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THE FUNCTION OF INSURANCE LAWYERS

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Casualty insurance and the Bar are uniquely related. No other branch of industry relies so fully upon the legal profession. Lawyers guide companies in their corporate affairs. Lawyers help shape the products the companies sell. Lawyers adjust and litigate losses. Lawyers largely determine legislation which defines powers and obligations of companies. Lawyers frequently administer insurance. Lawyers strongly influence public opinion of insurance. Perhaps most important of all, lawyers as social architects play a leading role in formulating principles of social adjustment and readjustment which determine the character of casualty insurance and the extent of the public need for it.

The reliance of the profession upon casualty insurance is no less extensive. Thousands of lawyers are employed in the business. Other thousands count companies among their clients. Many more thousands, representing the public, profit from the existence of insurance. Casualty insurance is probably the largest single source of income of the profession.

An anamoly of this unique relationship is that neither party to it has made a sustained effort, the one to explain, the other to understand, how organized co-operation could make this relationship of greater value to both and enable casualty insurance to become an even stronger factor in the nation's economy. The time has come when organized co-operation can no longer safely be postponed.

No better forum could be found for discussion of needed

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co-operation than the insurance section of a state bar association. I would like to discuss with you today a few matters, as illustrative of many, upon which I believe a continuous plan of co-operative endeavor would be of great value to insurance and to the Bar, both immediately and in the years ahead. What I shall say does not necessarily express the "official position" of the insurance business, whatever that may mean. Rather, it will be a completely individual expression of purely personal views.

We are in the midst of a world-wide social upheaval. For many years to come, whatever political party may be in power, welfare of the individual and of small business will be the dominant concern of law-making bodies and courts, both nationally and in the states, and will actuate social thinking. In periods of social revolution all institutions, such as insurance, undergo radical changes. An institution survives such a period not by uncompromising resistance to new ideas but by intelligent appraisal of what is taking place and by self-direction of changes which enable it to function under new conditions. The best and the only sound method of meeting developments which must be expected is to anticipate them, to try to understand them and so to shape our plans that private industry with the aid of the Bar can provide insurance which follows rather than counters the trend.

Casualty insurance is peculiarly susceptible because it embraces the types of insurance most closely related to immediate objectives of the social movement—security of the individual—security against want arising from injury, illness, death, old age and unemployment. Within the field of casualty insurance we have seen employers' liability insurance all but disappear to make room for a new social concept of responsibility to injured employees. We now see a change gradually taking place in other types of liability insurance, particularly in automobile insurance. Its function is changing from that of protection for the insured to protection for individuals who face insecurity as the result of injuries. We would be inexcusably stupid if we did not recognize these changes as indicative of a trend and as portents of more drastic changes in the years ahead.

Like all professions and all industry, lawyers and insurance prosper and deserve to prosper only to the extent to

which they meet a need in the public economy. There is nothing sacrosanct about conditions under which we now function. We have no vested interest in rules as they stand. Both our selfish interests and our public duty require that we take our bearings and chart a new course, a course which will enable us to use in full measure for the public welfare the tremendous forces which are ours.

In taking our bearings we should begin, I think, with frank recognition of our weaknesses. The insurance industry has an incredible ingenuity for making simple things complex. Nearly always it does things the hard way. It often insists upon having knowledge when application of intelligence would suffice. It often sacrifices common sense to sylogism. It often allows individual views of social philosophy to govern decisions which should be governed by practical business judgment. Our training as lawyers overemphasizes the importance of precedent and discourages thinking unhampered by history. We find it extremely difficult to look forward instead of backward and accept principles which have no counterpart in common law. When we adopt new principles from life at one end of a legal theory we are reluctant to slough off principles from history at the other end. All this means, I think, only that both insurance and the Bar allow conservatism too much play, and that in charting our course we must recognize this shortcoming as a drift which can easily throw us off course if we make no allowance for it.

The major function of insurance always has been stabilization of our economy. Insurance is the most indispensable stabilizing factor in the life of our nation. But for it no business could embark upon expansion of sufficient scope to meet public needs. If industry could not protect its assets by insurance against unexpected losses, it could neither borrow nor safely risk its own funds. Elimination of chances of crippling fortuitive disaster is an essential of financial stability. And of no less importance to the individual is stabilization of his personal finances for his and his family's benefit.

So long as stabilization of the affairs of the insured was the sole function of insurance, the manner in which a loss was adjusted and litigation handled was of importance only to the insured. If his interest were adequately pro-

tected, his insurance had performed its function. But for several years a new function, more readily apparent in casualty insurance than in fire and life insurance, has been developing—the function of protecting interests other than those of the insured. More and more people are realizing that any uninsured loss, whether it be destruction of a building by fire or loss of earnings of an injured person, is a loss to society and, especially if such a loss may directly burden society, as in the case of disability of the wage earner of a family, should be insured. This trend of thought is behind statutory requirement of liability insurance on automobiles. Indirectly this theory of loss to society underlies the noticeable trend toward using direct loss covers, such as fire and burglary insurance, to supplement services rendered in mercantile pursuits.

The chart of our course must recognize this change in the function of insurance as one of the most significant trends. It is significant because of its effect not only upon the character of insurance but upon the handling of losses and litigation of claims. Our covers must be adequate to perform the new function and losses must be handled with that function in mind.

Adequacy of casualty insurance is often prevented by ill-advised legislation. Too little is left to discretionary power of insurance commissioners and too much is incorporated in statutes. For example, if an insurance commissioner is given adequate discretionary power, there is little need for legislation fixing policy provisions. Casualty insurance changes so rapidly, always in the direction of more adequate protection, that it is only a matter of time when a statute requiring specific policy provisions for the benefit of the public will serve to deprive the public of protection available in other states. If there must be statutory requirements let them be so drafted as to permit broader insurance. If insurance is to become and remain adequate for its new function statutes must permit growth. We have far too many statutes which prevent all-risk covers and joining of covers in one policy. Insurance lawyers would serve the business and themselves well if they would rid their statute books of laws which impede progress in the public interest and if, when consulted about new legislation, they would keep in mind the over-all needs of the business.

In their work of adjusting and litigating claims, lawyers do much to create good or bad relations between insurance and the public. Undue delay in adjustments and unwarranted litigation can emasculate the effectiveness of insurance as a means of meeting a social need as thoroughly as inadequacy of the insurance. Any insurance company worthy of public confidence wishes to pay every legitimate loss as soon as is feasible. The greatest service a lawyer can render an insurer is to effect fair settlements quickly. This does not mean that he need not be a good fighter or that he should not fight when necessary. It means that the lawyer who is worth most to the insurance business is he who has established with plaintiff's attorneys a reputation of making equitable settlement offers and of being able to hold verdicts close to the amounts of his offers. An equitable settlement made as soon as damages have been ascertained is far preferable to a settlement in the same amount two or three years later during or after a lawsuit. Delays in our court procedure and our infelicitous custom of offers and counter-offers with settlement in court or on the courthouse steps do much to create public disfavor.

It is easy to understand the enthusiasm of a trial lawyer for a good fight. He will frequently find his enthusiasm matched by the contact man with his client. A trial lawyer gets as much of a kick out of a hard trial as he does out of his golf. He will work day and night to see that no detail of evidence is overlooked. It is difficult for him to understand that to big business a lawsuit is only a bookkeeping transaction. When suit is brought a reserve is set up. At the end of the trial the reserve is taken down, either because the suit has been won or because the judgment has been paid. The paramount interest of the insurer is to take down that reserve as soon as is consistent with good business, and it is willing to pay well the lawyer who will work as hard to make early just settlements as to win lawsuits.

But neither adequacy of insurance nor the most efficient handling of adjustments and litigation will enable casualty insurance long to hold its place as a means of effecting social objectives unless the law which defines responsibility squares with the public's feeling of responsibility. Throughout our history lawyers have been architects of our social structure. The form of our government, its Constitu-

tion, the state governments and their constitutions, our administrative tribunals and our statutory and case law are the work of lawyers. If we are to have significant readjustment of our theories of responsibility of one citizen to another, law establishing those changes should be the work of lawyers and not of idealistic theorists. But before we draft changes we must anticipate and appraise trends and formulate principles. And we must never forget that the closer the need for insurance approaches a social objective, the more feasible becomes the argument that government should provide the insurance.

The Bureau of Labor Standards of the United States is on record, at least unofficially, as favoring state insurance of workmen's compensation. The reasons assigned do not require state insurance, but some of them should stimulate us to remedy weaknesses in our current systems. Private insurance has functioned so well in this field that no expansion in state insurance has occurred in recent years. But we must not allow that fact to make us smug. We must anticipate efforts to expand state insurance in this field and efforts here, as have been made in England, to incorporate workmen's compensation insurance in a government social security plan. The best argument against insurance by government, both state and federal, is private insurance so adequate to meet social needs and so well handled that government insurance would be an obviously backward step. We must not only examine every sincere criticism; we must actively seek and remove imperfections.

Shortly after the end of the war we shall have with us again congestion of court dockets by thousands of automobile accident suits. Our cumbersome court procedure and our ancient principles of negligence, while adequate to protect the insured, are wholly inadequate to meet the new function of liability insurance. When public dissatisfaction with the system becomes sufficiently strong, we shall probably have a new theory—either an absolute, limited liability with a summary method of administration or an absorption of disability by a social security plan; and a part of the system will undoubtedly be a demand for state insurance. The parallel between industrial accidents and automobile accidents is too close to be ignored. Insurance and the Bar should not

repeat its refusal to recognize the trend of public thought. We should do something about it before it is too late.

Nor can we supinely watch the expansion of social security plans without considering the effect upon private insurance. A complete program of subsistence benefits guaranteed by the government is inevitable. Only the time of its completion is uncertain. It can be a program of government insurance which swallows workmen's compensation and disability insurance, as in Britain, and which will eventually replace civil liability (for what need would there be for either if all disability were compensated); or it can be a program limited to subsistence benefits in which the best of our existing system, including private insurance, is preserved. The part casualty insurance and the Bar plays under a social security program is up to us.

We have much thinking, much planning and much work to do if we are to convince the public that private insurance is the best medium for meeting social responsibilities. We cannot prove our case by opposing necessary adjustments in the social order, or by doing nothing. We must abandon our traditional hypothesis that social innovation violates immutable legal principles. Mere negation never won an argument. One of the secrets of success of the American way has been gradual change rather than abrupt upheavals; and there seems to be no reason to expect abrupt reversal of existing principles of responsibility. Sound, gradual progress in the right direction is, I believe, the course we should chart, but it must be progress—constructive, sympathetic and sincere progress.

One result of the social revolution which did not follow the American way of gradual change was the reversal last June by the United States Supreme Court of its oft-repeated pronouncement that insurance is not commerce. Although other Justices warned of drastic conditions which would follow and demonstrated that such results were not necessary to establish the power of federal control of insurance, a minority of the Court, by chance a majority of participating members, razed the structure which the states, during seventy-five years' reliance upon earlier decisions, had erected.

The immediate effects of the decision were: First, to subject insurance to diverse existing federal statutes, in some instances in direct conflict with state statutes, second,

to subject insurance to such further federal regulatory acts as Congress may at any time see fit to enact; and, third, to throw into the realm of doubt and uncertainty many state regulatory laws.

Whatever differences of opinion may once have existed over the relative merits of federal regulation as opposed to state regulation, the view is now all but unanimous that regulation of insurance by the states should continue. This view is not based upon objection to further weakening of powers of the states and further concentration of power in the federal government, although I have little doubt such an objection would suffice for many. Rather, it rests upon belief that differences in industrial, agricultural and economic conditions make it wholly impracticable to regulate insurance from one central source and force it into a common mould. Furthermore, the system of state regulation, created by trial and error over a period of seventy-five years, is too valuable to the public to be jettisoned if it can be saved.

Since June, 1944 insurance companies, through committees of their organizations, have been studying the effect of change of status upon tax laws of the various states. This study requires careful scrutiny of the entire tax scheeme of each state to determine whether the scheme discriminates against the interstate commerce. If a tax operates more oppressively upon interstate commerce, several questions must be resolved: First, is the statute one which falls within court decisions which declare state statutes invalid because discrimination is apparent from the statutes themselves; second, have correlative or corresponding burdens been placed upon intrastate commerce; and third, do differences in treatment accomplish substantial equality? There are many decisions of the Supreme Court on these points. Having reached conclusions for each state and having determined the nature and scope of needed corrective legislation, the companies must decide how best to pay taxes pending legislative correction of statutes of doubtful validity.

Companies have likewise been working for months to determine the best basis for state control of rates. Because there will be introduced in the legislatures of many states bills to create state control or to amend and supplement existing control, it is imperative that insurance lawyers understand the issue involved.

The right of Congress to regulate insurance was established by the decision of the Supreme Court. Insurance rates are now subject to existing federal statutes. There is, however, no federal statute specifically regulating insurance rates. Until Congress creates regulation by the federal government, states are free to regulate rates within the proper exercise of state police power.

A state statute regulating interstate commerce under its police power is generally regarded as valid if (1) it does not contravene existing federal law, and (2) it does not invade the national interest by unduly burdening interstate transactions. So long as Congress does not establish specific regulation of rates, it would seem that the competing demands of state and national interests can be accommodated: and that regulation of rates by a state to protect its citizens is a local matter which need not conflict with national interests. If the scope of state regulatory law is confined to establishment of rates adequate to protect solvency of companies, reasonable for citizens to pay and not unfairly discriminatory in their application, there is reason for confidence that such control would be a valid exercise of police power.

A more difficult problem arises under existing federal statutes. In many states insurance companies are required by law to collaborate with other companies through rating organizations in order that rates may be based upon experience broader than that of a single company. These requirements in many states have succeeded statutes which theretofore had made such collaboration illegal. The change in legislative policy was due to sad experience under laws which encouraged unfettered competition in the cost of insurance. But the federal anti-trust statutes, which the decision made applicable to insurance, declare such collaboration illegal, and the Supreme Court has said that the purpose of collaboration is immaterial. Companies are in a position of being required to comply with state law in order to obtain licenses and of being subject to indictment under federal anti-trust law if they do comply.

Combining experience is essential in casualty insurance rate-making. Insurance is the only industry which cannot determine the cost of its product before the product is sold. The expense of doing business can be estimated as in any other industry, but the cost of the product, determined by

losses which occur, can be fixed only at a later date when losses have been paid. Insurance rates are made upon the assumption that the future will, within reasonably narrow variations, repeat the past. The broader the record of past performance, the greater is the probability that it is not distorted by chance and the greater becomes the degree of accuracy of prognosis. No one company has a sufficient volume of business to render its own experience a safe guide for the future. Hence, it is imperative that the experience of many companies be combined. Drafting statutes which will permit proper collaboration and which will survive conflicts between federal and state power is an extremely delicate task.

In the case of Parker v. Brown,[1] the Supreme Court stated that the Sherman Act does not apply to a state, as such, and was not intended to restrain state action or official action directed by a state. It is believed that state legislation can be properly drawn to give power of approval and disapproval to a state officer which will, whether or not relief is afforded by Congress, take state approved rates outside the scope of the Sherman and Clayton Acts and offer at least strong argument that the use of rates so approved is not violative of other existing federal statutes.

Adequate state regulation must resolve not only the delicate balances between local and national interest and conflicting federal and state law affecting collaboration. It must also accommodate diverse requirements of many kinds of insurance and several kinds of insurance companies. Furthermore, there is as great danger from too strict as from too lax regulation. If too strict it may unduly burden interstate commerce. If too lax it may in fact be no regulation. In either event the Damoclean sword might fall.

Because casualty insurance is constantly expanding it is impossible to anticipate changes which may become desirable. For this reason it is preferable that regulation be established by adoption of principles within which administering authority can exercise broad discretionary power, rather than by adoption of details which, under changed conditions, might block the path to desirable improvement. Flexibility in making rates and rating plans is imperative. With federal control always imminent state administrators

1. 317 U.S. 341 (1943).

required by exigencies of the insurance business without delay incidental to enabling legislation.

The purpose of this detailed discussion of tax and rate statutes is to demonstrate, if demonstration is necessary, that preparation of legislation is no task for laymen or for lawyers not thoroughly conversant with the issues of law and fact. It should be obvious that ill-considered legislation, however well-intentioned, can defeat the very purpose of its enactment.

The stock casualty companies, acting through the Association of Casualty and Surety Executives and with the advice and help of the National Bureau of Casualty and Surety Underwriters, have prepared a model bill setting forth the principles I have mentioned. This bill will be available for use in any state where rate regulation is contemplated. Work is still in progress with other groups similarly engaged, looking toward agreement upon a single bill. This bill is the work of lawyers who have devoted months to the legal issues involved and of rate experts thoroughly conversant with all intricacies of rate-making. It should not lightly be brushed aside in favor of a bill less carefully prepared. In many states changes in this model bill will be necessary because of adequate existing law relating to some phases of rate control. In making such changes extreme care is imperative, and consultation with the individuals who drafted the model bill is desirable. In no other way can the delicate balances be preserved. Insurance lawyers will render a great service to casualty insurance if, when consulted about legislation, they will bear these points in mind.

It may be that Congress can be persuaded to implement state power by a declaration of intent or by permission to the states, or by itself subjecting insurance to state laws; and by exempting from existing federal laws legitimate practices of collaboration required by the peculiarities of insurance. If so, regulation by the states would be on a firmer basis. But we cannot assume that Congress will so act or that such action, if taken, will be permanent. We must so shape our legislation that only specific federal control can upset our work.

When we have adopted carefully prepared legislation, we have gone only part way. In the last analysis, the type of administration provided will decide whether we shall have

federal control. We would probably be safer with expert administration under a poor law than poor administration under a good law. What we must have is a good law and good administration. The indictment in the federal case was against fire insurance companies; but make no mistake, it is state regulation that is on trial.

This means that insurance lawyers must interest themselves not only in proper legislation but in proper administration. State insurance departments must be adequately financed. The administrator and his staff must be the best material obtainable. Payment of more adequate salaries will be necessary, in many states, to attract men capable of effective administration. If these things necessitate legislation we must have it promptly.

Insurance departments must have competent legal advice. No department, however small, should try to function under current conditions without the full time services of a capable lawyer familiar not only with local problems but with fine questions of balance between state and federal power.

We must convince state supervising officers that continuance of state regulation depends upon them. They must be made to understand and to appreciate fully the danger inherent in weak and in arbitrary regulation. They must make state regulation function adequately and smoothly. They must find ways to permit rating as a unit of a risk having exposures in several states. They must find ways to permit uniformity in practices and in policy forms. There must be no unnecessary differences between the states which can constitute or be alleged to constitute undue burden upon interstate commerce. I believe all these results can be accomplished under the bill I have mentioned by an administrator with vision and ability.

I have emphasized the importance of capable legal advice to insurance departments and the necessity of active interest by the Bar in administration for this reason: If federal control of insurance is established it will probably come as the result of litigation questioning powers assumed by a state administrator or the manner in which powers are exercised or not exercised. Competent advice to state administrators can prevent niggling, arbitrary decisions which unnecessarily burden the business and invite resistance. Com-

petent advice to companies can prevent sniping at proper exercise of state powers. A state Bar actively interested in making state regulation function can reduce to a minimum instances in which challenge of state authority is necessary or desirable.

Earlier I expressed the view that the time has come when organized co-operation between insurance and insurance lawyers can no longer safely be postponed. I have shown you, I trust, that the interest of the lawyer is no longer confined to individual cases which he may be called upon to handle; but that his interest is in the welfare of the business as a whole—the covers, the legal and social theories underlying the covers and the regulation of the business.

The Indiana Bar, by organization of this Insurance Section, has set an example for other states. Establishment of the Section could not have been better timed to take a prominent and important part in charting the course of insurance during the social unheaval in which we find ourselves. The Section might further show the way to other states by making one of its major functions active co-operation with the insurance business in all matters looking toward the general welfare and improvement of insurance and insurance practices and the preservation of state regulation. Only by active co-operation can insurance lawyers protect their interests in the subject matter of their practice.

Without co-operation from the Bar, the course of insurance during the next few years, will be rough and dangerous. With such co-operation, I am supremely confident that we can chart a safe course, take advantage of favorable conditions and steer away from dangers which threaten to engulf us.

> "There is a tide in the affairs of men,
> Which, taken at flood, leads on to fortune;
> Omitted, all the voyage of their life
> Is bound in shallows and in miseries.
> On such a full sea we are now afloat,
> And we must take the current when it serves
> Or lose our ventures".