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Allocation of Loss and Property Insurance

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The troublesome problem of a possible double recovery by an insured owner of property invites renewed analysis. The problem arises when I, the insured owner, has a claim against his insurance company and likewise one against T, a third party. The latter claim may accrue for a variety of reasons, e.g., because T negligently destroyed a building or because T had agreed to buy it before a fire damaged it. Should I recover damages for T's negligence on the full purchase price and also receive payment from the insurance company? If not, how is the loss to be adjusted? If I is to be deprived of his "windfall," who is to benefit?¹

Resolution of the issue, which appears in an array of factual contexts,² varies with context and court. No less than five solutions, none of them altogether satisfactory, have been advanced. Following a statement of these solutions and their supporting and opposing arguments, an approach will be suggested which places the insurance contract in a more realistic perspective. The central issue is not simply the technical problem of insurance law stated; it is rather one of fixing risk of loss between I and T. To that issue the possibility and desirability of

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² In addition to the negligence and executory contract for the sale of realty cases, an only partial listing would include: sale of personalty, mortgage, landlord-tenant, bailment and derivative and absolute liability cases.
insurance coverage of the loss, i.e., the insurance contract, is relevant, more so than has always been recognized. So considered, it should produce a more rational allocation of risk of loss and the elimination of a difficult insurance problem.

II. THE SOLUTIONS

Five ultimate solutions to the problem initially stated are possible:
(A) The insured may be allowed to collect from both his insurer and the third party; (B) Although the insured may be limited to indemnification for his loss, the source of recovery may be left to his choosing; (C) Loss may be apportioned between the insurer and the third party; (D) Loss may be allocated entirely to the insurer; (E) It may be placed completely on the third party. Many of the cases, while involving the problem, do not require its resolution. However, examples of all of the solutions except C are to be found in the decisions, and, although no case finally adopting C has been noted, it has been urged by more than one commentator.

The diversity of solutions to the problem is attributable to two factors. Courts, failing to recognize the common thread, generally tend to examine the question only in terms of the fact situation before them. For instance, mortgage cases are decided without reference to the treatment of landlord-tenant problems. Moreover, and this may be the reason for the category-by-category approach, each of the possible solutions is subject to serious objection. One solution may better commend itself in one context than in another.


4. E.g., Foley v. Manufacturers' & Builders' Fire Ins. Co., 152 N.Y. 131, 46 N.E. 318 (1897). There the insured simply maintained an initial suit against the insurer. No ultimate allocation was required by the case presented; however, the court seemed to concede the possibility that the insured would recover from both insurer and third party. See Note, 35 So. CAL. L. REV. 501, 503-04 (1962).


6. See note 4 supra.

7. A rare exception is In the Matter of Future Mfg. Co-op., 165 F. Supp. 111 (N.D. Cal. 1958) (sale of personalty case adopting solution D in preference to A and E). It has been suggested that even that court's frame of reference was too narrow. See Patterson & Young, CASES AND MATERIALS ON INSURANCE 190 (4th ed. 1961).
A. Collection from Both Insurer and Third Party

Examples of collection by the insured from both a property insurer and the third party seem to be confined to cases where the latter's liability to the insured is contractual. Probably this is explained by the almost uniform acceptance in this country of the principle of subrogation of a property insurer to the insured's rights against third-party tortfeasors, a principle which represents solution E noted above.

With that qualification, however, no particular regard for factual category is displayed. In *Alexandra Restaurant v. New Hampshire Ins. Co.*, the third party was a landlord, who was obligated by the lease to repair fire damage and did so; the insured tenant nonetheless was allowed to recover from his insurer. The court reasoned that the tenant's insurer had made an absolute promise to pay and not simply an agreement to indemnify. In a Seventh Circuit case the court refused to credit the condemnee's insurance against the condemnation award for a building. Accordingly, the condemnee recovered from both insurer and condemnor. The solution was justified on the ground that the insurance contract was personal to the named insured.

The argument which underlies these decisions allowing an insured to collect from both insurer and third party stems from the fact that the insured has two, independent contractual rights for which he has given valuable consideration. Having "paid" for both rights, he now should be entitled to realize on them. Indeed, any other approach will produce a windfall for either the insurer or the third party. Accordingly, each right is to be handled as if the other did not exist.

This reasoning loses its appeal when it is realized that it produces a rule which permits double recovery by the insured. Double recovery is generally avoided in our law on the same principle as that of unjust enrichment, and it is particularly obnoxious where insurance, or at least insurance of property, is involved. The same policies that lead to the requirement of an insurable interest, however broadly a requisite interest
is defined, apply here. The prospect of double recovery may lead to wagering by the insured, which is said to be socially unproductive. It may lead to the temptation, at the same time too great to resist yet too devious to expose, of the insured himself to effect the loss.\(^\text{12}\) And where the third party and the insurer are free from fault no useful purpose is served by allowing the insured more than indemnification. It is hardly surprising that collection by the insured from both insurer and third party to the extent that it produces double recovery had little appeal\(^\text{13}\) and is therefore the least commonly found of the five solutions.

B. Indemnification From a Source Selected by the Named Insured

It is quite a different matter to give the insured rights against both insurer and third party but to limit him to indemnification and to leave the choice of its source to him. Under this solution the insured may proceed against either, and, recovery from one, if it amounts to indemnification, discharges the other.

Again, cases adopting this course seem limited to situations where the third party's liability is contractual because of application of the subrogation result in tort cases. Moreover, most of the decisions, and there are many, are cases excusing the insurer following indemnification of the insured by the third party,\(^\text{14}\) although there seems to be no reason why the third party is not excused by an insurance payment unless it is that the insurer's obligation is more obviously limited to indemnification than the third party's.\(^\text{15}\) With these limiting features no particular factual lines are observed in the cases.

Typically the announced ground of decision excusing the insurer after the insured has been indemnified by a contractually obligated third party is that the insured has suffered no loss. This was the announced basis of decision in the leading case of \textit{Ramsdell v. Insurance Co. of No. America}\(^\text{16}\) where, interestingly, there is no indication that the third-

\(^{12}\) Prevention of wagering and guarding against the moral hazard are standard justifications of the insurable interest requirement. See \textit{Patterson, Essentials of Insurance Law} 109-11 (2d ed. 1957); \textit{1 Richards, Insurance §§ 64-65} (5th ed. 1952).

\(^{13}\) See, \textit{e.g.}, \textit{Firemen's Ins. Co. v. Georgia Power Co.}, 181 Ga. 621, 183 S.E. 799 (1935) (subrogation of insurer denied, but double recovery avoided by crediting the third party with the amount of insurance paid); \textit{Home Ins. Co. v. Hartshorn}, 128 Miss. 282, 91 So. 1 (1922) (to prevent double recovery by insured bailor, insurer to share in any ultimate recovery from bailee).


\(^{16}\) 197 Wis. 136, 221 N.W. 654 (1928).
party tenant was under any duty to repair although the lease gave him the privilege of doing so. It was also the rationale in Glens Falls Ins. v. Sterling\(^\text{17}\) where a building contractor was contractually liable to the insured who simply failed to prove that he had not been indemnified by the third party. Occasionally, release of the insurer on these stated grounds may also be attributable to the insured’s destruction of a subrogation right of the insurer which would otherwise have operated to produce solution E. An example may be Flint Frozen Foods v. Firemen’s Ins. Co.\(^\text{18}\) where the insurer successfully defended against the third-party-pledgor to whom the insured pledgee made a post-loss assignment where the loan for which the property was pledged as security was repaid.

The solution is supportable by analogy to the common-law treatment of joint tortfeasors. Indemnification of the injured party by one tortfeasor relieved the other of liability.\(^\text{19}\) The analogy is imperfect in the sense that this result in insurance cases does not appear where the third party is a tortfeasor. More important perhaps is the fact that, subject to the prohibition of double recovery, this result gives the insured maximum freedom of contract.

There is much to be said for this freedom in terms of initial indemnification of the insured. He has contracted for two sources of compensation. Should he not be allowed to select his own route, guided by such factors as ease, speed and sureness of recovery as they appear to him? He may be denied double recovery, but surely the consideration he has given for these contract rights entitles him to this much. Indeed, if he pursues one path with no success or only partial satisfaction, perhaps he must be allowed to try the other as well.\(^\text{20}\)

To concede this much, however, is not to accept the solution wholeheartedly, for it does not follow that the matter ends there. Once the insured has made his choice and has been indemnified, it is still possible to provide for readjustment between insurer and third party in order to effect a desired, ultimate allocation of loss. In fact this is exactly what is done in the subrogation cases, and it has been done where the insured was first indemnified by the third party and it seemed desirable that the insurer bear the loss. By leaving ultimate allocation of loss to the insured, the court abdicates the power to effectuate any policies that

\(^{19}\) Although judgment against one tortfeasor no longer bars suit for the same injuries against another, the injured party is entitled to but one satisfaction. Prosser, Torts 241-246 (2d ed. 1955).
should bear on the matter. Judicial disposition of the controversy becomes incomplete. In truth it must be admitted that some of the decisions cited above must be characterized as incomplete. In both Ramsdell and Sterling the courts have held no more than that the insured is not entitled to more than indemnification. They have not said that readjustment between insured and third party is impossible; they have not been asked to rule on the point, although it is likely that such would be the ruling. On the other hand, in Flint the insurer and the third party are face-to-face; yet the effect of this decision is unclear. The court may be saying: let the matter rest as the insured left it or, as already suggested, it may be saying that loss quite properly belongs to the third party. In all events, to leave the choice of ultimate loss allocation to the insured is either to forfeit the power to make a desired allocation or to admit that there is no basis for making a choice. Neither can be justified. The forfeiture involves a sin of omission, and there is a more appealing solution if the admission is sound.

C. Pro-Rating Loss Between Insurer and Third Party

Some form of apportionment of loss between the insurer and the third party is a natural step beyond leaving ultimate loss allocation in the hands of the insured. The same reasoning that produces rules permitting contribution between joint-tortfeasors or apportionment of loss between two insurers applies here. If there is no basis for consistent allocation to one or the other, insurer and third party should share the loss. There may be some difficulties in determining the appropriate contribution, but that can be handled, as is apportionment among several insurers who have assumed risks in varying amounts, by prorating loss in proportion to percentage of risk assumed.

Yet no court seems to have been willing to adopt this approach. The idea of apportioning loss between insurer and third party has been confined to the commentators. Interestingly, even among the latter the proposal has been limited to cases where the third party's liability is absolute, derivative or based on ordinary negligence, cases where the fifth, subrogation result usually applies. Clearly the impetus for the proposal is dissatisfaction with the subrogation result as working an injustice. If sound, however, it appears equally justifiable to apply the

22. Apportionment of loss between insurers exists even without a pro rata clause. That clause goes further and limits from the outset an insurer’s liability to his proportionate share of the loss. 2 Richards, Insurance §§ 175-76 (5th ed. 1952).
23. An abortive attempt by a trial court to do so has been noted. See note 5 supra.
24. See King, supra note 3, at 65, 81 (third party negligent or absolutely liable); Langmaid, supra note 3, at 988, 991-92 (third party vicariously or absolutely liable).
solution to other cases.

Because of the analogies to contribution and apportionment between insurers, this result may commend itself more than leaving allocation to the whim of the insured. But if there is a sound basis for choice, this solution is wrong. Its weakness, and this may explain lack of judicial acceptance, is that it is simply a compromise. It can be sustained only on the premise that there is no rational basis for choice between allocation to the insurer and to the third party. However, the problem under consideration does not involve two tortfeasors or two insurers; rather, it concerns an insurer and a third party. Whatever the character of the latter, he is almost certainly distinguishable from an insurer. The decisions allocating loss entirely to insurer or entirely to the third party suggest distinctions which may provide a basis of choice.

D. Placing the Loss on the Insurer

Ultimate allocation of loss entirely to the insurer is comparatively rare in judicial decisions. It has become commonplace only in cases involving the sale of realty where the vendor has insured. Ordinarily that result has been justified on the ground that the purchaser has equitable title to the property and that, the insurance running with the land, an equitable claim of the purchaser to the insurance proceeds in the hands of the vendor follows. The idea that the purchaser has equitable title to the property is perhaps too settled to permit doubt. The "jugular vein" of the argument lies in the idea that the insurance runs with the land; yet it seems clear that in many respects it does not. If, for example, I sells property to T and title passes, I's insurance does not cover T's subsequent loss unless the insurer has assented to an assignment of the policy. Briefly, the explanation of this legal principle is that, while we say that the property is insured, in fact it is only I's interest, no longer in existence, which was insured. One court, dealing with a case involving the sale of realty, succinctly stated the matter:

The supposed injustice stems from absence of "fault" on the part of the third party in such cases.


"These reasons may savor of layman’s ideas of equity, but they are not law. . . . Insurance is a merely personal contract to pay a sum of money by way of indemnity to protect the interest of the insured." 28 If the argument of equitable claim is tenuous in the sale of realty cases, it is nonexistent in other cases which allocate loss to the insurer, i.e., give the third party the benefit of the insurance. Yet there are an increasing number of cases in which this is done. 29

This suggests the presence of other considerations justifying the result. It may, for example, reflect the fact that the third party simply cannot afford to bear the loss individually, although that is not necessarily true in all cases. One wonders, for example, in General Mills v. Goldman, 30 whether the tenant is not perfectly capable of bearing the loss. Of course, the court finds it unnecessary to consider that point by interpreting the lease as relieving the tenant from liability. While no case has been found in which the decision is expressly based on this ground, it may have been an unarticulated premise in some.

It is true, however, that in all cases the insurer is, or should be, able to bear the loss. After all it has been paid a premium for assumption of the risk, a premium theoretically fixed on the probabilities of the occurrence of the insured event. 31 Perhaps a more tenable argument, then, is the negative one that not to allocate loss to the insurer is to give it a windfall. 32 This apparently was the basis of decision in In the Matter of Future Mfg. Co-op. 33 where the California federal court, after rare examination of a variety of cases, declined to allow the insured a double recovery or to subrogate the insurer to the insured’s right and allocated loss to the insurer “who has been compensated for insuring against such loss. . . ." 34

29. See Young, Some “Windfall Coverages” in Property and Liability Insurance, 60 Colum. L. Rev. 1063 (1960). Professor Young approves this result when: (1) the claim of the third party is easily identified by the relationship between the insured and the third party; (2) allowing the claim will not increase the hazard assumed by the insurer; (3) allowing the claim will not impair the indemnity of the named insured, and (4) there is a means of preventing an arbitrary choice by the insured between the insurer and third party. Id. at 1064. The fourth requirement indicates concern about solution B.
30. 184 F.2d 359 (8th Cir. 1950), cert. denied, 340 U.S. 947 (1951) (General Mills the tenant).
32. Keeton, op. cit. supra note 3; Patterson, op cit. supra note 12, at 151; Kimball & Davis, supra note 1, at 841; King, supra note 3, at 71; 72 Harv. L. Rev. 1380, 1382 (1959).
34. Id. at 116.
The validity of the windfall argument, however, is debatable. Clearly the premium is not all windfall, for the insurer has assumed the risk of a loss for which no third party, or at least no financially responsible third party, is liable. In the absence of such third party the insurer is unquestionably obligated to pay. Moreover, if calculation of the premiums has been based on the assumption that loss will be allocated to the third party by subrogation of the insurer to the insured's rights against that party, then there is no windfall at all. The extent to which that assumption figures in premium computation is unclear. Professor Patterson has stated that subrogation plays little or no part in rate-fixing and cites as evidence the fact that there is no premium reduction in insuring secured creditors, where the subrogation right has obvious value. Professor Keeton, pointing to the rates charged mortgagees who insure separately, takes the same position. Yet there is room for doubt. Failure of the insurer to give premium advantages to mortgagees and other secured creditors is not dispositive. The savings may have been distributed on a wider basis—to all insureds. If premiums are fixed on the basis of losses paid and if the figures reported for losses paid are adjusted to reflect subrogation recoveries, then allocation of loss to the third party is not a windfall to the insurer.

But this doubt has not been the usual basis for rejection of allocation of loss to the insurer by the courts. Rather, the chief stumbling block has been the principle of "personal contract." Again and again the courts have declined on this ground to give the third party the benefit of the insurance, the corollary of allocation of loss to the insurer. In essence, the argument is that the insurer has not agreed to assume the third party's risk of liability. Because risk assumption for a fee requires care in the selection of risks, burdening the insurer with "insureds" not of its own choosing is improper. This "classical" concept arises from the fact already noted that, while insurance is on property or against property losses, it is of people. Its rigorous application, however, ignores the additional fact that insurers under no legal compulsion often

35. Patterson, op. cit. supra note 12, at 151-52.
36. Keeton, op. cit. supra note 3, at 172. Nor do insurers differentiate in rate between policies covering only a conditional vendor and policies covering both vendor and vendee. 72 Harv. L. Rev. 1380, 1382 (1959).
37. See Note, 28 Colum. L. Rev. 202 (1928); Note, 13 Hastings L. J. 474 (1960) (suggesting that subrogation recoveries are reflected in rate structure).
38. Panhandle Oil Co. v. Therrell, 158 Miss. 810, 131 So. 263 (1930); Brownell v. Board of Educ., 239 N.Y. 369, 146 N.E. 630 (1925); Godfrey, supra note 1, at 420; Comment, 22 La. L. Rev. 225 (1961); Note, 28 Colum. L. Rev. 202 (1928); 72 Harv. L. Rev. 1390, 1381 (1959).
extend coverage to the interests of unknown third parties. Perhaps the
commonest example is coverage of a bailor's interest by appropriate
language in policies issued to a bailee as the named insured. Typically
this is done only in cases where the named and therefore known insured
has possession or custody of the property, and the risk involved in
insuring an unknown third party is thereby minimized, if not eliminated.
Judicial extension of coverage to a purchaser under an executory con-
tract for the sale of realty where possession has not changed might be
justified thusly, although there is no language in the policy purporting
to so extend the coverage; in at least one case there was language to
the contrary. There are even infrequent examples of express extension
of coverage to include the interests of unknown third parties in possession
of the property.

This quarrel with the "personal contract" principle cuts both ways,
however. If it raises doubt as to the practical significance of the concept,
it also suggests a potential solution or a means of eliminating the problem.
The property insurance contract can be drafted so as to expressly extend
the coverage to include the third party's liability interest; at least this
might be done for certain categories of third parties. Insurance contracts
covering both bailee and bailor or mortgagor and mortgagee are ex-
emplary, although in both those cases the insurance is procured by the
one who, in the posture of the problem, would be a third party."

A further difficulty with allocation of loss to the insurer arises
when the third party separately insures his own interest, a phenomenon
apparently occurring with increasing frequency. Simply to give the third
party the benefit of another's insurance in addition to his own may then
lead to double recovery on his part. This was the outcome in *Vogel v.
Northern Assur. Co.* where a federal court saw no escape from the
Pennsylvania rule giving the purchaser of realty the benefit of the

40. Ordinarily language indicating an intent to cover the interest of one other
than the named insured is required. Typical is the "held in trust or on commission"
clause. *Id.* § 162.
purchaser of half-interest in a boat subsequent to issue of the policy; marine insurance).
43. As to coverage of bailees and bailors, see *Patterson, op. cit. supra* note 12, at
125-30. As to coverage of mortgagors and mortgagees, see *Vance, Insurance* 773-74
(3d ed. 1951). More than the liability interest of the third party may be covered.
Such policies cover the bailee's interest based on contract right and the mortgagor's
property interest.
44. 219 F.2d 409 (3d Cir. 1955). From one standpoint this is double recovery by
an insured. The purchaser was indemnified by his insurer and by a third-party vendor,
liable because he had insured.
vendor's insurance. In Insurance Co. of North America v. Alberstadt,\(^45\) the Pennsylvania court subsequently avoided the dilemma by prorating the loss between vendor's insurer and purchaser's insurer. However practical as a solution of the particular problem, that device seems contrary to firmly ingrained rules on apportionment. Loss is not ordinarily apportioned between insurers when the two policies cover distinctly different interests.\(^46\) Still another alternative is to treat one policy as providing primary coverage and the other as excess.\(^47\) Which policy is primary and which is treated as excess may create a problem, and in all events two premiums will have been paid for a single risk. Arguably, it would be preferable to give the third party the invariable benefit of the owner's policy.

E. Placing the Loss on the Third Party

Diametrically opposed to allocation of loss to the insurer is a result placing the loss on the third party. The latter is by far the most commonly encountered solution in the property insurance cases. Allocation of loss to third-party tortfeasors\(^48\) or mortgagors\(^49\) is virtually universal. It is also the prevailing result when the third party is a purchaser of personality\(^50\) or a common carrier.\(^51\) Less often in this country, but with perhaps increasing frequency, it may be found in other fact categories where the third party's liability is contractual.\(^52\)

\(^{45}\) 303 Pa. 556, 119 A.2d 83 (1956). Superficially this case appears to be an example of the apportionment solution. See pt. II, C supra. However, the court does not indicate that apportionment would have been required had the purchaser been uninsured, and Pennsylvania precedent, allowing the purchaser the benefit of the vendor's insurance, is clearly to the contrary. Dubin Paper Co. v. Insurance Co. of No. America, 361 Pa. 68, 63 A.2d 85 (1949). Apportionment in the Alberstadt case seems to have been designed solely to prevent double recovery by the third party.


\(^{47}\) KEEroN, op. cit. supra note 3.

\(^{48}\) PATTERSON, op. cit. supra note 12, at 148; Campbell, Non-Consensual Suretyship, 45 Yale L.J. 69, 76-77 (1935); King, supra note 3, at 64.

\(^{49}\) Lockett v. Western Assur. Co., 190 Ark. 1135, 83 S.W.2d 65 (1935); Gainesville Nat'l Bank v. Martin, 187 Ga. 559, 1 S.E.2d 636 (1939); Le Doux v. Dettmering, 316 Ill. App. 98, 43 N.E.2d 862 (1942); PATTERSON, op. cit. supra note 12, at 150-51; Godfrey, supra note 1, at 422; Young, supra note 29, at 1072-74 (noting, however, some exceptions).

\(^{50}\) See King, supra note 3, at 82; 20 Md. L. Rev. 161, 165-66 (1960). There is some tendency to treat alike mortgage and conditional sale cases. See KEEtoN, op. cit. supra note 3, at 170-73. For the suggestion that the cases involving the sale of personal property are "about equally divided," see In the Matter of Future Mfg. Co-op, 165 F. Supp. 111 (N.D. Cal. 1958); 72 Harv. L. Rev. 1380, 1381 (1959). But see Gillingham v. Phelps, 5 Wash. 2d 410, 105 P.2d 825 (1940).

\(^{51}\) The maneuvering between carriers and shipper's insurers over this result provides an interesting sidelong. See VANCE, INSURANCE 794-96 (3d ed. 1951); Note, 31 Harv. L. Rev. 901 (1924).

All too often the sole explanation advanced by opinions reaching this result is the applicability of the doctrine of subrogation. Indeed, where there is dispute on the matter today, it nearly always appears in the narrow focus of whether the subrogation provision in the insurance contract provides rights of that sort greater than those arising by operation of law. This rationale and this focus of dispute are unfortunate, for subrogation is merely a means to an end rather than an end in itself. The basic issue is whether loss is to be ultimately allocated to the third party rather than the insurer. If that question is affirmatively answered, then subrogation is the process by which that allocation is effected.

A doctrine originating in equity, “legal” subrogation is the product of the more fundamental value judgment allocating loss between one viewed as primarily and another thought to be only secondarily liable. For example, subrogation of an insurer to the insured’s right against a tortfeasor must have been based on the notion that the tortfeasor is primarily liable because guilty of fault, while the insurer whose liability rests only on contract is only secondarily liable. It was Professor Langamid’s inability to find “fault” in absolute or derivative liability cases which led to his proposal that the subrogation result be replaced by an apportionment solution of such problems. Mr. King’s more recent proposal of apportionment between insurers and third parties who are guilty of no more than ordinary negligence follows the same line of reasoning—that the degree of “fault” in such cases does not justify the “primarily liable” characterization. This challenge to “legal” subrogation is strengthened if, as has been suggested, tort liability has taken on a purely compensatory function.

Justification of subrogation of the insurer of a mortgagee to the latter’s rights against the mortgagor is somewhat more difficult, for the element of fault disappears here. One explanation of the applicability

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55. Campbell, supra note 48, at 76-77.


of subrogation, however, is that the mortgagor typically has possession or control of the property and is therefore in a better position to avoid loss. Another is that the mortgagor’s obligation is independent of and antecedent to the loss, the fortuitous occurrence of which ought not alter his duty to pay. Undoubtedly the “personal contract” concept has also been a factor, although it would seem that, if sound, the doctrine has potentially more general application.

All of these arguments can be made to support subrogation against chattel mortgagors and conditional sale or installment purchasers. Decisions in such categories are not uniform, however. The possession or control and personal contract arguments, at least, are applicable also where the third party is a bailee or tenant. Only the personal contract argument, however, seems germane when the third party is a landlord, and subrogation is usually denied here.

It thus becomes apparent why American courts, except in the mortgage cases, have been traditionally reluctant to permit subrogation to contract rights. The justification for characterization of the third party as primarily liable in such cases simply grows weaker and weaker until it rests on nothing firmer than “personal contract.”

Yet there is another, independent approach to the question which may be used to rationalize a subrogation result even when the third party cannot be classified as primarily liable. It is the argument, usually denominated “conventional” subrogation, that the subrogation clause of the insurance contract may, without more, require that result. To elaborate, the insured is the owner of a potentially valuable right against a third party. If he chooses to assign that right to the insurer in partial payment for insurance coverage (the premium supplies the remainder), he should be allowed to do so. Essentially, it is a freedom-of-contract argument. It might have met with immediate objection were assignment of tort claims involved, but they, already covered by “legal” subrogation, are not.

58. Actually it is the personal contract argument which seems to have been most regularly used to justify the subrogation result. See 1 Glenn, Mortgages § 27.5 (1943).


61. See Kimball & Davis, supra note 1, at 860-68. A number of courts in the process of denying subrogation, have suggested that a policy provision calling for subrogation under the circumstances might have produced a different answer. See In the Matter of Future Mfg. Co-op., 165 F. Supp. 111 (N.D. Cal. 1958); Fields v. Western Millers Mut. Fire Ins. Co., 290 N.Y. 209, 48 N.E.2d 489 (1943).
In a recent article Professor Kimball suggests increased insurer interest in "conventional" subrogation. This is not surprising for insurers have much to gain and nothing to lose from its recognition. An alliance of "legal" and "conventional" subrogation would provide uniform allocation of loss to the third party, for the insurer in large measure dictates the terms of the insurance contract. What is perhaps more important is the indication of judicial receptivity to conventional subrogation. Traditionally, American courts have concluded that the subrogation provision of the insurance contract confers no rights which did not accrue without it—that the provision simply makes explicit that which was implicit.

To accept conventional subrogation on the ground of freedom of contract constitutes, as did allocation of loss according to the choice of the insured, an abandonment of the power to control loss allocation. It puts the matter entirely into the hands of insured and insurer, realistically into the hands of the latter. It allocates loss to the third party not because the court believes it should fall there, but because insured and insurer have agreed on that allocation. The agreement of those parties should be controlling only if the court truly is indifferent to the allocation problem. Freedom of contract is always subject to overriding public policy; surely loss allocation is a matter of this scope. To object to conventional subrogation is not to reject ultimate allocation of loss to the third party. It merely permits retention of the allocation problem in the realm of judicial control.

Within that realm, however, there are objections to allocation of loss to the third party and therefore to subrogation by operation of law. One of these, that subrogation is a windfall to the insurer, has already been discussed. And even if it could be established that subrogation has been a windfall in the past, that argument is not dispositive. Surely subrogation savings could be passed on to insureds, if not by initial reduction of premiums, by dividends or credits against ensuing premiums on a ratable basis.

Perhaps a more practical and therefore more serious objection to allocation of loss to the third party is one posed by the process rather than the result. Subrogation creates pitfalls for the insured. If not avoided with care, these may leave him with less than indemnification, a startling conclusion when it is considered that he starts with multiple sources of indemnification. Release or discharge of the third party by the insured

63. Cf. Patterson, Essentials of Insurance Law 150-51 (2d ed. 1957); Kimball & Davis, supra note 54, at 860.
64. See text accompanying notes 30-37 supra.
destroys the insurer's right of subrogation. Almost uniformly, destruction of that right provides the insurer with an absolute defense to an action on the policy if the proceeds have not already been paid. And if they have been paid, in most jurisdictions the insurer is allowed to recoup that payment from the insured. Obviously, unless the insured released or discharged the third party only after being totally compensated by him, that act leaves him with less than total indemnification. In several jurisdictions this harsh doctrine has been softened, at least where the insurer has already paid and is seeking to recover back, by requiring that the insurer show that it is prejudiced by loss of the right. This approach, however, is somewhat ambiguous. What must the insurer show? That it would have recovered $X from the third party which entails proof of third-party liability? Subrogation claims are settled or compromised just as any others. Lack of clarity as to what must be proved, as well as difficulties as to how an agreed-upon element could be proved in litigation between insured and insurer, has led to rejection of this modification of the rule.

Operation of the destruction rule can be softened in other ways. Two possibilities are briefly suggested: (1) a distinction might be drawn between intentional and unintentional (as to fact of release) releases; (2) the insurer might be required as a condition of avoiding liability or of recovering back on this ground to take certain steps to adequately warn the insured of the pitfall. A combination of pre-loss warning when the policy is issued and regularly thereafter and of post-loss warning on receipt of notice of loss would surely be helpful, although it would not necessarily eliminate the danger.

It is at least arguable that the pitfall objection is an inadequate one. Perhaps the insured deserves this fate if he tampers with the means purposefully established for accomplishing a chosen allocation of loss.

69. The rule has already been qualified so that the insurer's subrogation claim against a third party is not destroyed when the latter obtained the release from the insured with knowledge of the right. Calvert Fire Ins. Co. v. James, 236 S.C. 431, 114 S.E.2d 832 (1960).
70. This argument presupposes that the purpose of subrogation is more than prevention of double recovery by the named insured. That premise is confirmed by cases which leave the insured without full indemnification because of his destruction...
F. A Category-by-Category Approach

These, then, are the alternatives and the arguments for and against them with an indication of their judicial following. In view of the objectionable features of each of the five solutions, it is hardly surprising that different jurisdictions have disagreed about similar cases. Individual judges and courts, as well as commentators, are likely to be variably impressed by the different arguments. It is no less surprising that within a single jurisdiction decisions adopting now one solution and now another are reached. Confronted with the conflict a court quite naturally seeks additional guidelines; the result is categorization based on factual difference. Thus, in one state a third-party tortfeasor or mortgagor may be required to bear the loss through application of the subrogation-result, while his counterpart, a tenant or purchaser of realty, gets the benefit of insurance procured by the landlord or vendor.

Factual distinction, of course, is not peculiar to this problem. And it would seem a perfectly valid approach if the factual differences are at the same time real and relevant. Often it seems they are not. Perhaps the best example of unreal distinction appears in a contrast of the mortgage and sale-of-realty cases. Where the insured is a mortgagee and the third party a mortgagor, loss is placed almost uniformly on the latter by subrogation of the mortgagee's insurer to the mortgagee's rights against the mortgagor. On the other hand, in most jurisdictions a purchaser under an executory contract for the sale of realty is given the benefit of the vendor's insurance, i.e., loss is allocated to the insurer. Yet the two cases are remarkably alike. In both the liability of the third party is contractual and is antecedent to and independent of the insured event. In both the third party has, in addition to an interest based on legal liability, a property interest of his own which would of the subrogation right. See, e.g., Rogers v. American Fidel. & Cas. Co., 52 N.J. Super. 254, 145 A.2d 344 (1958); 2 Richards, Insurance § 196 (5th ed. 1952).


74. See note 25 supra.
support insurance at full value and which survives the contractual liability.

Why are different results reached? To say that the doctrine of equitable conversion, applicable to the sale of realty but not the mortgage cases, requires the dichotomy is not enough. That doctrine is, after all, only a legal fiction providing the original basis for assessment of risk of loss to the purchaser. Risk of loss is on the mortgagor who owns the equity of redemption without the necessity of a fiction. Perhaps it can be argued that the usually short duration of the vendor-purchaser relationship when contrasted with the ordinarily longer mortgage period justifies different treatment; it may seem unreasonable to expect the purchaser to get insurance so quickly. But the time element is a variable. In a given case the mortgagor may be as much a newcomer to the property as the purchaser and the duration of the mortgage period shorter-lived than that of the executory contract. Surely, if time has this significance, it should be examined case-by-case to see whether the third party at the time of loss had had a reasonable opportunity to insure. Still another ground of distinction may be possession. The mortgagor is more apt to have possession than the purchaser and, on that account, he may be more obviously responsible for loss. The likelihood, however, is not by any means a certainty. Again, if possession is pivotal, inquiry ought to be made case-by-case and the decision should not be reached on generalities.

Given the different treatment of these cases, how do we deal with controversies in a third and related category, the sale of personalty? Is the buyer to be given the benefit of the conditional vendor's insurance or must he bear the loss by operation of subrogation? Probably a majority of decisions have reached the latter result. Obviously, the problem is strikingly similar to both the mortgage and sale of realty problems and accentuates the fact that different treatment of those cases involves inconsistency.

That inconsistency has been noted elsewhere and the suggestion has been made that the mortgage cases should be decided as are sale of realty problems. This would eliminate the inconsistency difficulty without resolving another. If both cases are to be treated alike, perhaps it is the subrogation result that should apply. This would avoid the "per-

77. See note 50 supra.
sonal contract" objection, for example. But is it really desirable for
the purchaser of realty to bear the loss, or do we really want the
mortgagor to have the benefit of mortgagee's insurance? Are the distinc-
tions relevant in the sense that they accomplish what is sought in the
best possible way?

III. Thesis

Although these cases arise in very different factual contexts, they
alike pose the insurance problem initially stated. Neither the difficulties
with the competing solutions nor the factual variations necessarily end
a quest for uniform treatment of that question. It is the thesis of this
article that, with one exception, its appropriate solution is ultimate alloca-
tion of loss to the third party by means of subrogation. Double recovery
violates the principle of indemnity which is fundamental to property
insurance law. In addition to the weaknesses already noted, the other
solutions wholly, partially or irregularly reallocate risk of loss between
the insured and the third party simply because of the insurance by giving
the third party the benefit of the insurance. The exceptional case is that
in which the third party has explicitly contributed to the cost of the
insurance; no reallocation of risk there results from giving the third party
the benefit of the insurance. This thesis does not involve the conclusion
that the insurance factor lacks significance. It is of great relevance; but
the appropriate juncture for its consideration is at the point of initially
fixing risk of loss between the insured and the third party. Once that
risk has been rationally allocated with due regard for the insurance
factor, the presence or absence of insurance should not bear on allocation
of loss.

A. Reallocation of Risk of Loss

By definition the insurance problem is limited to cases where,
absent insurance, the law puts risk of loss on the third party. To give

79. One court, allowing a conditional vendee the benefit of the vendor's insurance,
concluded that this factor was of less significance than "equitable considerations
favoring the vendee." In the Matter of Future Mfg. Co-op., 165 F. Supp. 111 (N.D.
Cal. 1958).

80. This is an oversimplification only to the extent that, where a third party
under no legal obligation has indemnified the named insured, a comparable problem
may arise. In such a case the insured has been denied further recovery from his
This position can be sustained on the technical ground that the insurer was denied its
option to itself replace or repair, 221 N.W. at 655. The court also justified the result
on the ground that the insured sustained no loss. The latter theory prevents double
recovery, and the relationship of the third party to the property can be used to
distinguish the gift cases. Contra, Edlin v. Security Ins. Co., 269 F.2d 159 (7th Cir.
1959) (condemnee entitled to insurance proceeds although compensated by condemnor
him the benefit of the insurance reallocates risk of loss to the insured solely because the latter has insurance. More accurately, it puts risk of loss on all those insureds covered by the particular insurer against the same kind of loss, but the reallocation effect is the same whether insureds are viewed individually or collectively.\(^8\) An insurance contract does not shift loss or the risk thereof from the named insured to the insurer. Rather, it distributes loss and risk among all of those insured. They pay regular premiums which are the source from whence the individual insureds who actually suffer loss are indemnified. To an insured, then, the premium is simply a substitute for loss.\(^2\) It is a desirable substitute because it is an easier burden to bear than loss itself, but it is a burden nonetheless. To give the third party, who is otherwise liable, the benefit of the insurance is to put the burden of the loss, through the burden of the premium-substitute, on the insured. It is effectively a reallocation between the insured and the third party of loss or risk of loss.

Not only does this reallocation occur when the third party is given the full benefit of the insurance, but it also takes place for the same reasons, although only partially, when loss is apportioned between insurer and third party. In reality loss is apportioned between the insured and the third party. The apportionment solution was criticized as a compromise;\(^3\) it is a compromise on risk of loss. The allocation of loss to insurer or third party at the election of the insured approach produces the same result when the insured selects his insurer as the loss-bearer. The election-by-the-insured result takes the question of risk of loss from the courts and vests it in the individual insured.\(^4\)

This reallocation does not occur when the insured is allowed a double recovery. That result, however, clearly violates the indemnity principle. That principle seems too fundamental to the law of insurance, indeed to private law generally, to be ignored. Nor does reallocation follow from the subrogation result. The insured does not lose from allocation of loss to the third party. He stands to gain if his premiums presently reflect subrogation recoveries, as is claimed, or are made to

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which might have abandoned condemnation after the fire). In such a case the reasons urged herein for ultimate allocation of loss to the third party have no application. Therefore, no reason can be found why the insured should not recover from the insurer, the recovery being impressed with a constructive trust for the benefit of the third party.

81. The fact that loss is reallocated to all insureds provides an additional basis for objection to allocation at the election of the insured. It is one thing to permit him an election against his own interest; it is quite a different matter to vest in him the power to prejudice co-insureds.


83. See text accompanying notes 24-34 supra.

84. See note 81 supra.
reflect them, as is clearly possible. There the third party ultimately bears the loss, and to that extent the burden of carrying insurance is reduced.

B. The Exception: Where the Third Party Contributes to the Cost

Reallocation does not take place, of course, when the third party contributes to the cost of any insurance protection from which he benefits. Because uniform application of the subrogation result rests finally on the reallocation argument,\textsuperscript{85} whether there has been such a contribution becomes all-important.

The key to the answer does not lie in the basis of the third party's liability to the insured; it requires a further examination of their relationship.\textsuperscript{86} Obviously there is no contribution when the sole link between them is that the third party caused the loss. Even in retrospect the appropriate size of a third-party contribution would be impossible to compute. The only possible source of contribution appears to be in the consideration flowing between the parties when they are tied by contract. Within that seemingly narrow framework, however, two very nice questions appear: Was there a contribution? Assuming a contribution, was it adequate? The difficulties posed by the first of these questions are probably enough to deny the third party the benefit of insurance in the absence of an explicitly contracted-for contribution.

Again the mortgage case is illustrative. Arguably, the funds with which a mortgagee insures come from the mortgagor's interest payment. They must if the mortgagee is to profit from the transaction. This argument might be buttressed by a citation of those decisions refusing to increase the mortgage debt by insurance costs of the mortgagee,\textsuperscript{87} although it seems more likely that such decisions are a product of the usual view that such insurance is for the sole benefit of the mortgagee. On the other hand, it is just as likely that the interest rate for the

\textsuperscript{85} It has been suggested that an additional reason for denying the third party the benefit of the insurance is to avoid an increase of risk to the insurer. Young, \textit{Some "Windfall Coverage" in Property and Liability Insurance}, 60 \textit{COLUM. L. REV.} 1063, 1064 (1960). The revenues of the insurer must at least equal losses sustained plus the costs of administration. Premiums, the primary source of revenue, are computed on the basis of predicted loss experience. \textit{Mowbray & Blanchard, Insurance} 372-73 (5th ed. 1961). If protection of the third party's liability interest increases the risk and therefore losses, the security of the entire plan is threatened. The threat may be more apparent than real since the insurer has assumed the risk of the named insured's loss for which third parties are liable. Presumably the premium reflects that fact unless it has been adjusted for subrogation recoveries. See text accompanying notes 44-47 \textit{supra}.

\textsuperscript{86} See Mackaman, \textit{Subrogation: A Landlord-Tenant Problem}, 4 \textit{Drake L. Rev.} 79 (1955) (urging that a lessee be given the benefit of lessor's insurance). This is not to be confused with Professor Young's suggestion that identification of the third party's claim follows from the relationship. Young, \textit{supra} note 85, at 1064-65.

mortgage loan is merely that prevailing in the area at the time, and includes no contribution for insurance costs. This is supported by the fact that quite often the mortgagor insures both interests at his own expense.88

Contribution to the cost of insurance becomes even less certain in cases where all monetary consideration flows from the insured to the third party. Where, for example, is there a contribution to the cost of a bailor's insurance by a bailee to whom a storage fee is paid? Theoretically the bailee might lower his fee when dealing with insured bailors. It seems more likely, however, that included in his fee will be a charge for the cost of his own liability coverage and, sometimes, for express coverage of the bailor's property interest.89

In sum the presence and amount of an other-than-explicitly contracted-for contribution is too uncertain a matter on which to turn the insurance problem in an individual case. It involves either detailed fact-finding on a hazy question of intent of the parties or use of a presumption one way or the other.90 The possibility of an implicit contribution is not to be ignored entirely. Its relevance, however, is also greater in initial allocation of risk of loss.

C. The Relevance of Insurance

The issue is not resolved against giving the third party the benefit of the insurance simply by recognition of the fact that to do so reallocates risk of loss between the insured and the third party. The question remains whether such reallocation is appropriate.

Traditionally the courts have given a negative answer whenever the problem has been expressly presented in terms of the appropriateness of the reallocation. This has been especially true when the third party

88. A “loss payable” or “standard mortgagee” endorsement is used. See note 72 supra. Under the former the mortgagee is subject to the insurer’s defenses against the mortgagor; under the latter he is not. The “standard mortgagee” endorsement is usually said to create an independent contract between mortgagee and insurer. Vance, Insurance 776 (3d ed. 1951). This theory has created some problems. See, e.g., Aetna Ins. Co. v. Eisenberg, 188 F. Supp. 415 (E.D. Ark. 1960) (bailee allowed recovery on that theory despite misrepresentations of bailee). Characterization of the mortgagee as a third party beneficiary expressly freed by the policy from such defenses might be more accurate and avoid some of these problems.

89. The bailee may insure for the benefit of his bailor. Patterson, op. cit. supra note 63, at 125. This is sometimes described as a representative interest. To label it a distinct category of insurable interest seems superfluous. Cf. Keeton, Basic Insurance Law 83 (1960).

90. See 34 Chl.-Kent L. Rev. 259 (1956). Of course, where such a contribution is explicit the third party should be given the benefit of the insurance. See, e.g., Pendleton v. Elliott, 67 Mich. 496 (1887); Raplee v. Piper, 3 N.Y.2d 179, 164 N.Y.S.2d 732 (1957); Buckner v. U. S. Fire Ins. Co., 209 N. C. 640, 184 S.E. 520 (1936); Prentiss-Wabers Stove Co. v. Millers Mut. Fire Ins. Ass’n, 192 Wis. 623, 213 N.W. 632 (1927).
was a tortfeasor.\(^9^1\) Insurance coverage of the injured party, however complete, is no defense in the tort action. The same result prevails when the third party is a mortgagor. Probably the rationale most commonly encountered is that a contrary result penalizes the providence of the insured and unjustly enriches the third party. Such reasoning, however, no more than restates the effect of the contrary result—reallocator of risk.

In all events the command of history, even if clear, would not be inexorable. The possibility of change is evidenced, for example, by subsections 2-510 (2) and (3) of the Uniform Commercial Code, where insurance of the buyer and seller, respectively, produces reallocation of risk, as well as by judicial decisions in other fields. Increased interest in insurance treatment of losses has been generated by highway accidents and employee injuries. The novelty of compulsory automobile liability insurance and workman's compensation\(^9^2\) has worn off, but the insurance treatment of those problems suggests the wisdom of fresh examination of the handling of property losses.

The argument for giving the third party the benefit of another's insurance, even at the expense of reallocation of risk, must ultimately stand on the desirability of risk distribution through insurance as a means of absorbing property losses.\(^9^3\) Essentially, the justification of risk distribution is that loss, a substantial and often overwhelming burden on the individual, becomes no more than a tolerable expense when spread among a sufficiently large group. And that spreading process, of course, is the function of insurance if it is to be accomplished privately. Insurance is a means by which individuals may join to share losses occurring at random within the group.\(^9^4\) Its use, voluntarily or otherwise, is increasingly popular.

In only one area is risk distribution by insurance or any other means currently deemed undesirable. Intentional misconduct is usually thought to be best discouraged by requiring the wrongdoer to bear individually loss caused thereby. Accordingly, liability for intentional misconduct is

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91. 2 Harper & James, Torts § 25.22 (1956); McCormick, Damages 324-25 (1935).
92. In neither compulsory automobile liability insurance or workmen's compensation is loss reallocated because of insurance. Compulsory automobile liability insurance is paid for by those who would be liable in tort. Gregory & Kalven, Cases on Torts 725-42 (1959). Workmen's compensation is paid for by employers because it is believed that employee injury is an inevitable incident and therefore legitimate burden of enterprise. Id. at 710-24; Prosser, Torts 382-83 (2d ed. 1955).
93. This is the acknowledged justification of Uniform Commercial Code § 2-510 (2)-(3).
ordinarily uninsurable.\textsuperscript{95} It follows then that allocation of loss by means of subrogation to the third party guilty of intentional wrong is appropriate.

With that exception, however, the third party's liability in all our cases is an insurable one. It is therefore permissible that his risk of liability be distributed in order to avoid the possibly oppressive imposition of loss on him individually. The question remains whether the desirability of risk distribution creates a pressure strong enough to justify reallocation of risk between the insured and the third party. Clearly the answer to this question may vary with factual context. One might be willing on this basis to reallocate risk where the third party is contractually liable, but reluctant to do so when he is a tortfeasor. Evaluation of such a matter is not, properly speaking, a question of insurance law at all. These are problems of the substantive law of real property, torts, sales, etc. To label them as noninsurance questions is not to deny that they must be answered and that the answers need constant reexamination. But the labeling process is nonetheless suggestive of something important; it indicates that the timing of the evaluation is material. What leads to the thesis that the solution to the insurance problem first posed is properly the subrogation result unless the third party has explicitly contributed to the cost of insurance is the matter of timing. The appropriate point at which to weigh the desirability of risk distribution of loss through insurance is at the initial, noninsurance stage of fixing risk of loss. Once that risk has been fixed with due regard for risk distribution, it should not be altered simply because one party is or is not in fact insured. A rational allocation of risk which makes the third party liable should be adhered to by means of the subrogation result.

Three considerations support this proposition. The first is that juggling of allocation of risk because of the fact of insurance creates uncertainty. Consider the case of the buyer of goods under section 2-510(3) of the Uniform Commercial Code. He is liable for loss or damage to the property before delivery only if he commits a breach of the contract and if the seller is wholly or partially uninsured. Should he insure? The purchaser of realty faces a like question since in most jurisdictions he is given the benefit of vendor's insurance. If buyer and

\textsuperscript{95} Farm Bureau Mut. Auto Ins. Co. v. Hammer, 177 F.2d 793 (4th Cir. 1949); Employers Mut. Liab. Ins. Co. v. Hendrix, 199 F.2d 53 (4th Cir. 1952). Policy exclusion from coverage of such conduct is common. Moreover, losses intentionally produced by the insured cannot satisfy the usually stated requirement that the insured event be fortuitous. MOWBRAY & BLANCHARD, INSURANCE 54 (5th ed. 1961).

\textsuperscript{96} Whether liability for gross negligence is insurable has been the subject of debate. See PATTERSON & YOUNG, CASES AND MATERIALS ON INSURANCE 318 (4th ed. 1961).
purchaser insure because they are unwilling to take the risk and seller and vendor, as it turns out, were insured, there will be over-insurance of the property, a form of economic waste. That this uncertainty might be eliminated in theory, if the parties have the foresight to contract with regard to insurance,\textsuperscript{97} fails to recognize that this is not always feasible. Had it been so section 2-510(3) of the Code would have been unnecessary.

The problem of uncertainty is compounded if the law is unsettled. The Code eliminates that problem for the buyer. The weight of judicial authority may do so for the purchaser. But suppose the third party is a tenant and the insured his landlord?\textsuperscript{98} In some areas the law is remarkably uncertain; the third party may be confronted with both legal and factual doubts of considerable magnitude.

A second and more significant reason for insisting that the desirability of risk distribution through insurance be considered at the outset is that only at that juncture can it properly be weighed against competing interests. Undoubtedly a rule initially assessing risk of loss to the third party may be grounded on interests distinct from, although not inconsistent with, indemnification of another. Tort liability, for example, may have an admonitory as well as a compensatory feature which is lost if the third-party tortfeasor is given the benefit of another's insurance.\textsuperscript{99} Because one who has possession of property is often best able to avoid loss of or damage to it, there may be advantages in assessing risk of loss to a third party, such as a mortgagor, in possession. Attempted weighing of the competing interests governing risk of loss in all the cases in which the common insurance problem is posed is beyond the scope of this article. It is worth remarking, however, that in the two cases just cited both the competing interest and risk distribution may be given effect by a rule allocating loss to a third party who

\textsuperscript{97} If the parties contract with reference to insurance of the property, either release of the third party or express contribution by him to the cost of insurance seems probable. See General Mills, Inc. v. Goldman, 184 F.2d 359 (8th Cir. 1950) (lease absolved tenant from liability); Buckner v. U.S. Fire Ins. Co., 209 N.C. 640, 184 S.E.2d 520 (1936) (mortgagor given benefit of coverage since, under terms of mortgage, chargeable with mortgagee's insurance costs).

\textsuperscript{98} See King, supra note 57, at 81. Cases adopting the subrogation result are regularly found. E.g., Chicago, St. Louis & New Orleans Ry. v. Pullman Southern Car Co., 139 U.S. 79 (1891); Hartford Fire Ins. Co. v. Chicago Tunnel Terminal Co., 12 Ill. App.2d 539, 139 N.E.2d 770 (1958); F.H. Vahlsing, Inc. v. Hartford Fire Ins. Co., 108 S.W.2d 947 (Tex. Civ. App. 1937). For the view that there is a trend toward construction of the lease exculpating the lessee and allocating loss to the lessor's insurer, see Martin, Liability for Loss by Fire Among Insurer, Tenant and Landlord, 18 Ohio St. L.J. 423 (1957).

\textsuperscript{99} SALMOND, TORTS 21 (11th ed. 1953); PROSSER, TORTS 20 (2d ed. 1955).
can insure against liability. The third party’s burden becomes his liability insurance premium rather than the cost of the loss itself. In some cases it may be impossible to reconcile the interests; in that event the more important of the two should prevail. However, to reallocate risk simply because the injured party is insured strips competing interests of any weight and makes risk distribution the sole factor in decision.

Moreover, the risk distribution factor is one which itself changes in weight in at least two respects which vary with the factual context. The first is the likelihood of an implicit contribution by the third party to the cost of insurance. The greater the likelihood of that contribution the stronger will be the risk distribution interest. Consequently, the argument for risk distribution is clearly weightier where the third party is contractually linked to the insured. If there is monetary consideration flowing from the third party, this interest is further strengthened. And, since it is impossible at this juncture to determine whether there is insurance, likelihood of insurance coverage by one party or the other is important. Such considerations as commercial availability of insurance at reasonable rates and the relationship of the parties to the property are obviously relevant.

It may be urged that this balancing process is so sensitive that to insist upon it in the abstract, i.e., without knowing whether there will in fact be insurance coverage of the property at all, deprives the court of needed flexibility. For example, it might be argued that the position of section 2-510(3) of the Uniform Commercial Code is sound—that the competing arguments for assessing risk of loss to seller or buyer are so closely balanced that the problem can only be resolved in light of whether the seller is actually insured. It is clear, however, that this argument necessitates the uncertainty and prevents true balancing of competing interests. It carries with it an additional, self-contained difficulty involving the third and final reason for the thesis of this article. Although it seems to give primacy to the risk distribution interest, it actually undermines that interest.

Reallocation of risk between parties simply because one of them is insured may only obscure the need for a fundamental reexamination, in the light of the desirability of risk distribution through insurance, of the initial assignment of risk. A decision giving the third party the

100. _But cf._ 2 HARPER & JAMES, TORTS § 25.23 (1956) (discussing social insurance).
101. See Brewer, _An Inductive Approach to the Liability of the Tenant for Negligence_, 31 B.U.L. REV. 47 (1951) (suggesting that a tenant finds insurance difficult to procure and that one solution is to absolve the tenant from liability for negligence).
102. One solution is “social insurance.” See 2 HARPER & JAMES, TORTS §§ 25.19-23 (1956); GREGORY & KALVEN, op. cit. supra note 92, at 710-24, 743-86. Its utility has been
benefit of insurance where he would otherwise be liable achieves dis-
tribution of the particular loss. It does no more than that, and it may
discourage efforts to do more. By means short of compulsory insurance,
risk distribution through insurance is most likely to follow the exertion
of pressure on a party to insure. That pressure is greatest where, by
allocation of risk, a party must absorb the loss individually if he does
not insure. Thus, initial rules fixing risk of loss may need reassessment
in terms of application of such pressure to the appropriate party as a
means of achieving more widespread distribution of loss. It seems
likely that a number of current rules governing risk allocation need
such a reexamination. Many were formulated at a time when the
relevance of risk distribution was not recognized and have remained
undisturbed despite growing awareness of that element.

D. An Illustration

The sale of realty case supplies a relatively simple illustration of
this thesis. A decision giving the purchaser the benefit of vendor's
insurance, *i.e.*, placing the loss on the insurer where the purchaser would
bear the loss in the absence of insurance, seems a desirable solution of
the controversy immediately before the court. The loss is thus distributed
in society rather than being placed solely on the purchaser. At the same
time the result quite clearly reallocates the risk from the purchaser to
the insured vendor who paid the insurance premium and who thus, with
other insured owners, paid for the loss. Of course it is possible that the
vendor has recouped his insurance costs through the purchase price, but
in the absence of an express provision to that effect in the sale contract
there is no certainty that he has done so.

Yet, if distribution of loss through insurance is of sufficient import-
ance to justify this reallocation, the decision is incomplete. It puts no
pressure, other than fear of the purchaser’s insolvency, on the vendor
to insure. It may even tempt him to cancel existing insurance coverage
if he is satisfied that the purchaser is financially secure. Without ins-
urance he will be indemnified for any loss by the purchaser; with
insurance any loss falls, at least indirectly, on him. Pressure to insure
or to remain insured can be exerted on the vendor, however, if risk of
loss is allocated to him so that insurance coverage is his only escape
from loss. Moreover, there are several factors that make it logical to put
this pressure to insure on the vendor rather than on the purchaser. The

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suggested primarily with regard to industrial and highway accidents. The latter, of
course, often include some property losses. Despite the economic significance of
property losses generally, such an approach is not advocated here.
cases which give the purchaser the benefit of vendor’s insurance reflect the fact that the vendor is more likely to be insured than the purchaser because of his prior connection with the property, although, unlike some of the other situations in which the problem arises, insurance is readily available to the purchaser. At the same time the vendor is in a position to require the purchaser to contribute to the cost of insurance by adjustment of the purchase price; he has a means of insisting that one with an economic interest in the property share the cost of protecting that interest. Thus risk distribution is fostered, and comfortably so, by allocation of risk to the vendor from the outset.\(^{103}\)

Are there competing considerations? Assuming first that the vendor retains possession, there do not seem to be any such considerations unless the purchaser causes the loss. If he does so intentionally, risk of course should be assessed to him, and it is uninsurable. If loss is negligently caused by the purchaser, probably he should bear the risk since it is his conduct that has made the agreed exchange impossible.\(^{104}\) There may be some merit, however, in the argument that the purchaser should be excused, or at least that the purchase price should be abated by the amount of loss, since the vendor was in the better position to obtain protection.

If the purchaser does take possession, there is a conflict of the same sort when he also causes loss. There is also a conflict when he does not cause the loss, for with possession comes the ability to take steps to prevent loss. This ability, incidentally, may alter the risk from the insurer’s standpoint. More importantly, it may be argued that risk should be allocated to the party in possession who is able to control the property.\(^{105}\) Does this factor override the insurance consideration? The framers of the Uniform Vendor Purchaser Risk Act,\(^{106}\) engaging in the kind of reexamination of risk allocation advocated here, apparently

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103. An additional argument for assessing risk to the vendor, available where the buildings are an important part of the bargained-for exchange, is impossibility. See Anderson v. Yavorski, 120 Conn. 390, 181 Atl. 205 (1935).

104. This apparently is the position taken in the Uniform Vendor Purchaser Risk Act, 9C U.L.A. 314 (1957), which deals only with cases where the property “is destroyed without fault of the purchaser.”

105. See 4 Williston, Contracts § 942 (rev. ed. 1936).

106. Adopted in California (1947), Hawaii (1941), Illinois (1963), Michigan (1941), New York (1936), North Carolina (1959), Oregon (1955), South Dakota (1937) and Wisconsin (1941). 9C U.L.A. 131 (Supp. 1963). The moving force behind the act was Professor Williston, Handbook of the National Conference of Commissioners on Uniform State Laws 204 (1934). The theoretical justification for assessing risk to the purchaser only on transfer of title or possession is that this reflects the parties’ intention. 4 Williston, Contracts § 940 (rev. ed. 1936). He argued that insurance is the most important practical reason for leaving risk of loss on the vendor in possession. Id. § 942.
thought so. That legislation puts risk of loss on the vendor between the time of contracting and transfer of title or change of possession, whichever occurs first. Whether this act gives too much weight to the possession or control factor may be debated. However, the apparent subordination of the insurance consideration is not as drastic as may appear. The assumption of possession may be thought of sufficient moment to bring home to the purchaser the need for insurance protection which is readily available to him.

In any event the decision is the result of a balancing of truly competing interests, a process made impossible if the insurance element is considered only where there actually is insurance when it is then dispositive. The weighing of competing considerations is difficult, but it should not be evaded on that ground.

IV. CONCLUSION

Treatment of these cases as involving merely issues of insurance law has had unfortunate consequences. The debate about the competing insurance solutions is in large measure misleading. In reality, the question posed by each of these cases is one of risk of loss and should be resolved in that light. Insurance stands as a significant factor in allocation of risk of loss because it provides a means for distribution of losses. In many instances this factor has not been given adequate consideration in determining desirable allocation. To evaluate it properly, however, the narrow insurance issue must be uniformly treated. Where risk of loss has been allocated to the third party with due consideration of the risk distribution factor, loss should be ultimately allocated to him even when another is in fact insured. Only thus can the problem of loss allocation be examined in its proper perspective.