduce compensation payments by old age and family benefits. The former, it is true, fall within the state jurisdiction while the latter are subject to federal legislation and it must be added that they are based upon contributions made partly by the employees themselves. Yet, the importance of the entirety of workmen's compensation cannot be overemphasized.

Naturally, Congress could amend the Social Security Act so as to allow

by the recipient of a family benefit. 53 STAT. 1367 (1939), 42 U. S. C. § 403 (d), (e) (1940). As one can see, workmen's compensation has no bearing upon the right to the full benefits.

¹⁰⁷RESTATEMENT, RESTITUTION (1937) § 162. In the states without a statutory provision by which the insurance carrier or employer is subrogated to or assigned the rights of the injured person or his dependents against the tortfeasor, the courts have denied a common-law subrogation. Such states are Ohio, New Hampshire, and West Virginia. See, as an example, *Merrill v. Marietta Torpedo Co.*, 79 W. Va. 669, 92 S. E. 112 (1917). The same considerations must obtain whenever analogous questions arise in the field of old-age insurance.

There are some precedents abroad. Thus, in post-war Austria an attempt was made to secure such statutory recovery for all branches of statutory insurance. See *GEWERBLICHES SOZIALVERSICHERUNGSGESETZ*, B. G. B. (1938) No. 1, § 73. In America, in the short time of its operation, the old age insurance law has not yet occasioned disbursements of such dimensions as to invite the problem of recovery actions against tortfeasors. Naturally, without a statutory provision to that effect, the Social Security Board has no right of recovery against the murderer of a relatively young worker in good physical condition who reasonably could have been expected to live for another thirty years. Needless to say, even a statutory recovery could under no circumstances include the present value of benefits which would have been payable with the expiration of his life expectancy, as computed on an actuarial basis.

¹⁰⁸Unemployment benefits are subject to deductions for workmen's compensation in twenty-nine states, and for old age and survivor's benefits in thirty-one states. See *Comparison*, cited *supra* note 102, at 106, and *TEX. REV. CIV. STAT. ANN* (Vernon, Supp. 1939) tit. 83, art. 5221b-3 (e) (2) and (3).

for a suspension of its benefits pending compensation payments. That would, of course, necessitate the attachment of a condition pursuant to which that suspension would not take place where the compensation is subject to deductions for those old age benefits by virtue of state legislation. With the increasing number of old age and survivor's insurance beneficiaries in the years to come and with the growing necessity for economizing the disbursements in the post-war world, some legislation of this kind is to be expected.¹⁰⁹

That result, like the others found in the course of our discussion, fits very well into the whole structure of compensation insurance, which the Connecticut highest court properly classified as a "peculiar type of insurance."¹¹⁰ It is peculiar even where, as in New York, the insurance status of the employees does not arise automatically. There, the employees have no more private rights of action to enforce the obligation to insure than in Washington, for the obligation is a public one.¹¹¹ The fact that the statute supplies the workers also with some means of control over the employer's compliance with his obligation must certainly be held consonant with its nature. The New York act enables the employee to control his coverage by requiring the employer to post and to maintain in a conspicuous place typewritten or printed notices concerning his insurance and his statutory rights.¹¹²

Such control is a common feature of social insurance law. The Social Security Act requires the employer periodically to furnish each employee

¹⁰⁹Compulsory compensation insurance against sickness has been rudimentary in America so far, Rhode Island's Acts of 1942, c. 1200 being the only exception. Where abroad such legislation met compensation insurance, the appropriate interconnection between the two classes of statutory insurance had to be established, for there is not only an identity of the contingencies to a great extent, but also an identity of the relief granted. How statute law can dovetail the effects of one insurance with those of the other can be seen from the German REICHSVERSICHERUNGSORDNUNG § 559, and Austrian GEWERBLICHES SOZIALVERSICHERUNGSGESETZ (1938) § 178.

¹¹⁰Piscitello v. Boscarello, 113 Conn. 128, 130, 154 Atl. 168, 169-170 (1931).

¹¹¹Here again one is impressed with the analogous approach in other fields of social law, e.g., labor relations law. See, for instance, Amalgamated Workers v. Cons. Edison, 309 U. S. 261, 60 Sup. Ct. 561 (1940).

¹¹²W. C. L. § 13a (2) and § 51. The form (size) which must not be reduced without the Commissioner's consent is prescribed by him. Form C-105; RULES OF THE COMMISSIONER, Rule 20. As to the consequences an incorrect notice may have, see *Warney v. Board*, 290 N. Y. 329, 49 N. E. (2d) 466 (1943). Furthermore, pursuant to other provisions, the Commissioner may, upon notice of cancellation by the last insurer, initiate an investigation of the coverage of the compensation risk with a new insurer. W. C. L. § 111. By California law, the failure of the employer for a period of ten days to furnish a verified statement showing such coverage establishes a prima facie case of failure to insure. CAL. LABOR CODE (Deering, 1937) § 3711. According to N. Y. W. C. L. § 52(3) such a prima facie case can be made out only "in any prosecution" for violation of the insurance obligation. In July, 1942 alone there were for failure to insure 200 criminal convictions secured in New York City. (1942) 32 AM. LAB. LEG. REV. 127.

with a written statement regarding the amount of wages paid to him.¹¹³ True, there the coverage is independent of the employer's compliance with his obligation to make contributions for himself and to make appropriate deductions from the wages for the premiums owed by the employees.¹¹⁴ However, the follow-up of this branch of insurance shows the significance of a check-up by the employee as to whether his employer had complied with his obligation of making contributions, and as to whether his wage reports were correct. Besides the right to be furnished with periodic wage statements, each wage earner, and after his death his dependents, have the right¹¹⁵ to request from the Bureau of Old Age and Survivors Insurance a report of his earnings as noted in the wage records of the Bureau, records primarily based upon the employer's statements.¹¹⁶ However, there is a time limit for the exercise of that right. Such an inquiry must be made not later than sixty days after the expiration of four years following the year of the payment.¹¹⁷ With the expiration of that period, the records of the Board constitute conclusive evidence of the amount of the wages as far as insurance rights are concerned.¹¹⁸ Thus, lack of vigilance may amount to a virtual destruction of claims. Yet, even if the claimant were to receive something,

¹¹³INT. REV. CODE § 1403(a). The statement must be furnished not later than the second day of the first calendar month following the period covered by the statement, the longest period being not in excess of four calendar quarters.

¹¹⁴*Id.* at §§ 1400, 1401 (a) (b), 1410.

¹¹⁵42 U. S. C. § 405(c) (i) (1940); 5 FED. REG. 1866 (1940), 20 C. F. R. § 403.703 (Supp. 1940).

¹¹⁶See Monograph No. 16 (Soc. Sec. Bd.) on *Administrative Procedure*, REP. ATT'Y GEN'S. COMM'N (1940) 6.

¹¹⁷*Id.* at 8; 42 U. S. C. § 405 (c).

¹¹⁸42 U. S. C. § 405 (c) (1) (2), and 20 C. F. R. § 403.702 (a) (Supp. 1940). Owing to the short time of its existence, the construction of the statute lacks the guide-posts of judicial decisions. There has been no case as yet reported concerning an insured's action for damages against an employer which is based on failure to make contributions, or on false reports made to the authorities. Such action would put the delinquent employer in the place of the insurer, just as is done by the W. C. L. Where, as in Texas, in absence of compulsory insurance workmen's compensation protection depends upon consent, the courts, nevertheless, once that protection has been secured, hold the employer liable as if he were the insurer when he had failed to give the statutorily required notice of the termination of the insurance. TEX. REV. CIV. STAT. ANN. (Vernon, 1941) tit. 130, art. 8306, § 3c. See *Anderson-Berney Realty Co. v. Soria*, 123 Tex. 100, 67 S. W. (2d) 222 (1933). Reverting again to old age insurance, we cannot ignore the fact that tax returns available still later, even after the expiration of the four years, can enable the bureau to conform its records with the actual figures and may prevent the forfeiture of the insured's quarters of coverage. See 20 C. F. R. § 403.703 (b) (Supp. 1940). It remains to be seen whether the reckless, nay intentional, failure of the employer to report at all or to make current reports will, in a civil action, be deemed to make up for the claimant's lack of vigilance. Abroad, many jurisdictions have recognized the claimant's right to damages; some countries formulated a statutory provision to that effect. See, e.g., Austrian GEWERBLICHES SOZIALVERSICHERUNGSGESETZ § 75.

the taxes not being turned over by the employer would still lead to a deduction to be made from the benefits to which he is entitled.¹¹⁹

¹¹⁹There are provisions in the W. C. L. by which obligations are thrust upon the employee after the occurrence of the contingency insured against. For instance, there are the obligations to give notice of an accident or a disability, to make a request for medical treatment under certain circumstances, to submit to a medical examination, and to report the commencement of an action against a third party. W. C. L. §§ 13(b), 13a(4), 18, 29(1), and 45. See also *Dorfman v. Levine*, 260 N. Y. 665, 184 N. E. 137 (1932). Of similar nature are the obligations imposed upon claimants under the two other public insurance laws. They concern periodical reporting concerning the continuance of the claimant's unemployment and reporting of certain events by the beneficiary of the old age and survivor's statute. N. Y. LABOR LAW §§ 503(3)(b) and 510(2) on one side, and Soc. SEC. ACT § 203(g) on the other. Yet failure to perform those obligations need only affect a quantum of the claim. It does not cause the coverage to be forfeited. In other words, such failure does not affect the status of being insured and can, therefore, remain outside our discussion.