The Role of the Court in the Development of Insurance Law

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The court, the legislature, and the insurance commissioner have all contributed to the development of insurance law. Taking the subject as a whole, the focal point for law-making has been the legislature, but in some aspects the court has been dominant. This essay will examine quantitatively and qualitatively the relative importance of the Wisconsin Supreme Court in the development of various parts of insurance law, and interpret the findings. Though this is a case study in the law of a single jurisdiction, most of the generalizations it makes are probably of equal validity in other states.

The analysis is a functional one. The point of departure is the economic and social role of the insurance business, as a reflection of pervasive demands and attitudes in society. The law is considered as an instrument to aid the performance of that role. The cases have been classified and studied, not primarily in terms of legal doctrine, but in terms of the fulfillment by the insurance enterprise of its function in society. Ideally, for such a study, trial court cases should be examined, or at least sampled. For the trial court as well as the appellate court, contributes in its practices to fulfillment or frustration of the function of the enterprise. But to sample the state trial court cases would be prohibitively difficult and expensive; thus the raw materials for the present study are the reported appellate court opinions. By the end of 1955, the Wisconsin Supreme Court had decided nearly 1400 insurance cases and federal courts also had rendered opinions in nearly 100 insurance cases arising in Wisconsin. All these were examined. These opinions heavily emphasized legal doctrine. The traditional solution of controversy in doctrinal terms obscures, but does not entirely conceal, the underlying attitudes which are the real

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grounds for decision. It is the latter that this essay seeks to uncover.

GENERAL CHARACTERISTICS OF THE FLOW OF INSURANCE LITIGATION

The most striking characteristic of the flow of insurance litigation—at least at the appellate level—is its failure to keep pace with the rapid expansion of the insurance enterprise. Figure 1, p. 562, which plots the number of reported Wisconsin insurance cases as a function of time, shows a gradual long-term increase in the number of cases from the beginning of insurance litigation in the state in 1854 until 1936. From 1936 until 1947 the trend was sharply downward, though the upward movement was resumed in 1948, at least temporarily.

However, the long-term increase in the number of cases decided on appeal is misleading. During the period in question the volume of insurance business constantly increased at a rapid rate. Moreover, in the century during which the Wisconsin court has dealt with insurance matters, there has been a constantly increasing list of lines of insurance represented in insurance litigation. Not only does this mean that the decided cases represent a much more extensive area of economic activity, but more significant, the newer lines of insurance have special problems of their own, leading to a flurry of litigation during the early history of each new line of insurance.

The normal pattern of development of insurance litigation may be seen better if the qualitative expansion of the business is discounted by treating separately each line of insurance,[1] and if the quantitative growth of the business is minimized as a factor by plotting cases per million dollars of insurance premiums as a function of time.[2] Too many adventitious factors affect the quantity of insurance litigation, and the sample is too limited, to describe with confidence a "normal" curve for the flow of insurance litigation in a particular line of insurance, but some general char-

[1] Figure 2, p. 562 shows the annual flow of fire insurance cases; Figure 3, p. 562 shows the annual flow of automobile liability insurance cases.

[2] Figure 4, p. 562 shows the annual flow of fire insurance cases per million dollars of insurance premiums; Figure 5, p. 562 shows it for automobile liability insurance. The premium data for the years 1921-1955 were obtained from the annual reports of the Wisconsin Insurance Commissioner; the data prior to 1921 was not available, and for fire insurance a straight-line development from an assumed beginning date of 1850 was postulated. Though this introduces inaccuracy into the graph, it certainly does not seriously distort it for the limited use here made of it. An additional inaccuracy is introduced by the variations in the value of money over the term of the graph, but no conclusions would be altered by the correction of the data.

acteristics emerge. During the early life of any line of insurance, the flow of litigation is fairly rapid. Then, as the major problems are settled, and the principal structure of legal doctrine is laid out as a basis for the administration of claims, the flow of appellate litigation decreases to a low level. During the half century from 1854 to 1900, there was an average of roughly one reported fire insurance case for each million dollars of premiums, while from 1901 to 1955, the average was about three-tenths of one case per million dollars of premiums. In the years from 1943 to 1955, fire insurance litigation almost ceased at the appellate level; only 24 cases were reported in those 13 years, averaging one case for each 14 million dollars of premiums.

During the twentieth century, as new lines of insurance have come into prominence, the initial flood of litigation settling the main problems of the new fields has given a misleading appearance of constancy to the total flow of insurance litigation. For example, automobile liability insurance was in part responsible for the size of the bulge in the middle 1930's, Figure 1, p, 562; though it came on the scene before 1920, increased highway crowding and greater speed combined with depression and the greater volume of insurance sold to make the 1930's the great creative period for automobile insurance law.[3] The sharp decline during the years of World War II reflects partly the normal easing off of litigation in several lines of insurance then reaching maturity; partly it reflects a sharp drop in automobile insurance litigation as a result of gas rationing and decreased highway speeds during the war years.[4] The sharp increase beginning in 1948 was largely the result of the revival of automobile insurance litigation, which had not yet settled its doctrinal problems and reached mature stability. The three years, 1954—1956, gave some indication that the upward trend had at

[3] The death toll on American highways increased rapidly from about 9,000 in 1920 to 18,000 in 1925, to 29,000 in 1930, and 34,000 in 1935. This was in an area which reported roughly 4/5 of the total deaths. Automobiles increased from 9 million in 1920 to 20 million in 1925, and 26 million in 1930. During the 1930's the number stayed about constant. Wisconsin automobile liability premiums increased from about $1 million in 1920 to $3 million in 1925 and $5.8 million in 1930. They also stayed about constant during the 1930's. Though the great period of growth in insurance and in number of cars on the highways was in the 1920's, the delay in litigation, the continuing increase in the death and accident rate, and the effect of depression made the litigation bulge appear later. For these and other supporting statistics, see various STATISTICAL ABSTRACTS OF THE U. S.

[4] As one indicator of these trends, the STATISTICAL ABSTRACT OF THE U.S. report 1944 automobile deaths at 19,000, 1945 at 23,000, and 1946 at 30,000 for an area which reported approximately 4/5 of the total deaths.

length ceased and that stability at a lower level was in sight for the entire industry.[5]

Superimposed on these basic long-term trends of insurance litigation are short-term variations. Depressions led to an increase in litigation; all the graphs show a correspondence between the flow of litigation and the major depressions of our history too close to be accidental.

A factor concerning litigation that cannot be measured precisely is the variation in loss settlement practices of the companies. A more generous handling of claims might lead to a reduction in litigation. Thus the fact that prior to 1875 the flow of fire insurance litigation was less than in the last quarter of the nineteenth century may well be explained by the more generous settlement practices of the earlier period. After the Chicago fire of 1871 a tighter claims administration became the settled practice of the industry; technical defenses were used when possible, and the companies deliberately delayed settlement as long as possible. Eventually the industry learned the public relations value of a generous and prompt settlement of claims, and the decreased flow of fire insurance litigation may have resulted in some unmeasurable amount from this change in company policy.[6]

This basic pattern of insurance litigation holds good for the Wisconsin data on each of the major lines of insurance. Marine insurance was already a mature form of coverage when Wisconsin came on the historical scene. Numerous 18th century English cases settled the basic law, and though marine insurance was important in servicing the grain trade on the Great Lakes in the 1850's and 1860's, and the lumber trade later, the process of maturation of marine insurance had so far proceeded by that time that marine insurance litigation already had virtually ceased.[7]

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[5] The 1956 cases are included in Figures 1, 2, and 3, p. 562, but as of this writing the Commissioner's report was not available to obtain the 1956 premium data for Figures 4 and 5, p. 562. Nor are the 1956 cases included in the subsequent discussion. There were a total of 21 cases during the year, of which seven were automobile liability, four life, three fire, and one each wind, fidelity, burglary, hail, workman's compensation, theft, and general liability.

[6] For discussions of claims administration policy in fire insurance, see generally the ANN. PROC. FIRE UNDERWRITERS' ASS'N OF N.W. during the 1870's. For particular examples, see 3 *id.* at 42 (1872); 4 *id.* at 46 (1873); 6 *id.* at 55 (1875); 7 *id.* at 26 (1876); 8 *id.* at 117 (1877). (The first few proceedings are in the name of the Association of State, General and Adjusting Fire Insurance Agents of the Northwest.) That twentieth century practices are more generous than those described in these references is apparent to anyone with first-hand knowledge of modern insurance operations.

[7] There were only 15 marine insurance cases in the entire history of

Fire insurance was next in order of development; its characteristics have already been described. Commercial life insurance came on the Wisconsin scene at an early date. The volume of litigation was never large; no more than seven cases were decided in a single year. From a slow start, the flow of litigation became heaviest and steadiest in the years from 1900 to 1940; then in the 16 years from 1941 to 1956 it dropped off and only 28 cases were decided—life insurance litigation too had almost disappeared at the appellate level. Fraternal life insurance had its day from 1890 to 1920; over a hundred cases were decided in those three decades, many dealing with the one problem of up-grading fraternal insurance societies into modified legal reserve companies. From 1921 to 1956, on the other hand, there were only 20 cases, though the total volume of business done by the fraternals remained fairly constant through the first half of the twentieth century.[8]

Of the main twentieth century developments in insurance, automobile coverage has already been described. Corporate suretyship came into its own with an initial rash of cases in 1915 and 1916, then a fairly steady output until the early 1930's, when business depression made suretyship an important subject of litigation for a few years, after which the cases dropped off rapidly to a minimum. In other new lines, the amount of litigation was too small to provide meaningful patterns.

By mid-twentieth century, therefore, the insurance business seemed to be approaching the end of litigation, at least at the appellate level. Thus in 1955 only eight non-life cases were decided; yet the premium income of fire and casualty companies was nearly three hundred million dollars. It is especially noteworthy that automobile liability insurance, which had a premium volume of only forty-three million dollars, produced seven cases, while the remainder of the fire and casualty insurance business, providing a quarter of a billion dollars of premium income, was represented by only a single case. Though this proportion is not quite representative of mid-century years, it suggests the direction of development, as illustrated by the Wisconsin data.[9]

Wisconsin. One case was decided in each of 1858, 1867, and 1868. In the 1870's eight were decided, four in one year. There were no cases in the 1880's, one in the 1890's, then none until the 1930's, when there were three in quick succession.

[8] In 1955 there were 620,000 certificates in force in Wisconsin, with three quarters of a billion dollars of coverage. WIS. INS. COMM'R ANN. REP. 227 (1956).

[9] 1956 was perhaps more nearly typical. There were 21 cases, yet considering the enormous volume of business attained in that year, the appellate

The quantitative pattern of appellate insurance litigation suggests a radically changing role of the court in the implementation of the insurance enterprise. During the early part of insurance law development, the court was especially active as lawmaker. The doctrines of insurance law developed by Lord Mansfield in 18th century marine insurance cases had to be adapted to the needs of the developing society of 19th century America, and to the variant problems of successive new lines of insurance. The adaptation became progressively easier as available analogies increased in number. Once a legal framework was created within which the industry might operate, appellate litigation became an occasional matter. The court was reduced virtually to the role of super-administrator of claims, available in the background as the highest level in the claims adjustment hierarchy; in mid-twentieth century controversy normally ceased before it reached the Supreme Court of Wisconsin. The court's role as lawmaker was no longer important.

THE COURT SUBORDINATE

In order to examine the role of the court qualitatively, it is necessary first to state a general functional framework within which the cases may be classified and discussed.

The law's initial impact on the insurance industry, functionally if not chronologically, is in the validation of the enterprise, i.e. the declaration by the law of the legality of the enterprise, and the delimitation of the area of that legality. It is not beyond question that insurance should be a legally valid activity, in all the broad sweep of its possible ramifications, or indeed in any part of it. Pious judgments about interference with divinely ordained events, pragmatic judgments about the tendency of insurance to increase the loss to society by encouraging policyholders deliberately to bring about the insured event, moral judgments about the effect on individual character of the elimination of risk, or the making of gambling contracts, political judgments about the collateral effects of the insurance industry on the larger society,—might conceivably operate to invalidate all insurance contracts. That they have not done so testifies to the legitimate and important social

litigation rate was very low. Seven were automobile liability cases, four life, three fire, and one each wind, fidelity, burglary, hail, workman's compensation, theft, and general liability. There is ground to suppose that the pattern of development described above holds good for all kinds of litigation, at both the appellate and trial levels. See HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 193 (1950).

role played by insurance; the potentially hostile social policies have merely limited the sphere of legitimate operation of insurance in relatively minor ways.

Within the area of validity of the insurance enterprise, its operation depends on the creation of an adequate insurance fund to pay the losses which are incurred. The law implements the needs of society in the insurance enterprise by determining the nature of the organizations created to act as insurers, by assessing the legitimacy of the corporate practices of such organizations, by governing the permissible methods of capital mobilization for the enterprise, by restricting the marketing and premium collection practices of the insurer, and by regulating the way in which premium rates are set.

Insurance premiums are normally collected in advance; in consequence insurance companies hold enormous sums of money for the payment of claims which have not yet accrued. In legal reserve life insurance such assets aggregate nearly a hundred billion dollars in mid-twentieth century.[10] Though such funds are technically the property of the corporate entity, language may often be found in the books suggesting that the courts regard the funds as, in a certain sense, trust funds.[11] This recognizes the underlying reality of the situation. The law implements the insurance operation by protecting the integrity of these funds against dissipation through the venality or the incompetence of insurance company officials.

The law must of necessity create a framework of doctrine within which the claims administration of the insurance business may proceed; the insurance fund which has been so carefully built up and preserved must be distributed to those entitled to participate in it. Care must be taken to see that only those share whose claims can be brought within the terms of the insurance scheme, as interpreted with the aid of the court's contract doctrines; i.e. the integrity of the fund must be guaranteed against this special threat. On the other hand, the interests of claimants must be safeguarded against unduly restrictive loss settlement practices; the reasonable expectations of the insurance buyer should be fulfilled.

Finally, in its mature growth, the insurance enterprise has impact on the larger society of which it is a part, by virtue of its great size and strategic position. The law, as the expression of the atti-

[10] INSTITUTE OF LIFE INSURANCE, LIFE INSURANCE FACT BOOK 60, 89 (1956).

[11] Hazelton v. New York Life Ins. Co., 148 Wis. 19, 134 N.W. 131 (1912) treated the company as a trustee for certain purposes.

tudes and opinions of society, regulates the effects of the insurance enterprise in this larger sphere.

In all of these areas except in the distribution of the insurance fund, the court has been subordinate; in the distribution of the fund the court has dominated the making of the law. We first consider the activities of the court in those areas in which it was subordinate.

Validation of the Insurance Enterprise

Positive Validation

The courts played but a minor role in the validation of the insurance enterprise. In a century, fewer than 50 cases dealt with the complex problems which may be subsumed under this heading; on the other hand literally hundreds of statutes were concerned with the delimitation of the area within which the insurance enterprise was valid. A positive validation of the enterprise was implicit in the creation of an elaborate corporate structure for carrying on the business; in this the courts played no part at all. Little more were the courts involved in the validation of new lines of insurance, in which the legislature responded almost automatically to the business and public demand for new types of protection.[12] Only one case even touched the validation of new lines of insurance; an 1897 case applied the rule of a statute and permitted a fiduciary to take credit in his accounts for a premium paid to a surety company.[13]

In the twentieth century, increasing concern for the social costs of private enterprise and private activity[14] has led to a vast proliferation of laws requiring social costs to be brought into the private cost accounting of entrepreneurs. Legislation created workmen's compensation, pension and annuity systems, financial responsibility laws, some compulsory automobile insurance, and unem-

[12] In only one case was the legislature's response hesitating; there was raging controversy from 1917 to 1930 over the permissible limits for group life insurance. The crux of the problem was the extent to which group life could be sold to labor unions, to counter its use as an anti-union device of employers. For clippings and other material on the controversy see the clipping file on Group Insurance in the Wisconsin Legislative Reference Library, and especially THE LEGAL STATUS OF ISSUANCE OF GROUP LIFE TO LABOR UNIONS: REPLIES TO QUESTIONAIRE, 1927; WITTE, MEMORANDUM ON LEGAL STATUS OF UNION GROUP, 1928; Letter from Robbins, Vice-President and actuary of Union Labor Life, November 28, 1927; address of Commissioner Johnson, National Convention of Insurance Commissioners, November 18, 1926.

[13] Hamacker v. Commercial Bank, 95 Wis. 359, 70 N.W. 295 (1897), applying Wis. Laws 1895, c. 219.

[14] KAPP, THE SOCIAL COSTS OF PRIVATE ENTERPRISE (1950).

ployment compensation systems. This vast extension of the law's concern, largely implemented through the use of insurance principles, and frequently of private or government insurance, occupied much of the time of twentieth century legislatures. There is little reflection in the reported cases of this widespread concern of the law for social cost accounting; a small handful of cases dealt with the constitutionality of pension laws,[15] of safety responsibility laws,[16] and of compulsory automobile insurance coverage as applied to a drive-it-yourself business.[17] The courts in these cases enunciate no general opposition to the development of the welfare society; even if a statute were invalidated it was only as to its more extreme applications or for remediable defects.[18]

In the positive validation of the insurance enterprise, the court made only one significant contribution. That was the modification of the status of married women, as it related to life insurance. The primary objective of life insurance is to provide economic protection for widows and children; the insurance business is vitally concerned, therefore, with the course of feminist legislation. Beginning with 1851 the Wisconsin legislature began to free women from their ancient subjections.[19] The purpose of the statutes was primarily emancipation—to free the married woman's property from the control of her husband and his creditors and assignees and to enlarge her positive control of her assets. An attitude of solicitude for the woman's protection also pervaded the legislation, however. The protective and emancipatory motifs sometimes conflicted, for if the woman were given dispositive power over assets, such as the right to assign her interest in an insurance policy, her protection against dissipation of property was diminished. Conversely an undue emphasis on the protective role of the law rendered the insurance policy sterile as property. The court and the legislature interacted in the development of a modern point of view toward the rights of women; though legislation began on the subject in 1851, and the court spoke as early as 1868, there were

[15] State *ex rel.* Smith v. Annuity & Pension Board, 241 Wis. 625, 6 N.W.2d 676 (1942); State *ex rel.* Dudgeon v. Levitan, 181 Wis. 326, 193 N.W. 499 (1923); State *ex rel.* Risch v. Trustees, 121 Wis. 44, 98 N.W. 954 (1904).

[16] State v. Stehlek, 262 Wis. 642, 56 N.W.2d 514 (1953).

[17] Watts v. Rent-a-Ford Co., 205 Wis. 140, 236 N.W. 521, 237 N.W. 276 (1931).

[18] *E.g.* State *ex rel.* Smith v. Annuity & Pension Board, 241 Wis. 625, 6 N.W.2d 676 (1942); invalidated as an appropriation of public funds for a private purpose an increase in pensions for persons already retired.

[19] Wis. Laws 1851, c. 158, patterned after Mass. Laws, c. 82 (1844); Wis. Laws 1862, c. 182, patterned after N.Y. Laws, c. 80 (1840).

about a dozen cases and half as many statutes before the matter was substantially settled during the first part of the twentieth century. Technical discussion of statutory construction problems concealed the interplay of basic attitudes: significant resistance to the movement toward broader rights for married women on the one side countered the achievement of the emancipatory objective of the legislation on the other. Moreover, an emphasis on woman's need for protection limited the emancipatory effect of the statutes, and the injection of the freedom of contract issue further complicated the task of reconciliation.

The contribution of the court was mainly a conservative one; it inhibited the free growth of married women's rights. Thus, despite very broad language in the 1851 insurance statute giving to every married woman-beneficiary the "sole and separate use and benefit" of the policy, the rights of the purchaser of the policy were preferred to those of the married woman-beneficiary:

> The leading object of the statute was, no doubt, to preserve to a married woman such insurance as should be provided for her benefit, and as her sole and separate property, free from the control of her husband and from the claims of his creditors. It was not intended to take from the party who effected insurance upon his own life at his own cost the right to control and dispose of the policy.[20]

The legislature clarified the purpose of the legislation by making the policy the woman's "sole and separate property."[21] The court reluctantly acquiesced, but virtually ignored the emancipatory objective, holding

> that the dominant purpose of the whole coure of legislation . . . has been to provide, not for married women, but for widows, and that the full scope thereof cannot be effected other than by holding a married woman powerless to in any manner, directly or indirectly, assign insurance made for her benefit. . . .[22]

The legislature again clarified its purpose by permitting the married woman to assign her interest in any life insurance policy, with the consent of the insurance purchaser.[23]

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[20] Strike v. Wisconsin Oddfellows' Mut. Life Ins. Co., 95 Wis. 583, 587, 70 N.W. 819, 820 (1897); Kerman v. Howard, 23 Wis. 108 (1868).

[21] Wis. Laws 1891, c. 376.

[22] Ellison v. Straw, 116 Wis. 207, 216, 92 N.W. 1094, 1097 (1903).

[23] Wis. Laws 1903, c. 15. The statutory construction problem in this area has been discussed by PAGE, COMMON LAW AND STATUTE BEFORE THE SUPREME COURT OF WISCONSIN 178-83 (unpublished thesis in University of Wisconsin Law School Library 1955).

Justice Marshall was the principal exponent of protectionism;[24] subsequently his even more urgent insistence on freedom of contract gave broad powers to the husband-insured and the company to contract out of the statute by any language sufficiently explicit.[25] Early in the twentieth century this process of lawmaking was substantially completed and reasonable stability achieved.

Restrictions Upon Validation

The positive validation of the insurance enterprise, and the attendant modification of certain rules of law to accommodate the needs of the emergent enterprise, were achieved almost solely by the legislature. On the other side of the coin, the developing industry met opposing social policies that hampered its growth, albeit in minor ways.

About fifteen of the small number of cases dealing with the validation of the insurance enterprise dealt with the requirement of insurable interest.[26] The insurable interest doctrine reflects three underlying policies, or attitudes. First, it reflects a pragmatic policy against tempting policyholders deliberately to bring about the insured event for personal gain. Second, it reflects a moral attitude that regards wagering contracts (i.e. policies where the insured has no interest to protect) as evil. Finally, in the case of property insurance, it reflects a notion derived from the contract itself that the insurance policy is merely an indemnity contract, and obligates the company to pay the policyholder only what he suffers by reason of the insured event. The policy against wagering contracts has particular reference to the time of making the contract, while the other two policies are better implemented by a rule requiring insurable interest at the time of the loss. The earlier marine doctrine of insurable interest required the interest to exist at both times. This was not detrimental to the needs of an insur-

[24] He wrote the opinion in the Ellison case, *supra* note 22. And see his bitter dissent from the reasoning of Canterbury v. Northwestern Mut. Life Ins. Co., 124 Wis. 169, 195, 102 N.W. 1096, 1105 (1905), where he urged that women needed special protection, and that complete emancipation was unsound.

[25] Hilliard v. Wisconsin Life Ins. Co., 137 Wis. 208, 117 N.W. 999 (1908) (insured permitted to obtain cash surrender value where policy so provided). This was extended by National Life Ins. Co. v. Brautigam, 163 Wis. 270, 154 N.W. 839, *modified on rehearing*, 163 Wis. 273, 157 N.W. 782 (1916) to change of beneficiary where the power to change the beneficiary was reserved by the policy. This last doctrine was confirmed by Wis. Laws 1939, c. 139.

[26] All but two were fire insurance cases. Insurable interest in life was treated in but a single case.

ance industry protecting property of a static sort, but with the development of extensive insurance protection on commercial activities the doctrine became seriously prejudicial to business enterprise. Thus fire insurance by a merchant or a manufacturer on his fluctuating stock of goods would be invalid with respect to goods acquired after issuance of the policy. In 1875 the Wisconsin Supreme Court dealt with this problem in a perceptive opinion by Chief Justice Ryan; it implemented social needs by holding that insurable interest in property was necessary only at the time of the loss.[27] Other insurable interest cases dealt with less basic problems, and mainly mapped out the detail of the doctrine, deciding when insurable interest was present and when it was lacking.[28]

A handful of cases dealt with other problems of validity of the insurance enterprise. The court upheld life insurance which protected against suicide;[29] it upheld the defense of lawsuits by insurance companies against the contention that the defense was champertous;[30] it struck down numerous surety bonds because of the invalidity of the principal contract whose performance the bond was supposed to ensure.[31] The court was guardian of the public morals; if the circumstances of issue of an insurance policy were sufficiently immoral, or otherwise contrary to public interest, the court struck down the contract on request.

Provision of an Insurance Fund

The development of the law governing the provision of an insurance fund was extremely rich in responses to the underlying forces operative in American society. During the whole of Wisconsin history, the law-makers were active in these fields. It was the legislature that dominated this development, however; the published reports of the courts demonstrate little appellate court activity in the field, and since most of the litigated problems found in the reports are of considerable significance, it is likely that a high proportion of litigated cases were appealed to the highest level.

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[27] Sawyer v. Dodge County Mut. Ins. Co., 37 Wis. 503, 544 (1875). Chief Justice Ryan put the result explicitly on the ground of business needs.

[28] The most significant such case made a choice between technical legal interest and economic interest as the essential basis for insurable interest: it came down on the side of economic interest. Horsch v. Dwelling House Ins. Co., 77 Wis. 4, 45 N.W. 945 (1890).

[29] Patterson v. Natural Premium Mut. Life Ins. Co., 100 Wis. 118, 75 N.W. 980 (1898).

[30] Gelo v. Pfister & Vogel Leather Co., 132 Wis. 575, 113 N.W. 69 (1907).

[31] *E.g.*, Bissell Lumber Co. v. Northwestern C. & S. Co., 189 Wis. 343, 207 N.W. 697 (1926).

Nature of the Corporate Organization

The court early had to deal with the structure of the insurance organization. The Troy Fire Insurance Company was one of only two companies chartered under the general insurance incorporation act of 1850; without statutory authority the company was divided into two separate departments, and the funds of the departments were kept entirely separate. The validity of this arrangement was tested in several early cases. The company, and later its receiver, sued to recover assessments from policyholders; an unsatisfied judgment on a policyholder's claim led to receivership for the company, and a determination whether a policyholder in one department might claim assets of the other department. The Wisconsin Supreme Court decided the matter in a fashion which showed little understanding of the purpose of the incorporation statute. The court invoked freedom of contract notions to uphold the departmentalization, despite the unsoundness of the insurance organization resulting from the fragmentation of the risk sharing area. In another suit, the federal court took a more enlightened view.[32]

These cases were characteristic of litigation in this field; the role of the court was very limited. Hundreds of statutes, including special charters, set up the structure of insurance corporations; other legislation—sometimes by general laws, and sometimes by amendments to special charters—provided for dissolution procedures and for the conversion of mutual to stock companies. The role of the court was merely to solve special problems arising out of the insolvency or reorganization of the insurance enterprise. It is significant as a demonstration of this merely residual role of the court that no more than a dozen cases specifically dealt with the structural problems of the business. A few dealt with the conversion of mutual to stock companies; thus an early case, (1861), presented a suit by dissenting certificate holders claiming to share in the assets of a company reorganized as a stock company under the authorization of special charter amendments procured from the legislature by a controlling clique.[33] It is probable that a high proportion of such dramatic and far-reaching cases were appealed,

[32] Allen v. Winne, 15 Wis. 113 (1862); Kelly v. Troy Fire Ins. Co., 3 Wis. 254 (1854); Fitzpatrick v. Troy Fire Ins. Co., 9 Fed. Cas. 199, No. 4844 (C.C.D. Wis. 1857).

[33] Nazro v. Merchants' Mut. Ins. Co., 14 Wis. 295 (1861). See Huber v. Martin, 127 Wis. 412, 105 N.W. 1031 (1906); Zinn v. Germantown Farmers' Mut. Ins. Co., 132 Wis. 86, 111 N.W. 1107 (1907).

which only serves to emphasize the minimal quantity of litigation and the residual role of courts in this area.

Legitimacy of the Corporate Structure and Operation

In the Jacksonian period the insurance enterprise encountered a strong attitude of distrust of corporations, which were regarded as tending to monopoly, and as destructive of "individual enterprise." Only when business men learned to appropriate for the corporation the symbols of the democratic ideology, and especially succeeded in claiming that corporations were instruments of "individual enterprise" was the attitude overcome.[34] The "anti-charter" attitude was early converted into opposition to special chartering, which was thereupon brought to an end by constitutional amendment in 1871.[35] This restrictive attitude continued to exist in other forms, however; for example, a handful of cases invalidated insurance policies which were outside of the authorized scope of the corporate enterprise.[36] Aside from these, and a single case holding unconstitutional a special incorporation act,[37] no cases dealt with the "legitimacy" of the corporate organization and operation. There was much lawmaking in the field, however; the legislature was repeatedly concerned with legitimacy problems. The legislature wrote into special insurance charters and general insurance laws a modern application of the mortmain policy; it strictly limited insurance company investment in real property in terms suggesting that the purpose was not to preserve the integrity of the insurance fund but to prevent land from falling into the grasp of the dead hand.[38] No case interpreted this policy. Furthermore, during most of Wisconsin's history, basic political attitudes played upon the corporate politics of mutual companies, in repeated clash between the democratic principle of one vote for each policyholder, and a property-oriented voting rule based upon the amount of insurance the policyholder had. The long-term trend was toward the democratic principle. The problem was solved largely by the legislature in numerous statutes; an attorney-general's opinion on the subject suggests that the breakdown of peaceful relations

[34] SCHLESINGER, THE AGE OF JACKSON 334-9 (1953); HURST, LAW AND THE CONDITIONS OF FREEDOM 15-17 (1956).
[35] WIS. CONST. art. XI, § 1.
[36] *E.g.*, O'Neill v. Pleasant Prairie Mut. Fire Ins. Co., 71 Wis. 621, 38 N.W. 345 (1888).
[37] State *ex rel.* Church Mut. Ins. Co. v. Cheek, 77 Wis. 284, 46 N.W. 163 (1890) (holding unconstitutional as a special act Wis. Laws 1889, c. 346, which authorized Methodists to form a church insurance corporation).
[38] See WIS. STAT. § 201.24(3) (1955).

within companies must occasionally have led to the brink of litigation, but despite its persistence not a single reported case dealt with the problem.[39]

Provision of Capital

The method of providing a capital fund for the companies also was settled almost exclusively by the legislature. In a few reported cases the court dealt with capital requirements. One case arose on refusal of a license by the commissioner, to interpret the application of the statute to a particular situation;[40] one arose on liquidation;[41] in two, subscribers to an increase in capital stock obtained restitution from a company seeking to keep their money despite abandonment of the increase;[42] another case dealt with the validity of a profit-sharing bond as a mechanism for providing operating capital for a new life insurance company.[43] In no case did the court make basic policy decisions; it only fixed the law in the interstices of the statutes.

Up-grading of Fraternal Associations

A special problem in the provision of the insurance fund arose out of the inadequacy of the 19th century method of providing funds in fraternal associations. As they were originally organized, fraternals operated basically by assessment of members on each death. Later, assessments were made on a regularized, periodic basis. The assessment technique as used for life insurance involved a latent weakness which was not present in the insurance of property. Assessments could remain constant only if the average age of the society could be kept constant. Once recruitment lagged, and the average age began to increase, the mortality rate climbed, and assessments had to be increased, or benefits cut, or the organization faced bankruptcy.

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[39] See *e.g.*, Wis. Laws 1859, c. 46 § 11; Wis. Laws 1911, c. 165; Wis. Laws 1929, c. 440; see also various unenacted bills, *e.g.* A. 77, 1883; A. 92, 1899; a petition to the legislature, A. 44, 1885, urging elimination of multiple voting squarely on the ground of the democratic principle of equal suffrage; and see 23 OPS. WIS. ATT'Y GEN. 126 (1934).

[40] State *ex rel.* Associated Indemnity Corp. v. Mortensen, 224 Wis. 398, 272 N.W. 457 (1937).

[41] In re Liquidation of Inter-state Exchange, 211 Wis. 258, 247 N.W. 839 (1933).

[42] Starkweather v. Chicago F. & M. Ins. Co., 210 Wis. 585, 246 N.W. 700 (1933); Leonhard v. Chicago F. & M. Ins. Co., 210 Wis. 578, 246 N.W. 697 (1933).

[43] Jacobs v. Wisconsin Nat'l Life Ins. Co., 162 Wis. 318, 156 N.W. 159 (1916).

At first the advocates of fraternalism supposed that the constant influx of new members would keep the society solvent, but with one society after another the "new blood" notion proved fallacious. During the 1870's and '80's, the latent weakness was not apparent, as the institution spread and sank deep roots into American life. With maturity of the institution, however, the weakness became patent and in the '90's, a more sophisticated understanding of the nature of life insurance led to efforts to shift fraternals from assessment operation to a legal reserve basis. Because of the political power of the widespread fraternals, compulsory measures were seldom adopted, but the legislature and the insurance commissioner cooperated over a period of several decades to encourage, by methods largely voluntary, the conversion of fraternals to a sound pattern of operation.

The role of the courts was secondary; such part as they did play was unenlightened. The contract terms of fraternal life insurance were much more favorable to insureds than the method of operation justified; the conversion process, therefore, was essentially one of limiting the older members to the benefits the existing reserves of the company would actually buy on an actuarially sound basis. Looked at realistically, every fraternal was insolvent, and either the benefits in existing policies must be scaled down, or premiums drastically raised on existing policies. If this were not done, then new members must pay for the errors of the past. The old members were obsessed with their contract rights, however, even when there was no money in the treasury to pay them. They had contributed for years, and were unwilling at an advanced age to lose the benefits on which they had depended. Nor was the obsession with contract rights limited to them. The Wisconsin Supreme Court at the turn of the century felt deeply the importance of freedom of contract and vested contract rights—so much so that it was unable to see the realities of the insurance business. All the court saw was a legal person, the fraternal association, which had made promises on which it was now trying to renege. It did not matter to the court that the certificate holders had received all the protection for which they had paid; they had been promised more, and must get it. In a series of cases in the first decades of the twentieth century, the court made it very difficult for the commissioner and the legislature to up-grade the operations of fraternals and put them on an actuarially sound basis. In the name of sanctity of contract, the court made it impossible for the

companies to go to a sound basis of operation without the consent of all the members, or reorganization.[44] Even a reserved power to change the by-laws was held not to justify any substantial changes in the contract.[45] Despite the resistance of old members,[46] and the lack of understanding of insurance in the court, the task of up-grading the fraternals was eventually completed successfully; litigation ceased on the subject by 1930. Toward the end, the judges showed some realization that freedom of contract was not a sufficient guide to the solution of the problems of mutual societies. In 1922, Mr. Justice Eschweiler made this clear when he said: "Such promise of plaintiff was part of a policy certain, if long continued, to wreck it, and the members of such a society have nothing approaching a vested right in a disastrous insurance system."[47]

Collection of Premiums

No more than two dozen appellate cases dealt with all these aspects of the structure and nature of insurance organization; twice as many dealt with the collection of premiums. Many of the latter involved the collection of assessments from reluctant members on the dissolution of companies;[48] others involved collection from agents or agents' estates;[49] a few were suits to compel assessment societies to make and collect an assessment in order to pay the plaintiff's outstanding claim.[50] Some policyholders, sued for assessments, raised technical objections to the formalities followed in

[44] Hall v. Wisconsin Life Ins. Co., 185 Wis. 507, 201 N.W. 732 (1925); Jones v. Supreme Court I.O.F., 141 Wis. 667, 124 N.W. 1027 (1910); Smith v. Northwestern Nat'l Life Ins. Co., 123 Wis. 586, 102 N.W. 57 (1905). In Voss v. Northwestern Nat'l Life Ins. Co., 137 Wis. 492, 118 N.W. 212 (1909), the court found that the policyholder had waived the breach by continued payment of the increased premiums; the court had no basic objection to up-grading of the operation, so long as it could find a comfortable way to evade the freedom of contract dogma.

[45] Stirn v. Supreme Lodge, 150 Wis. 13, 136 N.W. 164 (1912); Jaeger v. Grand Lodge, 149 Wis. 354, 135 N.W. 869 (1912); Wuerfler v. Trustees of Grand Grove, 116 Wis. 19, 92 N.W. 433 (1902).

[46] The bitter character of some of that resistance is shown by Morse v. Modern Woodmen of America, 166 Wis. 194, 164 N.W. 829 (1917), a libel suit arising out of the charges and counter-charges which flew in one such incident.

[47] United Order of Foresters v. Miller, 178 Wis. 299, 317, 190 N.W. 197, 204 (1922). The case is an exhaustive treatment of the problem and a good description of the actuarial methods used to upgrade the company. See also Zerbel v. Supreme Assembly, 199 Wis. 298, 226 N.W. 288 (1929).

[48] *E.g.*, Application of Whitman, 186 Wis. 434, 201 N.W. 812 (1925).

[49] *E.g.*, Silverman v. Fidelity and Casualty Co., 124 Wis. 459, 102 N.W. 891 (1905).

[50] *E.g.*, Jackson v. Northwestern Mut. Relief Ass'n, 73 Wis. 507, 41 N.W. 708 (1889).

the levying of the assessment, and sometimes the defense was successful, especially in the case of town mutual fire insurance companies, whose assessment procedure was prescribed by statute and must be followed exactly.[51]

Since premium collection cases involved relatively small amounts of money and relatively uncomplicated legal questions, it is probable that the percentage of appealed cases was very low; in the aggregate there must have been many hundreds, perhaps even a few thousands, of such cases in the trial courts. Here, though the court's role was only to resolve controversy in the event of breakdown of normal business processes, it was no mere residual role reserved for catastrophic situations, as with the regulation of the corporate structure of the companies. Rather, litigation was a fairly common weapon, both in actual use and as a threat to induce payment.

Regulation of Rates

Rate-making, too, was the subject of much law-making. Though in the nineteenth century the companies made rates subject to little public control, in the early twentieth century pressure for social control of rates brought rate regulatory statutes, giving to the insurance commissioner substantial power over the rate-making process. By mid-century, that power was being used more or less effectively in one or two lines of insurance. Despite the importance of rate-making in the insurance business, and a high level of public interest, almost no litigation involving rate making reached the appellate level. One significant mid-century case illustrated the impact of twentieth century attitudes on race discrimination; it held that under the statutes race was an illicit basis for classification in the operation of the state life insurance fund, however justifiable it might be actuarially as an indicator of probable mortality experience.[52] In rate-making, too, the court's role was re-

[51] Compare Lisbon Town Fire Ins. Co. v. Tracy, 236 Wis. 651, 296 N.W. 126 (1941) (action for premium, defense unsuccessfully raised) with Tomashek v. Hartland Farmers' Mut. Fire Ins. Co., 212 Wis. 622, 250 N.W. 447 (1933) (action for loss, failure to pay premium excused for non-compliance with statute).

[52] Lange v. Rancher, 262 Wis. 625, 56 N.W.2d 542 (1953). See also State *ex rel.* Board of Regents v. Ekern, 159 Wis. 319, 150 N.W. 506 (1915) (treating rate-making problems in state fire insurance fund). For related problems *compare* Newport Mining Co. v. Firemen's Ins. Co., 174 Wis. 401, 183 N.W. 161 (1921) where the risk was covered even though policy was erroneously written up at an inadequate rate *with* Hibbard v. North American Life Ins. Co., 192 Wis. 315, 212 N.W. 779 (1927) where an erroneously stated cash value was corrected in accordance with tables of loan values.

sidual and was confined to settling peripheral questions; the foci of law-making were the legislature and the commissioner's office.

Of about eighty reported cases dealing with problems of the provision of an insurance fund, over forty involved the collection of premiums, and about forty dealt with all other problems. In the face of the complexity of the legal problems involved in this vast area, this paucity of reported litigation demonstrates how meagre was the role played by the court. The great importance of most problems made it probable that litigation once begun would be appealed; only in the field of premium collection, where appealed cases were fairly numerous, was there likelihood that a major share of the litigation would cease at the trial level. The focus of law-making in this area was in the legislature, and to a lesser extent the insurance commissioner; the court legislated only interstitially.[53]

Preservation of the Integrity of the Fund

Once the insurance fund is provided, it must be protected against dissipation by venal or incompetent insurance company officials. Such dissipation is not unknown in the history of the insurance business.

Investment

One way in which the integrity of the fund is protected by the law is through detailed control of investment. By about 1870 a strict regime of control over insurance investment had been established in Wisconsin; the tendency since then has been toward a gradual amelioration of the rules. Though many statutes have been concerned with social control over insurance investment, there has been almost no litigation on the subject. The three reported Wisconsin cases on investment dealt with merely peripheral matters.[54]

Underwriting

The law has been concerned in a less pervasive way with underwriting rules; careless underwriting was as destructive of accumu-

[53] The law exercises some control over the marketing process; problems of the basic structure of the insurance market are functionally related to the "provision of the insurance fund." The discrete marketing practices of the companies are most important in the "distribution of the fund" and the whole area is discussed there. See *infra*, p. 544.

[54] Catholic Knights v. Levy, 261 Wis. 284, 53 N.W.2d 1 (1952); Northwestern Nat'l Ins. Co. v. Freedy, 201 Wis. 51, 227 N.W. 952 (1930); Attorney Gen. *ex rel.* Blied v. Levitan, 195 Wis. 561, 219 N.W. 97 (1928).

mulated insurance assets as unwise investment. Haphazardly the legislature interested itself in underwriting, but no litigated case reached the appellate level during the entire history of the state.[55]

Suppression of the Tontine

Some other management practices threatened dissipation of assets. One of these was the issuance in the late nineteenth century of deferred dividend, or semi-tontine, life insurance policies. The part of the premium above that needed to pay expenses and build up the legal reserve was not distributed to the policyholder as an annual dividend, but was withheld for a period of years; at the end of the time it was divided among the surviving policyholders. Persons whose policies lapsed, or who died, forfeited any claims to the deferred dividends, thus increasing the shares of those who remained. This contract appealed to the gambling instincts of potential policyholders, and on it was based the main marketing "pitch" of the late nineteenth century.[56]

The dissipation possibilities of such insurance lay in the fact that though salesmen freely "predicted" the outcome, no binding promises were made as to the amount of the deferred dividends which would be available at the end of the waiting period and there was a relative lack of legal accountability for the funds thus accumulated, since they were beyond the legal reserve.[57] Such relatively uncontrolled funds found their way into desperate struggles for market supremacy, as commissions were raised to attract more

[55] The most rigorous control of the selection of risks was applied to local mutual companies, where the absence of the commercial motive and the amateur character of the operation might lead to difficulty. For random examples, see Wis. Laws 1887, c. 305, § 6 for an absolute limitation on the size of the risks; Wis. Laws 1909, c. 118, § 1 for a limitation on risk size in terms of a percentage of company assets; Wis. Laws 1905, c. 373, § 6 for a limitation on risk size in terms of insurance in force; Wis. Laws 1909, c. 460, § 1 (§ 1901n) for a limitation on the policy term; Wis. Laws 1876, c. 344, § 11 for a prohibition of certain kinds of risks; Wis. Laws 1880, c. 134, § 1 for a limitation on permissible exposure of insured buildings; Wis. Laws 1911, c. 216, § 1 (§ 1957(3)(a)-(c)) for a medical examination requirement; Wis. Laws 1929, c. 317, § 1 for underwriting requirements for group life insurance. These examples are chosen at random; hundreds of statutes and bills dealt with the problem.

[56] The semi-tontine policy was the main weapon in the bitter struggle of the Equitable Life, the New York Life, and the Mutual Life of New York for market primacy in the late nineteenth century. It was semi-tontine because there was only a partial forfeiture by lapsing or deceased policyholders; in the original tontine, there was complete forfeiture. The tontine was invented by Lorenzo Tonti in the reign of Louis XIV, as a device to aid Cardinal Mazarin in the financing of the *Grand Monarque's* reign. See 1 BULEY, THE AMERICAN LIFE CONVENTION, 16, 92-105 (1953).

[57] See Tourtellotte v. New York Life Ins. Co., 155 Wis. 455, 144 N.W. 1117 (1914).

and better agents and to raid agency forces of other companies; they were also dissipated in personal extravagance, lobbying activities, and even bribery.[58] This abuse was eventually brought under control by legislation after an abortive effort was made by the insurance commissioner to stop the practice at an earlier date. In 1903 he revoked the license of the Equitable Life Assurance Society and the company sued to restrain the revocation. The company's suit was successful, the court holding that the existing statutes permitted the deferment of dividends.[59] Shortly after this case the legislature forbade deferred dividend policies.[60] In a few additional cases the courts dealt with the contention of policyholders that the amount of deferred dividends due under tontine policies was that expressed in the puffing statements of agents and sales literature, rather than that guaranteed by the policy; freedom of contract notions solved such problems in favor of the companies.[61] Preservation of the integrity of the fund would have supplied a sounder basis for decision.

Administrative Control

Much of the developing administrative control of insurance companies was directed to the preservation of the integrity of insurance assets. Thus in the 1940's the insurance commissioner fought a long delaying action in the administrative process and finally in the courts, in seeking to keep the State Farm Mutual Automobile Insurance Company of Illinois from entering the state. He was concerned with the integrity of assets and their sufficiency to pay claims. At length a new commissioner gave the company a license to operate in the state after it relinquished a life membership fee plan of operation that constituted its chief marketing "gimmick". This dispute was for years the vehicle for the expression of important personal and political animosities. It maintained some level

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[58] See JAMES, THE METROPOLITAN LIFE 139-165 (1947); 1 BULEY, THE AMERICAN LIFE CONVENTION 193-244 (1953); 1 PUSEY, CHARLES EVANS HUGHES 140-168 (1951); and see generally ARMSTRONG COMMITTEE RECORD: TESTIMONY, EXHIBITS, REPORT (1905). A good contemporary muckraking account was HENDRICK, THE STORY OF LIFE INSURANCE (1907), first published as articles in McClure's magazine.

[59] Equitable Life Assurance Soc'y v. Host, 124 Wis. 657, 102 N.W. 579 (1905).

[60] Wis. Laws 1905, c. 448. The task of suppressing the tontine was continued by Wis. Laws 1907, c. 636, c. 658; Wis. Laws 1911, c. 210.

[61] *E.g.*, Tourtellotte v. New York Life Ins. Co., 155 Wis. 455, 144 N.W. 1117 (1914).

of intensity during most of the second quarter of the twentieth century.[62]

In a variety of cases the court upheld the insurance commissioner in his efforts to maintain a semblance of control over the operation of insurance companies, and strike a balance between preservation of the assets of the companies and giving to policyholders what they reasonably expected.[63] The early effort to give the commissioner power to prescribe the terms of the fire insurance policy, reflected the conflict inherent in the simultaneous demands of these social policies. Bowing to the superior social policy of separation of powers, however, the court struck the statute down as an invalid delegation of legislative power.[64] The next standard policy law prescribed the terms by statute.[65]

Subrogation and Related Doctrines

Overshadowing all these doctrinally complicated cases in functional importance for the preservation of the fund's integrity were a group of cases dealing with a subject relatively simple in legal dogma. A hundred cases dealt with the related fields of subrogation, contribution, proration of losses among policies, indemnity agreements,—in a word, recoupment of its loss by the company from third persons legally responsible for such loss. Though there are subtle difficulties in the law of subrogation, most of these cases were straightforward; they merely applied settled principles to the facts of particular cases. It is perhaps significant that the number of such cases showed less tendency to decrease than was true of insurance litigation as a whole. From two to four cases each decade prior to 1910, the number increased to 9 in the next decade, to 11 in the 1920's, 24 in the 1930's, 21 in the 1940's, and 17 from 1951 to 1955. There were 7 suretyship cases among the subrogation cases of the 1920's, 10 in the 1930's, only 4 in the 1940's, and none in the first half of the 1950's. Notwithstanding the de-

[62] Duel v. State Farm Mut. Auto. Ins. Co., 240 Wis. 161, 1 N.W.2d 887 (1942); 2 N.W.2d 871; 243 Wis. 172, 9 N.W.2d 593 (1943); State Farm Mut. Auto. Ins. Co. v. Duel, 244 Wis. 429, 12 N.W.2d 696 (1944); *aff'd*, 324 U.S. 154 (1945). The history of the controversy can be traced to some extent in the clipping files of the Wisconsin Legislative Reference Library.

[63] Altogether 25 or 30 cases dealt with administrative control over the industry.

[64] Dowling v. Lancashire Ins. Co., 92 Wis. 63, 65 N.W. 738 (1896), invalidating Wis. Laws 1891, c. 195.

[65] Wis. Laws, 1895, c. 387. The legislature anticipated the Dowling case, *supra* note 64, and enacted the new statute before the old was invalidated.

crease in suretyship cases, the quantity of subrogation litigation remained high. Evidently it was part of the irreducible minimum of insurance litigation, which no amount of institutionalization of business procedures could eliminate.

The relative doctrinal simplicity of subrogation law was somewhat misleading, for the courts had to make some basic decisions of considerable importance. Thus the decision whether a fire insurance company which had paid a loss caused by a railroad should be subrogated to its policyholder's claim against the railroad was a basic determination of the agency best suited to distribute the fire loss caused by the development of railroad transportation. The railroad was chosen, and the insurer subrogated to the claim; it is interesting to speculate whether the result would be the same if the case were to arise first in the insurance conscious mid-twentieth century.[66]

Impact of Insurance on Society at Large

In its mature growth, insurance became a major mobilizer of capital available for economic expansion, and the needs of society for risk capital interacted with the policy of preservation of the integrity of the insurance fund to produce some lessening of the strictness of the regime under which investment of insurance funds took place. The vast aggregations of capital were useful to society for another reason, too. The constantly increasing need to find new sources of tax revenue made insurance funds an early and persistent target for tax levies. Taxation, like the control of investment, was almost exclusively a legislative function. Though there were a substantial number of litigated cases, they played no creative

[66] Swarthout v. Chicago & N.W. Ry., 49 Wis. 625, 6 N.W. 314 (1880). The case was decided in terms of technical rules of joinder of parties, but its implications were broader. It could be argued that the insurance company should bear the loss it was paid to bear: it was well-equipped to spread the risk of fire loss from modern machinery. The liability of the railroad led to insurance of its possible fire loss on inflammable property along its right of way, and Wis. Laws 1882, c. 286 was passed to eliminate doubt about the railroad's insurable interest in such property. In effect this was early liability insurance in the form of a fire insurance policy. See also XVII Ops. Wis. Att'y Gen. 163 (1928) for a similar problem in modern context. In Theresa Village Mut. Fire Ins. Co. v. Wisconsin Cent. Ry., 144 Wis. 321, 331, 128 N.W. 103, 107 (1911) the dissenting judge discussed the wider implications of subrogation as applied to fire losses in the shipment of Wisconsin's timber. Exhaustion of the timberland was bringing realization that concealed beneath legal problems were social policy problems of vast import. United States v. St. Paul Indemnity Co., 238 F.2d 594 (8th Cir., 1956) suggests the persistence of traditional contract notions, and hence an affirmative answer to the speculative question.

role; most merely interpreted the meaning of the tax statutes,[67] while the more significant represented challenges to the constitutional validity of the taxing laws.[68]

Isolated cases dealt with the role of the insurance industry in the prevention of loss,[69] with various insurance crimes, such as arson and conspiracy to defraud an insurance company,[70] or with the place of the insurance companies in the political balance of power.[71] Two or three dozen cases dealt with purely procedural problems.

Of these cases dealing with the impact of insurance on the society at large the most creative role was played by the court in about 30 cases dealing with the control of foreign corporations. This was a persistent concern of the legislature, as well, and for the most part the cases interacted with legislative attempts to subject to Wisconsin jurisdiction insurance companies operating from without the state, and having various degrees of contact with it. In one respect the contribution of the Wisconsin court was a major one; from the Booth fugitive slave incident[72] the Wisconsin court derived a strong states' rights feeling, and in its resistance to the pervasive centralizing forces of post-bellum days the Wisconsin court contributed to American constitutional law the doctrine that, even though the state might not prevent foreign corporations from removing cases into the federal courts, [73] it might revoke their licenses for doing so.[74] The United States Supreme Court was

[67] See, *e.g.*, New York Life Ins. Co. v. State, 192 Wis. 404, 211 N.W. 288, 212 N.W. 801 (1927).

[68] See, *e.g.*, Northwestern Mut. Life Ins. Co. v. State, 163 Wis. 484, 158 N.W. 328 (1916) (unsuccessful); Northwestern Mut. Life Ins. Co. v. State, 275 U.S. 136 (1927); and, 195 Wis. 190, 218 N.W. 98 (1928), *overruling* 189 Wis. 103, 207 N.W. 430 (1926) (successful).

[69] *E.g.*, Milwaukee Bd. of Fire Underwriters v. Badger Mut. Fire Ins. Co., 230 Wis. 60, 283 N.W. 342 (1939).

[70] *E.g.*, State v. Janasky, 258 Wis. 182, 45 N.W.2d 78 (1950) (arson, there were a half dozen such cases); State v. Lloyd, 152 Wis. 24, 139 N.W. 514 (1913) (conspiracy of agent and insured to defraud company).

[71] *E.g.*, Union Indemnity Co. v. Smith, 187 Wis. 528, 205 N.W. 492 (1925) (interlocking stock ownership, with companies operated separately, did not violate statutes restricting merger of companies).

[72] Booth was a Wisconsin abolitionist who violated the fugitive slave law. The Wisconsin Supreme Court espoused an extreme doctrine of nullification, but was bested in that contest for judicial supremacy. The legacy of states' rights feeling led to the renewed (and more successful) attempt to preserve local independence. See WINSLOW, STORY OF A GREAT COURT 67-121 (1912); SELECTED OPINIONS OF LUTHER S. DIXON AND EDWARD G. RYAN 69-101 (Roe ed. 1907).

[73] Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445 (1874), *reversing* Morse v. Home Ins. Co., 30 Wis. 496 (1872).

[74] State *ex rel.* Drake v. Doyle, 40 Wis. 175 (1876).

impelled to agree by the incisive analysis of Chief Justice Ryan of the Wisconsin Supreme Court.[75] The doctrine thus established lasted into the twentieth century.[76]

The Court and Distribution of the Fund

To apply the law to the facts of a particular controversy, and thus to settle the dispute is the traditional role of the court. The court did not make law, so the theory went, but only found it by logical processes and applied it to the facts of the case in hand. A realistic jurisprudence has made it clear that in the process of deciding particular cases, and despite the pretense that it merely found, and did not create, the law, the court has been a major agency of social policy-making in our society.[77]

Prerequisite to the successful performance of the creative function of lawmaking is the existence of a steady flow of litigious controversies essentially blanketing the area within which policy is to be made. In only one area of insurance law have there been enough particular disputes for the court to be a major policy-making agency. In the process of deciding what persons are entitled to share in the insurance fund, and the quantity of their participation, there is ample room for controversy. Indeed, every loss claim against an insurance company is a potential lawsuit. Thus it has been in connection with the distribution of the insurance fund, or the administration of claims, that the court has made its greatest contribution to insurance law. If the casebooks in general use in law schools are to be believed, administration of claims *is* insurance law.

Given the litigation-orientation of legal education, this distortion is not surprising. Except for the decade of the 1860's, when there were only 28 insurance cases (14 of them dealing with claims administration), the cases decided on the distribution of the fund have constituted a rather constant percentage of the total of insurance cases, varying between 70% and 80%. 75% of all the insurance cases reported in Wisconsin,—over 1100 out of 1469 cases—have dealt with that subject.

The basic policy problem of this area, as looked at from a functional viewpoint, is to make a rational adjustment between two competing social policies, (1) that of preserving the integrity of

[75] Doyle v. Continental Ins. Co., 94 U.S. 535 (1876).

[76] It was abandoned in Terral v. Burke Constr. Co., 257 U.S. 529 (1922). See Merrill, *Unconstitutional Conditions*, 77 U. Pa. L. Rev. 879 (1929).

[77] See Hurst, The Growth of American Law: The Law Makers Chapter 9 (1950); Cardozo, The Nature of the Judicial Process (1921).

the insurance fund by preventing unwarranted raids on it by persons not entitled to share under the terms of the operation, whether at all or to the full extent of their claims, and (2) that of giving effect to the reasonable expectations of the insured. Normally these policies do not conflict, but when in the opinion of the company the premium charge is not intended to cover a particular risk that the policyholder has some ground to think is included in his policy, there is room for litigation, and an adjudication by the court. Though the problem is essentially one of pure policy, the courts have handled it largely in terms of technical doctrine, through which the policy grounds appear "as through a glass darkly."

Of the two competing policies, the loyalties of the company are entirely with the preservation of the integrity of the fund; it seeks to bolster that policy ground for decision by the inclusion of various protective clauses in the contract. The insurance policy is replete with conditions which may invalidate the policy. It is not the intention of the company always to deny claims where there has been a failure of condition; instead it may merely wish an impregnable position of defense against all questionable claims, so that it can make its own decisions on the distribution of the fund without interference by the court. Thus Goble found in 1937 that 28% of all residence fire insurance policies in Champaign and Urbana, Illinois were not enforceable because of violations of the "sole and unconditional ownership" and "fee simple ownership" conditions of the existing standard fire insurance policy.[78] This use of contract terms to bolster the policy of preserving the integrity of the insurance fund has thrown into the balance on the side of the insurance company the social policy of preserving full freedom of contract. Pound has pointed out the tenacious resistance of a taught legal tradition to economically and politically powerful interests.[79] No tougher taught tradition than the notion of the utmost freedom of contract has ever developed in the common law.[80]

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[78] Goble, *The Moral Hazard Clauses of the Standard Fire Insurance Policy*, 37 COLUM. L. REV. 410, 418 (1937).

[79] POUND, THE FORMATIVE ERA OF AMERICAN LAW 82-84 (1938).

[80] In 1896, Justice Marshall, speaking for the Wisconsin Supreme Court, adopted the classic statement of Sir George Jessel, that

> "if there is one thing which more than another public policy requires it is that men of full age and of competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced. . . ."

Houlton v. Nichol, 93 Wis. 393, 398, 67 N.W. 715, 717 (1896).

Much of the law's role in implementing the growth of a democratic society has been to encourage a wide dispersion of decision making power, both by giving a high value to private property, and by providing "an assured framework of contract doctrine and administration within which private arrangements might work themselves out." Constitutional limitations on interference with contract obligations, through both the contracts clause and the due process concept, reflect attitudes that reached their peak in the late nineteenth century. Partly the concept of freedom of contract is a pragmatic judgment directed toward the maximization of human energies in the development of society; partly it reflects notions stemming from such moral philosophers as Kant.[81]

In most industries, the general framework of contract doctrine has sufficed, with minor concessions to the special needs of the industry. Hurst found that the Wisconsin lumber industry was able to operate within the framework of existing contract doctrine; the only appreciable judicial modification of the law was made by importing trade custom into the contract as an aid to interpretation of terms.[82] Insurance provided more difficult problems. It was one of the earliest, and most important, contracts which institutionally (and not merely occasionally) was a dictated contract, or contract of adhesion. The policyholder has nothing to say about the terms of the agreement he makes, and thus freedom of contract notions are peculiarly inapplicable, for to give full effect to the contract as adhered to by the insured is in no sense to encourage dispersion of decision making nor to give effect to the freely expressed will of the contracting party. Rather it is a negation of free will and a concentration of decision making power. Nonetheless, received and tough taught dogma of freedom of contract prevented special treatment of the institutionalized contract; the court perforce must do obeisance at the altar of free contract, all the while evading many terms of the contract by skillful "purposive" interpretation[83] and by the development of powerful doc-

[81] HURST, LAW AND THE CONDITIONS OF FREEDOM, 7-15 (1956); the quoted phrase is Hurst's, from an as yet unpublished manuscript on the lumber industry in Wisconsin; STONE, THE PROVINCE AND FUNCTION OF LAW, 251-264 (1946) attempts to trace the influence of Kant on American courts—the influence was not inconsiderable.

[82] From an as yet unpublished manuscript on the Wisconsin lumber industry.

[83] *E.g.*, Loomis v. Rockford Ins. Co., 77 Wis. 87, 45 N.W. 813 (1890) (contract doctrine of divisibility stretched to limit to uphold policy); O'Connor v. Queen Ins. Co., 140 Wis. 388, 122 N.W. 1038 (1909) (a leading case on law of hostile and friendly fires).

trines of waiver and estoppel. Only equity's abhorrence of forfeitures, to which the court at times gave free rein, expressed overtly the policy grounds for liberal interpretation of the policy terms. In 1879 Chief Justice Ryan said:

> If the crafty conditions with which fire insurance companies fence in the rights of the assured, and the subtle arguments which their counsel found upon them, were always to prevail, these corporations would be reduced almost to the single function of receiving premiums for little or no risk.[84]

The forfeiture idea came in through interpretation, however, and not as a denial of the basic freedom of contract principle: "It is freely admitted . . . that, to work a forfeiture of the contract, the breach must be a substantial one. . . . This rule is based on the presumption that the parties could not have intended by their contract that so serious a result should follow a failure to fulfill the strict letter of the stipulation, when the risk was not increased by such failure,"[84a] and ". . . all provisions, conditions, or exceptions which tend to work a forfeiture should be construed most strongly against the party preparing the contract and for whose benefit they were inserted."[84b] Usually policy considerations were obscured beneath the verbiage of a technical analysis.[85]

The legislature took a hand in countering the freedom of contract notion, through statutory definition of required or forbidden provisions, or even standard policies. The first standard policy law was declared unconstitutional in 1896, on the ground that the legislature exceeded the limits of proper delegation of powers in directing the insurance commissioner to prescribe the terms; an added factor was probably the judge's fundamental objection to interference with contract terms. The legislature itself then prescribed the policy and the new regime of controlled contract terms began, despite continued opposition by some insurance men to dictation of contract terms even when the companies dominated drafting. A prescribed contract led to numerous cases reversing

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[84] Appleton Iron Co. v. British America Assurance Co., 46 Wis. 23, 32, 50 N.W. 1100, 1 N.W. 9 (1879).

[84a] Copp v. German American Ins. Co., 51 Wis. 637, 640, 8 N.W. 127, 128 (1881).

[84b] Pagel v. United States Casualty Co., 158 Wis. 278, 281, 148 N.W. 878, 879 (1914). *Cf.* Justice Cardozo's classic reconciliation of "intention" and "justice" in Jacob & Youngs v. Kent, 230 N.Y. 239, 242-43, 129 N.E. 889, 890-91 (1921).

[85] See *e.g.*, Dunbar v. Phenix Ins. Co., 72 Wis. 492, 501 ,40 N.W. 386, 390 (1888). Reliance on precedent and technical doctrine seems greater in the twentieth century cases.

the construction rule that the court should interpret the contract most strongly against the company. Only when the standard policy was involved did the change take place, however.[86]

In this complex whirlpool of attitudes and policies, in part operating below the conscious level, the law of administration of claims worked itself out. Out of over 1100 cases in Wisconsin, and thousands more throughout the United States, modified to a greater or lesser extent by legislation, there has developed an adequate procedure for the administration of claims, and a doctrinal structure containing many elements of policy to soften the harshness of dogma.

Loss Settlement Procedures

Suitable distribution of the insurance fund requires an adequate method. Nearly 20% of the cases, or 195 out of 1100, dealt with loss settlement procedures. As procedure became better established and institutionalized, the percentage of loss settleemnt cases dropped off, from 36% in the 1860's and 30% in the 1870's to a low of 12% in the 1930's. The number of cases on loss settlement problems continued to drop in the 1940's and 1950's, but with the drastic drop in the total number of insurance cases in those decades, the loss settlement cases formed a higher proportion of the administration of claims cases, going up to 21% in the 1940's.

Notice and Proof of Loss

The companies imposed requirements of notice of loss and of proof of loss on the policyholders; numerous cases were necessary to interpret those clauses of the policy. Basically, the loss settlement cases in the first generations elaborately evaded the doctrine of freedom of contract while paying homage to it; around the turn of the century, the court became less reluctant to give full effect to freedom of contract notions and compel policyholders to

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[86] As late as 1894 an industry spokesman criticized government interference in contract drafting:

> "when it is asserted that the internal management and the manifold details of the business of a private corporation may be regulated by Statute, the protection of our form of government is menaced and socialism uprears its head."

25 ANN. PROC. FIRE UNDERWRITERS' ASS'N OF N.W. 40 (1894). On the change in rules of construction, *compare* Rosenthal v. Insurance Co. of N. Am., 158 Wis. 550, 553, 149 N.W. 155, 156 (1914) *with* Vaudreuil Lumber Co. v. Aetna Cas. & Surety Co., 201 Wis. 518, 230 N.W. 704 (1930).

stand by the contracts they made.[87] In the early cases, waiver was enormously extended, to provide a doctrinally acceptable way around the clauses. Thus failure to object to the insufficiency of proofs of loss,[88] denial of liability on grounds other than the insufficiency of the proofs,[89] or on no grounds at all,[90] examination of the insured under oath[91] or perhaps without an oath,[92] were all held to constitute waiver of the requirement of proof of loss. Even more striking, a request for additional information in connection with proofs of loss was a waiver of known failure of such substantial conditions in the policy as the "other-insurance" clause.[93] The attitude of the court is clear: most judges were not willing to forfeit the insured's protection because of failure of technical conditions, provided they could find some conceptually sound rationalization for a contrary result. The court refused overtly to discard the canon that freedom of contract was a basic value, however; even when they were most apparent, forfeiture notions came in through interpretation.

The difference among judges was one of degree only. Even Justice Marshall, the high priest of freedom of contract,[94] held in 1903 that physical inability to give notice of an accident, resulting from accident-caused unconsciousness, excused failure to give notice.[95] He had extreme difficulty in reconciling this holding with his doctrine, however, and in subsequent cases the liberality was not extended to cognate problems.[96]

Direct Action Statutes

The toughness of the freedom of contract dogma produced some remarkable results, despite the general orientation of the court in favor of the policyholder. A striking example is provided as

[87] *Compare* Killips v. The Putnam Fire Ins. Co., 28 Wis. 472 (1871) *with* Griem v. Fidelity & Casualty Co., 99 Wis. 530, 75 N.W. 67 (1898). Of course the necessity of doctrinal rationalization made consistent application of basic attitudes unlikely. In Connell v. Milwaukee Mut. Fire Ins. Co., 18 Wis. 407 (1864), *e.g.*, Justice Cole gave full effect to loss settlement conditions with no obvious reluctance, though in many other cases he found waiver.

[88] Connell v. Milwaukee Mut. Fire Ins. Co., 18 Wis. 407 (1864).

[89] Warner v. Peoria Marine and Fire Ins. Co., 14 Wis. 345 (1861).

[90] McBride v. Republic Fire Ins. Co., 30 Wis. 562 (1872).

[91] Badger v. Phoenix Ins. Co., 49 Wis. 396, 5 N.W. 848 (1880).

[92] Badger v. Glens Falls Ins. Co., 49 Wis. 389, 394, 5 N.W. 845, 846 (1880).

[93] Cannon v. Home Ins. Co., 53 Wis. 585, 11 N.W. 11 (1881).

[94] See note 80 *supra*.

[95] Comstock v. Fraternal Accident Ass'n, 116 Wis. 382, 93 N.W. 22 (1903).

[96] See, *e.g.*, Graves v. United Commercial Travelers, 165 Wis. 427, 162 N.W. 425 (1917).

late as the 1920's by the court's treatment of the direct action statutes; the court was so reluctant to permit the insurance company to be joined as named defendant in automobile personal injury cases that the legislature had to act repeatedly in order to achieve its objective.[97]

The court was not hostile to a right of direct action against the insurer, as it showed when in 1927 it was willing, on first consideration, to find that a policy was a liability contract without the aid of the statute.[98] Rather, adherence to the principle of freedom of contract was the ground of the court's resistance: ". . . [I]t is a question of how far the legislature has intended to limit the right of insurers to freely contract, a right which is a valuable, constitutionally protected right."[99]

Scope of Coverage

Scope of coverage occupied the attention of the court in 345, or 31%, of the administration of claims cases. Moreover, the percentage of claims administration cases dealing with scope problems was a steadily increasing one. None of the seven cases decided in the 1850's dealt with scope of coverage, but decade by decade the percentage mounted, to 7%, 8%, 11%, 17%, 22%, 32%, 36%, 47%, 47%, 57%. During all but the last two decades, too, the absolute number of cases increased as well; a peak of 106 cases was reached in the 1930's, dropping off to 49 in the 1940's and 30 from 1951 to 1955.

This pattern of scope of coverage cases throws some light on the shifting role of the court in the development of insurance law. As the decades passed, the interaction of the industry and the courts resulted in the institutionalization of marketing and loss settlement procedures. Fewer cases were necessary for the court to do its job as the framework of claims adminstration law was worked out and the court's role was reduced to that of super-administrator over the claims administration process. The law-making function

[97] Wis. Laws 1925, c. 341, c. 372; Wis. Laws 1929, c. 467; Wis. Laws 1931, c. 375. The court at length capitulated, in Lang v. Baumann, 213 Wis. 258, 251 N.W. 461 (1933).

[98] Ducommun v. Inter-State Exchange, 193 Wis. 179, 212 N.W. 289 (1927).

[99] See Bergstein v. Popkin, 202 Wis. 625, 633, 233 N.W. 572, 575 (1930). The cases and statutes as they stood in 1934 were exhaustively treated in CULLEN, SOME PROBLEMS ARISING UNDER AUTOMOBILE LIABILITY INSURANCE IN WISCONSIN (unpublished thesis in Wisconsin Law School library, 1934). And see generally McKenna, *Joining the Insurer and Insured in Automobile Cases*, 17 MARQ. L. REV. 114 (1933); Comment, 1953 WIS. L. REV. 688. And see Note, *infra*, p. 669, for more thorough treatment of some loss settlement problems.

of the court was essentially completed in those areas; nothing remained for it to do but to force settlement in accordance with the framework it had created, by being present in the background to compel recalcitrant parties. Only in occasional cases was force necessary.

In scope of coverage cases, however, institutionalization was less easy. New lines of insurance came into existence, each with its special problems of definition of coverage. Some of the newer developments were quite technical and complex. Even within the old lines, new extensions of coverage, new combinations, newly drafted forms kept the problem of extent of coverage before the court. Thus fire insurance provided a constant, though modest, stream of appellate litigation on the scope problem for the whole century. Accident and health insurance was a prolific source of controversy about coverage. After some fairly early litigation, the bulk of the accident and health cases were decided from 1880 to 1930. Suretyship dominated scope litigation from 1900 to 1930, and continued at a high rate into the 1940's.[100] The first automobile liability cases came about 1920, and from 1930 they dominated the scope litigation. A very large proportion of those cases dealt with the interpretation of a single clause, the so-called omnibus clause, which grants protection to other persons driving the car with the permission of the insured.[101] There was also a surprising number of scope cases dealing with the miscellaneous lines of coverage.

The development of new lines of insurance did not result in a proportionate increase of litigation on scope problems. The answer is probably not far to seek: many problems could be settled by analogy, and the astute claims adjuster could be fairly accurate in his predictions of the outcome of potential litigation. Moreover, the insurance companies had learned the desirability of a generous loss settlement policy as the basis for sound public relations. Claims adjustment accordingly was conspicuously more fair, and less litigation resulted from controversy over loss settlement. Such litigation as did result was more likely than not to arise from disagreement over the scope of the coverage. Hence the decline in

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[100] Suretyship cases are of less interest to us than most cases because most of them turned on questions of breach of the obligation being guaranteed by the bond; they raised few problems of insurance law.

[101] See especially Quin v. Hoffmann, 265 Wis. 636, 62 N.W.2d 423 (1954); Note, 1955 WIS. L. REV. 140.

such litigation was slower than in the marketing and loss settlement areas.[102]

Control of Marketing

Over 40% of the administration of claims cases dealt with a field we can describe roughly as the control of marketing. The court's function here was two-fold: it had initially the task of adapting existing contract and insurance law to provide a framework of approved practice in accordance with which the insurance business could be institutionalized; after the framework was completed, the court had the job of superintending the marketing process indirectly, through the supervision of claims administration. If the court created the framework well, its task as superintendent should be reduced to one of providing potential compulsion in the background of loss settlement.

Control of the Policyholders

The control of marketing can be divided into two parts: the control of the policyholder, and the control of the company. Approximately 22% of the claims administration cases fall in the first division, and 23% in the second. The control of the policyholder is one of the primary objects of the company in drafting its applications and policies; the bulk of the cases dealing with control of the insured, therefore, involve the interpretation of policy conditions and the modification of the common law of warranty and representation. Functionally warranties, representations, and the law of concealment enable the company to select and control, and to some extent to delimit the risks it assumes. Conditions have a similar object—to control the insured in his relation to the risk and the contract. Doctrines of freedom of contract, and the accepted rules of warranty and representation, are the technical devices through which the court implements the company's control of the policyholder. I have elsewhere described the technical process by which warranty and representation law was adapted to the needs of American insurance;[103] Wisconsin was typical of that process. No further comment need be made on the general characteristics of litigation in this area except to point out, (1) that

[102] See note 6 *supra* on loss settlement policy. The primary conflict in these cases was between the integrity of the fund, protected by the freedom of contract doctrine, and the reasonable expectations of the insured, guarded by liberal doctrines of contract construction.

[103] Kimball, *Warranties, Representations and Concealment in Utah Insurance Law*, 4 UTAH L. REV. 456, 460-65 (1955).

the quantity of litigation, both absolutely and in percentage of total administration of claims cases, was greatest in the two decades around the turn of the century, and, (2) that during the 1930's there was a remarkable spurt of appellate activity on premium payment, considered as a condition precedent to recovery under the policy. This flurry of litigation simply reflected the marketing problems of an acute depression period; no special results of it appear in the marketing process itself.

Control of the Insurance Company—In General

Control of the company is functionally different, though many cases deal with both aspects of marketing control. If the insured is controlled by conditional clauses, the insurance company is controlled by doctrines of waiver and estoppel applied to the failure of those conditions. Often the court first decides that a condition applies to the situation in question, only to find that the conduct of the company has resulted in waiver or estoppel.

Control of the Insurance Company—Agency Practices

The practice of issuing oral binders in some lines of insurance raises a question of the validity of an oral contract of insurance. A dozen cases treated the problem. Despite the complexity of the insurance contract, oral contracts were upheld,[104] except in the case of accident and health insurance, where the court interpreted the standard provisions law as requiring a written policy, though it contained no express requirement of a writing.[105] In the same year the court decided the standard fire policy imposed no such requirement. The prevalence of oral binders in fire insurance led to the distinction, which could not be supported by the language of the statutes:

> It would operate as a serious disturbance of settled notions, as well as of the manner in which fire insurance business is conducted, to hold that the insured was without protection until the written policy was issued or delivered.[106]

These decisions were important in validating the marketing practices of the business, for if oral contracts of insurance were invalid,

[104] See *e.g.*, Kiviniemi v. American Mut. Liab. Ins. Co., 201 Wis. 619, 231 N.W. 252 (1930) (automobile insurance); Neuberger v. Aid Ass'n for Lutherans, 207 Wis. 133, 135, 240 N.W. 885, 886 (1932) (life insurance discussed in dictum).

[105] Schilbrch v. Inter-Ocean Cas. Co., 180 Wis. 120, 192 N.W. 456 (1923), interpreting Wis. Laws 1911, c. 84; Wis. Laws 1913, c. 601.

[106] Milwaukee Bedding Co. v. Graebner, 182 Wis. 171, 180, 196 N.W. 533, 536 (1923), interpreting Wis. Laws 1917, c. 127.

practices of property and liability insurance agents would have to be revised substantially in order to protect purchasers.

The appellate court was also concerned with various unfair trade practices, such as misrepresentations by agents,[107] backdating of policies,[108] illegal rebating,[109] and requirements of boldface print for certain clauses.[110] Some cases were prosecutions for selling insurance without a license.[111] In these cases, the marketing offense was created by statute, and the court had only the subordinate role of applying the law to the facts.

Control of the Insurance Company—Powers of Agents

Central to the control of the company is the relationship it has to the acts of its agents. The marketing structure of the business early came to revolve around the agent, who was an independent businessman with interests of his own; the prevailing commission method of compensation made him more concerned for the welfare of the client whose business he solicited than that of the distant corporation whose interest it was his legal duty to protect.[112] The fiduciary obligation of unswerving loyalty to the company was in tense conflict with his self-interest, and this tension between fact and legal theory was a major focal point for insurance litigation.[113] The natural defense of the companies to the questionable loyalty of agents was circumscription of their powers, and legal controversy swirled around the effectiveness of such attempts. The cases, like those dealing with loss settlement, show the characteristic pattern of a partial and sometimes reluctant accommodation of

[107] See, *e.g.*, Glassner v. Johnston, 133 Wis. 485, 113 N.W. 977 (1907).

[108] Fuchs v. Germantown Farmers' Mutual Ins. Co., 60 Wis. 286, 18 N.W. 846 (1884).

[109] See *e.g.*, Diefenbach v. Jarett, 176 Wis. 70, 186 N.W. 189 (1922) (commission splitting between two life agents not illegal rebating); Fry v. Integrity Mut. Ins. Co., 237 Wis. 292, 296 N.W. 603 (1941) (illegal rebating in fire insurance, coverage proportionately reduced). To evade the rebate statutes in life insurance, special agency contracts, advisory board contracts, or other devices were used to give prospective policyholders a favored position. The Supreme Court held a "special agent's contract" to be an illegal rebate, in Urwan v. Northwestern Nat. Life Ins. Co., 125 Wis. 349, 103 N.W. 1102 (1905). Other cases considered the effect to be given this illegality. See *e.g.*, Laun v. Pacific Mut. Life Ins. Co., 131 Wis. 555, 111 N.W. 660 (1907). For the most part such practices were suppressed by rulings of the Attorney-General. See, *e.g.*, 1906 Ops. Wis. Atty. Gen. 618; 1904 Ops. Wis. Atty. Gen. 368, 295; and, 1908 Ops. Wis. Atty. Gen. 463.

[110] See *e.g.*, Williams v. Travelers Ins. Co., 168 Wis. 456, 169 N.W. 609 (1918).

[111] See *e.g.*, State v. Farmer, 49 Wis. 459, 5 N.W. 892 (1880).

[112] Farren, Life Assurance 63 (1823) shows a very early appreciation of this conflict of interest.

[113] About 175 cases dealt with the role of the agent in the marketing structure.

tough dogma to the needs of the industry. Here, however, the court's application of policy considerations was more frankly articulated. Moreover, the taught tradition to be outflanked here, —the notion that the authority of an agent must be shown by the acts and words of his principal[114]—might sometimes be opposed by the freedom-of-contract principle, for the maintenance of a firm base of reliable reasonable expectations was a practical prerequisite of the workings of an industry based on free contract. The victory of needs over dogma was only partial however, and some cases applied traditional concepts mechanically and strictly.

At an early date the court set its pattern for the solution of the problem; the half articulated premise of the court's decisions was a public policy imposing on the companies complete responsibility for the workings of the marketing organization.[115] The companies chose their agents, and the law would not permit them to limit effectively the delegated power, for the practical needs of the evolving market economy demanded that policyholders be able to rely reasonably upon the company as represented by the agent. The burden of malfunctioning of the market system was transferred by these decisions from the individual policyholder to the company, and thence to policyholders collectively.

A persistent example of the problem was the tendency of the commission-compensated agent to conceal from the company information he received from the policyholder, when it showed breach of warranty or condition. The court early made it clear that the

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[114] The very first Wisconsin insurance case, Kelly v. Troy Fire Ins. Co., 3 Wis. * 254, *266 (1854) took this traditionally restrictive view of the scope of the agent's authority. A few later cases also did so. See *e.g.* Fleming v. Hartford Fire Ins. Co., 42 Wis. 616 (1877). *But cf.* American Ins. Co. v. Gallatin, 48 Wis. 36, 46, 3 N.W. 772, 776 (1879) (on distinction between recording and surveying agents).

[115] In Warner v. Peoria Marine & Fire Ins. Co., 14 Wis. *318, *323 (1861), the court said:

> "The company, however, held them out to the world as its agents, authorized to receive applications for insurance, to issue policies, receive premiums, etc.: and it is a little less than downright fraud upon the public, to claim that such agents could not make a policy accurate in the description of the property insured, or insert such a clause in respect to subsequent insurance as was inserted in this policy. If insurance companies can avoid their liabilities on such grounds as these, there would be no safety in dealing with them."

If this is the "apparent authority" doctrine, that is nothing more than a rationalization of the victory of reasonable expectation over the limited authority of the agent. Two years later the court made it clear that its attitude was persistent:

> "If they deal habitually with people throughout the country through these local agents, every person should be entitled to assume that such agents are authorized to receive communications material to their contracts, until notified to the contrary."

company was responsible for this conduct of its disloyal agent.[116] The companies were faced with a difficult problem in management, for commission-compensated agents were not amenable to a kind of control which could compel them to act in accordance with their theoretical fiduciary obligations. The companies made efforts to work out systems of compensation on a contingent basis, in order to structure the situation to put the agent's self-interest on the same side of the transaction as the company's.[117] The problem was never solved, however.

Beginning with 1870 the legislature took a hand in the problem,[118] and from about 1880 the statute dominated the cases on agents' powers. Its sweeping terms made all compensated representatives agents "to all intents and purposes". The statute swept occasional and sub-agents into the agency doctrine developed in earlier cases,[119] and struck geographical limitations from agency contracts, so far as the policyholder was concerned.[120]

At an early date the companies sought to prevent "waiver" by agents by inserting non-waiver clauses in the policies. Though such clauses were ineffective with respect to waiver by an agent's knowledge of breach at the outset,[121] the court in 1887 gave effect to the contract provision to prevent subsequent waiver.[122] But the judges' retreat was a limited one; the court soon held the clause ineffective to prevent waiver by general agents, for the company could not limit its own power to contract.[123]

Thus efforts at direct limitation of the agent's power to bind the company were relatively ineffective. A more subtle effort at

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Keeler v. Niagara Fire Ins. Co., 16 Wis. *523, *539 (1863).

[116] May v. Buckeye Mut. Ins. Co., 25 Wis. 291, 306-7 (1870):

> "The tendency of modern decisions has been strongly to hold these companies to that degree of responsibility for the acts of the local agents which they scatter through the country, that justice and the due protection of the people demand, without regard to private restrictions upon their authority, or to cunning provisions inserted in policies with a view to elude just responsibility."

This central doctrine was never abandoned, though some of its peripheral incidents varied from time to time.

[117] See 5 ANN. PROC. FIRE UNDERWRITERS' ASS'N OF N.W. 21 (1874); 5 *id.* 83 (1874); 7 *id.* 134 (1876); 13 *id.* 57 (1882); 17 *id.* 212 (1886); 19 *id.* 91 (1888); 28 *id.* 127 (1897) for committee reports and other discussions of these problems.

[118] Wis. Laws 1870, c. 59, § 22; Wis. Laws 1871, c. 13, § 1; Wis. Laws 1880, c. 240, § 5.

[119] See *e.g.*, Schomer v. Hekla Fire Ins. Co., 50 Wis. 575, 7 N.W. 544 (1880).

[120] Knox v. Lycoming Fire Ins. Co., 50 Wis. 671, 7 N.W. 776 (1881).

[121] See *e.g.*, Palmer v. St. Paul Fire & Marine Ins. Co., 44 Wis. 201 (1878).

[122] Hankins v. Rockford Ins. Co., 70 Wis. 1, 35 N.W. 34 (1887).

[123] Renier v. Dwelling House Ins. Co., 74 Wis. 89, 98, 42 N.W. 208, 211 (1889).

limitation made use of the standard policy law, in the drafting of which the companies played a large part. In fact there is some ground for supposing that the limitation of agents' powers was a principal purpose of the statute.[124] An ironclad non-waiver provision was incorporated in the 1895 standard fire policy, but another provision charged the company with knowledge possessed by the agent up to the time of delivery of the policy.[125] The tenacity of established dogma was evident when Mr. Justice Marshall seized upon this "knowledge" clause to hold that the legislature intended to preserve intact the long line of authorities on the agent's knowledge of breach. He eluded the non-waiver clause by calling the result an "estoppel", rather than a "waiver". The distinction had largely been ignored in previous cases, but was now seized upon to preserve the established structure of marketing responsibilities so painfully worked out in prior decades.[125a]

Despite Justice Marshall's reluctance to overturn the agent's knowledge cases, his opinions, and those of other contemporary judges, showed a marked retreat from the advanced positions previously taken on agents' powers. For example, the parol evidence rule was used to prevent waiver of a clause delaying effectiveness of a life policy till after company approval,[126] and in 1902, Mr. Justice Marshall held, even after conceding that an agent was a general agent, that he could not waive the requirement that an initial premium be paid in cash, even if he made private arrangements to take merchandise for it.[127]

By the 1920's an end to the judicial reaction was apparent. In 1923, for example, the court held that an unconditional delivery of a life insurance policy by the agent was a "waiver" of nonpayment of the first premium.[128] But the position now taken by the court was less extreme than the 19th century position; for ex-

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[124] See Welch v. Fire Ass'n, 120 Wis. 456, 464, 98 N.W. 227, 229 (1904).

[125] Wis. Laws 1895, c. 387, § 1.

[125a] Welch v. Fire Ass'n, 120 Wis. 456, 98 N.W. 227 (1904).

[126] Chamberlain v. Prudential Ins. Co., 109 Wis. 4, 85 N.W. 128 (1901), overruling Mathers v. Union Mut. Acc. Ass'n, 78 Wis. 588, 47 N.W. 1130 (1891).

[127] Tomsecek v. Travelers' Ins. Co., 113 Wis. 114, 88 N.W. 1013 (1902). See also Bostwick v. Mutual Life Ins. Co., 116 Wis. 392, 423-24, 89 N.W. 538, 92 N.W. 246, 252 (1902), where Justice Marshall stresses the policy of preserving integrity of the fund.

[128] DeGroot v. Mutual Life Ins. Co., 179 Wis. 202, 190 N.W. 443 (1923). See also Klingler v. Milwaukee Mech. Ins. Co., 193 Wis. 72, 213 N.W. 669 (1927); Spohn v. National Fire Ins. Co., 190 Wis. 446, 209 N.W. 725 (1926). *But cf.* Stillman v. North River Ins. Co., 192 Wis. 204, 212 N.W. 67 (1927).

ample, not all agents were treated as general agents, but some were mere soliciting agents with limited powers.[129]

In mid-twentieth century the court's arsenal of weapons was sufficiently diversified for policy considerations to affect the result indirectly, through choice of relevant analogies. The court used with telling effect the doctrines of waiver and estoppel; freedom of contract notions might be used or might be avoided by the forfeiture principle; in the background were the useful statutory provisions. With discriminating analysis and attention to subtle fact differences, the court might make the insurance company, and ultimately the whole body of policyholders, bear the burden of most of the malfunctioning of the agency system, without completely freeing the individual policyholder from responsibility to respond rationally to the marketing process. The uncommitted reader could hardly agree with the companies' complaint of mistreatment by the court; considered objectively, the technique seems nicely designed for its complex task.[130]

Conclusions

The role of the court in the development of insurance law has changed greatly over the course of the last century. In earlier generations both insurers and policyholders were individual entrepreneurs; in the nineteenth century large corporate insurers came to dominate the field. Insurance law, developed largely from the practices of merchants in a pre-corporation age of free contract, required substantial adaptation to an era of contracts of adhesion, and to the new lines of insurance created for the needs of industrial society. In a multitude of 19th and early 20th century cases, the court hammered out a modified legal framework for the administration of claims; it created law. Though the court never ceased entirely to play the creative role, that task was largely completed,

[129] Sachs v. North American Life Ins. Co., 201 Wis. 537, 230 N.W. 612 (1930).

[130] There were other headings of consequence in the administration of claims field. Well over a hundred cases had to determine which of rival claimants was entitled to the policy proceeds. The rights of married women, discussed *supra* p. 528, can be regarded as an aspect of tha tproblem. 136, or 12%, of the administration of claims cases can best be subsumed under the heading of pleading and procedure. Important questions were decided in some of these cases. For example, burdens of pleading and proof may be decisive in the litigation of claims; to cite a single case, Redman v. Aetna Ins. Co., 49 Wis. 431, 4 N.W. 591 (1880) dealt with the distinction between conditions precedent and subsequent. The former must be pleaded by the policyholder-claimant, the latter by the company. The court makes many terms which conceptually were conditions precedent, into conditions subsequent, to fix the burden of pleading and proof on the company.

and the court became more and more super-administrator of the claims administration framework it had built. That was its primary role in mid-twentieth century. For the most part it played the part simply by being available in the background of all disputes over claims; only the infrequent breakdowns of the normal processes required the court to come forward to exercise compulsion. The decline in the volume of appellate litigation, and the shifts in character of such litigation, such as the shifts away from loss settlement procedure cases and toward scope of coverage cases, demonstrate the magnitude and suggest the nature of the change in role.

Beyond the field of administration of claims, the court never did play a basically creative role. So far as it legislated, it did so in the interstices or on the periphery of statutes. From the beginning the court was administrator and not lawmaker in these diverse fields.

The court was subordinate to the legislature in the making of insurance law outside the area of administration of claims primarily because the court was not suited to that task. Its passive character, and its dependence for its lawmaking opportunities upon the accidents of litigation, deprived it of opportunity to deal with the innumerable problems out of which it might have woven a satisfactory legal fabric. Nor did it show the superior capacity for lawmaking that would justify its primacy in all areas of insurance law. Its handling of the upgrading of fraternal associations showed how dogma imprisoned the court and disabled it for a creative role. So also its inhibiting activity in the creation of a modern approach to women's rights shows how much more adequate the legislature was as lawmaker. The traditional formulation of the court's role, as law finder and law applier, but not as law creator, made the court incapable of the sweeping policy judgments that were necessary to help create a new industry virtually overnight in an age of impetuous change. The nineteenth century court could make law, but it could do so only slowly, by a gradual process of inclusion and exclusion, of analogy and difference. Such law making took time, and there was no time. The pace of change was such that the law, outside the field of claims administration, must be made overnight. The corporate structure must be adapted to the needs of non-political corporations, and basic decisions made as to the legitimacy of internal political structure in the light of nineteenth century American ideology. No sooner had insurance begun to expand beyond its initial foothold in the insurance of marine shipping into wider contact with American life than men

discovered that society had much interest in the ways in which the insurance fund was acquired, in the preservation of its integrity, and in the wider impact of insurance activities on society. Controls could not evolve; they must be created by conscious art. There was no time to wait for the insurance commissioner to develop gradually out of the Curia Regis; he must come into existence as a going institution. A single generation produced both the officer and the assignment of his tasks. And the commissioner's activity must be paid for; the creative agency must have the power of the purse. The court was not adapted to this task and the legislature dominated the making of insurance law in these important fields.

The inadequacy of available remedies militated against law-making by the court. There must be much organizational work and business activity before litigious controversy over claims could test the basic validation of the enterprise, the legality of the corporate structure and practices, or the propriety of the ways in which the fund is raised. Basic legality must be known before the enterprise can proceed. The common law action for damages thus would not serve. The declaratory judgment would have helped, but only the legislature could make the positive decisions needed to justify elaborate commercial activity in new fields and under new forms.

Most questions outside the distribution of the fund were widespread in incidence, but not especially intense. All policyholders were involved but none to a very great extent. Nor did the questions always involve money; for instance the problem of voting rights did not. Only in the area of administration of claims were the litigious controversies individualized enough, large enough in amount, and frequent enough, that the court could adequately serve as the main lawmaking agency.

With a claims administration framework to begin with, derived from Lord Mansfield's marine insurance law, and with innumerable controversies as raw material, the court was able to make suitable law in the one area. Though the court did not realize it, and though its own dogma of freedom of contract made the task difficult, the primary functional objective of the court in the whole century of Wisconsin development was the shackling of the unrestrained will of the insurance company. The development of waiver and estoppel, skillful techniques of contract interpretation, and the broad sweep of the company's responsibility for its agency organization, were the main devices for achieving the objective. The court's handling of technical doctrine to achieve this objective

bears much resemblance to the earlier use of fictions and the development of equity to soften the harshness and temper the inadequacies of legal dogma. Insurance, which began in marine shipping as a completely free contract for the achievement of a limited business objective, became a social institution of vast importance and extensive implications. In the process, it ceased to be an expression of the will of both contracting parties, and became an expression of the will of the insurance company, largely restrained by social policy for the achievement of the objectives of a highly-organized society.

FIGURE 1

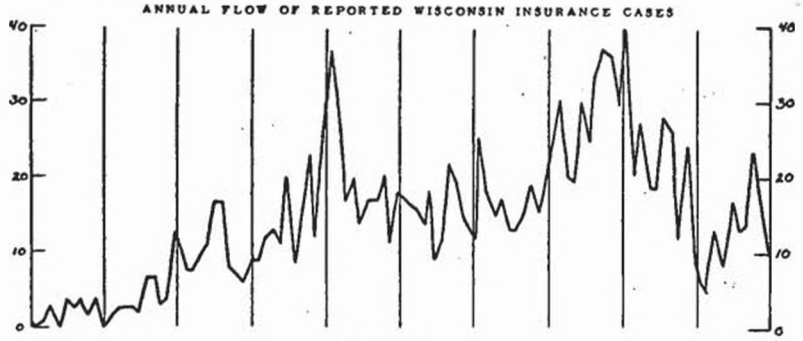

FIGURE 2

FIGURE 3

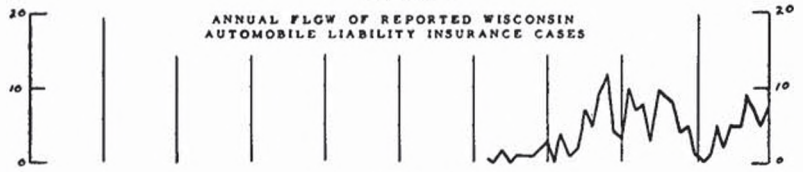

FIGURE 4

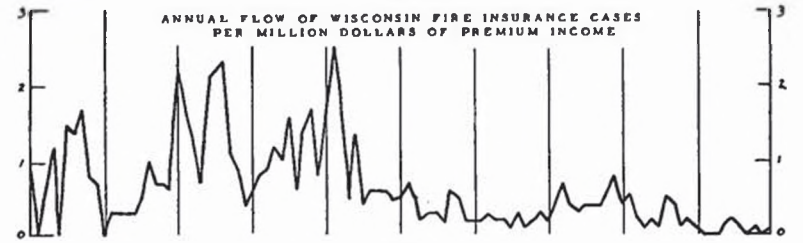

FIGURE 5