CONNECTICUT INSURANCE LAW JOURNAL

VOLUME 10

2003-2004

CONNECTICUT INSURANCE LAW JOURNAL

VOLUME 10 2003-2004 NUMBER 1

CONTENTS

A 21ST CENTURY SYMPOSIUM ON JOSIAH ROYCE'S *WAR AND INSURANCE*

Tom Baker[*]

Josiah Royce's *War and Insurance* has long topped my list of unlikely insurance books. Written by a prominent Harvard philosopher at a feverish pace following the outbreak of the First World War, delivered as a lecture at Berkeley, and then quickly printed in book form, *War and Insurance* seemed to leap off the shelves into my hands almost every time I explored the insurance collection in a new library. In time, the presence or absence of the book (along with the wonderful *Yale Lectures on Insurance*) came to signify whether a library had an interesting early 20th century American insurance collection.

Beyond that, it was difficult to know exactly what to make of the book. The basic argument – that a mutual reinsurance organization formed by member nations could eliminate revolution and war – seemed hopelessly optimistic and naïve. Yet, the idea received serious and extensive attention at the time, with front page coverage in the New York Times and a receptive audience among insurance professionals. Moreover, any serious effort to place insurance within a philosophical context certainly deserves attention, especially today, when even business schools no longer pay much attention to insurance and faculty in liberal arts institutions rarely acknowledge that it exists.

The opportunity to give *War and Insurance* that attention came in early 2003, when the members of the New England Insurance and Society Study Group engaged in an extended conversation with and about the book. First in Boston and then in Hartford (where we were joined by Jonathan Simon via video link from Boalt Hall, near the site of Royce's lecture), the group struggled to understand Royce in his context and to glean something from *War and Insurance* that would have meaning today. The concrete results of those efforts appear in this symposium issue.

The issue opens with a reprint of Royce's essay, together with his extensive introduction. As usual, the introduction was written some time after the main text. In this case, however, that usual chronology should have been explicitly acknowledged by printing the "introduction" at the back of the book. The introduction is in fact a commentary on the essay, and is worth a second look after reading that essay.

---

* Connecticut Mutual Professor and Director, Insurance Law Center, University of Connecticut School of Law.

Jonathan Simon begins our contemporary encounter with Royce in the essay "Peace and Insurance: Recovering the Utopian Vision of Insurance in Royce's *War and Insurance*." "[S]tanding on the other side of the great twentieth century expansion of insurance," (73) Simon finds in Royce both a worthy intellectual ancestor for contemporary students of insurance and society, as well as an inspiration in the search for effective communities of interpretation. While Simon reports that Royce failed to appreciate the economic and organizational limits of insurance, Simon honors Royce's early recognition of "the hermeneutic function of insurance, i.e. its ability to define risks and articulate choices that responsible subjects must make." (74)

Carol Weisbrod's essay, "War, Insurance and Some Problems of Community," tackles the concepts of community Royce addressed in *War and Insurance* and explores how community figured in Royce's life as well as his work. Perhaps most significantly, she identifies an implicit, "wounded community" that may have been the source of the passion that drove Royce to write and promote *War and Insurance*, but that, paradoxically, exposes the difficulty of building a world community around insurance or, indeed, any other kind of institution. As Weisbrod points out, and as Royce's own life illustrates, the default community is sectarian, mindful of boundaries, reluctant to include, and eager to expel those who are different. Times of stress – particularly war – challenge any effort toward universal community, especially on the international stage.

In "Postnational Insurance on the Eve of Destruction" Timothy Alborn places *War and Insurance* within the context of the utopian insurance marketing of its time. Alborn juxtaposes Royce's ideas with those of Darwin Kingsley, President of New York Life Insurance Company from 1907 to 1930, and demonstrates many of the core themes in *War and Insurance* – particularly salvation through insurance – also appeared in Kingsley's early speeches, which were published together as *Militant Life Insurance* in 1911. What Kingsley saw more clearly than Royce, however, was the threat that the nation, and not just nationalism, posed to the universal (if thin) solidarity that global insurance could provide. Thus Kingsley would have been far less sanguine than Royce about the ability of an inter-national insurance organization to end the problem of war. On the other hand, Kingsley failed to see the benefits of social insurance, delivered through the state, that Royce clearly articulated.

In "Paradigms, Assumptions, and Strategies: Royce and Method," Thomas Morawetz closes the symposium with a meditation on *War and Insurance* that helps explain the contradictory reactions that the essay evokes: "both clairvoyant and obsolete, both subtle and naïve." (123).

Charting an elegant path through Thomas Kuhn, film, and the history of philosophy, Morawetz shows how Royce's ideas are wedded to "theories of human nature and of politics and assumptions about personal and national self-transcendence that seem out of touch with contemporary ways of thinking." (124). While that does not mean that we have nothing to gain from Royce's encounter with insurance, it does it explain why the gain comes in the form of inspiration, and not in the form of useful ideas that can be repackaged for the twenty-first century.

Readers clearly will judge for themselves, but our authors report having learned a great deal from their encounter with Royce. Not a blueprint for our time and not even a blueprint for his own, Royce's *War and Insurance* nevertheless deserves our attention, both as a testament to the utopian appeal of insurance and as a reminder of the possibilities, and some of the limits, of insurance communities.

WAR AND INSURANCE

Josiah Royce[*]

PREFACE

As a preparation for an address which I have been invited to deliver on the occasion of the twenty-fifth anniversary of the Philosophical Union of the University of California, I read to a general audience, at the summer session of that University at Berkley (during the last fortnight of July, in the present year) a series of six philosophical lectures. These six preparatory lectures contained a restatement of the theory of what I had called, in a recent book of mine, the "Process of Interpretation," and, in particular, discussed the nature and functions "Communities of Interpretation." What this last term means the reader of this present may learn, if he pleases, on pages 47-64.

I had intended to continue and to summarize the main theses of these six lectures in my anniversary address before the Union.

The summer session ended. The war began.

My address, in the form in which I had intended to read it, was thus rendered useless, and was thrown aside. But the theory both of the "process of interpretation" and of "the communities of interpretation" had, during the last two years, seemed to me capable of a wide range of practical applications; and same of these, including a sketch of certain very general philosophical aspects of banking and of insurance, had been already presented to my audience at Berkeley during the July lectures just mentioned.

Abandoning, then, my previous plans for the address before the Union, I wrote this present address, — partly in the neighborhood of Los Gatos, in the Santa Cruz mountains of the California Coast Range, and partly at Berkeley. This writing took place between August 2 and August 27, under the immediate influence of impressions due to the events which each day's news then brought to the notice of us all; and yet with a longing to see how the theory of "interpretation" which I owe to the logical studies of the late Mr. Charles Pierce, would bear the test of an application to the new problems which the war brings to our minds.

I have to thank my friend, Mr. John Graham Brooks, of Cambridge, Massachusetts, as well as my colleague, Mr. H. B. Dow (lecturer on Insurance at Harvard University); and, above all, my philosophical colleague at the University of California, Professor Charles H. Rieber (who

---

* Preface dated September 15, 1914, Cambridge, Massachusetts.

was my host while I was at Berkeley, and who is also the president of the Philosophical Union), for some careful criticisms of this address; and for their aid in preparing it for publication.

INTRODUCTION

WHEN a number of persons are subject to risks, they may contribute to a common fund, and then use this fund as a means of making good certain of the losses which, in consequence of these risks, fall upon one or another member of the company of adventurers who thus contribute. The contributions themselves form an insurance fund. The method of business in question constitutes the basis of the modern institution called insurance. The special ways in which the adventurers are brought into association, and the sorts of risk against which the individual members of a group of insurers are protected, vary widely. But at the basis of any systematic modern method of insurance lie considerations which belong to the general theory of probability, and which are everywhere in question in the statistical sciences. Since risks, and the adventures of individual men, are amongst the most practical matters with which we are acquainted, while the theory of probability and the principles of statistical science involve some of the most abstruse problems of logic and mathematics, insurance, viewed either as a mode of business or as a social institution, is one of the most momentous instances of the union of very highly theoretical enterprises with very concrete social applications.

Furthermore, as experience shows, the insurance principle comes to be more and more used and useful in modern affairs. Not only does it serve the ends of individuals, or of special groups of individuals. It tends more and more both to pervade and to transform our modern social order. It brings into new syntheses not merely pure and applied science, but private and public interests, individual prudence, and a large regard for the general welfare, thrift, and charity. It discourages recklessness and gambling. It contributes to the sense of stability. It quiets fears and encourages faithfulness.

But this principle of insurance has not yet been applied to international affairs, and, in so far as the present writer is aware, no one has heretofore proposed that a group of nations should form an organization for the mutual insurance of its members against any kind of risks.

The present essay offers reasons why such a proposal is both timely and feasible. Since the whole subject is new, what is attempted in this brief discussion cannot be a mature plan. This paper is preliminary, is tentative, and intends to be subject to a thoroughgoing revision. Its whole present purpose is gained, in fact, if it leads to a serious revision of its own

imperfections. It wishes to attract the attention of some wiser minds than that of its author to the fact that, at the moment of an unprecedented crisis in the world's history, the possibility of precisely this new mode of international cooperation which is here outlined is worthy of a somewhat careful study.

Nations, viewed as corporate entities, are as subject to risks as are individual human beings. Some of these risks are principally moral in their nature; but many of them can be more or less exactly estimated in economic terms. Thus, floods, famines, pestilences, earthquakes, and volcanoes may interfere, in various fashions, with the economic as well as with the rest of the social life of the peoples thus afflicted. Apart from actual famines, the considerable failure of their crops may impair, for a season, the normal supplies of individual nations. Internal crises, social and political, may interrupt their healthy development in ways involving not only moral disasters, but heavy expenses. Such evils come upon various nations with irregularly recurrent, but also with widely different, weight and seriousness. Only a vast and long-continued collection and an exceedingly difficult statistical analysis of the facts regarding such calamities could determine the regularities which a sufficiently large number of instances of national disaster would be, if properly studied, certain to show. Such regularities, however, if once discovered, would furnish an "actuarial basis" upon which an insurance of individual nations against such risks could conceivably be undertaken.

But in order that an insurance could be actually undertaken, there would have to be in existence a vast and well-secured fund, contributed by a great number of individual nations, and held, under established rules, ready to supply the means of paying to an insured nation — perhaps the whole of its loss in case of any previously defined sort of disaster; or perhaps such a portion of that loss as an equitably devised insurance contract, duly adjusted to the contribution previously made by the nation in question, declared to be payable from the common fund in case a certain definite disaster befell one of the nations which had subscribed to the insurance agreement.

Since all irregularly distributed phenomena of a given type, if sufficiently numerous, — so long as they are indeed finite in number, — show some kind of statistical regularity, this "actuarial basis" for various forms of international insurance could be furnished by the patient study of the economically definable risks and losses of a sufficiently large group of nations, followed through a long enough period of time.

But an essay which, like the present one, proposes a new international enterprise, gains little from a mention of this purely theoretical possibility.

The fortunes of nations, — their risks and their calamities, in so far as such matters are estimable in economic terms at all, — might indeed be studied historically and statistically (as if by an observer from another planet), in case we had any hope that a group of nations could be induced to contribute to a common fund to be used for the insurance of individual nations against any special sorts of disaster. And a sufficient study of duly collected historical and statistical materials could indeed indicate to an expert actuary the way in which a group of nations could make provision for compensating the individual members of the group for certain disasters. But the main concern of this essay lies in proposing as a topic for further study and conference the practical question whether any valid grounds can be given why various nations ought to be urged to contribute to such a common insurance fund.

The proposal seems so far away from our present habits of international intercourse, and so unlikely to meet approval, that one who glances at the title of the present essay is likely to turn away from it without further reading. The only hope of the author lies in the fact that the topic of the essay may be approached from various sides, and may consequently arouse the interest of several sorts of people. Where one possible reader finds himself forthwith repelled, another may be induced to give to the topic a second thought even because of the very aspect of the matter which his neighbor has thought fantastic, or abstruse, or unpractical. The business of this word of introduction consists simply in indicating how many sided the topic is, and so how many and varied are the chances that the author's proposals are worthy of being submitted to scrutiny as much when they ought to be rejected as when, by chance, some of them are worthy of approval. For the principal value of these proposals lies in the fact that they have a certain novelty (although they are also the outcome of a lengthy process of previous reflection); that they set forth a method of practical action suited to the present crisis (although they are also founded on the theses of a student of philosophy); that they refer to matters which the experience of the business world has long since tested (although they also speak of issues which the tragedies of the present moment show to be infinitely ideal and pathetic); and finally that, while they are written down in the midst of a world war, they expressly analyze and attempt to use that motive which, in the history of humanity, has thus far most made for peace.

I.

Now the body of this essay approaches our main thesis from the side of "War." It discusses in a way which I believe to be somewhat novel some of the deepest motives which render war at present so fatally recurrent and

dangerous. Hereupon it draws a contrast between these essentially war-producing motives of human life and those motives which are exemplified in certain of the well-known and important social and commercial institutions of the world. Amongst those motives it dwells in particular upon the ones which are represented by the modern institution of insurance. Hereupon it outlines, with necessary brevity and incompleteness, a plan whereby a possible future organization for mutual insurance amongst the nations may be devised and may tend towards the gradual establishment of more pacific relations among the nations than they now possess.

To the plan thus submitted certain obvious objections arise. While leaving to the essay itself its own part in the exposition and defense of the plan for international insurance which is set forth, this Introduction will best serve its purpose if it briefly emphasizes certain of these most obvious objections to the plan proposed, and then points out why they are not final, and how they may be in a measure obviated.

The first of these objections will occur to every reader. If one supposes that for any reason a group of nations were considering whether to contribute to a common fund for the insurance of the individual nations belonging to this group against any class of evils, it would be natural to say: "All international peace, under existing conditions, is fragile. A fund contributed by individual nations for their insurance against disasters would constitute a possible object of predatory attacks. In other words, the safety of the insurance fund would have to be provided for. This would be as difficult as to provide for the carrying out of any other international agreement in which large interests were involved. Concerning the administration of the fund differences of opinion would arise. Since the fund would be international, these differences would have to be submitted to arbitration or else to war. To the already existing obstacles which the Hague tribunal has to meet new obstacles would be added. Differences of opinion concerning the use of the insurance funds would frequently involve what is usually called national honor. They would, therefore, be hopeless differences. And this initial defect would appear to belong to any international insurance scheme."

It is worth while in this Introduction to call a special attention to the fact that the plan outlined in the main body of this essay undertakes to meet this very objection by a novel proposal. This proposal contemplates the founding of an entirely new but very easily comprehensible kind of international corporation, — a distinctively new entity which would be neither a nation, nor a court of arbitration, nor an international congress, nor a federation of states, nor any such body as at present exists. The new body would be a Board of Trustees, with powers and duties which would

be in the main fiduciary *and with no political powers or obligations whatever.*

The new proposal depends upon a consideration which I believe to be deeply founded in human nature, and which can be best understood only if the reader is kind enough first to become acquainted with what this essay sets forth concerning those human relations which I call "dangerous" and those which, as I believe, experience shows to be essentially peaceful in their tendencies. Common sense well recognizes, and all human history, so far as it is applicable to the problem at all, exemplifies the fact, that it is difficult to find, for purposes of dealing with delicate and controversial matters, a trustworthy politician, or a trustworthy diplomat, or a trustworthy ruler, or (in case of matters that involve sufficiently pressing and passionate issues), an entirely trustworthy and unprejudiced arbitrator or judge. *But it is much easier to find, under suitable social conditions, a faithful and enlightened and fair-minded trustee.* This essay contains many illustrations of the reasons why this assertion is true.

This essay proposes that a certain fund, contributed by various nations, should be put into the hands of a board of international trustees. The constitution and the mode of selection of the members of this board is briefly set forth in the text. The board, according to the scheme proposed, would have a minimum of judicial powers. These judicial powers would never refer to questions which could be called questions of national honor. The judicial problems of the board would be limited to questions referring to the actual interpretation of certain contracts. These contracts would be either of the nature of insurance policies, or else of other forms of trust agreements. When these contracts had put certain funds into the hands of the board, the funds being held in trust for certain insured nations, or for other nations that intrusted funds to the board, the board would have the sole right, in controversial cases, simply to decide what the terms of the contract, or of certain connected duties of trust, established as the right of the nation or nations of whose funds the board was trustee.

The tentative proposal of this essay is that the decision of the board regarding these matters — a decision which would always be made by a public procedure and in accordance with established rules — would be a final decision, so that no nation should have any authority, under its agreement, to appeal from the decision in question. Reasons appear in the essay why such confidence in trustees regarding the interpretation of their own fiduciary duties would be well founded, if once the international agreement under which the board was constituted had been reasonably well devised, and if once the board had been carefully selected by the insuring nations and if the board were sufficiently large and varied, and if its

proceedings were public.

The board of international trustees in question would possess, or would gradually and naturally acquire, various fiduciary duties in addition to those determined at any stage by its relation to the business of international insurance. Insurance is in many cases naturally combined with various forms of investment, and with various devices for serving the common ends of the members of a mutual insurance company. Every such fiduciary duty of the board would be determined by special agreements and would be administered according to the rules and decisions of the board. Inevitably the board ought to have a right to proceed against its own members by whatever judicial methods it chose, in case an individual act involving breach of trust was in question. *But the board as a whole would not have to report to any nation. It would act deliberately and publicly, but in the light of its own conscience and discretion. This entire autonomy of the board with regard to its duties and acts as trustee would be correlated with an entire absence of any political functions or powers.*

The international board of trustees which my plan contemplates would have no police to guard it, no international army or navy to protect it, no direct interest in international controversies, and no reason for diplomatic relations with any existing powers. It would receive its funds in trust as voluntary contributions of the nations. It would administer its trust in accordance with policies of insurance and deeds of trust. It could neither declare war nor make peace. Nominally it might hold its sessions, after the manner of the Hague tribunal, in some neutral state, and be regarded as possessing a peculiarly close although essentially ideal and, so to speak, sentimental connection with that state. But its obligations would be to its own conscience, guided by the deeds of trust which it had undertaken to administer.

Its members would be selected by international agreement. Its rules would be subject to change only in such fashion as did not abridge the rights already acquired by the nations who had entered into the agreement.

Just as the individual holder of the policy of an insurance company has, if he is dissatisfied with the conduct of his company, the freedom to surrender his policy and to receive in turn the "surrender value" of that policy, so, subject to certain general and reasonable rules regarding due notice and a proper period of time allowed for withdrawal, any nation that found itself dissatisfied with the procedure of the international board of trustees would be free to withdraw its interest in the entire enterprise and to receive the "surrender value" of its policy, and a return of its funds held in trust.

I submit that an international board of this kind would be at present

a novelty; and that, if some form of international insurance proves to be feasible, such a body might become, in the end, one of the most potent international enterprises on earth.

But all the foregoing is subject to the very obvious objection, that if the board had no army, no navy, and no political powers, it would be helpless to defend the funds committed to its trust from tie assaults of any power that desired to use these funds for its own purposes. In fact, the powers of the board of trustees in question would be indeed financial and fiduciary in case the nations respected these powers. But such powers, an objector might insist, would be wholly spiritual. Wherein would lie their temporal safeguard?

To this perfectly obvious objection this essay proposes an equally obvious plan by which the funds committed to the trustees could be so invested that they were actually inaccessible to any power on earth which was not actually in a position to conquer all of the powers who had entered into the insurance agreement or who had deposited funds with the trustees. The funds could be invested as widely in the world as one pleases, and could be made subject to the order of the board of trustees and of that board only. If an individual capitalist, fearing that a war of the nations might endanger his private fortune, desired to keep that fortune safe, he could, even in the present troubled world, guarantee that result with reasonable safety by investing his funds widely enough, in various countries, and securely enough in each of his selected depositories. The new entity which this essay proposes to institute, the international board of trustees, would have far more varied opportunities to keep its funds in places where the armies and the navies of the various existing powers would threaten it in vain despite the publicity of all its official proceedings.

The board would possess no territory which could be seized, it would lay claim to no neutrality which could be violated. Its absence of political power would secure it against direct armed assault. Its individual trustees might be made prisoners or executed; but such efforts might well kill its body without touching its essentially intangible soul.

Since its acts of investment would all be made according to established rules and under the public charge of the board, its individual trustees would have no power to surrender its funds, no matter how much they wished to do so. Only the board, acting in its corporate power as trustee, would have any power to dispose of the funds that were put into its trust.

II.

The next objection which readily occurs to the mind, and which the

reader of the plan for international insurance herein expounded is especially asked to notice, is founded upon the fact that if the nations, by large contributions to the common fund, won for themselves large and important rights through their insurance agreements, they would win hereby no safety against the dangers of war, and in particular of conquest. Yet amongst all the evils against which nations could insure, if a scheme for mutual insurance proved to be successful, some at least of the evils due to war would surely be the most important. The objector might well continue that, if it were possible to give to the plan such a development as to enable the international board to insure an individual nation against any considerable portion of the losses and expenses which war might entail, the very success of the plan, up to that point, would tend to render individual nations careless, and so more disposed, if possible, than they otherwise would be, to engage in war. For the man whose house is insured may thereby be rendered less rather than more careful with regard to the risk of fire.

To both these objections the plan outlined in this essay provides what may be regarded as at least a partial answer. This answer must be judged in the light of the few passages in the essay which directly deal with these aspects of the question. I call attention to these passages, and expressly point out that what I propose involves a tentative suggestion, which is proposed for the sake of revision.

What it is worth while to mention in this Introduction is that this essay suggests an extension to international insurance of devices which are already known in the insurance of individuals. In particular, a part of the plan here tentatively set forth would involve a way in which the life of every one of the insured nations was, so to speak, insured by the general insurance organization for the benefit of mankind.

That is, the more rights an individual nation had acquired by virtue of previous insurance, the less motive a conqueror would have for finding this nation attractive prey. For the insurance board of trustees might undertake, by special agreements, functions which were not only those of insurance but also those of investment, so far as concerned an individual nation. That is, an individual nation might put a portion of its property in trust, and under the administration of the board. One could even now conceive that some South American republic might find such an investment of a portion of its wealth possible and useful. In the future still greater nations might be attracted into similar undertakings.

But if either insurance rights or trust funds thus belonged to a nation which happened to suffer the accident of occupation or of conquest, the conqueror of such a nation *would not, according to this plan, be able to find*

so much of the conquered nation's property, or to use it. For the plan defined in this essay includes the, provision, that, if a nation loses its life, then its insurance rights, and of course its funds deposited in any form in trust with the international board, *simply revert to the common fund of mankind, and are henceforth used and held in trust by the international board for the benefit of all the insuring nations.*

Closely connected with this provision of the plan here outlined, is another, whereby whatever nation won in a war would be prevented from extorting from any vanquished nation, by means of any sort of treaty, either its insurance rights or any other funds which it had, before the war, put in trust with the board. This Introduction may well call attention to these aspects of the plan involved in this essay, since in case of the success of such a plan as the one here outlined, these provisions might become valuable allies to the cause of peace.

Finally, so far as the present set of objections is concerned, the important provision that any nation committing the "first act of war" with which a given contest began, would thereby vitiate so much of its policy as related to any possible insurance that it might possess against any of the costs or expenses of this particular war, — this important provision would tend to introduce a restraining motive against war. And many other such restraining motives could be readily devised and added to this first motive by means of insurance agreements. How far-reaching such a provision would prove may be left for the further study of the reader of this essay and for such future discussions as this essay, by good fortune, may arouse amongst students of the questions thus proposed. It is enough at this point simply to insist that there are here international questions which are worthy of careful consideration, and which do not involve any of the difficulties which have already played so large a part in the history of arbitration, and of other attempts at international agreements.

III.

A colleague of mine, and a high authority upon problems of insurance, in replying to my request for his criticisms upon this essay, has pointed out, as a serious objection to any plan for international insurance, that strong nations would be likely to prefer to insure themselves, while if only the weak nations joined in the international agreement, little would be accomplished. The direct rejoinder to this objection which is suggested in the text of the present essay, consists in pointing out, that if there were *any* evils, whether or not evils of war, against which international insurance proved to be feasible, and if the plan here proposed began, even very

modestly, to accomplish something in the way of bringing several nations together for purposes of mutual insurance, *every such mutual insurance would involve the nations in new forms of cooperation,* whose motives would be of the essentially peace-making kind analyzed in the text of this essay.

But precisely in so far as such motives appeared at all as a result of international insurance, they would tend to make, more and more, national evils insurable. For if the nations begin thus to cooperate, *they will, for the first time, learn what that sort of honor is which is involved in keeping agreements such as the insurance business exemplifies.* What is called national honor is at present altogether too much a matter of capricious, private, and often merely personal judgment, *simply because the nations are not as yet self-conscious moral beings.*

They have not learned, as corporate entities, what mutual loyalty is, because they have not begun to come together in those communities whose type is described in this essay.

Personal honor is always the correlative of some practical form of loyalty, and of some recognition of an obligation, — a recognition that one acquires through actual business of the sort that does not go on in those dangerous relations which this essay somewhat elaborately analyzes.

If the international body of trustees had in its charge any large trust in which a number of nations were interested, these nations, working through their board, would become clearly conscious of the sort of loyalty and hence of the sort of honor which is found upon the highest levels of the business world.

Thus a genuine and reasonable sense of honor would begin automatically to enter international relations. And the more it entered, the more chances there would be for mutual insurance. This mutual insurance, if it once extended to any of the evils of war at all, would tend in time to extend to more and more of them. And in this way the community of mankind would be formed, and would gradually grow by methods and in accordance with principles which are at once ideal and businesslike.

So, even if one began with the mutual insurance of a comparatively few nations which were relatively weak, a new sort of international relation would begin to exist. And the more this relation existed, the more new international insurance enterprises would be possible. The whole very wonderful history of insurance tends to show this, and to warrant the somewhat enthusiastic prediction with which this essay closes.

IV.

One further remark remains for this Introduction to emphasize. Important as it seems to the present writer that some *beginning* should be made in inducing a group of nations to contribute to a common fund for insurance against some of the evils of war (however few of such risks may be as yet insurable) — still this essay, in dealing with "war and insurance," certainly does not intend to confine itself solely to the possibility of insurance against the risks of war. A widely varied list of natural calamities against which insurance is possible has already been presented.

It is noticeable that any international insurance, which dealt with natural calamities, would involve a contract in which the individual nation was indeed to receive some definable insurance payment in case of certain disasters; but that, as a fact, the individual subjects would, in most such instances, be obviously, at least in part, the natural beneficiaries who would receive from their government the payments which would first come to the nation in question from the international board of insurance.

From the nature of the case, the international board would have no authority whatever to direct any sovereign state how it was to distribute to its subjects funds delivered by it as proceeds of the payment made to it by the board, in accordance with the insurance policy. No possible international controversy could arise regarding the use which any sovereign state made of any of its insurance benefits when once they were received.

But, on the whole, any modern sovereign state would be inevitably much influenced by the prevailing public opinion of its own people with regard to the distribution of its insurance funds. Consequently, the existence of insurance benefits and, in turn, the existence of contributions made by the individual state to the international insurance fund, would be of great possible benefit to any individual state, in dealing with its most pressing social problems. For whether a nation was amply able to insure itself against a risk or not, an insurance policy would constitute a convenient means of providing, in advance, by a single financial device, for a definite class of the needs or the risks of its subjects.

A single example will suffice to indicate the way in which a system of international insurance, once established, would furnish an extremely simple mode — a wholly new sort of machinery — by means of which an individual state might deal with some of its most intimate internal problems and issues.

The various forms of workmen's insurance are now becoming of great

importance in the life of individual states. Such problems are dealt with by different nations in modes which vary and ought to vary according to the special social problems which occupy the consciousness of the individual nations, and which also vary with the systems of legislation and of government which characterize different nationalities.

Every effort to apply the experience of one sovereign state with regard to the best form of workmen's insurance to the life of another sovereign state, has at present to involve new legislative or administrative decisions, and constitutional difficulties of the most varied sort.

Now international insurance, without in the least interfering with the discretion, with the constitution, or with the independence of any nation concerned, would furnish, if it existed, a most convenient mode whereby various nations could learn from one another's experience, how to deal with such a problem as that of workmen's insurance, and how to apply what they learned through such experience to the special modes of administration and of legislation which were suited to the constitution of each state.

Thus, suppose that the international board of trustees existed, and that the individual state was willing to contribute a fund to the general fund, thereby taking out a policy which insured to it, at suitable intervals, a payment adequate to cover the total cost of a given class of accidents occurring to its workmen in the various dangerous occupations. The form of such a policy, its costs and conditions, would depend entirely upon what proposal the international board was prepared to entertain, and what contribution to the common insurance fund the sovereign state in question was willing to make. The insurance payments, when duly made, would be wholly at the disposal of the state receiving them.

Only, instead of devising some elaborate legislation of its own, hampered perhaps by numerous constitutional and legal restrictions, determined by the whole past history of its laws and customs, the insured sovereign state would now have on its hands simply the problem of distributing the fund paid to it as the result of its workmen's insurance policy, to the people to whom, in its opinion, this sum should be equitably distributed.

In a country such as the United States, where any plan for workmen's insurance of any type must at present pass through the slow ordeal of adjusting itself to the laws and customs of each separate state of the Union, and where a constitutional amendment, authorizing a general federal law on the subject, would involve awkward and possibly

dangerous complications, the whole subject could be much more simply dealt with if the international board of insurance, after due investigation of the facts about accidents, about old age, or about any other topic involving matters of interest to bodies of workmen in any state of the Union, named, not upon constitutional grounds, and not upon the ground of any treaty with any foreign power, a sum in return for which the international insurance board would be willing to pay, at stated intervals, into the treasury of the United States, a certain sum called for by a certain policy, in case the United States Congress simply appropriated the money to pay for the policy in question.

Now there is no doubt that the United States is amply able to insure itself against all risks and expenses that are due to disease or to accident or to old age, in so far as these things affect its various classes of laborers. It is equally sure that manifold constitutional difficulties and varieties of custom lie in the way of carrying through any scheme affecting workmen's insurance throughout the various states of the American Union.

It would be, therefore, of advantage to the United States if an international insurance board existed, and if it had the opportunity to pay for any policy that might at any time seem good to it affecting workmen's insurance anywhere within its borders. For the constitutional difficulties and the varieties of state legislation which stand in the way of carrying out any one plan for workmen's insurance in the United States would not stand in the way of a plan for appropriating a certain sum to be paid by the authority of Congress to the international insurance board. Nor would such difficulties be nearly as great when the problem arose as to how the proceeds received from such a policy were to be distributed to individual workmen throughout the United States, or to any part of it. The insurance policy would not be needed as a financial investment. But it would furnish a new and valuable machinery for devising and carrying out possible social reforms.

This is but a single example. As soon as one considers the possible uses of an international insurance board, in case that, while it did its business with the nations, their individual subjects were the natural beneficiaries of the insurance in question, one sees that, without the least interference with the discretion or the independence of any nation, a vast simplification of the machinery whereby each nation might deal with its own social problems would be furnished.

While the various nations took out policies for any such social purpose by putting certain sums in trust with the board, they would very naturally

take counsel together, by comparing their various modes of social insurance, and of other socially beneficent processes. *Every word spoken in such counsel would tend toward mutual understanding among the nations and towards simplification of the social problems of each, or of the ways in which these problems were to be dealt with.* Yet at no moment would such conference in the least interfere with the honor of the individual nations, or involve new disputes, or stand in the way of any national ambition.

It will be clearly observed that the international board of insurance would have no hostility to the growth of international arbitration, or to the authority of the Hague tribunal. Its existence would imply no hindrance to any other influence that at present furthers, or that may in future further, the substitution of peace for war in international life.

Therefore the strong nations could use, and could profitably use, international insurance quite as much and quite as hopefully as the weak. For it would provide them a new machinery for the financial care of reforms.

The more it was used, the more it would become useful. And the genuine community of mankind would indeed be begun, not as a merely fantastic hope, but as an institution whereby part of the world's daily business was done.

It seems well to close this Introduction with the words of a great authority on the theory of insurance, — words by which the present writer's thoughts have been constantly guided in the writing of this essay. The words are those of Charlton Thomas Lewis, Ph.D. They appear in the article on "Insurance," which the eleventh edition of the "Encyclopaedia Britannica" prints on page 658 of Volume XIV: —

"The value of insurance as an institution cannot be measured by figures. No direct balance-sheet of profit and loss can exhibit its utility. The insurance contract produces no wealth. It represents only expenditure. If a thousand men insure themselves against any contingency, then, whether or not the dreaded event occurs to any, they will in the aggregate be poorer, as the direct result, by the exact cost of the machinery for effecting it. The distribution of property is changed, its sum is not increased. But the results in the social economy, the substitution of reasonable foresight and confidence for apprehension and the sense of hazard, the large elimination of chance from business and conduct have a supreme value. The direct contribution of insurance to civilization is made, not in visible wealth, but in the intangible and immeasurable forces of character on which civilization itself is founded. It is preeminently a modern

institution. Some two centuries ago it had begun to influence centers of trade, but the mass of civilized men had no conception of its meaning. Its general application and popular acceptance began within the first half of the 19th century, and its commercial and social importance have multiplied a hundredfold within living memory. It has done more than all gifts of impulsive charity to foster a sense of human brotherhood and of common interests. It has done more than all repressive legislation to destroy the gambling spirit. It is impossible to conceive of our civilization in its full vigor and progressive power without this principle, which unites the fundamental law of practical economy, that he best serves humanity who best serves himself, with the golden rule of religion, `Bear ye one another's burdens.'"

WAR AND INSURANCE

GREAT tragedies are great opportunities.

The new griefs which to-day beset the civilized nations call for new reflections and for new inventions. Our past methods of furthering the cause of peace on earth have disappointed many hopes that, in their day, seemed both fascinating and reasonable. We must not expect, at any time in the near future, to make an entire end of war, but we need to understand better than we now do the depth, the gravity, and the true nature of the motives which have thus far made warlike tendencies so persistent in the life of mankind. We also need to discover, if we can, methods not yet tried, whereby the wars of the nations may be gradually rendered less destructive, and less willful.

This essay is to be devoted to both the tasks thus indicated. The main part of this paper will give an account of some of the familiar, but too little heeded, and too ill defined reasons why wars are, despite our civilization, so fatally recurrent incidents of our international life. This first part of our paper must be somewhat lengthily stated; for, as the old Buddhist scripture says: "Long is the night to him who is awake; long is a mile to him who is tired; long is life to the foolish who do not know the true law."[1] And our poor human nature is still on the level on which we are often wakeful in the night and often have yet to seek after the knowledge of the true law which may some day bring us nearer to the life of peace.

This earlier and also lengthier part of our paper will gradually lead us, however, to the definition of some principles bearing on a fragment of

1. MAX MÜLLER, "Sacred Books of the East," Vol. X, p. 20.

the true law both of war and of peace. And so far this paper will be a contribution to what has been called, by the Dutch Ethnologist Steinmetz, the "Philosophy of War." But, at the very close of our discussion, we shall be led to an application of these principles which I believe to be in certain respects new. We shall then, in the second and much shorter part of our discussion, propose a method of practically furthering the gradual growth and reinforcement of the cause of peace on earth. This method has not yet been tried. I believe that the principles upon which it is founded are, in certain concrete instances, as familiar to the modern civilized man as are his most characteristic forms of prudence, of thrift, and of cooperation. But the application of these principles to the philosophy of war remains still inadequate; and, at the present moment, this field for further efforts to form plans that look towards peace is still open. This paper will thus close with a brief indication of the nature of one such plan.

I. UTOPIA OF UNIVERSAL PEACE

TO propose any way for furthering the cause of universal peace is to arouse the objection that all such proposals, if definite in their formulation, and universal in their intention, have thus far always proved utopian. As has often been asserted, man appears in history as essentially a fighting animal. When he becomes civilized, he changes, indeed, the fashion of his fighting, and, in the course of time, gradually improves both the morals and the methods of his warfare. Cruelty, pillage, and extermination become less prominent amongst the aims which absorb the warrior's mind. Wars are waged for purposes which become more ideal as time goes on.. Humanity of mood directs, in a measure, the plans of rival nations. The modern national spirit itself sometimes appears to be a sort of preparation for some larger enthusiasm which, as we often hope, may, in a far-off future age, make the community of mankind its main object of fraternal devotion, and the whole earth its country.

But, on the other hand, as the nations grow in power and in self-consciousness, some of the disastrous but profoundly human motives, which most tend to make men fight with their neighbors, not only survive in the midst of the highest cultivation which we have yet reached, but are even intensified by the very intelligence, by the loyalty, and by the resoluteness, which lie at the basis of what our civilization most needs and prizes. Nobody can rightly consider the problem of war who regards the war spirit as a mere relic of barbarism, or as due solely to the evil side of our nature. The mystery of war and of its

fascination can be fathomed only in case we first observe that although, of old, wars were often due in a large part to the passions and ambitions of rulers and of the ruling classes of the warring peoples, modern wars, however much princes may take part in their beginnings, are, on the whole, waged by peoples, and are in part the expressions of the recently acquired power of an intelligent democracy. Ancient wars were frequently the result of ignorance, and of blind popular passion, of superstition, or of the greed of individuals. Modern wars are in many cases deliberately and thoughtfully planned by patriots who love their country's honor, who are clearly conscious of well-formulated ideals which they think righteous, and who fight in the name of the freedom of the people, and in the service of what they suppose to be the highest human culture. World-wide sympathies do not prevent warlike passions from seeming to many who cultivate them not only necessary, but morally indispensable; not only honorable, but holy; not only fascinating, but rational.

Let us remember then that, whatever the mere form of any national government may be, it is at present the democracy itself, or at all events, the prevailing popular will, however it is expressed, which, in the more warlike modern nations, actually prepares for war, which dreams of it in advance, which tries cheerfully to bear the burdens of its expenses, which glories in its risks and in its victories, and which frequently and consciously justifies it as the highest, as the completest, and so as the most ethical expression of national loyalty. Let us remember too that modern democracy, or whatever else expresses the will of a people, does this not because it lacks a sympathetic interest in the concerns and in the sentiments of the men of other nations, but because our modern form of human solidarity is such that international hate travels as far, as fast, and as persuasively as does love. The civilized world thrills with sympathy for the calamities of obscure or of distant men; but it also thrills with a common admiration for high spirit, and for warlike enthusiasm. Sympathy implies a disposition to imitate, and so, just because of our present degree of solidarity, we tend to imitate whatever is impressively vigorous about the will and the power of interesting men and nations. Such imitation is, in many cases, an imitation of the war spirit.

Only in case we keep in mind both the vast masses of popular interest and the very high grade of intelligence which are now devoted, in many great nations, to the cultivation of warlike motives, and to the preparation for war, can we see how far away is the utopia of universal peace.

As a fact, the advance of civilization not only brings with it motives

which tend to check and to control the barbarous aspects of war, but also motives, some of them new, which tend to make war appear, to many individuals and nations, more ideal, more righteous, more significant, than ever. The modern world, wherein every great human experience of passion, of sorrow, and of love arouses a warm response in the most distant parts of the inhabited earth, - this same world echoes the warlike passions as readily as it does the humane ones, longs to imitate the powerful peoples as well as to relieve the sufferers from an earthquake, and is stirred by its far-reaching rivalries as much as by its other expressions of solidarity. Its social problems are common to all the civilized lands; but so too are the dispositions to encourage and to feel the contrasts of races, and the rivalries of commerce and of cultivation. The democracies are vast; but so too are the conflicting interests for which these democracies are ready to fight. Science brings all men near to each other; but science also originates new industrial arts, and these arts can be used for war as well as for peace. Civilization makes men more thoughtful about both social and moral issues. But such thoughtfulness, if once inspired by patriotism, and by international jealousies, can both counsel and wage war deliberately, and with a self-righteous assurance such as our elementally passionate or simply superstitious ancestors never knew.

So, of themselves, neither cultivation, nor thoughtfulness, nor humane breadth of sympathies, nor the discoveries of science, nor the aspirations of the democracy, have been able to make wars cease on the earth. Modern wars may, as we now know, become more widespread, more democratic in spirit, more ideally self-righteous, than ever they were before.

Whoever undertakes, then, to plan any method of decreasing the evils of war, must take account of these facts and must consider how deeply rooted in civilized man the tendency towards war still remains. One may well begin such an enterprise by asking whether it is not indeed altogether hopeless. In view of the facts thus summarily sketched, is not this great disease of mankind, the love of war, beyond cure, and perhaps beyond any lasting relief?

And yet: The spectator who today witnesses the tragedy entitled "Man," watches a scene wherein both the events and the characters arouse, side by side with many old emotions and reflections, certain wholly new movings of pity, of fear, and of wonder. Can one remain a merely passive spectator? Must one not seek, at least in imagination, some more active means whereby he may transform his pity into charity, his fear into an inspiring hope, his wonder into some sort of interpretation of the meaning of what he witnesses? In such an effort lies the task of this essay.

II. THE NEIGHBOR: LOVE AND HATE

THE facts just cited, the prominence of warlike motives in modern men, the stubborn survival in culture of the tendencies which express themselves in armaments, in the jealousies of nations, and in actual wars, - all these things call for further characterization in terms of a principle which shall be sufficiently general in its scope, and sufficiently important in its practical applications, to serve as a guide in our search for a way of giving to humanity a measure of relief from its most dangerous social burdens. The higher religious have long sought for an expression of such a principle. Two of them in particular, namely Buddhism and Christianity, have found and used a formula which is, in fact, extremely general in its statement, and very highly practical in its demands, as well as in some of its applications. In its Christian expression this formula is as familiar as is its failure to guide men, and lies at the basis of the counsel which Christian teachers of the most various creeds daily give to each of the faithful regarding his relation to his fellow man. Just because of this familiarity of the best known forms of the Christian formula, we may be aided to make the principle in question momentarily vivid in our minds, if we here refer to one of the simplest and most popular of the scriptures of the original Southern Buddhism, the work from which I have already quoted the passage about those who find the night long. The name of this book is the Dhammapada. Let me cite from this scripture a mere fragment of a single text. At a moment when the world is at war, this ancient Buddhist word may awaken, by the very contrast between its spirit and that of the passing mood of modern European patriots, a comment which will help us to see where our real problem lies: -

> 'He abused me, he beat me, he defeated me, he robbed me'; - in those who do not harbor such thoughts hatred will cease. For hatred does not cease by hatred at any time: hatred ceases by love, this is an old rule.[2]

Such, then, is the formulation of the greatest of human practical problems by the Dhammapada; such is the solution of this problem which that ancient Buddhist scripture proposed, several hundred years before Christ. You have but to think of the best known words of the parables and of the Sermon on the Mount in order to recall other and now distinctively Christian forms of this same rule for ending wars and for

---

2. MAX MUZARA, "Sacred Books of the East," Vol. X, p. 5

saving mankind. "Little children, love one another:" these words, in another part of the New Testament, restate this view of the escape from all the horrors which war entails. In an equally simple, and, as I may at once add, in an equally imperfect shape, Tolstoi's version of the Christian spirit not long since filled with a sad longing the very European world whose destinies have, since then, been so dominated by preparation for war, and by acts of war.

Considered by itself, and apart from all theological formulations, this lore which is common to Buddhism and to Christianity may be summed up in the assertion that the moral destiny of man depends upon a certain pair of relations, - the relation of love towards his neighbor, - and the relation of hate. In so far as man is dominated by the hate-relation, this doctrine tells us that he is lost. In so far as the love-relation becomes his guide, he is, according to the same teaching, saved; for then he enters the realm of inner as well as of outer peace, and his life wins its only true sense, its only possible fulfillment. There is, then, so this view of life teaches, a good relation of man to his neighbor; it is the relation of lover to beloved. There is a relation to his neighbor which is not only dangerous, but deadly to man; and that is the relation of an enemy to the neighbor whom he hates. The whole problem of life lies here. Let men become lovers, and then whatever men's mere fortunes may be, all is well. Let them remain enemies, and then not only wars are waged, but also the shadow of death is upon the whole inner and outer life of man. The dead lie waiting burial. The mourners wail and cannot be comforted. Such, I say, is the substance of that view of our problem which Christianity and Southern Buddhism share in common.

Now this doctrine of life is so ancient, and is, in mere words, so widely accepted, that just because we are deadened by the mere repetition of such words, we have difficulty in making very vivid to our minds how far this common Buddhist and Christian lore is from telling us the whole truth about the way whereby the winning of peace and the fruitful union of human souls is to be sought, if ever such peace and union is to take place in the world of daily life at all.

In order to illustrate this contrast between real life and this ideal of life, let us simply fancy that some supernatural stranger, having an angel's tongue, and bearing a flag of truce, appears to-day upon a battlefield in Belgium or in Servia, and, having first somehow miraculously caused the conflict to cease for a time, announces to all present, so that they hear him, the news of how he has in his possession the formula for ending all wars, including the present strife on this field. Let him then read, over the heaps of the wounded and of the dead as they lie there the words I have

just read from the Dhammapada: - "Hatred does not cease by hatred; hatred ceases by love; this is an old rule."

As soon as this angel of peace has finished his message and has departed, the warriors, so far as they are not yet helpless, will of course return to the tasks wherein they find their honor and their duty, as well as their own fierce joy and pain, their own bitter weariness, and their own passionate obedience and devotion. As they do so, will they not feel, along with us the spectators, that the words of this angel visitant, spoken during the brief truce, are not only impotent, but irrelevant?

In fact, these words do not even touch, by themselves, upon the real practical problem of this battlefield and of all battlefields.

This problem obviously is: *how* shall the hate-relation come to be forgotten, and how shall the love-relation come to be the dominant motive of a human life such as is ours? When not only our worst motives, but also our patriotism, our love of all that we hold dearest, our honor, - when all these counsel us, if we be men, to treat as enemies those who are the foes of this honor, we see that we are in the presence not only of passion, but of fate; and that this passive form of the law of love can successfully address its words only to those who, like the Buddhist monks, or like the Christian saints of the desert, have first abandoned, as Schopenhauer said, the will to live, have parted company with whatever makes a man's character vigorously active and unsparingly and constructively creative; have also parted company with whatever makes us ready to be like those angels who excel in strength. Hate, after all, is but one aspect of war. War's other aspect, what one may call its spiritual aspect, is the loyalty to which it gives active employment, the fearless faith in life which it converts into works, the endurance which it transforms into creative deeds. In this other aspect of war lies its appeal to what is best in man.

The real problems of war cannot be solved, then, merely in terms of this contrast between the love-relation and the hate-relation, and in terms of the mere condemnation of the hate-relation. For there are human relations which call out our most active loyalty, our most constructive devotion, our highest energy, and which cannot be defined merely in terms of the contrast between loving and hating a man's individual neighbor. Such are the human relations which are exemplified when many men are together devoted to one common although by chance unwarlike task, such as the task of an art, or of a science, or of some church wherein there is present a genuine communion of the faithful. Such tasks may indeed be called tasks of love, but they are not tasks of the merely self-forgetting and

passive love which the Dhammapada contrasts with hate. They are the tasks of a sort of Pauline charity whose object is not merely the individual neighbor, but a whole community of many men viewed as a superpersonal, and yet also as somehow a personal being. The one who loves in this spirit loves a spiritual body wherein individual men exist as members, and wherein he also is a member. He seeks not his own, but he loves, as Paul said, "Not after the flesh but after the spirit." He loves as Paul also said that Christ loved the church. Therefore he is above both the hates and the loves which contrast and which contend on the battlefield. When a company of artists or of scientific men work together upon the common tasks of their calling, they are not merely, as "little children," loving one another, nor yet are they hating, each his neighbor. Their human relations are those of the loyalty of individuals to the communities wherein the true tasks of life are found. The relation which is here present is expressed in the devotion of the individual's life to the spirit of some community, wherein he lives and moves and has his being.

Now such human relations, namely those which bind a patriot to his country, a warrior to his service, an artist to the community of all who love art, a scientific man to the community of all who study nature, these are indeed, as we have said, the highest human relations. These express the best in man. I have already said that the motives underlying these human relations often lead to the worst of warlike hatreds. This is as sad a fact as it is prominent in human history. But we have gained something for the understanding of our problem if we have first seen that this problem involves not merely the contrast between love and hate, but the contrast between those relations which an individual man bears to his individual neighbor, and the relation which a patriot bears to his country, or the individually faithful saint to the visible or invisible church to which, as he believes, all the faithful belong.

It is therefore not by mere love of one's neighbor that hatred can be made to cease. And in fact historical Christianity has never been merely a religion of such passive love. The Pauline charity involves a relation of the individual to the whole mystical body of the faithful. This relation is viewed by Paul as so important that he tells us how, without this charity, without this relation of the believer to the whole spiritual body of the faithful, *no* form of the love of an individual man for his neighbor, *no* giving of one's body to be burned, would really profit either a man or his neighbor in any respect. The Pauline charity involves a relation whose type profoundly differs from the type which the author of the

Dhammapada has in mind. Paul does not say: "Think of that neighbor yonder, and love him; and then the hate-thoughts and the wars will cease." Paul says, in substance, "Be loyal to the spiritual body whereof you are a member. Gird on the whole armor of loyalty. Practice, meanwhile, not mere self-sacrifice, but positive virtues which, in form at least, are essentially although not merely militant. And then you will rise above petty hate as much as above merely private and individual love. You will perhaps wage war, but not because you are greedy; rather because you love the union, the community of all the loyal, the spiritual body of those who are one in faith and in service. Then you will be a man with a country; and for your country you will be ready, on occasion, both to fight and to die.

If our angel visitor on the battlefield proclaimed the words of Paul rather than those of the Dhammapada, he would express what I believe to be the really higher spirit of historical Christianity. And the warriors, before they returned to their awful tasks, would feel that, while he had not indeed justified the slaughter of men as anything that is in itself a good, he had given them some glimpse of the reason why the warlike spirit has its spiritual meaning, as well as its tragic horror of great darkness. He would have hinted that, if ever relief is to come to humanity's great woe of combat, it will come not merely through a cessation of hate and a prevalence of love for individual men, but through the growth of some higher type of loyalty, which shall absorb the men of the future so that the service of the community of all mankind will at last become their great obsession, while this world-patriotism, when it comes, will remain still as active, and on occasion as militant and as businesslike in its plans and in its devotion as is now the love of warring patriots for their mutually hostile countries.

In facing the problem as to how this possible future world-patriotism, how this distant but eagerly desired result can ever come to be, I will not say reached, but gradually approached, we have gained, I believe, something, however little, by seeing that we have not here chiefly to do with two contrasting relations of pairs of individual men, namely the love-relation, and the hate-relation. Our fiction of the angel visitant on the Belgium or Servian battlefield helps to remind us wherein consists the contrast between his advice, as we first stated it, and the sort of counsel which we ourselves in the present discussion are seeking. He says, to every warrior: "Love your neighbor, even if he has thus far been your enemy. Since you cannot love him and also willfully kill him, you have only to follow, all of you at once, my word, and

then not only this, but all battles will automatically cease. You will all return to your homes. Then peace will come on earth."

But, as we have seen, the instinctive sentiment which the warriors, after their momentary truce, and even while the thunders of the captains and the shouting begin again, will feel (whether they have wit and patience to articulate their reply or not), - this sentiment may well take the form of saying: "I am not merely related to my neighbor here, who seeks my life as I seek his, and who is a hateful man hunter as I also am. My highest and deepest relations are to my country and to its allies and foes, to our common service, to my honor, and (if you will) to our forefathers and to our posterity, yes to the whole world of man."

And so, for the warriors, and for us who now study the philosophy of war, the genuine problem relates not so much to the contrast between the love-relation and the hate-relation, as to the contrast between our relations to our individual neighbors, and our relations to our honor, or to our duty, or to our country, or to mankind, or to whatever community you may choose to consider.

Here, at length, we enter the region where the issues of war and of peace must be faced and thought out, if anywhere we are to find a reasonable guide towards a solution. My greatest question is not: "Do I love my neighbor or do I hate him?" but "Have I, or have I not the right, the worthy, the saving relation to my community, to my family, to my country, to mankind? "If we want to learn to answer this question, we next need to consider some very plain and familiar, but neglected, facts about the nature of communities, and about the social relations of men.

III. THE DANGEROUS SOCIAL RELATIONS AND COMMUNITIES

KANT, in one of his more practical and popular works, has used a well-known expression, which has often been cited, but which has little been heeded. This expression bears upon the natural relation of the individual man to his individual neighbor. Hobbes, in the seventeenth century, had said: "By nature every man is at war with his neighbor. Only some special social device can make him behave as if he were a peaceful creature." Rousseau, in Kant's own time, had asserted that by nature men love to be in harmony with one another, so that only the artificial customs of society are the source of the mutual hatreds and rivalries which lead to war. Kant, in the remark to which I now refer, goes deeper than both of these conflicting theses. Kant says, in substance: "By nature man both hates and loves his neighbor." And Kant goes on to point out that, in real life, each of these tendencies, the loving tendency as

well as the hating tendency, actually both nourishes and inflames the other.

For man, as a social animal, cannot do without his neighbor. In solitude he pines or starves. It is not good for man to be alone. Yet, if you give man a companion, it is equally natural that the two should, erelong, quarrel!

Their quarrel need not be due to the fact that they are naturally malicious. But, perhaps by mere accident, they soon get in each other's way. Then they easily begin to quarrel, and their quarrel tends to inflame its own motives. Hence Kant's formula for the natural relations of a pair of human beings is that the natural man can "Neither suffer his fellow nor do without him." Deprive a man of his mate, and he finds the world intolerably lonesome. Give him a companion, and the two irritate each other. For, if only by mere accident, they erelong become rivals in some quest; or perhaps they interrupt each other in a conversation and then each, if sufficiently eager, begins to say (out of pure love both for his fellow and for the sound of his own voice): "Do not interrupt me. Listen to me." Herewith begins a possible quarrel. Such a quarrel, if two nations were concerned, might lead to war.

This last example of social friction is not Kant's example, but it well illustrates why what one may call the *dyadic, the dual, the bilateral relations of man and man, of each man to his neighbor, are relations fraught with social danger. A pair of men is what I may call an essentially dangerous community.*

A man may, at any time, love his neighbor. They may both feel kindly towards each other. It may be that neither is malicious, that neither is, as people say, a totally selfish creature. All that is needed, however, to make serious friction possible between the two men is that each shall be active, and watchful, and that he shall have some sort of "business and desire, such as they are." It is tolerably certain that, if this condition is fulfilled, the business and desire of the two men shall be, in whatever way you please, different, and in some way contrasting. Even if they love each other, they will then be disposed not to do precisely the same thing at the same time. Or if, as in a conversation between two people, each of them does desire to say, at any moment, the very same thing which the other desires to say, this same act will have different relations to the conversation according to the intents which each of them has as he speaks to the other.

Now, in any such case, the perfectly natural, and in fact inevitable contrast, between the acts, or between the results of action, on the part

of the two neighbors who love each other, will of itself tend to create friction.

A certain social tension is therefore a perfectly natural accompaniment of any concrete social relation between two people. However friendly they are, at the outset of a social task, to disagree in some respect is the normal result of any social intercourse between two neighbors. If two men are neighbors, each of them inevitably tends, in some respect, to get in the other's way.

Let the two eager speakers, who long to talk together, but who automatically tend to interrupt each other, just because each loves to have the other as his listener, let them serve as a perfectly elementary example of a tendency which you find assuming all grades of importance, from the most trivial to a furious quarrel which may lead to a death grip of two fighters, or to a war between two nations.

There is, therefore, a law of the social intercourse between the members of a pair of individual men, or (for that matter) of the social intercourse between the members of a pair of individual groups or nations of men, - a law for which I have long used the name: *The law not only of the danger, but also of the original sin, of the dual, or dyadic social relations of men.* The law is this: When two men, or two consolidated groups of men, are set at some such social task as observing each other, or playing a game together, or debating a question, or buying and selling, or borrowing and lending, or hunting for food, or even when they explicitly undertake the task of helping each other, then, at any one stage of this dual or bilateral activity, one of the two will indeed be either loving the other, or else not loving him. And when a new and interesting relation to a neighbor first comes in sight, love is quite as natural as is antipathy.

But as the two individuals pass from one stage to another of the activity in question, the natural contrast between the two men or groups tends to lead to some mutual interruption, of jostling, or to some other vexatious contrast of behavior. Each therefore tends, in some fashion, to surprise the other painfully, to snub his activities, and so to get in the other's way. We naturally do such things not because we are by nature either mainly selfish or primarily malicious or even greedy. We do all this merely because, if taken in pairs, we are, in each pair, two different and contrasting people or groups. Our whole self-consciousness, in fact, depends upon noting how different from our neighbors each of us is. But contrasts that strongly interest us can easily become unpleasant. Therefore mutual love and agreement between the members of a pair of human

beings is an easily interrupted relation. Our differences can readily come at any moment to seem mutual challenges. If love between a pair of friends survives such endless trials, it does so through patience, or through the aid of other relations which are naturally more stable, or because love takes on the form of true loyalty. *But loyalty, which is the love of a self for an united community, always involves relations which concern more than two people.*

Taken by itself, the mutual love of a mere pair of people tends, like physical energy, to run downhill; to be baffled by personal contrasts, to be thwarted by mutual interruptions, to give place to a consciousness of painful differences, to be worn out by time. As Griselda says to her cruel lord: --

> "But sooth is said; algate I find it true,
> For in effect it proved is on me,
> Love is not old as when that it is new."

This assertion constitutes the first half of the law of the original sin of the dyadic human relations. Love, when it is a merely dyadic relation between a pair of lovers, is essentially unstable and inconstant. For the two tend in the long run to interrupt, to bore, or collide each with the other.

The second half of our law is easily stated. When mutual friction once arises between a pair of lovers or of rivals or of individuals otherwise interestingly related, whether they be men or groups of men, *the friction tends to increase,* unless some other relation intervenes, or unless more than a pair of members belong to the community wherein mutual love ought to be sustained, or mutual jealousy averted.

> "Never any more
> While I live,
> Need I hope to see his face
> As before.
> Once his love grown chill,
> Mine may strive –
> Bitterly we embrace,
> Single still."

So laments the lonely wife in Browning's "Men and Women." The situation is human. It daily occurs, and is even commonplace. It illustrates the natural fortune of a pair either of lovers or of human beings otherwise related, who remain merely a pair. When, through any accident,

mutual antipathy chances to arise in such a pair, then each of the members of the now distracted community of two irritates the other to new antipathies. Thus in such cases love grows old while hate renews its impish youth.

The only possible renewal of the youth of such an old love depends upon establishing new and creative social ties between the two who once loved, or else upon enlarging and enriching the community, so that it is no longer merely a community of two.

But at this moment we are reminded of a new consideration. As a fact, the natural unit of human society, in all its stages of evolution, is the family. But the normal family is not a pair, but is at the least a triad, a group of three persons: Father, Mother, Child. What one might call the molecule of the most lasting and simply instinctive human social groups is, so to speak, an union wherein at least three individual persons, three social atoms, or, in higher stages, three social groups, participate. In such a community love can indeed readily assume its more stable forms, and can turn into a more ideal loyalty. In a mere pair of persons, love, while frequently both present and intense, is essentially unstable; while hate, when once it appears, tends to grow with what it feeds on, namely with the natural contrasts between individuals, and because of their mutual interruptions, and by virtue of the constantly growing consciousness wherewith each of the two antipathetic persons observes how the other regards him. But in the family triad, the winning and common care for the child may charm away many of the most besetting influences that tend to wreck home unity.

Let us sum up the results thus far reached: The advice which the Dhammapada gives us, about love and hate, ignores an essential fact, namely, the fact of the dangerousness of the dyadic human relations; and forgets this reason why antipathy is so readily growing a weed in our social relations. We hate not merely because we remember injuries. Many of our sources of antipathy seem to be, in the single case, much more petty than is a desire for revenge; but are actually deeper in their meaning than is such a desire. Very often we tend to hate simply because there are so many of us, and because we are so different one from the other; and so because, when we are taken in pairs, we thus appear in each pair as interrupters and intruders, each member of the pair annoying his fellow even while trying to express whatever love he chances to possess for the other, and each emphasizing his own hatred when he feels it, by dwelling on these dual or bilateral contrasts.

Such is thus far our result; here then is the fundamental principle of the philosophy of war. The deepest reason why war is so persistent is that

the nations, thus far in history, are related chiefly in pairs, -pairs of commercial rivals, pairs of borrowers and lenders, pairs of stronger and weaker nations, pairs of superiors and inferiors, pairs of plunderers who do not understand each the other, - pairs of plotters, each of whom suspects his opponent.

And the deepest reason why what is best in individual men does not destroy but often inflames the warlike spirit, lies in the fact that the best in individual men depends upon their loyalty to their own groups, upon their patriotism, and also upon their interest in groups which are not mere pairs. In such interests in groups which are larger and richer than pairs, consists men's very desire for human solidarity. For human unions can become stable and fruitful only through the establishment of relations which are very different from the dangerous dyadic relations of lovers, of rivals, and of warriors.

The sound advice to men is then not completely expressed by the word: "Little children, love one another"; but rather by the Pauline advice to love some united community which has the characters ascribed by Paul to the church. *War itself persists because the nations still cultivate dyadic relations too exclusively.*

We have thus seen wherein lies the basis of the problem of war. War is simply one case whereby to illustrate how dangerous the dyadic relations are in the social world; and how dangerous a community is one which has the form of a pair either of individual men or individual nations.

In the social world which consists of pairs, love indeed finds many temporary dwelling places; but it also finds no continuing city, and so, has to seek in utopia for a city out of sight; while hate is indeed not universal, and not all powerful, but is grounded in the natural diversities and in the mutual observations of men, and is therefore always ready to be aroused in those who had been, until it appeared, friends and brothers; while if once aroused, hate tends to grow more intense and distracting as it observes its own life. In those communities which are mere pairs, time is the consumer of love but the nourisher of hate. Love between the members of a mere pair tends to wax old as does a garment; while hate, when once it comes, flourishes in a malicious youth, witch-like and death-dealing.

IV. THE COMMUNITY OF INTERPRETATION

THE outlook for humanity would indeed be dark, if our social relations were limited to mere pairs of individuals or of nations or of other groups of men, whether petty or vast. But, as a fact, this is not the case.

We have already seen that there is at least one human community

which has characters and relations such as no mere pair of human beings can possibly possess. This is the community consisting of father, mother, and child. This natural and instinctively originated community is never perfect, and is never entirely stable. And hate can find a place in it as well as love. But we also know that this natural community possesses, even in the life of barbarous and uncultivated man, a normal stability, and a normal fruitfulness, as a basis of family peace and loyalty, which lies at the root of many very vast social organizations. Out of an aggregation and perfectly natural interconnection of such triadic family groups, or of what you may call triadic social molecules, a patriarchal social order can be built such as several very great and stable Oriental civilizations have richly illustrated. Time and fecundity favor the family. Its form tends to abide. It favors a type of love which forms a model for all the loyal.

It behooves us then next to consider whether there are other groups of human beings, other communities, perhaps artificial, but essentially sound and progressive, which have characters such as the triadic union of father, mother, and child illustrates. And herewith our quest enters upon a new stage. Pairs are dangerous communities. Are there triadic communities which are less dangerous? Are there many instances of such triads? Can we name such?

As a fact, all of us depend for the opportunity to do our daily business upon the existence, upon the stability, and upon the fruitfulness of such relatively peaceful and loyal triadic social groups. Let us name a few of them; for in this field concrete examples are especially instructive. Let us talk then no more of pairs of lovers or of rivals. Let us consider some communities which are essentially groups of three individuals, or of three groups of men.

Suppose that somebody, - let us call him A, - desires to do business with another man, whom we will call C. So far, some relation involving the pair consisting of A and C is sought. But perhaps A and C are dwellers in different cities, or in different countries. Perhaps they are not on speaking terms. Perhaps they speak different languages. Perhaps each is too busy about his own affairs to dream of interrupting the other. In such cases the dual relation whereby A might do business with C, cannot readily be established. What shall A do?

A form of business which daily grows, in the modern world, more and more important, hereupon suggests itself to our minds. Suppose that A finds some third man, - let us call him B, - who undertakes *to represent A's plans to C, to interpret, to explain, to urge them in C's presence; to act, in a word, as the agent of A in the proposed*

dealing with C. Let the business hereupon be carried out according to this method. That is, let A find the agent B. Let this agent, let B do the proposed work.

Hereupon there will be formed a community consisting essentially of three persons, A, B, C, who occupy different places in this community. Their relations will be not merely dual or dyadic, but treble or triadic. And each will have, in the resulting triadic transaction, an unique place. Each can be named by this, his special function in this triadic community.

This community will consist of what is usually called a *principal,* of an *agent,* and of a *client,* or other such man, *to whom the agent represents the principal.* The relations of these three persons are such as need to be expressed in triadic terms. This community cannot be reduced to a mere collection of pairs. If you try to understand its structure, you will find that you have to think in terms and in relations with which the study of mere pairs of persons cannot make you familiar.

And now, this community is such that its relations have a most instructive practical value. To observe what this value is, you have first to observe that this community is naturally a peace-loving community. Every business involving a stable type of *agency* depends upon mutual respect and confidence. And you then have also to remember that in our modern world *we daily come to be more and more dependent upon finding and using agents.* New forms of agency, new classes of agents, accompany every advance of civilization. And you have still further to remember that agents *tend on the whole to further international as well as personal peace and good will.*

The type of community here in question needs in view of its vast power, effectiveness, and fruitfulness, a name of its own. Let me suggest a name. I need a very general name, for this type of community in question is also exemplified by triads of men, or groups of men, whose relations you would hardly think of defining by means of the term agent. Common to all the communities of this type is their tendency to further peace, good will, and loyalty, and to have an unifying influence both upon individuals and upon nations.

I venture to call a community such as that consisting of principal, agent, and client exemplifies, a *Community of Interpretation.* It is a community having a very wonderful adaptation to the most various social tasks. It is the best type of community that we know, just because of its general tendency, illustrated in widely various special examples, towards stability, unity, and practical effectiveness. Our most productive as well as our most ideal sorts of business daily require us either to become

members of some sort of community of interpretation, or, when we are already members, to act loyally in accordance with the place that we occupy in such a community. Such communities are not merely convenient. They are indispensable to civilized life. They are not merely so frequent as to be commonplace, but they are socially so potent as to seem, in some of their exemplifications, almost superhuman in the skill and in the humane sort of social unity which they create and sustain. Having begun with the extremely well-known instance of the community consisting of a principal, an agent, and a man, sometimes called a client, to whom the agent represents the principal, we may at once characterize in very general terms the mere form which any community of interpretation possesses.

A community of interpretation consists of three persons, or groups of persons, who are its members. We may call these members A, B, and C. We may first think of them as individual men. We shall find, however, that in general, each of the members of a community of interpretation not only may also be a group of men; but that this individual group in such a community may be much more numerous than is any now existing nation. Our present interest lies in the form of the community of interpretation, in its relations to the warlike, to the peaceful, and to the loyal tendencies and dispositions of men. We wish to show that, on the whole, a community of interpretation, not only is, in itself, a peaceful group of men, but also may be, and frequently is, a very highly active and strenuous and creative community; and that its life essentially tends to enrich both the power and the unity of mankind. A community of interpretation is a sort of artificially created but marvelously fruitful family. Of social molecules, each of which consists of three atoms, or individuals united in a community of interpretation, the most potent and peaceful and reasonable social orders in the modern world consist.

We also wish to show that, *if the world's peace is to be furthered, such progress must take the form of creating and sustaining certain definable communities of interpretation.* We shall be able to show that this our main thesis, in this paper, is at once a philosophical principle, and a perfectly practical and business-like proposal, whose truth and value the market place exemplifies as well as does any rightly constituted theory of society. By this thesis our philosophy of war will be at a stroke converted into a philosophy of peace, and that without our confining ourselves to any merely utopian dreams or plans. We shall show, not indeed how universal peace is at once to be attained, but how the human world is now actually on the way towards a possible, even if very distant, universal peace; and we shall also show that this way lies along the very

lines of progress which the form and the functions of any community of interpretation exemplify.[3]

A, B, and C, the members of any community of interpretation, work together upon a task which is at once theoretical and practical, - at once businesslike and ideal, - a task which may be as unemotional and impersonally stern in its requirements as is any serious business of men, but which may also require all the passionate devotion, and all the eager loyalty, which any man can give. This task, in its simplest expression, is this. A and C, to use again the phrase of Hamlet, have their own individual "business and desire, such as they are." The remaining member of the community, whom I now call B, has, as his peculiar business in this community, the task of addressing C, and of explaining or interpreting to C what A's desire or business is, to the end that C may be brought into some definite sort of cooperation with A.

This cooperation, if it occurs at all, will bring A and C into some kind of social unity, such as will make them act as if they were, in a certain respect, *one man.* To bring about this sort of solidarity, and this cooperation of C with A, is the interpreter's main aim and interest, so far as he is indeed the interpreter of this community. He desires, just as any reasonable agent desires, not to do A's will alone, nor C's will alone, *but at once to create and to make conscious, and to carry out, their united will, in so far as they both are to become and remain members of that community in which he does the work of the interpreter.*

Since B has this united will of A and C as his aim and inspiration, he must be what I call loyal. That is, he must be the willing, and, for the purposes of this special task of interpretation, the thoroughgoing servant of the cause of uniting the will of C, to whom he represents the ideas of A, with the plans of A, whom he interprets. B, the interpreter, is therefore the most important member of the community in question. For he both defines and expresses its united purpose. He brings C into touch with A. He holds them together. His essential aim as interpreter is that not his own private will, but the will of the whole community, should be done, and that A and C should act as one man, while, in bringing A and C together, he

---

3. The idea, although not the name of the "Community of Interpretation," is derived by me from certain essays of the late logician, Mr. Charles Peirce. The philosophical bearing of this idea, and its relations to very deep and far-reaching philosophical issues, have been discussed in Vol. II of my recent work entitled the "Problem of Christianity" (New York, 1913). The present application of Peirce's theory of interpretation to the philosophy of war and peace is, so far as I know, new.

usually discovers or in some measure creates their common will.' Hence B is above all the most obviously and explicitly loyal member of the community. On the other hand, - "in his will," when he finds and expresses it, "is the peace" both of A and of C. His success lies in this peace. His "business and desire," if he is indeed a successful interpreter, create, sustain, and constantly increase their harmony. "To this end he comes" into this community. He incarnates and furthers and enlightens its aims, precisely in so far as he worthily fulfills his business as interpreter.

In the single case, as in the market place or in the office, the business or the idea which B interprets to C, and the common will of the community of interpretation which B discovers, expresses, or carries out, may relate to matters of a commonplace, or even of a sordid character ; but on the whole there is no ideal activity of man which is too lofty to be expressed or furthered through a community of interpretation. For all rational plans involve the cooperation of pairs of men, - the union and the unity and harmony of the wills of those who are to cooperate. But, for the very reasons heretofore pointed out, such union and such unity cannot be stable, secure, and enlightened, unless to the pair of men who are to cooperate there is added the third man whose business and desire it is to bring and to keep these two in touch each with the other. Such a mediator is precisely an interpreter of one of the two men to the other. The interpreter has then the function *to transform the essentially dangerous pair into the consciously and consistently harmonious triad.* Because the interpreter B at once discovers or creates and expresses the one meaning and will of A and C, I have called him "The Spirit of the Community."

V. SPECIAL COMMUNITIES OF INTERPRETATION

LET me next return from the generalization 'which the mention of the ideal business of an agent has suggested to us, to further special examples of communities of interpretation. Let me call your attention to three such communities. They are both practical and ideal in their nature. They are both businesslike and redeeming in their influence. The civilized world has long depended, for some of its most characteristic and precious life, upon one of these communities. The two other communities are modern. Until very recently the world knew only the most rudimentary beginnings of them. But they have already transformed, in certain profoundly significant respects, the modern world. They dominate our social order more and more; and they will continue to do so, transforming it at a rate which promises for a long time to increase.

The three communities of interpretation which are now in my mind are these:

1. The judicial community.
2. The banker's community.
3. The community of insurance.

All of these three communities are coordinated with the agent's community, and cooperate with various forms of the latter, so that you may say: Our present civilization depends, for all its most peaceful, worldly, and practical activities, upon these four distinct sorts of communities of interpretation. If you removed all four from our social order, then this our human world, precisely upon its most practical and constructive side, would degenerate into a vast aggregate of the dangerous communities which are pairs. The family triads aforesaid would indeed remain as the principal basis for the loyal life of mankind; while a few other less visible and less obviously practical types of triads would characterize so much of our civilization as still would be left to us.

Let us look a little closer at the communities of interpretation now before us. The agent's community we have already characterized.

The judicial community consists of a pair of contending individuals or social groups, while the third member of the group is a judge, or umpire, or arbiter, or mediator, whose office consists of interpreting to a defendant the will, the case, and the legal or social rights of a complainant or plaintiff.

The judicial community is the most ancient and familiar of the communities of interpretation. Upon the dignity and authority of judges and umpires the social world depends for the control and transformation of certain well-known consequences of the original sin of the dyadic relations. From social conditions, which, if uncontrolled, directly lead to elemental warfare, the judicial community actively leads the way to other social conditions which constitute peace. The peace thus won is not in general the peace which the Dhammapada advises us to seek by substituting love for hate. But it is the peace which incites men to new cooperations as soon as the contention is thus judicially settled. Hence the judicial community is indispensable to civilization.

The banker's community consists of a borrower, of a lender, and of a third person whose life and interest it is, in general, to make the relation of the borrower and the lender a relation that is profitable to both of them. This third person is that active interpreter of credits, that expert as to

the safety of loans, who is known as a banker. The lender deposits with the banker. The banker accommodates the borrower. Or, if the borrower and the lender are that very dangerous pair consisting of persons known as a promoter and an investor, the banker may then appear as a broker, whose business it is to bring and to keep investors in profitable and fruitful touch with those who undertake or promote novel enterprises, for which they need capital.

Apart from the banker or broker, acting as interpreter, the pair consisting of a borrower and a lender is a peculiarly dangerous pair. The advice of the Dhammapada, the "old rule" that hatred ceases by love, becomes not merely ineffective but bitterly and tragically humorous, when applied to the natural relations which tend to arise within this pair consisting of borrower and lender. The ancient and medieval social world knew of borrowing and lending mainly as calamitous social relations, which seemed fatally to lead to avarice, to fraud, and to the bondage of those debtors whom want or overconfidence had thrown into the hands of their creditors.

One of the most dramatic of all social transformations has been that which has been due to the appearance, in the modern world, of the banker's community of interpretation. Out of an aggregation of the social molecules which are, in one way or another, banker's communities, the whole vast and productive system of modern credit has grown. The result is that, as a noted publicist some years ago said to me: "Ours is the age, and ours is the civilization of the broker." You easily see what this publicist meant. You all know how, despite all the unhappy social accidents that interrupt the workings of the modern system, and that mar both its morals and its success, the modern credit system is, on the whole, both a result of loyalty and a trainer of loyalty.

For, necessary to the great banker's enduring success is his steadfast loyalty to his function as interpreter and so as the "spirit of his community." Just as he may otherwise fail, so he may defraud. But, on the whole, banking has made not only for thrift, for cooperation, for the constant increase of investment, for confidence, and so for the unity of mankind, but it has also made for loyalty; and has in fact both taught loyalty to the business world and exemplified loyalty, as only the work of a community of interpretation can do. The banker's community, then, is the social molecule of a vast organism, whose life is, on the whole, a life of peaceful construction, and in that sense a life of a true love of mankind. If war ever ceases, if peace ever comes, the banker's community will have had an important share in the process.

It remains next to speak of the community of insurance. Everybody

knows in general of its vast and transforming influence, and of its recently acquired social importance. Few notice the reason why it has become so important. Our previous study of the general characters of the community of interpretation can be easily applied to the community of insurance.

Men take risks. They are often obliged to do so. Sometimes they take them merely because they love risks. But when a man takes a risk and loses, there is in general somebody else who has to bear the consequences of this loss. It may be his creditor, his assign, his heir, or his next friend, upon whom the loss falls; but, since nobody liveth unto himself, and nobody dieth unto himself, the man who takes a risk is seldom the only man who pays for the loss. Now let us call the man who takes the risk A. Then let the man who has to bear the loss if A loses, but who of course might correspondingly win if A won, be named C, and let us call him A's *possible beneficiary*, who of course may be, if A loses, quite the opposite of a receiver of benefits.

Now the relation of A to C, the relation of the man who takes the risk, to the man who may win if A wins, but who will lose if A loses, is a dyadic relation. Like the other human social relations of pairs, it is dangerous. It daily embitters the relations of debtors and creditors. It daily makes some people penniless, and inspires others with hate. Its very danger makes it morbidly fascinating to those who have once learned to gamble. It fills the social order with fears and suspicions. It wrecks souls. And you cannot escape from the poison of this dangerous relation by merely loving the man whose risks lead to losses which you have to bear. Love seldom cures any such fool of his folly, and the one who loves him suffers the more because of the love.

Now the community of insurance comes to exist when somebody, let us call him B, undertakes to bring the man who takes the risk into a true and active union of interest with his possible beneficiary. The members of the community of insurance are the *adventurer A,* that is the man who takes the risk, the *beneficiary C,* and the *insurer,* who is the spirit of the community, and who is commonly incarnate in some corporate community.

The insurer B estimates or interprets the *insurable value of* the risk which A takes. For a consideration corresponding to this insurable value, B undertakes to make C not only A's possible beneficiary, but A's actual and reasonably secure beneficiary. That is, *B insures the beneficiary C against any loss due to the risk which A takes.*

For reasons which can only be stated in terms of the theory of probability this result can be reached only in case many risks are

estimated, and insured by the same insurer B. Hence the insurer's community tends, far more than even the banker's community, to demand some larger union of the social molecules whereof the single community of interpretation consists. In consequence insurance very largely takes the form of mutual insurance. It brings men together in vaster and in more highly organized and articulated groups than the banker's world knows. It leads to constantly new social expressions. It contributes to peace, to loyalty, to social unity, to active charity, as no other community of interpretation has ever done. It tends, in the long run, to carry us beyond the era of the agent and of the broker into the coming social order of the insurer. We cannot predict all that it will yet accomplish; but we can already see that *of all the business relations and of all the practical communities yet devised, the insurance relations and the insurance communities most tend to bring peace on earth, and to aid us towards the community of mankind.*

MUTUAL INTERNATIONAL INSURANCE

In the search for influences that might further, the cause of international peace, well-known efforts have already been made to devise practical and international uses of the judicial community, of the banker's community, and of the agent's community. Each of these efforts has so far proved both conditionally useful and frequently disappointing. *No adequate effort has yet been made to further the cause of peace through the deliberate application of the form of the insurer's community to international business. Now this is what I propose as my present contribution to these dark problems.*

The foregoing study of the triadic communities of interpretation, and of the dangerous character of those communities which are pairs, has been needed to enable us to show why this newest of the great communities of interpretation has so rapidly acquired its vast influence over the social destinies of men and why we need to put it to new uses.

Our whole discussion up to this point has prepared the way, therefore, for our final thesis, which is this : -

There is a still untried method of gradually leading towards international peace, and of rendering wars progressively less destructive and less willful. This is the method to which I call your attention. It is in general the method of undertaking mutual international insurance against some of the common calamities to which all mankind, or certain large portions of mankind, are subject. Stated in terms of our theory of the communities of interpretation, this method may assume the form of a maxim, or if you like, of a proposed

constitution or international agreement upon which a new community of insurance may be founded, as follows : -

Apply to international relations, gradually and progressively, that principle of *insurance which has been found so unexpectedly fruitful and peaceful and powerful and unifying in the life and in the social relations of individual men.*

Begin to make visible the community of mankind, not merely, as at present, in the form of alliances which are ambiguous, and at times irritating, and of arbitration treaties which are likely to be broken at some passionate moment when they are most needed, but in the form of a sufficiently large board of financially expert trustees, whose membership is international, whose services are duly compensated from the funds of the trust, and whose conduct is guided by plainly stated rules which have the substantially unanimous consent of all the nations concerned in the plan of mutual insurance which is in question. Let these rules be changeable only by the substantially unanimous consent of the members of the already existing community of insurance, or in such wise as not to abridge rights which the already existent body of rules have created.

Let the funds of the mutual insurance organization in question be put, in form, into the charge of some well-known and, so to speak, essentially neutral power, such as Sweden, or Switzerland. Let this fund be protected from merely predatory assaults by the fact that under the rules, it would, from the first, be invested by the board of international trustees, that is by the incorporated insurance community, in decidedly various investments, and in various parts of the world, so that it could not be found or used by any one power unless this power had first violently conquered all of the nations that had contributed to the trust, and that had, under the rules thereby acquired, a definite interest in its distribution.

Let rules be formulated, as such became needful, to regulate the conditions under which one of the partners in the plan of mutual insurance could surrender, with or without notice, its already acquired rights under the insurance agreement.

Let the international insurance community in question have no direct political powers or duties whatever. Let it be purely a financial and fiduciary body, with a minimum of inevitable judicial functions.

Let its fidelity to its trust and to its rules be guaranteed simply by the size of its controlling board, by the personal character, the experience, and the mode of selection of the members of this board, and by the entire publicity of all its proceedings and official acts.

Let it have no powers as an arbitrator in case of international disputes, but *entire autonomy, under general rules, regarding those judicial decisions which it would inevitably have, from time to time, to render, when disputes arose as to what rights the individual members of this international union for mutual insurance had acquired or forfeited by their own acts as sovereign powers.*

Let it lay down no arbitrary rules for international morality; let it not undertake to codify international law; let it hold aloof from all politically colored international disputes.

On the other hand, let there be simply no appeal from its deliberate and judicial decisions as to the financial and fiduciary matters which were left to its decision and discretion by the international agreement for mutual insurance.

Let any and all the sovereign states of the world, great or small, at war or not at war, whether accused or not of present or past barbarism by their neighbors, be at any time at liberty under general and financially precise rules, to enter the international insurance community as new members, to contribute to its fund, and to receive in turn an amount of insurance against a definite sort of national calamities - an amount which, as in case of ordinary mutual insurance companies, should be duly proportioned to the deposit made.[4]

Finally, so far as this first outline sketch of our plan is concerned, let a provision be made for emergencies as follows: A nation, insured under the agreement, might undergo revolutions, or might be conquered in war, or might be divided into several states, or might be lost in some new federation of various states. This transformed sovereign state might already have acquired, before its disappearance, larger or smaller rights to an insurance payment, under conditions which might have come to be actually realized. In this case, *the trustees of the mutual international insurance organization would have sole power to decide what state or states, if any, had inherited the insurance payment or payments due to the state which had thus passed away from the now visibly represented family of nations.* If, however, the trustees of the fund decided, formally and judicially, and of course after due investigation, and quite publicly: "No now existing state has justly inherited the insurance

4. Let it freely cooperate, when it chose and in so far as its functions permitted, with the plans, the influences, and the undertakings of the Hague tribunal. But, since its own business is thus financial and fiduciary, let it not itself be subject to the Hague tribunal and let it carefully avoid, so far as possible, the actual taking part in arbitration or "judicial settlement of international disputes."

rights which belonged to the formerly existing state. The dead state is now unrecognizable among the living states" - then *the insurance rights of the dead state would simply lapse;* and its insured funds would return to the general fund, to be used by the remaining members of the community of mutual insurance under the general rules. *Thus a motive would be furnished whereby both internal revolutions and external conquests would be made less attractive to disturbers of the social or of the international peace of mankind.*

Furthermore, if, at the end of a war, the vanquished power had some right under the mutual insurance agreement to certain funds, and if the victor hereupon insisted upon forcing the vanquished to surrender, as a spoil of war, its rights under the contract of mutual insurance or the funds due to it under these rights, *then a treaty thus to surrender the property rights or the money due to the vanquished under the insurance agreement, would automatically make void the whole insurance contract which the vanquished had made.* From the moment the vanquished had been forced to surrender its funds, now due, or its rights acquired under the insurance contract, from that moment the insurance trustees would *simply pay nothing of the funds in question either to the vanquished power or to any other single power. The whole fund in question would simply return to the common fund,* and be used for the common benefit of all the nations that participated.

So much for a first sketch of the proposed agreement of mutual insurance. You will ask: *Against what evils should this mutual international insurance company, when once organized, attempt to insure its clients?*

In answer, first, think of the long possible list of evils from which directly or indirectly all the nations suffer, and with which, in the first place, war itself has perhaps little, - perhaps nothing to do. Such evils are widely distributed, have an incidence which affects now this people and then that people, are capable of a careful statistical study, and are therefore in principle insurable. Individual nations cannot in general insure their subjects against them. *A community of nations could insure an individual nation against them,* and could pay over a guaranteed sum to the insured and suffering nation.

A brief and inadequate list of such calamities is as follows:

1. Destructive earthquakes and volcanic eruptions.
2. Certain of the migratory pestilences, and in particular, certain of the tropical diseases.

3. Some of the destructive storms of the type which follow, in general, known tracks but strike special localities by chance (such for instance as the West India hurricanes, and the China Sea typhoons).

4. Recurrent famines and great crop failures.

5. Marine disasters. (For the ocean exacts a statistically definable toll from the commerce of the whole world.)

Herewith varying a little the type of cases, we may further mention:

6. *The destruction in war time of the private property belonging to the subjects of unquestionably neutral states.* (This is a first mention of the "war risks" which our insurance company might learn, in its gradual growth, more and more to insure.)

Now suppose a community of mutual international insurance once instituted upon such general lines. To the foregoing list of internationally insurable losses, a great number of others can and would soon be added. What would be the general result?

The mutual insurance community would be sure to do what other mutual companies have done.

1. *It would proceed carefully to investigate such losses both from a statistical point of view and with regard to their causes.*

2. *It would attempt to reduce the number and magnitude of these causes.* To this end it would use all possible moral influences consistent with its functions as a trustee. Being no political state, and having no protection except the fact that its funds were *nearly inaccessible to any predatory power,* it could use none indeed but moral influences. But on the other hand, being no Hague tribunal, although often cooperating with that tribunal, it would not be likely to irritate its clients by unwelcome judicial decisions about already bitterly controversial matters. It would need to ask for no new arbitration treaties. It would leave to the Hague tribunal the work of formulating international law. Its own function would be the higher one of cultivating international cooperation through mutual insurance against common evils and thereby teaching by example the meaning and the attractiveness of the loyalty of each individual nation to the community of all nations. Mutual insurance would make this community visible.

3. But these, its non-controversial and purely moral influences, would still be influences whose source would be the first *spirit of the community* of all mankind which would ever yet have won permanent and visible presence on earth. In its efforts not only to alleviate but to prevent pestilence

and famine, the board of trustees, representing all the nations in the community of insurance, would *inspire all the nations actually to work together,* at once in a charitable and in a businesslike way, as they have never worked before. *As the spirit of this triadic community, the insurance organization would both exemplify and teach loyalty. Now the nations, living, thus far, in dangerous pairs, and in groups of pairs, have never yet had any chance of acquiring international loyalty.*

We have then a vast experience of business-like activities behind us when we assert that this triadic community, once founded, would ceaselessly tend to increase, to discover new powers, and to exercise new and peaceful influences. But you will ask: Could it go farther? *Could it insure its members against any of the evils of actual war?* And if it did so, would that still more directly tend towards the diminishing of wars?

I answer that, if large enough, *this community of mutual international insurance could insure its members progressively against more and more of the evils and destructive calamities due to war,* by the simple addition of one very important rule to the rules so far laid down: If a nation had a war with another, the insurance trustees would never directly inquire as to the moral justification of this war, but would ask: *Who committed the first act of war? No nation would receive insurance compensation for any expenses due to a war in which it committed the first act of war.* This rule would, in each case, require judicial interpretation. But this again would be no arbitration of a Hague tribunal, but purely a financier's decision as to whether or no an insurance policy was at least temporarily or in a single case vitiated by an act of a nature known beforehand.

For the rest, in so far as our insurance company undertook to pay any war expenses, it would get a businesslike interest in averting the causes of war which would express the will of all the insuring nations, and which would possess a fecundity, an ingenuity, and a wisdom of which we shall know nothing until we get such a community of interpretation formed *to teach the nations, by the potent devices of mutual insurance, the art of loyalty to the community of mankind.*

But you will say, such a community would need to begin with very vast financial resources. How shall the nations, now absorbed in greed and in rivalries, the dangerous pairs, be induced to invest their funds in so prodigious and humane an undertaking?

To this question the present moment furnishes the fitting answer. Herein lies the very core of the present practical proposal. For, when the

present war is ended, one side will be the victor. That side will include *more than one nation.* The victors will jointly or severally demand an indemnity or several indemnities from the vanquished, and might raise some new quarrel over the division of the spoils. Well, - *let the victors make their demand together. Let them demand one indemnity from all the vanquished. When it is paid, let the victors at once begin and actively establish the first mutual international insurance company against national calamities, including wars. Let them devote this whole indemnity to forming the initial fund of this company.* Let them deposit the fund with the trustees, and under the formal care of Switzerland or of Sweden. Then let them draw up their rules, and thenceforth *invite all sovereign states, great or small, including the vanquished states*, to insure by payments and enjoy all the advantages of the insurance. *This act of thus using the war indemnity will be much less wasteful than to waste it in preparations for future war.* The vanquished will not hope to make it an object of future plunder. *It will henceforth be the fund of the community of all mankind.* And this community of *all mankind will begin to take on visible form, presence, and power to save.*

Lincoln on a famous occasion used a triadic phrase. He spoke of "government of the people, by the people, and for the people."

My thesis is *that whenever insurance of the nations, by the nations, and for the nations begins, it will thenceforth never vanish from the earth, but will begin to make visible to us the holy city of the community of all mankind.* To such a vision perhaps we have a right, even while the slain lie awaiting burial. Let us dwell upon this vision, at once ideal and practical. Let us say of this vision, of this holy city, - "Even so, come quickly. For then, none of these dead will have died wholly in vain."

PEACE AND INSURANCE: RECOVERING THE UTOPIAN VISION OF INSURANCE IN ROYCE'S *WAR AND INSURANCE*[1]

Jonathan Simon[*]

> We cannot predict all that it will yet accomplish; but we can already see that *of all the business relations and of all the practical communities yet devised, the insurance relations and the insurance communities most tend to bring peace on earth, and to aid us towards the community of mankind.*[2]

August 1914

"War and Insurance" was delivered as a lecture in Berkeley, on August 27, 1914 to the Philosophical Union of the University of California on the occasion of the 25th anniversary celebration of that organization. The lecture was to be the culmination of a series of lectures that Royce, then on the Harvard faculty, had been invited to give at Berkeley, but on the fateful day of August 14, 1914, with war fully joined in Europe, Royce set aside his carefully prepared lecture and hastily composed "War and Insurance."[3]

Royce proceeded to lay out a plan for an independent world body which would undertake to insure nations against a variety of natural and human disasters. Nations would, by transfer of assets to a mutual fund controlled by a highly professionalized international group of trustees, establish a global investment fund. The fund would in its initial stages indemnify member nations up to a certain amount against exigencies that while catastrophic for any particular nation could be absorbed by the wealth of a large group of nations (at least if it included the most powerful economies), including volcanoes, earthquakes, famines and the like. In time, as its procedures became more regularized and self confident, the

---

1. JOSIAH ROYCE, WAR AND INSURANCE: AN ADDRESS DELIVERED BEFORE THE PHILOSOPHICAL UNION OF THE UNIVERSITY OF CALIFORNIA AT ITS TWENTY-FIFTH ANNIVERSARY AT BERKELEY, CALIFORNIA, AUGUST 27, 1914 (The Macmillan Company 1914).

* Professor of Law/Jurisprudence and Social Policy.

2. ROYCE, *supra* note 1, at 64 (emphasis in original).

3. JOHN CLENDENNING, THE LIFE AND THOUGHT OF JOSIAH ROYCE (Vanderbilt Univ. Press 1999).

fund might venture to indemnify nations against losses created by international conflict itself.

Royce's proposal drew a surprising amount of attention. For a time it drew its author back into the public eye as it was debated in the New York Times and other sites of public discourse. *War and Insurance*, brought out as a book by Macmillan sold well and was reviewed favorably although with lots of criticism. The plan was also considered by two Harvard Business school professors, H.B. Dow, and W. B. Medlicott. Dow advised Royce that a system of reinsurance might be the best way to implement the plan with each society having a national insurance company with which the international body might deal.[4]

Royce was far from alone among his generation in seeing in the practical workings of insurance, particularly in the social insurance form of workmen's compensation, an almost magical solution to the problems of the modern world. He was unique however in bringing to this discourse about insurance an advanced sociological and philosophical perspective that saw insurance not as simply a god-like technology but as a process of government and human social organization. For those of us who have been interested in what a sociology of risk and insurance[5] might yield us in purchase on our present, Royce's proposal for what he called "mutual international insurance," presents us a multifaceted bequest.

First, it gives us an ancestor and one of some importance in intellectual history. Despite being on the losing side of the culture war within academic philosophy, and being assessed relative to figures as daunting as Dewey and Pearce, Royce remains a major source of the only truly homegrown American contribution to modern philosophy, pragmatism and like the other pragmatists, the lines between philosophy and sociology are perforated and frequently crossed. *War and Insurance* makes a number of important claims about insurance quite consistent with the more recent work of both economists and sociologists of risk and insurance. Indeed, *War and Insurance* describes insurance as a form of government, something that has an important theme of contemporary scholarship.[6]

Second, Royce's picture of insurance and government is drawn at a moment when the loss spreading capacity of insurance was still approaching the peak of political influence it reached after World War II.

---

4. CLENDENNING, *supra* note 3, at 386.

5. *See* Tom Baker & Jonathan Simon, *Introduction* to EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY 12.(Tom Baker & Jonathan Simon eds., Univ. of Chicago Press 2002) [hereinafter EMBRACING RISK].

6. *See generally*, RICHARD ERICSON ET AL., INSURANCE AS GOVERNANCE (Univ. of Toronto Press 2003).

Standing as we now seem to, in a period when loss spreading as a political strategy is in steep decline, War and Insurance offers us a counter balance to the pessimistic views on the social costs and benefits of loss spreading that are now in ascendance.

Third, Royce was imagining the furthest extensions of the insurance as loss spreading model in the face of the greatest self inflicted calamity that human kind had experienced up until then. Royce himself would not live to see the final tallies, but by his death in 1916 he had certainly learned of battles in which tens of thousands died in contest of meters of ground. The terrorism attack of September 11, 2001, poses a similar kind of challenge to the integrity of the global order and to the model of insurance as a system of security.

Last Stand in Berkeley

Royce had come to Berkeley, his *alma mater* and first academic job, for more than an opportunity to relax in the temperate Bay Area summer with former colleagues and students. His planned lectures were to be a public clarification of his main philosophical theses which had just recently culminated in the publication of his *The Problem of Christianity*,[7] a book which Royce considered his masterpiece. Royce's brand of Hegelian idealism tinged with enough American populism to make him an occasional ally of Dewey, Pierce, and the pragmatists, had been one of the leading academic philosophical schools of the late 19th century in the United States. Although Royce may not have understood the situation in this way, in retrospect it is clear that his philosophical project was not so much defeated as superseded by the emerging analytic school that would dominate American academic philosophy at Harvard, and in most of American academia for the rest of the 20th century. His graduate seminars at Harvard were increasingly back-waters and his recent books received few serious reviews. His biographer describes the situation well:

> Philosophy was already moving toward analytical climates too severe for metaphysics, and on the eve of World War I, the audiences for lectures on the Beloved Community were rapidly diminishing. Royce, who had once said that philosophies are kept alive by the critical attention they get, sensed that his was now dying, or already dead.[8]

---

7. JOSIAH ROYCE, THE PROBLEM OF CHRISTIANITY (Univ. of Chicago Press 1968).
8. CLENDENNING, *supra* note 3, at 359-60.

Royce had come back to Berkeley to offer a defense of his life's work and rally what was left of his philosophical stature.[9]

Royce's philosophy was a profoundly optimistic one, tinged with all the themes of progressive modernism, i.e., the inevitable evolution of reason, and human compassion, the strong confidence in the progress of history that seems so distant now in the post-modern world. Like his pragmatist contemporaries C.S. Pearce and John Dewey, Royce made the interpretive nexus of "the community" a central locus for reconciling the subject and object in epistemology, and the individual and the collective in ethics. But as the title of his last major work suggests, [10] Royce was still very much a Christian,[11] who could not but see the progress of divine spirit in the increasingly interdependence of the world community. Royce's spirits must have risen at the prospects of outlining the main reasons for his optimism to a "hometown" crowd to whom he remained the great success story who had made it all the way from rural California to a named professorship at Harvard.

The course of events that summer could not have been worse for Royce. On June 28 Archduke Ferdinand was murdered in Sarajevo. On August 3, the Germans invaded Belgium and moved rapidly toward Paris. Royce's prepared manuscript was titled, The Spirit of Community, the theme of which was that modern economic development, particularly the banking and insurance industries, was bringing into existence the basis for a harmonious world order. Now every newspaper in the world carried the negation of that thesis on its front page.

The outbreak of the war was emotionally devastating to Royce. As a philosopher whose primary influences had come from Germany[12] he immediately faced the fact of the overwhelming anglophilia of the American academia. Eventually he came out publicly and loudly against Germany[13] but for the first year of the war he maintained a pained silence. Fated to die before the war's conclusion, we can be certain that like few

---

9. The existential importance of this may have been even more intense if he had any foreboding that in two years he would be dead. He had already suffered a stroke in February of 1912. *See* CLENDENNING, *supra* note 3, at 338.

10. *See* ROYCE, *supra* note 7.

11. Dewey had begun his career very much a Christian as well. Indeed the position of academic philosopher remained quite linked to religious instruction through the middle of the nineteenth century.

12. Royce took a Ph.D. at Johns Hopkins, the first American university to introduce that German degree and which was a major center of German intellectual culture.

13. After the sinking of the Lusitania on May 7, 1915, Royce felt that neutrality was no longer morally (or perhaps politically) viable, and he began an angry denunciation of Germany to his Harvard classes and in his public correspondence.

other Americans at this stage, Royce suffered the war as a dark plague on much that had been central to his intellectual life for half a century.

Delivered in the first anguished response to the war's outbreak, WAR AND INSURANCE took no side in the war accept against its continuation. Royce was clearly sobered by the early violence of the fighting and the signs that both sides were committed to a long conflict if necessary. The lecture passed, in short order, over most of the foundations on which pre-war hopes for lasting peace had been based, including religion, science, and democracy. In one of the book's most visionary passages, Royce imagines "some supernatural stranger, having an angel's tongue, and bearing a flag of truce" appearing over the battlefields of Serbia and Belgium to read words taken from the Buddhist Dhammapada but which sound in almost any of the great religions: "Hatred does not cease by hatred; hatred ceases by love; this is an old rule."[14] The angel, in Royce vision, has no effect on the warring parties who quickly "return to the tasks wherein they find their honor and their duty."[15] But if religion was hopeless, Royce put no more stock in the two great pillars of the post-Enlightenment faith, science and democracy.

> So, of themselves, neither cultivation, nor thoughtfulness, nor humane breadth of sympathies, nor the discoveries of science, nor the aspirations of the democracy, have been able to make wars cease on the earth.[16]

Indeed, Royce presciently suggested that democracy was itself one of the causes of contemporary wars and their savagery: "[m]odern wars may, as we now know, become more widespread, more democratic in spirit, more ideally self-righteous, than ever they were before."[17]

The unfolding of the 20th century would confirm this much of Royce's thesis. Both world wars and most of the major conflicts of the cold war were framed (often by both sides) as battles of liberation and or for democracy. Enemies are more frequently demonized as monstrous followers of an inhuman cause. Despite these insights about the propensity of modern societies toward conflict, the bulk of *War And Insurance* is an optimistic brief for the likely success of a new kind of loyalty, one now directed at the human race or some super-national portion of it. The war, Royce insisted, reflected much that was redemptive in modern conditions,

---

14. ROYCE, *supra* note 1, 16-17.
15. *Id.* at 17.
16. *Id.* at 9-10.
17. *Id.* at 10.

especially the capacity for loyalty to entities well beyond the immediate lived experience of community and into something more extended and abstracted. Royce was not prepared to view the war as a contradiction to his positive philosophy of world spirit. The war, in its own way, Royce argued, revealed the necessity and the possibility to achieve a new integration among nations. It was not a sign of mankind's primitive nature. Indeed, Royce argued, modern war was ironically a product of modernity's very own democratic spirit.

> The mystery of war and of its fascination can be fathomed only in case we first observe that although, of old, wars were often due in a large part to the passions and ambitions of rulers and of the ruling classes of the warring peoples, modern wars, however much princes may take part in their beginnings, are, on the whole, waged by peoples, and are in part the expressions of the recently acquired power of an intelligent democracy. [18]

Royce also insisted that the hate filled rhetoric that filled the propaganda of both sides not be taken as indicating how distant civilization remained from the Christian principle of love for thy neighbor. Royce argued that the progress of civilization was in fact a dialectic of love against hate.

> And so, for the warriors, and for us who now study the philosophy of war, the genuine problem relates not so much to the contrast between the love-relation and the hate-relation, as to the contrast between our relations to our individual neighbors, and our relations to our honor, or to our duty, or to our country, or to mankind, or to whatever community you may choose to consider.[19]

War was not a triumph of hate over love, but of some relations of love over other potential ones. If this war was more terrible than others, it was partially because the warring parties constituted national communities of loyalty as never before.

Dangerous Relations

Royce's philosophy might best be thought of as a kind of speculative social theory, one that placed great weight on the nature of relationships. The most celebrated relationships in society consist of one on one

18. *Id.* at 5-6.
19. *Id.* at 26.

connections, which Royce described as "dyadic." These relationships, like those between husband and wife, master and servant, teacher and student, were among the most intense, noblest and most valuable relationships, but in Royce's analysis, they were also necessarily unstable, capable of shifting from love to hate and then back again. This was not only true of individuals but also of nations who often found themselves paired in intense relationships with specific partners who were alternatively trading partners and war enemies (i.e. France and Germany). Indeed, Royce views this dyadic quality of national relationships as a major explanation for war.

> The deepest reason why war is so persistent is *that the nations, thus far in history, are related chiefly in pairs*, pairs of commercial rivals, pairs of borrowers and lenders, pairs of stronger and weaker nations, pairs of superiors and inferiors, pairs of plunderers who do not understand each the other, pairs of plotters, each of whom suspects his opponent.[20]

Royce highlighted the words "thus far in history" to indicate that he was not dealing with universal laws but a pattern in history of some substance. Royce's model recognized the power of pairs to produce tremendous cultural progress and destruction but saw real progress as possible only through the development of agents acting not in but on pairs.

Royce's philosophy embraced a second kind of relationship, one often ignored or if recognized demeaned. These relationships, which Royce called "tryadic" linked an individual actor to a pair of other actors. Celebrating these tryadic relationships as sources of social peace and stability, Royce highlighted a figure little loved in popular culture but increasingly recognized by the emerging field of sociology, i.e., the agent. According to Royce, much of the progress toward social stability and order in contemporary societies had been achieved through the creation of agents capable of mediating such relations. The institution of law and of the judge was perhaps the earliest example of such a "triadic" structure, according to Royce.

> The judicial community is the most ancient and familiar of the communities of interpretation. Upon the dignity and authority of judges and umpires the social world depends for the control and transformation of certain well-known consequences of the original sin of the dyadic relations. From social conditions, which, if uncontrolled,

20. ROYCE, supra note 1, at 39.

> directly lead to elemental warfare, the judicial community actively leads the way to other social conditions which constitute peace.[21]

Modern civilization had produced two new institutions, which performed this function even more capably, banking, and insurance. Both involved agents who stood between structurally opposed individuals, investors and borrowers, risk takers and the victims or beneficiaries. Unlike the judicial community, which Royce saw as leaving the individuals largely unchanged, both banking and insurance tended toward the construction of larger and more comprehensive communities since they required expanding the pools of participants in order to mediate successfully. Of the two, insurance was clearly the more evolutionary in Royce's view. While Banking created new structures of solidarity between parties it left them more or less intact in their other relations. Insurance was different with an almost inherent pressure to grow larger and more comprehensive.

Royce offered a theory of "triadic mediation," which he claimed to derive from his late friend the logician Charles Peirce, and his theory of "interpretive communities"[22] was part of his original planned lecture. The outbreak of the war led him to push forward an idea he described as preliminary and tentative and expressed in part "to attract the attention of some wiser minds than that of its author."[23] If the principle of insurance had worked so well to bring about an integration of opposing forces in domestic society, and brought thereby progress toward harmony and strengthened community, why not apply the same principles to international relations.[24]

> Our present civilization depends, for all its most peaceful, worldly, and practical activities, upon these four distinct sorts of communities of interpretation. If you removed all four from our social order, then this our human world, precisely

---

21. *Id.* at 57.

22. *Id.* at 50 n.1. In attempting to build a normative political philosophy from Peircean linguistics Royce traveled a path more recently developed by Jurgen Habermas. *See* JURGEN HABERNAS, THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY (Thomas McCarthy trans., 1984). The idea of tryadic relations also parallels Michel Foucault's conception of government as "action on the action of others." See Michel Foucault, *Governmentality, in* ESSENTIAL WORKS OF FOUCAULT, 1954-1984, VOL. III POWER, at 201 (James D. Faubion ed., 2000).

23. ROYCE, *supra* note 1, at xi.

24. *See id.*

> upon its most practical and constructive side, would degenerate into a vast aggregate of the dangerous communities which are pairs.

The concept of "community of interpretation" formed the central axis of Royce's later philosophy, and its most profound intersection with the work of Charles Peirce.[25] In his 1913 book, *The Problem of Christianity*,[26] Royce argued that the most philosophically significant part of Christianity was its epistemology. By locating the redemptive locus of the divine in the existing human community on earth, Christianity pointed to the decisive role of communities in providing a ground for individual knowledge and ethical action. For Royce the organized church was only one instance of this power of community, which was also embodied in political unions like nations, and in organizational forms.

A Sociology of Risk and Insurance

The economic analysis that has come to dominate our view of insurance portrays insurance relationships as transforming subjects in a negative way by diminishing their incentives for precaution, a process known as moral hazard.[27] Royce recognized the significance of moral hazard. In describing the difficulties inherent in allowing indemnification of war costs Royce states the problem of moral hazard almost precisely as a contemporary economist would:

> [t]o insure an individual nation against any considerable portion of the losses and expenses which war might entail, the very success of the plan, up to that point, would tend to render individual nations careless, and so more disposed, if possible, than they otherwise would be, to engage in war. For the man whose house is insured may thereby be rendered less rather than more careful with regard to the risk of fire.[28]

Compare Royce with Ken Abraham, a law professor and author of the leading economically oriented casebook on insurance law, who stated

---

25. *Id.* at 50 n.1.

26. Given as a series of lectures and then revised by Royce for publication all within several months of Royce recovering from a potentially devastating stroke. *See* CLENDENNING, supra note 3, at 370-74; ROYCE, THE PROBLEM OF CHRISTIANITY, *supra* note 7.

27. *See generally* Tom Baker, *On The Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996).

28. ROYCE, *supra* note 1, at xxix.

"[t]he term now refers more generally to the tendency of an insured party to exercise less care to avoid an insured loss than would be exercised if the loss were not insured." [29]

Royce also understood the significance of what contemporary insurance calls "adverse selection" the danger that that voluntary insurance pools may come to consist primarily of higher cost subjects. Noting the problems of attracting nations to a novel idea like an international mutual insurance, Royce observes "that strong nations would be likely to prefer to insure themselves, while if only the weak nations joined in the international agreement, little would be accomplished."[30]

But while Royce appreciated the dangers of moral hazard and adverse selection, he also believed that insurance was capable of generating pro-social pressure that ultimately outweighed them. In this regard Royce, anticipated the interest of contemporary sociologists of risk and insurance in the ways insurance relationships also produce order, regulation, and collective improvements in precautions.

For Royce, the primary countervailing effect of insurance was as an interpretive community. Royce theorized that social order was generally supported by the interpretive intervention of third parties into relations between individuals. Royce was celebrating the new class of professionals that were expanding the traditional role of lawyers and clergy in forms like medicine, social work, and teaching, as well as private agency roles like banking and insurance. All of these "agents" work not just for clients, but also on the relationship of one party, the client, to a range of other parties. To Royce this triadic intervention into on going relationship produced a variety of social gains. The agent provides a perspective in which the two potentially contentious parties are both represented. In this regard, communities of interpretation tend toward conflict resolution.

But their most important effect, for Royce, is epistemological; communities of interpretation allow the differences between parties, and thus the nature of the parties themselves, to become intelligible. The task of the interpreter or agent is to represent each party to the other.

> The remaining member of the community, whom I now call B, has, as his peculiar business in this community, the task of addressing C, and of explaining or interpreting to C what A's desire or business is, to the end that C may be brought into some definite sort of cooperation with A.[31]

---

29. KENNETH ABRAHAM, INSURANCE LAW AND REGULATION 4 (3d ed. 2000).
30. ROYCE, *supra* note 1, at xxxiii.
31. *Id.* at 51.

Thus the agent brings the two parties together into "some kind of social unity,"[32] which not only produces knowledge gains for the parties involved but offers to society a more stable and reliable unit for constructing a social order around.

Insurance operates to create a community of interpretation between risk taking parties and those who are exposed to the risks taken.

> The insurer B estimates or interprets the *insurable value* of the risk which A takes. For a consideration corresponding to this insurable value, B undertakes to make C not only A's possible beneficiary, but A's actual and reasonably secure beneficiary.[33]

Thus the insurer produces knowledge about the risks of the parties, making visible what was only implicit in the relationship between risk takers and their beneficiaries. While other interpretive communities, like law and banking, operate to turn agonistic dyads into more stable triads, only insurance brings to into play an internal logic of growth based in its actuarial methods. Because of the statistical law of large numbers, the cost of insuring the risks of any party declines as larger number of experiences incorporated into the premium calculating system allows the scope of losses to be predicted more precisely. The relations between risk takers and those who suffer losses as a consequence, for example, can only be mediated by a larger community. "It brings men together in *vaster and in more highly organized* and articulated groups than the banker's world knows. It leads to constantly new social expressions. It contributes to peace, to loyalty, to social unity, to active charity, as no other community of interpretation has ever done."[34]

This benevolent cycle of information growth produces a countervailing force to the incentives of moral hazard and adverse selection. By producing a more and more precise picture of risk through the creation of broader risk pools, insurance creates not only new opportunities for insurers to better measure and price risk, but also to design mechanisms to contain it. Just as the transfer of risk may create incentives for the insurance customer to take fewer precautions, the knowledge produced by the risk insurance relationship creates opportunities for the insurer to channel knowledge back to the insured so as to make possible more effective risk precautions. This new knowledge does not just enter into

32. *Id.*
33. *Id.* at 63.
34. *Id.* at 64 (emphasis added).

existing calculations, rather, by bringing the truth of their own risk to the subject; insurance knowledge may help produce a new consciousness of responsibility.

Royce's recognition of the special capacity of insurance to produce more effective regulation of risk resonates with the insight of recent sociologists of risk and insurance. Carole Heimer has described the role insurance plays in regulating access to the most important kinds of public and private assets. "These days one must first acquire a surety bond before getting a loan to start a business, arrange for fire insurance before securing a mortgage to purchase a home, and offer proof of auto insurance to register a car or get a license to drive."[35]

While this raises concerns about the consequences of discrimination in insurance (redlining) it suggests how critical a role insurance plays as an enabler, bringing its subjects into a condition in which other markets (in this case lenders) can establish their own relationships with the subjects; indeed relationships with far more palpable repercussions for consumers (own a home) then the contingencies indemnified by insurance. By providing an administrative apparatus capable of assigning financial responsibility and collecting it in affordable payments, insurance makes it possible for government to place mandates of responsibility on subjects that would otherwise be bitterly resisted. Insurance, from this perspective, can become a powerful if largely invisible form of regulation, setting conditions and obligations for participants in various markets and activities with no public debate formal law making.

Royce's claim that insurance "brings men together in vaster and in more highly organized and articulated groups than the banker's world knows"[36] seems to recognize precisely the governmental capacity of insurance as its major contribution. While Royce saw this as driven by the greater levels of loyalty created by insurance compared to banking and other agency relationships, Heimer emphasizes the economic and political efficiency benefits to government of delegating regulatory tasks to insurance. Moreover, compared to recent studies, Royce appears idealistic in his conception of the insurance relationship not having taken into account the conflicts introduced by the existence of a competitive private market for insurance.[37] In effect, Royce seems attuned to the narratives

35. Carole A. Heimer, *Insuring More, Ensuring Less: The Costs and Benefits of Private Regulation Through Insurance*, *in* EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY 116, 116 (Tom Baker & Jonathan Simon eds., 2002).

36. ROYCE, *supra* note 1, at 64.

37. *See* Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform"*, 50 RUTGERS L. REV. 657 (1998).

promoted by insurance marketing that depict insurers as primarily focused on helping customers recover from disaster rather than the narratives offered by insurers when they are rejecting claims.[38] Royce also failed to anticipate the convergence of insurance with other kinds of financial agents. Banking has come to look a great deal like insurance in many of its roles. Consider the emergence of a secondary market in mortgages bundled together and sold like bonds, which is based on the presumably tighter integration of lenders and makes it possible to extend lending to a vaster group.

Royce's account of insurance relationships also resonates with what Deborah Stone calls the "moral opportunities" of insurance in contrast to its "moral hazards."[39] Stone argues that insurance can also change the incentives of actors in ways that not only do not degrade precaution but foster it.[40] Royce saw insurance as producing and intensifying the loyalty of subjects toward collective interests. When insurers covered ordinary domestic losses, they helped produce the growth of a social welfare mentality by making visible the interdependence of citizens and financing the mobilization of reconstruction services. Likewise, Royce hoped an international mutual fund would help build domestic institutions of social integration in those societies where they were lacking or lagging. The awarding of large sums of money to injured states would stimulate the creation of welfare institutions inside that nation to undertake direction of recovery spending. These institutions would begin to transform the relationship between subjects and government.

> But, on the whole, any modern sovereign state would be inevitably much influenced by the prevailing public opinion of its own people with regard to the distribution of its insurance funds.
>
> . . . .
>
> [A] system of international insurance, once established, would furnish an extremely simple mode —a wholly new sort of machinery —by means of which an

38. *See* Tom Baker, *Constructing the Insurance Relationship: Sales Stories, Claims Stories, and Insurance Contract Damages*, 72 TEX. L. REV. 1395 (1994) (contrasting the dual nature of insurance as preying on insureds who are in need and as an overseer of those who are greedy and dishonest).

39. Deborah Stone, *Beyond Moral Hazard: Insurance as Moral Opportunity*, *in* EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY 52 (Tom Baker & Jonathan Simon eds., 2002).

40. *Id.*

> individual state might deal with its most intimate internal problems and issues.[41]

In this respect, Royce anticipated the role the United States played through the Marshall plan in post-World War II reconstruction in Europe. The provision of millions of dollars in reconstruction funds has been widely credited with leading Western Europe to remain solidly committed to capitalism and liberal democracy during the Cold War.[42]

Internationally such an insurance system could also function as a deterrent to the clearest case of human inflicted national disasters war. Aggressor nations would stand to forfeit any rights to the insurance coverage (and thus of their investment in the fund) by the international body, while it would be denied at least that portion of the wealth of the victimized state which was invested through the insurance body internationally. In time, Royce believed, such an institution would affirmatively work a transformation in the spirit of relations among nations.

> For if the nations begin thus to coöperate, *they will, for the first time, learn what that sort of honor is which is involved in keeping agreements such as the insurance business exemplifies.* What is called national honor is at present altogether too much a matter of capricious, private, and often merely personal judgment, *simply because the nations are not as yet self-conscious moral beings.* [43]

Royce and Advanced Liberalism

If Royce's analysis shares a lot with contemporary ideas in both the economics and sociology of risk and insurance, his confidence in the success of the insurance model of government stands in contrast to the dominant themes of contemporary domestic and international relations. Royce saw the advantage of "vaster and in more highly organized and articulated groups"[44] while contemporary policy discourse in most post-industrial societies generally celebrates the advantage in smaller organs whose interrelationship is regulated by stochastic or market mechanisms rather than by organization and articulation. Royce saw the power produced by spreading loss and socializing risk across broader and broader

41. ROYCE, *supra* note 1, at xxxviii-xxxix.

42. The Marshall plan was launched by President Truman in 1948. LEWIS L. GOULD, THE MODERN AMERICAN PRESIDENCY 109 (2003).

43. ROYCE, *supra* note 1, at xxxiv (emphasis in original).

44. *Id.* at 64.

masses of humanity, while neo-liberal thought calls upon its subjects to embrace risk and accept both responsibility and the rewards that come from control.[45]

Dead before the end of World War I, Royce never lived to see the insurance model reach the very highest levels of acceptance in the years after World War II when broad social insurance became a central tenant of liberal government in Europe and to an extent globally. In the years since the "welfare state" was established, its high costs and coexistence with persistent social problems helped to drain trust from insurance programs, especially in the 1970s when a steep global recession and a Middle Eastern oil crisis slowed the growth of the economy.

Since the 1970s insurance has experienced decline in political stature. This has been true of both public and private insurance. Fully public insurance systems, mainly aimed at the poor or elderly, have been defined as in or near crisis since then. Income assistance to parents in poverty ceased to exist as an entitlement in the "Welfare Reform Act of 1996. Medicare and social security continue to retain support but are seen as unreliable and inadequate. Private insurance of the pure risk spreading type, especially private health insurance and private pensions that guaranteed a certain level of income has come to be perceived as prone to overspending. Hybrids of public and private insurance, like workers compensation, have also come to be seen as highly defective in the dominant policy discourse of advanced societies.[46] Today workers' compensation is seen as prone to fraud and abuse and too expensive.[47] For Royce, workers compensation was the clearest paradigm of the virtues of insurance in solving social problems with minimum costs.

If more insurance makes people less interested in preventing loss, then the social cost of losses will go up along with spending on insurance. Since Royce recognized moral hazard, why did it not dampen his belief that vaster and vaster insurance groups were a benefit to social order and social solidarity? The key for Royce was the capacity of agency relations to constitute new bonds of loyalty and new pathways for knowing and acting on risk:

> This coöperation, if it occurs at all, will bring A and C into some kind of social unity, such as will make them act as if they were, in a certain respect, *one man*. To bring

45. Tom Baker and I describe this shift more generally in EMBRACING RISK, *supra* note 5, at 3-4.

46. McCluskey, *supra* note 37, at 680-81.

47. *Id.* at 873.

> about . . . this coöperation of C with A, is the interpreter's main aim and interest, so far as he is indeed the interpreter of this community.[48]

In looking at banking and insurance (and agency relationships more generally), Royce saw a hermeneutic dimension where economists have come to see only silent incentives. Banking renders its subjects knowable; it interprets them:

> This third person is that active interpreter of credits, that expert as to the safety of loans, who is known as a banker. The lender deposits with the banker. The banker accommodates the borrower. Or, if the borrower and the lender are that very dangerous pair consisting of persons known as a promoter and an investor, the banker may then appear as a broker, whose business it is to bring and to keep investors in profitable and fruitful touch with those who undertake or promote novel enterprises, for which they need capital.[49]

Royce was far more excited about the possibilities of insurance than of banking.[50] The power of insurance to reconcile individuals to a collective order began with the radicalness of the danger posed by relationships between risk takers and those injured:

> Now the relation of A to C, the relation of the man who takes the risk, to the man who may win if A wins, but who will lose if A loses, is a dyadic relation. Like the other human social relations of pairs, it is dangerous. It daily embitters the relations of debtors and creditors. It daily makes some people penniless, and inspires others with hate. Its very danger makes it morbidly fascinating to those who have once learned to gamble. It fills the social order with fears and suspicions. It wrecks souls. And you cannot escape from the poison of this dangerous relation

48. ROYCE, *supra* note 1, at 51-52.

49. *Id.* at 58.

50. Clendenning attributes Royce's almost "mystical" sense of insurance to his lifetime devotion to George Buchanan Coale, one of Baltimore's leading citizens during Royce's years of graduate study at Johns Hopkins. Coale included among his ancestors signers of the Declaration of Independence. In time he made a fortune in the insurance business as the founder of the Merchants Mutual Marine Insurance Co. CLENDENNING, *supra* note 3, at 71, 364.

> by merely loving the man whose risks lead to losses which you have to bear. Love seldom cures any such fool of his folly, and the one who loves him suffers the more because of the love.[51]

Insurance, exemplified for Royce by workmen's compensation which was just then very much on the national agenda in the United States,[52] enabled the objective condition of interdependency imposed upon European and North American populations by the industrial economy to be matched through new forms of solidarity tied to a legal commitment to meeting the needs of those suffering the often arbitrary loses of industrial life. Moreover, insurance, by making both the interdependence and the needs visible, enabled a kind of practical intelligence among individuals to expand and form the basis for loyalty to the political and social units whose integration was itself made visible by insurance.

World War I itself might have been a warning to Royce. His central claim in the *Meaning of Christianity* was that insurance and banking had begun already to realize a unity of humanity long prophesied and celebrated by religions. The enormous violence unleashed by the opening clashes of the war stood in rebuke. In the lecture Royce strained to avoid this conclusion. The passions of the war, he argued, were part and parcel of the capacity of loyalty to wider human communities. The war itself, Royce speculated, would drive the nations toward something like mutual international insurance. The victorious states would, Royce accurately predicted, demand a payment of compensation by the vanquished parties for at least large parts of the process. This created a fund that might be used to start a mutual insurance investment pool.

Aspects of Royce's vision of loyalty seem to have been fulfilled by those institutions of the welfare state that still remain broadly popular, including national health insurance in countries like France and the United Kingdom, and Medicare and Social Security in the United States. These mechanisms did work to unify the populations subjected to them, to become a source of national pride and mutual solidarity. Their future is very much open to debate but not the survival of some kind of largely insurance based mechanism to address needs that have been traditionally met by these institutions.

---

51. ROYCE, *supra* note 1, at 62.

52. It is not clear from the text whether Royce appreciated that workmen's compensation had its origins in Germany but he surely would have appreciated the implicit demonstration of international intelligence. *See* ROYCE, *supra* note 1, at xli-xlii.

But if insurance has served to build loyalty to the state, its capacity to create international solidarity remains elusive. At the heart of Royce's international mutual insurance was his vision of trustees, an international group of financial experts governed by a strict set of laws enforced by them collectively, who would operate as a kind of international administrative agency to make and enforce the rules of the mutual fund. These "financially expert trustees" are the way "the community of mankind" becomes visible.[53] Paraphrasing Lincoln, Royce depicted the board as visible representation of the unity of the international order:

> [Lincoln] spoke of "government of the people, by the people, and for the people."
>
> My thesis is that whenever insurance of the nations, by the nations, and for the nations begins, it will thenceforth never vanish from the earth, but will begin to make visible to us the holy city of the community of all mankind. [54]

Does insurance fail to build global solidarity because it is mostly a private enterprise rather than a public union of nations? Or does the failure of insurance to build global solidarity, shared with most forms of public and private insurance today, bespeak the absence of the hermeneutic function that Royce found so strongly in the insurance idea? Royce wrote of the "coming social order of the insurer."[55] Did we see that in the mid-Twentieth century social welfare states or has it yet to be realized?

September 2001

Royce's text is all the more interesting as a mirror for our present when we read it as a meditation on global violence and insecurity. Unlike World War II, which simmered for a year or more before breaking out into open conflict between nations, the state violence of August 1914 broke out with astounding speed. A Europe that had enjoyed several decades of rapidly integrating economies was suddenly and catastrophically enmeshed in unprecedented destruction and violence among former trading partners. Since September 11, 2001, the United States and much of the modernized world face a global confrontation with terrorism after a period in which the

53. ROYCE, *supra* note 1, at 67.
54. *Id.* at 80.
55. *Id.* at 64.

possibilities of global peace and economic progress seemed incredibly promising.[56]

The present moment is also one in which insurance has been raised as an issue. Royce had to project the image of insurance into the space of global war. Since the terrorism attacks of September 11, 2001, insurance has been an integral part of the discussion including the scope of coverage under the property insurance policies for the world trade center, the ability of global reinsurance firms to sustain the losses, the fairness of the compensation scheme for victims of the attack approved by Congress, and the degree of sharing to be enforced in terrorism insurance.

Although Royce died early in the war he was prescient in foreseeing the levying of massive financial demand against the defeated party as compensation for the damages of a war blamed totally on the defeated.[57] Bankers, more than insurers, played a crucial role in reconstructing European nations after World War I.[58] The political arrangements of that order proved catastrophically flawed however, leading in less than twenty years to a new a far more dangerous European, indeed global war. Only after that did insurance reach its highest influence as state policy, and even then mainly at the level of the nation state.

Royce believed that "the reconstitution of people into vaster and vaster communities is the only process that can ultimately lead to an age of peace."[59] European societies in 1914 were just at the beginning of the curve of insurance. The limited amount of existing insurance meant that the large portions of the population remained to be brought within insurance system. Today influential opinion in most advanced economies feel that social investment in insurance is at or over its maximum sustainable level. Even if important aspects of the national insurance structures are unlikely to disappear, they do not offer much room for growth that could drive a new level of international unity.

The current war on terrorism bears comparisons in some ways with the global war whose outbreak Royce pondered on from Berkeley. As the philosopher Jurgen Habermas has noted:

> The comparison [of September 11, 2001] is not to be drawn with Pearl Harbor but rather with the aftermath of

56. In this case the terrorist attacks followed an intensified global recession that had already shaken some of the "irrational exuberance" that characterized the last years of the 20th century.

57. ROYCE, *supra* note 1, at 79.

58. *See e.g.*, CHARLES S. MAIER, RECASTING BOURGEOIS EUROPE: STABILIZATION IN FRANCE, GERMANY, AND ITALY IN THE DECADE AFTER WORLD WAR I (1975).

59. ROYCE, *supra* note 1.

> August, 1914. The outbreak of World War I signaled the end of a peaceful, and, in retrospect, somewhat unsuspecting era, unleashing an age of warfare, totalitarian oppression, mechanistic barbarism and bureaucratic mass murder.[60]

Both moments seemed to introduce a new and threatening model of war itself. World War I saw the emergence of tanks, machine guns, and airplanes as instruments of the fighting. The war between the United States (and its allies) and *Jihadist* terrorism has introduced new tactics including using hijacked civil aircraft to destroy office buildings and suicide bombings of civilian soft targets like nightclubs and busses.

In both August 1914 and September 2001, mobilized complex and murky alliances existed which stand in contrast to the clearly defined blocks that arrayed themselves in World War II and the Cold War that followed. During the Cold War confrontation of two rival "super-powers", the United States and the Soviet Union (and to some lesser degree China, the other Communist "super-power"), defined the logic of virtually every conflict on the globe, and many domestic struggles as well.[61] The breakdown of this bi-polar order since 1989 has led to a paradox centered on the United States. As Jacques Derrida has pointed out "world order, in its relative and precarious stability, depends largely on the solidity and reliability, on the *credit*, of American power."[62] But that power is far less easy to wield without the stabilizing structure of the Cold-War confrontation itself

World War I was far more compatible with Royce's insurance based vision of peace. Its major protagonists were similar societies with closely matched economies and cultures. Indeed, Germany, France, and England were all industrial powers with extensive trade. They shared a commitment to domestic insurance. Indeed, the even more fearsome war that broke out in 1939 between these enemies was largely pitched as a battle between contending "insurance" societies whose battle was in some respects driven

---

60. GIOVANNA BORRADORI, PHILOSOPHY IN A TIME OF TERROR: DIALOGUES WITH JURGEN HABERMAS AND JACQUES DERRIDA (2003).

61. For example, competition for support in the newly independent countries of Africa and Asia helped to intensify the civil rights struggle of African Americans in the United States. *See* MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000).

62. BORRADORI, *supra* note 60, at 93 (emphasis in original).

by their obligation to achieve security for their respective populations.[63] In contrast *Jihadist* terrorism fights for a wholly different model of the nation, one with its own vision of charity and solidarity that is quite different from the European insurance tradition that Royce embraced.

The very dominance of the United States in the post-Cold War order increases its attraction to terrorists who would seek to strike a decisive blow to that order, but at the same time it demonstrates the limits of the Cold War model of security. Cold War alliances operated as a kind of analogy to the mid-twentieth century rise of domestic political orders anchored in mass insurance. The nuclear weapons of the both the United States and the Soviet Union, operated as a kind of insurance policy for their client states and allies. The threat of "mutually assured destruction" in a kind of terrible inversion of Royce's mutual insurance fund provided a measure of global peace, but one contingent on the ready availability of the means of mass destruction rather than mass reconstruction.

In that respect, we might view the terrorist attack of September 11, 2001 as a kind of horrifying demonstration of reactive risk or moral hazard at a global level. Osama bin Laden and his terrorist organization, after all, were originally supported by the United States and its allies as part of the Cold War confrontation with the Soviet Union, which at that point had seized control of Afghanistan.[64] Just as mass insurance seemed over time to reduce the security of western publics, weapons of mass destruction built to guarantee the security of great alliances now threaten to fall into the hands of terrorists who threaten all secular visions of world order.

If September 11 stands in a way for the limits of the old security order, both that of mass insurance and mass destruction, our future security may depend on intensifying the public discussion of both insurance and war. Just as Royce in 1914, looked to the molecular changes in the European nations who then found themselves in combat to discern a future structure of global security, we need to begin a discussion now of what kinds of social practices hint at new kinds of loyalties. Like Royce we need to confront risk in its contemporary forms, but those forms challenge the conventional loss spreading solutions of insurance. Today, standing on the other side of the great twentieth century expansion of insurance, we need to consider both how to get more out of twentieth century models of insurance, and simultaneously to look beyond for ways to manage risk

63. Michel Foucault argued that this was the logic of wars in the twentieth century. *See* MICHEL FOUCAULT, VOL. I: AN INTRODUCTION TO THE HISTORY OF SEXUALITY, 137 (Robert Hurley trans. 1980).

64. *See generally* BORRADORI, *supra* note 60, at 92.

beyond insurance.[65] The path toward both objectives leads through greater attention to Royce's notion of insurance as a "community of interpretation." Toward the former we must ask how to enhance the hermeneutic function of insurance, i.e., its ability to define risks and articulate choices that responsible subjects must make. Royce was a good enough philosopher to detect that hermeneutic function within private insurance but not a good enough sociologist to confront the economic and organizational limits to that function. Toward the latter we must ask what other kinds of communities help us interpret risk. Here we can proceed by examining both new and old models of managing risk that are developing the fabric of contemporary societies but which depend on different forms of solidarity and different kind of knowledge production than the modern form of insurance including associations of workers, teams of mountaineers, and support groups of cancer patients.[66]

65. Baker and Simon, *supra* note 5, at 10-12.

66. *See* Jonathan Simon, *Risking Rescue: High Altitude Rescue as Moral Risk and Moral Opportunity, in* RISK AND MORALITY 375 (Richard Ericson & Aaron Doyle eds. 2003).

POSTNATIONAL INSURANCE ON THE EVE OF DESTRUCTION

Timothy Alborn[*]

If the business of insurance is to protect people against the financial consequences of unforeseen risks, the marketing side of that business depends largely on dramatizing risk in the minds of potential customers. In the decades preceding World War One, as an increasingly complex world created new risks and increased the monetary stakes of old ones, the insurance industry experienced unprecedented growth. Salesmen had only themselves to blame if they could not discover commercial opportunities in the new workman's compensation laws, in the emergence of potentially dangerous technologies like airplanes and automobiles, and in the sheets of breakable glass that enveloped new office buildings across America and Europe. More traditional sectors like fire and life insurance received new momentum during this period, as businesses and individuals flooded to fire offices, spurred on by the free advertising provided by catastrophic blazes in Chicago, Boston, and San Francisco; and as life offices tirelessly invented new twists on old fears, adding coverage against disability and old age to an evolving variety of financial planning devices. All sectors of the insurance industry adorned these dark clouds of foreseeable decline and unforeseeable disaster with the promised silver lining of security.

That Josiah Royce understood this lesson of insurance marketing is clear from his opening gambit in *War and Insurance*, where he announced: "Great tragedies are great opportunities. The new griefs which to-day beset the civilized nations call for new reflections and for new inventions."[1] There was of course a profound difference between Royce's call for international insurance against warfare and the varieties of coverage offered by commercial insurance offices. For one thing, Royce welcomed nation-states as junior partners in his insurance vision, whereas (with the notable exception of workman's compensation in many countries) commercial insurers viewed the nation-state as, at best, unavoidable. For another, Royce lingered longer than most insurance salesmen ever did on the underlying social mechanisms which insurance implied. In presenting the insurer as the critical link in his triadic "community of interpretation," he wedded a century's worth of marketing rhetoric with the pragmatic

---

* Associate Professor of History (Lehman College, CUNY). The author wishes to thank Tom Baker, Peter Buck, Martha McCluskey, and the anonymous referee for helpful comments on an earlier draft of this paper.

1. JOSIAH ROYCE, WAR AND INSURANCE: AN ADDRESS 1 (1914).

philosophy of his Harvard colleague Charles Saunders Peirce.[2] Nevertheless, it pays to read Royce alongside that rhetoric, precisely because we can thereby discover the large extent to which Royce endorsed and employed many of the fundamental (if often unstated) assertions which had raised the Anglo-American insurance industry to world prominence. Two such claims in particular will be discussed in what follows: (1) the privileging of insurance over organized religion as a surer path to salvation, with important implications for the moral economy of the household; and (2) the inadequacy of the nation-state as a solution to social problems, and hence the need for insurance to emerge as a "post-national" alternative.

To help clarify where Royce's vision overlapped with the claims and justifications of contemporary insurance marketing, I will be making extensive use of the published statements of one especially articulate industry spokesman, Darwin Kingsley, who was President of New York Life between 1907 and 1930. Three years before Royce published *War and Insurance*, Kingsley issued a collection of speeches he had delivered between 1905 and 1911,[3] under the title of *Militant Life Insurance*.[4] Kingsley's volume betrayed nearly all the core themes of *War and Insurance*, stripped of much of their philosophical sophistication but garnished with a deeper appreciation for why people bought insurance and how people sold it. Running through both texts is a visionary faith in future international harmony and an unflinching condemnation of patriotism, warfare, and all these entailed. Unlike Royce, however, insurance for Kingsley was "militant"—signaling an appreciation of marketing as an aggressively active ingredient in his social utopia, not (as in Royce) merely a convenient conversation-starter. Similarly, although Kingsley would have agreed with Royce about the necessity for a core of financial experts to administer such a utopia, he was more suspicious than Royce about its sufficiency.

Militant Life Insurance is also a useful point of comparison with Royce because of its self-conscious location in the real world of American insurance practice as it existed on the eve of World War One. Although

---

2. *See* discussion of Peirce, *infra* p. 89.

3. Darwin Pearl Kingsley (1857-1932) was born and raised in Vermont. He attended college at the University of Vermont from 1877-1881, where he overlapped with John Dewey. Especially influential for both men was the philosophy professor H.A.P. Torrey, a Congregational minister. *See* George Dykhuizen, *John Dewey: The Vermont Years*, 20 J. OF THE HIST. OF IDEAS 515, 531 (1959). Kingsley spent his early adulthood in Colorado, first as a newspaper publisher in Grand Junction and then as the state's insurance commissioner and auditor (1887-89). He moved from there to New York Life, where he married the daughter of its president John A. McCall and rose to become Vice-President in 1898.

4. DARWIN P. KINGSLEY, MILITANT LIFE INSURANCE (New York Life Ins. Co. 1911).

Kingsley was, if anything, more sanguine than Royce regarding insurance's *ultimate* capacity to alter society for the better, he was by necessity also sorely aware of the crisis in public relations which had beset his industry during the first decade of the twentieth century. The clearest example of this was the scandalous revelation in 1905 that the Equitable and other big life offices had misallocated policyholders' funds, which resulted in an overhaul in American insurance regulation. To clear the path for international insurance, therefore, he first confronted the problem of public suspicion of big business more generally—suspicion which he saw as being fanned by misguided politicians. Along these lines, he was less sanguine than Royce about the capacity of states to mediate between insurance institutions and the people of the world. Instead of Royce's modest proposal for a gradually expanding transnational institution working in harmony with member states, Kingsley envisioned a virtuous spread of multinational corporations that if successful would take the place of imperfect sovereign states. Neither of these visions for the future was without a certain kind of prescience, and neither fully anticipated the many problems which would inhere in its practical execution.

Precisely because Royce and Kingsley were so concerned to promote insurance as a viable solution to global crises, they indicated in the course of their arguments the unique profusion of responses to risk that were available for public consumption at the beginning of the twentieth century. Religion, which preached that God would provide regardless of the severity of manmade or natural contingencies, remained relevant enough to warrant deep engagement by both authors. This response to risk overlapped with the voluntarist urge to provide against contingency within small, informal communities radiating outward from the family. A more recent response to risk was nationalism, which elevated the contingency of enemy invasion above all others. This response overlapped with the similarly recent idea of the welfare state, which would secure against risks of industrial accidents, unemployment and old age by pooling the collective resources of the citizenry. The bond between nationalism and welfarism, which had been most securely forged in Bismarck's Germany, would continue to flourish throughout the twentieth century. Finally, free-market advocates argued that states—whether in their nationalist or welfarist guise—obstructed capitalism's capacity to allocate resources efficiently and fairly, and thereby keep risk within acceptable levels. Taken singly, these various responses to risk represented evils against which insurance could be defined as a superior alternative. Taken together, they provided insurance utopias with building blocks, which could be arranged to suit one's specific predictions

and priorities—with Kingsley, for instance, combining insurance with a faith in markets, and Royce retaining more space for welfarism.

Pace my focus on Kingsley, the bulk of what follows will refer to life insurance and will have relatively little to say about other forms of insurance. Since the point of this article is to provide a context for Royce in the history of insurance *marketing* up to 1914, and not in insurance practice more generally, life insurance warrants special consideration since it produced by far the richest supply of marketing rhetoric during this period. Especially in America, life insurance marketing needed to overcome religious and communitarian obstacles not faced to the same degree by fire and marine insurance, which to a larger extent "sold itself."[5] This both increased the need for a ready supply of persuasive arguments, and guaranteed that those arguments would resonate with Royce's underlying concern to establish a "Great Community" capable of becoming one with God.[6] More straightforwardly, the wide variety of new forms of insurance that appeared on both sides of the Atlantic from 1850 did not have time to generate any rich marketing traditions of their own and, in any case, tended to follow in the well-trodden paths of life and fire insurance.[7] Certainly Royce envisioned his international insurer to provide for risks other than untimely death; and even Kingsley implied that other sorts of coverage would be provided by his multinational insurers of the future. But the fact that Kingsley, and less directly Royce, based their visions in large part on the rhetorical and technical promises of *life* insurance is significant, both from an historical perspective and because it helps account for some of the practical weaknesses in their visions.

The Angel of Death and the Angel in the House

Viviana Zelizer has suggested that around 1870 Americans underwent a change "from mutual aid to a commercial system of economic provision

---

5. I will be referring interchangeably to life insurance marketing literature from the United Kingdom and the United States in what follows. Although life insurance in these two countries displayed important contrasts during the period 1850-1914, marketing—or at least the specific variants I will be examining—was not one of them. The classic history of American life insurance marketing, J. OWEN STALSON, MARKETING LIFE INSURANCE: ITS HISTORY IN AMERICA (Harvard University Press 1942), freely includes British examples in his discussion and provides evidence for the appearance of UK-published sales literature in the US and vice versa.

6. "Great Community" is a standard reference to Royce's label for his communitarian philosophy.

7. *See* Barry Supple, *Corporate Growth and Structural Change in a Service Industry: Insurance, 1870-1914, in* ESSAYS IN BRITISH BUSINESS HISTORY 69-70 (Barry Supple ed., 1977).

for widows and orphans," and that this was part of a deeper "cultural transformation... from an ideology of altruistic exchange to a market ideology."[8] Insurance offices, in her telling, both responded to this transformation by modifying their marketing strategies, and helped effect it through their commodification and consequent desacralization of life and death.[9] To prosper in a culture that celebrated voluntarism and Christian charity, these companies initially "appealed to the ethics and not the pocketbooks of their customers, using moral persuasion to convince a skeptical public." After the 1870s, with its market share safely on the rise, the industry "discarded its moralistic approach for sober business methods." [10] Zelizer is quick to concede, however, that this "shift from beneficence to business after the 1870s was never fully accomplished"[11] — citing the popularity of fraternal orders which continued to subordinate business values to altruistic ones, and pointing to the persistence of "sentimentalism" and communitarian rhetoric even in the writings of "some of the most hard-bitten business leaders of the industry."[12] Further, this ambivalence was not just a by-product of transition, but rather betrayed "structural sources" in insurance as a social institution.[13] Hence she concludes that as long as insurance remains a part of social provision, "swings in balance will repeat themselves in response to the enduring tension and contradictory demands of altruism and commercialism."[14]

Religion properly plays a central role in Zelizer's account of this incomplete transition from altruistic exchange to market ideology, owing both to the sacred space traditionally reserved for death and other unforeseen "acts of God" and to the frequency with which both opponents and advocates of life insurance appealed to the Bible to support their position.[15] Religiously-inclined critics repeatedly brandished the Biblical injunction to "take no anxious thought for the morrow," and apologists just

---

8. VIVIANA A. ROTMAN ZELIZER, MORALS AND MARKETS: THE DEVELOPMENT OF LIFE INSURANCE IN THE UNITED STATES 93-94 (Transaction Books 1983).

9. *Id.* at 43-47.

10. *Id.* at 94.

11. *Id.* at 113.

12. Viviana A. Zelizer, *Human Values and the Market: The Case of Life Insurance and Death in 19th-Century America*, 84 AM. J. OF SOC. 591, 606 (1978). Significantly, she cites as an example of "sentimentalism" Kingsley's comment in *Militant Life Insurance* that that insurance was a "conviction first and then a business." *Id.* at 606.

13. *Id.*

14. *Id.* at 116. *See* Deborah Stone, *Beyond Moral Hazard: Insurance as Moral Opportunity, in* EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY 52 (Tom Baker & Jonathan Simon eds., 2002) for a discussion on the continuing relevance of altruism to present-day insurance practice.

15. ZELIZER, *supra* note 8, at 44-45, 76-78.

as often countered that the best way to do this was to "pay the premium on a Life Policy once a year, and [thereby] take no further thought... of my wife and family in after days."[16] This exchange, and endless variations on the same theme, identifies the territory on which insurance and organized religion waged battle well into the twentieth century. Both institutions depended on their ability first to induce anxiety about the future, then to relieve that anxiety with a promise of salvation. The primary anxiety facing Christians was eternal damnation. This could only be alleviated (at least in the Calvinist doctrine most favored by insurance's loudest critics) by doing good works in this world—in a word, altruism. The primary anxiety facing policyholders, if insurance salesmen did their job, was financial ruin owing to the occurrence of unforeseen disaster. This could only be alleviated by buying an insurance policy—in a word, commercialism.

Each of these ways of thinking about the future represented a specific theodicy that infringed in important ways on the other. Christianity conjured a wholly individual threat (eternal damnation) by preaching a solution—good works—which only made sense within a community of witnesses. Insurance conjured a mainly communal threat (since financial loss would be trivial if dependents, creditors, or others with "insurable interest" did not suffer along with the insured party) by preaching a solution—consumerism—which has historically been opposed to the idea of community.[17] What made the overlap between these two theodicies especially pressing by 1900 was the ascension of money as the most important indicator of social worth. Try as they might to identify money as the root of all evil, religious institutions had to admit that good works went hand in hand with financial power. A church without funds could save precious few souls. This made it relatively easy for insurance companies to blur the boundary between damnation and economic ruin, and to champion their risk-analysis technologies as a surer path to salvation than the gospel of mutual aid. Identifying hell with financial ruin, however, cut both ways: faced with the prospect of eternal damnation, it was hard to get too

16. STAR LIFE INSURANCE COMPANY 1913, Sales Pamphlet, (Zurich Fin. Servs. Group archives ST 4/1/13/1/1/14) (copy on file with author). The quote was from a British minister named Spurgeon, from a sermon probably first delivered in the 1860s. The Star was a London office that catered especially to Methodists.

17. *See* Timothy Alborn, *Senses of Belonging: The Politics of Working-Class Insurance in Britain, 1880-1914*, 73 J. OF MOD. HIST. 561-65 (2001). Life insurance is the extreme example of a form of insurance that is meaningless without a third party, since a dead person cannot spend his or her claim. Other forms of insurance, including varieties of life insurance with a strong investment element, appeal in varying proportions to the individual and the community.

distressed at the less distant, but also less terrifying, prospect of economic loss. Hence hellfire did not disappear from insurance rhetoric, it just retired to the background after salesmen had successfully instilled their customers with the fear of God.

Until the ink was dry on the proposal form, the Angel of Death hovered visibly over the prospective policyholder, ever ready to strike swiftly and without mercy. One sales brochure referred to "the unsparing hand of death" and "the King of Terrors" in the same sentence by way of anticipating the chance that an apparently healthy man might be "speedily called to his long account."[18] The promoter of an early casualty office observed that "[t]he impossibility of realising the idea of death leads us to magnify our personal safety," and did his best to restore a sense of proportion with a list of fatal accidents proving that death, "lurks in the air, in the open street, it haunts the race course, the hunting ground, the open field, the sites of building operations, and the marts of trade."[19] Such morbid reminders grew less prominent by the end of the nineteenth century, but never fully disappeared from the life insurance canon. Visitors to the United Kingdom Temperance and General's new head office in 1907 encountered allegorical representations of "Death and Old Age" on the stairwell and then, in the boardroom, a congregation of "Evil Powers, grouped at the west-end of the ceiling."[20] Besides Fire and Destruction, customers could witness Vice holding "a silver casket, whilst Death stretches forth his skeleton fingers and clutches the handle of his scythe."[21] Life offices envisioned death on their customers' behalf in order to scare them into insuring without delay. The Reliance Mutual's tract, "Life Assurance Explained," included a section on "Sudden Deaths—and Immediate Provision," which retailed stories of a Sheffield gentleman "killed by an explosion" seven weeks after insuring his life, a British Army

---

18. BRITON LIFE ASSOCIATION, A FEW WORDS TO THE AGENTS OF THE ASSOCIATION, ON THE GENERAL PRINCIPLES OF LIFE ASSURANCE, AND THE PECULIAR FEATURES INTRODUCED BY THE BRITON, ALSO RULES & REGULATIONS FOR THE GUIDANCE OF PERSONS HOLDING AGENCIES 5 (London, W.H. Cox 1861) (copy on file with author).

19. SHIRLEY HIBBERT, WE ARE NEVER SAFE: A FEW WORDS ON THE RISKS TO WHICH LIFE AND LIMB ARE DAILY EXPOSED 4, 10 (London, W.H. Collingridge 1855) (copy on file with author). The pamphlet was published by the Travellers and Marine Insurance Company, which offered "accidental death" coverage as well as casualty insurance.

20. UNITED KINGDOM TEMPERANCES & GENERAL PROVIDENT INSTITUTION, A DESCRIPTION OF THE NEW LIFE OFFICES, 196 STRAND, LONDON 17, 23 (1907) (copy on file with author). Like the Star, the UKTG catered to a niche market still steeped in Evangelical rhetoric and imagery, and hence persisted in its dramatic treatment of death longer than many other insurance companies.

21. *Id.*

officer who "fell dead upon the steps of the door" just after paying his premium, and of other policyholders who died of cholera, rheumatic fever and "malignant fever" within weeks of effecting a policy.[22] Such stories complemented tales of those who told the salesman to come back later and then died before making good on their promise to insure.[23]

The whole point of all these images of untimely death was, just as in the preacher's sermon, to convince the hearer to seek salvation before it was too late. Like the insurance company, the Evangelical minister ruthlessly exploited tales of sudden death, which (as Pat Jalland has observed) "allowed no opportunity for spiritual preparation and repentance" in a theology bereft of the solace of purgatory.[24] Also like an insurance claim, Evangelical salvation was available immediately and was only *cashed in* at death. The only difference was that repentant sinners (as opposed to the unrepentant variety) rarely died in Evangelical sermons, whereas death did not discriminate between the insured and uninsured. A dead recently-repented sinner was of less use to the Salvation Army than a dead recently-insured policyholder was to an insurance salesman, because the saved soul was expected to proceed from his or her brush with death to a productive life full of good works. In reality, insurance companies similarly preferred customers who survived their brushes with death, since they could thereby perform the good work of paying their premiums; but such people were less useful from a marketing perspective.[25]

A more important sense in which insurance differed from evangelism was that its salvation came in the form of financial security for one's dependents, not eternal glory for oneself. By focusing on the lives of dependents in this world following their breadwinner's demise, as opposed to the breadwinner's eternal life after death, insurance companies mapped a new territory that was miles away from the social and domestic economy of evangelical Christianity. They argued that insurance was the only true

---

22. RELIANCE MUT. LIFE ASSURANCE SOC'Y, LIFE ASSURANCE EXPLAINED 7-8 (London 1850) (copy on file with author). *See also*, ALEXANDER LOW, A FAMILIAR EXPLANATION OF THE BENEFITS AND PRACTICE OF LIFE ASSURANCE 7 (Robert Inches, n.d., Edinburgh) (copy on file with author); DAVID HARRIS, AN ADDRESS ON THE PRINCIPLES, AND BONUS APPROPRIATIONS, OF LIFE ASSURANCE 9 (Muir & Paterson, Delivered at a Meeting of Policy-holders, Edinburgh 1867) (copy on file with author).

23. *See generally* H. RISEBOROUGH SHARMAN, THE ADVANTAGES OF PROMPTITUDE & THE DANGERS OF DELAY: WITH AUTHENTICATED ILLUSTRATIVE CASES (G.J. Stevenson ed.., London) (copy on file with author).

24. PATRICIA JALLAND, DEATH IN THE VICTORIAN FAMILY 67 (Oxford Univ. Press 1996).

25. *See* Pamela J. Walker, *'I Live but Not Yet I for Christ Liveth in Me': Men and Masculinity in the Salvation Army*, *in* MANFUL ASSERTIONS: MASCULINITIES IN BRITAIN SINCE 1800, 1865-90 (Michael Roper & John Tosh eds., 1991).

source of salvation in a world populated by bereaved widows and the uncaring or incapable efforts of Christian charity. Further, they implied that insurance—moreso than Evangelical Christianity—had the capacity to transform the domestic sphere, turning it from a potential site of discord into a model for social harmony. Having vanquished the financial ravages of the Angel of Death, the life insurance industry set its sights on the "angel in the house."

As the *Economist* pointed out in 1846, life offices did not claim to insure "against death or against disease" *per se*, only against "property depending on life."[26] And in fact it was the penury following death, not death itself, that provided the preponderance of melodrama in life insurance literature, which outdid Dickens in morbidly foretelling the future. In the unselfconsciously maudlin words of one mid-century American pamphlet:

> Could the negligent or thoughtless father extend his hearing into the future, that the cry of his own children and the distress of his own wife might reach his ears—Had he the vision of a seer, he might perhaps behold his own offspring begging bread from door to door, or his widow, the partner of his youthful joys, the sharer of his love, toiling in sorrowful silence for a scanty pittance to relieve the pinchings of hunger, or hush the wailing of distressed infancy. Nay, more than this, he might see the worn out frame of that toiling widow sink beneath the load, into the grave, and his orphans cast upon the cold charity of the world, or the colder sympathy of relations. This is no overdrawn picture.[27]

Other contemporary sales tracts invited the customer to imagine his "wife and family being driven from their home destitute, the poorhouse their only alternative"[28] or his "weeping, helpless dependents, gathered round [his] dying pillow;"[29] and featured stories with titles like "Fatal Neglect" and "Neglect: A Gloomy Picture."[30] Such warnings were not

---

26. 4 THE ECONOMIST 1589 (1846).

27. STALSON, *supra* note 5, at 339.

28. JONATHAN COX, HOW TO MAKE A FORTUNE! ADAPTED TO ALL CLASSES OF THE COMMUNITY. AN ESSAY ON LIFE ASSURANCE 13 (London, William Penny 1857) (copy on file with author).

29. T.C. SMITHSON, TEN MINUTES ADVICE TO THE THOUGHTFUL AND PRUDENT. BEING A PRIZE ESSAY ON THE IMPORTANCE AND DUTY OF LIFE ASSURANCE 8 (Uxbridge, John Mackenzie 1852).

30. J. BAXTER LANGLEY, THE LIFE-AGENT'S VADE-MECUM, AND PRACTICAL GUIDE TO SUCCESS IN LIFE ASSURANCE BUSINESS 221-22 (London, Job Caudwell 1865).

without their religious supporters, as when the American minister De Witt Talmadge warned his flock in the 1880s not to be "so absorbed in the heaven to which you are going that you forget what is to become of your wife and children after you are dead."[31]

The "cold charity of the world" and "colder sympathy of relations" was nothing short of inevitable in the rhetoric of nineteenth-century life insurance. Salesmen routinely predicted that degradation would follow from widows being forced to appeal for charitable relief.[32] But even more frequently, they insinuated that those friends and relatives who were most likely to be appealed to could not be relied on to display a sufficiency of Christian love. Sales tracts belabored "the doubtful kindness of relatives [and] the forced charity of friends,"[33] "the cold and embittered assistance of more fortunate relations,"[34] and, most sweepingly, "the cold mass of humanity." [35] Such warnings, which appeared "again and again, until the very repetition has deadened our appreciation of its deep agony," amounted to nothing less than an indictment of the Golden Rule as an irrelevant, if not misguided, solution to the social evil of poverty.[36]

Even when they encountered people who sincerely intended to help their neighbors, insurance companies dismissed their efforts as insufficient—even irreligious—if they were not grounded in a clearheaded appreciation of actuarial laws. This attitude, which has been well-documented by historians of voluntarism, was widespread on both sides of the Atlantic, and reached its culmination in the "charity organization" movement in the late-nineteenth century.[37] For life offices, it took the form of a decades-long campaign against "assessment" insurance, which first spread in American fraternal orders in the 1860s and later migrated to Britain. Instead of charging level premiums up front, these societies

---

31. Carol Weisbrod, *Insurance and the Utopian Idea*, 6 CONN. INS. L.J. 381, 390 (2000).

32. *See* POPULAR VIEW OF LIFE ASSURANCE (London, Jones & Causton, 1840) ("[I]f Life Assurance met with that encouragement which its importance demands, ... a vast number of persons would be rescued from the evils consequent upon the death of their friends, and enabled to live in peace and comfort in their own happy dwellings, instead of dragging out their lives in public charities under a deep sense of their altered and degraded condition.") (copy on file with author).

33. SMITHSON, *supra* note 29, at 4.

34. COX, *supra* note 28, at 4.

35. 12 *Insurance Record* 300 (1874).

36. *Id.*

37. *See generally* FRANK PROCHASKA, THE VOLUNTARY IMPULSE: PHILANTHROPY IN MODERN BRITAIN (Faber & Faber 1988); STANLEY WENOCUR & MICHAEL REISCH, FROM CHARITY TO ENTERPRISE: THE DEVELOPMENT OF AMERICAN SOCIAL WORK IN A MARKET ECONOMY (Univ. of Ill. Press1989).

collected funds from their members as claims fell due.[38] To older level-premium offices, this was actuarial heresy, since it entailed escalating premiums as claims grew with a society's age. The Scottish insurance manager Archibald Hewat, who saw no contradiction between stern Calvinism and actuarial rigor, found a Biblical precedent for his side of the debate in the story of Joseph's advice to the Pharaoh to stockpile grain from seven years' of plenty in order to be able to feed his people during seven subsequent years of famine:

> Joseph—whom a great preacher has, on that account, called the President of the first Life Assurance Company—set on foot a scheme for storing—*reserving*—the surplus corn during the years of plenty... He did not let the farmers keep their surplus corn in their own barns... He knew too well the value of *Reserves*—an ample supply of corn stored away safely in barns under competent control where the people were *assured* it would be forthcoming as and when required.[39]

Perhaps the most striking reorientation of evangelical Christianity undertaken by life insurance concerned the status of women in the Victorian domestic economy. For evangelicals, the married woman was the "angel in the house," burdened with the duties of converting her preternaturally sinful husband and of teaching her children to lead godly lives. Though uniquely empowering for women, this ideology introduced antagonism into the household and produced in men a painful tension between religiosity and masculinity, which they only partially remedied by such means as "muscular Christianity."[40] Life offices echoed this view of marriage, but only up to a point. Salesmen pressured wives to preach to their husbands the virtues of insurance; and since that entailed rerouting income from vicious habits (drink and gambling) into regular premium payments, this qualified as a variant of the "angel in the house" model.[41] But it mattered, in this context, that wives were being enlisted to protect their own financial futures instead of their husbands' souls. In contrast to

---

38. *See* STALSON, *supra* note 5, at 445-61.

39. POST MAGAZINE, 1894, at 55. (copy on file with author). Joseph's actuarial interpretation of the Pharaoh's dream appears in *Genesis* 41. The "great preacher" was the American minister T. De Witt Talmadge, referred to above; his inspired reference to Joseph as an insurance executive was frequently cited in the 1890s.

40. Callum G. Brown, THE DEATH OF CHRISTIAN BRITAIN 88, 96 (Routledge 2001).

41. Countless examples of such efforts could be reproduced. *See, e.g., Insurance Record* 52-53 (1865); B.H. HILTON, READ ME THROUGH 11 (1884) (copy on file with author); LANGLEY, *supra* note 30, at 178.

the soul-saving angel, who already had a sure ticket to heaven and faced the empowering challenge of passing that privilege along to others, the goal of the policyholder's wife was to achieve financial independence after her husband's death. Whether or not she saved her husband's soul in the process was incidental to this fundamentally material objective.

Promoters of life insurance were at least implicitly aware that their version of the angel in the house was less likely than the evangelical variety to disrupt the Victorian home, since it postponed the wife's empowerment until after death had dissolved her marriage. Writing in 1865, the Massachusetts insurance commissioner Elizur Wright celebrated "our [present] civilization" whereby "in every family . . . only one life is devoted to the arts that produce . . . simply happiness at first hand."[42] As in all insurance literature, however, uninsured death threatened to shatter this arrangement: since "the whole depends . . . on one life rather than on all, the failure of that one life brings a calamity unknown before."[43] Taken in conjunction with the alleged insufficiency of charity, a clear trade-off emerged. The wife of an insured husband was dependent but happy during her marriage, and could look forward to financial independence in case her husband predeceased her. The wife of an uninsured husband was dependent but anxious during marriage (her dependency being due to the state of "present civilization," over which she had no control), and would become a "weeping, helpless dependent" if her husband died young.[44]

Forty years after Wright, Darwin Kingsley endorsed these views of death and domesticity, and reworked them into the beginnings of an articulate theory of social value. Like his predecessors, he dangled the prospect of premature death before the uninsured man, warning him of the "fate which he cannot himself think of without a shudder"; and he redefined salvation for such a man in no uncertain terms as "money in case of premature death."[45] But instead of seeking Biblical precedents for these conclusions, he openly acknowledged the implication that redefining salvation in this way meant redefining morality as well: "money has come to mean almost life itself," and hence was "in the hands of modern co-operation almost the center of moral as well as material power."[46] In the vanguard of this new era, in which "there is less and less belief . . . in the overshadowing care of Providence," was life insurance, "a vast, half

42. INSURANCE COMMISSIONERS, MASSACHUSETTS REPORTS ON LIFE INSURANCE: 1859-1865, 303 (1965).

43. *Id.*

44. *See* JALLAND, *supra* note 24; 12 *Insurance Record* 300 (1874).

45. KINGSLEY, *supra* note 4, at 115-16.

46. *Id.* at 15.

impersonal organization which professes to lift the individual somewhat out of the current hazards of existence, and offers to solve some of the pressing and cruel problems of fate."[47] Preaching from the heathen streets of downtown Manhattan, Kingsley announced that "Nylic men are Ministers, not of Grace but of Self-Respect," whose "sermons are . . . bound up in the great storehouse of social power called the New-York Life."[48]

In accounting for the origins of that social power, Kingsley reverted to the standard portrayal of the insured family, in which the securely dependent housewife had nudged aside the anxious "angel in the house." Echoing Wright, he imagined a history of civilization in which women had "attained a position which made them more dependent and at the same time more important in the social plan."[49] Children and elderly relatives thereafter increased "the promptings of affection and a sense of responsibility" within the family, until finally "the most advanced forms of society" developed mechanisms to care for their "dependent classes, which are constantly added to . . . as the structure of society increases in complexity."[50] This social transformation wrought a revolution in the value of human life. In Christianity, all individuals were of equal and potentially infinite value, since all held within themselves the capacity for eternal life. Kingsley turned this doctrine on its head, arguing that

> [a] human life strictly by itself may have little value. As a part of the social unit which we call the family, it has more value. As a part of the civil organization which we call the State, it has a still higher value . . . As a member of an organization which may comprehend millions and millions of similar units . . . the individual life finds its highest sociological usefulness.[51]

This new theory of social value hinged on "immediate capitalization of the value of every unit," without which its potential worth would go to waste. In this way life insurance, uniquely adept at such capitalization,

47. *Id.*
48. *Id.* at Foreword.
49. *Id.* at 199.
50. *Id.*
51. KINGSLEY, *supra* note 4, at 213.

acquired social power, which it would wield with the same gendered equity that "civilization" enforced within the family unit.[52]

From a very different starting point, Josiah Royce accomplished a strikingly similar redefinition of religious salvation, encompassing parallel conceptions of human nature and embracing parallel institutional solutions. As befit his close ties with Peirce and William James, Royce approached salvation as a problem of knowledge. To clarify the problem he used the concept of a "community of interpretation," which Peirce had developed as part of his larger semiotics of scientific discovery. In 1878 Peirce envisioned such a community of truth-seekers as extending "to all races of beings with whom we can come into immediate or mediate intellectual relation" and lasting "beyond any assignable date."[53] Precisely because of its possible extension across time and space, he identified the knowledge thus obtained with the "Charity, Faith and Hope" to which religious belief aspired.[54] As with William James in *The Varieties of Religious Experience*,[55] Peirce translated his dynamic, communitarian epistemology into a stance on religion that subordinated formal theology to an open-ended pluralism, welcoming different beliefs and experiences as all potentially contributing to an unfolding panorama of truth. [56] James disparaged as "idols of aspiring souls" the "noble, clean, luminous, stable, rigorous" tenets which theological systems offered as comfort amid "the muddiness and accidentality of the world of sensible things."[57] Against such systems, Peirce and James famously celebrated contingency.

Royce, in contrast, refused to abandon his search for an all-encompassing theology that would offer solace in a world beset by chance events. In *The Conception of God* (1897) he held out hope for an "Absolute Experience" that was "related to our experience as an organic whole to its own fragments." [58] In *The Problem of Christianity* he appealed to Peirce's "community of interpretation," complete with its "endless variety within all the selves which are thus mutually intepreted," but yoked it to a "Universal Community" which expressed the "history of the universe

52. *See* VIVIANA A. ZELIZER, THE SOCIAL MEANING OF MONEY: PIN MONEY, PAYCHECKS, POOR RELIEF, AND OTHER CURRENCIES 46-70 (Basic Books 1994) (discussing money and domesticity).

53. IAN HACKING, THE TAMING OF CHANCE 211 (Cambridge Univ. Press 1990).

54. *Id.* at 211-12

55. WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE (Image Books 1978).

56. HACKING, *supra* note 53, at 212-14.

57. *Id.* at 421.

58. John Herman Randall, Jr., *Josiah Royce and American Idealism*, 63 J. PHIL. 57, 70 (1966) (copy on file with author).

[and] the whole order of time."[59] With this move he clearly parted ways with James, who briskly dismissed Royce's "monistic absolutism" (the idea that "religion can be transformed into a universally convincing science") with the barb that "no religious philosophy has actually convinced the mass of thinkers."[60] Undeterred, Royce continued to seek a basis for universal consensus, honing his "absolute pragmatism" in treatises on *The Philosophy of Loyalty* (1908) and *The Hope of the Great Community* (1916, the year he died). His refusal to follow other pragmatists in embracing chance led him to lament the limited capacity of individual people to alter their world, and to insist all the more vigorously that society needed to be convinced to take the virtuous path of collectively keeping misfortune under control. To his Harvard colleagues, this sense that "man is wicked but the universe perfect" was an especially infuriating variety of Calvinism, precisely because of its remaining ties to pragmatism. As George Santayana noted: virtue, for Royce, "consisted . . . in holding evil by the throat; so that the world was good because it was a good world to strangle, and if we only managed to do so, the more it deserved strangling the better world it was."[61]

If this was indeed how Royce defined virtue, it should come as no surprise that he eventually settled on insurance as the best available social mechanism to achieve his hoped-for "Great Community." Insurance companies, after all, were in the business of presenting to their customers a world very much in need of strangling. They also promised to hold the evil of unforeseen risk by the throat—for a price. Most straightforwardly, that price was the payment of an insurance premium. More deeply, *pace* Zelizer, it was the acceptance of a new social order mediated by monetary exchange and, as significantly, by "abstract" as opposed to "qualitative" forms of mutuality.[62] Royce gladly accepted the insurance company's offer to alleviate risk, and was just as willing to pay their price. *War and Insurance* is one long justification of the insurance contract, an arrangement that would be unthinkable without the existence of money. To that end, it also valorized the power of statistical abstraction, without which insurance would be unable to work its miracles. In embracing insurance, Royce was engaged in the "taming of chance," which Ian Hacking has described in order to account for the paradoxical rise of social engineering

59. *Id.* at 66.

60. JAMES, *supra* note 55, at 440.

61. Randall, *supra* note 58, at 72.

62. On "abstract" versus "qualitative" mutuality, *see* François Ewald, *Insurance and Risk*, *in* THE FOUCAULT EFFECT 197, 203-04 (Graham Burchell et al. eds., Univ. of Chicago Press, 1991).

in "liberal" states.[63] In Hacking's account, these states could only get to governmentality by first happening on statistical laws regulating human behavior, then confronting the "metaphysical worry about human freedom" that ensued (how can *I* be free to act if *we* are predestined to follow social laws?), then finally appealing selectively to the necessary evil of state intervention in order to resolve that crisis.[64] The only difference in Royce's case was that he started with the metaphysical dilemma of free will, and only later resorted to statistics to worm his way out.

Royce dramatized the incapacity of "our poor human nature"[65] to stave off the chaos of an uncertain world by imagining what would happen if an "angel of peace" descended to the battlefields of Belgium and preached that "hatred ceases by love."[66] The soldiers, he concluded, would deem this advice "not only impotent, but irrelevant," and immediately resume slaughtering one another.[67] Echoing the insurance companies' claims regarding the insufficiency of Christian love, Royce argued that the only way to convince people who were willing to confront the ultimate risk of death—whether in the name of nationalism or from any other motive—was to inform them that such behavior affected other members of their immediate community, and that only the social technology of insurance was capable of guarding against that fate. "Men take risks," announced Royce, generalizing from the antisocial behavior of total war.[68] "They are often obliged to do so. Sometimes they take them merely because they love risks. But when a man takes a risk and loses, there is in general somebody else who has to bear the consequences of this loss."[69] The financial consequences of death pushed the Angel of Death aside as the key to sparking human interest in salvation, and the financial redemption of insurance pushed aside the "impotent" redemption of Christian love.[70] The road to heaven was paved with "the insurance principle," which "discourages recklessness and gambling . . . quiets fears and encourages faithfulness."[71]

---

63. *See* HACKING, *supra* note 53, at 119.

64. *Id.* To whit: "We obtain data about a governed class whose deportment is offensive, and then attempt to alter what we guess are relevant conditions of that class in order to change the laws of statistics that the class obeys. This is the essence of the style of government that in the United States is called 'liberal.'" *Id.*

65. ROYCE, *supra* note 1, at 19.

66. *Id.* at 25.

67. *Id.* at 25.

68. *Id.* at 43.

69. *Id.*

70. *Id.* at 25.

71. ROYCE, *supra* note 1, at x.

As with Kingsley, Royce's new path to salvation originated in the family. And from his discussion of the "family triad,"[72] one can infer that he would have held out no more hope for the "angel in the house" to save souls in that setting than he assumed would be the case with the "angel of peace" on the battlefield.[73] If we accept the idea that the evangelical household hinged on the contrast between the "angelic" wife and the sinful husband, the resulting tensions clearly appear in Royce's depiction of "the mutual love of a mere pair of people" which was forever "baffled by personal contrasts."[74] The insurance company promised to smooth these tensions by interposing itself as a surrogate breadwinner, which would preserve domestic peace by alleviating the wife's financial anxiety. Royce, as did Kingsley, credited other third parties as well as the insurer with this capacity to preserve stability—most notably the child, who "charm[ed] away many of the most besetting influences that tend to wreck home unity" by demanding care, feeding, and love.[75] But he soon proceeded apace to the insurer, "the spirit of the community," which "contributes to peace, to loyalty, to social unity, to active charity, as no other community of interpretation has ever done."[76] Insurance was an antidote to "the poison of [the] dangerous relation" between risk-takers and their victims; "merely loving the man whose risks lead to losses which you have to bear" was not.[77]

Safety in Numbers, Not in Nations

If insurance did indeed, as Zelizer has argued, partially supplant religion as a dominant social value by 1900, another force, potentially even more powerful, remained to threaten its hegemony. By 1914 the nation-state had become a potent threat both to the insurance industry,and through militant patriotism, to world peace.[78] Applying the insurance principle to the problem of conflict among nations, Kingsley and Royce surmised that nationalism flourished precisely because it offered a third path to salvation that shared important commonalities with both religion and insurance.[79]

---

72. *Id.* at 37.
73. *Id.* at 17.
74. *Id.* at 34.
75. *Id.* at 37-38.
76. *Id.* at 64.
77. ROYCE, *supra* note 1, at 62.
78. This was at least true in the United States where regulation ran the gamut between corruption and zealous reform.
79. The classic statement relating the rise of nationalism to the decline of religion is BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (Verso 1991) (1983). *See also* LIAH GREENFELD, NATIONALISM: FIVE

Both conceived of insurance as filling many of the same functions that nationalism presently performed, but doing so in an improved manner. Kingsley remarked that the nation-state, "under the fetish of patriotism," had become "the external something in which man sought salvation,"[80] and called insurance "a new patriotism" which taught "that there was no reason why [man] should slaughter his fellows in order to make his home safe";[81] Royce likewise hoped to fashion a "future world-patriotism" out of the principle of insurance.[82]

Kingsley began his indictment of the nation-state by holding it up to the bar he knew best, the capacity to relieve anxiety about the financial consequences of death:

> The injustices of society result largely from the fear of death, from dread of that grim visitor who may call on us at any moment. This fear drives the noblest of human impulses,—love of children, love of wife, love of home—into violent action . . . Remove from him to any extent this haunting fear of death and you will have gone far toward the solution of an elemental question. Governments and civil societies and religions haven't done much practically to banish this fear. Governments have emphasized it by becoming armed camps, by putting all citizens on notice that in its interest every man may have at once to march out to slaughter other men or be themsleves slaughtered.[83]

In the name of national security, governments had channeled people's fears against "contingent enemies," resulting in "a history of slaughter, of life squandered and wasted."[84] Making matters worse, patriotism had blinded citizens to the true costs of this slaughter. Once citizens accepted warfare as an inevitable price to pay for security, they failed "to consider

---

ROADS TO MODERNITY (Harvard Univ. Press 1992). Especially useful, given my discussion in this paper of insurance as a form of theodicy, is MICHAEL HERZFELD, THE SOCIAL PRODUCTION OF INDIFFERENCE: EXPLORING THE SYMBOLIC ROOTS OF WESTERN BUREAUCRACY 7 (Berg Pub. Inc. 1992). Herzfeld identifies the modern nation-state as a "secular theodicy" which appears to its citizens as an "apparent ineluctability of forces that compel [people] to deny their own moral judgment . . .." *Id.*

80. KINGSLEY, *supra* note 4, at 325.
81. *Id.* at 327.
82. ROYCE, *supra* note 1, at 24.
83. KINGSLEY, *supra* note 4, at 360.
84. *Id.* at 53.

other processes that are peaceful and beautiful," and that could be obtained with less waste of money and with no waste of life.[85]

In wasting the lives of its citizens in order to perpetuate itself, the nation-state represented a perversion of life insurance, which converted policyholders' deaths into the "sociologically useful" outcome of financial independence for widows and orphans.[86] States wasted wealth on wars, while insurance companies converted wealth into "comfort, freedom, health, [and] leisure."[87] And states, by the first decade of the twentieth century, were wasting wealth on a scale that dwarfed the insurance industry's powers of accumulation. Kingsley made this point by taking the parallel case of public works, which (like insurance) was an example of "peaceful and beautiful" expenditure, and which (unlike insurance) came from the same revenue stream as expenditure on national defense.[88] It took four years for New York City to raise and spend $35 million to build its subway system, and even longer to find sufficient resolve and funding for the construction of the Panama Canal; yet "what the world has hesitated over for a hundred years, the cost of this canal" was spent "three times over" in a single year in the recent Russian-Japanese War.[89] This testified to the capacity of patriotism to divert citizens' money from "forms of power in which they cannot see their definite place" to military power, which fed their appetite for "violent action" in defense of house and home.[90]

The same governments that exploited patriotism to justify expensive wars set obstacles in the path of commercial insurance. For Kingsley, these were two sides of the same coin, since fighting wars and regulating business each abstracted wealth from the institutions that were best able to produce and husband it. Hence, the "second greatest enemy" of insurance (and by extension, of all big business) was "the instinctive fear which men seem to have of vast accumulations of wealth,"[91] leading to the election of politicians who took pleasure in harassing businessmen like Kingsley.[92] In 1905, two decades into American trust reform, he decried the "mistaken ideas" of legislators who "control by destroying."[93] Two years after that, when most states had passed laws limiting the amount of new business life

85. *Id.* at 52-53.
86. *See id.* at 213-15.
87. *Id.* at 50
88. *Id.* at 52-53.
89. KINGSLEY, *supra* note 4, at 55-56.
90. *Id.* at 59, 360.
91. *Id.* at 47.
92. The first enemy, which Kingsley considered all but vanquished in America, was "man's inability or unwillingess to appreciate and meet his personal responsibility." *Id.*
93. *Id.* at 51.

offices could write and banning the industry's popular "tontine" schemes, his critique of state power grew more specific and more ill-tempered.[94] Nor was the nation-state's jealous regulation of wealth limited to America. As president of a company with branches around the world, Kingsley was sorely aware of the gauntlet of protective taxes, accounting requirements, and security deposits facing an aspiring international insurer.[95]

Despite this, Kingsley held out hope for international insurance. Specifically, he hoped his own company and a handful of other American offices could continue to add to their impressive market share in countries from China to Brazil. As of 1905, New York Life covered more than 200,000 foreign policyholders for nearly $500 million (24% of its total business), Mutual of New York insured $290 million on 122,000 foreign lives, and Equitable Life was writing $310 million on policies in nearly 100 countries.[96] The Germania, a New York office that originally catered to German immigrants, made major strides in Central Europe, which produced 45% of its business by 1910.[97] The towering heights which American insurance had scaled seemed to justify Kingsley's declaration in 1905 that "nothing human is foreign to [us]."[98] Two years later, with income caps on the American end and scandal-wary foreign states rushing to enact punitive laws, talk of world dominance largely ceased to circulate among most US life offices. The Equitable and Mutual used the new laws as a convenient excuse to scale back their foreign operations, which had long caused administrative problems.[99] Only New York Life continued to pursue foreign markets in the decade before World War One with the same gusto that all the "Big Three" had displayed in the two previous decades.[100]

---

94. Indeed, few of the essays in *Militant Life Insurance* that appeared in the wake of the Armstrong investigation managed to go more than a few paragraphs before lapsing into a churlish harangue against the latest insurance law. A 1908 Yale lecture on "Life Insurance in its Relations to Sociology" led with Herbert Spencer but lingered on the "strange, un-American and economically unsound doctrine advanced by the State of New York." KINGSLEY, *supra* note 4, at 206. A 1911 discourse to the Trans-Mississippi Commercial Congress on "Life Insurance and Justice" was largely a diatribe against progressive taxation.

95. *See* MORTON KELLER, THE LIFE INSURANCE ENTERPRISE 1885-1910: A STUDY IN THE LIMITS OF CORPORATE POWER 95, 98-99, 103, 280 (Harvard Univ. Press 1963) (describing foreign regulation of U.S. life insurance).

96. *Id.* at 81-82, 83. British fire insurers enjoyed similar foreign success in this period. CLIVE TREBILCOCK, PHOENIX ASSURANCE AND THE DEVELOPMENT OF BRITISH INSURANCE 132, 133, 230 (Cambridge Univ. Press 1998).

97. ANITA RAPONE, THE GUARDIAN LIFE INSURANCE COMPANY, 1860-1920: A HISTORY OF A GERMAN-AMERICAN ENTERPRISE 97 (New York Univ. Press 1987).

98. *See* KELLER, *supra* note 95.

99. *Id.*

100. *Id.*

In 1911, when other companies were acknowledging defeat, Kingsley told his sales force that their company "had penetrated through nationality and all the other institutions which have kept man from discovering himself."[101] If anything, his company's newfound isolation in foreign markets hardened his conviction that the nation-state was an evil in dire need of vanquishing.

Insurance exporters, especially in Britain, had been promising for decades to save the world with their financial products, usually employing blatantly imperialist language in the process. Hence a London company spokesman predicted, on the eve of the Boer War, that "when... we have a United South Africa, with its boundless resources only wanting the skill and capital of the Anglo-Saxon, then results both in insurance and other commercial pursuits will attain to dimensions at present unthought of."[102] Kingsley did not wholly forswear such language, comparing insurance's "world-view of the future" with his country's "fuller realization of her manifest destiny" in the Spanish-American War, and calling insurance "one of the Empire Builders of the world."[103] But he smoothed at least the most glaring contradictions between this sort of rhetoric and his condemnation of the nation-state by focusing on America's uniquely cosmopolitan makeup rather than its formal constitution. Americans had "the usual obligations of nationality," he claimed, but beyond that they also "owe... something that ignores the limits set by color or race or geographical boundaries, something that we cannot pay in our capacity as a nation."[104] Only life insurance had a "high enough" theory and a "broad enough" base to repay that debt.[105] In language befitting his secular Puritanism, he claimed that New York Life salesmen "sailed in a new Mayflower... away from the land of false doctrine, of war, of institutions which can last only as long as men fight each other."[106]

Kingsley's ultimate argument on behalf of the withering of the state and the ascension of insurance was a profession of faith that the former would collapse under its own weight. "The people can only pay about so much in taxes," he prophesied in 1911.[107]

> There is a limit to the standing armies they can support. There is a limit to the battle-ships they can build.

---

101. KINGSLEY, *supra* note 4, at 328.

102. A.W.G. Pritchard, *Insurance Work in South Africa*, *in* TRANSACTIONS OF THE BIRMINGHAM INSURANCE INSTITUTE 39 (1898-99) (copy on file with author).

103. KINGSLEY, *supra* note 4, at 26-27.

104. *Id.* at 48-49.

105. *Id.* at 49.

106. *Id.* at 328.

107. *Id.* at 325.

> There is a limit to the amount of vital energy that can be drawn from the great productive interests of life to rot on the water and degenerate in military camps.[108]

Ultimately, citizens would refuse to keep feeding the state's insatiable appetite for destruction and realize that "a hard-earned dollar is better used when it goes into a great fund for the benefit of the next generation, than when it is taken from a man to pay the interest on money spent in war."[109] Teaching people to recognize that the end of the nation-state was near was the task of "militant life insurance," which preached "that through modern methods and by the hands of the giants who wield them, we are surely passing up into a juster and sweeter life."[110]

Kingsley confronted the nation-state with the basic argument insurance companies had been using for years against the competing claims of religion. The state's claim to nurture justice and a sense of community was belied by the cruelty and indifference which it bred; insurance achieved the state's promise of justice by attaching it to the firmer foundations of scientific expertise.[111] The equivalent of "cold charity" in his critique of nationalism was the state's tendency to trivialize the tragedy and cost of past slaughter.[112] "If lives are sacrificed by the hundred thousand," ruminated Kingsley's putative patriot, "well, what of it, they belonged to a previous generation, and we get a glimpse of the loss only when we go to Arlington and see miles of little square headstones, on which there is only a number."[113] Insurance companies, in contrast, were only "half impersonal", and the numbers on their policyholders' forms served a higher purpose than to commemorate national glory—namely, to collect and distribute wealth "under a program more rational and more equitable than can be expressed in law or worked out in government."[114]

Building on the routine of the "series of republics" presently selling life insurance worldwide, Kingsley posited "a working plan of self-government, at once scientific, human and just," in which all citizens would be "rated, as a citizen, just as the individual is rated when he applies for life insurance."[115] Such a scheme, he promised, would "encourage the strong and yet control the greedy," and would "with exactness measure to a

---

108. *Id.*
109. KINGSLEY, *supra* note 4, at 26.
110. *Id.* at 13.
111. *See generally* STALSON, *supra* note 5.
112. *Id.*
113. KINGSLEY, *supra* note 4, at 57.
114. *Id.* at 15.
115. *Id.* at 362.

man what he shall ultimately take, and yet put substantially no limit on what he may take if he pays the just price". From a present-day perspective, which often presents insurance and "governmentality" as synonymous, it is tempting to question the possibility of such an allegedly "rational and equitable" program.[116] Kingsley was, at any rate, sufficiently anxious about this "impersonal" side to spend a great deal of time clarifying the position of the expert in the insurance office. He cautioned that actuaries and doctors had "a function, but not the most important function to fulfil" in the insurance industry.[117] Kingsley further claimed that "whenever the actuary has been made a sort of fetish, set up in a shrine and worshipped, life insurance has languished."[118]

If Kingsley at least addressed the possibility that an "insurance society" might subordinate justice to routine, he was infuriatingly silent when it came to including other forms of risk-spreading than life insurance in that society. Apart from a brief mention of the "increasing disposition to cover the risk of loss of all kinds by insurance" (citing fire, casualties, sickness, and burglary), his published statements on post-national insurance were entirely limited to his own specialty.[119] Especially conspicuous by its absence was social insurance, which—though only just emerging in the U.S. in the form of workman's compensation—had been thoroughly debated across the Atlantic from the 1870s.[120] We can infer what Kingsley

---

116. Carol A. Heimer, *Insuring More, Ensuring Less: The Costs and Benefits of Private Regulation through Insurance, in* EMBRACING RISK, *supra* note 14, at 116; Martha McCluskey, *Rhetoric of Risk and the Redistribution of Social Insurance, in* EMBRACING RISK, *supra* note 14, at 146; Nikolas Rose, *At Risk of Madness, in* EMBRACING RISK, *supra* note 14, at 209; Richard V. Ericson & Kevin D. Haggerty, *The Policing of Risk, in* EMBRACING RISK, *supra* note 14, at 238.

117. KINGSLEY, *supra* note 4, at 37.

118. Kingsley's animosity towards actuaries can be referred to the regulatory context of American life insurance. Unlike in Britain, where actuaries valued life offices by their own lights and only even needed to report their results to Parliament from 1870, all U.S. offices were required to submit to standardized valuations framed by state-appointed commissioners. Although, as Kingsley's own prior career as a commissioner implies, there was much fluidity between commercial and government actuaries, the closer association of technical expertise with the state tended to downgrade it within the hierarchy of the American life office.

119. KINGSLEY, *supra* note 4, at 36-37. Again, regulatory context is relevant here. Under American insurance law, companies throughout the nineteenth century were banned from combining life insurance with other forms of coverage. Hence institutional models did exist for a multinational composite insurer in 1911 (for example, the Phoenix and the Royal Exchange in the U.K.) but not in the U.S.

120. *See* E.P. Hennock, *British Social Reform and German Precedents: The Case of Social Insurance, 1880-1914*, 118 (Oxford University Press, 1987) (copy on file with author).

might have thought about such programs from a later comment by Owen Stalson, whose evolutionary account of the rise of life insurance in 1937 paralleled Kingsley's. Stalson called social insurance

> a reversion, probably a wise one, to the earlier fashion of requiring the individual to meet his responsibilities to himself, family, and community by imposing benefits on him and exacting from him his proper share of the costs of the system. The mechanism . . . is more modern, more scientific in method, but the basic need served by it is the same.[121]

The only part of this Kingsley might have disputed was Stalson's concession that this "reversion" to an earlier form of mutuality was "probably wise." At any rate, there was no obvious place in his political economy for a state that spent as much money on welfare as on war.

In broad outline, Josiah Royce's indictment of nationalism and his alternative appeal to insurance overlapped substantially with Kingsley's. Royce identified patriotism as a "modern form of human solidarity" in which "international hate travels as far, as fast, and as persuasively as does love"; and hoped that once they started effecting insurance contracts nations would "become clearly conscious of the sort of loyalty and hence the sort of honor which is found upon the highest levels of the business world."[122] He did not follow Kingsley, however, in presenting the nation-state itself as an obstacle to "a juster and sweeter life." He envisioned international, not post-national, insurance. The organization should be formed by "a group of nations", which would furnish data and thereby develop "an 'actuarial basis' upon which an insurance of individual nations against such risks could conceivably be undertaken."[123] Nations, not individuals, would be free to withdraw their funds from the insurance pool at any time, and trustees appointed by member states would determine the disbursement of funds. Once disbursed, the member states would determine specifically how their own funds would be spent.

Like Kingsley, Royce assumed that insurance occupied a higher stage of civilization than mere politics, which either incited conflict between nations through militarism or nurtured conflict within nations through partisanship. As an example of the latter, he cited the "manifold constitutional difficulties and varieties of custom[s]" that "lie in the way of carrying through any scheme affecting workmen's insurance" in the United

121. STALSON, *supra* note 5, at 653.
122. ROYCE, *supra* note 1, at xxxv, 7.
123. *Id.* at xiii-xiv.

States.[124] Unlike Kingsley, who circumvented the state to preach insurance principles directly to individual policyholders, Royce sought to elevate the state by enticing it to join a businesslike institution. In determining responsibility for starting a war, for instance, the insurance board's ruling would be "purely a financier's decision as to whether or not an insurance policy was . . . vitiated by an act of a nature known beforehand."[125] And finally: "our insurance company . . . would get a businesslike interest in averting the causes of war" in order to reduce claims.[126] In principle, these ways of approaching problems would rub off on member states, and ultimately trickle down to citizens of those states as they discovered the rewards of membership.

Because he preached to nations, not individuals, self-insurance was a bigger problem for Royce than it was for Kingsley. On describing his scheme to "a high authority upon problems of insurance," Royce learned of the "serious objection . . . that strong nations would be likely to prefer to insure themselves, while if only the weak nations joined in the international agreement, little would be accomplished."[127] He responded by suggesting some global risks which all nations could agree on: "*any* evils, whether or not evils of war, against which international insurance proved to be feasible" as starting point.[128] All states should be able to agree that famine, floods, epidemics, and crop failures warranted relief to anyone who suffered them, and were likely to strike rich and poor nations alike. At the very least, he hoped, such seeds of consensus stood a better chance of growing into something stronger than would ever be the case with the Hague Tribunal, which served only to "irritate its clients by unwelcome judicial decisions about already bitterly controversial matters".[129] A second reason why strong nations might willingly join such a body was that it could add much-needed legitimacy and technical assistance to their efforts to provide social insurance: "new and valuable machinery for devising and carrying out possible social reforms."[130] Again, there was an implicit trickle-down effect, since successful social programs would add legitimacy

124. *Id.* at xlii-xliii.

125. *Id.* at 78.

126. *Id.*

127. *Id.* at xxxii.

128. ROYCE, *supra* note 1, at xxxiv.

129. *Id.* at 76. Kingsley shared Royce's suspicion of juridical expressions of internationalism, condemning the fiction called international law with its "courts of arbitration [and] Hague Tribunals." *Id.*

130. *Id.* at xliii-xliv.

to states, which would thereby feel an incentive to govern their citizens according to the principle of insurance.

As the social insurance example suggests, a big advantage of Royce's approach over Kingsley's is that it left ample room for types of insurance that, at least in retrospect, have proven to be more popularly (and arguably more efficiently) provided by states as opposed to private companies. On the other hand, there was little in Royce's scheme to suggest that he was as conscious as Kingsley of the possibility that justice might be sacrificed at the idol of expertise. Numbers, for Royce, were safer than nations. "Since all irregularly distributed phenomena of a given type, if sufficiently numerous . . . show some kind of statistical regularity," he argued, "this 'actuarial basis' for various forms of international insurance could be furnished by the patient study of the economically definable risks and losses of a sufficiently large group of nations."[131] Workman's compensation, for instance, "could be much more simply dealt with if the international board of insurance, after due investigation of the facts about accidents, about old age, or about any other topic involving matters of interest to bodies of workmen, . . . named . . . a sum."[132] Royce's entirely negative justification for this way of solving social problems was that it avoided the adversarial political process.[133] Like insurance more generally, he embraced "due investigation" by a scientific community as an antidote to the poison of interpersonal (or interclass, or international) conflict. He did not consider whether the cure might be worse than the disease.

The prospective fortunes of the internationalist visions of Kingsley and Royce were soon put to the test by World War One. Writing in 1918, Kingsley depicted Germany as the ultimate armed camp, the evil extreme of the sovereign state. Since it threatened personal as well as national security, he defended Americans' involvement in the war as crucial to preserving their way of life, commenting that "[w]e are temporarily wearing moral gas masks while the boys over there fight." [134] To explain the war, he reverted to his earlier social evolutionary account, shorn of its final "insurance" stage.[135] He condemned the "unscientific" relations between governments, which by upholding the concept of nationality led

131. *Id.* at xiii-xiv.

132. *Id.* at xlii.

133. *See* THEODORE M. PORTER, TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY IN SCIENCE AND PUBLIC LIFE (Princeton University Press 1995).

134. Darwin P. Kingsley, *Woodrow Wilson and the Doctrine of Sovereignty, in* THE EMPIRE CLUB OF CANADA SPEECHES 1917-1918 325 (Empire Club of Canada 1919) (copy on file with author).

135. *Id.*

their citizens to see "safety only in the state"; and he predicted a second world war if the doctrine of sovereignty was not defeated along with Germany. [136] All this was of a piece with his prior pronouncements on the nation-state. Glaringly absent from his hope for a post-war world, however, was any mention of insurance. Instead, Kingsley offered Woodrow Wilson's vision of a federation of self-determined democracies, which would "unite . . . not as mere governments, but as peoples."[137] His newfound reticence concerning insurance's world-saving powers reflected the stark reality of his own company's fortunes four years into the war. With nationalization promised in Spain and Italy and already underway in Russia, and assets frozen throughout central Europe, New York Life was well on its way to beating the same retreat from foreign markets that other American insurers had undertaken a decade earlier.[138] Little wonder that Kingsley now embraced the nation-state as "a means to an end," instead of waiting impatiently for its demise.[139]

In this context, it would certainly seem that Royce's vision of an international insurer which would work with and thereby reinforce the legitimacy of existing states was more in keeping with the realities posed by the postwar world. Although Royce did not survive the war, his remarks in *The Hope of the Great Community* reaffirmed his prior faith in the viability of sovereign states within a wider, but relatively weak, union. Although such a community would " . . . unquestionably be international by virtue of the ties which bind its various nationalities together," he predicted, "it [would] find no place for that sort of internationalism which despises the individual variety of nations . . . "[140] For most of the twentieth century, history proved Royce's point. Wilson's postwar ideal of national self-determination famously led to a proliferation of nationalism and an erosion of democracy, as did the flowering of nationalisms forty years later following the demise of British and French overseas empires.[141] In addition to rekindling international conflict, however, the stronger states that emerged from World War One also accomplished unprecedented levels

---

136. *Id.* at 329-30, 335-36.

137. *Id.* at 339.

138. KELLER, *supra* note 95, at 280; Paul J. Best, *Insurance in Imperial Russia,* 18 J. EUR. ECON. HIST. 165-67 (1989). Nationalism dealt an especially cruel blow to the Germania, which lost nearly half its assets and had to change its name (to the Guardian) as a result of the War. *See* RAPONE, *supra* note 97, at143-63.

139. Kingsley, *supra* note 134, at 336.

140. *Cited in* Stuart Gerry Brown, *From Provincialism to the Great Community: The Social Philosophy of Josiah Royce*, 59 ETHICS 14, 34 (1948).

141. *See* MARK MAZOWER, DARK CONTINENT: EUROPE'S TWENTIETH CENTURY (Alfred A. Knopf, Inc. 1999).

of social provision for their citizens, especially in North America and Western Europe, but also arguably in the Eastern Bloc.[142] In at least some national contexts, for instance France and the USSR, the equity achieved by welfare states has departed significantly from the classic "breadwinner" model which inhered in Kingsley's perfect world of life insurance.[143] As Jürgen Habermas has recently argued, it is precisely in order to preserve these accomplishments of the liberal state that a "global domestic policy" needs to be imagined.[144]

Significantly, Habermas identifies globalization as the primary threat which today faces "democratic self-steering within a national society"—specifically citing the problem of capital flight, which exerts "fiscal pressure ... on the tax-based resources of the state."[145] In a perverse sense, this dilemma exactly restates Kingsley's dream of diverting money from government treasuries to productive business. The difference, of course, is that Kingsley assumed (correctly, in an era when welfare programs represented a tiny fraction of most national budgets) that governments mainly spent money on wars. The rise of welfare states since Kingsley's time has complicated his simple zero-sum equation setting wasteful military spending against beneficent private investment. Yet, military spending remains a staple of all national budgets, so that we cannot easily label the abstraction of funds from the state as entirely or always retrograde. What can be said is that globalization, to the extent that it has generated a trade-off between preserving economic growth and providing social services, has restricted the range of contingencies which "post-national" insurance can be envisioned as covering, and has restricted the range of people around the world who can expect to benefit from its blessings. Globalization asks those who struggle to survive beyond this halo of risk-spreading—the illegal alien seeking healthcare in California, for instance, or the debt-ridden third-world state—to suffer the full

---

142. PETER BALDWIN, THE POLITICS OF SOCIAL SOLIDARITY: CLASS BASES OF THE EUROPEAN WELFARE STATE, 1875-1975 (Cambridge Univ. Press 1990); STEPHEN KOTKIN, MAGNETIC MOUNTAIN: STALINISM AS CIVILIZATION (Univ. of Cal. Press 1995).

143. *See* SUSAN PEDERSEN, FAMILY, DEPENDENCE, AND THE ORIGINS OF THE WELFARE STATE: BRITAIN AND FRANCE, 1914-1945 (Cambridge Univ. Press 1993); RICHARD STITES, THE WOMEN'S LIBERATION MOVEMENT IN RUSSIA: FEMINISM, NIHILISM, AND BOLSHEVISM, 1860-1930 (Princeton Univ. Press 1978).

144. JÜRGEN HABERMAS, THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS 62 (MIT Press 2001).

145. *Id.* at 67, 69. The argument is that multinational corporations are in a position to blackmail states into reducing their taxes by threatening to take their capital and jobs to a different country; to keep its citizens employed, the state is thereby forced to reduce its citizens' welfare provisions. *Id.* at 69.

consequences of economic risk in an increasingly volatile global market.[146] States rich enough to welcome global business without wholly eliminating welfare provision, meanwhile, often act as though Royce's vision of insurance *through* nations and Kingsley's of insurance *without* nations are both feasible and mutually consistent. They do so, however, only by abandoning both men's deeply-held vision of insurance as a truly universal savior of mankind.

146. *See* Martha McCluskey, ***Rhetoric of Risk and the Redistribution of Social Insurance***, *in* EMBRACING RISK, ***supra*** note 14, at 146.

WAR, INSURANCE AND SOME PROBLEMS OF COMMUNITY

Carol Weisbrod[*]

In *War and Insurance*, Josiah Royce deals with several kinds of community, two obviously and one implicitly. The first is the community of interpretation, the structure of the triad, which he adapted from Peirce and used in the *Problem of Christianity*. The second is the Beloved or Universal Community, towards which this suggestion for the practical advancement of peace was headed. The third is the shattered or wounded community, implicit in *War and Insurance* in the form of the international community, which is injured by the nation that fires the first shot. This paper discusses these three communities against the background of several other treatments of community in the work of Josiah Royce. *War and Insurance* (1914) is a product of the same thinking that produced the *Philosophy of Loyalty* (1908) and the *Problem of Christianity* (1913), and can be related to ideas presented in those works, as well as to material in the posthumous work, *The Hope of the Great Community* (1916).

* * *

By the end of his life, Josiah Royce had come to believe that the idea of community had dominated his work. In 1956, Joseph Blau suggested that the lasting contribution of Royce's work was his life long attempt to deal with community.[1] The work on loyalty, Blau suggested, was a transitional formulation of the problem of community, which Royce had raised in his earliest work. Towards the end of his life, Royce himself noted that:

> I strongly feel that my deepest motives and problems have centered about the Idea of the Community, although this idea has only come gradually to my clear consciousness. This was what I was intensely feeling, in the days when my sisters and I looked across the Sacramento Valley, and wondered about the great world beyond our mountains.[2]

---

* I would like to thank Tom Baker, Carolyn Jones and Aviam Soifer for their assistance. I am also grateful to the participants in the Royce Project of the Connecticut Insurance Law Journal for their comments on a draft of this piece.

1. Joseph L. Blau, *Royce's Theory of Community*, THE J. OF PHILOSOPHY 92 (Feb. 2, 1956).

2. JOSIAH ROYCE, THE HOPE OF THE GREAT COMMUNITY 129 (Books for Libraries Press 1967) (1916).

It is a picture of loneliness, of children isolated and looking for something, rather than of children speaking from a secure embedded place. And it describes something that was, many thought, apparent in Royce throughout his life.

A. Communities

It seems that Josiah Royce wrote on community from the point of view of someone who was not a natural fit with the sense of harmony and unity with which "community" is often identified. In an early novel, he wrote sympathetically about the advantages of practicing a religion of which one was the only member.[3] "There is a deep satisfaction in being the sole member of a religious sect."[4] His character said: "[y]ou need not propagate the faith, you are relieved from all the rivalry of fellow-worshipers, you enjoy alone the sacred fountains."[5] In his own voice, Josiah Royce noted that he had "always been, as in my childhood, a good deal of a nonconformist, and disposed to a certain rebellion."[6] Royce was a Californian who made his career at Harvard, but was uncomfortable in the Harvard culture. He remained a "shy, strange, lonely figure, sometimes mistaken for a university janitor," his biographer writes.[7]

Royce's parents were 49ers who crossed the mountain in harsh and difficult conditions of the sort that resulted in the tragedy of the Donner party.[8] The family had a connection to the Burned over District of upper New York State,[9] an area of intense religious activity, which saw the growth of a great variety of religious sects. This was enough of an influence for his biographer to include a full description of the sectarian movements of that part of the country. Royce was raised on the Bible and on the *Book of Revelations*.[10] As Oppenheimer notes, his writing is filled with biblical echoes and allusions.[11] Several commentators note that Royce generalized from his own experiences "to give a universal meaning to his

---

3. JOSIAH ROYCE, THE FEUD OF OAKFIELD CREEK 63 (Literature House 1970) (1887).
4. *Id.*
5. *Id.*
6. ROYCE, THE HOPE OF THE GREAT COMMUNITY, *supra* note 2, at 130.
7. JOHN CLENDENNING, THE LIFE & THOUGHT OF JOSIAH ROYCE (2d ed. Vanderbilt Univ. Press 1999).
8. *Id.* at 12.
9. *Id.* at 6. *See generally* WHITNEY CROSS, THE BURNED-OVER DISTRICT (Cornell Univ. Press 1950).
10. CLENDENNING, THE LIFE & THOUGHT OF JOSIAH ROYCE, *supra* note 7, at 9.
11. Frank M. Oppenheim, *Introduction to* JOSIAH ROYCE, SOURCES OF RELIGIOUS INSIGHT, at xiv-xv (The Catholic Univ. of America Press 2001) (1912).

personal feelings."[12]

What kinds of biographical experiences of community might he have drawn on? Those interested in community inevitably deal with two issues: the first, the definition of community; the second, the problem of sanctioning in the community, which is to say maintaining the definition of community. This concern is, of course, shared by religious and secular communities, and Royce had experience of both. But his childhood socialization is likely to have presented him most clearly with the pictures of religious sanctioning and discipline rather than of organic unities.

He was from a house without material resources and of limited culture. Late in his life he wrote that he was twenty years old before he saw a beautiful man made object.[13] He died as a philosopher with international standing, today considered one of the group who stand for a classical period in American philosophy. The move from one status to the other was undertaken deliberately, and with awareness of the uncertainties involved. As a young man, he had an academic appointment in California, but was focused on getting out of California to the east. He wanted this to the point that he resigned his position to take a one year visitorship at Harvard with an uncertain future. He was, he said, prepared to take risks in a good cause.[14]

Thus far we see a man interested in community who himself experienced many, and even rose through many. But the point is not merely that Royce was interested in community or used communities as an aspect of an American upward mobility story, passing from one to another. More significant is that Royce insisted that the individual was nothing without the community. He had stressed the community in the early historical work on California: "[i]t is the State, the Social Order, that is divine. We are all but dust, save as this social order gives us life."[15] He

---

12. Many of these feelings had to do with loneliness and solitude. Clendenning notes "the locked doors and empty rooms" of his dreams. CLENDENNING, THE LIFE & THOUGHT OF JOSIAH ROYCE, *supra* note 7, at 274. *See also* John J. McDermott, *Josiah Royce's Philosophy of the Community: Danger of the Detached Individual, in* AMERICAN PHILOSOPHY 172 (Marcus G. Singer ed., 1985) ("The Philosophy of Loyalty is vintage Royce, being an attempt to justify personal experience as an anticipation of eternal meaning.").

13. Letter from Josiah Royce to Richard Clark Cabot (June 25, 1912), *in* THE LETTERS OF JOSIAH ROYCE, at 577-78 (John Clendenning ed. The Univ. of Chicago Press 1970).

14. CLENDENNING, THE LIFE & THOUGHT OF JOSIAH ROYCE, *supra* note 7, at 109. In fact Clendenning suggests he had married a woman from the East Coast, and seems to have married a family as much as an individual. *Id.* at 83.

15. JOSIAH ROYCE, CALIFORNIA 501 (Heyday Books, Berkeley 2002) (1886). He is to the end a Californian, he says. But of course he left California and provided detailed instruction on how, in effect, to do what he did, to a nephew thinking about leaving

knew various social orders and not all of them were the state. But finally it was the community that mattered, and loyalty to a cause.

Clearly, Royce did not intend individual identifications with communities to be solid or fixed or monolithic. In general, Royce saw the cumulation of loyalties.[16] In the *Philosophy of Loyalty*, he wrote: "[m]oreover, my loyalty will be a growing loyalty. Without giving up old loyalties I shall annex new ones. There will be evolution in my loyalty."[17] But there is a major issue: since "fidelity and loyalty are indeed inseparable, the breaking of the once plighted faith is always a disloyal act. . . ."[18] This will be the case unless we discover that "the original undertaking involves one in disloyalty to the general cause of loyalty" and that this discovery requires the change.[19]

And of course some individuals were associated with evil causes and evil communities. It is clear in the *Philosophy of Loyalty* that an individual will make choices among loyalties. Even the dyad of the romantic couple – defined as loyalty only by saying that each in the couple is loyal to their union – will not necessarily be stable.[20] In the *Philosophy of Loyalty*, the suggestion is that one might have to move from loyalty to another, in the interest of a higher loyalty. Thus, it could be that there are higher and lower loyalties, "indeed, the once awakened and so far loyal member of the robber band would be bound by his newly discovered loyalty to humanity in general, to break his oath to the band."[21]

Along with the interest in community, there is in Royce an interest in the problem of exit from the community, or betrayal of the community, breaking of the community, shattering, wounding. One can see it from the early historical work on California, the early community in which he was

---

California. (The nephew apparently did not leave California. *See* ROYCE, THE LETTERS OF JOSIAH ROYCE, *supra* note 13, at 238-39). The identification of the State and the social order is not inevitable. Certainly Royce was working before the American identification of the National State and community which, for example, is said to characterize the New Deal.

16. Others also viewed individual identifications with communities as the cumulation of loyalties. *See* Carol Weisbrod, EMBLEMS OF PLURALISM 189-202 (2002).

17. JOSIAH ROYCE, THE PHILOSOPHY OF LOYALTY 63 (Vanderbilt Univ. Press 1995, 1908).

18. *Id.* at 97.

19. *Id.*

20. *Id.*

21. Even here, however, the former membership remains as a bond. "[H]e would still owe to his comrades of the former service a kind of fidelity which he would not have owed had he never been a member of the band. His duty to his former comrades would change through his new insight. But he could never ignore his former loyalty, and would never be absolved from the peculiar obligation to his former comrades, - the obligation to help them all to a higher service of humanity than they had so far attained." *Id.*

interested, through to the late discussions of atonement in the *Problem of Christianity*. In *California*, he had insisted that the community, the social order, the state, was divine, and that the individual alone was nothing significant at all.[22] This is his position throughout his life. And the community would have to protect itself. One way the community protected itself was by expelling the unworthy member. John Clendenning, Royce's biographer, includes an account of Royce's reaction to the problem when a colleague was caught up in a scandal. In effect, he would have to be written out of the community, one "no longer worthy of the moral support" of his fellow workers.[23] Early in his career, in his work on California, Royce includes a reference to a man exiled from the train of the Donner party.[24] Sarah Royce, Josiah's mother, saw herself as "Hagar, expelled from [her] homeland."[25] Royce also saw himself as "expelled from the hearth."[26] The mechanism of expulsion for discipline was one with which he would have been raised.

But if expulsion was the disciplinary mechanism of the religious communities he must have known, it should not be thought that he was interested only in such communities. Royce was interested in many kinds of community, some religious, some what we would call firms, as when we see him describing business organizations. One scholar has considered his interest as connected to the community of children who studied at his mother's school.[27] He was concerned with the community of miners in California, and in the forms of justice administered in these miner's communities.[28]

And communities can overlap and have different names.[29] A commercial firm can be a religious brotherhood. The beloved community can also be the universal community or perhaps even the invisible church.[30] The beloved community will be a community of interpretation.[31]

---

22. ROYCE, CALIFORNIA, *supra* note 15, at 501.

23. CLENDENNING, THE LIFE & THOUGHT OF JOSIAH ROYCE, *supra* note 7, at 318.

24. ROYCE, CALIFORNIA, *supra* note 15, at 43.

25. CLENDENNING, THE LIFE & THOUGHT OF JOSIAH ROYCE, *supra* note 7, at 13.

26. *Id.*

27. Frank M. Oppenheim, *Graced Communities: A Problem in Loving, in* THEOLOGICAL STUDIES 44, 604-24 (1983).

28. ROYCE, CALIFORNIA, *supra* note 15, at 279.

29. *See* discussion in John Smith, *Royce on Religion, in* THE JOURNAL OF RELIGION 261-66 (1950).

30. JOSIAH ROYCE, THE PROBLEM OF CHRISTIANITY 20 (The Univ. of Chicago Press 1968) (1918).

31. *Id.* It has been noted that Royce never fully developed the definitions between the different kinds of community he talked about. *See* Smith, *supra* note 29. John Smith wrote:

Royce's insistence on the importance of the social for individual understanding includes rejection of conventional separations between religious and secular problems. In the *Sources of Religious Insight,*[32] he dealt with the issue of knowing the authenticity of a divine revelation by comparing the issue to a bank's knowing whether a check represented the authentic will or signature of its customer. In both cases, there had to be some sort of pre existing knowledge or experience. This was the 'vast presumption' on which the believer in revelation rested. And somehow one had to account for that knowledge.[33]

The relationship of Roycean thinking to traditional Christianity is fairly clearly presented in the *Problem of Christianity.* He starts with the idea that: "for every estrangement that appears in the order of time, there somewhere is to be found . . ., the reconciling spiritual event . . . ."[34] He repeats the idea: "for every wrong there will somewhere appear the corresponding remedy," and again "for every tragedy and distraction of individual existance the universal community will find the way -- how and when we know not, to provide the corresponding unity, the appropriate triumph."[35] He moves to the familiar formula: "[w]e are saved through and in the community. There is the victory which overcomes the world. There is the interpretation which reconciles. There is the doctrine which we teach"; and he concludes that: and "this doctrine, as we assert, is in agreement with what is vital in Christianity."[36] This doctrine was not, he conceded, what the apologists for Christianity ordinarily taught, but still he held to it.

Royce was particularly concerned with two maxims of Christianity

---

> Royce, it must be made plain, was by no means clear himself on the meaning and precise relations between such expressions as "Beloved Community," "community of mankind," (which I take to have the same denotation as "great community") and "universal community." [I]t was only in Royce's last years, when the international situation was so tragic, that he used the expression "great community"; and it meant for him the community of those dedicated to the "interests of mankind," interests transcending national and indeed all boundaries. As such, "great community" meant an international human community largely ethical, social, and even commercial (but not *political*) in character. . . .

Id. at 262.

32. JOSIAH ROYCE, SOURCES OF RELIGIOUS INSIGHT 25 (The Catholic Univ. Press of America 2001) (1912).

33. *Id.* at 22-23.

34. ROYCE, THE PROBLEM OF CHRISTIANITY, *supra* note 30, at 388.

35. *Id.*

36. *Id.* at 404. But his conclusion was that one could "[l]ook forward to the human and visible triumph of no form of the Christian Church." *Id.*

which he thought had been, over time, greatly damaging to Christian civilization.[37] The first was that "[b]y no deed of his own, unaided by the supernatural consequences of the work of Christ, can the willful [sic.] sinner win forgiveness"; the second was that "[t]he penalty of unforgiven sin is the endless second death."[38] He questions the "problem of christianity" as to the second death of the Book of Revelation: "what ethically tolerable meaning can a modern man attach to these words?"[39] Royce turns at this point in the discussion to the issue of reconciliation of the willful traitor to the shattered and wounded community.[40]

Later in the same work, he deals with the issues of loyalty in a commercial firm, noting that the loyalty that a firm might demand, and its general quality, might in fact turn it into a kind of religious brotherhood.[41] This was true even though at first glance a commercial firm would not seem to be a model of a religious organization. "A business firm would seem to be, in general, no model of a religious organization [sic.]. Yet it justly demands loyalty from its members and its servants."[42] Certainly, if the firm "lives and acts merely for gain, it is secular indeed."[43] But there is another idea:

> if its business is socially beneficent, if its cause is honourable [sic.], if its dealings are honest, if its treatment of its allies and rivals is such as makes for the confidence, the cordiality, and the stability of the whole commercial life of its community and (when its influence extends so far) of the world, if public spirit and true patriotism inspire its doings, if it is always ready on occasion to sacrifice gain for honour's sake -- then there is no reason why it may not become and be a genuinely and fervently religious brotherhood.[44]

Some of these questions are further developed in *War and Insurance*.

---

37. *Id.* at 151.
38. *Id.*
39. *Id.* at 152.
40. *Id.* at 175.
41. ROYCE, THE SOURCES OF RELIGIOUS INSIGHT, *supra* note 32, at 274-75.
42. *Id.* at 274.
43. *Id.*
44. *Id.* at 274-75.

B. The Communities of *War and Insurance*

In the *Philosophy of Loyalty*, a discussion of loyalties involved certain tensions and conflicts. Royce hoped that loyalties would be cumulative. Sometimes they couldn't be, then someone would move to higher loyalty. The idea in the *Philosophy of Loyalty* that the dyad is unstable becomes, in *War and Insurance*, the proposition that some of those dyads may in fact be dangerous. Moreover, we see in the *Philosophy of Loyalty* an anticipation of the method of *War and Insurance*, in which dyads are viewed in a way that turns them into triads. For example, the couple is not viewed only dyadically in terms of loyalty to each other. Rather, they are viewed as also loyal to something else, their union.[45] The triad is completed in another way when there is a child.[46] It is not simply a matter of describing a three part relationship as it exists in the natural or even conceptual order, as when we say that agency is defined as a three part relationship. In Royce, the three party relationship is constructed with more or less force out of materials which are not obviously triadic to begin with. As the couple could be expanded into a triadic structure, so also an individual could be, at certain times, seen as in triadic relation. A man reading an old letter and thinking about it is seen as a present self, interpreting a past self to a future self.[47] Royce saw the insurance solution as second best in international affairs. He would have preferred Kant's world federalism,[48] but he believed that this was unlikely to happen. But the second best solution was endorsed with enthusiasm.

War and Insurance is an essay with various pieces, some of which are not about insurance at all. The essay cited the Christian communitarian vision of insurance (using an article in the 11th ed. of Britannica, ending with "bear ye one another's burdens") but Royce's view of insurance seems in many ways quite idiosyncratic.[49]

Royce had a powerful respect for insurance and its history. Clendenning notes that the insurance industry had for Royce some special, almost mystical significance. He suggests a connection to a "paternal aspect" of insurance, a substitute for the protective father that Royce had

---

45. ROYCE, THE PHILOSOPHY OF LOYALTY 11, *supra* note 17, at 11.

46. JOSIAH ROYCE, WAR AND INSURANCE 36-37 (1914).

47. ROYCE, THE PROBLEM OF CHRISTIANITY, *supra* note 30, at 287.

48. *See* KANT, *Perpetual Peace, in* POLITICAL WRITINGS (Hans Reiss ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1970) Kant distinguished his idea from the idea of a world state. *Id.* at 102.

49. On bearing one another's burdens, *see* Carol Weisbrod, *Insurance and The Utopian Idea*, 6 CONN. INS. L. J. 381-422 (2000); Charlton Lewis, *Insurance, in* 11TH ed. of Encyclopedia Britannica, *quoted in* WAR AND INSURANCE xlvi-vii (1914).

missed as a child.[50] Then, there is the connection to the insurance executive George Coale.[51] Wilson suggests an influence in Charles Peirce, and his references to life insurance.[52] And there is the communitarian idea. But insurance is not for Royce finally about mutual aid. "The best workings of the insurance principle have been, on the whole, its indirect workings."[53] It has not only taught men, in manifold ways, both the best means and the wisdom of "bearing one another's burdens; but it has also established many indirect, and for that very reason all the more potent, types of social linkage, which the individual policy-holder or underwriter very seldom clearly and consciously estimates at their true value."[54] (The not-only-but-also construction appears in a discussion of international insurance in *Hope of the Great Community.*[55])

There is no discussion in Royce of the long colorful history of marine insurance, Lloyds of London, or ancient legal systems using insurance. Royce sees a modern institution.[56] Moreover, insurance is an institution presented entirely benignly, even spiritually, as an example of "sound and business like devotion."[57] The Armstrong inquiry of 1905 in New York[58] might have suggested some difficulties, but Royce is not concerned about this aspect of the "wonderful history of insurance." The words "business" and "business-like" are used positively.

Royce sees the company as a kind of neutral mediator (the "third" originally discussed by Charles Peirce) standing between the insured and the beneficiary. His discussion is odd in two ways. First, it assumes that there is always a beneficiary who is distinct from the insured. While this is the most common form of the life insurance contract, it is not always the form selected. Second, it assumes neutrality in the activities of the third,[59]

---

50. Royce had a largely absent father. CLENDENNING, THE LIFE & THOUGHT OF JOSIAH ROYCE, *supra* note 7, at 16, 22.

51. CLENDENNING, THE LIFE & THOUGHT OF JOSIAH ROYCE, *supra* note 7, at 364.

52. R. JACKSON WILSON, THE QUEST FOR COMMUNITY36 (Oxford Univ. Press 1968).

53. ROYCE, THE HOPE OF THE GREAT COMMUNITY, *supra* note 2, at 71-72.

54. *Id.* at 71-72, 74.

55. *Id.* at 71-72.

56. *Id.*

57. *Id.* at 73.

58. The Armstrong investigation of the life insurance industry in New York revealed significant abuses. *See* Vance, Insurance. *See also*, Buis & Anderson, THE ARMSTRONG INVESTIGATION IN RETROSPECT, 238 XI Assoc. of Life Ins. Counsel Proceedings (1952-53) stressing that "the abuses" disclosed are definitely of the past. Cf. defaulting bankers. Blau, *supra* note 5, at 96, refers to the "highly idealized" presentation of the banker's of the community. Would judges recognize the Roycean description of their roles in the triads? ROYCE, WAR AND INSURANCE, *supra* note 46, at 57.

59. *See* ROYCE, THE HOPE OF THE GREAT COMMUNITY, *supra* note 2.

if not something even more altruistic. In the *Hope of the Great Community*, this third is presented this way: "[B]ut in each of these communities, one of the members has the essentially spiritual function or task of representing or interpreting the plans, or purposes, or ideas, of one of his two fellows to the other of these two in such wise that the member of the community whom I call the 'interpreter' works to the end that these three shall cooperate as if they were one, shall be so linked that they shall become members one of another, and that the community of the whole shall prosper and be preserved."[60]

Royce's description of insurance as a community of interpretation was specific to him (and Royce was as interested as any academic in saying something new).[61] But some aspects of the description resonate with more conventional treatments. One might compare the discussion of Nathan Isaacs, someone who counted among the realists but who taught in a business school. He sees, in 1934, a history that is different in at least one way from the one that Royce offered. For Isaacs, who had in 1921 written on the standardized contract, a significant part of the story was the overreaching of the industry that led to regulation by the state.

"Prior to the days of the standardized insurance contract," Isaacs wrote, "it was customary for the insurance companies to draw their own agreements with the aid of their attorneys and include exculpatory clauses that tended to relieve them of burdens and make the insurance of doubtful value to the insured in an emergency."[62] He gave the example of "comparatively unimportant stipulations in the application," which were described as "warranties."[63] Thus, "the insurance company was . . . able to point to technical defenses that had little or nothing to do with the actual risk incurred."[64] And, "[e]ven where these defenses were not pressed to the limit," Isaacs noted, "they served as talking points of no little importance for the adjusters in their efforts to make the best possible settlement for the insurance company after a loss was incurred."[65]

---

60. ROYCE, THE HOPE OF THE GREAT COMMUNITY, *supra* note 2, at 64.

61. *See, e.g.*, ROYCE, THE LETTERS OF JOSIAH ROYCE, *supra* note 13, at 26.

62. NATHAN ISAACS, THE LAW IN BUSINESS PROBLEMS 217 (The Macmillan Company, rev. ed. 1934).

63. *Id.*

64. *Id.*

65. *Id.* Isaacs writes, "[t]he contract of insurance is said to be one of the utmost good faith (*uberrimae fidei*). That is to say, the insurer is in such a position of disadvantage with regard to the property insured or the event described in the policy that the utmost good faith is required on the part of the person insured. It is reasonable also to impose on him a burden of proving that he is entitled to the insurance fund claimed." *Id.* at 218 (emphasis in the original). It is striking that Isaacs sees the obligation of good faith as one imposed on the

"Insurance creates something more than a contractual relation between the insurer and the insured."[66] Isaacs writes, "[i]n the case of life insurance, the prime object is to create an estate to be claimed eventually by some one other than the insured."[67] (Here is the "third" which Royce builds on to create his triad): "[h]ence, in these contracts more clearly than in others, the law has found it necessary to give a right and a standing in court to the beneficiary who is by the very nature of the case not one of the parties to the contract."[68] But as Isaacs notes, there can also be a third party in other insurance contracts. He states that, "[e]ven in the case of fire insurance or insurance against theft, the beneficiary or the partial beneficiary may be some one other than the purchaser of the insurance, namely, the mortgagee of the insured property."[69]

It is worth noting that ordinary descriptions of insurance drew on different ideas of what insurance "is". Thus, some ideas stress the mutual aid or communitarian aspect of the insurance relationship. Here the true connection is between those in the community of shared risk. The company is a kind of facilitator; particularly clear in mutual insurance companies, and less true in profit making share selling structures. Another view sees the prime relationship as between the individual and the company. Here, the connection between policyholders disappears in a formal contract analysis. It is this contract relationship that is the background of the Nathan Isaacs comment.

Royce offers another version in *War and Insurance*. Like judges dealing with litigants, and banks dealing with borrowers and lenders, insurance is, for Royce, an example of a triad. This is strikingly different from the conventional legal view. It is made possible by a perspective in which the fact that many insurance contracts may have a beneficiary other than the insured (clearly in life insurance, but often, as Isaacs noted, in other sorts of insurance contracts); it is used as the way to describe a triadic relationship as in the nature of the insurance arrangement. This is true, as Royce argued in *Problem of Christianity*, because the one who most obviously may lose something is not the only one who may lose something. Thus, when insurance covers the loss, a third party always benefits. The view of insurance as involving only two parties, the insured and the insurer, is, in effect inadequately descriptive. There is always, in Royce's view, a

---

person insured. Present definitions talk about an obligation of good faith imposed on both parties.

66. *Id.* at 218.
67. *Id.*
68. *Id.*
69. *Id.*

triad, sometimes in effect an obvious articulated triad, sometimes an implicit triad.

Royce viewed insurance as part of the development of the sciences. "The growth of the natural sciences as well as of the technical industries of mankind also makes possible and comprehensive forms and grades of cooperation which men have never before known."[70]

Royce assumes that his insurance mechanism will not deal with the morality or immorality of the nation which fires the first shot. Right or wrong, the nation which fires first will be dealt with, and the sanction is that the nation that starts the war will not receive the benefits of insurance.

Exit which is seen in the *Philosophy of Loyalty*, from the point of view of the individual who makes choices about Loyalty, becomes in the *Problem of Christianity* not a matter of the "inner life" of the individual, but rather a threat to the harmony, to the "purity of the unscarred love" of the community. It becomes treason. This treasonous act can be done by any individual and by nations. (Royce argues that the community is a kind of person[71] - an idea that would be entirely familiar to lawyers.)[72] Compared to language like this, it is the bloodlessness of the moral analysis in *War and Insurance* which is striking. The mechanism will ultimately result in peace as nations get used to the idea of the device. It is a practical move in the direction of the universal or beloved community, but a large issue unaddressed is the composition of the group of the insured. (Are some nations not eligible?) The *Hope of the Great Community* offers some limited guidance. "[T]he community of mankind will be international in the sense that it will ignore no rational and genuinely self-conscious nation."[73] And there it is left.

The Hope of the Great Community was in press at the time of Royce's death. It reflects his aspirational stance - a universal community of all mankind. This community goes by several names. *War and Insurance* argued that insurance was a way to achieve this community. "[O]f all the business relations and of all the practical communities yet devised, the insurance relations and the insurance communities most tend to bring peace on earth, and to aid us towards the community of mankind."[74] The issue was tested for Royce with the sinking of the *Lusitania*.

C. The Sectarian Community as the Default Position.

---

70. ROYCE, THE HOPE OF THE GREAT COMMUNITY, *supra* note 2, at 37-38.

71. ROYCE, THE HOPE OF THE GREAT COMMUNITY, *supra* note 2, at 122-23.

72. *See* AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 71-75 (Harvard Univ. Press 1995).

73. ROYCE , THE HOPE OF THE GREAT COMMUNITY, *supra* note 2, at 52.

74. ROYCE, WAR AND INSURANCE, *supra* note 46, at 64 (emphasis omitted).

In 1915, a German submarine sunk the British passenger ship *Lusitania*. Twelve hundred people died, including 100 Americans.[75] Royce had attempted to maintain neutrality in the early period of the First World War, but the attack on the *Lusitania* cast the question of the morals of war in a different light.[76] Royce responded powerfully. "This," Oppenheim argues, "was *not* the mature Royce's usually gentle, even kindly and playful behavior towards the friends of humanity, but his moral response to one who preferred the interests of a bully nation to those of the whole human family of nations."[77]

In his speech on the *Lusitania*, given in 1916, Royce dealt with the text: "[T]hey rest from their labour and their works do follow them."[78] *Revelation* 14:13 is commonly interpreted to mean that their works shall follow them into the great balancing, which is part of the final judgment. Royce does not however focus on this reading. Rather, he seems to give a modern, even secularist, tone to the line. Their works follow them because "our memory and our piety will not let go our hold upon what is best and dearest in the past . . . ."[79] Royce sees the works of the dead of the *Lusitania* as surviving them in our memory. In effect the text is read as saying that their works shall succeed them in us.[80]

But if, in this way, the Royce of the *Lusitania* speech is moving away from a traditional reading of Revelation, there seems to be another way in which he retains a sense of the most terrible meanings of that text. "The German Prince is now the declared and proclaimed enemy of mankind."[81] The language evokes the casting of Satan into the lake of fire. It is not clear what can be done to change this. Perhaps the reparations discussed in

---

75. Germany was at war with England, but not the United States.

76. A modern commentary describes the depravity which "necessitates the great white throne judgment of 20:11-15." "Here," Osborne writes, "is the answer to those who argue for universalism - depravity is an eternal force, and it demands an eternal punishment. The truth is: Hitler and Stalin will hate God more in a billion years than they did the day they died!" GRANT R. OSBORNE, REVELATION 39 (Baker Academic 2002).

77. FRANK M. OPPENHEIM, ROYCE'S MATURE ETHICS 42 (Univ. of Notre Dame Press 1993) (emphasis in original).

78. ROYCE, *Anniversary of the Sinking of the Lusitania*, *in* THE HOPE OF THE GREAT COMMUNITY, *supra* note 2, at 93.

79. *Id.* at 94.

80. The Jerusalem Bible translates: "Now they can rest forever after their work, since their good deeds go with them." The King James translation ... "and their works do follow them..." seems to be more ambiguous on faith and works in its syntax. This is apparently true generally. *See* GERALD HAMMOND, *English Translations of the Bible, in* THE LITERARY GUIDE TO THE BIBLE 647 (Robert Alter & Frank Kermode eds., 1987). Thanks to Pamela Sheingorn for helpful conversation on this point.

81. *See* discussion *infra*, at 119.

War and Insurance are a piece of that story, part of the idea of "minding ones manners" referred to in the *Lusitania* speech. But the possibility that the traitor will be unreconciled remains.[82] A community, Royce had noted in 1913, could be as base and depraved as an individual.[83] It was, in this way, like a fallen angel. This is what Germany, which had given Royce so much, had become for him.

Horace Kallen's recollection of an encounter with Josiah Royce shortly before his death in 1916 is striking. Kallen wrote:

> On a widened path between Emerson Hall and the Library stood a large black limousine around which I was trying to find my way when I saw Professor Royce, heading apparently for the limousine. His steps seemed hesitant and unnaturally short, all his movements suggested an uncertainty, a reluctance to make them. When I greeted him, his round blue eyes looked staring, and without recognition. It was a moment or two after I had spoken my name that he remembered who I was. And then he said in a voice somehow thinner, and more dissonant than I remembered: "You are on the side of humanity, aren't you?"
>
> At first the query was entirely meaningless to me. Then I recalled what I had heard about Royce's speech on the sinking of the *Lusitania*, and I experienced great shock and hurt that this teacher of mine could ask me such a question at all. Much later, I came to think how ironical it was that a believer with a philosophic creed like Royce's should ask a question which excluded from humanity the one family of mankind upon the all-inclusive systems of whose thinkers and artists the believer himself so amply relied . . .."[84]

Kallen's use of the idea of expulsion is notable, evoking as it does the sanction of a community. His rhetoric does this even more strongly. "However sacrificially he lived up to his engagements in his personal and professional relations," Kallen wrote, "suffering them, struggling for their nourishment and upkeep, at the sinking of the *Lusitania* he came to a limit.

---

82. ROYCE, *Anniversary of the Sinking of the Lusitania, in* THE HOPE OF THE GREAT COMMUNITY, *supra* note 79.

83. ROYCE, THE PROBLEM OF CHRISTIANITY, *supra* note 30, at 123.

84. The episode is included in the Clendenning biography. CLENDENNING, THE LIFE & THOUGHT OF JOSIAH ROYCE, *supra* note 7, at 378-79.

There was an evil which nothing in his experience, certainly nothing in his philosophy, could reconcile him to, an evil *ad extirpandum*."[85] The language of extirpation, derived from the 13th century papal bull justifying torture of heretics, is Kallen's. But the thought is clearly that of Royce, invoking the sanctions of the religious community against those who are no longer worthy of association. The default community is not the family, for example, the home where, when you go there, they always have to take you in. Rather it seems to be the sectarian church in which expulsion is always a possibility, and the final judgment involves an ultimate expulsion. "When the Church came to develop its doctrines of the future life," Royce wrote, it also came developed "a well known group of opinions describing the endless penalty of sin . . . . The apocalypse imaginatively pictures this doom."[86] And then: "[i]n outlines, this group of opinions [Christian Doctrine] is familiar even to all children who have learned anything of the faith of the fathers."[87] Royce was himself certainly such a child.[88]

Royce expanded his view on the war in a late speech. He writes: On one view, "the present war is essentially a conflict between nations and between national ideals."[89] And then: "[t]he essence of this doctrine is, that just as the conflicting powers are nations, so the main moral concern ought to be expressed in hopes that this or that nation will obtain a deserved success."[90] By contrast, his view is that "the present war is a conflict more conscious, more explicit, and for that very reason more dangerous than any we have ever had before, a conflict between the community of mankind and the particular interests of individual nations."[91] It follows that "no nation engaged in this war is, or can be, right in its cause, except in so far as it is explicitly aiming towards the triumph of the community of mankind."[92] Royce prefers universalism and his sectarianism is forced on him. He would prefer the community of the whole, of all mankind, but it is

---

85. Horace M. Kallen, *Remarks on Royce's Philosophy*, 53 J. OF PHILOSOPHY 131, 138 (1956).

86. *Id.* at 100. Royce remembered Apocalypse as the first independent reading he did. The book did not give him clear ideas; he said. Autobiographical Sketch *Hope of the Great Community*, 124. But it might have left clear pictures.

87. *Id.*

88. CLENDENNING, THE LIFE & THOUGHT OF JOSIAH ROYCE, *supra* note 7, at 8 and 277 (on the father as a mystically inclined Evangelical Christian). Speaking of these last speeches, Clendenning writes: "[a]t last he was the true son of his father." *Id.*

89. ROYCE, THE HOPE OF THE GREAT COMMUNITY, *supra* note 2, at 31.

90. *Id.*

91. *Id.*

92. *Id.*

not here. The wounding of the universal community results for him in a sectarian group.

Kallen discusses the relation between Royce's response to the *Lusitania* and his general philosophy. "It seems to me," Kallen wrote, "that Royce's reaction to the sinking of the *Lusitania* underlines what I believe to have been the role of his philosophy in his personal history. It became a very skillfully elaborated, highly refined tune whistled in life's dark for encouragement, for comfort, for companionship, on a road of existence that might otherwise have been even lonelier and more anxious."[93]

Among those who died on the *Lusitania* were Royce's own students. They were his dead, Royce said, and his pain is evident in his private and public statements. "The German Prince is now the declared and proclaimed enemy of mankind." Royce insisted:

> [D]eclared to be such not by any "lies" of his enemies, or by any "envious" comments of other people, but by his own quite deliberate choice to carry on war by the merciless destruction of innocent, non-combatant passengers. The single deed is indeed only a comparatively petty event when compared with the stupendous crimes which fill this war. But the sinking of the *Lusitania* has the advantage of being a deed which not only cannot be denied, but which has been proudly proclaimed as expressing the appeal that Germany now makes to all humanity. About that appeal I am not neutral. I know that that appeal expresses utter contempt for everything which makes the common life of humanity tolerable or possible.[94]

The German Prince was the enemy of mankind and had to be dealt with in an appropriate manner. That manner, following the forms of the sectarian community, would involve some sort of exclusion, followed possibly -- but only possibly -- by atonement and reinstatement. And it meant that the party of mankind might not, finally, include all of mankind. The contrast to a 1912 discussion of the Crusaders is clear. In *The Sources of Religious Insight*, (1912) Royce defined the invisible church as "the community of all who have sought for salvation through loyalty."[95] It might include people who were in some respects not conventionally good.

---

93. Kallen, *supra* note 86, at 139.
94. ROYCE, THE LETTERS OF JOSIAH ROYCE, *supra* note 13, at 630.
95. ROYCE, SOURCES OF RELIGIOUS INSIGHT, *supra* note 15, at 280.

The Crusaders, he notes, were religious but they were also robbers and murderers. "I know not" he wrote, "what degrees of greedy blindness are consistent with an actual membership in the invisible church . . . ."[96] Royce was interested here in "loyal life according to their lights." [97] By the time of the *Lusitania* he apparently knew more.

But Kallen is not altogether persuasive when he says, that the *Lusitania* was evil beyond Royce's understanding. Royce had always been concerned with evil. In *The Problem of Job*[98] he had dealt with evil, and characteristically included examples from the political and the personal spheres. "Witness Armenia," Royce said, referring also to innocent children born with hereditary diseases.[99] Personal, political, family and international interests are all used as immediate illustrations. Evil, sorrow, and tragedy are pervasive, and one of the tragedies, in effect, is that some people must be excommunicated from the universal brotherhood. In the *Problem of Christianity*, the person who leaves is seen as a traitor who then comes back, makes atonement, and is reconciled. The discussion of atonement is individual. Presumably atonement relates to nations also. But it seems that it is not always possible.

Royce took *War and Insurance* seriously as a workable proposal. Questions remain about the practicality of the idea. First, if all the nations are somehow to end up in the insurance or reinsurance plan, (and, incidentally, what nations are in Kant's federation? Kant insists that he is talking about a scheme built on the continuing existence of nations) how do we determine who is a nation? Does Royce's universalism include those who are not peace loving or freedom loving or Christian? He seems to distinguish only between strong and weak nations. (Other ideas continue to be evident.) One recalls the Christian/Muslim issue in the EU currently. Further, Royce assumes conventional acts of war committed by nation states. This assumption may also be seen to have many difficulties. (Is insurance better on this issue? Is everyone insurable?) "Who started the war" is viewed as a technical question. This may not be altogether true, however. One might compare this discussion:

> When I was a child, I saw a movie in which the Soviet Union blew up the Alaska pipeline. The bombing was in response to a U.S. grain embargo that had led to

96. *Id.* at 284.
97. *Id.* at 285.
98. *See generally* JOSIAH ROYCE, *The Problem of Job, in* STUDIES OF GOOD & EVIL 1, 1-28 (D. Appleton & Co. 1898).
99. *Id.*

> widespread starvation in the Soviet Union. The president telephoned the premier to denounce him for the bombing. The premier responded that the president had fired the first shot. Amazed, the president said, "You mean to say that when we decide not to give you our grain, you think that gives you the right to bomb our pipeline?" The premier responded, "It's not your grain. It's the world's grain."[100]

Schmidtz's account offers two radically different perceptions on this "simple factual question" of who fired the first shot.

Horace Kallen's explanation of the position taken by Royce on the *Lusitania* saw it as an inevitable compromise of the sort that philosophers of a particularly absolutist variety may have to make. The suggestion here is that it shows Royce reverting to the definitions of community with which he was familiar from childhood, in which the community maintains its purity and its boundaries by expelling those who cannot maintain the standards of membership.

Royce was a member of a number of communities. His family of origin, his marital family, extended family, his professional community of Philosophers and the Harvard community at large. He was a Californian, and an American. And then there were other communities, and other phases of community. The communities of interpretation, and the community of mankind, the Universal community. But perhaps we can end by noting that his reaction to the *Lusitania* was personal. Despite his insistence on the meaningless of human life in the absence of community, in the end he spoke not as a representative or as a member but as an individual. Royce concluded a letter on the *Lusitania* with what may have been a formulaic disclaimer. "Of course, I need not tell you that a Harvard professor speaks only for himself, and commits none of his colleagues to anything that chances to be on his mind or on his tongue."[101] But formulaic or not, there is something in the relationship expressed between the individual and the community which deserves attention.

Royce's work on community remains of interest. It has been rediscovered by some interested in community. And so there is something poignant in the explicit recognition that he spoke as an individual. And even more in his acknowledgment that this individual who spoke was not fixed certain and determinable. On the contrary, the individual was fluid, contested and uncertain. Your self, Royce said, is "a history, a drama, a

---

100. DAVID SCHMIDTZ & ROBERT E. GOODIN, SOCIAL WELFARE & INDIVIDUAL RESPONSIBILITY XV (1998).

101. ROYCE, THE HOPE OF THE GREAT COMMUNITY, *supra* note 2, at 59.

life quest."[102] Speaking in 1915, Royce used an anecdote about Schopenhauer walking in the park, approached by an official who asked "Sir, who are you?" And Schopenhauer answered: "I wish you would tell me. That's exactly what I am trying to find out."[103] So, too, Royce, as Clendenning suggests.

But Royce tried in the end to live in the world and to respond to problems in the world, to do something to help bring about the situation he saw as a goal, and simultaneously to create a bridge between his mental life and his active life. *War and Insurance*, a description of one of the possible forms of international activity which would, while business-like in its methods, make "visible to us the holy city of the community of all mankind,"[104] was a significant piece of that process.

---

102. *Id.*
103. CLENDENNING, THE LIFE & THOUGHT OF JOSIAH ROYCE, *supra* note 7, at 392.
104. JOSIAH ROYCE, WAR AND INSURANCE, *supra* note 46, at 80.

PARADIGMS, ASSUMPTIONS, AND STRATEGIES: ROYCE AND METHOD

Thomas Morawetz[*]

Introduction

In the 2002 movie, "Adaptation,"[1] the screenwriter, Charlie Kaufman, made his own efforts to write the screenplay the subject of the screenplay itself and made himself a major character in the movie. An analogous postmodern move would be for me to write about my own efforts to find a thread through Josiah Royce's address, "War and Insurance,"[2] rather than simply to present the fruits of those efforts. In doing so, I risk the plausible charge of being far less entertaining or imaginative and much more tedious than Kaufman or Spike Jonze, the movie's director.

Royce's address is singularly problematic. Readers are likely to see its ideas as both clairvoyant and obsolete, both subtle and naive. It might be said that most significant philosophical works, when they are reappropriated after a few generations or more, can easily give rise to such paradoxes.[3] Their style and many of their methodological assumptions are often superceded. Their ideas, however, clothed in different terms, can be made viable and provocative.

But Royce's philosophical corpus has long been in limbo. He is rarely read or taught. He is often seen as having written the final chapter of a closed book insofar as he is the final legatee of the American version of Hegelian idealism.[4] If we are tempted to see him as relevant and even clairvoyant, we may need to justify that response. Does his way of thinking have valuable insights that were overlooked in much of the twentieth century? Is it an approach that is newly relevant in the

---

* Tapping Reeve Professor of Law and Ethics. He has earned a Ph.D. (1969) and an M. Phil. (1968) in philosophy at Yale University, where he also earned his J.D. in 1968. Professor Morawetz has taught at the University of Connecticut School of Law since 1977. He has published more than forty articles and written or edited nine books, including his collected essays in legal philosophy under the title *Law's Premises, Law's Promise: Jurisprudence after Wittgenstein*.

1. ADAPTATION (Sony Pictures 2002).

2. JOSIAH ROYCE, WAR AND INSURANCE (1914).

3. Over the last fifty years there have been discernible periods in which historical works of philosophy have generally been disdained and regarded as obsolete and other periods in which their investigation has been the major philosophical activity. The era of so-called Oxford linguistic analysis (roughly 1950 to 1970) was a fairly clear example of the former.

4. *See* JOHN E. SMITH, THE SPIRIT OF AMERICAN PHILOSOPHY 82-85 (1963).

circumstances of this fledgling century? Or are we simply drawn to accidental and coincidental similarities between his concerns and ours? In the latter case, we may nod in recognition of these adventitious parallels and find his lessons momentarily intriguing but stillborn.

If much of Royce's philosophy seems alien and obsolete, there are at least two ways of explaining why, two ways of trying to find a thread. One way is to adopt the fashionable notion of paradigms.[5] Accordingly, it is tempting to use the rhetoric of the last forty years of philosophy and ask whether Royce's ideas seem obsolete because he uses an intellectual paradigm that we no longer share, one that we have abandoned. In part II of this paper I shall explore the utility and limitations of trying to account for our relation to Royce in the language of paradigms—and I shall show how and why this is a problematic approach.

In part III, I employ a different device to investigate our responses to Royce, the notion of an intellectual strategy. Royce uses a strategy of extrapolation from individual human nature to the nature of social and political institutions. Strategies of this kind are durable, and there are many examples in the history of social theory. I shall explore briefly the ways in which a critique of this kind of strategy throws Royce into perspective. It does so at a high cost because it makes clear that Royce presupposes theories of human nature and of politics and assumptions about personal and national self-transcendence that seem out of touch with contemporary ways of thinking. In this way, we can come to terms with some of the paradoxes in our response to Royce's address.

Kuhn's Paradigm for Paradigms

Is it helpful to ask whether Royce shares our paradigm of politics, of nationhood, or economics, or of motivation? Concluding that he does indeed share our paradigm is a way of making him relevant to *our* conversation. But, as I shall argue, the question is fatally vague because paradigm-talk in the realm of human nature and politics is fatally confused. To see this, we must digress from Royce at fearsome length—perhaps as distractingly as Charlie Kaufman digresses in "Adaptation"—to consider the origins (and limits) of paradigm-talk among contemporary scholars.

The fashion for talking about paradigms began with Thomas Kuhn's

5. Among the countless academic books that have exploited the language of paradigms shamelessly are TOM BOTTOMORE, SOCIOLOGY AND SOCIALISM (1984); IRENE E. HARVEY, LABYRINTHS OF EXEMPLARITY (2002); and ORGANIZATIONAL OF THEORY AND INQUIRY: THE PARADIGM REVOLUTION (Yvonna S. Lincoln, ed., 1985).

The Structure of Scientific Revolutions,[6] probably the most influential book in philosophy of science in the last half of the twentieth century. Kuhn challenged the prevailing notion that scientific progress consists in ever-closer approximations of the truth about reality.[7] He argued that this assumption was neither provable nor necessary to account for scientific activity, for discovery and the acquisition of knowledge. He proposed instead a theoretical account whereby scientific study at any given time is governed by shared assumptions about certain matters that are taken as fundamental truths and thus held constant while other matters are subject to examination. These assumptions extend to questions about what methods of study are appropriate for carrying out research and about how to frame and use the results of the investigation.[8] Within such research programs, there is progress toward satisfying the original goals, toward refining both the accepted methods and conclusions.[9]

Over time, however, these fundamental assumptions will be placed under greater and greater strain. When the observations of investigators can no longer be accommodated by the parameters of the research project, a conceptual revolution occurs, compelling a questioning and reconfiguration of the fundamental assumptions of science and of its agenda. In this way, one paradigm of scientific knowledge and investigation is replaced by another.[10] The Copernican, Galileaen, and Einsteinian revolutions are examples.[11] Each recast the premises, respectively, of astronomy and physics. In each case, the nature of the enterprise was redefined. What counted as knowledge under the obsolete paradigm had to be systematically reconceived.

Thus, Newtonian physicists and adherents of relativity theory inhabit different worlds. Every claim of Newtonian physics requires translation into the new scheme of understanding. While there may be circumstances in which events may be investigated within the confines of Newtonian rules, it is taken for granted that this is an artificial convention—a special case—in which the conditions for the breakdown of Newton's laws are excluded.

Paradigms do not merely succeed each other temporarily. Different simultaneous cultures may employ different scientific paradigms. The

---

6. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3d ed., Univ. of Chicago Press 1996) (1962).

7. *See id.* at 35-42.

8. *See id.* at 23-51.

9. *See id.* at 23-42.

10. *See id.* at 66-110.

11. *See id.* at 77-91, 144-159.

science of ancient pre-Columbian cultures in the Western hemisphere coexisted in time with the science of Renaissance Europe.

Kuhn's model of scientific and conceptual revolutions fell on receptive ears and had influence beyond its intended domain. As an intellectual ploy, it resonated with the mid-century currency of Wittgenstein's model of language games.[12] Just as Wittgenstein urged us to think of all communicative efforts (and, by implication, all thought) as embedded within a bedrock way of proceeding that is not subject to reflection and questioning, a form of life,[13] Kuhn seemed to apply this insight to science. "Normal" scientists working on research projects within a paradigm have no occasion to reflect and question the paradigm. At most, their findings reinforce the paradigm and fill it out.

It is easy to see how Kuhn's model of scientific revolutions and investigative paradigms could be borrowed and extended to explain other enterprises. In some cases, the influence was direct. For the most part, however, Kuhn's use of the notion of a paradigm simply anticipated and fitted into a way of thinking that proved ubiquitous in the late twentieth century. Stanley Fish felicitously translated the notion of a language game with shared assumptions into the idea of an interpretive community.[14] Applying the notion first to literature and then to law, Fish described an interpretive community as a group of investigators who agree in their conception of the premises of their enterprise and in their sense of what outcomes are available to them. They may, to be sure, disagree in results, adopting different outcomes for specific problems and their disagreements may be unresolvable. But their disagreements will nonetheless follow the rules of the enterprise.

For example, traditional literary criticism in the 1930s and 40s looked for the meaning of a literary work in the intentions of the author and sought those intentions in the author's personal history and in the place of the work in general cultural history.[15] Within such an interpretive community, there might be endless disagreement about what an author's biography might mean but not about the premise that the biography is significant.

---

12. *See generally* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe, trans., Basil M. Blackwell, ed., 1958) (1953).

13. *See* HANS-JOHANN GLOCK, A WITTGENSTEIN DICTIONARY 124-29 (1996) (discussing the notion of "form of life").

14. *See* STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980).

15. This tradition of understanding texts contextually as a reflection of the values of the community and of the author is defended by some contemporary critics. *See* JOHN M. ELLIS, LITERATURE LOST: SOCIAL AGENDAS AND THE CORRUPTION OF THE HUMANITIES (1997) and E.D. HIRSCH, JR., VALIDITY IN INTERPRETATION (1967).

Succeeding interpretative communities presumed that the meaning of a work was to be found within the confines of the text and, still later, that meaning was to be seen as an idiosyncratic product of the reader's appropriation of the text.[16] Each interpretive community is defined by the premise that determines how it investigates meaning. Sharing such a premise, different investigators may arrive at different conclusions.

Fish applied the same notion to law.[17] Judges serving together on an appellate court share a sense of the craft of opinion writing, of the nature of the matters in dispute, and of the range of meaningful responses. Their sense of the parameters of their job may differ enormously from judges of a century ago—judges from a different interpretive community—in both style and substance. But the potential range of disagreement within any given court, as representative of an interpretive community, will remain as great as on any previous court.[18]

To this point, it would seem that the conceptual tool of a paradigm, tied as it is to the concept of an interpretive community, is sharp enough to pare away at the question of our relation to Royce. Do we share a paradigm, inhabit the same interpretive community? Or is our paradoxical distance from him explainable in terms of a conceptual revolution, an intellectual abyss that divides us? Regrettably, as I shall argue, the tool has grown blunt. Just as fashions in clothes and food lose their appeal through overfamiliarity, fashions in critical thought become intellectual crutches and sources of confusion.

It has been disconcertingly easy, in the wake of Wittgenstein, Kuhn, and Fish to see all divergences as symptoms of warring paradigms. Historians who subscribe to different modes of explanation are said to use different paradigms. Paradigms may be identified with the styles of historical theorists such as Marx, Vico, Spengler, or Dilthey or with the favored levers of historical change such as economics, or social class, or unique leaders, or all of these in conjunction.[19] More generally, different

16. So-called reader response theory is generally attributed to the work of Stanley Fish (*see* FISH, *supra* note 14) and Wolfgang Iser (*see* WOLFGANG ISER, PROSPECTING: FROM READER RESPONSE TO LITERARY ANTHROPOLOGY (Johns Hopkins Univ. Press 1989)).

17. *See generally* STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989).

18. *Id.* at 87-140.

19. One way to understand this point is that the various historical theorists can and should be seen in something of a dialogue about significance and explanation in history. The use of the concept of conflicting paradigms precludes the possibility of dialogue (at least in any use that is derived from Kuhn). The question of objectivity and the historians' perspectives is discussed interestingly by Joyce Appleby, Lynn Hunt, and Margaret Jacob. *See generally* JOYCE APPLEBY ET AL., TELLING THE TRUTH ABOUT HISTORY (1994).

cultures or societies are said to represent different paradigms for interpreting experience. The same suggestion is extended to genders, races, and ethnic groups. To the extent that each may be said to experience and understand the world in a distinctively different way, this is taken as evidence of divergent paradigms.

Such promiscuous use of the notion of a paradigm is fatally flawed. For one thing, the criterion for sharing a paradigm or not becomes arbitrary and simplistic. Do judges on an appellate court share a paradigm because they engage in debate and have a common sense of what sorts of opinions are expected from them, or do they have different paradigms (see the world in systematically different ways) insofar as they invariably differ in their politics and their expectations about human nature? Do I share a paradigm with Homer if I can read the *Odyssey* and feel empathy with Odysseus' plight—and does the same hold true in reading *Othello* or *King Lear*? The notion of a shared paradigm becomes so elastic that in matters of social and personal experience it is possible that one shares a paradigm of experience with anyone who has ever lived, and alternatively that any two individuals who disagree in an unresolvable way do so because they use different paradigms. If that is so, the concept is useless.

Why have we arrived at this plight? Kuhn's original analysis addressed the distinctive history of the physical sciences. It is relatively easy to periodize the history of science, even if it may be problematic how the periods relate to each other. The sea change represented by a Copernican or an Einsteinian revolution is apparent to all. Analogous reconceptions or revolutions do not occur in the social sciences or in cultural matters. Every insight that can be called a revolution in thinking, a change of paradigm—such as the work of Freud, Marx, or Adam Smith—has its inchoate anticipations in other times and places.[20] Moreover, these so-called revolutions are never permanent in the way those of Copernicus and Einstein have been. Over time, Freud's insights have been questioned and spurned as much as those of Marx.[21] Determinate boundaries for interpretive communities with shared paradigms are simply not to be

20. This can be done in at least two ways. In the case of Marx, for example, one can point to the continuities between his writings and those predecessors to whom he acknowledged a debt—the utopian socialists St. Simon and Fournier; the German philosophers, Hegel and Feuerbach. Alternatively, one can find remote anticipations of a theorist's ideas in earlier writers in various genres. Thus, one can look to Sophocles and Shakespeare for anticipations of Freud.

21. Jonathan Lear observed that "Freud-bashing has gone from an argument to a movement." Jonathan Lear, *The Shrink Is In*, *in* THE NEW REPUBLIC, Dec. 25, 1995, at 18. Among the most vociferous Freud-bashers are Frederick Crews, Adolph Grunbaum, and Richard Webster.

found; they are endlessly debatable.

It is important to see the irony of such debates. A basic implication of Kuhn's way of thinking is that disagreement is meaningful only among those who share a conceptual paradigm, those who share a sense of what questions are to be asked and with what kinds of evidence they might be answered. By Kuhn's own premises, disagreements over the merits and comparability of so-called "paradigms" are nonsense.[22]

Charlie Kaufmann, in *Adaptation*, agonized over the problem of getting started, the problem of method. These musings about paradigms have a similar self-reflective function even if they do not reflect his neurotic self-paralysis. In the next section, I shall suggest that, having come to a dead end with the notion of paradigms, we need to look at Royce from the standpoint of analytic strategy.

From Individual to Society: Examining Royce's Strategy

Royce is often said to have derived his philosophical method from Hegel.[23] He also has a substantial debt to Plato. Plato's strategy in *Republic* is to extrapolate from what we know about human nature to what we can say about societies.[24] Although other political and social philosophers have followed a similar strategy,[25] Plato's version is probably most familiar.

The strategy is in equal parts seductive and implausible. On one hand, we know human nature most immediately from our own experience. We know the experience of setting goals and trying to achieve them; we know conflict and how it can (and cannot) be resolved; we know how experience and its interpretation change over time. In all of these ways, it is said, persons and societies are analogous. Societies are persons writ large. Since we know persons immediately, being persons ourselves, and societies only indirectly, by participating and observing events over time, we can draw inferences from the microcosm to the macrocosm, from persons to societies.

On the other hand, every element of this strategy can be questioned. It is hardly obvious that the trajectory of a society is like that of a person's

---

22. *See* KUHN, *supra* note 6, at chapter XIII.

23. *See* SMITH, *supra* note 4, at 82-85.

24. A series of critical essays that discuss Plato's extrapolation from the psychological sense of justice to social justice appears in 2 PLATO: A COLLECTION OF CRITICAL ESSAYS, (Gregory Vlastos ed., Doubleday 1971). *See especially* the essays by David Sachs, Raphael Demos, and Gregory Vlastos. *Id.*

25. The tendency to make inferences from the goodness of persons to the goodness of society is particularly marked in social utopian thinkers such as Robert Owen, Charles Fournier, and Henry, Comte de Saint-Simon.

life. The ways in which societies define and pursue goals, when they do so at all, are not obviously modeled on the ways persons do so. Conflicts between persons and conflicts between societies or nations may or may not be analogous. Power and wealth, jealousy and greed may motivate and explain conflict at both levels, but the ways in which they relate to action are infinitely diverse. Does a nation experience and process jealousy in the way a spurned lover does? Does a person crave power for the same reasons that an imperial colonizing nation does? And is a nation's historical self-knowledge and self-blinding comparable to that of an individual?

Moreover, the claim that we know persons better than we do societies is dubious. Many recent philosophers have followed Wittgenstein in arguing that the fund of terms and assumptions we use to think about ourselves are part of our collective heritage.[26] Our language and our "forms of life" (our collective ways of acting and thinking) make possible self-definition and self-reflection. To say that we know ourselves first and society, or others, second is to commit a solipsistic fallacy.[27] It is to take for granted that, even if we are not initiated into the terms of thought and expression of our culture, we can still exercise self-knowledge because it is prior. In fact, many philosophical psychologists are inclined to reverse the inference. They would claim that how we define ourselves is determined by psychological categories that are (socially) available to us and, in particular, by the ways in which others respond to us and think of us.[28]

These questions make Plato's strategy seem distant. Nonetheless, it is a way of thinking that binds Royce to Plato and one that is a key to understanding Royce's aims in his *War and Insurance* address. For Plato, the parts of the soul are analogous to the parts of the state. Just as the person works properly only when each part of the body does its distinctive job, the parts of the state work justly only when each class—the aristocrats, the military, and the workers—does its own distinctive job and refrains from seeking power inappropriately.[29] Much of the *Republic* is given over to accounts of how the state degenerates when it is disordered. By close analogy, the soul also suffers, sometimes irreversibly, when the passions and the appetites govern reason.

Royce is similarly strict in drawing analogies between the person and

---

26. *See, e.g.*, REDRAWING THE LINES: ANALYTIC PHILOSOPHY, DECONSTRUCTION, AND LITERARY THEORY (Reed Way Dasenbrock, ed., 1993); THE INSTITUTION OF PHILOSOPHY: A DISCIPLINE IN CRISIS? (Avner Cohen & Marcelo Dascal, eds., 1989).

27. *See* RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 98-127 (1979).

28. *Id.* at 357-94.

29. PLATO, REPUBLIC, books II-V.

the state (or society). While Plato's account of how the individual achieves the good life and his full potential is intrapersonal, Royce's account is interpersonal. He takes a dark view of the prospects for the individual left solely to his own devices.[30] Such a person is predetermined to follow narrow self-interest. However, when the interests of persons clash, as inevitably they will, the mediation of the interests of two persons by a third as intermediary, will prove transformative.[31] The mediator will make possible a process by which each individual transforms himself, his self-understanding, and his goals and identifies himself with purposes and ideals that transcend himself as an individual. He becomes part of a community and identifies with the goals of the community. In this way, he also transcends the limitations of his own place and time. For Royce, this process of self-transcendence, mediation, and re-definition has religious significance as it establishes the link between the individual and the eternal.[32]

It is easy to see how Royce's proposal of a universal insurance scheme involves a straightforward extrapolation of these ideas. Nations, like individuals, define and pursue their self-interest narrowly. But they can be brought together through a process of mediation and led to re-imagine their interests. Through the mediation of third parties, nations can transcend their self-interest and can be brought into a community of shared interests.[33]

Underlying both parts of the analogy is an unstated premise about the *real* interests of the parties. Royce never doubts that those interests lie in identification with the larger community—and ultimately with the eternal.[34] A narrower individual-bound or nation-bound conception whereby the interests of individuals and nations conflict reflects a limitation of vision, a kind of myopia. When a larger and truer vision is attained, the process by which this occurs falls away and becomes irrelevant. Thus, Royce's insurance scheme is much more than a way of affecting political calculations by manipulating economic interests and a way of deterring war by making it more costly. It is a way of interposing an intermediary that transforms nations' self-understanding of their interests and goals.

Royce's imaginative leap from persons to nations can be examined by distinguishing four aspects: (1) his view of human nature, of the interests of persons and of their self-understanding of their interests; (2) his view of

30. *See* ROYCE, *supra* note 2, at 28-36.
31. *See id.* at 44-54.
32. *Id.* at 80.
33. *See id.* at 65-80.
34. *See* JOSIAH ROYCE, THE PHILOSOPHY OF LOYALTY 163-85 (1908).

nations, *their* interests, and their ways of framing and pursuing those interests; (3) the strength and persuasiveness of the analogy between persons and nations, and finally (4) the general notion of self-transcendence and the identification of one's "true" interests. With each aspect, I shall try to describe the gap between Royce's approach or strategy for these topics and our own a century later.

(1) Hegel, who inspired Royce's approach to philosophy, was an odd heir of the enlightenment, not least in his concept of human nature. Enlightenment philosophers through Kant had little doubt about persons' capacity for moral self-transcendence. As Kant argued, we are capable of formulating a categorical imperative for our conduct, of deriving concrete injunctions from it, and of subsuming our will to those injunctions.[35] Hegel was more attentive than Kant to the dark side of experience and the will.[36] He saw the individual's journey as a dialectical process, but one that could and should culminate in self-overcoming and in personal harmony with the goals of historical evolution. This focus on dialectical struggle endeared Hegel to Romantic writers in the late nineteenth century.[37]

By the time Royce gave Hegel's model an American and pragmatic flavor, a more pessimistic and doubtful view of human nature was already gestating in modernism. As Royce argues in *War and Insurance* and elsewhere, any two individuals are likely to have antithetical or competing interests. Cooperation always threatens to devolve into war; love will devolve into hate. At this point, Royce's debt is as much to Hobbes as to any later thinker.[38] But, as he says, if we interpose an intermediary between A and C, that intermediary (B) will act as an agent to effect a community of interest between A and C.[39] This will not only be a pooling of interest but, distinctively, a community of interpretation. A and C will not only cooperate to achieve their former ends but will be in a position to formulate new ends, to "interpret" circumstances differently.[40]

Royce's distinctively American and pragmatic examples may suggest that he has business relations in mind, that he is drawing on Hobbes and Adam Smith. On this interpretation, the contribution of the B is to make A and C see the advantage of market-like arrangements, to show them that

---

35. *See generally* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (H.J. Paton, trans., Harper & Row 1964) (1785).

36. *See* J.N. FINDLAY, HEGEL: A RE-EXAMINATION 81-147 (Oxford Univ. Press (1993) (1958).

37. *Id.* at 339-59.

38. *See generally* THOMAS HOBBES, LEVIATHAN (Edwin Curley ed., 1994) (1668).

39. *See* ROYCE, *supra* note 2, at 42-54.

40. *Id.* at 47-49.

their personal ends can be achieved best by transactions and trade-offs.[41] But this is much too narrow a view of his project. He talks about circumstances that change the parties' interests, wedding them. Thus, he talks about how the family triad in which "common care for the child . . . charm[s] away"[42] conflicting tensions. He says that "groups which are larger and richer than pairs . . . [give rise to] men's very desire for human solidarity."[43] In each case, he is concerned with transcending individualism.

Royce's near contemporary, Freud, was less sanguine about our capacity to transcend individualism and about the desirability of doing so. Devising yet another Hegelian triad of thesis/antithesis/synthesis, he stressed the life-long struggle of the ego to referee the conflict between spontaneous will (the id) and the internalized and necessary admonitions of society (the superego).[44] For Freud, individualism is a hard-won prize and one well worth pursuing.[45]

By the middle of the twentieth century this kind of admonition had prevailed. We had grown accustomed to being skeptical of those who would subvert individualism in the spirit of solidarity to the community.[46] Perhaps wrong-headedly, the spirit of Hegel was seen to hover behind the totalitarian movements of Nazism and Communism.[47]

For better or worse, individualism remains a primary intellectual orientation. We remain ambivalent about both the possibility and the desirability of subsuming our individual interests to those of the larger community. The influential critical legal theorist Duncan Kennedy bridges the surviving spirit of existentialism and the skeptical spirit of contemporary legal thought when he notes that "at the same time that it forms and protects us, the universe of others (family, friendship, bureaucracy, culture, the state) threatens us with annihilation and urges

---

41. The idea of the market being guided by an "invisible hand" has, of course, been one of the most potent ideas in economic theory. *See* ADAM SMITH, THE WEALTH OF NATIONS 423 (Edwin Cannan ed., Random House, Inc. 1937).

42. ROYCE, *supra* note 2, at 37.

43. *Id.* at 38-39.

44. *See generally* Sigmund Freud, *The Interpretation of Dreams, in* THE BASIC WRITING OF SIGMUND FREUD (A.A. Brill ed. & trans., The Modern Library 1938).

45. Freud is especially concerned to make this point in his later writings about society and social institutions. *See, e.g.*, SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS (Doubleday & Co. 1958).

46. It is hard to underestimate the influence of the twentieth century experiments with totalitarianism on this attitude and state of mind.

47. *See generally* KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES (Princeton Univ. Press 1950).

upon us forms of fusion that are quite plainly bad rather than good."[48] He adds that "[c]oercion of the individual by the group appears to be inextricably bound up with the liberation of that same individual."[49]

None of this means that self-transcendence and identification with shared goals is as meaningless notion. For Kennedy as much as Royce, self-awareness and change are possible and desirable.[50] We continue to think of human nature as malleable or, as the social psychologist Robert Lifton once said, "Protean."[51] But for the reflective individual in the late twentieth and early twenty-first century, personal change is seen as a perpetual struggle with the bounds of self-knowledge and the limits of will.[52] Identification with group norms and goals must be subjected to skeptical scrutiny. We are regularly warned about the alternative by such diverse cultural examples are Orwell's *1984*[53] and *Star Trek*'s the Borg.[54]

Thus, Royce is very much a nineteenth century figure and not a modernist in his thin view of human nature. He has in mind well-meaning communities and malleable individuals capable of quasi-religious conversion. The latter need only a catalyst to put aside their scrappy pursuit of desires to serve the greater good of the eternal community.

(2) Royce makes a similar assumption about nations but camouflages it in common sense. He does, to be sure, flesh out his insurance scheme with practical admonitions about national interest, incentives, and motives.[55] It is easy to read the scheme as a clairvoyant anticipation of globalization. Just as the ministers of the World Bank propose that economic interdependence through the creation of the world market works to the benefit of all and deters all from aggression,[56] Royce proposes that nations become each other's insurers against the costs and ravages of conflict.

Royce describes the effects of transnational decisions of the "mutual insurance community" grandly.[57] He says that its moral influences "would

48. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 212 (1979).

49. *Id.* at 212.

50. *See id.* at 221.

51. *See generally* ROBERT JAY LIFTON, BOUNDARIES: PSYCHOLOGICAL MAN IN REVOLUTION (Random House 1970).

52. *See, e.g.*, KNOWING OUR OWN MINDS (Crispin Wright et al. eds., Clarendon Press 2000).

53. GEORGE ORWELL, 1984 (Everyman's Library 1992) (1949).

54. *Star Trek: The Next Generation* (Paramount Pictures, 1987-1994).

55. ROYCE, *supra* note 2, at xvii-xxxvi.

56. This argument is made in the World Bank's many published policy papers and technical papers, but it is probably most familiar to the common reader as the subject of countless critiques.

57. ROYCE, *supra* note 2, at 75.

still be influences whose source would be the first spirit of the community of all mankind which would ever yet have won permanent and visible presence on earth."[58] The board of trustees of this community "would inspire all the nations actually to work together, at once in a charitable and in a businesslike way, as they have never worked before."[59] And this process would both "exemplify and teach loyalty"[60] in a world in which such loyalty has no precedent, in which "the nations . . . have never yet had any chance of acquiring international loyalty."[61]

Consider how significantly this description contrasts with even the most ambitious schemes of contemporary transnational economic institutions. In a world of global markets, nations are expected to remain competitive entities. Indeed, an argument for globalization is that it will enhance their competitiveness. They would hardly be expected to *put aside* national interests for the sake of a "community of all mankind," and any politician making such a suggestion would insure his or her political demise. We have come to take for granted that, under any representative government, local interests cannot generally be superceded by those of mankind. Royce's references to a shared spirit that becomes a "permanent and visible presence on earth"[62] invoke a religious rather than a political framework. Political entities, in the face of such a spirit, can put aside the interests that define and divide them. Only in this sense can there be what Royce calls a new form of "international loyalty."

Royce's details on the practical management of the insurance scheme thus mask its utopianism. The convulsions of twentieth century make such utopianism seem naive. Nations must struggle to become democratic and to represent the interests of their citizens. Those interested groups will not – Royce notwithstanding – relax their conflicts. Nations cannot abandon the local and national concerns of their citizens and merge these concerns in a moral community of all mankind. This essentially religious vision remains a distant and barely coherent idea, one to which the individual and national experiences of mankind through history give little support.

(3) There is something seductive about the idea that persons and societies grow, mature, and decline in comparable ways, and that we can learn by extrapolating from persons to societies, and vice versa. Plato, Hegel, and Royce all found the analogy useful. Contemporary thinkers find it easy to resist the temptation.

---

58. *Id.* at 76 (emphasis removed).
59. *Id.* at 76-77 (emphasis removed).
60. *Id.* at 77 (emphasis removed).
61. *Id.* (emphasis removed).
62. *Id.* at *76*

Isaiah Berlin famously borrowed from the Greek poet Archilochus the distinction between hedgehogs and foxes.[63] Hedgehogs interpret experience from the standpoint of a unitary idea; foxes notice the variety of experiences and caution against simplification and unwarranted assimilation. We live, it seems, in an era of foxes. When politicians talk about exporting the American model of democracy throughout the world, scholars point out that the educational, economic, and cultural circumstances of the world's societies make many of them unready and each of them idiosyncratic. Hedgehog-inspired schemes and hypotheses are typically greeted with skepticism and tend to enjoy little more than fifteen minutes of fame. The proponents of the "end of ideology" in the 1990s were forced to take note the flourishing of anti-Christian and anti-Western political movements.[64] The proponents of economic globalization have begun to attend to unforeseen and divisive implications of their arrangements.[65]

Moving from speculation about society to speculation about persons, one sees similar habits and misgivings about universal ideas. In the last two or three decades, psychologists have conceded that the diversity of persons and have moved from ambitious structural theories of human nature to transactional and physiological questions about the formation of personality and the parameters of individual development.[66]

The consequence for Royce in particular and Hegelian theory in general is that attempts to analogize the development of persons and societies are likely to fall on doubting if not deaf ears. It seems axiomatic that persons are too varied and that the differences between individuals and societies (or nations) are too great for us to learn much from the comparison. The ways in which individuals come to self-knowledge and come to terms with their interests and goals and the ways in which societies or nations come to pursue collective ends are, to the contemporary scholar, altogether different bundles of problems.

---

63. ISAIAH BERLIN, THE HEDGEHOG AND THE FOX 1 (Simon & Schuster, Inc. 1953).

64. The promise of and obstacles to global democratization are discussed in many recent essays and books. *See, e.g.*, ESREF AKSU & JOSEPH A. CAMILLERI, DEMOCRATIZING GLOBAL GOVERNANCE (Palgrave MacMillan 2002). The debate over the perseverance of ideological conflict in the 1990s echoes an earlier debate from the 1950s. *See* DANIEL BELL, THE END OF IDEOLOGY 109 (The Free Press Corp. 1960); *see also* THE END OF IDEOLOGY DEBATE (Chaim Waxman ed., Funk & Wagnalls 1968).

65. One of the most widely read and influential analyses of these issues is by Amy Chua, author of WORLD ON FIRE (Doubleday 2003).

66. *See, e.g.*, ROY SCHAFER, A NEW LANGUAGE FOR PSYCHOANALYSIS (Yale Univ. Press 1976); *see also* ROY SCHAFER, INSIGHT AND INTERPRETATION: THE ESSENTIAL TOOLS OF PSYCHOANALYSIS (Robert D. Hack ed., Other Press 2003).

Reductionism is the explanatory strategy that presumes to explain complex entities by examining their component parts; it claims that the characteristics of the former are simply cumulative expressions of the characteristics of the latter.[67] A reductionist explains the ways in which illness affects a person as a function of the ways in which microscopic entities affect the cells of the body. A critic of reductionism contends that complex entities have features that are not simply amplified versions of the features of the parts.[68] In this sense, Royce is a reductionist. He explains the behavior of societies or nations by extrapolating from the behavior of persons. The counterargument to this strategy is that the trajectory of the life of a nation is not simply that of the collection of lives it contains. History is not psychology writ large.

(4) Self-transcendence is an elusive notion. It seems to belong in one of two kinds of contexts. In a religious context, it refers to the spiritual openness of the individual to a transcendent entity, to the acceptance of a god and the willingness to identify one's ends with such a transcendent entity. In a political context, one may transcend oneself by living and seeing oneself as the agent and tool of a national purpose. Totalitarian systems of government take this understanding of the role of persons and rule accordingly. The distinction is in part artificial: in many societies the religious and the political definition of the role and place of the person coincide.[69]

In a secular democratic context, self-transcendence is a more modest and equivocal notion. It may mean acting altruistically and adhering to a moral code. It may mean sacrificing oneself for others. It may mean overcoming one's faults. It may simply mean acting purposefully rather than on impulse. In all these variations, it is individualistic, and it remains the description of a struggle. The personal goal in this philosophy of life is the Greek ideal of an individual life well lived and not the Christian ideal of an individual serving the city of God and seeking eternal salvation. Royce clearly embraces the latter ideal when he says that the individuals, A and C, who join a community of interpretation will enter "into some kind of social unity, such as will make them act as if they were, in a certain respect, one man."[70] For B, the mediator, "the united will of A and C . . . [is] . . . his aim and inspiration."[71]

---

67. *See* THOMAS NAGEL, MORTAL QUESTIONS 167 (Cambridge Univ. Press 1979); DEREK PARFIT, REASONS AND PERSONS 279 (Clarendon Press 1984).

68. NAGEL, *supra* note 67, at 167; PARFIT, *supra* note 67, at 279.

69. *See* CLIFFORD GEERTZ, LOCAL KNOWLEDGE 167, 234 (Basic Books 1984).

70. ROYCE, *supra* note 2, at 51 (emphasis removed).

71. *Id.* at 52.

Similarly, the idea that states will transcend themselves by joining a "community of interpretation" of mankind—and thus that nations will wither away—is hardly an accessible and plausible eventuality in modern political thought. At the very least, the collective experience of human history speaks firmly against its likelihood. None of this means that efforts to create international organizations and cultivate transnational respect for human values are pointless. But it does seem to mean that the coexistence rather than the withering of states, with their distinctive identities and goals, might be the more appropriate aim.

Summing Up

The closer one looks at Royce, the further he recedes. What seems at first glance to be a remarkably clairvoyant anticipation of global economics is something quite different. In two ways the modern climate of thought is inhospitable to his approach. First, he sees economic harmony not as an end but as means to bring about a so-called community of interpretation of all mankind. This is a goal that we now firmly identify as religious and that seems to require religious orthodoxy to be intelligible. In its secular guise, it echoes totalitarianism. Second, his strategy leans heavily on the analogy of personal self-transcendence and national self-transcendence. Both sides of the analogy can, I have suggested, barely withstand scrutiny.

The comparison of persons and nations is not a paradigm that has been superceded. There will doubtless be a time when this strategy will again seem useful, when the hedgehogs will claim their ground and their reductionist inclinations will be widely shared and rewarded. But that time is not now.

THE REVOLUTION OF THE TIMES:[1] RECENT CHANGES IN U. K. INSURANCE INSOLVENCY LAWS AND THE IMPLICATIONS OF THOSE CHANGES VIEWED FROM A U. S. PERSPECTIVE

William Goddard[*]

INTRODUCTION

In the last few years, the government of the United Kingdom has implemented changes to the procedures for administration of insolvent insurance companies. More changes are likely in the near future. This paper will address three related questions:

1) What are the recent changes in English insurance insolvency law?
2) How will those changes make insurance company insolvency proceedings in England more or less like insolvency proceedings in the United States?
3) How will the new changes affect insurance market participants in the United States?

SUMMARY

The United Kingdom's government has made several important changes to the laws governing insolvent insurance companies in England and Wales.[2] The most important changes affect the choice of insolvency

---

* The author is a University of Connecticut School of Law J.D. candidate 2004 and received his M.B.A. and A.B. degrees from Dartmouth College. Mr. Goddard would like to thank Mr. John Breckenridge of Her Majesty's Treasury; Evan Flaschen, Anthony Smits, and James Terry of Bingham McCutchen LLP; Stephanie Mocatta and Richard Whatton of Omni Whittington Insurance Markets Limited; David Tiplady of Kendall Freeman; and Harriet Maunsell OBE for their guidance and extremely helpful comments on drafts of this comment. The author, however, remains solely responsible for all views expressed and any mistakes or omissions made in this comment. This Comment was prepared during the period from April to September, 2003 and does not reflect changes in the law or regulations after that point.

1. "And see the revolution of the times Make mountains level, and the continent Weary of solid firmness, melt itself Into the sea!" WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE FOURTH act 3, sc. 1., *available at* http://online-literature.com/view.php/henryIV2/10 (last visited Sept. 21, 2003).

2. Similar changes have been enacted to regulations in Scotland and Northern Ireland whose general statutes governing insolvency are different from those in England and Wales.

procedures available to an insurance company and the relative priority given to competing claims in an insolvency proceeding. When an insurance company becomes insolvent in England, policyholder claims are now granted priority ahead of other creditors. This change makes the priority of payment in an English insurance company insolvency more like the priority structure in similar proceedings in United States. In contrast, English insurance companies are now eligible for insolvency reorganization proceedings (Administrations) used by other commercial companies in England, while commercial bankruptcy is not available to most insurance companies in the United States. These changes to claim priority and insolvency procedures have been brought on by internal consensus, European Union directives and the financial distress of two very large English insurance companies. As a result of these changes, insurance companies in the United States who have ceded reinsurance to English insurers [3] may experience a marked weakening of their position within an English insolvency proceeding. U.S. reinsurers will likely feel little change as a result of the new rules and U.S.-based policyholders will regain some lost ground.

DISCUSSION

I. Insurance insolvency in England and Wales

A. The English Insurance Marketplace

Insurance in England and Wales breaks down into two primary segments: Lloyd's of London and independent insurance companies.

1. Lloyd's of London

Lloyd's of London is a private association of individual underwriters. Individuals accepting insurance risk commit to back insurance policies with the entirety of their personal wealth, while corporations supporting individual underwriters do so with their entire corporate assets. Lloyd's started out as an exchange of individual underwriters who began meeting in Edward Lloyd's coffee house sometime near the end of the 17th Century.[4] The exchange survived Mr. Lloyd's death in 1713 to become an English

---

See, e.g. The Insurers (Reorganisation and Winding Up) Regulations (2003) S.I. 2003/1102, § 52. The changes in Scotland and Northern Ireland are beyond the scope of this paper.

3. U.S. insurers placing reinsurance overseas are referred to in this paper as "U.S. cedents." A "cedent" is an insurance company that has purchased reinsurance coverage from another insurance entity. R. H. JERRY, UNDERSTANDING INSURANCE LAW, § 140[a] at 898 (2d ed., 1996).

4. A BRIEF HISTORY & CHRONOLOGY, LLOYD'S OF LONDON, at 2, *at* www.lloyds.com/index (last visited Sept. 24, 2003).

institution. For most of its history, Lloyd's was a self-regulating insurance exchange, operating under authority granted by Parliament pursuant to a number of statutes beginning with the incorporation of Lloyd's in 1871. The Lloyd's Act of 1982 added appointees of the Bank of England to the governing Council of Lloyd's. Today, Lloyd's is regulated by the United Kingdom's centralized financial regulator, the Financial Services Authority ("FSA"). Lloyd's experienced significant financial instability in the mid 1990's as mounting asbestos and environmental claims in the United States worked their way through the traditional Lloyd's market in which syndicates of underwriters provided reinsurance to other syndicates.[5] In 1995 – 96, Lloyd's was forced to undergo an expansive program of re-formation called the "Reconstruction and Renewal," in response to this crisis. The "R&R" brought broad sweeping changes to Lloyd's. These changes provided badly-needed reinsurance to Lloyd's syndicates for years prior to 1993 and settled litigation between Lloyd's and its members resulting from the financial crisis, while, at about the same time, Lloyds allowed corporate entities to provide underwriting capital for the first time.[6] The financial trouble at Lloyd's set the stage for the changes and greater regulatory oversight that were to follow in the companies market. In addition, as discussed below, the focus of U.K. insurance regulators may be returning to Lloyd's, making it the candidate for the next round of insolvency regulation.

2. The "Companies Market"

The "Companies Market" is made up of privately capitalized and individually incorporated insurance companies selling insurance in the United Kingdom and overseas. These break down into: mutual insurance companies, proprietary companies owned by shareholders, and mutual indemnity associations (similar to reciprocals in the US) and collecting friendly societies (which sell industrial life insurance).[7] Insurance is often classified by line (e.g. fire, auto ("motor"), aviation, marine, etc.). However for regulatory purposes, the far more important distinction is between "long-term" insurance and "general" insurance.[8] Long-term insurance is defined in England as life, annuities, and permanent health insurance. General insurance includes the balance of the property-casualty

---

5. THEODORE A. BOUNDAS, PRACTISING LAW INSTITUTE, UNDERSTANDING LLOYD'S AND THE LONDON MARKET: 1998 UPDATE AND OUTLOOK, at 14-17.

6. D. S. HANSELL, INTRODUCTION TO INSURANCE, § 12.34 (1999).

7. *Id.* §§ 11.1 – .7.

8. The distinction between long-term and general insurance is drawn in the United Kingdom's Insurance Companies Act 1982. *See* HANSELL, *supra* note 6, at §§ 2.15 – .16.

lines, from accident and sickness on the one hand to motor liability and property damage on the other.[9] This distinction roughly resembles the split in the United States between life/health insurance and property-casualty insurance, but the similarity is not exact.

B. The English Insurance Insolvency System, Leading Up to the New Changes

The insolvency of insurance companies is the subject of intense regulatory scrutiny in the United Kingdom. In addition to being an important industry and employer, insurance is of vital interest to governments because insurance touches the lives of so many consumers and those consumers depend most on insurance benefits in times of personal distress (fire, automobile accidents, etc.). In order to achieve a balance between the needs of consumers and the needs of creditors, insurance insolvency involves a unique cast of characters and unique rules. Traditional insolvency law is generally driven by the need to balance the interests of competing creditors, provide for orderly credit markets and, in some jurisdictions, provide a fresh start for the debtor.[10] However, when an insurance company becomes insolvent, protection of the consumer takes center stage. Both the United States and the United Kingdom have developed complex systems for processing the estates of insolvent insurers and providing financial assistance to individual policyholders making claims against those estates. As described later, the administration of insolvent insurance companies in the United States is based upon a unique, state-based system of insurance regulation that has developed gradually since World War II. England, on the other hand has experienced great change and upheaval in its insurance insolvency system, first in the early 1990's, accelerating during the troubles at Lloyd's in the mid-1990's and then recently moving very swiftly. Before examining the insurance insolvency system now coming into place in England, it is important first to understand briefly how insurance English insolvency mechanisms developed and then to explore the innovations of the early 1990's.

1. The Players

a. Regulators

Historically, insurance in England was very lightly regulated. The Life

9. HANSELL, *supra* note 6, § 2.16.

10. Evan D. Flaschen & Timothy B. Desieno, *The Development of Insolvency Law as Part of the Transition from a Centrally Planned to a Market Economy*, 26 INT'L LAW. 668-69 (1992).

Assurance Companies Act 1870 brought requirements for deposits and financial disclosure to life insurers. The Assurance Companies Act 1909 extended these requirements to some non-life lines such as fire and accident insurance, but Lloyd's remained exempt from both Acts.[11] In the 1930's the Assurance Companies (Winding up) Acts gave the Board of Trade the ability to act in an insurance insolvency.[12]

In 1946, solvency regulation was introduced and regulators began to attempt to enforce appropriate levels of capital to assure solvency in relation to the size of the insurer.[13] Insurance regulation was later assumed by the Department of Trade and Industry. The Financial Services Markets Act of 2000 ("FSMA 2000") consolidated the regulation of financial firms, including banks and insurance companies, into a single national regulator, the Financial Services Authority (the "FSA").[14] The FSA's Board is appointed by Her Majesty's Treasury ("HM Treasury" or "Treasury"). The FSA has extensive powers to review and enforce the solvency of both Lloyd's entities and independent insurers.[15] The FSA also exercises great control over who may occupy management positions at insurance companies.[16]

b. Guaranty Schemes

In 1975, following a major insurance company failure, the Policyholder Protection Board ("PPB") was set up. The PPB paid policyholders 100% for compulsory insurance and 90% for other insurance in the event of an insurance company failure.[17] It provided benefits only to natural persons and partnerships made up exclusively of natural persons. When Weavers agency and its related insurance entities went insolvent, a great many foreign insureds sued to participate in the benefits provided by the Board. A law firm that contained professional corporations was found not to

---

11. HANSELL, *supra* note 6, §§ 33.5 – .7

12. *Id.* § 33.9 at 335.

13. *See id.* § 33.10 at 335.

14. The Financial Services Authority, *Who we are*, *at* http://www.fsa.gov.uk/who/ (last visited Sept. 24, 2003).

15. FINANCIAL SERVS. AUTHOR., FSA HANDBOOK, Ch. 11 REQUIRED MARGINS OF SOLVENCY, *at* http://www.fsa.gov.uk/handbook/bl5lldpp/lld/chapter_11.pdf (last visited Sept. 27, 2003) [hereinafter FSA HANDBOOK]; FSA HANDBOOK, App. 2 INSURERS: SCHEME OF OPERATIONS, *at* http://www.fsa.gov.uk/handbook/bl3supppb/appendix_2.pdf (last visited Sept. 27, 2003).

16. Stephen Browning, *The Changing Face of Insurance Regulation*, 26 New L.J. 621 (2002).

17. HANSELL, *supra* note 6, §33.24-.27 at 339-40. The PPB could also attempt to find another insurer to take over the policies of a failed insurer and make payments to the purchaser.

qualify, but the House of Lords determined that many U.S. individuals and firms were covered.[18] This led to a public outcry in the U.K. and legislation was adopted which prevented coverage of policyholders residing outside the United Kingdom.[19] The PPB was funded by a levy of up to 1% on premium income. As described in section (c)(3) below, the PPB has now been replaced by the Financial Services Compensation Scheme.

2. Options Open to Insolvent Insurers, Prior to 2001

a. Administration Order

In England, because the Insolvency Act 1986 § 8(4) specifically prohibited insurance companies from seeking an administration order, the U.K. counterpart of a U.S. bankruptcy reorganization was closed to insurers.[20]

b. Company Voluntary Arrangement

The Insolvency Act 1986 provides for voluntary agreements with creditors ("Company Voluntary Arrangements" or "CVAs"). If a 75% vote of a creditor class is obtained, the arrangement is binding upon every creditor in the accepting class who received notice and was able to vote.[21] However, insurance companies have many policyholders and potential claimants, some of whom are unknown at any given time. It is very difficult for an insurer to give notice to all potential claimants and next to impossible to secure the agreement of the required majority. Those creditors who did not receive notice and have the opportunity to vote would not be bound, making this option of limited use to insurers.[22] The Insolvency Act 2000 attempted to address this issue by increasing powers to bind creditors who are given notice but do not attend the creditors meeting. However, the presence of unknown creditors still makes this alternative suboptimal for insurance companies.[23] In addition, it is

---

18. 18 Ackman v. Policy Holders Protect. Bd., [1993] 3 All ER 384, [1993] 3 WLR 357, [1993] 2 Lloyd's Rep 533.

19. EQUITABLE MEASURES ACTION GROUP, SCOPE OF PROTECTION TO GUERNSEY BRANCH, POLICYHOLDERS UNDER UK LEGISLATION, *at* www.emag.org.uk/documents/scopeofprotection.guernesy.19oc01.html (last visited Sept. 27, 2003). The Policyholder Protection Act of 1997 restricted benefits to UK and Channel Islands and Isle of Man policyholders. *Id.* HANSELL, *supra* note 6, § 33.25.

20. CROSS FRONTIER INSOLVENCY OF INSURANCE COMPANIES, § 1.04 (Gabriel Moss ed., 2001) [hereinafter Gabriel Moss].

21. COLLIER INTERNATIONAL INSOLVENCY GUIDE, ENGLAND & WHALES, ¶ 24.05(4) (Matthew Bender 2002).

22. Gabriel Moss, *supra* note 20, § 1.03.

23. *Id.* § 1.46.

uncertain if a CVA would be honored by foreign jurisdictions, particularly in Ireland and the rest of Europe.[24]

c. Liquidation

Liquidation is open to all companies, including insurers. The liquidation process is governed by the Insolvency Act 1986. Liquidations may be either voluntary or compulsory, except that life insurers are not eligible for voluntary liquidation.[25] An insolvency professional is appointed as the liquidator and all the assets are sold with a view to a final winding-up. The compulsory liquidation begins with the entry of a winding-up order by the court and the associated stay of creditor actions.[26] Liquidation allows a company and its creditors to arrange a solution with finality and do so under the protection of court-ordered stay.

For insurers, liquidation can be an unwieldy process. Liquidation requires a valuation of claims, yet liability insurers often have claims that take many years to reach final settlement, making an immediate valuation of these claims is very difficult.[27] In addition, liquidation also allows for setoff of mutual debts, but on a principal-by-principal basis that may be problematic for insurers. Written records at an insurance company may simply not be adequate to support the required accounting because English insurers often do business based upon oral understandings, especially with regard to reinsurance.[28] Further, it is standard practice to keep accounts with brokers on a net basis, rather than accounting on a principal-by-principal basis. The liquidator may need to make substantial modifications to an insolvent insurer's record keeping systems in order to accommodate principal-to-principal accounting and accurately reflect historical transactions.[29] In addition, liquidations in England do not set a final date

---

24. *Id.*

25. HANSELL, *supra* note 6 § 34.25 at 354.

26. COLLIER INTERNATIONAL INSOLVENCY GUIDE, ENGLAND & WHALES, ¶ 24.04(3)(b) (Matthew Bender 2002).

27. A claim for injury from asbestos can take decades before its cost is ultimately determined.

28. R. H. JERRY, UNDERSTANDING INSURANCE LAW, § 142(C) at 903 (2d ed., 1996). There is less need for written contracts in the U.K. because of the repeal of the statute of frauds in 1954. *Id.* § 31(d) at 176. Further, English law recognizes a reinsurance contract based upon only the original binding slip. Contracts of reinsurance are typically issued, if at all, months after the original slip. BARRY R. OSTRAGER & MARY KAY VYSKOCIL, MODERN REINSURANCE LAW AND PRACTICE § 2.02 (2d ed. 2000). This lack of documentation, combined with the large number of reinsurers that may participate in a single risk, may result in a daunting requirement for forensic analysis in order to establish the balances due to and from each reinsurer.

29. Gabriel Moss, *supra* note 20, § 1.14.

(the "bar date") after which untimely claims are barred.[30] Claims may be submitted at any point in the process, therefore late-filing claimants can be paid excess compensation in order to "catch up" with compensation paid to other claimants. Given the number of claimants in an insurance insolvency, the lack of a bar date can make the process even more difficult. The combination of lack of written records, net-basis bookkeeping and the absence of a bar date make the accounting required for a liquidation complex and expensive to implement. As a result, the unique needs of an insolvent insurance company limit the usefulness of the liquidation mechanism.

d. Scheme of Arrangement

Insurance companies needed a more flexible alternative than the three listed above. During the 1990's the U.K. insurance industry developed a hybrid proceeding to meet this need, based upon a combination of a voluntary scheme of arrangement under the Companies Act 1985 and some features of the liquidation process.

The Companies Act 1985 §425 allows a binding compromise with creditors if approved by 75% of creditors and sanctioned by a court.[31] This mechanism can provide important flexibility to run off claims as they are agreed, thereby avoiding the difficulty of premature claim valuation. In addition, methods of setoff can also be agreed. This avoids the difficult accounting system transformation required in a liquidation. Since it is a voluntary arrangement, the plan can also provide for a bar date to reduce or eliminate late claims.[32] Yet these arrangements are complex and can take many months to negotiate among the various creditors and the debtor. Accomplishing this negotiation without the benefit of a judicial stay of creditors can be extremely difficult because one creditor can sabotage the process by beginning a judicial action or seeking a winding-up order.

A major insolvency served as the catalyst needed to develop a more flexible procedure, better suited to the needs of insurers. In the early 1990's a number of the insurance entities related to the H.S. Weavers Agency became insolvent. At the time, this failure was the largest and most complex insurance insolvency in history of the United Kingdom.[33] When the many parties were unable to reach an agreement, creditors petitioned for a winding-up. This action resulted in the appointment of a provisional liquidator by the court. Under the provisional liquidator's

30. *Id.* § 1.21 at 13.
31. *Id.* § 1.15 at 10-11.
32. *Id.* § 1.21 at 13-14.
33. BOUNDAS, *supra* note 5, at 16.

supervision, a scheme of arrangement was finally agreed.[34]

A provisional liquidator may be appointed by the court as part of the court's discretionary powers between the time a petition for winding-up is submitted and the time a winding-up order is entered.[35] The court supervision associated with the appointment of a provisional liquidator permits a stay of creditors as well as the invalidation of fraudulent and preferential transfers. These tools can address the major drawbacks of a scheme of arrangement undertaken without a provisional liquidator. The method is not a perfect solution to the problems faced by an insolvent insurer, however, because a provisional liquidation cannot remain open indefinitely. The winding-up petition must be dismissed when the scheme of arrangement is agreed[36] or a winding-up order is entered and an actual liquidation is begun. Once the petition is dismissed, the avoidance powers and stay of creditors would end. In addition, during the appointment of the provisional liquidator, it is necessary for the parties to return to court every six months to renew the provisional appointment until the scheme is agreed. Treasury estimated that the cost of these additional judicial actions could be £10,000 - £30,000.[37] Finally, terminated employees of the insolvent insurer would not receive government benefits during a provisional liquidation because the appointment of a provisional liquidator does not trigger compensation from the National Insurance fund for displaced workers.[38] In spite of its drawbacks, the combination of a provisional liquidation and a scheme of arrangement served well enough to be used for many major insolvencies between the early 1990's and 2002.[39]

e. Priority Structure

Until 2002, insurance insolvency law in the United Kingdom provided a level playing field for unsecured creditors. In an insurance insolvency in the United Kingdom, policyholders, cedents, trade creditors and other unsecured creditors enjoyed equal priority after the secured preference

---

34. Gabriel Moss, *supra* note 20, § 1.17 at 12.

35. Denton Wilde Sapte, *Insolvency – United Kingdom* (International Law Office, London), May 2003, *at* http://www.internationallawoffice.com/overview.cfm?country=United%20Kingdom&workareas=Insolvency (last visited Sept. 12, 2003).

36. Gabriel Moss, *supra* note 20, § 1.32 at 18.

37. FINANCIAL SERVICES AND MARKETS ACT 2000, ADMINISTRATION ORDERS FOR INSURERS, HM TREASURY, 2002 at 16 *at* http://www.hm-treasury.gov.uk/Consultations_and_Legislation/Financial_Services_and_Markets_Act/insurers/fsma_insurers_index.cfm (last visited Sept. 16, 2003).

38. *Id.*

39. Gabriel Moss, *supra* note 20, § 1.17 at 12.

creditors (government, employees, etc.) were paid.[40] This is a marked difference from the priority of claims in an insurance insolvency proceeding in the United States (see below).

C. The New Changes

1. Forces Encouraging Change

A number of forces have coalesced to bring about remarkable changes in the way insurance insolvencies are administered in England:

Financial Troubles at Major Insurers: First, Parliament's attention has been has been closely focused on insurance thanks to two very large troubled insurers. The Independent Insurance Co. Ltd. failed in 2001 and is now in provisional liquidation affecting approximately 600,000 personal lines and 200,000 commercial lines policyholders.[41] The Equitable Life Assurance Society (approximately £21 billion in assets) was crippled by an adverse court decision that greatly increased its liabilities and left it with a very thin reserve between assets and liabilities.[42] Equitable is not currently insolvent, but its creditors have approved a plan under § 425 of the Companies Act 1985, allowing Equitable to pay benefits at less than full value.[43] The Equitable crisis has spawned no fewer than three web sites for members to air grievances and obtain information.[44] Politicians have been very sensitive to this high level of public concern.

Consolidation of regulation: Second, the U.K. government has been making an effort to streamline its regulation of financial institutions. As discussed above, the creation of the FSA to supervise banks and insurance companies was part of this regulatory initiative as was the consolidation of the United Kingdom's financial guaranty schemes.

European Union initiatives: Third, the European Union has proposed a new directive concerning insurance insolvency that is currently being implemented by the member states. After three rounds of discussions, the European Commission is now working on a new directive on insurance guaranty schemes. The Commission has also continued to focus its

---

40. LOVELLS, INSURANCE INSOLVENCY, CLIENT NOTE, A COMPARATIVE STUDY OF THE INFLUENCE OF HIH, *at* http://www.lovells.co.uk (last visited Sept. 16, 2003).

41. *In re* Indep. Ins. Co., [2002] EWHC 1577, ¶ 9 (Ch. 2002).

42. EQUITABLE LIFE ASSURANCE SOCIETY, ANNUAL REPORT AND ACCOUNTS 2002, *available at* http://www.equitable.co.uk/content/content_16.asp (last visited Sept. 18, 2003).

43. *In re* Equitable Life Assurance Soc'y, [2002] EWHC 140 (Ch. 2002).

44. http://cookham.com/community/equitable (last visited Sept. 18, 2003); http://www.investorsassociation.org (last visited Sept. 18, 2003); and http://www.emag.org.uk (last visited Sept. 18, 2003).

attention on the regulatory oversight of Lloyd's.

The combination of internal pressure, regulatory consolidation and E.U. initiative have brought on changes in several key areas of insurance insolvency law: the introduction of revised winding-up rules for insurance companies, a new financial guaranty scheme, the introduction of administration orders for insurance companies, and changes to the priority order for payment of claims in an insurance company insolvency.

2. The New Winding-Up Rules for Insurers

At the end of 2001, the U.K. government enacted new rules for the liquidation of insurers. The Insurers (Winding Up) Rules 2001 came into force on December 1, 2001.[45] The new rules included important provisions for the separation of long-term business from general business[46] and guidance on the use of actuarial methods to value insurance claims.[47] The new rules superceded the Insurance Companies (Winding up) Rules 1985.[48] The 1985 rules contained very general language on the valuation of pending claims that had troubled the courts for many years.[49]

As with the 1985 rules, the new rules provide that an insolvent insurer be broken up into two pieces, one for long-term business and one for everything else. The long-term business is grouped with the assets related to it and administered separately.[50] The new rules go into great detail on the valuation of the long-term policies and provide such substantial protection for long-term policyholders that the rules appear to give them an advantage over other policyholders. These new rules have been revised again to incorporate the E.U. changes discussed below.[51]

3. The Creation of a New Guaranty Scheme

As discussed above, FSMA 2000 consolidated regulation of financial services entities into the hands of the FSA. Two years later, the Financial Services and Markets Act 2002 ("FSMA 2002") consolidated the

---

45. The Insurers (Winding Up) Rules (2001) SI 2001/3635, § 1(1), *available at* http://www.hmso.gov.uk/SI/SI2001/20013635.htm (last visited Sept. 27, 2003).

46. *Id.* § 5.

47. *Id.* Schedule 1 § 2(2).

48. *Id.* § 1(2).

49. The old Schedule 1 indicated that the future portion of a policy was valued at its unearned premium while the historical claims were governed by this phrase: "in any other case a just estimate of that value." Gabriel Moss, *supra* note 20, § 1.12 at 8-9.

50. The Insurers (Winding Up) Rules (2001) SI 2001/3635, § 5.

51. The Insurers (Reorganisation and Winding Up) Regulations 2003, SI 2003/1102 (see discussion *infra* Section c.5.A).

Policyholder Protection Board with the bank guaranty facility and other government-supported financial guaranty schemes to form a single new guaranty scheme, the Financial Services Compensation Scheme ("FSCS").[52] It was reported in the press that the insolvency of Independent Insurance had overwhelmed the PPB.[53] If there had been a failure of the Equitable, the crisis would have been many times more severe. Because of its larger size and resources, FSCS will be better able to manage large insurance company failures. At the end of November 2001, the PPB and its remaining funding of £64.2 million were transferred to the FSCS, but not before the PPB had paid out £15.4 million in the Independent Insurance Company Ltd. insolvency.[54] With the establishment of the FSCS, the compensation structure for insurance policyholders has changed slightly. In the event an insurance company fails, claimants are paid 100% of their claim up to a specified level and then 90% thereafter.[55] Large corporations are still excluded from making a claim for compensation from the FSCS, but small businesses are now eligible in some cases.[56]

4. The Introduction of Administration Orders

The Insolvency Act 1986 § 8(4)(a) had prohibited orders of administration for insurance companies.[57] FSMA 2002 § 360 granted HM Treasury the power to invalidate this prohibition and the Treasury

---

52. Financial Services and Markets Act, 2000, c.8 (Eng.). The FSCS has separate funds for each industry segment to prevent one type of business from paying for a failure in another (e.g. to prevent insurers from paying for a bank failure).

53. Karen Murray, *What Happens If Your Insurer Goes Bust*, MONEYEXTRA, *at* http://www.moneyextra.com/features/2002/f041202_insurance_20.html (last visited Sept. 27, 2003)

54. FINANCIAL SERVS COMP. SCHEME, FINAL REPORT AND ACCOUNTS FOR POLICYHOLDERS PROTECTION BOARD (PPB), (Mar. 1, 2002), *at* http://www.fcsc.org.uk/files/documents/pdfs/dcqk,rrsvntdjry.pdf (last visited Sept. 2003, on file with Connecticut Insurance Law Journal). The amount of funding seems small in relation to guaranty associations in the United States. According to their published financial statements, on December 31, 2002, The Connecticut Insurance Guaranty Association had assets of over $57 million and the Massachusetts Insurers Insolvency Fund had assets of over $91 million. *Id.* These organizations provide payments only in the failure of property-casualty insurance companies and only within their chartering state. *Id.* The balances do not include the assets of each state's life and health insurance guaranty association. *Id.*

55. FSA HANDBOOK, *supra* note 15, § 10.2 (Limits on Compensation Payable, 2003).

56. FSA HANDBOOK, *supra* note 15, § 4.2 (Who is Eligible to Benefit From the Protection Provided by the FSCS?, 2003).

57. Financial Services & Markets Act. 2000 (Administration Orders Relating to Insurers) Order 2002, (2002) S12002/1242; *Insurance Insolvencies*, INS. L. MONTHLY 14.8(2) (August 2002); Financial Services and Markets Act 2002 (Administration Orders Relating to Insurers) SI 2002/1242

exercised this power in May 2002.[58] Now a reorganization procedure similar to a U.S. Chapter 11 is available to English insurance companies. If an order of administration is made by a court, an administrator is appointed to take over the company's affairs and a stay of creditors is put into place. The Treasury modified the rules for setoff so that an insurer put into administration and subsequently put into liquidation would have limited setoff obligations.[59] In addition, Treasury allowed the administrator to make payments to any creditor, as long as the amount did not exceed that reasonably considered to be paid out in a liquidation.[60] This provision appears to be a method for an insolvent insurer to meet ongoing claim obligations. Finally, Treasury acknowledged the special status of the FSA by allowing the FSA to make an application for administration or to be informed of any application and represented in the hearing on the application.[61]

Prior to issuing the new regulations, Treasury published a consultation document in which they explained the reasoning behind the changes. Treasury stated that the prevailing method for administering insolvent insurance companies (a scheme of arrangement accompanied by a provisional liquidator), "has often involved postponing the hearing of the winding-up petition for several years and distorted the liquidation process in ways which were never intended."[62]

The powers of an administrator are generally broader than those of a provisional liquidator, especially in his ability to operate the ongoing business.[63] Liquidators are also subject to extensive oversight by both creditors and the court. Provisional liquidators' powers are subject to specific authorization by the court and may not include all the powers open to either a liquidator or an administrator. The authority of a provisional liquidator must be renewed every six months by the courts.[64] Insurance company managements may be hesitant to use an administration order given the wide powers of the administrator. Yet, once this route is chosen,

---

58. *Insurance Insolvencies*, INS. L. MONTHLY 14.8(2) (August 2002)

59. Financial Services and Markets, (2002) S.I. 2002/1242 § 5.

60. *Id.* at § 6(2).

61. *Id.* at § 4.

62. HM Treasury, *Financial Services and Markets Act 2000, Administration Orders for Insurers,* at 5 (May 11, 2001), *at* http://www.HM-Treasury.gov.uk/media//2fb36/admin_insurers_0511.pdf (last visited Sept. 27, 2003).

63. International Law Office materials on UK Insolvency, *available at* http://www.internationalawoffice.com/overview.cfm?countr=United Kingdom (last visited Sept. 27, 2003) and www.doctorsofdebt.com (last visited Sept. 27, 2003); 2-21 COLLIER INTERNATIONAL BUSINESS INSOLVENCY GUIDE: ENGLAND & WHALES, ¶ 21.04(f) (2002).

64. *Administration Orders for Insurers, supra* note 62, at 15-16.

it could lead to a more efficient process because an administrator will have more leverage than a provisional liquidator in negotiating with creditors and debtors of the insurer.

Administration orders offer some additional advantages for an insolvent insurer. Administration orders are accompanied by a stay of creditors[65] and grant the administrator the power to petition the court to avoid preferential and fraudulent transfers.[66] Unlike a provisional liquidation, an administration can remain open while the scheme of arrangement is implemented, leaving in place the stay of creditors and avoidance powers. This is a substantial improvement over a provisional liquidation that must be dismissed when the scheme of arrangement is agreed. In addition, administrations offer government benefits to discharged employees that are not available under a provisional liquidation.[67]

The use of an order of administration for an insolvent insurer is too new a process for any reported cases. However, in July 2002, PricewaterhouseCoopers, one of the leading insolvency administrators in the United Kingdom, announced that one of its partners had been appointed administrator of an English insurance company, Folksam International Insurance Company (UK).[68] The announcement included a prediction that a Scheme of Arrangement under § 425 of the Companies Act 1985 would likely be proposed to creditors in the administration.[69] Since a proposal to creditors in administration does not effect a reduction of debt without a scheme or company voluntary arrangement (CVA),[70] schemes of arrangement will not be replaced by administration orders, but only supplement them. An administration order may be entered and remain in place while the parties negotiate and implement a scheme of arrangement.

The use of administration orders for insolvent insurance companies will continue to evolve and there will be additional changes in the coming months. The Enterprise Act of 2002 made sweeping changes to the

---

65. 2-21 COLLIER INTERNATIONAL BUSINESS INSOLVENCY GUIDE ¶ 21.05 § (2)(c)(i) (Matthew Bender & Co. eds., 2003) [hereinafter COLLIER].

66. *Id.* § (3)(d)(i).

67. Administration Orders for Insurers – A Consultation Document, *supra* note 62, at 16.

68. *Folksam International Insurance Company (UK) – in Administration*, PRICEWATERHOUSE COOPERS GLOBAL (July 22, 2002), *available at* http://www.pwcglobal.com/extweb/ncpressrelease.nsf/docid/D484F093C08932B180256BFE0056F7B6?OpenDocument.

69. *Id.*

70. COLLIER, *supra* note 65, at § (3)(e).

insolvency system in the U.K. and to administrations in particular.[71] These changes are being phased in over 2003 and 2004. The Treasury must now adopt regulations to implement the changes with regard to the administration of insolvent insurers. Possibly the most important area for interpretive regulation will be the Enterprise Act's requirement that administrations be restricted to a term of 12 months. The Enterprise Act allows courts to extend this limit for more complex cases and permits amendment to the limit in the future.[72] Insurers have just gained the benefit of the longer period of protection provided by administration orders. The Treasury may want to use regulations to allow administrations of insolvent insurers to remain open for longer than 12 months to permit the processing of insurance claims. The Enterprise Act also abolished the Crown's preferential rights to recover unpaid taxes (the "Crown Preference").[73] This may allow more funds to be available for policyholders. The Treasury will publish the new regulations in 2003 or early 2004. In the meantime, the insurance industry will continue to experiment with this new tool.

5. The E. U. Directives

a. Insurance Insolvency Directive

In March 2001, the European Union adopted the "Directive 2001/17/EC of the European Parliament on the reorganisation and winding-up of insurance undertakings" designed to establish standards for insurance insolvency among member countries. The Directive sets out guidelines for both winding-up and reorganization proceedings and recognizes insolvency professionals operating across the entire E.U. The Directive mandates implementation by the member states before April 20, 2003.[74]

The Directive seeks to mutually recognize the management of insurance insolvencies across the membership. It does this by recognizing the proceeding in the "home Member State" as providing the governing law over the insolvency. The home Member State's proceeding would be enforced in all other member states according to the home Member State's rules.[75] The supervisory authorities in the home Member State would be required to inform the supervisory authorities in the other members on the

---

71. *Insolvency Reform and the Enterprise Act*, THE INSOLVENCY SERVICE, at http://www.insolvency.gov.uk/reform.htm (last visited Sept. 20, 2003).

72. *Enterprise Act 2002 – Frequently Asked Questions*, THE INSOLVENCY SERVICE, at http://www.insolvency.gov.uk/faqeactc.htm (last visited Sept. 20, 2003).

73. *Id.*

74. Directive 2001/17/EC of the European Parliament and of the Council, 2001 O.J. (L 110) 38.

75. *Id.* at 32.

implementation and ongoing status of a proceeding.[76] The home Member State's law would govern the powers of the liquidator and rights of setoff (with some exceptions).[77] Article 19 makes exceptions to the primacy of the home Member State's law in the case of employment contracts, immovable property and vessel registration to allow those matters to be governed by the law of the applicable state (there are certain other exceptions in other articles as well).

From a U.K. law perspective, the most revolutionary aspect of the Directive is that it makes policyholders a major priority. "It is of utmost importance that insured persons, policy-holders, beneficiaries and any injured party having a direct right of action against the insurance undertaking on a claim arising from insurance operations be protected in winding-up proceedings."[78] Article 10 of the Directive recognizes only two possibilities. Either insurance claims enjoy "absolute precedence" or insurance claims have priority after preferred claims, which may only include claims by employees, taxes, social security claims, and *in rem* rights.[79] Article 17 reinforces the primacy of policyholders by requiring that notices to holders of insurance claims be in the language of the claimant's home state and allowing the claimant to respond in his own language.[80]

In November 2002, HM Treasury circulated a Consultation Document requesting public comment on proposed rules to implement the directive in the U.K.[81] The Treasury listed a date of March 30, 2003 for the regulations to be laid before Parliament and an effective date of April 20, 2003.[82] In the Consultation Document, the Treasury stated that the Directive would apply to Lloyds, although new legislation might be required to accomplish this.[83] Treasury indicated its intent to recognize proceedings in other Member States, including their reorganization measures and officers, as

---

76. *Id.*

77. *Id.* at 33.

78. *Id.* at 29.

79. *Id.* at 34. It should be noted that the "absolute precedence" is with respect to the insurer's technical provisions while the priority after the preferred claims is over all of the insurer's assets.

80. *Id.* at 35.

81. HM TREASURY, IMPLEMENTATION OF THE INSURERS REORGANISATION AND WINDING-UP DIRECTIVE, preface (Nov. 2002), *available at* http://www.hm-treasury.gov.uk/media//bfc79b/insurers_reorg.pdf (last visited Sept. 18, 2003).

82. *Id.* at ¶ 126. Comments on the Consultation Document were required by January 31, 2003. *Id.* The new regulations came into force on April 20, 2003. The Insurers (Reorganisation and Winding Up) (2003) SI 1102, § 1, *available at* http://www.hmso.gov.uk/si/si2003/20031102.htm (last visited Sept. 18, 2003).

83. HM TREASURY, *supra* note 81, ¶¶ 11-12.

long as evidence of appointment was provided and no action contrary to U.K. law was taken inside the United Kingdom.[84] These regulations came into effect on April 20, 2003 as implemented by Statutory Instrument 2003 No. 1102, The Insurers (Reorganisation and Winding Up) Regulations 2003.[85]

Treasury indicated that it would revolutionize the priorities in an English insurance insolvency by implementing Article 10 of the Directive, granting priority to policyholder claims.[86] "Article 10 is the key article of the Directive."[87] First, the new regulations recognize certain preferential debts in accordance with the limited classes allowed under the Directive.[88] Since there is currently a plan in the U.K. to abolish the "Crown Preference" for taxes, only contributions to occupational pension schemes and employee liabilities remain as priority items.[89] After the few preferential debts, the new regulations grant "insurance debts" priority over all other debts of the insurer.[90] Insurance debts refer to obligations under insurance contracts. Obligations arising from reinsurance contracts are specifically excluded from insurance debts.[91] This marks a significant change from the current priority system in the U.K. in which policyholders are not given priority over reinsurers and other unsecured creditors.

The regulations carefully preserve the separation between long-term and general insurance by allowing these portions of a composite insurer to be administered separately, paying the claims of each out of assets attributed to that business.[92] A surplus in one business may be used to fund a shortfall in the other business, however.[93] The former rules separating long-term from general assets of life insurers are revoked by the new regulations.[94]

In the 2001 directive, the EC allowed member states to choose whether to grant subrogation rights to a local guaranty scheme.[95] The Treasury

84. *Id.* ¶ 2.

85. SI (2003) 1102, § 1. Editor's note: after this comment was completed, the UK Government expanded and refined this legislation in the The Insurers (Reorganisation and Winding Up) Regulations (2004) SI 2004/353 *available at* http://www.hmso.gov.uk/si/si2004/2004353.htm (last visited Sept. 18, 2003).

86. HM TREASURY, *supra* note 81, ¶ 62.

87. *Id.*

88. SI (2003) 1102, § 17.

89. *Id.*

90. *Id.* § 21.

91. *Id.* § 2(4)(c).

92. *Id.* § 22(2)-(4).

93. *Id.* § 22(6), (8).

94. *Id.* § 20.

95. Directive 2001/17/EEC, 2001 O.J. (L 110) 29.

specifically determined to grant these rights to the United Kingdom's insurance guaranty scheme, the FSCS, but solicited comments on this policy in the Consultation Document.[96] The Treasury did not report any negative comments on this provision and final regulations indicate that claims paid by the FSCS will receive priority as insurance debts.[97]

The Association of British Insurers (ABI) published its response to the Consultation Document.[98] ABI generally expressed support for the Treasury's proposed regulations.[99] They specifically endorsed the ranking of reinsurers with other general creditors and granting the FSCS subrogation rights with policyholder priority.[100]

b. European Commission Working Group on Insurance Guaranty Schemes

This group met for the third time in January 2003.[101] A working paper was published prior to the meeting that indicated some of the topics for discussion.[102] These included a wide variety of difficult issues ranging from mandatory coverage to subrogation.[103] At this time, only two member states have guaranty schemes for both life and non-life, while two others have one of these two types. If the European Commission decides to pursue universal coverage within the European Union, it will have a long way to go.

The work on this initiative appears to be a natural progression from prior E.U. directives. For example, the insurance insolvency directive addressed guaranty schemes by asking member states to decide whether to allow guaranty schemes to have policyholder priority on subrogated claims.[104] In addition, the E.U. has recently issued several directives

---

96. HM TREASURY, *supra* note 81.

97. *Id.* § 32.

98. ASSOCIATION OF BRITISH INSURERS, ABI RESPONSE TO HM TREASURY CONSULTATION DOCUMENT, IMPLEMENTATION OF THE INSURERS REORGANISATION AND WINDING-UP DIRECTIVE (Jan. 31, 2002) *at* http://www.abi.org.uk/display/file/300/response_to_hmt_reorganisation+_and_winding_up-directive.doc (last visited Sept. 18, 2003).

99. *Id.* at 4.

100. *Id.* at 5.

101. EUROPEAN COMMISSION, INSURANCE GUARANTEE SCHEMES (Discussion paper for the III meeting of the Working Group - January 2003) 2, ¶2 (2003), *at* http://europa.eu.int/comm./internal_market (last visited Sept. 18, 2003).

102. *See id.*

103. *Id.*

104. Press Release, E.U. Institutions, Insurance: Commission welcomes rapid adoption of Directives to strengthen protection of policyholders (Feb. 14, 2002), at http://europa.eu.int/rapid/start/cgi/guesten.ksh (last visited Sept. 18, 2003).

concerning solvency margins of insurance companies[105] that should facilitate the adoption of guaranty schemes in countries that do not have them. Uniform solvency margins can reduce the number of failed insurance companies and therefore reduce need to draw upon guaranty funds. The previous directives provided for regulators to make earlier intervention into troubled insurer.[106] Because the U.K. already has a guaranty fund system, any new directive will not have a significant effect in England. Yet uniformity of guaranty schemes throughout the E.U. could ease pressure on the system in the U.K. by allowing coverage in other jurisdictions.

At the conclusion of the January meeting, the Working Group published their broad findings in a document entitled: "Insurance Guarantee Schemes – Orientation debate."[107] The Working Group advocated a coordinated approach among the member states.[108] The document contains many arguments for adoption of guaranty schemes and dismisses arguments against such schemes as "theoretical rather than practical."[109] The report suggests "the adoption of a legally binding instrument based on the principles of home country control, mutual recognition and harmonisation of essential standards as the most appropriate way forward."[110] The report concludes with a request by the Commission to direct the Working Group to continue research on minimum levels of protection and to prepare a draft proposal for a future directive.[111]

c. The European Commission's Interest in Reform at Lloyd's

For the last two years, the European Commission has expressed concern over the level of government oversight of insurance activities at Lloyd's. In January 2003, the E.C. announced that it would continue its "infringement procedure into the regulation and supervision

105. *Id.*
106. *Id.*
107. INSURANCE COMMITTEE, EUROPEAN COMMISSION, INSURANCE GUARANTEE SCHEMES – ORIENTATION DEBATE (2003), *available at* http://europa.eu.int/comm/internal_market/insurance/docs/markt-2504-03/markt-2504-03_en.pdf (last visited Sept. 18, 2003).
108. *Id.* at 2.
109. *Id.* at 4.
110. *Id.* at 6.
111. *Id.* at 7.

of...Lloyd's."[112] The Commission acknowledged that the FSA had been given greater powers to supervise Lloyd's, but sought evidence that Lloyd's could effectively monitor the solvency of its participants as required by E.C. directives, given the extent to which Lloyd's is a self-regulating entity.[113] Only few years have passed since the last round of problems at Lloyd's, yet the waves of asbestos exposure now being recognized by U.S. insurers cannot help but have an impact on the Lloyd's network. Given the pressure from the E.C. and rising asbestos exposures worldwide, Lloyd's may be the target of the next initiative for insurance insolvency law in the United Kingdom.

6. Solvent Schemes of Arrangement

An important stepchild of insurance insolvency mechanisms in the United Kingdom is the "solvent scheme," which uses the many of the insolvency tools to close a solvent, but dormant insurer. Many liability insurance policies must pay a claim based upon an accident ("occurrence") that originated during the coverage period, no matter when that claim is discovered and reported.[114] For long-gestation claims such as exposure to asbestos, it can take decades to progress from initial exposure to discoverable injury. Consequently, a dormant insurer must continue to be able to accept claims for a very long time before it can be shut down. When one of these long-delayed claims surfaces, the insurer must not only adjust the claim, but also determine what reinsurance was in place during the policy period and seek reimbursement from the proper reinsurers. Storing and maintaining adequate records can be a daunting task given the reliance on oral understandings and the long delays in the preparation of written contract common in the London Market.[115] In response, insurance regulators in the United Kingdom have allowed solvent companies no longer writing new business ("in run off") to enter into a scheme of arrangement; paying off claims at estimated values and winding-up the insurer. The challenge had been to force those who did not agree to take a cash settlement in lieu of future claims. Using a scheme under § 425 of the

---

112. Press Release, E.U. Institutions, Insurance: Commission continues infringement procedure concerning regulation and supervision of Lloyd's (Jan. 21, 2003), *at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/97|0|AGED&lg=EN&display=

113. *Id.*

114. These are called "occurrence" policies. For some lines of business, claims are paid based upon when they are reported. These are called "claims made" policies.

115. *See generally* JERRY, *supra* note 28.

Companies Act allows a court sanction to squeeze the objectors out.[116] In order to regulate this practice, the FSA carefully supervises plans and must approve the individual who will supervise the scheme.[117] Through a solvent scheme of arrangement, insolvency law has provided a valuable tool to solvent insurance companies, enabling the closure of dormant insurance companies and the release of their invested capital.

E. Conclusions on U. K. Insolvency

Insurance insolvency in the United Kingdom is in a state of great change. The outcome of these changes will make the procedures for insolvent insurance companies more flexible and more policyholder oriented. First, the United Kingdom has formed a powerful central regulator for its financial services industry and consolidated its financial services guaranty schemes under this regulator's control. The U.K. government has also streamlined its insolvency laws and provided for commercial insolvency legal systems to accommodate insolvent insurance companies. The priority order for payment of claims in an English insurance company insolvency has changed to the benefit policyholders, but possibly at the expense of cedents and other creditors. A scheme of arrangement coupled with a provisional liquidation, the informal mechanism that has developed over the last decade to process English insurance company insolvencies, has become pervasive and will probably survive under the new regulations, but a more suitable alternative is now available (administration). The continued instability of the Equitable Life Assurance Society should keep all parties focused on the success of these regulations. If the European Commission takes action on financial guaranty schemes, this could make the U.K. guaranty scheme system more familiar in other parts of the E.U. and grant a broader web of protection for those insured by U.K. institutions but residing in other parts of the European Union. The future should bring more change, but for now, policyholders should feel more secure that English insurance policies will pay as promised, the insurance industry should be pleased to have a more flexible system to administer troubled insurance companies, and general creditors should feel somewhat uneasy about their potential payout in an insurance company insolvency.

---

116. Companies Act, 1985, c 6, § 425(2) (Eng.). Of course, if the insurer is dependent on reinsurance to pay its claims, it must force its reinsurers to pay based upon the estimates used to pay claims under the scheme. Schemes cannot force reinsurers to pay if their contracts do not require payment and plans may fail if they do not obtain agreement of the reinsurers.

117. Gabriel Moss, *supra* note 20, § 1.50.

II. Insurance Insolvency in the United States

A. The U. S. System of State-Based Insurance Regulation

The insurance regulatory system in the United States is primarily driven by state law. This system developed immediately following the Civil War when the United States Supreme Court declared that insurance regulation was beyond the reach of Congress' commerce powers because insurance was not "a transaction of commerce."[118] In 1944, the Supreme Court reversed itself and found insurance to be interstate commerce for regulatory purposes.[119] In response, Congress institutionalized the structure of state insurance regulation through the passage of the McCarran-Ferguson Act.[120]

1. The McCarran-Ferguson Act

The McCarran-Ferguson Act recognizes the primacy of state regulation. The Act protects state insurance laws from pre-emption by federal laws not specifically targeted to insurance with the phrase every insurance regulator knows by heart: "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . ."[121]

In order to determine the outcome of a conflict between state and federal law, a court first looks to see if the federal law is specifically related to insurance. In rare cases, courts can find intentions that are not obvious, but generally, courts look for a specific language manifesting intent to regulate insurance.[122] Next, a court observes if the state law is enacted for the purpose of regulating insurance. Courts can be very generous in finding such a purpose in state laws, requiring only that the law have the "end, intention, or aim" of regulating the business of insurance.[123] In order to determine if a given regulated activity is within "the business of insurance," courts will look to see if the activity i) transfers the policyholder's risk, ii) protects the policyholder relationship, iii) is restricted to entities within the insurance industry.[124] Finally, the court will

118. Paul v. Virginia, 75 U.S. 168, 183 (1868).
119. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944).
120. 15 U.S.C. §§ 1011-1015 (2000).
121. 15 U.S.C. § 1012(b) (2000).
122. *See, e.g.* Barnett Bank v. Nelson, 517 U.S. 25, 42 (1996).
123. United States Dep't of the Treasury v. Fabe, 508 U.S. 491, 505 (1993) (quoting Black's Law Dictionary 1236, 1286 (6th ed. 1998) (1990)).
124. Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982).

examine if the federal law impairs the implementation of the state law. If the federal law does not relate to insurance and all the other tests are met, then the federal law will have no effect within that state.

In the case of the administration of an insolvent insurance company, the United States Supreme Court has determined that those activities that protect policyholders are conclusively beyond the reach of federal regulation.[125] Circuit courts differ on how far this exclusion extends, but a number of Circuit Courts of Appeal have held that entire state insolvency systems are immune from federal intervention because they serve to protect policyholders, although at least one court has required an examination of each individual component of a state's insolvency system.[126] The United States Bankruptcy Code not only does not specifically relate to insurance, but the Code specifically excludes insurance companies from bankruptcy protection.[127] This combination of the McCarran-Ferguson reverse preemption and the bankruptcy exemption leaves the field of insurance insolvency exclusively to the individual states.

2. The NAIC Model Acts

Foreign observers can find insurance regulation in the United States very difficult to understand, in part, because each state has its own system for administering an insolvent insurance company. In an attempt to make the system uniform, the National Association of Insurance Commissioners has published model laws that can be adopted by the states. Those states that have chosen to adopt the model laws have systems that can be quite similar; however few states implement the model laws verbatim. The NAIC has proposed, and many states have adopted the Insurers Rehabilitation and Liquidation Model Act.[128] While any participant in a proceeding in a particular state must be familiar with that state's laws, the Model Act serves as a guide for what may be encountered at the state level.

3. Types of Proceedings

There are four basic types of proceedings that may involve a troubled

---

125. *Fabe*, 508 U.S. at 508 – 09. Congress could, of course pass a law specifically intended to regulate a specific insurance practice, but there are very few examples of this.

126. *See e.g.* Munich Am. Reins. Co. v. Crawford, 141 F.3d 585 (5th Cir. 1998), *cert. denied*, 525 U.S. 1016 (1998). The First Circuit has the somewhat narrower view as expressed in *Garcia v. Island Program Designer, Inc.*, 4 F.3d 57 (1st Cir. 1993), *remanded to* 875 F. Supp 940 (D.P.R. 1994), *affirmed by* 62 F.3d 1411 (1st Cir. 1995).

127. 11 U.S.C. §§ 109(b)(2), 109(d) (2000).

128. INSURERS REHABILITATION AND LIQUIDATION MODEL ACT (Nat'l Assoc. of Ins. Comm'rs 2000), *available at* http://www.naic.org/receivership/documents/rma.doc (last visited Sept. 18, 2003).

insurer. The first three take place in the state where the insurance company is formed and principally regulated (its state of "domicile"). The fourth can take place in other states.

The first type of proceeding is no more than an intense regulatory focus on a troubled insurer. This process goes by many names, for example, "supervision." It is simply a heightened degree of regulatory oversight wherein the regulator will approve certain transactions and generally watch closely over management. While under supervision, an insurer may require regulatory approval to enter into transactions outside of its regular business activities.[129] This is not generally announced to the public.

Second is a reorganization of the company wherein it continues to operate.[130] This proceeding can go by the name "rehabilitation" or "conservation" depending on the given state. While the insurer continues to operate, a receiver (generally the state insurance commissioner operating through a representative) displaces management. Since few would want insurance from a troubled entity, policies are often written with direct recourse to a reinsurer if the insurer does not pay. Few insurers emerge from rehabilitation, despite the name of the procedure. Once an insurer loses public confidence it is hard to regain it.

Third, an insurer can enter liquidation proceedings. In this case, notice is provided to policyholders that their policies will be cancelled in a short period of time.[131] Reinsurance is collected, assets are liquidated and creditors are paid according to statutory priorities.[132] Liquidation bears some resemblance to an insurance liquidation proceeding in the United Kingdom or a proceeding under Chapter 7 of the U.S. Bankruptcy Code.

Fourth is the ancillary proceeding. This is a creature of the United States' federal system wherein a state holding deposits of a failed insurer can hold a proceeding in that state, pay certain local creditors (generally policyholders) then remit any excess to the domiciliary state where the main proceeding is taking place.[133]

4. Priorities in Insolvency

Of great importance to all parties are the eventual priorities in which

---

129. D. RAIM & D. MROS, CROSS-FRONTIER INSOLVENCY OF INSURANCE COMPANIES § 2.03 (Gabriel Moss et al. eds., 2001).

130. INSURERS REHABILITATION AND LIQUIDATION MODEL ACT §§ 16 – 19.

131. *Id.* § 22.

132. *Id.* § 20.

133. *Id.* § 58.

claims are paid. This system can vary from state to state, but general observations can be made from the Model Act. Like bankruptcy, expenses of administration are paid first. However, the similarity ends there. In most states, expenses of the state guaranty funds are paid next, followed by policyholder claims and policyholder-related claims of the guaranty funds. Next comes the federal government and certain limited employee claims. Finally, after a small number of miscellaneous government claims, the general creditors are paid.[134] This class generally includes insurance companies (cedents) that were reinsured by the failed insurer. Although one state appellate court in Ohio ruled recently that reinsurers were not to be treated differently from other policyholders,[135] this finding was reversed on appeal and is not the majority view. Equity holders come last as they would in a U.S. bankruptcy. The United States government has repeatedly challenged any exceptions to the Federal Priority Statute,[136] but the United States Supreme Court has held that under certain state statutes the government may have a lower priority than policyholders.[137]

5. State Guaranty Associations

While the state is administering the insolvency of the insurance company, state guaranty associations will pay a limited amount of many claims. These funds were set up primarily in the 1970's to protect consumers from insurance failures.[138] These payments are limited to entities below a certain net worth (often $50 million[139]), and pay compensation only up to specified limits (generally $300,000 or state workers compensation limits).[140] The state guaranty associations are run on a state-by-state basis, often administered by a board elected from the state's insurance companies acting under the supervision of the state insurance department.[141] Once it pays a claim, the guaranty association will generally

134. *Id.* § 47.

135. Covington v. Ohio General Ins. Co., 2001 WL 1013126 (Ohio Ct. App. Sept. 6, 2001). The Ohio Supreme Court subsequently reversed, 99 Ohio St. 3d 117 (2003).

136. 31 U.S.C. § 3713(a) (2000) which grants the U.S. Government first priority in all insolvencies outside those under the Bankruptcy Code (U.S. Code Title 11).

137. United States Dep't of the Treasury v. Fabe, 508 U.S. 491, 492 (1993).

138. DAVID A. MOSS, WHEN ALL ELSE FAILS, GOVERNMENT AS THE ULTIMATE RISK MANAGER 264-71 (2002).

139. NATIONAL CONFERENCE OF INSURANCE GUARANTY FUNDS, 2002 SUMMARY OF PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION ACTS OF THE VARIOUS STATES & U.S. TERRITORIES,. *at* http://www.ncgif.org/Publications/laws%20Summary/Laws%Summary.htm (last modified July 31, 2002).

140. MOSS, *supra* note 138, at 270.

141. *Id.*

be subrogated to the policyholder and seek payment from the insolvent estate.[142]

6. Single Forum Clauses

One of the most all-pervasive aspects of the insurance insolvency system in the United States is the supremacy of the state receivership court. State insurance statutes generally prohibit the bringing of any type of action against an insolvent insurer in any court other than the state receivership court administering the insolvency.[143] Participants from other countries should be aware that removal to a federal court is generally not available because these clauses are very strictly enforced. It is only when a receiver reaches outside of his estate to enforce contractual rights of the insolvent insurer, for example forcing arbitration on another party,[144] that another court may have jurisdiction, but other courts may be reluctant to assume this jurisdiction and defer to the receivership court.[145]

B. The Procedure for Alien[146] Insolvent Insurers in the United States

While U.S. domiciled insurers must enter insolvency in state courts, an insurance company domiciled outside the U.S. may be a candidate for relief in the U.S. bankruptcy courts. Bankruptcy courts have been willing to grant cooperation under § 304 of the Bankruptcy Code to the foreign receiver or administrator.[147] Courts have held that this treatment withstands challenge under the McCarran-Ferguson Act.[148] In this way, a U.K. insurance company in a U.K. proceeding may obtain the benefits of federal court protection in the United States during the course of the U.K. proceeding. This may encourage insolvent English insurance companies to petition for administration under the U.K. Insolvency Act 1986 as opposed to a provisional liquidation/scheme of arrangement in which the court proceeding is dismissed once the scheme is adopted. It is unclear if court protection under 11 U.S.C. § 304 continues once a winding-up petition in the U.K. has been dismissed, but an administration order could continue

142. INSURERS REHABILITATION AND LIQUIDATION MODEL ACT § 47(c).

143. *See In re* Advanced Cellular Sys., 235 B.R. 713, 723 (Bankr. D. P.R. 1999).

144. *See* Suter v. Munich Reins. Co., 223 F.3d 150, 152,162 (3d Cir. 2000).

145. *See In re* Reliance Group Holdings, 273 B.R. 374, 396-406 (Bankr. E.D. Pa. 2002).

146. In the United States, insurers who are domiciled (formed under the laws of that state and primarily regulated in that state) in a given state are called "domestic;" those domiciled in another state are called "foreign," and those domiciled outside the United States are called "alien."

147. 11 U.S.C. § 304 (2000).

148. *See, e.g., In re* Laitasalo, 193 B.R. 187,193-194 (Bankr. S.D.N.Y. 1996); *In re* Rubin, 160 B.R. 269, 281 (Bankr. S.D.N.Y. 1993).

after the scheme was approved and therefore, theoretically, so would assistance granted under §304.

The United States Bankruptcy Code excludes foreign insurance companies that are "engaged in such business in the United States."[149] It would be possible for a foreign insurance company not doing business in the United States to be taken into bankruptcy in conjunction with U.S. based affiliates. This has happened in at least one case with the permission of the insurance company's domiciliary regulator.[150] While very rare, this could be a method for a U.S. Bankruptcy court to have primary responsibility for the administration of an insurance company.

C. Solvent Schemes in the United States

Despite the popularity of schemes of arrangement for solvent insurance companies in the United Kingdom, no similar structure has taken hold in the United States. Although state regulators have shown interest in such schemes to relieve them of regulating a dormant carrier, nothing similar to a solvent scheme has ever been executed in this country and then written about publicly. In the United Kingdom, the Companies Act 1985 § 425 provides a mechanism to squeeze out dissenting policyholders of a solvent insurance company, but there is no effective counterpart in the United States.[151] Without an established procedure for solvent companies, a state insurance regulator would be formally required to approve such a plan under existing state insurance laws. The absence of transactions in the United States could be because regulators are reluctant to forcibly truncate the rights of a policyholder without his consent; creating a messy political problem, especially in a smaller jurisdiction.[152]

It has been maintained that U.S. bankruptcy courts will recognize a solvent scheme operating in a foreign country and grant it assistance under § 304. One case cited for this proposition relates to the Bermuda insurer Hopewell International Insurance,[153] however this precedent is far from clear and the relief granted in the U.S. was eventually revoked.[154]

D. Conclusions on U.S. Insurance Insolvency Law

---

149. 11 U.S.C. § 109(b)(3) (2000).

150. *In re* PRS Ins. Group, Inc., 274 B.R. 381 (Bankr. D. Del. 2001).

151. Rhode Island has enacted a somewhat experimental statute, but it has yet to be tested. R.I. GEN. LAWS § 27-14.5-1 (2002).

152. It should be noted that as in the United Kingdom, it may be difficult to compel reinsurers to pay under such a plan.

153. RAIM & MROS, *supra* note 129, § 1.43 n.99.

154. *In re* Petition of the Bd. of Dirs. of Hopewell Int'l Ins. 272 B.R. 396 (Bankr. S.D.N.Y. 2002).

The U.S. system employs a fragmented system for administering insurance insolvencies. Regulation and implementation is done on a state-by-state basis with little federal intervention, except in the case of alien insurers seeking cooperation under the Bankruptcy Code. Priority is given to policyholders in all cases and the guaranty funds play a very important role by paying policyholder claims and then seeking subrogation from the insolvent estate. State insurance departments are staffed by knowledgeable regulators focused specifically on insurance, but their influence may be limited by the relative size of their state. While there are many recent court decisions regarding insolvent insurers, state insurance insolvency procedures have existed in similar form for many years. These procedures are shielded from federal law by the McCarran-Ferguson Act's reverse pre-emption. Change can be slow when it requires adoption in each of fifty independent states. From time to time, calls for federal regulation have been heard, but so far there has been little action and the system appears in place for the foreseeable future.

III. Comparing the Two Systems

The procedures for managing an insolvent insurance company in the United Kingdom differ from procedures in the United States in a number of important respects.

A. Strength of the Regulator

In the United Kingdom, the FSA is a single, national regulator of all financial services. In the United States, insurance insolvencies are managed by state insurance departments. Except in very large states, these are small operations focused exclusively on insurance. A large U.S. insurer may feel that it could exert greater influence in a proceeding before a state insurance department than it could in a proceeding before the FSA.

B. The Pace of Regulatory Change

The Parliamentary system in the U.K. enables the government to envision change and use its majority in the House of Commons to translate its vision into law. The quick pace of change in U.K. insurance insolvency law over the last few years is testament to this capability. The sweeping changes in commercial insolvency have also been implemented very quickly. However, regulation of Lloyd's has not changed as rapidly as the European Union would like. In the United States, changes in insurance laws occur gradually because changes must be made in each state. In addition, the pace of change in insolvency law has also been slow in the United States. United States bankruptcy laws were last overhauled in 1978.

When the Supreme Court found some of the 1978 changes unconstitutional, it took Congress two years to fix the problem.[155] Changes to the bankruptcy law have been introduced in Congress more than once in recent years, but the changes have failed to pass.

C. Alternative Systems Available to an Insolvent Insurance Company

The United Kingdom has moved insolvent insurers into the mainstream of its insolvency laws by adopting administration orders for insurance companies. In the United States, insolvent insurers are excluded from the commercial bankruptcy system and are administered in state courts according to state rules. The single forum provisions of state insurance insolvency laws give great power to the state receivership courts to hear claims against insolvent insurers. Yet, on a larger scale, it is interesting that the European Union's directive on insurance insolvency forces member states to grant authority for an insurance insolvency to the member state that began the proceeding and prohibits competing proceedings in other member states. In this way, the new European system resembles the insurance insolvency system in the United States in which the receivership court in the domiciliary state controls the estate of the insolvent insurer.[156]

D. Priority Structures in Insolvency

With the new changes, the United Kingdom has elevated the priority of policyholder claims in an insurance company insolvency above those of most other claimants. In the United States, policyholders have always come first. One difference still remains. In the United Kingdom, claims for taxes are given priority over policyholder claims even after giving effect to the most recent changes. However, this difference will soon be eliminated as Enterprise Act 2002 contains provisions to abolish the Crown Preference in 2003 or 2004.[157]

IV. What do the U. K. Changes Mean for U. S. Market Participants?

The initiatives adopted in the United Kingdom will have a profound effect on the insurance industry in England and its relationship with U.S.

---

155. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). Congress did not enact 28 U.S.C. § 157 curing the defect until 1984.

156. Ancillary proceedings in states holding deposits of an insolvent insurer form a limited exception to the control of the domiciliary proceeding.

157. *Frequently Asked Questions about the Enterprise Act: Abolition of Crown Preference*, THE INSOLVENCY SERVICE, at http://www.insolvency.gov.uk/faqeactp.htm (last visited Sept. 20, 2003).

insurance entities. The United Kingdom has a powerful national regulator, the FSA, which oversees both banks and insurance companies. This gives the FSA a great advantage over U.S. regulators who supervise only insurance and do so on a state-by-state level. The U.K. has adopted a much more flexible insolvency regime for insurers, bringing them into the mainstream of U.K. insolvency law by making administration orders available. Policyholders are now given priority over general creditors and reinsurers. These changes will affect each market participant differently, depending on the participant's relationship to an insolvent insurance company.

A. What U.S. Cedents Can Expect

Insurers in the United States that cede reinsurance into the London Market should review these changes carefully. The U.S. insurer may feel weaker in an English proceeding than one in the United States because of the role of the FSA. In a proceeding in the United Kingdom, a U.S. insurer is faced with a powerful national regulator, while in the United States, the insurer will face a state regulator on whom a large U.S. insurer may exert considerable influence.

The introduction of administration orders for insolvent insurance companies may weaken the U.S. cedent's position further. In an administration, the U.S. creditor may encounter a powerful administrator with a long-term appointment. The existing provisional liquidation structure involves court approval, but requires regular court review and a dismissal of the winding-up petition upon the implementation of the scheme. An administrator's plan can be approved with a simple majority of creditors and this approval may set a process in motion that is difficult to stop. While a scheme of arrangement approved by 75% (by value) of creditors is still required to adjust debts,[158] a cedent may feel that an administration is more coercive than a provisional liquidation and that he has less negotiating leverage than before.

The priority rule changes brought on by the European Union Directive have put cedents into a subordinated position relative to policyholders. While cedents would encounter this priority order in a U.S. proceeding, the cedent may be accustomed to negotiating alongside policyholders in English insurance insolvencies.[159] Since the implementation of the Directive in the United Kingdom grants subrogation rights to the FSCS,

158. COLLIER, *supra* note 65, § 21.05(4)(a).

159. US law firms are already sounding the alarm. LeBoeuf, Lamb, Greene & MacRae, *Changes to UK Insolvency Rules Mean Cedents May Lose Out*, (Feb. 25, 2003), *available at* http://www. llgm.com (last visited Sept. 18, 2003).

U.S. cedents may also be confronted with a very large and influential creditor with a higher priority. Cedents will need to review the credit quality of their counterparties and consider placing reinsurance with separately capitalized reinsurance companies that do not have individual policyholders.[160]

B. What U. S. Policyholders Can Expect

U.S. policyholders of English insurers are rare except for those jurisdictions where English insurance companies are admitted in the United States and submit to regulation by state regulators. When a policyholder buys insurance from an admitted carrier based outside the state, the purchaser will still receive guaranty fund coverage from his state guaranty association. U.S. policyholders placing coverage in the U.K. market on a surplus lines basis will not have this protection. A typical example would be a U.S. law firm placing professional liability cover in the United Kingdom. These were exactly the people that the PPB changes in 1997 squeezed out of the U.K. guaranty scheme.[161] These individuals should feel emboldened by the recent changes that give their claims priority ahead of U.S. cedents in the administration of an insolvent U.K. insurance company.

C. What U.S. Reinsurers Can Expect

U.S. insurance entities proving reinsurance to U.K. entities will feel little change.[162] Those providing reinsurance are debtors to the insolvent insurance enterprise and will not be affected by the changes in priority. In the long term, however, they may feel some effects of the more efficient administration order process as opposed to the more ad hoc provisional liquidation proceeding. If a U.S. reinsurer is netting claims payments against premium collection, they will need to be familiar with the setoff rules for insolvent insurance companies in administration proceedings. While U.S. regulations have long encouraged reinsurance contract clauses that enforce full payment in the event of the cedent's insolvency, these clauses may not be as common in the United Kingdom. It is unclear if an

---

160. If there are no policyholders to be given priority, reinsurance cedents will be on a level playing field with other creditors. Another way to mitigate exposure is to insist upon adequate collateral in the form of cash or letters of credit. However, if security is only provided for case reserves, a cedent may suddenly become under-collateralized in the event of adverse development.

161. *See* Ackman v. Policy Holders Prot. Bd., 2 Lloyd's Rep. 533 (1993), *supra* note 18.

162. This is in those situations where the U.S. company is the reinsurer and the UK company is the cedent. Of course, the reinsurer should be cautious of sums due from the cedent such as unpaid premium.

administrator of an insolvent insurer would be able to use avoidance powers to attack payments of reinsurance premium in order to gain advantage with reinsurers. All of these minor issues will need to be tested in light of the new regulations in the United Kingdom, but a reinsurer is a debtor, not a creditor of an insolvent estate, and as such, will be little affected by the changes.

CONCLUSION

In the United Kingdom, the procedures for the winding-up of an insolvent insurer have changed greatly over the last year. Insolvent insurers in England are now eligible for general reorganization proceedings in the form of an administration order, while most insurance companies in the United States are not eligible for reorganization in a federal bankruptcy court. In response to a European Union directive, the United Kingdom reversed long-standing practice and granted policyholder claims priority over the claims of other creditors, as is the practice in the United States. The United Kingdom has consolidated its regulation of financial institutions and its financial guaranty schemes into the hands of the FSA and FSCS, while insurance regulation and guaranty fund protection in the United States are implemented on a state-by-state level. Insurance companies that cede reinsurance into the London Market will need to review their credit exposure to English insurers, but other United States insurance market participants will feel little change. The most significant aspect of the changes to insurance insolvency laws in the United Kingdom is that the changes are so dramatic and so fundamental. Like all rapid change, there is certain to be fallout requiring further revision. It will be important to see how things develop over the years ahead.

TRADEMARK LAW AND THE CGL: THE RACE BETWEEN INFRINGEMENT LIABILITY AND ITS RELUCTANT INSURANCE COVERAGE

*Jennifer S. Janik**

I. INTRODUCTION

When surrounded by fashionable brand names, catchy slogans, and colorful symbols, it is easy to overlook the fact that the trademarks and trade dress designs with which we are constantly inundated are actually some of today's hottest business investments. The intellectual property market has been gaining momentum and magnitude over the past decade, with rapid advances in technology and communications driving the boom. The estimated worth of intellectual property owned by Standard & Poor's top 500 companies in 1999 was assessed at $3.4 trillion,[1] an amazing figure that represents only the largest and most successful businesses. Trademarks and intellectual property as a whole are unique as insurable assets: they are commodities that most businesses already possess in one form or another, and can represent valuable resources not yet exploited to their full extent. As one researcher has commented, "[t]he potential of this realm is clearly making itself known."[2]

Many companies are not yet entirely aware of their intellectual property assets, but with an increasing concern to protect these intangibles, disputes over trade, copy, and patent have been multiplying. Litigation involving intellectual property rights has the potential to reach every genre of business, making for an increasingly volatile, yet respectable, trend.[3] The numbers are remarkable: four unrelated cases stemming from patent, trademark, and copyright infringement claims yielded damages and settlements in the amount of approximately $540 million.[4]

Trademarks are not an incidental part of this trend either. In a way, trademarks are central to the boom because every business, down to the smallest manufacturer, has a potential trademark that may one day need

---

* University of Connecticut School of Law, J.D. Candidate 2004. Thanks to Professor Tom Baker and to my fellow journal members for their input and assistance.

1. Barbara Bowers, *Minding the Store*, 102 Best's Rev., Nov. 2001, at 93, 94.

2. Richard S. Betterley, *Coverage Concepts for Intellectual Property*, Risk Mgmt., Feb. 2001, at 17, 18.

3. "[T]he intellectual property capacity of a company is now more valuable than its buildings, machinery and fixed assets." Louis J. Speltz & Ann S. Grayson, *Is That Your Final Answer: Are Insureds Entitled to Insurance Coverage for Trademark Infringement?*, 23 HAMLINE L. REV. 348, 349 (2000).

4. Betterley, *supra* note 2, at 18.

protection. Protecting and defending one's trademarks is not an inexpensive endeavor, even for the smallest manufacturer. Indeed, if one is playing in the big leagues, disputes can cost well over $100 million. For example, Trovan, Ltd. sued Pfizer, Inc. for trademark infringement claiming misappropriation of their "Trovan" mark.[5] Trovan had used the mark for ten years and in 1997 filed a lawsuit against Pfizer for using the name; however, despite Trovan's efforts, Pfizer marketed a drug using the Trovan name in 1998.[6] As a result, Trovan was awarded $143 million,[7] undoubtedly a substantial amount even to a giant such as Pfizer.

Although an award of this caliber is not an everyday occurrence, the general trend toward increased legal actions cannot be ignored. In 1987, 2,330 trademark cases were filed with the federal appellate courts and the mean amount of damages awarded to the plaintiff was approximately $861,722.[8] By the year 2000, the number of trademark cases filed with the federal appellate courts had risen to 4,053, but the mean amount of damages awarded to the plaintiff was only approximately $485,108. With the rise of cyber-piracy and other new technological issues, and the new realization of the value of trademarks and trade dress, the number of cases is likely to increase. In the midst of this new market, companies have discovered that proper protection and risk allocation is necessary to stay in the trademark game: a trademark is, in fact, not dissimilar to any other valuable property investment. Insurance has emerged as an obvious risk management mechanism to help guard a company's assets and to help prevent liability for infringement.[9]

This relatively new idea of insuring solely against trademark infringement liability is obviously in reaction to pricey settlement examples set forth in the media as well as recent case law; however, the basic business insurance policy does not provide for the defense of trademark infringement claims. This basic policy, known as a Commercial General Liability (CGL) policy, is only designed to provide risk management for the most basic needs that all businesses encounter, whether the business is a

---

5. Trovan, Ltd. v. Pfizer, Inc., No. CV 980094 LG-B MCX, 2000 WL 709149, at *1 (C.D. Cal. May 24, 2000).

6. *Id.* at *2.

7. Betterley, *supra* note 2, at 18. As of February 2001, this was the largest published trademark award, although the record has almost certainly been beaten as of this publication.

8. Theodore Eisenberg & Kevin M. Clermont, *Judicial Statistical Inquiry Form, at* http://teddy.law.cornell.edu:8090/questat.htm (last visited Sept. 25, 2003). Award in 2000 dollars.

9. Melvin Simensky & Eric C. Ostenberg, *The Insurance and Management of Intellectual Property Risks*, 17 CARDOZO ARTS & ENT. L.J. 321, 321 (1999).

small home business or a Fortune 500 corporation. Trademark infringement is not mentioned in the policy, yet insureds are winning coverage in the courts.

One of the CGL claim sections is titled "advertising injury," and is defined in the 1986 version of the CGL as four offenses that offer areas of protection for the insured. The legal controversy that surrounds this policy deals with two of these offenses; Is the language in the CGL meant to cover claims of trademark and trade dress infringement, thus imposing on insurers a duty to defend policyholders who are accused of infringing on another's marks? The crux of this argument is represented in a split between two factions of the federal appellate courts: the majority interprets the language as broadly-encompassing to cover trademark infringement claims, and thus gives the insured trademark and trade dress insurance defense coverage.[10] The minority faction takes the opposite view and narrowly interprets the policy and the protection it affords the insured.[11] In order for a company with a CGL to have any hope of insuring against infringement liability, it must rely on favorable state law to force the carrier's duty to defend or duty to indemnify. This is little help, however, since state and federal courts applying the same state law have come to different conclusions as to whether insurance companies have a duty to defend the insured in these cases.[12] The model CGL was revised in 1998, and the new version is just beginning to be interpreted by the courts.[13] The courts' reactions to the revised language will have an impact on potential insurance coverage, and businesses perhaps should start questioning the scope of the 1998 coverage and investigating whether they should procure additional intellectual property insurance.

This Comment examines the way the relationship between the intellectual property market and the CGL has changed in the past few

---

10. *See, e.g.*, Hyman v. Nationwide Mut. Fire Ins., 304 F.3d 1179 (11th Cir. 2002); Charter Oak Fire Ins. Co. v. Hedeen & Co., 280 F.3d 730 (7th Cir. 2002); Gemmy Indus. Corp. v. Alliance Gen. Ins. Co., 190 F. Supp. 2d 915 (1998), *aff'd without opinion*, 200 F.3d 816 (5th Cir. 1999); Letro Prod. Inc. v. Liberty Mut. Ins. Co., 114 F.3d 1194 (9th Cir. 1997).

11. *See, e.g.*, Advance Watch Co. Ltd. v. Kemper Nat'l Ins. Co., 99 F.3d 795, 805 (6th Cir. 1996); Callas Enter. Inc. v. Travelers Indem. Co., 193 F.3d 952, 956 (8th Cir. 1999).

12. *See, e.g.*, Williamson v. North Star Co., No. C3-96-1139, 1997 WL 53029, at *4 (Minn. Ct. App. Feb. 11, 1997) (holding that the word "title" was meant to be interpreted in an intellectual property sense, since it appeared in the same clause with the term "copyright" and was therefore subject to protection under "infringement of title" provision); *but see Callas*, 193 F.3d at 956 (holding alleged trademark infringement was not "misappropriation of advertising ideas or style of doing business" and was not infringement of copyright, title or slogan). Both cases apply Minnesota law.

13. *E.g.*, Superformance Int'l, Inc. v. Hartford Cas. Ins. Co., 332 F.3d 215 (4th Cir. 2003).

years, and attempts to predict how this relationship will effect policyholders and carriers in the near future. Although recent problems with infringement insurance have circulated around the present circuit split, the current controversy deals with a waning pool of cases that rely on the 1986 CGL. Insurers and policyholders alike should be prepared for the next generation of model policy revisions. Also, as the coverage of the CGL becomes more limited, the need for specialized security in the form of trademark infringement liability will continue to grow and create a market for more special-purpose policies.

Part II of this Comment touches on current trademark law, as well as a brief history and purpose of the CGL policy. Part III introduces the revised 1998 form, analyzes the changes made, and identifies the consequences for trademark liability coverage, such as the newly-defined idea of "advertisement" and its potential for dispute. Part III also examines the dispositive language in the leading majority and minority decisions on infringement liability and attempts to use that language to predict the courts' readings of the new 1998 language. Part IV speculates as to the future of trademark and liability, in light of changing CGL coverage, the increase in exclusionary clauses, an expanding intellectual property market, and the newest 2001 CGL revisions. Part IV also explores other types of insurance policies, such as media liability policies and Internet liability policies that could emerge to fill in the gap between CGL coverage and the needs of special-purpose industries. What seemed at first like a small, specialized niche market may prove to become much larger than expected and much more expensive.

II. BACKGROUND

A. Trademark Law

The most common forms of intellectual property protection are trademark, patent and copyright. Each is governed by its own set of statutory or common law rules. Registered trademarks, service marks and trade dress are governed by the Federal Trademark Act, or Lanham Act,[14] as well as common law. A "trademark" is defined by the Lanham Act as:

> [A]ny word, name, symbol, or device, or any combination thereof . . . used by a person, or . . . which a person has a bona fide intention to use in commerce and applies to register on the principal register . . . to identify and distinguish his or her goods, including a unique

14. 15 U.S.C. §§ 1051-1127 (1994).

> product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.[15]

The functions of a trademark are to identify the origin of a product, to act as a guarantee of the product's quality, and to advertise for the product.

Under Section 43(a) of the Lanham Act, registered trademarks are protected from similar marks or product appearances that may be confusing to consumers.[16] A Lanham Act cause of action requires a party to show that the infringing mark was used to identify the goods or services to the public in a manner that could cause likelihood of confusion as to the source of the goods.[17] A person is prohibited from using a "word, term, name, symbol or device, or any combination thereof, [which is] likely to cause confusion . . . mistake, or to deceive as to the affiliation, connection, or association of such person with another person . . . ."[18] If there is a conflict between state and federal trademark law, the Lanham Act will preempt the state law.[19]

Infringement of a trademark consists of an act committed by any person without the consent of the trademark owner who:

> (a) use[s] in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or
>
> (b) reproduce[s], counterfeit[s], cop[ies], or colorably imitate[s] a registered mark and appl[ies] such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive . . ..[20]

---

15. *Id.* § 1127.
16. *See id.* § 1125(a).
17. *See id.* § 1127.
18. *See id.* § 1125(a).
19. *See* 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 22 (4th ed. 1996).
20. 15 U.S.C. § 1114

Under the Lanham Act, intent to infringe is not a relevant factor, although courts will examine the good faith of the alleged infringing party to determine whether the infringement was innocent or whether it was "palming off," which is the common law prohibition against deceptive use of another's trademark, and means trying to pass off one's own mark as another's.[21]

Trade dress is akin to a trademark in the intellectual property world.[22] It is a technical term that refers to "the total image of a product and may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques."[23] It is most frequently used to indicate the packaging or labeling of goods, but the design of the product itself may also be considered protectable trade dress.

B. Commercial General Liability Policy

The CGL insurance form is created and published by the Insurance Services Office, Inc. (ISO), who revises and updates the basic policy language for the insurance community every few years as necessary.[24] The CGL, originally created as the Comprehensive General Liability policy, is the basic insurance policy used by most businesses in the United States; by itself, this general liability policy generates tens of billions of dollars in annual premiums from U.S. businesses.[25] Created in 1941 in response to a need for a "general purpose liability insurance policy" that any business in the commercial market could use,[26] the CGL is a collection of standardized forms that have emerged from the property and casualty insurance industry, [27] designed to allow carriers to assess risk in potential policyholders and alter premiums accordingly.[28] The CGL was also created with the idea that its existence and adoption would bolster the market for "special-purpose" insurance coverage, such as intellectual property, to fill in the coverage gaps created by the limited extent of the basic business plan and the needs

---

21. *See* MCCARTHY, *supra* note 19, at § 25.

22. *See* JANE C. GINSBURG ET AL., TRADEMARK AND UNFAIR COMPETITION LAW 45-46 (Foundation Press, 3d ed. 2001).

23. John H. Harland Co. v. Clarke Checks, Inc., 711 F.2d 966, 980 (11th Cir. 1983).

24. The new 1998 revision was not the first revision to the CGL since the drafting of the 1986 CGL, however, the 1998 is the first full revision.

25. Kenneth S. Abraham, *The Rise and Fall of Commercial Liability Insurance*, 87 VA. L. REV. 85, 90 (2001) (citing A.M. Best Co., Best's Aggregates & Averages: Property-Casualty 265 (1999)).

26. *Id.* at 89.

27. Christopher L. Graff, *Insurance Coverage of Trademark Infringement Claims*, 89 TRADEMARK REP. 939, 940 (1999).

28. Abraham, *supra* note 25, at 89.

of the specialized business plan, which usually possess identifiably unusual risks.[29]

The CGL, built for basic business practice liability, offers two areas of coverage. The first part offers coverage for bodily injury and property damage ("Coverage A").[30] The second part, ("Coverage B"), offers coverage for personal injury and advertising injury,[31] and is the section of the 1986 CGL utilized to obtain infringement coverage.[32] The ISO defines "advertising injury" as an offense committed "in the course of advertising your goods, products or services."[33] The following enumerated offenses fall under the designation of "advertising injury":

> a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
>
> b. Oral or written publication of material that violates a person's right of privacy;
>
> c. Misappropriation of advertising ideas or style of doing business; or
>
> d. Infringement of copyright, title or slogan.[34]

In order for a claim to be covered, there are three requirements that a policyholder must meet in order for a business to recover under the advertising injury provision of its policy:

> 1. The allegations in the underlying complaint can be read as being included under one of the "advertising injury" offenses;
>
> 2. The policyholder was engaged in "advertising activity" when the alleged "advertising injury occurs; and
>
> 3. There is a causal nexus between the injury and the advertising.[35]

---

29. *Id.* at 105.

30. Insurance Services Office, Inc., *Commercial General Liability Coverage*, Form No. CG 00 02 02 86 (1984) [hereinafter 1986 CGL].

31. *Id.*

32. *See infra* Part III.B.1.

33. 1986 CGL, *supra* note 29, § I.

34. *Id.* § VI.

35. Graff, *supra* note 27, at 944.

The CGL stipulates that the insurer has a duty to defend the client legally if the underlying cause of action in a plaintiff's suit falls under the policy, even if the claim is false, frivolous or fraudulent. In determining an insurer's duty to defend, the court applies the factual allegations present in the complaint to the terms of the disputed insurance policy and then construes those allegations, assuming all reasonable inferences and usually resolving any doubt as to the existence of the duty to defend in favor of the insured. All that matters in determining a carrier's duty is whether the conduct as alleged in the underlying complaint is at least arguably within one or more of the categories of wrongdoing that the policy covers and not necessarily the legal label that the plaintiff attaches to the defendant's actions. The carrier also has a duty to indemnify the insured for damages paid due to an ordered judgment or settlement if the facts during litigation meet specific criteria outlined by the carrier. [36] This duty is based on allegations in a complaint that, if proved, would give rise to recovery under the terms and conditions of the insurance policy.[37]

In spite of the intent of the insurers and the industry, the states have created certain procedures and rules for interpreting insurance contracts, which were designed with some purpose in mind about the way society should judge conduct bound by these contracts on either side: "[w]here there is no ambiguity, terms should be given their ordinary meaning, and neither party ought to be favored. . . . Where the terms are ambiguous, however, such ambiguities are to be construed against the drafter."[38] Most jurisdictions have language similar to this.[39] Thus, the courts are instructed

---

36. The duty to defend is broader than the duty to indemnify because the duty to defend is triggered by possible, as opposed to actual, coverage.

37. For example, Company X sues Company Y for trademark infringement (underlying complaint). Y turns to its insurance company to relieve some of the cost of what has become an expensive lawsuit. If the insurance company denies coverage because it interprets the policy as not providing a duty to defend a trademark infringement suit, Y can sue its insurer (for breach of insurance contract, bad faith, etc.), arguing that under its expectation under the insurance policy, Y should be reimbursed by the insurer for its costs of defending the suit, because X's allegations in the underlying complaint raised their potential for liability under one of the listed "advertising injury" offenses. The court will then decide if the insurance policy covers the offenses delineated in the language of the complaint.

38. Sholodge, Inc. v. Travelers Indem. Co., 168 F.3d 256, 259 (6th Cir. 1999).

39. *See, e.g.*, Granite State Ins. Co. v. Aamco Transmissions, Inc. 57 F.3d 316, 319 (3d Cir. 1995) (insurance policies under Pennsylvania law will be interpreted according to a reasonable insured's understanding rather than the narrow legal meaning of policy terms); EKCO Group, Inc. v. Travelers Indem. Co., 273 F.3d 409, 412 (1st Cir. 2001) (New Hampshire law favors the insured where the policy is genuinely ambiguous and choice is between two readings, one providing coverage, and one not).

to read these documents as they are, not to force technical meanings. Ambiguities in a word dictate that the word be used in its "plain language" meaning, as an ordinary person would use in everyday speech.[40]

In recent years, it has become apparent that the basic CGL insurance will not suffice as an effective or reliable defense in intellectual property litigation. The new "basic" policy has several exclusions that inspire some to quip about an "implied big claim exclusion," which comes from "the perceived tendency of commercial insurers to deny any substantial claim by asserting what policyholders regard as questionable policy defenses."[41] For instance, the original CGL contained only five exclusions,[42] whereas today's CGL contains over a dozen exclusions, not counting the individualized exclusions added by carriers. Although the ISO has stated that the changes in wording between the 1986 policy and its predecessors[43] were not intended to alter the scope of the coverage provided by the policies,[44] this apparently does not influence the reasoning of the courts, who generally do not take into consideration the motives of the policy's drafters, relying instead on state laws of contract interpretation. Despite the ISO's motives for changing the language in the 1998 form, the courts will interpret the new scope of coverage as they see fit. To develop an idea of how the 1998 language will be interpreted, it is important to explore the circuit split and the rationale given by courts when interpreting the 1986 language.

III. THE 1998 LANGUAGE

The ISO altered the standard language, affecting those phrases in the policy that have been the subject of much dispute in the past. Cases involving trademark infringement are relatively new, but the upsurge in the number of cases has provided an abundance of material from which to sketch a rough meaning of certain terminology in the CGL. Depending on the jurisdiction, the outcome in recent cases has been somewhat more predictable than when trademark infringement first became a respectable insurance issue, although just as insurance attorneys are becoming acquainted with the familiar language of the standard 1986 CGL, the

40. *See e.g., Advance Watch,* 99 F.3d at 799-800 ("Terms are to be interpreted by considering their commonly understood meanings. Courts should refrain from applying a 'technical or strained construction' to words in insurance policies." [citations omitted]).

41. Abraham, *supra* note 24, at 103.

42. Donald S. Malecki et al., *General Liability Insurance, in* 1 Commercial Liability Risk Management and Insurance 238 (2d ed. 1986).

43. Such as the 1973 CGL and 1981 Broad Form Comprehensive General Liability Endorsement.

44. Simensky, *supra* note 9, at 332.

language has been changed. Arguably, the same arguments and methods of analysis left over from the 1986 CGL will come into play in looking at the new wording.

The 1998 form is the most recent full revision of the CGL. The new advertising injury section has been called "[t]he most sweeping set of changes in the history of coverage . . ."[45] Overall, the new policy language is an adjustment for the new "basic" needs of businesses today combined with a reaction to the amount of litigation surrounding the older versions.

This Comment attempts to analyze the language of the 1986 CGL "advertising injury" section as construed in federal appellate court opinions and pertinent district court opinions in hopes of shedding light on the various interpretations of potential infringement insurance terminology. The cases discussed in this Comment are some of the chief federal appellate cases addressing the 1986 CGL, and the decisions provide insight as to the meaning of "advertising injury" coverage in various jurisdictions. Among the factors that may influence the court's opinion are: how the policy is read,[46] jurisdictional precedent, public policy, revisions in the CGL language, as well as the individual facts of each case.

A. What Does the 1998 CGL Cover?

Although the ISO drafts the CGL as well as most standard insurance forms, the courts do not look to the intent of the drafters when deciphering the CGL's meaning. Also, the drafters' notes are not very helpful in revealing what the ISO wanted to accomplish with the changes, and so they offer little, if any, enlightenment on how to read the new CGL. For example, in announcing both the 1986 and 1998 revisions, the ISO described them as non-substantive clarifications of prior coverage.[47] A "Notice to Policyholder" accompanying the 1998 revisions reads: "the changes in the Personal and Advertising injury in these coverage forms result in broadening the coverage in certain respects and may, in certain states, result in a decrease in other respects."[48] While this statement is certainly true, it does not help or hinder an argument for coverage. The

---

45. I International Risk Management Institute, Commercial Liability Insurance § V.E.2 (2000).

46. For example, whether ambiguous language is construed against the insurer or simply as the insured's reasonable expectation.

47. Robert H. Jerry, *Insurance and Intellectual Property (and E-Commerce): Comments on the Evolution and Availability of Coverage*, Insurance Law Section, Association of American Law Schools Annula Meeting, at 4 (Jan. 5, 2001) (citing Lawrence O. Monin, *ISO Advertising and Personal Injury 1998 Revisions: Major Surgery or Just a Band-Aid Fix?*, 4 Mealey's Emerging Ins. Disp. 24 (Aug. 19, 1999)).

48. *Id.* at 4.

ISO makes sure to note that changes in the 1998 version are difficult to quantify.[49] One writer has commented that "[t]aken as a whole, the revised Personal and Advertising Injury Coverage is at least equal to, if not broader than, that which the current coverage provides."[50]

1986 CGL "Advertising Injury" means injury arising out of one or more of the following offenses:

1. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services;
2. Oral or written publication of material that violates a person's right of privacy;
3. **Misappropriation** of advertising ideas or **style of doing business**; or
4. Infringement of copyright, **title**, or slogan.

Must be committed "in the course of advertising," which is not defined in the CGL.

1998 CGL "Personal and Advertising Injury" means injury arising out of one or more of the following offenses:

1. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services;
2. Oral or written publication of material that violates a person's right of privacy
3. The use of another's advertising idea **in your "advertisement"**; or
4. Infringing upon another's copyright, **trade dress** or slogan **in your "advertisement."**

"Advertisement": means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters.

49. *Id.*
50. *Id.*

The 1998 CGL combines the categories of personal injury and advertising injury into one section labeled "Personal and Advertising Injury."[51] Of the seven subsections defining the concept "injury," sections (f) and (g) of the CGL are the significant carryovers from the 1986 CGL subsections, and are the new editions of the offenses under which courts were able to find coverage for trademark infringement. The interpretation of these sections is the focus of this paper.

B. The First Element: Is There an Injury?

Again, the test to secure insurance coverage is 1) whether there was an injury, 2) whether the injury happened in the course of advertising, and 3) whether there was a causal nexus between the advertising injury and the advertising. To trigger an insurer's duty to defend, the cause of action must be for "advertising injury," in which case it would fall into one of the categories listed above. Those seeking defense and indemnification for trademark infringement use the sections of the CGL that cover "the use of another's advertising idea" and "infringement" as listed above, and again, courts will use the language from the underlying complaint to ascertain coverage.

1. Advertising Idea

Injury arising out of the offense of:
- ❑ The use of ***another's advertising idea*** in your "advertisement."

Courts that have allowed trademark or trade dress infringement coverage under the 1986 counterpart to this offense have essentially equated "advertising" with trademarks. For example, when a consumer sees a trademark, such as the Nike "Swoosh," it communicates a message to him that the source of the product is the Nike Corporation, whose products he may have purchased in the past. This trademark, the "swoosh," has communicated a message to the consumer ("the maker of this product is the Nike Corporation") that may influence his purchasing decision. According to some courts, advertising does the same thing – communicates to the consumer, influencing his purchasing decisions. Therefore, the argument follows that if trademarks and advertising share the same function and have similar results, they should be treated as similar ideas.[52] The Nike Swoosh "advertised" to the customer because it induced the customer to buy the product.

---

51. Insurance Services Office, Inc., *Commercial General Liability Coverage*, Form No. CG 00 01 07 98 § V (1997) [hereinafter 1998 CGL]. The 1986 CGL separated the two injuries.

52. "[O]ne reasonable interpretation of 'advertising ideas' and 'style of doing business' concepts ... is that they encompass the physical appearance of a product--the ornamental

Third Circuit. In *Frog, Switch & Manufacturing Co. v. Travelers Insurance Co.*,[53] the insured, Frog, sought coverage from its insurer after defending a case in which Frog was alleged by the underlying plaintiff to have engaged in unfair competition by misappropriating information, falsely advertising, and reverse passing off under the Lanham Act.[54] After unsuccessfully filing an insurance claim for the defense of this lawsuit, Frog brought Travelers to court. The court found the insurer had no duty to defend because the underlying complaint alleged only that the insured took the product *design* itself (that of a dipper bucket) and lied about the design's origin in the advertisement. The policyholder tried to argue that this was covered as an advertising injury, but the court found that the complaint did not allege an infringement of a trademark or other wrongful taking of an "advertising idea."[55]

The court assumed for the sake of argument that trademark infringement constitutes misappropriation as required, and that a trademark can be seen as an "advertising idea," because the mark is a way of marking goods so that they will be identified with a particular source: "[a] trademark depends for its effectiveness on communicating a message to consumers about the marked good, which is the essence of advertising, and therefore allegations of trademark infringement arguably allege misappropriation of an advertising idea."[56]

The *Frog* court found for the defendant because the complaint did not allege 1) that Frog misappropriated *methods of gaining customers*, 2) that what the insured took *was itself an idea about identifying itself to customers*, 3) that the misappropriated dipper bucket design was an *indication of origin*, 4) that it's *identifying marks* were misused, and 5) that Frog took any other ideas about advertising its products.[57] The underlying plaintiff only claimed that the insured wrongfully took information about the manufacture of its product, and then advertised the resulting product.

The court's point, it seemed, was that in order for a policyholder to receive coverage under an advertising injury provision, the allegations cannot just be *a nonadvertising idea that happens to be made the subject of*

---

features that distinguish it from similar products and identify its source. Because trademark and trade dress serve this function, the concept of 'advertising idea' or 'style of doing business' may reasonably be interpreted to include these types of claims." Adolfo House Distrib. Corp. v. Travelers Prop. & Cas. Ins. Co., 165 F. Supp. 2d 1332, 1339 (S.D. Fla. 2001).

53. 193 F.3d 742 (3d Cir. 1999).

54. *Id.* at 747.

55. *Id.* at 749.

56. *Id.* at 750.

57. *Id.* at 749.

advertising.[58]

Second Circuit. In *R.C. Bigelow, Inc. v. Liberty Mutual Insurance Co.*[59] the court, easily and without much discussion, found that the allegation of trade dress infringement in the complaint, claiming confusingly similar packaging, was enough to qualify as an advertising idea.[60] Celestial Seasonings, Inc. ("Celestial") sued the insured, Bigelow, alleging that Bigelow's new packaging was confusingly similar to that of Celestial's.[61] The court reasoned that to "advertise" means "to announce publicly especially by a printed notice or a broadcast; [and] to call public attention to especially by emphasizing desirable qualities so as to arouse a desire to buy or patronize," and for an idea to be considered advertising, "information must be publicly or widely disseminated."[62] Thus, according to the court, the allegation that Bigelow copied Cellestial's packaging and displayed it in their published advertisements constituted a sufficient allegation that Bigelow was copying an advertising idea.[63]

Fifth Circuit. The Fifth Circuit addressed the phrase "advertising idea" in *Sport Supply Group, Inc. v. Columbia Casualty Co.*,[64] and basing its decision on a traditional interpretation of "advertising," the court described it as a "term as referring to a device for the solicitation of business."[65] The disputed mark "Macgregor," the court found, is a label that serves to identify and distinguish certain products.[66] The Fifth Circuit reasoned that, under Texas law, a trademark is not viewed as a marketing device, and adopted the more conventional stance of a trademark as an identifier.[67] The exception to the exclusion dealing with misappropriation of advertising ideas did not apply to trademarks because trademarks are not "advertising."[68]

---

58. *Id.* at 748. Compare this to Sentex Sys., Inc. v. Hartford Accident & Indem. Co., 93 F.3d 578, 580 (9th Cir. 1996) ("In this day and age, advertising cannot be limited to written sales materials, and the concept of marketing includes a wide variety of direct and indirect advertising strategies.").

59. 287 F.3d 242 (2d Cir. 2002).

60. *Id.* at 247.

61. *Id.* at 244.

62. *Id.* at 247 (quoting QSP, Inc. v. Aetna Cas. & Ins. Co., 256 Conn. 343, 365-66, 773 A.2d 906 (2001).

63. *Bigelow*, 287 F.3d at 247.

64. 335 F.3d 453 (5th Cir. 2003).

65. *Id.* at 462.

66. *Id.* at 464.

67. *Id.* at 464.

68. *Id.* at 465.

2. Trade Dress

> Injury arising out of the offense of:
> ❑ Infringing upon another's copyright, ***trade dress*** or slogan in your "advertisement."

In the 1998 CGL, the offense of "infringement of copyright, title, or slogan" has been changed to "infringement upon another's copyright, trade dress, or slogan," replacing "title" with "trade dress."[69] In past decisions, some courts have found that "infringement of title" encompasses trademark infringement.[70] The omission of the word "title" may not have a substantial effect on coverage, although replacing it with "trade dress" will open the doors to many more attempts at seeking coverage for infringement, since "trade dress," a form of intellectual property, connotes something akin to trademark, certainly more so than "title." As a policyholder, it will be easier to argue that one's trademark is covered under the allowable exception for "infringement of trade dress"; it more aptly applies to commercial sales than "title," and while trade dress and trademark are distinct intellectual property concepts, aspects of each overlap the other, as they both serve as commercial source-identifiers. One of the arguments over trademark infringement coverage will surely rest on the jurisdiction's reading and defining of "trade dress," and whether that definition is broad enough to include trademarks as well.

Eleventh Circuit. The *Hyman v. Nationwide Mutual Fire Insurance Co.*,[71] court found that under the 1986 CGL, trade dress infringement could be covered under either advertising idea or style of doing business, reasoning that "without defining the exact parameters of the phrase, we conclude that 'style of doing business' must include the manner in which a company promotes, presents, and markets its products to the public."[72] While "the classic trade dress infringement action involved the packaging or labeling of goods . . . it may extend to marketing techniques and can include certain sales techniques designed to make the product readily identifiable to consumers and unique in the marketplace . . . ."[73] The argument can readily be made that a trademark shares these characteristics of making a product "readily identifiable to consumers" and "unique in the marketplace."

---

69. 1998 CGL, *supra* note 51.

70. *E.g.*, Charter Oak Fire Ins. Co. v. Hedeen & Cos., 280 F.3d 730, 736 (7th Cir. 2002).

71. 304 F.3d 1179 (11th Cir. 2002).

72. *Id.* at 1189.

73. *Id.* at 1189 (internal citations and quotations omitted).

The Supreme Court. In *Two Pesos, Inc. v. Taco Cabana, Inc.*,[74] the Supreme Court ruled that trade dress warrants the same federal protection under the Lanham Act as do trademarks. In analyzing criteria for Lanham Act protection for trade dress, the court reasoned:

> [Inherently distinctive trade dress] is capable of identifying products or services as coming from a specific source and secondary meaning is not required. This is the rule generally applicable to trademarks, and the protection of trademarks and trade dress under § 43(a) serves the same statutory purpose of preventing deception and unfair competition. There is no persuasive reason to apply different analysis to the two.[75]

Although *Two Pesos* has been criticized for its blurring of the trade dress/trademark distinction, [76] it does provide for the argument that trade dress and trademark are similar properties under federal law. Furthermore, the decision outlines many other similarities between the two groups.

Despite the similarities some courts observe between trademarks and trade dress, at least one court has reasoned that without doubt, one does not equal the other. In *Central Mutual Insurance Co. v. Stunfence, Inc.*,[77] the District Court rejected the insured's argument that the same legal analysis was necessary to resolve the claims of both trade dress and trademark infringement.[78] The court pointed out that trade dress is only a "subset of trademark law,"[79] and that provision of coverage for the lesser encompassing term (trade dress) did not provide coverage for the greater

---

74. 505 U.S. 763 (1992).

75. *Id.* at 773.

76. Criticizing the decision in *Two Pesos*, the Supreme Court in Wal-Mart Stores, Inc. v. Samara Bros., 529 U.S. 205 (2000), distinguished the trade dress issue at bar, stating that:

> [T]he trade dress there at issue [in Two Pesos] was restaurant decor, which does not constitute product *design*, but rather product packaging . . . . While distinguishing *Two Pesos* might force courts to draw difficult lines between product-design and product-packaging trade dress, the frequency and difficulty of having to distinguish between the two will be much less than the frequency and difficulty of having to decide when a product design is inherently distinctive [which would afford it protection under the Lanham Act]. To the extent there are close cases, courts should err on the side of caution and classify ambiguous trade dress as product design, thereby requiring secondary meaning.

Id. at 206.

77. 292 F. Supp. 2d 1072 (Ill. 2003).

78. *Id.* at 1077.

79. *Id.*

(trademark).[80] The court also claimed that "it is clearly significant that the ISO made the change from 'title' to 'trade dress' and not 'trademark' after there was a clear trend in most courts to recognize that the term 'title' included trademark infringement claims."[81] Although this can be said to be an accurate portrayal of trade dress, one cannot help wonder whether other courts will see the distinction so crisply, or whether they will draw the conclusion that insured realized this distinction.

C. The Second Element: Is There Causation?

> 1998 CGL:
> Offenses must be committed "in your [notice that is ***broadcast or published*** to the general public or specific market segments about your goods, products or services ***for the purpose of attracting customers or supporters.***]"

The second element needed to trigger a carrier's duty to defend under the 1986 policy is that the offense is an "advertising activity." In the standard 1986 policy, "advertising" was not defined in the policy and had to be interpreted by the courts. The 1998 CGL has added the restriction in your "advertisement" and the ISO has now defined "advertisement."[82]

1. Conventional Advertising

First Circuit. "Advertising" in *EKCO Group, Inc. v. Travelers Indemnity Co. of Illinois*,[83] referred to conventional advertising, not the broader concept of inviting public attention to a product, or "solicitation" as the Fifth Circuit described it. The underlying complaint alleged that EKCO infringed on the design of a teapot, making the product confusingly similar to that of the underlying plaintiff's product.[84] The policyholder, EKCO, claimed that it was covered under its CGL because it was accused of trade dress infringement, which fell under "misappropriation of advertising ideas."[85] The court admitted that advertising does have many meanings, however, the one that would be used in reading a policy was "a reference to advertising in newspaper, radio, television, or other familiar media where the advertisement is an activity or item distinct from the

80. *Id.*
81. *Id.* at 1078.
82. 1998 CGL, *supra* note 51.
83. 273 F.3d 409 (1st Cir. 2001).
84. *Id.* at 410-11.
85. *Id.* at 411.

product being advertised."[86] After all, "[t]o call a real teapot intended for sale as a kitchen utensil an 'advertising idea' is not a natural usage . . . ."[87] Even assuming that the teapot was an advertising idea, the court noted that the only infringing offenses charged in the complaint were that the physical reproduction and sale of a look-alike teapot by EKCO. The court did not accept the insured's argument that physical reproduction and sale of the products constituted "in the course of " advertising, so there was not the requisite causal connection.[88]

> To speak of "the course of advertising your goods" suggests some distinction between producing and selling the goods on the one hand and "advertising" them on the other; and all of the definitions of covered offenses apart from "misappropriation" make clear . . . or imply . . . that the drafter had in mind something akin to conventional advertising ("oral or written publication of material" causing libel or invasion of privacy; infringement of copyright, title, or slogan).[89]

The First Circuit opined that the conventional form of advertising "the familiar bundle of business activities associated with that term" was the natural reading and "the only one that avoids outlandish results . . . ."[90]

Sixth Circuit. In *Advance Watch Co. v. Kemper National Insurance Co*,[91] the first federal appellate decision to address trademark infringement,

---

86. *Id.* at 413.

87. *Id.*

88. *Id.*

89. *Id.* at 414.

90. *Id.* It is worth noting that the *EKCO* court did happen to mention the new 1998 CGL and noted that the new language provides coverage for infringement in "your advertisement" for trade dress infringement, which was one of the underlying causes of action in the complaint. *Id.* at 415. The insured brought up that the narrowed definition of "advertisement" in the new CGL contrasted with the prior language. The First Circuit, sounding sympathetic to a policyholder's position, made sure to state that in contrast to the Sixth Circuit's harsh reading of the policy language in *Advance Watch*, "we can ourselves imagine a possible claim if, in the course of a published advertisement, a rival's trademarked insignia were misappropriated." *Id.* at 416.

91. 99 F.3d 795 (6th Cir. 1996) (applying Michigan law). *Advance Watch* is a case infamous in trademark insurance law because of its incredibly narrow application of policy interpretation to trademark and trade dress infringement. The case has been highly criticized and is cited mostly for its treatment of the 1986 policy language "misappropriation" to represent a common law tort. Hyman v. Nationwide Mut. Fire Ins., 304 F.3d 1179, 1189 (11th Cir. 2002) ("We believe, therefore, that the district court erred in relying on Advance Watch. The majority of courts outside the Sixth and Eighth Circuits to confront this question . . . . have rejected the reasoning of that case."). Most other courts,

the court held that the manufacture, advertising and sales of pens closely resembling those of the underlying plaintiff's did not fall into the first element of "misappropriation of advertising ideas," nor did it fall under the second element of being an "advertising activity." The underlying plaintiff, A.T. Cross Co. ("Cross"), alleged in its complaint that the Advance writing instruments infringed Cross' trademarks, consisting of the shape and appearance of the writing instruments themselves.[92] Cross' complaint against Advance specifically asked for an *injunction of Advance's advertisements* and that *Cross be allowed to destroy all infringing advertisements and catalogs*.[93]

The court found that it was not the advertising itself, but rather the actual deceptively similar product, which was the subject of the complaint. "[E]ven if Advance could be said to have misappropriated Cross' advertising ideas or style of doing business, it cannot reasonably be said to have done so in the course of advertising its writing instruments, when it is the shape and appearance of the writing instruments themselves which Cross claimed to have caused injury."[94] Thus, although the court did not find that the pen's design was an "advertising idea," if the pen design were an advertising idea, the court would still not allow coverage despite the evidence of their "advertising idea" being the subject of many advertisements. When Advance argued that the appearance of the pens was in itself advertising, the court stated that the argument was flawed, as it would allow advertising injury coverage whenever a product is "merely exhibited or displayed."[95]

2. Broad View

Some courts have concluded that because trade dress and trademark infringement claims require proof of consumer confusion, that advertising, as an activity of calling the public's attention to an infringing product, is inherent in a Lanham Act claim.

Seventh Circuit. In the decision *Charter Oak Fire Insurance Co. v. Hedeen & Cos.*,[96] the court granted defense coverage to the insured for alleged infringement of the logo "Micro Machines," which the insured used

---

especially at the federal appellate level, have found that "misappropriation" means "to use." *Id.* This is irrelevant now that the 1998 CGL language provides for "the use of another's advertising idea," and *Advance Watch* may be the reason the new language was inserted. 1998 CGL, *supra* note 51.

92. *Advance Watch* at 806.
93. *Id.* at 806 (emphasis added).
94. *Id.* at 807.
95. *Id.*
96. 280 F.3d 730 (7th Cir. 2002).

as a title on the company's letterhead. The court relied on the common dictionary definition of "advertise" as "call[ing] the attention of the public to a product or business; . . . to proclaim the qualities or advantages of (a product or business) so as to increase sales" and also "to call public attention to esp[ecially] by emphasizing desirable qualities so as to arouse a desire to buy or patronize."[97]

The insurer argued that the letters, as "one-on-one customer solicitations" were not advertising.[98] Although there was no indication of the volume of letters sent out, or of recipients of the letters, the court agreed with the allegations of the complaint, which claimed that the infringing letterhead affected "the commercial public," noting that that the insured was in a business with a limited commercial audience.[99] The court found a duty to defend because it believed that taken liberally, "it is at least arguable" that the offense occurred within the course of advertising, thus triggering the duty.[100]

In *Energex Systems Corp. v. Fireman's Fund Insurance Co.*,[101] the court held that the causation requirement was met under the CGL because "the claim for trade dress or trademark infringement includes as an element of proof *some communication between seller and consumer*" and that such communication constitutes advertising.[102] The underlying plaintiff alleged that "the total visual effect" of the infringing product would cause confusion, both in brochures and on the store shelves.[103] The court

---

97. *Id.* at 736 (internal quotations omitted).

98. *Id.* at 737.

99. *Id. See also* Bear Wolf, Inc. v. Hartford Ins. Co., 819 So. 2d 818 (Fla. App. 2002), a more recent case, in which the policy in question specified the injury be done "in your advertisement" which was defined as a "publication that is given widespread public distribution." *Id.* at 820. The infringing product was a display of a cigar box and lighter at an industry trade show. The court held:

> [I]f the product had been advertised on a single billboard with very little exposure to the public because of its isolated location, it would qualify under the policy as an advertisement . . . [Also,] an advertisement in a small town newspaper with very limited circulation would also be an advertisemnt. Given those examples we see no reaosn to read "widespread public distribution" so narrowly as to exclude a display at one of the industry's larget trade show, whether it was open to the general public or not." *Id.* at 821.

100. *Id.* Under the 1998 CGL, it would probably be less likely, but certainly not impossible, to find that the letterhead was a "notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." 1998 CGL, *supra* note 51, at § V.

101. No. 96 CIV. 5993, 1997 WL 358007 (S.D.N.Y. June 25, 1997).

102. *Id.* at *4 (emphasis added).

103. *Id.* at *3.

believed that "[a]lthough the word advertising was not used in the complaint, it is clear that the confusion which was created through Energex's communications with its customers took place through advertising."[104]

Narrow View "Advertising":

EKCO

- Done in ***newspaper, radio, television, or other familiar media.***
- It is an activity or item ***distinct*** from the product being advertised.

Advance Watch

- Must be more than infringing product in advertisement.
- Must be ***main focus*** of complaint.

Broad View "Advertising":

Charter Oak

- ***Calling the attention*** of the public to a product or business.
- ***Emphasizing desirable qualities*** so as to arouse a desire to buy or patronize.

Energex

- Communication between seller and consumer.
- Can be ***part of product***, on the store shelf.

Analysis. Regardless of whether the CGL was broadened or narrowed purposely, the broad interpretation of the meaning of advertising injury in recent case law ignores the primary purpose of the CGL and the fact that another entire market for intellectual property business exists. The financial impact on insurance companies should also be a major consideration, as the First Circuit noted: "[i]t is worth adding that if the . . . open-ended definition [of advertising injury] were employed, it is hard to see how an insurer could even begin to calculate risks and set premiums."[105]

104. *Id.* at *4.
105. *EKCO*, 273 F.3d at 414.

CGL coverage was created "to provide base coverage for a wide range of risks faced by all types of businesses," and it is argued that the advertising injury provision "was clearly designed to provide protection for the only use of intellectual property common to all businesses, that is, *use in advertising*."[106] For basic business needs, a CGL is a good policy; however, as the intellectual property market continues to grow and the stakes become higher, it becomes increasingly risky even for small businesses to rely on their CGL policy when it comes to their intellectual assets. Unfortunately, trademark protection is still somewhat new and can be very expensive for smaller to mid-size companies to acquire, and one lawsuit can wipe out an entire business.

Both the changes in the 1998 policy and the fact that insurers have been inserting exclusionary clauses into existing forms means that this large pool of problematic 1986 policies is finite in number and will eventually decline. As intellectual property is such a costly and volatile market, arguably the ISO purported to restrict insurance coverage available under the CGL, mainly by the failure of the new language to directly address the concerns over trademarks, and by increased restrictions on the forum ("advertisement") under which one is insured. However, the other side can also argue that in light of the insertion of the specific legal property "trade dress" instead of "title" that the policy may be opening up to the protection of the softer side of intellectual property.

> [I]t appears that ISO intends for the CGL form to cover certain types of trademark infringement claims. . . . [I]f it intended to exclude coverage for trademark infringement, it could have easily added an exclusion to that effect in its 1998 revision. Its decision not to do so, as well as its deletion in 1986 of a former exclusion expressly barring coverage for certain types of trademark infringement claims, indicates that the ISO CGL form is intended to cover claims of trademark infringement.[107]

D. The 2001 Exclusions for Intellectual Property

Addressing this concern, the ISO has already come out with their 2001 revised CGL form. Although the 1998 CGL is the focus of this paper, as it is slated to be next in line to be the subject of much litigation, the 2001 policy contains significant changes for those attempting to obtain

106. Simensky, *supra* note 9, at 333 (emphasis added).

107. Ernst Martin, Jr. et al., *Symposium on Insurance and Technology: Insurance Weblining and Unfair Discrimination in Cyberspace*, 54 SMU L. Rev. 1973, 1999 (2001).

intellectual property coverage under it. Specifically, the "personal and advertising injury" section that is discussed in the above section is altered in the 2001 form.

1998 CGL:
"Personal and Advertising Injury" means injury arising out of one or more of the following offenses:

- The use of another's advertising idea in your "advertisement"; or
- Infringing upon another's copyright, trade dress or slogan in your "advertisement."

2001 CGL:
"2. This insurance does not apply to:
. . .
(i) 'Personal and advertising injury' arising out of the infringement of copyright, patent, ***trademark***, trade secret or other intellectual property rights.

However, this exclusion ***does not apply*** to infringement ***in your "advertisement"*** of copyright, ***trade dress***, or slogan."

Coverage for trademark infringement is precluded unless the policyholder can not only meet the same criteria that are set forth in the 1998 CGL, but also overcome the obstacle of the explicit trademark exclusion. Thus, the argument may be made that because policy excludes trademark infringement explicitly, it would not make sense for policy language to prohibit trademark infringement, only to allow it again under the guise of "trade dress," when it could have easily done so under "trademark."

IV. THE FUTURE OF TRADEMARK AND OTHER INTELLECTUAL PROPERTY INSURANCE

Since there has yet to be many cases litigated that address the new 1998 (or 2001) ISO standard language in the advertising injury section, what exactly will happen with insurance and trademark is uncertain. However, it is certain that the CGL will continue to be disputed in the intellectual property arena, such as what constitutes an "advertising" or "trade dress." The ISO is clearly trying to alter the CGL's coverage for

basic business needs, thereby opening the way for more specialized policies. In addition to trademarks and trade dress, this change affects patent and cyber-law as well, although to what extent is unclear. Policyholders should err on the side of caution when assessing their intellectual property coverage available under their existing CGL policies.[108] They should be aware of exclusionary clauses and look into specialized policies for their needs.

A. Exclusionary Clauses

It has been said that the recent trend in case law to cover trademark liability is a distortion of the risk management process.[109] "Suddenly," one critic points out, "risks that were not appropriately measured by insurance actuaries have, nevertheless, been shifted to insurers, ultimately to the detriment of the remaining insureds in the same category of risk. Not surprisingly, insurers have reacted to recent case law by revising their policies."[110]

It is now common for insurers to add on exclusions to their policies that alter or exclude coverage for possible specialized liabilities, such as patent infringement actions, for example, inserting the offense exception of "infringement of copyrighted advertising materials or slogans" into an advertising injury provision in place of the standard language, "infringement of copyright, title or slogan."[111] These exclusionary clauses, which can be in the form of blanket or conditional prohibitions, can be bypassed with endorsements, and some companies are adding entire endorsements to alter language that may reduce or add coverage and eliminate any "ambiguous language."[112]

Although insurers seem to be inserting exclusions into their policies more frequently than in the past, these clauses certainly do not preclude litigation or dispute, which can serve as an expensive way to interpret a clause meant to relieve one of these problems. In *Palmer v. Truck Insurance Exchange,*[113] the "advertising liability" section of the policy provided coverage for "[i]nfringement of copyright or of title or of

108. Philip R. Sellinger et al, *Findinig Intellectual Property Liability Coverage in the New Business Era – Part III*, METRO. CORP. COUNSEL, Sept. 2000, at 8.

109. Simensky, *supra* note 9, at 333.

110. *Id.*

111. Sellinger, *supra* note 103, at 8.

112. *See* Betterley, *supra* note 2, at 21.

113. 988 P.2d 568 (Cal. 1999). *See generally* Michael Traynor & Alison Choppelas, *Geoffrey H. Palmer v. Truck Insurance Exchange: An Analysis of Insurance Coverage for Trademark Infringement*, 16 Santa Clara Computer & High Tech. L.J. 489 (2000).

slogan."[114] There was a separate exclusion in the policy for claims made against the insured for "infringement of registered trade mark, service mark or trade name . . . [but this] did not relate to titles or slogans."[115] The court held that in this case, the enumerated offense of "infringement of title" did not encompass an underlying claim for trademark infringement because the subject of infringement was not a "title" or "slogan" of an artistic or literary work, as was meant by the policy.[116] The court stated that the definition of "title" cannot subsume the definition of "trademark" as understood in the policy; otherwise, all or part of a trademark exclusion clause becomes meaningless.[117] In other words, the court reasoned that if "trademark" meant "title," then the policy exclusion for trademark would be pointless.[118]

In many of the cases dealing with exclusionary clauses in the CGL, unless the trademark is also a title or slogan, or fits in some other way, the carrier will not cover trademark infringement. Courts that have interpreted this exception for trademarked "titles" or "slogans" have tended to give them narrow meaning associated with a work of art or publishable matter, rather than their ordinary, common meaning.[119]

B. Purchasing Specialized Policies[120]

At this point only a small number of insurers offer specialized intellectual property insurance, although the number is quickly growing.

---

114. *Palmer*, 988 P.2d at 571.

115. *Id.* at 572.

116. *Id.* at 573-74.

117. *Id.* at 574.

118. *Id.* (Paradoxically, it was a court applying California law, the court in American Economy Ins. Co. v. Reboans, Inc., 900 F. Supp. 1246, 1253-54 (1994), which was also one of the first courts to interpret the meaning of "title," that gave it its broad and general meaning and found the term to encompass trademark infringement. Apparently, the meaning of "title" changes depending on the context of the document.)

119. *See* Indus. Indem. Co. v. Apple Computer, Inc., 95 Cal. Rptr. 2d 528 (1st Dist. 1999) (in a policy that expressly excludes coverage for trademark infringement except for "titles or slogans," the offense "infringement of title" does not encompass an underlying claim for infringement of a business name because treating business names as "titles" ignores the express exclusion of coverage for claims of trademark infringement, since every tradename is also a "title" in the broad sense); *but see* First State Ins. Co. v. Alpha Delta Phi Fraternity, No. 1-94-1050, 1995 WL 901452, at *8 (Ill. App. Ct. 1st Dist. Nov. 3, 1995) (the enumerated offense of "infringement of title or slogan" encompassed an underlying action for trademark infringement, as the dictionary definition of title is "a mark, style, or designation; a distinctive appellation; the name by which anything is known").

120. A cautionary note: a CGL policyholder's purchase of, or even interest in, a special-purpose policy may be cited in a coverage dispute by an insurance company seeking to prove there was no reasonable expectation of coverage under the CGL. Sellinger, *supra* note 103, at 8.

Because intellectual property in general is a relatively new concept and requires a remarkable amount of skill and knowledge of patent, trademark and copyright law, it can be complex to underwrite.[121] It is questionable whether carriers seeking new policy opportunities will have the underwriting skill to properly price and develop coverage.[122]

There are three different types of intellectual property policies that are currently available. This article deals only with intellectual property defense coverage, which has been the subject of the circuit split and a main contributing factor to the drastic revisions to the ISO policy. In 1999, only four carriers offered intellectual property defense coverage, the most traditional protection. Today, more carriers offer their own versions of specialized intellectual property protections ranging from basic trademark and copyright infringement allowances to full worldwide coverage for cyber-liability.

1. Media Liability Coverage and Errors and Omissions Policy

Media Liability Coverage (MLC), also called an Errors and Omissions policy, is basically a professional liability policy tailored for creative works as well as for the advertising of those works, representing a volatile niche market and a costly, though sometimes invaluable, investment.[123] These policies defend against causes of action arising out of the insured's broadly defined media activities, and risk-specific coverage can be tailored for particular companies.[124] MLC policies are especially useful for those companies whose business is advertising, broadcasting, publishing or telecasting, as these policyholders are excluded from advertising injury coverage under the 1998 and 2001 CGL.

There is not a standard form for an MLC policy, and while there are similarities among the available policies, there can also be significant differences. Most MLC policies are written on an individualized basis, where the agreement will identify the offenses that are subject to coverage, so it is important to pay close attention to the provisions.[125] They generally

---

121. Betterley, *supra* note 2, at 18.

122. Betterley, *supra* note 2, at 19.

123. Not incredibly costly, however. Errors and omissions policies providing coverage of several millions of dollars can be purchased for under ten thousand dollars, depending on the size of the deductible. Simensky, *supra* note 9, at 328.

124. Michelle W. Tilton & Chad E. Milton, *Insuring Intellectual Property Claims, in* INSURANCE LAW – WHAT EVERY LAWYER & BUSINESSPERSON NEEDS TO KNOW 379, 388-95 (Practising [sic] Law Inst., 1997).

125. *Id.* at 388.

insure against liability for the dissemination of any portion of an insured's creative works, as well as the dissemination of advertising for those works.[126] Media Liability Coverage typically covers liability arising out of copyright and trademark infringement; misappropriation of ideas, titles or other items not covered by copyright; and violation of rights of privacy and publicity; to name some.[127] Most MLC plans pay for expenses from litigation defense, damages awarded to the insured's adversary and settlement payments.[128] This policy is useful for covering trademark, trade name, trade dress, service mark, and copyright infringement and it also can cover unfair competition and infringement of title or slogan relating to copyright and trademarks. [129] However, it is geared toward a narrow market that deals primarily in communication and media.

Media Liability Coverage, like all other insurance policies, has several exclusions that limit the scope of available coverage.[130] For example, like the CGL, an MLC policy does not cover damages caused by the commission of intentional acts. However, an MLC plan does not respond to other basic business claims for bodily injury or property damage that are covered under traditional general policies.[131] These policies do not cover patent infringement, and business owners should be aware they do not function as all-around intellectual property insurance programs.[132]

Typically, MLC language provides that if the policyholder is covered by another policy, then coverage under the MLC is secondary. The current litigious environment of the intellectual property insurance issue has prompted speculation that soon this secondary placement stipulation could lead to disputes between the MLC carrier and the CGL carrier.[133]

2. Internet Liability

The basic CGL does not cover certain industries such as "advertising, broadcasting [or] publishing," and the 2001 CGL also excludes an "Internet search, access, content or service provider" and those whose

126. Simensky, *supra* note 9, at 326.

127. *Id.*

128. *Id.*

129. Tilton, *supra* note 119, at 387-88.

130. Lynda A. Bennett & Jennifer A. Lopez, *Insurance Covers New Wave of Liability: Specialized Policies Address Activity that Traditional Protection May Limit*, N.Y. L.J., June 10, 2002, at S5.

131. *Id.*

132. *See* Simensky, *supra* note 9, at 329. Insurers such as Lloyd's of London provide separate insurance policies covering losses due to patent infringement.

133. *Id.* at 328.

business is "[d]esigning or determining content of websites for others.[134] Although some of the risks associated with e-business are not insurable because they fail to give rise to an insurable interest,[135] the industry is quickly adapting to address the unique issue of trademarks on the internet. Historically, a standard CGL policy or errors and omissions policy could be expected to cover new legal liabilities that arose with the development of business technology. Today, there is considerable exposure, and standard general policies do not come close to providing adequate protection for the immense number of commercial Internet transactions.[136]

The CGL certainly has not been revised sufficiently to meet the needs of most e-commerce companies, even though many Internet disputes arise from traditional causes of action such as trademark or copyright infringement.[137] This has left a need for a niche policy market with tremendous potential for profit. Although many companies have succeeded in utilizing their basic insurance policies for specialized injuries such as those that come with intellectual property, it is not feasible for Internet companies to do the same. Besides the express exclusions for media-related industries in the CGL, there are other factors to consider. For example, the CGL will cover only those injuries that occur within a certain coverage area, which in most policies consists of the United States. Because the Internet is not confined to only the United States, Internet-related policies offer e-businesses worldwide coverage. Also, although some basic brick and mortar companies can survive on a CGL alone, Internet companies cannot rely on an e-commerce policy alone. A cyber-liability risk management policy will not cover the insured for an occurrence at that company's physical point of presence.[138]

Thus, in response to the growing e-commerce market, insurance companies have begun to offer supplemental new e-commerce policies. These policies cover infringement of intellectual property as well as other protections that specific to the Internet.[139] One example is the Internet

---

134. Insurance Services Office, Inc., Commercial General Liability Coverage Form, CG 00 01 10 01 (2000) (Coverage B).

135. Bowers, *supra* note 1, at 93. A spokesperson for the ISO has stated that "[t]his area was so new that we wanted to make it very clear that this was not included in the standard CGL." *Id.*

136. *See id.*

137. Jonathan Bick, *Legal Liability Dictates E-Commerce Insurance*, 169 N.J. L.J. 698 (2002). Again, the purpose of the CGL revisions was rather to discourage providing coverage for cyberliability because of its growth and instability. *Id.*

138. *Id.*

139. *See* Bennett, *supra* note 125.

and Computer Network Security Policy (ICNSP).[140] This policy is designed to protect Internet companies from business liabilities rather than legal difficulties and offers four different types of protection, ranging from confidential disclosure of information to an unauthorized user to funds for protection from liability due to infringement.[141] In sum, while Internet policies are not for every business, they can be very useful in infringement liability coverage depending on the needs of the business.

3. Carrier-Specific Specialized Policies

Each insurer, such as Chubb, Lloyd's of London, or Aon has its own policies with different names but the same basic function. These policies usually provide reimbursement for litigation expenses and damages for which the insured is liable and has paid to a third party arising out of covered litigation. The individualized exclusions of each separate the functions of these specialized policies. Although in 1999 there were only four carriers who provided intellectual property insurance, the numbers have been growing and there are many more players and policies to choose from than there were four years ago.[142]

Although there are distinctions among policies offered by the various carriers, they generally fall into one of three categories, two of which were discussed above: professional (media) liability, cyber-liability, and patent infringement. AIG offers a "Producers Errors and Omissions Insurance" which is directed toward advertising agencies, broadcasters, producers, and publishers.[143] This is basically an MLC policy, which is marketed as protection against "copyright or trademark infringement, libel or slander, invasion of privacy, and unauthorized use of titles, formats, ideas, characters, plots, or other literary or musical materials."[144] Aon, along with offering the traditional Defensive Coverage, also offers two kinds of Value Loss coverage; IP License Revenue Protection, designed to "cover license revenue streams from core [intellectual property]," and Asset Financing Protection, which the company states is for "[w]hen companies need to raise finance using their [intellectual property]/patent portfolio as collateral, this cover protects the finance provider (normally a bank) from invalidity

140. *Id.*
141. *Id.*
142. Betterley, *supra* note 2, at 18.
143. AIG Producers & Omissions Insurance, *at* http://www.aig.com/Common_ProductDB/1,4610,2513,00.html (last visited Sept. 16, 2003).
144. *Id.*

of the patents."[145] Aon also offers Technology Transfer coverage, which deals specifically with intellectual property-related issues arising out of "mergers and acquisitions, licensing contracts, development agreements, [and] IPOs."[146] Swiss Re offers a Telecom, Media and Cyberliabity Policy, as well as an Intellectual Property Policy, although the latter covers only patented material, and contains an express exclusion for non-patented trademarked material.[147] Exclusions and endorsements can be negotiated to specialize many of these policies, and although this area of insurance is rapidly growing, it is still focused on the markets that employ heavy use of their trademarks. As seen by the cases discussed above, though, trademark infringement is a potential problem in any industry, and once the CGL begins to lose its place as infringement insurance, more niche policies will spring up to take its place.

V. CONCLUSION

Once the 1998 version is more widely adjudicated, the business owner will probably find that the courts will give a narrower interpretation to the adjusted language, with definite coverage for certain types of infringement, such as that deemed trade dress, though covering less overall than the 1986 form because of the new, narrower causal nexus requirement. Of course, the 1986 form will eventually become phased out and new interpretations of the 1998 and 2001 forms will most likely leave many businesses looking for specialized coverage to fill in the gaps left by the growing exclusions. As commerce and industry become more complex and specialized, so too will the form of protection necessary to guard our assets.

---

145. Aon Intellectual Property Products, *at* http://www.aon.com/risk_management/intellectual_property/ip_products.jsp (last visited Sept. 16, 2003).

146. *Id.*

147. Swiss Re Telecom, Media, and Internet Service Providers Liability, *at* http://www.swissre.com/INTERNET/pwswpspr.nsf/a2c3aad3ba6ba44bc125699a005d2ba1/781dde73526461b7c1256d1f004a0aa8 (last visited Sept. 16, 2003).

FARM BUREAU MUTUAL INSURANCE COMPANY V. KURTENBACH:[1] CHOOSING THE ROAD LESS TRAVELED IN INTERPRETING MOTOR VEHICLE EXCLUSIONS IN FARM COMPREHENSIVE LIABILITY POLICIES

*Gregory O. Nies**

TABLE OF CONTENTS

---

* Farm Hand, the Harold Thiessen farm of McPherson County, Kansas, 1986-90; B.A., University of Nebraska at Omaha, 1996; J.D. candidate, University of Connecticut School of Law, 2004.The author would like to thank Professor Roger A. McEowen (Kansas State University) and Mr. Robert W. Stites of Farm Bureau Mutual Insurance Company for their guidance in the initial research stage; Professor Tom Baker of the University of Connecticut School of Law and Note Editor Nafija Mujic for their ideas and comments throughout the writing of this work; and the editors and members of the Connecticut Insurance Law Journal for their valuable assistance in bringing the Note to publication. However, the author's greatest debt of gratitude is owed to his wife for her enduring enthusiasm and support. The views expressed in this note are solely those of the author.

1. 961 P.2d 53 (Kan. 1998).

INTRODUCTION

Farm Comprehensive Liability Policies are specialized insurance policies designed to provide protections against risks peculiar to farming activities, and as such generally exclude coverage for motor vehicles designed for and used on roads, such as automobiles, while providing coverage for accidents involving farm equipment, such as tractors. So called dual-use vehicles, those both designed for and used on roads as well as in the field for farming purposes, are much more problematic.[2] In *Farm Bureau Mutual Insurance Co. v. Kurtenbach*, the Kansas Supreme Court ruled that an unregistered but street legal motorcycle used primarily for farm work was not a motor vehicle that could be excluded under a common Farmer Comprehensive Liability Policy.[3]

In *Kurtenbach*, the court examined three issues: first, whether the accident occurred on the insured's premises; second, whether the motorcycle was a motor vehicle subject to registration and thus exempt from insurance coverage; and finally, whether the insured should be awarded attorney fees for defending against a claim initiated by the insurance company.[4] Of these three issues, the courts seem to indicate that the holding regarding the award of attorney's fees was the most significant portion of the case.[5] The authors of legal abstracts and treatises cite to *Kurtenbach* primarily for its expansionist view that a state highway bisecting the insured property constitutes "on premises" for the purposes of liability insurance coverage.[6] Notwithstanding the undoubtedly qualified assessments of *Kurtenbach* by these two groups of legal experts, it is the

---

2. "Where farm implements are excepted from the motor vehicle exclusion, dual use vehicles are problematic." 9 COUCH ON INSURANCE § 127:35 (3d ed. 1997).

3. *Kurtenbach*, 961 P.2d at 61.

4. *Id.* at 54.

5. As of the date of this article, *Kurtenbach* had been cited by eight different courts, including the Kansas Supreme Court in a later decision, an 8th Circuit district court, and five times by 10th Circuit district courts. (Shepard's Reference check via LEXIS on Nov. 18, 2002). Seven of these eight citations referred to the third issue in *Kurtenbach*, namely that attorney fees would be awarded to the insured for defending against a declaratory judgment if the insured prevails. Only the 8th Circuit district court cited *Kurtenbach* for a different issue: Hanson v. North Star Mut. Ins. Co., 71 F. Supp. 2d 1007, 1013 (D.S.D. 1999) (Citing *Kurtenbach* for its holding on the second issue of defining "on premises" with regard to a Farm Comprehensive Liability Policy).

6. *See* 9 COUCH ON INSURANCE, Supplement § 128:32 n. 88 (3d ed. 2002) (*Kurtenbach* is referenced in the section explaining "on premises" exclusions of coverage); 43 AM. JUR. 2D Supplement, *Insurance* § 727 (2002) (One sentence abstract of *Kurtenbach* mentions only the courts holding that "crossing the highway" was on premises).

intent of this article to argue that the most significant--and ultimately dangerous--holding in *Kurtenbach* was neither of these two issues, but rather the Kansas Supreme Court's abandonment of the long established "design" test in favor of a purely subjective "intended use" test when defining off-road vehicles and farm implements exempt from coverage under Farm Comprehensive Liability Policies.

Part one of this Note will provide a brief overview of liability insurance as it relates to farming. The risks and liabilities most commonly associated with farming will be examined as well as a brief look at insurance basics, including an insurance provider's promises to indemnify and defend, limitations to coverage, and principles of policy construction and interpretation. Specific attention will be addressed to the Farm Comprehensive Liability Policy or FCLP, including its general purpose, coverage and limitations.

Part two of the Note will outline the background of the *Kurtenbach* case itself, including the relevant facts, procedural posture, and an objective overview of the court's holding. This section will also examine the unpublished decisions of both the initial Morris County District Court ruling, the Kansas Appellate Court majority ruling, and (especially) the appellate court dissenting opinion.

Part three of the Note will examine the Kansas Supreme Court's departure from the majority rule. After summarizing the majority and minority design-based rules held in other jurisdictions, the Note will briefly review the pre-*Kurtenbach* Kansas precedent, essentially abandoned by the *Kurtenbach* court, which had followed the majority rule.

Finally, part four of the Note will outline and critique the significant changes in insurance law that result from the Kansas Supreme Court's redefinition of a motor vehicle subject to registration, as commonly excluded from coverage under FCLPs. The Note will examine in detail the new rule established in *Kurtenbach* from the perspectives of what it does not hold, what it actually does hold, and most significantly the dangers to which it could lead. In conclusion, the note will argue that the design-based tests used in the majority of other jurisdictions--including Kansas before *Kurtenbach*--are much better suited to aid courts in determining if a motor vehicle should be excluded from coverage under a Farm Comprehensive Liability Policy.

I. LIABILITY INSURANCE AND FARMING

A. Risks and Liabilities in Farming

Farming is an inherently dangerous activity.[7] While great strides have been made in recent years to raise the standards of safety in agricultural production and heighten farmer awareness of safety issues, the physical nature of the occupation as well as its reliance on heavy equipment continue to place it at or near the top of the dangerous occupation lists.[8] In addition to the risks of physical injury, modern agricultural technology, while infinitely beneficial in increasing farming productivity, can also lead to substantial property damage, and even product liability.[9] In our modern litigious society, the significant risks that necessarily follow farming translate into enormous potential liability for the farmer.[10] Aside from exercising common-sense caution, the most effective method for a farmer to mitigate the risk of liability is through the purchase of adequate liability insurance coverage.

B. Liability Insurance Law Basics

---

7. John D. Copeland, *Analysis of the Farmer's Comprehensive Liability Policy*, 24 IND. L. REV. 1451, 1451 (1991).

8. There were 780 agricultural work deaths in 2000, or 22.5 deaths per 100,000 workers, and 130,000 disabling injuries. These disheartening figures earned agriculture the rank of the most dangerous industry in the United States, a position it took from the mining industry in 1998 and has held ever since. NAT'L SAFETY COUNCIL, Injury Facts, 48 (2001).

9. John Copeland, Director of the National Center for Agricultural Law Research and Information (NCALRI), listed the six most common areas of liability for farmers as the following: 1) agrochemicals, 2) injury to visitors, 3) escaping animals, 4) motor vehicle liability, 5) agent liability of employees, and 6) liability towards employees. Copeland, *supra* note 7, at 1451-53. These six areas of liability outlined in Copeland's 1991 article are just as applicable today, however I would add a seventh area of liability that has developed over the last 10 years: GMO (Genetically Modified Organism) liability. A recent report entitled GMO Liability Threats for Farmers, authored by David Moeller of the Farmers Legal Action Group, was written to warn producers of the potential legal risks associated with new biotech crops. Moeller warns that "farmers and seed companies who are responsible for genetically contaminating neighboring fields might be liable for a neighbor's damages based on tort claims of trespass to land, nuisance, negligence or strict liability." *Wrong Side of the Law? Critics: Biotech Crops Could Land You in Court*, PROGRESSIVE FARMER, Feb. 2002 at 12. Moeller also warns that breach of contract claims could be brought against a producer unable to fulfill the terms of his commitment due to cross-contamination. *Id.* Moeller's strongest warning to farmers should put FCLP providers on notice as well: "[Moeller] suggests that growers should closely examine their insurance policies to determine if their insurance covers instances of lost production, contract violations or contamination of non-biotech grain supplies with biotech grains." *Id.*

10. Copeland, *supra* note 7, at 1451.

At the risk of stating the obvious, it must be still be said that life is uncertain and accidents happen.[11] That accidents will occur is certain; when, where, and to whom these unfortunate events will occur provide the uncertainty that insurance law defines as risk.[12] Insurance has been described as nothing more than the transformation or allocation of risk.[13] Insurance companies, through the use of contracts with large groups and armed with actuarial tables to help them make sense of life's uncertainties, provide the service of spreading risk around in order to make it more manageable. In these contracts (insurance policies), the insured provides consideration (a premium) to the insurer in exchange for a series of promises in which the insurer agrees to assume the insured's risks.[14] These contracts include both promises to assume certain risks as well as limitations, or exclusions of coverage for certain risks.

1. Promise to Indemnify

Liability insurance is "primarily concerned" with the insured's legal liability for injuries to third parties.[15] This liability generally extends to two categories of injuries, "Bodily injury" and "Property damage."[16] The insurance company's promise to indemnify essentially means it assumes the insured's duty to reimburse the injured party for the loss sustained, thereby putting the insured in the same position he would have occupied had no loss occurred.[17] In nearly all modern liability policies, this duty to indemnify is conditioned on an "occurrence," which is generally found to be synonymous with an "accident" as liberally defined by the courts.[18] Once an occurrence is triggered, the insurance company is duty bound to

---

11. ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW, 11 (2d ed.1996).

12. *Id.*

13. Copeland, *supra* note 7, at 1454.

14. *Id.*

15. *Id.*

16. JERRY, *supra* note 11, at 440. "Bodily injury" is generally defined in insurance law as "bodily injury, sickness, or disease sustained by any person during the policy period, including death resulting therefrom." Copeland, *supra* note 7, at 1454. "Property damage" has been defined as "physical injury to or destruction of tangible property occurring during the policy period, including loss of property use." *Id. See also,* JERRY, *supra* note 11, at 440-41 (nearly identical definition of "Bodily injury and "Property damage").

17. JERRY, *supra* note 11, at 570.

18. Copeland, *supra* note 7, at 1454. The courts have defined an accident a "a fortuitous event that is neither expected nor intended by the insured." *Id.* at 1454-55. Thus, an occurrence or accident can be either a spontaneous event such as a vehicle collision, or damages sustained over time, such as injuries sustained from agrochemical exposure. *Id.* at 1455. However, an intentional act, such as an assault, would fall outside of general liability policy coverage. *Id.*

indemnify the insured for any loss, not expressly excluded, that occurred within the effective dates of the policy.[19]

Secondarily, the promise to indemnify "obligates the insurer to pay expenses incurred by the insured in any suit the insured defends . . . ."[20] This duty to indemnify the insured for litigation expenses arises when the third party does not include the insurer in the suit filed against the insured.

2. Promise to Defend

The second main promise in a general liability policy binds the insurer with the duty to "defend the insured in any lawsuit brought by a third party alleging liability covered by the policy."[21] Thus, liability insurance has also been called "litigation insurance."[22] This duty to defend is owed "unless the insurer establishes that the facts contained in the lawsuit fall within an applicable policy exclusion."[23] One of the most common of such exclusions is, of course, the motor vehicle exclusion, which was the contentious issue in *Kurtenbach* and the topic of this note.[24] These exceptions demonstrate one of several categories of limitations generally found in liability policies.

3. Limitations on the Duty to Indemnify and Defend

While general liability policies typically contain broad language outlining the insurer's duty to indemnify and defend the insured, they also often contain carefully crafted provisions of limitation.[25] One of the most universal limitations in liability insurance policies is the motor vehicle exclusion. As stated in Couch on Insurance, "[p]olicies of liability insurance, other than motor vehicle liability policies, generally exclude

---

19. *Id.* at 1455.

20. *Id.* This includes costs such as bonds and pre- and post-judgment interest awarded against the insured. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *See infra* Part I.B.3 (Discussing the motor vehicle exclusion at issue in this case more thoroughly).

25. *See* Copeland, *supra* note 7, at 1456. These limitations have been categorized into five areas in which the insurer may not owe a duty to indemnify or defend. First, limitations occur when the insured fails to perform his duty, such as payment of premiums, giving proper notice of an occurrence, or failure to cooperate with the insurance company; second, the policy may identify particular areas of activity not covered by the policy; third, the policy will nearly always contain specific exclusions of coverage; fourth, the policy will outline the time period in which coverage does, and more importantly does not, exist; and fifth, the policy will contain a monetary cap on the amount of damages that would be paid when coverage is found. *Id.*

from coverage liability for damages arising out of the ownership, maintenance, use, loading or unloading of a motorized vehicle."[26] However, Couch adds, "[t]here may be exceptions to this exclusion which have the effect of providing coverage for use of farm implements and the like."[27] With these general principles in mind, it becomes obvious that the interpretation of a policy limitation is crucial; whether an occurrence involving a dual-use vehicle is covered as a farm implement, or excluded as a motor vehicle turns on the interpretation of the motor vehicle limitation provision.

4. Interpretation and Construction of Liability Insurance Policies

Since an insurance policy is a contract, interpretation of a policy is the process by which the meaning of the language used by the parties who entered into the contract is determined.[28] However, as one distinguished insurance law scholar has pointed out, it is crucial to remember that it is the courts who do the interpreting.[29] Therefore, the more accurate definition of interpretation would be, "the process by which a court determines the meaning it will give the language used by the parties in a contract."[30]

Courts strive for uniformity and objectivity in their adjudication of insurance disputes, and the primary way in which they reach this goal, to the extent that they do, is through the utilization of standard rules of interpretation. These rules of construction and interpretation of policy provisions in insurance law, while many, are well developed.[31] In some

---

26. COUCH, *supra* note 2, § 127, at 33.

27. *Id.*

28. *See* JERRY, *supra* note 11, at 125-26.

29. *See id.* at 126.

30. *Id.*

31. The rules of construction for insurance provisions, like the general canons of construction for statutes, have been phrased several different ways depending on the treatise in which they appear. The general themes are, however, the same. The following ten rules of construction for insurance provisions are representative of the rules in general: 1) As with any contract, the insurance agreement must be enforced according to its terms; 2) Insurance policies are to be construed in their entirety, and no greater significance shall be given to any single provision of the policy; 3) All insurance policies must be interpreted according to the purposes and hazards against which the policy was designed to protect; 4) It is the obligation of the insurer to clearly define in explicit terms any limitations or exclusions to coverage expressed in the contract; 5) In interpreting insurance contracts, the words of the policy must be measured by the reasonable expectations of the insured; 6) Any ambiguities in the contract must be construed in favor of the insured; 7) Language is ambiguous when the language is susceptible to two or more meanings by a reasonably prudent person; 8) If contractual language is ambiguous, extrinsic evidence may be used to show the intention of the parties; 9) Plain and unambiguous language contained in the contract must be given its fair and natural meaning; 10) Parole evidence is inadmissible to contradict, supplement, or

jurisdictions, the rules have been codified into the general statutes.[32] When taken as a whole, these rules of construction yield one undeniable principle: in disputes over coverage, the vast majority of the rules favor the insured.[33]

The various jurisdictions have interpreted certain broad principles and resolved common questions in such a consistent manner that legal treatises are able to state with some degree of accuracy the "general rule" pertaining to certain issues. For example, aided by common language used throughout the insurance industry, the treatises are able to state that in liability policies, "it may be said that a motorcycle is not an 'automobile,' [b]ut a motorcycle generally is considered to be a motor vehicle . . . ."[34] This rule was stated even more forcefully by Couch, who concluded in a section entitled "What Constitutes Vehicle Within Exclusion," that ". . . a motorcycle, or motor scooter, is clearly a vehicle."[35]

C. The Farm Comprehensive Liability Policy (FCLP)

1. Definition, Purpose and Interpretation of FCLPs

Farm Comprehensive Liability Policies have been described as "essentially homeowners' policies tailored to the special needs and requirements of persons who live in rural areas and engage in those activities of a generally agriculture nature which are normally carried out in such areas."[36] The Farm Comprehensive Liability Policy, or FCLP, is the most common form of liability policy used by farmers and ranchers today.[37] It is designed to meet the specific needs of farmers, and therefore "includes a combination of coverages including comprehensive personal liability, employers liability, and use of powered equipment."[38] This combination of coverage and limitations tailored to "persons who live in rural areas and engage in agricultural and like activities" make the FCLP unique from the standard homeowners policy.[39]

---

vary a written contract that is clear, and explicit and contains no ambiguities. Copeland, *supra* note 7, at 1456-57.*See also*, JERRY, *supra* note 11, at 133-34.

32. See N.D. CENT. CODE § 9-07-01 to 9-07-18 (2003) (North Dakota codified 18 general rules of construction in Title Nine, Contracts and Obligations, Chapter 9-07, Interpretation of a Contract, in the North Dakota Century Code).

33. Copeland, *supra* note 7, at 1456.

34. 7 AM. JUR. 2D *Automobile Insurance* § 201 (1997).

35. COUCH, *supra* note 2, § 127, at 34.

36. Jane Draper, Annotation, *Farmowners Liability Insurance Rights and Coverage*, 93 A.L.R. 3D 472 § 2 (1979).

37. Copeland, *supra* note 7, at 1453.

38. *Id.*

39. COUCH, *supra* note 2, § 128, at 31.

Notwithstanding the unique features of a FCLP, they are "subject to the same rules, regulations, limitations, and court interpretations as any other liability policy."[40]

Although the FCLPs are "designed specifically for the protection of farmers . . . . [t]he rules governing the construction and interpretation of insurance contracts generally apply to such policies."[41] As such, the general cannons of construction designed to provide objective and consistent interpretation of contracts apply to the provisions in a FCLP outlining both coverage and limitations.[42]

2. Coverage of a FCLP

A Farm Comprehensive Liability Policy, like liability policies in general, state their coverage in quite broad terms while meticulously crafting specific limitations. However, there are three main areas of coverage that are usually described in detail within most FCLPs; persons covered, activities covered, and premises covered.

Generally, a FCLP covers the "insured," a group made up of the "named insured" and any listed "additional insured's."[43] Thus "the insurer owes both the named insured and the additional insured's the duties of indemnification and defense."[44] The FCLP protects any valid insured from liability to a third party unless the occurrence involves a loss falling under an exclusion.

The activities for which coverage is generally provided under a FCLP is, not surprisingly, farming activities.[45] While it sounds simplistic, the courts have had many opportunities to try and interpret just exactly what farming activities do--and do not--include. Courts stuck with the task of providing a definition for "farming" have looked to everything from Webster's Dictionary to other areas of law such as agricultural zoning and tax cases.[46]

---

40. Copeland, *supra* note 7, at 1454.

41. 43 AM. JUR. 2D *Insurance* § 727 (1982).

42. *See supra* note 32.

43. Copeland, *supra* note 7, at 1457.These labels are terms of art subject to definitions within the policy itself. However, in general, the "insured" are any of those persons whose "loss triggers the insurers duty to pay," the "named insured" is the person "specifically designated as an insured under the policy," and "additional insured" are those classes of people who have some relationship to the named insured, such as family members, employees or even partners and joint ventures if so provided. *Id.*

44. *Id.*

45. *Id.* at 1463.

46. *Id.*

The most contentious area of coverage, however, has been the "insured premises" provisions. Generally, the FCLP "extends coverage to liability arising from the ownership, use, or maintenance of the 'farm premises.'"[47] The FCLPs usually attempt to define and describe the covered premises in the policy itself. In addition to the described premises, if expansive language is used, such as "adjoining ways," the interpretation of the policies coverage is complicated, and the facts surrounding the particular case increase in importance.[48] Notwithstanding the importance of the individual case facts, as a general rule public streets or highways are "off premises," even if the "public street bisects the insured's property."[49] However, extremely expansive language, such as "premises used by the insured in connection with the insureds' residence" has been interpreted to extend on premises coverage to otherwise undescribed premises.[50]

3. Limitations of FCLPs

It is an established principle that "[a]n insurer has the right to limit its liability and impose conditions and restrictions upon its contractual obligation not inconsistent with public policy."[51] FCLPs usually have specific limitations to the three coverages outlined above, as well as several additional express limitations and coverage exclusions. Of the limitations to the three specific coverages, the most common include the household exclusion,[52] the business pursuits exclusion,[53] and most relevant to this note, the "off premises" exclusion.

---

47. *Id.* at 1468.

48. *Id.* at 1469.

49. COUCH, *supra* note 2, § 127, at 37. Note that the holding in *Kurtenbach* is directly contrary to this general insurance law principle.

50. *Id.*

51. 43 AM. JUR. 2D *Insurance* § 461 (1982).

52. Common limitations to the persons covered include the household exclusion and employee exclusions. In order to prevent collusive lawsuits, FCLPs typically exclude family members or household members from making a claim against the insured. Likewise, while FCLPs protect the insured from claims by third parties stemming from the negligent acts of employees, these same employees are generally not protected from injuries caused by the insured employer. However, an employee endorsement providing such coverage can usually be added--in exchange for an increased premium. Copeland, *supra* note 7, at 1458-60.

53. While FCLPs cover liability for injuries arising out of farming activities, they generally exclude coverage from "business pursuits" not considered to be farm related. *Id.* at 1463. The so-called business pursuits exclusion is not easily defined, and often business activities such as renting out farmland for recreational pursuits are difficult to distinguish from farming activities. *Id.* at 1464. In such instances, the courts often apply a two-prong test and inquire whether or not the activity is 1) motivated by profit, and 2) contains evidence of continuous activity. *Id.* The business pursuit exclusion is made even more

Off premises limitations generally fall into two categories: "undescribed premises" and "away from premises" exclusions. First, FCLPs "exclude from coverage any liability arising out of premises owned, rented or controlled by the insured if those premises are not listed in the policy declaration."[54] Secondly, the much more complicated "away from premises" exclusion excludes coverage for "bodily injuries or property damage from the use of automobiles or other mechanical devises" that "occur away from the insured premises."[55]

In addition to the limitations corresponding to the areas of listed coverage, FCLPs generally have several other specific exclusions, including either limitation of coverage or out right exclusion of coverage for liability stemming from pollution,[56] products liability,[57] items in care/custody/control of another,[58] and, of course, motor vehicle accidents.

The motor vehicle exclusion--the issue that is at the heart of *Kurtenbach*—has been described by Professor John Copeland, the Director of the National Center for Agricultural Law Research and Information (NCALRI) as follows: "The FCLP is not designed to provide coverage for bodily injury and property damage arising out of the ownership, maintenance, or use of motor vehicles including loading and unloading of trailers and semi trailers. Instead, coverage for such events must be

---

complicated by the fact that it is subject to an incidental no business pursuit exception. Certain pursuits, such as the operation of a roadside produce stand, are exempt from the business pursuit exclusion because they are incident to the covered farming activity. *Id.* at 1466. Custom Farming (the use of one's own farm machinery in the farming operations of another for pay), however, is generally considered a separate business pursuit and is therefore not covered under an FCLP unless a separate endorsement is added and additional premiums are paid. *Id.* at 1467.

54. *Id.* at 1469.

55. *Id.* at 1470.

56. While older FCLPs may not contain any reference to pollution liability coverage or exclusion, newer policies either provide severely limited coverage or absolute exclusion of coverage. Today, many farmers have the option of obtaining a separate endorsement to their FCLP to provide for limited coverage of pollution liability. *Id.* at 1480-81.

57. FCLPs usually contain "products liability and warranty exclusions." *Id.* at 1482. Therefore, farmers should be aware that their coverage for liability "ends the moment their product leaves the farm premises." *Id.* This exclusion could be especially troubling for those producers found liable for selling grain products "contaminated" with GMOs. *See supra*, note 9.

58. The "standard FCLP excludes coverage for property or persons in the care or custody and control of the insured." Copeland, *supra* note 7, at 1483. The exclusion of "persons" under care of the insured is essentially the same limitation as the household exclusion to persons covered. The property coverage exclusion for those tangible items left in the care, custody or control of the insured would exclude that insured from coverage for his liability should he cause the loss of the item he was entrusted with. *Id.*

obtained via an automobile liability policy."[59] In what could be considered a prophetic abstract of *Kurtenbach*, Professor Copeland wrote the following summery of motor vehicle exclusions in FCLPs five years before the *Kurtenbach* claim was filed:

> Farm tractors, trailers, implements, or vehicles in use on the farm not subject to motor vehicle registration, or any other equipment designed for use principally off public roads, are not excluded from coverage. As a result, litigation frequently arises as to whether the particular piece of machinery is subject to motor vehicle registration. If it is subject to motor vehicle registration, it falls under the motor vehicle definition and is excluded from coverage.[60]

This then is the dilemma of the farmer: is my dual-use vehicle an exempt farm implement/off-road vehicle, or is it a "motor vehicle" subject to registration? Couch states that "[f]arm vehicles are generally not characterized as an automobile for purposes of coverage under an automobile liability policy . . . ."[61] Professor Copeland states that coverage for motor vehicles "must be obtained via an automobile policy."[62] Therefore, categorizing the vehicle and choosing the right insurance policy is absolutely crucial for obtaining any liability coverage at all. Unfortunately, selecting the one "correct" insurance policy may not be quite as simple as one may think--at least not in Kansas. Farmers do not want to purchase the more expensive automobile insurance policy to cover a vehicle if they can obtain liability coverage without it. This brings us to *Kurtenbach.*

II. BACKGROUND: *FARM BUREAU MUT. INS. CO. v. KURTENBACH*

A. Facts

Prior to the occurrence that prompted the action, Farm Bureau Mutual Insurance Company issued the defendants, Glenn and Barbara Kurtenbach,

---

59. *Id.* at 1485.
60. *Id.*
61. COUCH, *supra* note 2, § 127, at 35.
62. Copeland, *supra* note 7, at 1485; *see infra* text accompanying note 59.

a "Farm Master insurance policy."[63] On July 20, 1992, the Kurtenbach's son, Scott, was involved in an accident when the motorcycle he was driving collided with an automobile driven by Lyle Nelson.[64] The accident occurred when Scott, along with passenger Christopher Speltz, attempted to cross U.S. Highway 56.[65] The Kurtenbachs owned or rented land on both sides of Highway 56, and Glenn Kurtenbach argued that "it was a necessary part of farming operations to drive the motorcycle across the highway to access that part of his farm on the other side."[66] The Kansas Supreme Court concluded "Scott was using the motorcycle in farming operations at the time of the accident."[67]

The motorcycle involved in the accident was a 1978 Yamaha DT 175 dirt and trail bike, equipped with headlights, a speedometer, a brake light, turn indicators, one mirror, a muffler, front and back fenders, a tachometer and a horn, "although the horn did not work."[68] The motorcycle was purchased in 1979 by the Kurtenbachs for farm use, and had never been licensed or registered.[69] In his deposition, Glenn Kurtenbach stated that the motorcycle was used "primarily for farm purposes although he would sometimes ride the motorcycle on his property to 'have fun with it' or to go fishing."[70] The defendants also admitted that Scott had "ridden the motorcycle on the township road west of his parents' house approximately 10 to 15 times."[71]

The insurance policy the defendants purchased from Farm Bureau was a "comprehensive general liability policy insuring the Kurtenbach's farm, including their dwelling and 805 acres."[72] The policy expressly excluded from coverage: "1. Bodily injury or property damage arising out of the ownership, maintenance or use of: . . .. b. motorized vehicles or watercraft owned or operated by or rented to an insured person, except as provided under Incidental Liability and Medical Coverages."[73] Thus, the Kansas Supreme Court concluded that the "dispute in this case center[ed] upon the

63. *Kurtenbach*, 961 P.2d at 55.A "Farm Master" policy is another common term for a FCLP.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Kurtenbach*, 961 P.2d at 55.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*

incidental coverage provisions of the Farm Master Policy." [74] The Farm Bureau policy provided incidental motorized vehicle coverage under three general circumstances: vehicles not subject to registration where the incident occurs on the insured's premises; incidents occurring anywhere with golf carts or trailers; or incidents involving motor vehicles designed exclusively for off road use.[75]

B. Procedural Posture

1. Morris County District Court

a. Plaintiff's Request for Declaratory Judgment

Farm Bureau Mutual Insurance Company initiated legal proceedings in the *Kurtenbach* case when it filed a declaratory judgment with the Morris County District Court.[76] In an unpublished decision dated July 26, 1995, Judge Larry E. Bengtson ruled against Farm Bureau and in favor of the defendants, finding the Farm Master Policy did provide coverage for the motorcycle accident.[77] The defendants filed a motion for attorney fees and expenses, reviewed below.[78]

b. Defendant's Motion for Attorney Fees and Expenses

In the decision regarding the award of attorney fees, the court first reviewed its use of the "reasonable expectations" test in interpreting ambiguous policy language, and its determination that Farm Master Policy covered the accident involving farm equipment, which it ruled occurred off

---

74. *Id.*

75. *Kurtenbach*, 961 P.2d at 55.The policy provided as follows:

> 2. INCIDENTAL MOTORIZED VEHICLE COVERAGE. We pay for bodily injury or property damage which:
>
> a. occurs on the insured premises and results from the ownership, maintenance, use, loading or unloading of:
>
> (1) Motorized Vehicles not subject to motor vehicle registration because of their type or use; or
>
> (2) Recreational Motor Vehicles;
>
> b. occurs anywhere and results from:
>
> (1) golf carts being used for golfing purposes;
>
> (2) utility, boat , camping trailers except when the trailer is carried on, towed by or attached to a motor vehicle or recreational motor vehicle owned by the insured;
>
> c. motorized vehicles designed exclusively for use off public roads and used – principally to service the insured premises. *Id.*

76. *Id.* at 54.

77. Farm Bureau Mut. Ins. Co. v. Kurtenbach, No. 94 C 28, slip op. at 281 (Kan. Dist. Ct. Dec. 4, 1995).

78. *Id.*

the farm premises.[79] The court determined that the test, which asks how the reasonable person could have expected the motorcycle to be operated, was the correct standard to apply.[80] Applying the test, it found, as a matter of fact, that "a reasonable person could surely foresee the crossing of a public highway with farm equipment when such highway bisects the insured's farm."[81] It further stated that "[i]t would be unreasonable to require the equipment to be trailered across the highway."[82]

In the second part of the case, the court reviewed and affirmed the three independent factors it originally used to determine the motorcycle was indeed farm equipment.[83] First, the court ruled that "[t]he motorcycle was not required to be registered with the State of Kansas, as the vehicle was not used on public roads and met the statutory definition of a farm vehicle."[84] Second, the court noted that "[n]inety-eight percent of the use of the motorcycle was strictly confined to farming," and that "[a] reasonable person could foresee the use of farm equipment capable of transporting a person to be used for such transportation . . . ."[85] It concluded that to find otherwise would be to place the undue burden on the insured to carry "two separate insurance policies on each and every farm vehicle."[86]

The court further supported its position that the motorcycle was farm equipment with precedent from other jurisdictions, which also relied on the "reasonable expectations" test.[87] The court reasoned that the language of the policy should be considered ambiguous, and "numerous authorities . . . state [that] in insurance contracts when the language is unclear it can be construed by its plain meaning and in favor of the insured."[88] The court ruled that the policy's language extending coverage to "all necessary operations" of farming, including vehicles used "principally to service the

---

79. *Id.* The court did not state its reasoning for reaching the conclusion that the policy language was ambiguous.

80. *See id.*

81. *Id.*

82. *Id.*

83. *Kurtenbach*, No. 94 C 28, slip op. at 282.

84. *Id.* Note that no explanations were given by the court as to how it arrived at the conclusion that the motorcycle "met the statutory definition of a farm vehicle." *Id.* at 145.*See infra* KAN. STAT. ANN. § 8-126(cc) (2002) at note 150.

85. *Kurtenbach*, No. 94 C 28, slip op. at 282.

86. *Id.* In addressing an argument made by the plaintiff, the court noted that to classify all vehicles manufactured with signal lights as automobiles "would necessitate that tractors also be defined as automobiles under briefed arguments . . .." *Id.* at 282-83.

87. *Id.* at 283.The court relied primarily upon Utah Farm Bureau v. Andrews, 665 P.2d 1308 (Utah 1983).*Id.*

88. *Id.*

insured's premises" would result in coverage since they ruled the motorcycle was farm equipment, and "crossing the highway" is necessary to farming.[89]

The third issue the court addressed was whether the defendant was entitled to recover attorney fees pursuant to Kansas Statutes, or if Farm Bureau's denial of the claim was "based upon a legitimate issue of dispute."[90] The court, again, used the "reasonable or ordinary person" standard to interpret the "ambiguities of language" in the policy in favor of the insured.[91] The court concluded that it would be unreasonable to interpret the policy language in a manner that would place actions made pursuant to it outside the reach of K.S.A. 40-256, and consequently awarded attorney fees.[92] The court granted judgment against the plaintiff, and awarded the defendant $2,550 plus interest under the policy, as well as $436.10 in costs.[93]

2. Kansas Court Of Appeals

a. Majority Holding

Farm Bureau appealed both the district court's determination in the declaratory judgment action that the policy provided coverage for the accident, and the lower courts decision to award attorney fees to the defendants.[94] The three-member panel of the Kansas Appellate Court

---

89. *Id.* at 284. The court's decision was based upon its interpretation of section 2.c of the Farm Master policy, Incidental Motorized Vehicle Coverage, which states: "We pay for bodily injury or property damage which: c. motorized vehicles designed exclusively for use off public roads and used principally to service the insured premises." Farm Bureau Mut. Ins. Co. v. Kurtenbach, 961 P.2d 53, 55 (Kan. 1998). Note that language such as "results from" is missing from the beginning of part c. Perhaps the provision would not have been declared ambiguous by the court if it would have read: "We pay for... damage which: *results from* motorized vehicles..." *Id.* *See supra* note 75 for the policy language of the full Incidental Motorized Vehicle Coverage section.

90. *Kurtenbach*, No. 94 C 28, slip op. at 284.

91. *Id.* at 285.

92. *Id.* KAN. STAT. ANN. § 40-256 (2002) states in relevant part:

> all actions hereafter commenced, in which judgment is rendered against any insurance company . . . if it appear from the evidence that such company . . . has refused without just cause or excuse to pay the full amount of such loss, the court in rendering such judgment shall allow the plaintiff a reasonable sum as an attorney's fee for services in such action . . ..

Id.

93. *Kurtenbach*, No. 94 C 28, slip op. at 287.

94. The Notice of Appeal was filed by Farm Bureau Insurance Co., Inc. on Dec. 27, 1995.KANSAS APPELLATE COURTS, CLERK OF THE APPELLATE COURTS – CASE SEARCH RESULTS, Case Number 75674, *available at*

affirmed the lower court ruling on both issues in its majority decision with one judge dissenting.[95] In its written but unpublished opinion, the facts the Appellate Court recounted were essentially the same as the facts presented in the published Kansas Supreme Court decision presented above, with the exception that the Appellate Court quantified the motorcycle's non-farm use as "1 to 2% of the time."[96]

The unpublished appellate decision does, however, provide a much more detailed account of the procedural posture of the case up to its appeal than is provided in the Supreme Court decision. According to the appellate court, *Kurtenbach* began when Nelson, the driver of the automobile hit by the motorcycle, brought suit against the Kurtenbachs for damages resulting from the accident.[97] The Kurtenbachs asked Farm Bureau to defend pursuant to their Farm Master insurance policy.[98] Farm Bureau refused to defend, and instead filed a declaratory judgment claim against the Kurtenbachs, Nelson, and Scott's passenger Speltz.[99] At this point, Nelson's insurance company, Metropolitan Property & Casualty, also stepped into the proceedings since it provided uninsured motorist coverage for Nelson.[100]

Both parties, Farm Bureau as plaintiff and the Kurtenbachs, *et al.*, as defendants, filed motions of summary judgment in the declaratory judgment action.[101] The Morris County District Judge ruled in favor of the defendant's summary judgment, and the Kurtenbach's filed the motion for payment of attorney fees (reviewed above), which the court also granted.[102]

The Appellate court affirmed the lower courts determination that coverage applied, and that attorney fees should be awarded, but for differing reasons on both accounts.[103] In reviewing the district court's ruling, the Kansas Appellate Court majority looked at three issues: whether the accident occurred on "insured premises," whether the motorcycle was

---

http://judicial.kscourts.org:7780/pls/coa/CLERKS_OFFICE.list_case (last visited Sept. 2, 2003).

95. The panel included Chief Justice Brazil, who wrote the majority opinion, Justice Lewis, and District Judge John Anderson III. Justice Lewis wrote a separate dissenting opinion. Farm Bureau Mut. Ins. Co. v. Kurtenbach, No. 75,674, slip op. at 1 (Kan. App. Ct. Sept. 12, 1997).

96. *Id.* at 2.

97. *Id.* at 3.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Kurtenbach*, No. 75,674, slip op. at 3.

102. *Id.*

103. *Id.* at 3, 5, 10, 12-13, 15.

subject to vehicle registration, and whether attorney's fees should be awarded.[104]

In the first issue addressed, the Appellate Court determined that while the policy provision addressed by the lower court may have been ambiguous, any lack of clarity was irrelevant since coverage could clearly be found under another provision.[105] However, this provision, while not "ambiguous," still required the court to decide if the accident occurred "on the insured premises."[106] The Appellate court found the lower court did not err in ruling that the accident occurred on the insured premises as defined by the policy.[107]

The new section of the policy under which the Appellate court found coverage also required the court to find that the motorcycle was "not subject to motor vehicle registration because of [its] type or use."[108] The Appellate court again affirmed the lower court's ruling that, based on use, the motorcycle was an implement of husbandry and therefore not subject to registration.[109]

In the third and final issue, the Appellate court questioned the trial court's finding that K.S.A. 40-256 required the insurance company to pay costs for its refusal "without just cause" to pay the claim.[110] The appellate court concluded that the "unusual facts of this case and the complexity of

---

104. *Id.* at 4-13.

105. *Id.* at 9.The appellate court found coverage should have been found under section 2.a(1) of the "Incidental Motorized Vehicle Coverage" section, which states: "We pay for bodily injury or property damage which: a. occurs on the insured premises and results from the ownership, maintenance, use, loading, or unloading of: (1) Motorized Vehicles not subject to motor vehicle registration because of their type or use . . . ." *Id.* at 4.

106. *Id.* at 6.

107. *Kurtenbach*, No. 75,674, slip op. at 9.

108. *Id.*

109. *Id.* at 13.Addressing the appellate briefs of both parties on this issue, the court found that the Kansas statutes defining the registration exemption of implements of husbandry, while limited to vehicles designed "exclusively for agricultural operations" provided for "incidental" operation on highways. *Id.* at 11. Farm Bureau argued that "exclusively" for agricultural use meant 100% and thus precluded the motorcycle used for non-farm use 2% of the time. *Id.* at 11-12. However, the court found this strict interpretation of the statute to be "unreasonable or absurd" and therefore incorrect. *Id.* at 12 (quoting Todd v. Kelly, 251 Kan. 512, 520, 837 P.2d 381 (1992)).

110. *Id.* at 14.KAN. STAT. ANN. § 40-256 (2002) states in relevant part:

> That in all actions hereafter commenced, in which judgment is rendered against any insurance company . . . if it appear from the evidence that such company . . . has refused without just cause or excuse to pay the full amount of such loss, the court in rendering such judgment shall allow the plaintiff a reasonable sum as an attorney's fee . . .

Id. at 13.

the legal issues raised" made it clear that a bona fide legal controversy did exist.[111] Thus, the court stated, "we conclude that a reasonable person would disagree with the trial court's determination that just cause did not exist. The trial court abused its discretion in awarding attorney fees pursuant to K.S.A. 40-256."[112] Rather, the Appellate court determined that the proper test to apply was the *Upland* rule, which requires the insurance company to pay to the insured all reasonable expenses incurred at the company's request.[113] The Appellate court then concluded that because the courts determined the policy did provide coverage, and "Farm Bureau had a duty to defend, under the *Upland* rule, the Kurtenbachs [were] entitled to recover their attorney fees and expenses incurred in defense of the declaratory judgment action."[114] The Appellate court also tacked on the appellate case attorney fees to Farm Bureau's bill pursuant to Kansas Supreme Court rules.[115]

b. Dissent

Judge Lewis wrote a dissent in which he stated that he could not agree with the majority's decision to find coverage under section 2.a of the policy, and that he would have remanded the matter back to the trial court for a factual determination concerning the use and design of the motorcycle.[116] While he agreed with the majority's determination that the highway, which bisected the insured's land, was "insured premises," he disagreed that the motorcycle, "which was equipped to be street legal and which was operated on the public highways" was "'not subject to motor vehicle registration.'"[117]

Judge Lewis first determined that there was "at the very least, a material question of fact" as to whether the motorcycle was truly exempt from registration.[118] He applied two tests, design and use, and concluded that the motorcycle failed to escape statutory registration requirements under both.[119] The motorcycle contained all the equipment required by Kansas statute to be "street legal," and the Kurtenbachs themselves had conceded in their appellate brief that they used the motorcycle on the

111. *Id.* at 15.
112. *Id.*
113. *Kurtenbach*, No. 75,674, slip op. at 15-16.For the *Upland* rule, see Upland Mut. Ins., Inc. v. Noel, 519 P.2d 737 (Kan. 1974).
114. *Kurtenbach*, No. 75,674, slip op. at 18 (citations omitted).
115. *Id.* at 18-19.*See* Kansas Supreme Court Rule 7.07 (KAN. CT. R. ANN., 45 (1996)).
116. *Kurtenbach*, No. 75,674, slip op. dissent at 1.
117. *Id.* at 2 (dissent).
118. *Id.* at 3 (dissent).
119. *Id.*

public roads 10 times "'give or take.'"[120] Judge Lewis believed the courts ruling in *Kresyman v. State Farm Mutual. Automobile Insurance. Co.* was dispositive of the issue, and required the court to find any motorcycle driven on a highway must be registered.[121]

Judge Lewis next turned his attention to the majority's finding that the motorcycle was an "implement of husbandry" under Kansas statutes and was therefore qualified for an agricultural registration exemption.[122] Judge Lewis concluded that the "court has no business saying that a 98% use is close enough to qualify as an 'exclusively agricultural use" as required by statute.[123] Judge Lewis preferred the strict dictionary definition of "exclusively" that did not allow for exception, and noted that while 98% farm use may be "close enough for government work," it would be the "first step down a very steep hill which will lead to confusion."[124] Judge Lewis concluded: "[i]n my judgment, the majority decision creates a dangerous precedent insofar as the registration statutes of this state are concerned. It holds that a street legal motorcycle may be an 'implement of husbandry' and that it may be used on the highways of this state for fun and fishing purposes without being registered as required by law."[125]

3. Kansas Supreme Court

Eight days after the Appellate court denied its Motion for Rehearing in October of 1997, Farm Bureau filed a Petition for Review with the Kansas Supreme Court.[126] The highest Kansas court granted review of *Kurtenbach* on December 30, 1997.[127] After reviewing "the Court of Appeals' decision affirming the decision of the trial court that coverage existed and also affirming the trial court's award of attorney fees and expenses," the

120. *Id.*

121. *Id.* at 4-6 (dissent).Kresyman v. State Farm Mut. Auto Ins. Co., 623 P.2d 524 (Kan. 1981) (a mini-bike was required to be registered because it was operated on a highway).

122. *Kurtenbach*, No. 75,674, slip op. dissent at 6.

123. *Id.* at 7-8 (dissent).

124. *Id.* at 7 (dissent). Judge Lewis elaborated on his slippery-slope argument by wondering about "vehicles that are used for agricultural purposes 97% of the time, or 90%, 80%, 55%?" *Id.*

125. *Id.* at 9-10 (dissent).

126. Petition for Review was filed by Farm Bureau Insurance Co., Inc. on Oct. 14, 1997.KANSAS APPELLATE COURTS, CLERK OF THE APPELLATE COURTS – CASE SEARCH RESULTS, Case Number 75674, *available at* http://judicial.kscourts.org:7780/pls/coa/CLERKS_OFFICE.list_case (last visited Sept. 3, 2003).

127. Farm Bureau Mut. Ins. Co. v. Kurtenbach, No. 95-75674-AS, 1997 Kan. LEXIS 198, at *1 (Kan. Dec. 30, 1997).

Kansas Supreme Court affirmed the judgment of the Court of Appeals "as modified."[128]

C. Review of Kansas Supreme Court Holding

The Kansas Supreme Court recognized two questions in Kurtenbach: first, did the Farm Bureau policy provide coverage for the accident, and second, should the insurance company pay attorney fees?[129] The court declared their power of review in both questions to be "unlimited," and noted that they were "not bound by the prior determinations of the trial court and Court of Appeals."[130] The court determined the question of coverage presented two separate issues: first, did the accident occur on the insured premises, and second, was the vehicle involved a "motor vehicle" subject to registration.[131] These issues, along with the question of who must pay the attorney fees, comprise the three specific issues the Kansas Supreme Court addressed in their holding.

1. The Accident Occurred on the Premises

The Kansas Supreme Court rejected the trial court's assertion that the incidental coverage provisions of the policy were "ambiguous," even though it recognized language "such as 'results from'" was clearly missing from section 2.c. of the policy.[132] Instead, the court adopted the reasoning of the Court of Appeals and found coverage under section 2.a. of the policy, which extended coverage to vehicles not subject to registration if the accident occurred on the insured premises.[133] The court embraced the Appellate Court's reasoning on the premises issue nearly verbatim, directly quoting nine paragraphs from the Court of Appeal's decision including one carefully selected paragraph from the dissent.[134]

The Kansas Supreme Court agreed with the Appellate Court that the policy language itself mandated an expansive interpretation of "insured premises."[135] The Kurtenbach's policy defined "insured premises" as "the farming premises which you own, rent or operate . . ." and it further defined farming as "the maintenance or use of premises for the production of crops or the raising or care of livestock, *including all necessary*

128. *Kurtenbach*, 961 P.2d at 54.

129. *Id.* at 54.

130. *Id.* at 55.In declaring their standard of review to be plenary, the Kansas Supreme Court cited as precedent Gillespie v. Seymour, 823 P.2d 782 (Kan. 1991). *Id.*

131. *Id.* at 56.

132. *Id. See supra* accompanying text at note 89.

133. *Id.* at 56. *See supra,* note 105.

134. *Kurtenbach*, 961 P.2d at 56.

135. *Id.* at 56-57.

operations."[136] The Kansas Supreme Court noted that both lower courts accepted the defendant's argument that driving the motorcycle across the highway was a necessary part of farming.[137]

The court further agreed with the Appellate Court's reasoning that the policy's expansive definition of insured premises and the specific facts of the case distinguished it from the two cases raised by Farm Bureau, which both held nearby roads were *not* part of the "insured premises."[138] The court distinguished *Shatoska v. Widdon*,[139] which held that coverage limited to "any premises used by the insured in connection with the insured premises" did not include a service road that led to the insured premises by stating it contained policy language much more restrictive than in Kurtenbach's policy.[140]

Likewise, the court also distinguished *Farm Bureau Mutual Insurance. Co. v. Sandbulte*,[141] which held that "in the insured premises or ways immediately adjoining" did not include a road which was used to travel from one tract of land to another.[142] The *Kurtenbach* court, applying the "reasonable expectation test" as advocated by the lower courts, was quick to draw the distinction that traveling *on* the highways as in *Sandbulte*, would be to "utiliz[e] a public road as much as any registered, licensed vehicle," and therefore a reasonable person could not expect a FCLP to intend "insured premises" be extended to all roads which an insured may use to access his land.[143] However, to merely *"cross"* the highway, as in *Kurtenbach*, was a necessary part of the farming "operation" and therefore it was "reasonable for them to assume coverage under section 2.a.(1)."[144] In holding that the motorcycle accident that occurred on Highway 56 was within the "insured premises" as defined in the incidental coverage section of the insurance policy, the court noted that "[a]s a general rule, coverage clauses are interpreted broadly to afford the greatest possible protection to the insured."[145] As a final justification, the court also pointed out that even the dissenting judge in the lower Appellate Court ruling agreed that the accident occurred on the insured premises.[146]

---

136. *Id.* at 56 (emphasis added by Davis, J.).
137. *Id.*
138. *Id.* at 56-57.
139. 468 So.2d 1314, 1317-18 (La. App. 1985).
140. *Kurtenbach*, 961 P.2d at 56.
141. 302 N.W.2d 104, 110 (Iowa 1981).
142. *Kurtenbach*, 961 P.2d at 57.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*

2. The Motorcycle was not a "Motor Vehicle" Subject to Registration

Recognizing that this was the issue that divided the Court of Appeals, Justice Davis outlined why the Kansas Supreme Court followed the "majority decision, authored by Chief Judge Brazil," which concluded that "the bodily injury or property damage resulted from the ownership and use of a motorized vehicle not subject to motor vehicle registration . . . ."[147] But in doing so the supreme court was forced to first, admit that the facts of the case really did not allow a registration exemption for the motorcycle under the traditional statutory farm equipment exclusions, and second, fashion a whole new--and much broader--registration exemption in order to find coverage under the FCLP.[148]

The court noted that the majority opinion from the Appellate Court found the Kurtenbachs' motorcycle to be exempt from registration under K.S.A. § 8-128(a)(1) as an "implement of husbandry."[149] Kansas statutes define an implement of husbandry as "every vehicle designed or adapted and used exclusively for agricultural operations . . . ."[150] Thus the Kansas exemption statutes parallel the two requirements of Section 2.a.1 of the FCLP, design and use. The court noted that Judge Lewis in his dissent made a good argument that the motorcycle, which was designed to be street legal, could hardly be a type of vehicle meant to be excluded from registration as an implement of husbandry. However, the court declared that "this conclusion does not end our inquiry, for we must, as the Court of Appeals did, examine the use made of the motorcycle and determine whether it is not subject to motor vehicle registration because of use."[151]

---

147. *Id.* at 58.

148. *See Kurtenbach*, 961 P.2d at 58-59.

149. KAN. STAT. ANN. § 8-128(a)(1) reads in relevant part: "Registration of vehicles, exceptions. (a) the following need not be registered under this act, any: (1) Implements of husbandry." *Id.* It is worthy of note that this section outlines eleven specific classes of vehicles that are exempt from motor vehicle registration, of which "implements of husbandry" is the first. *Id.*

150. KAN. STAT. ANN. § 8-126 reads: "Definitions. The following words and phrases when used in this act shall have the meanings respectively ascribed to them herein: (cc) 'Implement of husbandry' means every vehicle designed or adapted and used exclusively for agricultural operations, including feedlots, and only incidentally moved or operated upon the highways. Such term shall include, but not be limited to: (1) A farm tractor; (2) a self-propelled farm implement; (3) a fertilizer spreader, nurse tank or truck permanently mounted with a spreader used exclusively for dispensing or spreading water, dust or liquid fertilizers or agricultural chemicals, as defined in K.S.A. 2-2202, and amendments thereto, regardless of ownership." *Id.*

151. *Kurtenbach*, 961 P.2d at 58.

The court simply adopted and quoted the majority opinion from the Appellate Court regarding an expansive interpretation of the phrase "used exclusively for agricultural operations," concluding that an "exact and literal interpretation" would not serve the purpose of the exemption, and the statute should be "construed according to its spirit and reason," which would even allow "de minimus recreational use" of a vehicle while still maintaining its implement of husbandry registration exemption.[152] This said, the court was still forced to recognize that the Kurtenbach's motorcycle failed to meet the first statutory requirement, being "designed or adapted . . . for agricultural operations."[153] Thus, the court ruled, "[c]ontrary to the majority opinion of the Court of Appeals, we conclude that the motorcycle involved was not an 'implement of husbandry' and, therefore, not exempt from motor vehicle registration under the provisions K.S.A. 8-128(a)(1)."[154]

The Kansas Supreme Court's next step charted new territory in interpretation of FCLP vehicle exclusions. The court moved beyond the specific agricultural vehicle exemption statutes, and reexamined the primary Kansas vehicle registration statute itself. The court noted that the governing law in Kansas, K.S.A. 8-127, requires "[e]very owner of a motor vehicle, motorized bicycle, trailer or semitrailer intended to be operated upon any highway in this state . . . apply for and obtain registration . . . ."[155] The court then concluded that "the motorcycle in this case may not be subject to registration if it is not 'intended to be operated upon any highway in this state.'"[156]

Using their new "intended use" test, the court examined several key facts closely. First, the motorcycle was purchased new in 1979 for the purpose of farm use and had never been registered. The court noted that the motorcycle was "used to check fences and scout for musk thistles, and other chores around the farm. Basically, it took the place of a horse."[157] Second, the fact that the highway "split" the Kurtenbach's property and farming operations required it be crossed led the court to conclude that at the time of the accident "the motorcycle was not, within the meaning of K.S.A. 8-127, being operated upon any highway of this state."[158] Finally, the fact that the motorcycle was driven "10 to 15 times since 1979 . . . on

152. *Id.*
153. *Id.*
154. *Id.* at 59.
155. *Id.* (citing KAN. STAT. ANN. § 8-127(a)).
156. *Kurtenbach*, 961 P.2d at 59 (quoting KAN. STAT. ANN. § 8-127).
157. *Id.*
158. *Id.*

[a] country road" without registration and therefore in violation of the law, did not matter since *at the time of the accident*, it was merely crossing, and not operating on a highway.[159]

The court noted and agreed with most of the analysis in Judge Lewis' dissent pertaining to the precedent of the 1981 Kansas Appellate Court ruling *Kresyman v. State Farm Mutual. Automobile Insurance Co.*, in which it was held that a mini-bike must be registered.[160] However, the court distinguished *Kresyman* from the case before it by observing what it termed "a crucial difference."[161] The court wrote that in *Kresyman* the accident occurred while "the mini-bike was operated on a public highway . . ." while " . . . [u]nlike *Kresyman*, the accident in this case occurred on Kurtenbach's premises within the meaning of Farm Bureau's policy . . .."[162] The Kansas Supreme Court concluded: "based upon the particular facts of the case . . . the motorcycle was covered under section 2.a.(1) of the Incidental Motorized Vehicle Coverage provision in the Farm Master policy."[163] The court reached this conclusion because the Kurtenbachs passed the "intended use" test by proving "the motorcycle's use was consistent with the owners' intended use for farm purposes and operation within the confines of the owners' property."[164] The court reasoned that merely crossing a highway didn't count as driving on it, and "[m]ore importantly, at the time of the accident, the motorcycle was being used consistent with the owners' intended use."[165]

3. Attorney Fees

Regarding the award of attorney fees, the Kansas Supreme Court agreed with the majority opinion of the Appellate Court, ruling in favor of the defendants and, once again, against the insurance company. The court found the Appellate Court's reliance on *Upland Mutual Insurance, Inc. v. Noel*[166] proper despite Farm Bureau's argument that their policy, unlike that in *Upland*, did not require the insurance company to pay all reasonable expenses incurred by the policy holder at the request of the insurer.[167] Farm Bureau noted that in the absence of an express contract to the

159. *See id.* at 61.
160. *Id.* at 59-60.*See supra* Part II.B.2 (Discussing Judge Lewis' dissent).
161. *Kurtenbach*, 961 P.2d at 60.
162. *Id.*
163. *Id.* at 61.
164. *Id.*
165. *Id.*
166. 519 P.2d 737 (Kan. 1974).
167. *Kurtenbach*, 961 P.2d at 61.

contrary, Kansas follows the "American rule" in which "each party to litigation is responsible for his or her own attorney fees."[168]

However, the court noted that the Farm Bureau policy did contain language that "'reasonable expenses any insured incurs' will be reimbursed by the insurer."[169] Moreover, their previous ruling in *Upland* clearly held that when a insurer denies both coverage and their duty to defend, and instead files a declaratory judgment action, the insured may recover attorney fees incurred in defense of the declaratory judgment action if it is determined that coverage is owed.[170] In *Kurtenbach*, the court extended this rule to hold an insurer liable for attorney fees when it "agrees to assume the duty to defend under reservation of rights, but before the underlying matter is resolved brings a declaratory judgment action seeking a determination that no duty to defend or coverage exists."[171]

The court noted that this rule requires the insurer to pay attorney fees only when the declaratory judgment action determines the existence of coverage.[172] The court justified this extension by concluding that if a court determines coverage exists, "one may conclude that the insured was compelled to extend his or her own funds in litigation expenses to obtain the benefit of his or her bargain with the insurer."[173] Finally, in what can best be described as adding insult to injury, the Kansas Supreme Court ordered Farm Bureau to pay the Kurtenbach's $842 in attorney fees and expenses "incurred in connection with the preparation and argument before this court" pursuant to Rule 7.07 of the 1977 Kansas Court Rules Annotated 49.

III. *KURTENBACH*'S DEPARTURE FROM THE MAJORITY RULE

A. Vehicle Exclusions in FCLPs: Other Jurisdictions

In *Kurtenbach*, the Kansas Supreme Court rejected "design" as an element used to determine whether a vehicle is a motor vehicle subject to registration or an exempt farm implement, in favor of their new, and much more subjective, "intended use" test. In doing so they broke with their own previous precedent as well as the majority of outside jurisdictions, which use the two-prong test of "design" and "actual use."

While the majority of courts that have grappled with the issue believe the two-prong test of whether the vehicle was designed for off road use, as

168. *Id.* at 62-63.
169. *Id.* at 63.
170. *Id.* at 64.
171. *Id.*
172. *Id.*
173. *Kurtenbach*, 961 P.2d at 64.

well as whether it was in fact actually used for farm use is the most objective way to classify a dual-use vehicle, at least one jurisdiction, Illinois, has made a compelling argument that design should be the only consideration.[174] In a far less compelling argument, New York has gone the other direction and declared that only the actual use of the vehicle matters, while North Dakota and Alabama avoid the complications of the issue all together by simply declaring FCLP motor vehicle exclusions ambiguous and then settle the issue based on contract intent and reasonable expectations.[175]

1. Majority Rule: Design and Use

In 1981 the Iowa Supreme Court laid the foundation in Iowa for the adoption of the majority rule in *Farm Bureau Muual. Inurance. Co. v. Sandbulte*,[176] when it declared that a pickup truck could not be classified as a farm implement because it was "clearly 'designed' for highway use" and frequently used for travel on roadways, including its use at the time of the accident, thus no coverage was found under the FCLP because of the motor vehicle exclusion.[177] The two-prong test was more fully developed and utilized six years later in *North Star Mut. Ins. Co. v. Holty*,[178] in which the Iowa Supreme Court reached a similar holding, but in a case with a significantly more difficult fact pattern.[179]

In *Holty*, the insured tried to collect under his FCLP for liability related to an accident involving his 1951 half-ton truck, which he had adapted to haul fertilizer and grain by permanently attaching a gravity box with an auger to its chassis.[180] The truck was primarily used for transporting agricultural products between Holty's farms, and while the truck was once licensed, registered and insured with an automobile policy, at the time of the accident all had lapsed.[181] While not as clear-cut as Sandbulte's pickup (which was unaltered from its original design), the Iowa Supreme Court declared the reasoning in *Sandbulte* "dispositive" in *Holty,* and found that, "at the time of the accident Holty's truck still had a windshield, rear view mirror and lights," and thus, despite its modifications, ". . . it was still

174. Rockford Mut. Ins. Co. v. Schuppner, 538 N.E.2d 732 (Ill. App. Ct. 1989).

175. Nationwide Mut. Ins. Co. v. Erie & Niagra Ins. Assoc., 249 A.D.2d 898 (N.Y. App. Div. 1998); Heitkamp v. Milbank Mut. Ins. Co., 383 N.W.2d 834 (ND 1986); Garrett v. Algfa Mut. Ins. Co., 584 So.2d 1327 (Ala. 1991).

176. 302 N.W.2d 104 (Iowa 1981).

177. *Id.* at 114-15.

178. 402 N.W.2d 452 (Iowa 1987).

179. *Id.* at 453.

180. *Id.*

181. *Id.*

clearly designed for highway use under the policy definition."[182] Moreover, the court noted that "[i]t was used on public roads and was licensed and insured as a motor vehicle from 1967 to 1982," and therefore was excluded from coverage under the FCLP.[183] Most significantly, however, the court clearly articulated the reason why motor vehicles must be distinguished from genuine farm implements in such cases: "The operation of automobiles owned by an insured is a separate and distinct risk from the type for which persons ordinarily purchase farm liability insurance."[184]

The Utah Supreme Court used the same two-prong test in *Utah Farm Bureau Mut. Ins. Co. v. Orville Andrews & Sons*[185] in 1983, but held that a modified truck *was* an implement of husbandry, and therefore covered under a FCLP.[186] Andrews purchased a two ton truck chassis in 1972, welded a feeder box to the back, but never registered it or listed it under the vehicle schedule of his insurance policy, as he did with two other trucks regularly used to haul grain on public roadways.[187] The accident occurred on a public highway when the truck was enroute from Andrews farm to leased property five miles away where he fed cattle daily.[188]

Andrews' FCLP contained a motor vehicle exclusion, but also provided an exception for "farm implements" though it failed to define the term.[189] The court applied the two-prong test and declared, "Andrews feeder truck is an implement of husbandry because (1) it was modified by them so that it could be used for the sole purpose of feeding their cattle which is an agricultural purpose, and (2) it has been exclusively used for that agricultural purpose since it was so adapted over a decade ago."[190]

Sixteen years later, the Tenth Circuit Court of Appeals, applying Utah law, relied on the *Utah Farm Bureau* and its two-prong test to decide *West American Insurance Co. v. Lamb*.[191] In *Lamb*, the insured tried to collect

182. *Id.* at 456.
183. *Id.* (citing *Sanbulte*, 302 N.W.2d at 115).
184. *Holty*, 402 N.W.2d 452, 456 (Iowa 1987).
185. 665 P.2d 1308 (Utah 1983).
186. *Id.* at 1310.
187. *Id.* at 1309.
188. *Id.*
189. *Id.* The Utah Supreme Court turned to its own motor vehicle act, which defined the synonymous "implement of husbandry" as "[e]very vehicle which is designed for agricultural purposes and exclusively used by the owner thereof in the conduct of his agricultural operations." *Id.* at 1310 (citing U.C.A., § 41-1-1(*m*) (1953)). Note the similarity between the Utah and Kansas statutory definition of "implement of husbandry." *See* KAN. STAT. ANN. § 8-126(cc), *supra* note 152.
190. *Utah Farm Bureau Mut. Ins. Co.*, 664 P.2d at 1310.
191. No. 98-4146, 1999 U.S. App. LEXIS 25716 (10th Cir. Oct. 18, 1999).

on a FCLP for an accident that occurred on a Utah highway involving his 1976 ¾ ton pickup.[192] The court declared that the "pickup truck was not only 'designed for travel on public roads' but was actually put to such use... the GMC truck plainly qualifies as an 'auto' and is therefore expressly excluded from coverage under the policy."[193] The court then scolded the insured, declaring that his "effort to classify the truck as 'farm machinery' strains reason."[194]

The two-prong "design and use" majority rule is also used in the western agricultural states of Wisconsin, Minnesota, and Arizona. As early as 1971 the Wisconsin Supreme Court declared that fertilizer tanks designed and used for transportation of agricultural products on highways were not "implements of husbandry," but bulk dry fertilizer applicators designed for field use and only incidentally operated on highways were "implements of husbandry."[195]

In 1984, the Minnesota Supreme Court declared that a three-wheeled all-terrain vehicle (ATV), "originally designed . . . for off road travel," but subsequently "modified, registered and insured by the owner for travel on public roads," was a motor vehicle.[196] Applying the two-prong test, the court held that the ATV, "when owner-modified for travel on the public road (design) and when traveling on the public road (use), is a 'motor vehicle' within the meaning of a motor vehicle exclusion of a farm liability policy."[197]

In 2001, one of the most recent appellate level courts to take up the issue, the Arizona Court of Appeals, used the two-prong majority rule to declare that a self-propelled agrichemical sprayer known as a Lor-al was a motor vehicle and not an "implement of husbandry."[198] After noting that

---

192. *Id.* at *2-3.

193. *Id.* at *5-6.

194. *Id.* The court distinguished the feeder truck in Utah Farm Bureau, which was clearly "modified" for the "sole purpose" of agriculture, from the pickup in Lamb, which was "registered and insured under an automobile policy and regularly used on public roads," further noting that "[h]eavy-duty features and a trailer hitch do not transform a truck into farm machinery." *Id.* at *7.

195. Wisconsin Fertilizer Ass'n Inc. v. Karns, 190 N.W.2d. 513, 519 (Wis. 1971).

196. North Star Mut. Ins. Co. v. Moon, 357 N.W.2d 95, 97 (Minn. 1984).

197. *Id.* at 95.The Minnesota Supreme Court stated, "[w]e do not think an accident which occurs on a public road with an ATV such as Moon's, which was intended and adapted for lawful travel on public roads, presents the kind of risk contemplated by North Star's farm liability policy." *Id.* at 97.

198. Castillo v. Miller's Mut. Fire Ins. Co. of Tex., 25 P.3d 13, 17 (Ariz. Ct. App. 2001). The court noted that the Arizona motor vehicle statutes defined an "implement of husbandry" as "vehicles designed primarily for agricultural purposes and used exclusively in the conduct of agricultural operations." *Id.* at 17, *citing* A.R.S. § 28-101(27) (1996).

the sprayer was designed for road transport and field use, the court emphasized the second prong of the test, noting that "being designed for an ultimate agricultural purpose is not conclusive when classifying a vehicle for insurance purposes. In Arizona, it is also necessary to consider the vehicle's use of public roadways."[199] The court then concluded that since the Agro employees "regularly drove the Lor-al on public roadways" including interstates, it was therefore "a motor vehicle and not an implement of husbandry."[200]

It is clear that a majority of the jurisdictions which have grappled with the issue of classifying a dual-use vehicle have used the two-prong test of vehicle design and use to decipher farm implements from motor vehicles. However, several other jurisdictions have devised other methods for deciding such issues.

2. Illinois Rule: Design Only

In 1991, the Ohio Court of Appeals ruled that a 1972 strait bed truck used for transporting agricultural products was a motor vehicle "because the truck was designed for use or travel on public roads," despite the fact that it was used "primarily" for farm use.[201] Thus, while not quite ready to abandon the use prong, Ohio clearly places more emphasis on design. Illinois, however does advocate looking *only* to the design of a vehicle in determining whether it is a farm implement or road vehicle.

In *Rockford Mutual Insurance. Co. v. Schuppner*,[202] the trial court ruled that a 1978 truck that was "generally used for farming" was a farm implement, and declared the accident, which happened on a public road, "was a covered occurrence, and that the determining factor in finding that the occurrence was covered was, in its judgment, the purpose for which the vehicle had been used, which the court found here to be a farm purpose."[203] However, the Appellate Court for the First District reversed, stating: "We specifically disagree with the trial court that the determinative factor here was the purpose for which the vehicle was used." [204] More significantly, the court articulated a very compelling argument for why only design, and not use, should be considered:

199. *Id.* at 18.
200. *Id.*
201. Kneipp v. Herron, 602 N.E.2d 371, 373 (Ohio Ct. App. 1991).
202. 538 N.E.2d 732 (Ill. App. Ct. 1989).
203. *Id.* at 734
204. *Id.* at 737.

> If this court were to simply employ that test (use only), the definition of farm implement could conceivably cover anything used on a farm. Consequently, many vehicles clearly not intended for farm use could be considered farm implements if we were to use this definition. We believe such a definition too broad and not reasonably intended under the contract.[205]

The appellate court then fashioned its single-pronged design test: "We believe that the determinative factor more appropriately is whether the vehicle was designed for use on public roads or intended as a farm implement. Such an interpretation is, in our opinion, more consistent with the insurance policy's intended coverage."[206] Applying their new test, the court declared the truck was an "ordinary, basic 1978 Chevrolet truck" and the insured had "never claimed that the truck had been modified or adapted in any way for use for farm purposes."[207] Thus, the court ruled "it is clear that the Schupper's truck was a motor vehicle," and therefore excluded from coverage under the Farm liability policy.[208] More recently, in 2000, the Illinois Appellate Court for the Fourth District upheld this single-prong design test in *The Farmers Automobile Insurance Ass'n. v. Country Mutual Insurance Co.*[209] While Illinois makes a strong argument for breaking with the majority two-prong rule, the tests applied by other non-majority rule jurisdictions in deciding similar issues are supported with significantly less compelling reasoning.

3. "Use Only" and "Contract Intent" Tests.

The New York Appellate Court for the Fourth Division upheld a trial court ruling that declared an unmodified pickup a farm vehicle covered by a FCLP, and any public roadway it traveled part of the "insured premises"

---

205. *Id.*
206. *Id.*
207. *Id.*
208. *Schuppner*, 538 N.E.2d at 738.
209. 722 N.E.2d 1228, 1232 (Ill. App. Ct. 2000). The insured, holder of a FCLP from Country, faced liability from an accident that occurred on a public roadway involving his 1972 International grain truck. Country filed a declaratory judgment action, claiming it had no duty to defend since its policy contained a motor vehicle exclusion, and the trial court agreed. The appellate court reversed and remanded for further examination of the facts, citing *Rockford*. The court noted that the trial court was required to "determine what the grain truck was 'principally' designed to do. This determination does not require the court to consider the truck's actual use or whether and how it was registered, licensed or insured." *Id.* at 1232.

in *Nationwide Mutual. Insurance. Co. v. Erie & Niagara Insurance. Ass'n.*[210] The suit originated from an accident involving a 1983 Dodge pickup properly registered as a farm vehicle, which was traveling on a highway between two farms.[211] The court, without stating their reasoning, ignored the design of the pickup and based its opinion solely upon the vehicle's use, which it concluded "was used exclusively for farm purposes," and was therefore covered under the FCLP. [212]

North Dakota took a different route to solving the issue of dual-use vehicles by consistently declaring FCLP motor vehicle exclusion provisions as ambiguous, and then using contract interpretation rules to search for mutual intent and reasonable expectation. In the 1986 case *Heitkamp v. Milbank Mutual Insurance Co.*,[213] the North Dakota Supreme Court declared that an unmodified pickup used primarily for farming was a farm implement covered by a FCLP.[214] Just two years later the same court declared an unmodified pickup also used primarily for farming was *not* a farm implement and therefore was *not* covered by a FCLP in *Walle Mutual Insurance Co. v. Sweeney*.[215] In *Heitkamp*, the court concluded that there was "substantial evidence to support the jury's finding that the policy did provide liability coverage for the . . . 1973 Chevrolet pickup," because "[t]he ambiguity in the policy created a question of coverage which the 'factfinder' resolved in favor of the insured, and that resolution is consistent with our recognized rule of interpretation that ambiguities are to be construed, if at all possible, in favor of the insured."[216] However, in *Sweeney*, which contained a nearly identical fact pattern, the court found that the "mutual intention of Sweeney and Walle Mutual was ascertainable from the parole evidence," and then concluded that "neither Walle Mutual nor Sweeney intended the farm policy to cover a pickup."[217] The inconsistency and unpredictability of the North Dakota approach is blatantly obvious.

In 1991, the Alabama Supreme Court, citing both *Heitkamp* and *Sweeney*, noted that the FCLP at issue in *Garrett v. Alfa Muual. Insurance Co.*[218] "was ambiguous concerning coverage," because when Alfa drafted the policy they "attempted to define 'motor vehicle,' but made no attempt

210. 249 A.D.2d 898 (N.Y. App. Div. 1998).
211. *Id* at 898.
212. *Id.*
213. 383 N.W.2d 834 (N.D. 1986).
214. *Id.* at 837.
215. 419 N.W.2d 176, 180 (N.D. 1988).
216. *Heitkamp*, 383 N.W.2d at 837.
217. *Sweeney*, 419 N.W.2d at 180-81.
218. 584 So.2d 1327 (Ala. 1991).

to define 'farm implement.'"[219] The court then declared that whether or not the 1972 Ford Bronco was a "farm implement" was an issue of fact that must be decided by a jury, reversed the lower court's summary judgment ruling in favor of the insurer and remanded.[220] However, three justices dissented, writing that they preferred the two-prong test of design and use. They noted that "[t]he 1972 Bronco was designed for use on public roads (undisputed evidence shows that it was used on public roads)," and therefore they agreed with the trial court that the vehicle was excluded from coverage.[221] It is clear from the results of the above cases that the absence of an objective test in both North Dakota and Alabama has led to highly unpredictable results.

B. Pre-*Kurtenbach* Rule in Kansas

1. Setting the Stage for Interpreting Vehicle Exclusions in FCLPs

Agriculture holds a prominent role within the state of Kansas and its courts are no strangers to agricultural law, including farm insurance law.[222] However, prior to *Kurtenbach*, the appellate level courts in Kansas had not ruled directly on a case requiring the interpretation of a motor vehicle exclusion in an FCLP as related to a dual-use vehicle. Kansas did, however, have a string of cases that charted a far different course from the one the Kansas Supreme Court chose in *Kurtenbach*.

As early as 1968 the Kansas Supreme Court recognized that the "basic principles governing the construction of insurance policies in general are also fully applicable [to FCLPs]" even though such policies are designed specifically for the specialized needs of farmers.[223] Thus, the extensive body of insurance case law crafted over the years by Kansas courts was not to be ignored when new issues involving FCLPs cropped up (no pun intended). For example, it would be logical to assume that the precedent set by the Kansas Supreme Court in the 1970 motor vehicle exclusion case, *Clark v. Prudential Insurance. Co. of America*,[224] would be relevant to

219. *Id.* at 1330.

220. *Id.* at 1331-32.

221. *Id.* at 1332.

222. The Kansas Supreme Court clearly defined the purpose of FCLPs in a 1983 decision in which it upheld vehicle exclusions in FCLPs for vehicles subject to registration: "Farm-Master policies are designed to provide protection against risks that are peculiar to farming activities. Certain limitations are contained within the policy to decrease risk in order to reduce premium cost." Farm Bureau Mut. Ins. Co., Inc. v. Horinek, 660 P.2d 1374, 1376 (Kan. 1983).

223. Isaac v. Reliance Ins. Co., 440 P.2d 600, 604 (Kan. 1968).

224. 464 P.2d 253 (Kan. 1970).

later cases also involving motor vehicle exclusions in FCLPs.[225] In *Clark*, the payment of death benefits under a life insurance policy hinged upon whether the motorcycle the insured was riding at the time of the accident was in fact a "motor vehicle" for road use.[226] The Kansas Supreme Court stated in no uncertain terms: "We think an ordinary insured would commonly understand a motorcycle to be a motor vehicle. It is so defined by statute."[227]

2. Dual-Use Vehicles and Vehicle Exclusions in Liability Policies

While the issue was not addressed in the specific context of a FCLP, the Kansas courts had developed a clear line of case precedent on how to interpret vehicle exclusion provisions in insurance liability policies when confronted with dual-use vehicles. These early cases looked quite consistently to the characteristics of the vehicle's design and the vehicle's actual use--the two-prong test referred to in this note as the Majority Rule.

One of the first cases to come before the Kansas Supreme Court dealing with the issue of dual-use vehicles and vehicle exclusion provisions was the 1970 case *Kansas Farm Bureau Insurance Co. v. Cool.*[228] The flip-side of *Kurtenbach*, in *Cool* the issue was whether a dune buggy was a motor vehicle and thus covered by an automotive policy.[229] The insured argued that the dune buggy was a motor vehicle while the insurance company sought a declaratory judgment stating it was not.[230] The Kansas Supreme Court looked first to the design of the vehicle[231] and then to its use.[232] Relying on the two-prong test, the court ruled that the "dune buggy in the instant case . . . clearly was designed for use off public roads and . . . is excluded from coverage."[233]

The two-prong test of the majority rule was reaffirmed in 1981 by the Kansas Court of Appeals in *Kresyman v. State Farm Mutual Automobile*

---

225. *Id.* at 257.
226. *Id.*
227. *Id.*
228. 471 P.2d 352 (Kan. 1970).
229. *Id.* at 354.
230. *Id.*
231. The court listed in detail the design and construction of the dune buggy, which included parts from a pickup truck, tractor and even an airplane. The court made special mention of the components both normally associated with motor vehicles and required by statute for registered vehicles that the dune buggy lacked, including a windshield, headlights, taillights and a horn. *Id.* at 354.
232. The court noted that the dune buggy was "used . . . principally off the road as a utility vehicle . . . to pull tractors, build fence, hunt, pull a harrow and drill, and feed cows . . ." *Id.* at 354-55.
233. *Id.* at 359.

Insurance Co.;[234] the case Judge Lewis found dispositive in his dissent in *Kurtenbach* at the appellate level.[235] The *Kresyman* court noted that while the mini-bike in question was not designed for use on public roadways, when such a vehicle is *actually used* on a highway it must, by statute, be registered.[236] When *Cool* and *Kresyman* are read together, it is clear that prior to *Kurtenbach*, Kansas courts looked to both the design and actual use of a vehicle when determining if it was subject to an exclusion from a liability insurance policy. This use of the two-prong majority rule in Kansas was reaffirmed by the Kansas Court of Appeals in the 1987 case *Lloyd v. State Farm Mutual Automobile Insurance Co.*[237] and again in the 1990 case *Shumaker v. Farm Bureau Insurance Co., Inc.*[238]

IV. ANALYSIS

It must be noted that in all three issues the Kansas Supreme Court addressed in *Kurtenbach*, it ruled in favor of the insured and against the insurance company. The court enlarged "on premises" to include the traditionally excluded public highway, it increased the scenarios in which the insured is allowed to collect attorney fees from the insurance company in contested coverage actions, and it drastically expanded the types of vehicles which are not subject to motor vehicle exclusions in liability insurance policies.[239] Ample analysis of the court's ruling regarding the expanded "on premises" issue has been made by the authors of legal treatises on insurance law, while the courts have done a thorough job of reviewing the new attorney fees rule outlined in *Kurtenbach*.[240] Therefore, this note will analyze only the *Kurtenbach* court's treatment of the motor vehicle exclusion issue.

A. *The Effects of the Post-*Kurtenbach *Rule in Kansas*

234. 623 P.2d 527 (Kan. App. 1981).

235. *See supra* Part II.B.2.b.

236. *Kreysman*, 623 P.2d at 527.

237. No. 59,517, 1987 Kan. App. LEXIS 882 (Mar. 19, 1987). (unpublished case where court found that a modified hobby stock race car designed for and used exclusively for off road racing was not a motor vehicle subject to registration and therefore not covered under an automobile insurance policy). *Id.* at 9.

238. 785 P.2d 180 (Kan. App. 1990). (yet another dune buggy was held to be an off-road vehicle--despite the fact that it was driven at times on the public highways--because it was clearly designed as an off-road vehicle and was used as such at the time of the accident; thus, it met the qualifications of the motor vehicle exclusion in the automobile liability insurance policy.) *Id.* at 182.

239. *See supra* Part II.C.

240. *See supra* notes 5 and 6.

The immediate effect of *Kurtenbach* on insurance case law in Kansas was the abandonment of the "design" test used to determine if a dual-use vehicle fit within a motor vehicle exclusion provision of a liability insurance policy. Moreover, this relatively objective design test was replaced by the significantly more subjective "intended use" test, resulting in the confusing two-prong "intended use" and "actual use" test--the new *Kurtenbach* rule.

1. What *Kurtenbach* Did Not Hold.

The Kansas Supreme Court in *Kurtenbach* no doubt foresaw the inevitable abuse that would result from the subjective nature of its reasoning and repeatedly tried to place limits within the decision language itself. The court stated, "[w]e must emphasize that our conclusion is very fact specific," noting that while crossing Highway 56 did not prove an intention to use the motorcycle on highways, driving on it would have.[241] Justice Davis writing for the court further stated, "[w]e caution that our decision must not be read too broadly," noting that the highway in question split the property, and that it was necessary to cross the highway, but not to travel upon it.[242] The court was careful to clarify that "[h]ad this accident occurred while the motorcycle was being operated on any highway instead of simply crossing Highway 56, no coverage would have existed under the policy."[243]

2. What *Kurtenbach* Does Hold

The *Kurtenbach* court's warnings that its decision was fact-specific and should not be read too broadly notwithstanding, it remains the only case interpreting motor vehicle exclusion provisions in FCLPs to be issued by the state's highest court. The court quite clearly abandoned the majority rule for determining such cases and established precedent using a much more insured-friendly and subjective "intended use" test. Moreover, it removed the debate from the specialized exceptions granted to agricultural equipment. Precedent, history and tradition have long supported these agricultural exceptions, both carved out of case law and expressly created by legislative statute. In its effort to find coverage where none should have been found, the *Kurtenbach* court was forced to abandon the clarity of consistent precedent and statute language governing agricultural equipment exemptions and fashion a whole new loophole in the motor vehicle

241. *Kurtenbach*, 961 P.2d at 59.
242. *Id.* at 60 (quoting *Kresyman*, 623 P.2d at 527).
243. *Id.*

registration requirement statute itself.[244] Thus, its new registration exemption applies not only to agricultural vehicles, but also to any and all vehicles whose operators can convince a court that they generally do not "intend" to drive upon the public roads, regardless of whether or not they actually do.

The new rule created in *Kurtenbach* can be described as a two-prong "intended use" and an "actual use when caught" test. First, the heart of this new rule is the replacement of the traditional vehicle design test, now totally ignored, with the new "intended use" test. This allows the court to ignore the fact that a vehicle was designed for road use, and instead concentrate on the fact that the owner "intended" the vehicle for primarily farm or off road use. The court did note, however, that had the motorcycle in *Kurtenbach* "been frequently operated on the highways in violation of the law, such a fact might compel a different result."[245] Thus, the very subjective "intended use" test hinges upon the court's ability to "get into the mind" of the insured, so to speak, and determine intentions through whatever factual information may be available.

Second, the *Kurtenbach* court also put a new twist on the actual use test. Post-*Kurtenbach*, the key is not whether a vehicle was in fact used substantially on public roads, but rather all that matters is how it was actually used *when the accident occurred.* The court was very clear that the fact that the motorcycle was used several times on public roads to go fishing or for general fun, even though it was done in violation of the law, did not matter--the insured still "intended" it for farm use. However, it was equally clear that had the accident occurred during one of those times when it was illegally operating *on* the highway as opposed to "simply crossing" the highway (which the court ruled was part of the farm premises) "no coverage would have existed."[246] This new two-prong "intended use" and "actual use when caught" test would seem to benefit only Mr. Kurtenbach in this one case while unnecessarily confusing an area of law not in need of any additional difficulty.

B. Why *Kurtenbach* Is Wrong

1. The Benefits of Consistency and Predictability

The primary benefit of the traditional majority rule, which includes the objective design test, is clearly the fact that it provides much needed consistency and predictability to the construction of motor vehicle

244. *See id.* at 61.
245. *Id.*
246. *Id.*

exclusion provisions in FCLPs. As one commentator wrote: "Liability insurance is generally written for a specific hazard in order to enable the underwriter to calculate premiums on some equitable as well as predictable basis. As a result, the hazard to be covered under each policy is carefully defined and other hazards are excluded."[247] Quite frankly, for a liability insurance policy like an FCLP to work at all, the coverage and exclusion provisions must be clearly defined, their construction must be consistent, and court holdings relating to those provisions must be predictable.

The desirability of consistent judicial interpretations to both insurance consumers and insurance providers should be self-evident. The insurance industry's voluntary use of standardized language when drafting policy language not only provides real-world evidence of the benefits of consistency, but is also an example of how the industry itself is striving to help courts reach consistent rulings. [248] Holmes' Appleman notes that consistent judicial interpretations of standardized phrases will better ensure consistent treatment of all claimants because "[o]nce a judicial precedent is set regarding a standard coverage part, that precedent has far more meaning and scope."[249] The advantages of policy language standardization are, of course, negated if the judicial construction of the identical policy provisions by different courts is all over the map.

1. Reaching Consistency and Predictability Through Objective Tests

The benefits of consistency and predictability being readily apparent, the real question becomes exactly *how* should courts interpret motor vehicle exclusions in FCLPs when faced with dual-use vehicles. While the best answer to this question may yet to be discovered, it would seem that any *good* way would require the court to examine *objective* criteria concerning the vehicle, such as its design and actual use.

---

247. 7A JOHN ALAN APPLEMAN, APPLEMAN INSURANCE LAW & PRACTICE § 4500.04, at 209 (1st ed. 1979).

248. The Insurance Service Office ("ISO") is an organization whose members consist of property and casualty insurers and whose purpose is to draft standardized policy language. ISO forms provide an industry standard that benefits both the insurance companies and the insurance consumer. Consistency provides the consumer with assistance in comparison-shopping and hopefully, "uniform judicial opinions." 15 ERIC MILLS HOLMES, HOLMES' APPLEMAN ON INSURANCE 2D § 111.2 , at 78-80 (2d ed. 2000). Insurance companies benefit from consistency in data processing, underwriting and claims handling , which result in lower processing costs. More importantly, constancy allows the gathering of meaningful data on insurance coverages in order to develop sound actuarial projections for future costs. *Id.*

249. *Id.*

The *Kurtenbach* court's reliance on an insured's "intended use" of a vehicle is very nearly the definition of a subjective standard.[250] By contrast, examination of the actual use and especially the design of a vehicle is based upon externally verifiable phenomena and is therefore a significantly more objective test for courts to use.[251] Law must be predictable to work, and few would argue that our legal system functions best when courts rely more heavily upon objective, consistent and predictable standards as opposed to subjective, inconsistent and unpredictable judicial fiat--even in insurance law cases.[252]

While an objective inquiry into a vehicle's actual use is altogether proper, the Illinois Appellate Court has noted that a reliance on a use test alone would ultimately be problematic. The Illinois Appellate Court in *Rockford* warned that reliance upon use alone would lead to the "definition of farm implement (that) could conceivably cover anything" resulting in coverage for many vehicles "clearly not actually intended for farm use."[253] Such is the case in New York, and under its *Erie & Niagara Insurance Ass'n* precedent, one can imagine all manner of absurdities, such as a two-seat sports car qualifying as a "farm implement" as long as it is used to transport a farm employee.[254] While this approach does lend itself to predictability--almost anything will always qualify as a farm implement--such broad risks are clearly not what FCLPs were designed to mitigate.

The solution, of course, is to look to the design of the vehicle. Those vehicles designed or modified for off-road and/or farm use can logically, consistently and predictably be understood by insurance consumers, insurance providers and courts as the type of vehicle intended to be covered by general liability policies such as FCLPs. Conversely, any vehicle designed for road use would logically be considered by all as the type of vehicle that would require automobile insurance.[255]

---

250. Black's Law Dictionary defines "subjective" as: "Based on an individual's perceptions, feelings, or intentions, as opposed to externally verifiable phenomena." BLACK'S LAW DICTIONARY 1438 (7th ed. 1999).

251. Black's Law Dictionary defines "objective" as: "Of, relating to, or based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions." BLACK'S LAW DICTIONARY 1101 (7th ed. 1999).

252. Jerry states: "It is fair to assert that the public's apparent desire for simplicity and greater certainty in legal matters is likely to be reflected in more formalistic court decisions where interpretive inquiry is confined to the four corners of writings." JERRY, *supra* note 11, at 136.

253. *Rockford*, 538 N.E.2d at 737.

254. *Nationwide Mut. Ins. Co.*, 249 A.D.2d at 898. *See supra* text accompanying notes 210-12.

255. This is the conclusion that the Kansas Appellate Court came to in deciding that a dune buggy designed for off road use was excluded from coverage under an automobile

The most complete and objective method for adjudicating issues involving dual-use vehicles would combine the above-described elements of "actual use" and "design" into a two-prong test with an emphasis on design. Vehicles, such as a tractor, clearly designed for and primarily used off-road would be covered under FCLPs. Vehicles such as pickups and motorcycles designed for road use would be excluded from coverage if they are ever used on roads--this is what automobile insurance is designed for. Vehicles designed for road use but *never* used on roads would be covered under a general liability policy. This formula relies first upon the most objective element of vehicle design, next upon the vehicles actual use, and eliminates the need to discern the highly subjective "intended use" of the insured.

3. The "Benefits" of the *Kurtenbach* Rule: Flexibility

The obvious negative aspect of the two-prong majority rule is its inflexibility: it is difficult for a sympathetic court to assist a poor farmer suddenly faced with enormous liability and no insurance indemnity with such a rigid (although predictable) rule. It is no secret that "[s]ometimes courts interpret the language of policies to achieve a result that supposedly compensates for the unequal bargaining power between insurer and insured."[256] Robert Jerry describes this phenomena as the "decidedly pro-insured bias in insurance policy interpretation," and laments that this "pro-insured thrust of interpretation . . . is so well entrenched that dramatic change is highly unlikely . . .."[257]

While the argument made directly above admittedly asserts the difficulty in determining another's "intentions," nonetheless an inquiry should be made into the possible motives for the *Kurtenbach* court's departure from the majority rule. As already implied, the most probable reason would seem to be that courts often favor the empathetic plight of the individual over the financial interests of a large, multi-million dollar financial institution.

Indeed, the *Kurtenbach* courts, at all three levels, did interpret the motor vehicle exclusion provision in a manner that greatly aided Mr. Kurtenbach. Chief Judge Brazil had the opportunity to rule in the case

---

policy. The court stated: "Common sense also supports our conclusion. Devices designed primarily for use off road, while actually being used off road . . . simply pose a greater risk of injury. Insurance companies should not be expected to insure such greater risks at the same rate associated with the 'normal' use of such devices for on-road transportation purposes." Shumaker v. Farm Bureau Mut. Ins. Co., 785 P.2d 180, 182 (Kan. Ct. App. 1990).

256. JERRY, *supra* note 11, at 129.

257. *Id.* at 136.

twice, once as the author of the appellate level decision and again as a member of the Kansas Supreme Court. In the appellate case he authored, Chief Judge Brazil ignored design and concluded the motorcycle was a farm implement exempt from registration by statute, while in the supreme court holding, which overruled his declaration that the motorcycle was a farm implement, he agreed with the court's abandonment of the design test in favor of the newly created "intended use" registration statute loophole. In both cases he voted pro-insured, while relying on different reasoning. However, in the 1987 criminal case *Kansas v. Peimann*,[258] Judge Brazil relied heavily upon the two-prong test of vehicle "design" and "actual use" to determine that a pickup truck used for farming purposes was not exempt from registration as an "implement of husbandry."[259]

Judge Brazil was the senior judge on a three judge panel that issued a per curium decision in *Peimann* denying the defendant's claim for exemption from criminal charges for failing to register his farm truck. The decision was based upon the fact that:

> Peimann failed to show that the pick up was "designed or adapted and used exclusively for agricultural operations and only incidentally moved or operated upon the highways." It appears that Peimann's use of the pickup was a general all-purpose use, not exclusively related to agriculture, and that his operation of the truck on public roads was more than incidental.[260]

The case did not involve any insurance issues, thus the two-prong test resulted in a ruling that favored law and order, not a large insurance company, and went against a law-breaker, not an unfortunate farmer.

This note is not alone in concluding that the court's ruling in *Kurtenbach* was likely influenced by a pro-insured bias. Judge Lewis of the Kansas Appellate Court, who was in a far better position to gauge the motivation of his court when it issued its majority decision in *Kurtenbach,* made the same accusation. In his dissent, Judge Lewis declared: "My observation is that courts sometimes bend over backwards to find a fund from which an insured party can collect his damages. In doing so, I believe we occasionally place a risk on an insurance company which simply is not

258. 763 P.2d 21, No. 60,552, 1987 Kan. App. LEXIS 1252 (Kan. Ct. App. Oct. 15, 1987).

259. *Id.* at *2.

260. *Id.*

covered by the policy."[261] There is little evidence to lead one to believe that the Kansas Supreme Court reached the same conclusion as the Appellate Court majority in *Kurtenbach* for any other reason.

C. The Potential Dangers of *Kurtenbach*

In abandoning the two-prong majority rule, the *Kurtenbach* court created a new testing standard which provided considerably more flexibility, and without question benefited Mr. Kurtenbach. However, the potential costs of the court's ruling are phenomenal. This new standard for interpreting vehicle exclusion provisions with regard to dual-use vehicles in all comprehensive liability policies departs from objective and consistent principles, and rests instead upon the subjective discernment of the insured's intent. Such broad interpretations lead to confusion and unpredictability for both the insurance consumer and provider. The insurance industry will be forced to respond to the unpredictable but certainly greater potential risks by either raising premiums or crafting ever more restrictive exclusion provisions, possibly to the point of absolute exclusions, just to remain financially viable. Thus, while the *Kurtenbach* court's ruling benefited one farmer, Mr. Kurtenbach, its potential to harm all other farmers who rely upon affordable FCLPs is ominous.

1. The Extreme Result: Absolute Exclusion of All Motor Vehicle Coverage from FCLPs

While unquestionably the most extreme scenario, it is not entirely impossible that the insurance industry, faced with unreasonably broad judicial interpretations of their exclusion provisions, would be forced to revise their liability policies to drastically reduce coverage, or even implement an absolute exclusion of coverage for motor vehicles. Such was the case in the coverage of pollution risks in general liability policies.

Through general liability policies, insurance companies once routinely covered "sudden and accidental" pollution risks, but have now nearly universally redrafted their pollution exclusion provisions into what are termed "absolute pollution exclusions" to absolve themselves of all pollution liability.[262] The blame for this absolute exclusion of a risk once covered has been levied upon over-zealous and pro-insured courts, much

261. *Kurtenbach*, No. 75674, slip op. dissent at 2. Judge Lewis concluded: "I would suggest that the majority opinion attempts to fit a square peg into a round hole in order to find the insurance coverage in a policy that was not issued to cover the risk in question." *Id.* at 1.

262. 7A APPLEMAN, INSURANCE LAW & PRACTICE § 4525 (1st ed. 1979).*See supra* accompanying text to note 56.

like the *Kurtenbach* court. Appleman states that "[c]ommentators have suggested that the [old 'sudden and accidental' pollution coverage] language, from the perspective of the insurance industry, was too frequently construed in a strained or tortured fashion, in a manner which distorted the terminology and thereby 'frustrated' the intent of the industry."[263] The potential parallels between the *Kurtenbach* court's strained reading of FCLPs vehicle exclusion provisions in such a manner as to frustrate the insurance provider's intent, to that of the distorted judicial constructions which led to the demise of pollution coverage, are too readily apparent to ignore.

2. The Likely Result: A Change in Policy Language and Higher Premiums

Since the *Kurtenbach* ruling affects only one state, and so far no other jurisdictions have followed, the most likely consequence of *Kurtenbach* is simply that all Kansas farmers will ultimately be required to pay higher premiums for their FCLPs. To add insult to injury, farmers will also be required to learn the new policy language reflecting narrower coverage and stricter exclusions contained in the amended FCLPs. In short, they will be stuck with policies written to cover less, and that cost more. Robert Jerry has explained that "[b]ecause courts interpret policies in a light highly favorable to the insured, insurers inevitably find themselves providing coverage for events they thought were excluded."[264] The immediate answer is to revise the policy language and tighten the exclusion provisions on new policies in what is sometimes a "deliberate effort to counteract . . . narrow interpretations of the scope of exclusions."[265]

Indeed Farm Bureau Mutual Insurance Company has significantly altered the format of their FCLP. Completely gone is the "Incidental Motorized Vehicle Coverage" section that led to the three different interpretations by the three different courts in *Kurtenbach*.[266] Also gone is the broad definition of farming that included "all necessary operations."[267]

---

263. *Id.* Appleman also noted the "explosion in environmental litigation" as another factor which led to the absolute exclusion of pollution coverage in general liability policies. *Id.*

264. JERRY, *supra* note 11, at 129.

265. *Id.*

266. *See supra* Part II; *see supra* note 75.

267. *Kurtenbach*, 961 P.2d at 56.This broad language, which led the *Kurtenbach* court to conclude that crossing the highway was "farming" and thus covered premises, was changed to "responsibilities in connection with the maintenance and upkeep of the insured premises." FARM BUREAU MUT. INS. CO., FARM & RANCH POLICY FORM NO. FL999 04 01 94, FARM PREMISES & PERSONAL LIABILITY COVERAGE FORM §I(7) (1994).

Their new policy form very briefly states the various coverages in broad terms followed immediately by detailed exclusions.[268] However, because the definition of a motor vehicle is essentially the same, whether any of these changes would compel a Kansas court to reach a different conclusion than the one arrived at in *Kurtenbach* is doubtful.

What is known, however, is the general principle that "[w]hen courts find coverage where none was mutually intended, they further undermine the ability of insurers to predict future losses. This situation in turn makes it extremely difficult for insurers to price insurance accurately . . .." [269] As stated in Holmes' Appleman, forecasting "credible insurance rates requires that actuaries develop meaningful classifications . . . [and] gather reliable data for each of those classes (groupings of risks with similar loss characteristics) . . . ."[270] This, of course, cannot be done when courts disagree on what class of risk a vehicle falls under.

The obvious result of expanding coverage into areas where such coverage was never intended is a response by the insurance industry to protect itself. Without question "misguided judicial opinions" undermine the crucial contractual balance in society between liability insurance providers and insurance consumers, and leads only to "negative economic consequences such as steep premiums and coverage curtailment."[271] Mr. Kurtenbach's personal windfall notwithstanding, the Kansas Supreme Court's extremely expansive interpretation of motor vehicle exclusion provisions in FCLPs to find coverage where none existed serves only to financially injure the already struggling farming industry in Kansas as a whole.

CONCLUSION

The *Kurtenbach* decision marks both a clear and unwise departure from the majority rule of excluding dual-use vehicles designed for and used on

---

268. *See* FARM BUREAU MUT. INS. CO., FARM & RANCH POLICY FORM NO. FL999 04 01 94, FARM PREMISES & PERSONAL LIABILITY COVERAGE FORM (1994). In the new policy, Motorized Vehicles are still excluded. *Id.* at §1(15)(c). However the same exception for vehicles not subject to registration is also included. Thus even with this new policy language it is likely a court applying *Kurtenbach* would still find a comparable vehicle to be covered by the policy. However, the new policy's narrower definition of "Farming" and "Insured Premises" might preclude a similar ruling on the "on premises" issue.

269. Terri D. Keville, Note, *Advertising Injury Coverage: An Overview*, 65 S. CAL. L. REV. 919, 922 (1992).

270. HOLMES, *supra* note 249, at 80.

271. Gregory T. Lawrence, Note, *Sheets v. Brethren Mutual: Maryland's High Court Misconstrues CGL to Cover Excluded Economic Loss Caused by Negligent Misrepresentation*, 27 U. BALT. L. Rev. 189, 190 (1997).

public highways from coverage under Farm Comprehensive Liability Policies. FCLPs are designed to meet the unique risks farmers face in the course of their specialized occupation, and premiums are priced accordingly. In order to maintain coverage for legitimate farm implements and keep premiums within an affordable range for farmers, risks better covered by other types of liability policies, such as automobile insurance, must be excluded from coverage under FCLPs.

In *Kurtenbach*, the Kansas Supreme Court found that a motorcycle designed for road use and actually used on public highways was not a motor vehicle subject to registration because the owner "intended" the vehicle for farm use. The court, choosing the road less traveled, departed from the majority rule, which objectively examined the vehicle's design and actual use. The court instead relied on the far more subjective "owner intent" to determine when a FCLP must cover a dual-use vehicle.

The ramifications of the *Kurtenbach* decision are additional inconsistency and unpredictability in the area of interpreting motor vehicle exclusions in FCLPs. While such pro-insured rulings are beneficial to the one farmer named in the case, the bottom-line consequences for the remainder of the farmers in Kansas, should the *Kurtenbach* precedent stand, is only the potential for higher insurance premiums and even the possible loss of all motor vehicle coverage under FCLPs. While Robert Frost may have found enlightenment on the road less traveled, the Kansas Supreme Court would have been better served by sticking to the majority route.

FROM THE JOURNALS: INSURANCE LAW ABSTRACTS

Edited by Dorothy Puzio[*]

TERRORISM

Stephen P. Watters & Joseph S. Lawder, *Justice in a Changed World: The Impact of September 11th on Tort Law and Insurance*, 29 WM. MITCHELL L. REV. 809 (2003).

The 9/11 terrorist attacks have prompted a new approach to liability and insurance coverage by challenging the traditional framework for providing relief to those affected by terrorism. The sheer magnitude of 9/11, and the difficulty of proving causality and foreseeability with respect to the entities involved, other than the terrorists themselves, led the government to establish a no-fault Victim's Compensation Fund instead of encouraging individuals to seek relief the more traditional route, the tort system. However, acknowledging the existence of risk, the government has advocated a return to a fault-based approach with respect to liability for terrorism in the future. Concerning the insurance industry, its Terrorism Risk Insurance Act of 2002 (TRIA) places initial responsibility to pay for terrorist incidents, up to a certain amount, on businesses and insurers under a fault-based approach. The government then steps in as an insurer for catastrophic risks up to $100 billion. With respect to the tort system, a business owner's liability for terrorist acts will depend on the owner's relationship with the victim and the foreseeability of the terrorist act. Since 9/11, foreseeability has increased dramatically. While imperfect, these fault-based systems can be effective so long as we remember not to evaluate the predictability of risk in hindsight.

BAD FAITH

Eugene R. Anderson, *Symposium: A "Keene" Story,* 2 NEV. L.J. 489 (2002).

---

[*] Dorothy Puzio is a 2001 graduate of the University of Connecticut and a May 2004 J.D. candidate at the University of Connecticut School of Law.

The *Keene* "trigger of coverage" case[1] is one insurance case that has had a tremendous impact on the insurance industry, particularly its approach to litigation. It involved a lawsuit by a manufacturer of insulation products containing asbestos, against its insurance carriers for failing to protect it from liability at the hands of customers suffering from asbestos-related illnesses. The District of Columbia Circuit Court of Appeals held that the insurers were construing "injury during the policy period" too narrowly, and that "inhalation exposure, exposure in residence, and manifestation" all trigger coverage under the policies. Essentially, they would have to pay, but only one policy's limits would apply to each injury. This decision was based on the insurance company's own underwriting practices. However, instead of serving as a clarification for insurers of the standard to which they are held, it prompted them to continue new strategies of claim avoidance to circumvent *Keene*. These include defaming policyholders, hiding their files, and getting the policyholder in court, among others. Since claims controversies are seldom resolved satisfactorily in court and judges tend to make substandard underwriters, *Keene*'s most valuable lesson may be that "victories in battle hardly guarantee that the war will be won."

BAD FAITH

Leo P. Martinez, *Symposium: Classic Insurance Law in a Postmodern World*, 2 NEV. L.J. 403 (2002).

Gray v. Zurich Insurance Co.[2] is a great teaching tool and foundation of modern insurance law. It combines simplified facts with a confluence of insurance principles that are eloquently tied together to form new doctrine by a great judicial activist, Justice Mathew Tobriner of the California bench, to form new policy. *Gray* involved a dispute over denied insurance coverage where a doctor preemptively struck a driver who came over in a menacing way to his car after a near-miss auto collision. Gray's insurer refused coverage relying on an intentional acts exclusion in its policy and the injured's characterization of the incident as intentional in his complaint. California's traditional "four corners" rule, which compares the policy language to the complaint's allegations to determine the scope of duty to defend, would have supported the insurer's position. Instead, Justice

1. Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), *rev'g* 513 F. Supp. 47 (D.D.C. 1981).

2. 419 P.2d 168 (Cal. 1966).

Tobriner relied on the principle of reasonable expectations that he had articulated in an earlier opinion, *Steven v. Fidelity & Casualty Co.*,[3] and combined this with the observations that (1) providing a defense, as opposed to indemnification, does not violate public policy by encouraging intentional acts and (2) it is impossible to know whether a third-party suit falls within indemnification coverage until it is resolved, to arrive at the holding that an insurer must defend whenever it ascertains facts which give rise to the potential for coverage under a policy. This revolutionary approach, which requires the insured to make a prima facie showing of potential for coverage, has greatly expanded policyholders' rights and has since been adopted by numerous states outside of California.

GENERAL

Douglas G. Houser & Linda M. Bolduan, *Mold: Another Four-Letter Word Every Coverage Attorney Needs to Know*, 38 TORT TRIAL & INS. PRAC. L.J. 15 (2002).

Mold is not a new problem. Nevertheless, insurance claims for mold-related damage are on the rise, with many of these claims leading to lawsuits, accusing insurers who refuse to pay of bad faith. Why is the issue of mold becoming such a pervasive problem? The main reason: causation is a complicated question, and different jurisdictions take very different approaches to resolving the issue. While the two basic principles underlying the question of causation in all insurance claims are the same: proximate cause and ensuring loss, there are two very distinct lines of mold decisions. In light of this trend, insurers should take some general precautions, whatever their jurisdiction, which include, among other things, responding swiftly to water-related causes of loss that could yield mold and reminding policyholders of their duty to protect damaged property and mitigate losses. With these, they can help avoid confusing litigation about causation in what would surely be a factual inquiry.

GENERAL

Thomas R. Newman & Maro A. Goldstone, *Symposium: The Saga of Gracie Terrace*, 2 NEV. L.J. 502 (2002).

Sometimes lawsuits used as a tool of revenge become as complicated

3. 377 P.2d 284, 294 (Cal. 1962).

and tangled as the feelings which fuel them. Such was the case with Gracie Terrace. The saga of Gracie Terrace involved a series of lawsuits that spanned a period of three and a half years and began with a suit against a tenant and former vice-president of the apartment complex's governing body challenging her right to use a portion of the roof area specifically allocated to her by the Proprietary Lease. While the tenants and former vice-president eventually prevailed, in this politically motivated and arguably vengeful action, they became embroiled in a second, equally heated battle outside of the courtroom, this time with their insurance carriers over refusal of coverage. While the negotiations over the applicability or inapplicability of certain exclusions were many, the tenants ultimately succeeded in eliciting coverage by convincing the insurance carriers to reject the "four corners of the complaint" approach to policy interpretation in favor of a more generous approach. They convinced the insurer that requiring it to provide a defense whenever an insurer has knowledge of facts potentially bringing a claim within indemnity coverage is the most just way of fulfilling every insurer's implicit duty to defend.

BAD FAITH

Jeffrey E. Thomas, *Symposium: Crisci v. Security Insurance Co.: The Dawn of the Modern Era of Insurance: Bad Faith and Emotional Distress Damages*, 2 NEV. L.J. 415 (2002).

Crisci v. Security Insurance Co.[4] is a landmark insurance bad faith case that has helped to popularize bad faith law while providing a context for its development and evolution. In this case, Crisci sued her first-party insurer after it failed to settle a lawsuit against her, initiated by her tenant, who had fallen on the property for the $10,000 policy limit. Instead, the insurer litigated the case when the strength of its position was questionable at best, and lost. The tenant received a $101,000 judgment, $91,000 of which fell on Crisci, who thereafter became indigent and mentally ill. In what was to become a landmark bad faith decision, the California Supreme Court awarded Crisci emotional distress damages in addition to damages for bad faith, for the insurer's actions.

From the perspective of bad faith doctrine, the Crisci case established several core principles, namely (1) insurers have an implied covenant of good faith and fair dealing that serves as a basis for causes of action, (2) insurer bad faith claims sound in tort rather than contract, and (3) one way

4. 426 P.2d 173 (Cal. 1967).

to test for bad faith is questioning whether an insurer would accept a given settlement offer if its liability was unlimited. All of these contributions are significant, but even more groundbreaking: *Crisci* was the first decision to uphold emotional distress damages for an insurer's bad faith refusal to settle. In doing so, the case has opened the door for other states to award emotional distress damages in similar insurance cases (this the author wholeheartedly supports), by providing legal authority for doing so and providing a context in which to frame the issue. There is much evidence that *Crisci* has been very influential in this aspect of insurance law since its decision, and will likely continue to be so in the future.

HEALTH

Inimai M. Chettiar, *Contraceptive Coverage Laws: Eliminating Gender Discrimination or Infringing on Religious Liberties?*, 69 U. CHI. L. REV. 1867 (2002).

In recent decades, legislatures have passed contraceptive coverage laws requiring insurers to cover contraceptives in order to eliminated discrimination against women. In trying to balance this goal with respect for those entities considering contraceptive coverage objectionable on religious grounds, many have enacted exemptions for certain organizations, both broad and selective. This article focuses on whether these various statutory schemes violate the Free Exercise Clause of the First Amendment, which protects religious beliefs, but not necessarily conduct, from governmental intrusion.

Contraceptive coverage laws without exemptions, such as those of Vermont and New Hampshire, are constitutional because they satisfy the requirements of the Smith test: namely they are neutral and generally applicable. However, exemptions that apply to some but not all individuals or entities must pass strict scrutiny; therefore they must be justified by a compelling interest and narrowly tailored to fit that interest. Laws with broad exemptions are constitutional because they allow entities to identify themselves accordingly. By contrast, the constitutionality of laws with selective exemptions depends upon the group to whom the law applies. Generally, a selective exemption is constitutional if it (a) attempts to differentiate between exclusively religious and quasi-religious organizations, or (b) adds additional restrictions necessary for eliminating gender discrimination. In all of these ways, the well-intentioned contraceptive statutes pass muster.

TERRORISM

Daniel James Everett, *The "War" on Terrorism: Do War Exclusions Prevent Insurance Coverage for Losses Due to Acts of Terrorism?*, 54 ALA. L. REV. 175 (2002).

After the events of 9/11, many Americans perceive the struggle against terrorism as a war. This has focused attention on the important issue of war exclusion clauses, which relieve insurance companies of liability for losses caused by wear, in the context of terrorist acts. Fundamentally, these exclusions depend upon how insurers and courts define "war." There are two very different doctrines, technical meaning and common meaning, which have developed over the years to address this question. Increasingly, modern courts have moved away from the technical meaning doctrine, which relies on a formal declaration of war, in favor of the common meaning doctrine, which construes war in its ordinary, popular sense based on the particular facts of any given situation.

With respect to the war on terrorism, which at least arguably lacks the characteristics of an official war in the ordinary sense, application of war exclusion clauses requires that the terrorist groups have "at least some incidents of sovereignty," which include, among other things, assistance from or sanctioning by sovereign states. Accordingly, war exclusion clauses do not apply to the 9/11 losses because while Afghanistan consents to al Qaeda's presence within its borders, it had nothing to do with the 9/11 attacks. Where incidents of sovereignty are more questionable, extrinsic factors such as the scale of an attack, intent of the organization, and equipment used, come into play. Since most acts of terrorism will fall sort of these requirements, insurers should consider employing terrorism exclusions in the future to shield the entire industry from financial disaster.

HEALTH

Rachel Schneller Ziegler, *Safe, but Not Sound: Limiting Safe Harbor Immunity for Health and Disability Insurers and Self-Insured Employers Under the Americans with Disabilities Act*, 101 MICH. L. REV. 840 (2002).

When the Americans with Disabilities Act (ADA) was passed in 1990, it was celebrated as a landmark bill that would finally end discrimination against the disabled in the areas of employment, public services and public accommodations. In practice, however, the ADA has fallen far short of its expectations. One of the main reasons for this discrepancy has been the

courts' overly broad interpretation of Section 501(c) of the ADA, the safe harbor provision, which grants a partial exemption to health and disability insurers, as well as self-insured employers, from the ADA requirements so as not to destroy the profitability of the insurance industry.

Instead of limiting the safe harbor protections to risk variations that are excessive and atypical, and requiring insurers to provide evidence justifying disability-based distinctions, courts have treated the plea of safe harbor as an irrebuttable defense without need of proof, thereby undermining the spirit and purposes of the ADA. Accordingly, courts should adopt the undue hardship standard in these safe harbor cases, which would require defendant insurers to justify, through some form of empirical evidence, their denial of coverage to certain disabled individuals. This would ensure that courts' decisions remain consistent with the intent and purposes of the ADA, rely on actual data presented by insurers, and reflect a standard approach to evaluating these cases. This will lead to a more equitable result for people with disabilities, as well as a systematic application of the ADA.