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# Legislative and Judicial Control of the Terms of Insurance Contracts: A Comparative Study of American and European Practice

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# LEGISLATIVE AND JUDICIAL CONTROL OF THE TERMS OF INSURANCE CONTRACTS: A COMPARATIVE STUDY OF AMERICAN AND EUROPEAN PRACTICE

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## I. INTRODUCTION

### A. *General Remarks*

An insurance company exists to sell complicated risk-shifting contracts, and it is rarely expected to do anything with most varieties of insurance contracts beyond receiving the premium and issuing a document. Such a contract is aleatory: a definite performance on the side of the insured—payment of a premium—is exchanged for a promise to pay a much larger sum, but only on the happening of an unlikely contingency. However, if the contingency or insured event should occur, it is vital to the welfare of the policy-holder, and may be important to the entire economy, that payment be made to him promptly according to his reasonable expectations, which are based primarily on the terms of the contract.

It was the nineteenth century viewpoint of most legal systems that a regime of free contract was the norm, *i.e.*, that absent compelling reasons to the contrary, parties to contracts were to be free to negotiate about terms and to conclude agreements with any stipulations they might wish. Though freedom of contract is still regarded as an important value in the twentieth century, the public authority now intervenes frequently in the formation of contracts and places many restrictions on the freedom of parties to bargain as they will. Such restrictions have been imposed particularly for "contracts of adhesion," those agreements in which one of the parties has no choice other than to adhere to the terms dictated by the other party or reject the contract altogether. With its complicated terms defining and qualifying a contingency on which payment will be made, an insurance policy that is designed for mass sale to small policyholders is a classic example of a contract of adhesion. On the other

hand, if a policyholder is an industrial giant whose bargaining power and knowledge of the insurance market equals or exceeds that of the insurer, an individualized contract may be negotiated. Even organizations of policyholders sometimes develop sufficient strength to bargain with insurers on more or less equal terms. But most insurance business, whether measured by number of contracts or by total premium volume, falls within the category of contracts of adhesion. It is not surprising, therefore, that today the governments of most commercial countries intervene frequently to affect the terms of many varieties of insurance contracts.

The extent and manner of intervention vary remarkably from country to country. As to extent, the Netherlands and the United Kingdom have retained the tradition of a regime of free contract in the insurance market. At the other extreme may be found countries otherwise similar to Holland and England (Germany, France, and the United States) which interfere extensively with insurance contract terms. But in manner of intervention, there is close similarity in regulation between England and the United States, because of a common legal tradition and method, while Holland, so far as it does intervene, follows the pattern of its continental neighbors.

Intervention may take many forms. The legislature may create binding rules of law that override the conflicting terms of contracts, may dictate the exact terms parties must insert in contracts, may prescribe limits within which certain terms must lie, may prescribe the substance of terms, or may provide terms or legal rules effective only if the parties do not stipulate otherwise. It may also empower an administrative agency to intervene in like manner. Intervention of a different sort—by the judiciary—occurs in all countries, but most strikingly in the common-law jurisdictions, where the courts exercise significant control over freely negotiated contract terms through the process of interpretation.

The present study<sup>1</sup> surveys the ways in which the stipulations of the insurance contract are subjected to public control, as part of a larger research project aimed at a fuller understanding of insurance regulation.<sup>2</sup>

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1. The basic research for the present study was done by Dr. Pffennigstorf as a thesis for the degree of M.C.L. at the University of Michigan. It has been revised and rewritten by the authors jointly. Thanks are expressed to the William W. Cook Foundation for making this research possible by a fellowship grant and by other assistance, and to the Ford Foundation, which has contributed to the later stages of preparation of the article. Neither foundation is responsible for the views expressed, which are solely those of the authors.

2. Related studies already published include Kimball & Hansen, *The Utah Insurance Commissioner: A Study of Administrative Regulation in Action* (pts. 1-2), 5 UTAH L. REV. 429 (1957), 6 UTAH L. REV. 1 (1958); KIMBALL & CONKLIN, *THE MONTANA INSURANCE COMMISSIONER: A STUDY OF ADMINISTRATIVE REGULATION IN*

This article deals only with a part of the whole study of policy form regulation. Though it is not possible to make a complete division of the subject, the focus here is on the control of contract terms by legislatures and courts, leaving regulation by administrative agencies to be considered in a subsequent article. Both articles compare American with certain European methods and ideas.

### B. *Some Basic Ideas*

1. Public and private law. In the literature of Anglo-American law, the whole body of law is frequently classified by academic jurists into public and private law areas, but in the common law this terminology has only descriptive significance. Nothing of practical importance turns on the question of whether a problem falls within one area or the other.<sup>3</sup> In continental law the distinction has not only theoretical but also practical importance, and the application of principles of law and the competence of courts may depend on the classification of the problem. Ordinary courts generally have jurisdiction over private law matters while administrative agencies, sometimes supervised by a system of administrative courts, have jurisdiction over most public law matters.<sup>4</sup> It is no easier in continental jurisprudence than it would be in Anglo-American to settle upon definitions of public and private law that will be satisfactory

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ACTION (1960); KIMBALL, INSURANCE AND PUBLIC POLICY (1960); Kimball & Jackson, *The Regulation of Insurance Marketing*, 61 COLUM. L. REV. 141 (1961); Kimball, *The Purposes of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law*, 45 MINN. L. REV. 471 (1961); Kimball & Hanson, *The Regulation of Specialty Policies in Life Insurance*, 62 MICH. L. REV. 167 (1963).

Though the premium is a crucial term of the contract, and though premium rate and policy form regulation are closely related, even occasionally being performed simultaneously, the necessities of analysis led to exclusion from this study of any systematic consideration of rate regulation. Policy form regulation is analytically prior to rate regulation, form being the independent and rate the dependent variable in the relationship between them.

3. Being greatly influenced by the Roman law and modern continental writers, HOLLAND, JURISPRUDENCE 127-34, 366-67 (13th ed. 1924) regards the distinction between public and private law as the most important division in the law. But he recognizes that there is "no equivalent in our insular legal terminology." *Id.* at 367. See also JENKS, THE NEW JURISPRUDENCE 241-43 (1933). AUSTIN, LECTURES ON JURISPRUDENCE, Lecture XLIV (Student's ed. 1920) would give public law a relatively minor place in the *corpus juris* as a branch of the Law of Persons and would even regard much of it as merely positive morality or ethics, not as law. On the other hand, KIRALFY, THE ENGLISH LEGAL SYSTEM (3d ed. 1960) does not find it necessary even to use the terms.

4. Thus, the Verwaltungsgerichtsordnung of Jan. 21, 1960, § 40, [1960] Bundesgesetzblatt, Teil I, at 17, 21 (Ger.) specifies: "The administrative law process is provided for all public law controversies not of a constitutional nature, unless by federal law the controversy has been expressly assigned to another court." In German, *Privatrecht* is contrasted with *Öffentliches Recht*, and in French, *droit privé* with *droit public*. In Europe the law of insurance regulation is a part of administrative law, *Verwaltungsrecht*, *droit administratif*, which is the most important branch of public law other than constitutional law.

for all purposes,<sup>5</sup> but fortunately it is not necessary in this study to be concerned with such niceties. For present purposes the definitions of Enneccerus-Nipperdey are sufficient: "Public law is the law that settles the relationships of communities, as such, to one another and to their members," while "private law settles the legal relationships in which individuals stand as individuals, and not as members of the community."<sup>6</sup>

Insurance law is a mixture of public and private law. On the whole the law of the insurance contract, collected in continental Europe in insurance contract codes but mainly contained in innumerable court decisions in the Anglo-American system, must be regarded as private law, while the regulation of insurance enterprises is a matter of public law. But the line is not so clear as this generalization would suggest. When a statute enunciates a provision respecting the insurance contract, it may directly affect the contract, *i.e.*, the relations between the policyholder and the insurer, or it may not. If it directly affects the relations between the parties to the contract, fixing or altering the terms of the contractual relationship as they will be viewed by an ordinary court, the statute will be classified as having private law effect. This may also be expressed by saying that the statute is self-executing. When it creates a duty on the part of the insurance company vis-à-vis the state, however the duty may be sanctioned, the statute will be classified as having a public law effect.<sup>7</sup> It is quite possible, of course, for a statute to have both public and private law effects. It should be noted also that action by an administrative agency, though having mainly public law effects, can have also a direct effect on the private relations of the parties. Indeed, there are important instances of this in insurance law.

2. *Ius dispositivum* and *ius cogens*. Another classification is almost untreated in the literature of Anglo-American jurisprudence,<sup>8</sup> though the phenomena it reflects exist in English and American law as clearly as in the continental legal systems. If a document does not contain all of the terms considered essential to formation of a contract,

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5. See, *e.g.*, DAHM, DEUTSCHES RECHT 142-45 (2. Aufl. 1963); FORSTHOFF, 1 LEHRBUCH DES VERWALTUNGSRECHTS 94-107 (7. Aufl. 1958).

6. 1 ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS 225-26 (15. Aufl. 1959). The expression "as such" refers to the qualification in the next sentence, which specifies that proprietary or non-communal relationships of communities are subject to private law.

7. This terminology will make it easier to describe the nature of statutory intervention in the terms of insurance policies.

8. Thus, PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW (1937), is continental, though written in English. But see Lenhoff, *Optional Terms (Jus Dispositivum) and Required Terms (Jus Cogens) in the Law of Contracts*, 45 MICH. L. REV. 39 (1946); Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 729 (1931). See also FRIEDMANN, LAW IN A CHANGING SOCIETY 106-09 (1959).

Anglo-American courts traditionally regard it as too indefinite to enforce. To a considerable and increasing extent, however, courts have been enforcing incomplete agreements by using a rule of reason to supply the missing terms. This is accomplished under the guise of interpretation of contracts, the missing terms being supplied by finding "implied" promises. Of course, such implied promises are not presumptions of factual consent; they are judge-made rules of law applied in the absence of agreement by the parties on the point. In theory and usually in practice such rules of law are subject to displacement by contrary agreement, and insurance policies are usually carefully drafted to displace all such implied terms by explicit agreement.

In continental law, the replacement of customary or judge-made law by codes in earlier centuries made it necessary to handle the same problem in quite another way. A code itself is, in theory at least, a complete and systematic statement of an entire body of applicable law, and the various commercial codes, including the insurance contract statutes of Germany and other states, contain numerous rules of law that are applicable if the parties do not displace them by contrary agreement. This "optional" or "yielding" law is the functional equivalent of the "implied promise" of the Anglo-American law, but it is law enacted by legislatures, not created by courts. It is *ius dispositivum*, or law that can be disposed of by the parties.

When a statute relating to contract terms is enacted in the common-law system, it is natural and traditional to think of it as limiting freedom—as the imposition of compulsory terms on the parties to the contract. Indeed, this was certainly the character of most such statutes in the past. In recent decades, however, there has been a substantial trend in the common-law system toward the use of statutes containing merely optional terms, identifiable by language such as "unless the parties have otherwise agreed" or "subject to special agreement." Conversely, it has been observed<sup>9</sup> that there is a modern tendency in the continental system for commercial codes to contain more compulsory terms, or *ius cogens*, which may not be displaced by agreement of the parties, and fewer that belong in the category of *ius dispositivum*. In any case, both systems now have both dispositive and compulsory statutory terms.

But it is necessary to categorize statutory restrictions in still another way, for the continental codes frequently distinguish between the two parties to the contract, regarding one as weaker and the other as stronger. The parties are sometimes merely forbidden to alter the statu-

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9. Lenhoff, *op. cit. supra* note 8, at 40.

tory terms to the detriment of the weaker party. In insurance, the parties may be forbidden to make agreements inconsistent with the statutory terms except when the alterations are for the benefit of the policyholder. Terms that may not be changed at all for the benefit of either party are fully compulsory or absolute terms, or *absolut zwingende Vorschriften*. Nonconforming provisions are void; sometimes they may even make the entire contract void. Which effect follows depends on the statute's terms. Terms that may be changed for the benefit of the policyholder or insured person but not for the benefit of the insurer are semi- or relatively compulsory terms—*relativ* or *halb zwingende Vorschriften*.

With these classifications, it will be possible to describe the terms of statutes somewhat more compactly and effectively and to make more meaningful comparisons of the techniques in the various systems.

## II. STATUTORY CONTROL OF POLICY TERMS IN THE UNITED STATES

### A. *Historical Background*

Long before the enactment of comprehensive statutes regulating insurance, American state legislatures began to exercise control over some terms of insurance policy contracts.<sup>10</sup> At a time when administrative control was undeveloped and interference with the terms of contracts was unusual, legislatures sometimes inserted provisions in special corporate charters that reflected overriding considerations of public policy. An example of this is a charter granted in 1818 to the Massachusetts Hospital Life Insurance Company by the General Court of Massachusetts, which provided "That this corporation shall not have power to pay over any sums to the heirs of those who shall die by the hand of justice, or by suicide, or in consequence of a duel."<sup>11</sup> Later, general insurance statutes were enacted, beginning with life insurance, and were directed most often toward the protection of the policyholder against overreaching. For example, as early as 1861 a general Massachusetts statute provided for a period of grace in premium payment and for nonforfeiture

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10. 1 RICHARDS, *INSURANCE* 149 n.10 (5th ed. 1952) erroneously states that such control "was born out of" the Armstrong Investigation of 1905. Actually it has a much longer history.

11. Mass. Priv. and Spec. Stat. Sess. 1817, ch. 180, § 10. Insurance corporations were formed only by special charters until the latter part of the nineteenth century. See KUEHN, *THE WISCONSIN BUSINESS CORPORATION* 13-18, 27-30 (1959), for discussion of the special chartering of insurance corporations in Wisconsin; for the corresponding development elsewhere, see 2 DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* 231-47 (1914); EVANS, *BUSINESS INCORPORATION IN THE UNITED STATES 1800-1943*, at 10-30 (1948); DODD, *AMERICAN BUSINESS CORPORATIONS UNTIL 1860*, at 218-26, 292-309 (1954).



in case of default.<sup>12</sup> The failure of many companies during the depression of the 1870's stimulated the growth of the regulatory systems of New York and Massachusetts; statutes were enacted and provided, in part, for periods of grace for premium payment, nonforfeiture and cash surrender values.<sup>13</sup> These statutes did not introduce ideas of fairness which had originated with the legislators; rather they imposed standards voluntarily assumed by more liberal companies upon enterprises whose practices were less generous.<sup>14</sup> In that way the statutes not only protected the interests of the policyholders, but also the interests of established companies against threatened unfair competition.<sup>15</sup> These important and pathbreaking statutes dealt only with specific problems, however.

Fire insurance was the first line of insurance to receive systematic attention; this occurred in the 1870's and 1880's and led to a standard policy form.<sup>16</sup> As a result of New York's Armstrong investigation, a substantial amount of legislative activity developed about 1906-1910 affecting life insurance policy terms; it was similar in nature but more far-reaching than that of the 1870's.<sup>17</sup> Abuses similar to those discovered in life insurance brought about an investigation by the National Convention of Insurance Commissioners (NCIC) into accident and health insurance in 1910. The investigation led to enactment of state statutes based on an elaborate model bill prepared by the NCIC, which required inclusion of certain standard provisions in each policy.<sup>18</sup> In other lines of insurance, there has been somewhat less intervention, though there is a good deal of variation in the extent of regulation from state to state.

From the beginning of the development of American insurance laws, imitativeness played an important role so that patterns of legislation

12. Mass. Gen. Laws 1861, ch. 186. See also Michaelson & Goodridge, *Filing and Approval of Policy Forms*, in 6 EXAMINATION OF INSURANCE COMPANIES 367, 368 (N.Y. State Ins. Dep't ed. 1955).

13. N.Y. Sess. Laws 1876, ch. 341; N.Y. Sess. Laws 1877, ch. 321; N.Y. Sess. Laws 1879, ch. 347; Mass. Laws 1880, ch. 232; McCall, *A Review of Life Insurance*, in INSURANCE, A TEXT BOOK 9, 21 (Fricke ed. 1898) (President of New York Life Insurance Company).

14. AMRHEIN, *THE LIBERALIZATION OF THE LIFE INSURANCE CONTRACT* 57-58 (1933). For company lobbying as a factor, see KELLER, *THE LIFE INSURANCE ENTERPRISE* 1885-1910, at 214-26 (1963).

15. See MOWBRAY & BLANCHARD, *INSURANCE* 492 (5th ed. 1961).

16. See notes 53-59 *infra* and accompanying text.

17. AMRHEIN, *op. cit. supra* note 14, at 50; Rhodes, *Recent Insurance Legislation*, in 10 TRANSACTIONS OF THE ACTUARIAL SOCIETY OF AMERICA 145 (1907-1908).

18. MOWBRAY & BLANCHARD, *op. cit. supra* note 15, at 501-02. Some states were already feeling their way to statutory control over disability policy terms. See, e.g., KIMBALL, *INSURANCE AND PUBLIC POLICY* 233 (1960) for Wisconsin developments. In 1957 the Uniform Individual Accident and Sickness Policy Provisions Law, as adopted in 1950 by the National Association of Insurance Commissioners, was in effect in 45 jurisdictions. 1957 NAIC PROCEEDINGS II, at 330.

tended to move across the country in waves. But this was a uniformity without design; a deliberate effort to create a uniform approach to insurance legislation began with the formation of the National Convention of Insurance Commissioners (NCIC or NAIC) in 1871.<sup>19</sup> Drafting model bills has long been a principal activity of the NAIC, but despite its activity, the statute books of the states now present a varied picture. In all jurisdictions insurance controls are partly legislative—at least there is always a statutory standard fire policy. Usually there are standard provisions for accident and sickness insurance as well. In some instances, legislative control has been supplemented by a general administrative approval requirement applicable to all types of insurance policies.<sup>20</sup> In other states, administrative control, if any, has been less comprehensive, applying only to some kinds of policies. These administrative controls have developed quite independently for the different kinds of insurance, and the degree of systematization varies greatly from state to state. Some policies need only be “filed for information” with the insurance department, while others need formal approval by the commissioner. Still others must conform to statutory requirements but need no special administrative approval. Even provisions based on NAIC model bills are not always uniform, for states depart freely from the models.<sup>21</sup> Moreover, the model bills are not all consistent with one another; each reflects the thinking of the time of its development and is not completely compatible with provisions conceived at another time.<sup>22</sup>

Throughout the century since policy form control began to develop, the interest of the representatives of the public in the terms of the insurance contract has steadily increased. Today not only has the legislature itself interfered substantially with insurance policy terms, but it has also given significant power to the insurance commissioner to intervene. On the whole, in the American insurance market, the insurance contract is under virtually complete public control.

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19. The National Convention of Insurance Commissioners became the National Association of Insurance Commissioners in 1936. It is referred to here as NCIC or NAIC, according to date. The Armstrong revelations led to a conference of governors, attorneys general and insurance commissioners called by President Theodore Roosevelt. The so-called “Committee of Fifteen” emerged from that conference and was assigned the duty of preparing uniform requirements for policy forms. See BULEY, *THE AMERICAN LIFE CONVENTION* 264-66 (1953). More recently, draft proposals for uniform laws have been prepared by Committees of the NAIC.

20. *E.g.*, MICH. INS. CODE § 2236 (1956).

21. Purvis, *Comity and Uniformity in State Insurance Regulation*, in 1953 ABA SECTION OF INSURANCE LAW PROCEEDINGS 136.

22. Some notion of the complexity of legislative development, even in a single state, may be gained from KIMBALL, *op. cit. supra* note 18, at 230-40.

### B. *The Preparation and Enactment of Statutes*

A comparison of American with European control of policy forms requires attention to some features of the legislative process in each jurisdiction. In some American states the Insurance Commissioner now has an important position in the legislative process that was acquired only gradually. While in 1886 it could be asserted that the New York Superintendent of Insurance was no better qualified to draft a standard fire policy form "than an Egyptian mummy of the Second Dynasty,"<sup>23</sup> now he conducts annually a hearing in which legislative bills of the department and proposals made by the industry are discussed by department and industry representatives. The Superintendent's annual report to the legislature contains a special section devoted to proposed legislation which, in a recent year, disclosed that the department was sponsoring 33 measures before the legislature. Sometimes the department conducts research programs lasting for years.<sup>24</sup> In addition to its part in the initiation of legislation, the New York department exercises considerable influence during legislative deliberation. The insurance committee customarily asks the department's opinion on all bills touching insurance questions, and the governor, before signing the bill, normally asks for a memorandum. On the other hand, in many other states, including some large ones, the department still has no staff members really qualified to perform adequately the task of bill drafting.

The legislative position of the individual insurance departments, even of those lacking qualified personnel, is strengthened through cooperation with the industry and the NAIC, which has developed into an effective workshop for uniform legislation.<sup>25</sup> As a merely voluntary association of state officials, the NAIC has no official power and acts only through its member commissioners. Nevertheless, its bill-drafting

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23. Kennedy, *Origin of the Standard Fire Insurance Policy*, in *THE FIRE INSURANCE CONTRACT, ITS HISTORY AND INTERPRETATION* 20, 24 (Ins. Soc'y of N.Y. ed. 1922). See also Goble, *The Moral Hazard Clauses of the Standard Fire Insurance Policy*, 37 *COLUM. L. REV.* 410 (1937).

24. N.Y. 103RD PRELIMINARY REPORT OF THE SUPERINTENDENT OF INSURANCE TO THE NEW YORK LEGISLATURE COVERING THE CALENDAR YEAR 1961, at 118-28. For a research program, see REPORT OF THE SUPERINTENDENT OF INSURANCE TO THE 1958 LEGISLATURE FOR THE CALENDAR YEAR 1957, at 17-21.

25. Its first effort was a uniform standard provisions bill for accident and health insurance. Follmann, *Regulation of Accident and Sickness Insurance*, in *ACCIDENT AND SICKNESS INSURANCE* 234-38 (McCahan ed. 1954); Michaelson & Goodridge, *supra* note 12, at 370. See also note 18 *supra* and accompanying text.

The NAIC has participated in the preparation of other model acts, including one shaped during revision of the New York Standard Policy of fire insurance in 1913-1917 and in 1939-1943. See text at notes 64-68 *infra*. The New York form served as a model for the other states, but it is not only with respect to policy form that the NAIC prepares model laws. See, e.g., DRAFT UNAUTHORIZED INSURERS FALSE ADVERTISING PROCESS ACT, 1960 NAIC PROCEEDINGS I, at 151-52.

activities have been spectacularly successful when compared to the similar work of the Conference of Commissioners on Uniform State Laws. For example, the new Uniform Individual Accident and Sickness Policy Provisions Law, recommended by the NAIC in 1950, had been adopted in 45 states by 1957.<sup>26</sup>

Various factors contribute to the legislative success of the NAIC. Protracted deliberation based on investigations, questionnaires sent to the state insurance departments, and research done in the larger departments is followed by hearings at which industry representatives testify. Drafts are sent to all commissioners and interested companies, and are reviewed in the light of the criticisms received. For example, the 1950 Uniform Individual Accident and Sickness Policy Provisions Law was a product of "three years of cooperative effort by [the NAIC] Accident and Health Committee and representatives of the Bureau of Accident and Health Underwriters, the Health and Accident Underwriters Conference, and other industry representatives."<sup>27</sup> Such elaborate preparation is uncommon in American legislative activity at the state level.<sup>28</sup> Another factor in the success of the NAIC is a common interest of states and the NAIC in pressing vigorously for legislation; that often provides a motive for insurance department cooperation. Since 1945, the fear of federal intervention in case of inadequate state regulation has often been a powerful incentive to prepare and adopt uniform laws that are thought to be adequate to forestall federal insurance legislation.<sup>29</sup>

The extent and manner of industry participation in the legislative process varies from state to state. While the testimony of industry representatives in New York is heard routinely by the Insurance Department before a legislative bill is drafted and by the legislative committee,<sup>30</sup> as recently as 1959 the president of the NAIC felt it necessary to recommend that the industry be given notice of planned legislation, and that hearings or conferences be conducted before enacting new laws.<sup>31</sup> It may be doubted whether his concern was justified; the associations of insurers with staffs created for the purpose are active and self-activating

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26. 1957 NAIC PROCEEDINGS II, at 330.

27. Follmann, *supra* note 25, at 234 n.5.

28. Of course, it is not this factor but others that distinguishes insurance legislation from that of the Conference of Commissioners on Uniform State Laws.

29. Section 2(b) of the McCarran Act provides that the Sherman, Clayton and Federal Trade Commission Acts "shall be applicable to the business of insurance to the extent that such business is not regulated by State Law." 59 Stat. 33 (1945), 15 U.S.C. § 1012(b) (1952).

30. See, e.g., Note, *What the Legislators Are Doing*, 1958 INS. L.J. 69, 110.

31. 1959 NAIC PROCEEDINGS I, at 40.

participants in the law-making process.<sup>32</sup> Even so, something might be gained by formalizing and legitimating industry participation in the legislative process, however, as legitimacy is a powerful incentive to responsibility. Besides participation in preparatory stages, the insurance industry also engages extensively in lobbying,<sup>33</sup> including the use of threats of withdrawal from the state. Occasionally, but not often, such threats have been carried out.<sup>34</sup>

As yet no state has provided for formal and institutionalized participation of policyholders in the legislative process, perhaps because no strong association of policyholders for the protection and representation of their common interests had ever been formed until recent concern over threatened surplus lines legislation led to formation of the Insurance Consumers Subcommittee of the Unauthorized Insurance Committee of NAIC.<sup>35</sup> Nevertheless, policyholders' views and interests can influence legislation through lawsuits, the decisions of which may induce legislative action, through a large volume of complaints to the insurance department, leading to recommendations to the legislature, or through the fact that legislators are often policyholders or legal counsel for policyholders.

Some other groups have participated occasionally in insurance law-making. Brokers and agents were involved in the revisions of the New

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32. See, e.g., GLENN, *Association's 1958 State Legislative and Legal Activities*, in PROCEEDINGS OF THE 52D ANNUAL MEETING OF LIFE INSURANCE ASSOCIATION OF AMERICA 87, 88 (1958).

33. The proceedings of the various trade associations tell an eloquent story of involvement in legislative matters. A less direct, but perhaps even more telling, indication of such activity is reflected in the Wisconsin statute, which now requires, as a prerequisite for obtaining a license in the field of life insurance, an exact account of lobbying expenses, contributions to political parties, and other activity in the field of legislation. Wis. Stat. §§ 206.46-47 (1961).

34. See KIMBALL, *op. cit. supra* note 18, at 243.

35. In 1960, during hearings by a committee of the NAIC on problems of the non-admitted market, it was called to the attention of the committee chairman that insurance buyers were unrepresented; he responded by an invitation to form an insurance consumers advisory subcommittee. A group of nineteen representatives of corporate insurance buyers met in Chicago on September 25, 1960, to review the NAIC activity. This group grew to 150 by December. In order to make the subcommittee more representative, the American Society of Insurance Management was asked to take it over. The latter organization was formed as a national organization in 1950, though there was a predecessor organization with origins in the 1930's. It now has 30 state chapters and approximately 1350 members. Obviously, it is representative mainly of large corporate buyers of insurance, though its spokesmen claim more. Statement of Robert S. Gyory, Chairman, Subcommittee for Nonadmitted Insurance, American Society of Insurance Management, in *Hearings on S. Res. 56 (Part 11 Surplus Lines Insurance) Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 83rd Cong., 1st Sess. 6370-74 (1963); Address by Charles H. Groves, New York Joint Legislative Committee on Insurance Rates and Regulation, Oct. 3, 1962; Address by Raymond A. Severin, American Management Association in New York, May 8, 1961.

York Standard Fire Policy in 1913 and 1939-1943,<sup>36</sup> and as early as 1927 the American Bar Association approved a "Draft of Statutory Provisions relating to the Business of Insurance."<sup>37</sup> It is interesting that, unguided by institutionalized procedures, such participation has had no significant effect.

The kind of preparation that goes into NAIC model or uniform bills is unusual in the state legislative process, as is the sophisticated preparatory activity of the New York Insurance Department. Typically, there is a casual lack of concern for the niceties of professional technique. Bills are hastily drafted by persons unskilled in the insurance field and in legislative drafting and are then freely modified by legislators who display little regard for the inconsistencies thus introduced into the law, but respond instead to pressures or even to mere suggestions from constituents protecting their special interests. Ultimately a large number of insurance bills become law and contribute to a chaotic melange of legislation, often called, out of courtesy, an "insurance code." The typical American "insurance code" has grown up as a patchwork of measures put together without regard for the virtues of systematic thought.<sup>38</sup> Fortunately there is a contemporary effort in many states to correct some of the worst of the deficiencies thus created, but it faces considerable difficulties not unlike those that created the problem in the first instance. The contrast with the best of the European legislation is striking.

### C. *Legislative Control of Contract Terms*

Especially in earlier years, various constitutional objections were raised against legislative intervention in insurance policy terms. The earliest constitutional objection was that the statute infringed freedom of contract. Indeed, as late as 1894 an insurance man would say that "when it is asserted that the internal management and the manifold details of the business of a private corporation may be regulated by

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36. Rumsey, *The New Standard Fire Insurance Policy of the State of New York*, in *THE FIRE INSURANCE CONTRACT, ITS HISTORY AND INTERPRETATION* 41, 42 (Ins. Soc'y of N.Y. ed. 1922); 3 RICHARDS, *INSURANCE* 1589 (5th ed. 1952).

37. 1927 A.B.A. REP. 281. The draft went to insurance companies and commissioners, and the NCIC appointed a special committee, but the two committees were unable to conduct joint meetings. 1928 A.B.A. REP. 402; 1930 A.B.A. REP. 440. The National Conference of Commissioners on Uniform State Laws also failed to cooperate. *Ibid.* Kansas adopted some parts of the draft, and it was unsuccessfully introduced in Congress for the District of Columbia. 1928 A.B.A. REP. 402; 1929 A.B.A. REP. 344; 1931 A.B.A. REP. 394. The draft was not introduced in any other legislature. 1932 A.B.A. REP. 488.

38. The developments documented in detail in KIMBALL, *op. cit. supra* note 18, seem amply to support these generalizations. If further proof is needed, reading one or two American insurance codes selected at random will supply it.

Statute, the protection of our form of government is menaced and socialism uprears its head.”<sup>39</sup> Such arguments were not often successful in overturning statutes. Occasionally, however, a court has found that the state legislature exceeded the broad reach of the police power, as limited in state constitutional provisions. For example, in 1946 the Kentucky Supreme Court held that a statutory provision making it unlawful for a life insurance policy to provide for payment of the insured sum to an undertaker specifically named in the policy was in violation of the Kentucky Constitution on the ground that the stated purpose of the statute—to avoid unreasonable restraint of competition between undertakers—was an objective serving only the private interests of a few individuals, and was beyond the reasonable and legitimate interest of the state.<sup>40</sup>

Most statutes seek to achieve control over the substantive terms of the insurance contract so that the insured may enter a “reasonable” and “equitable” contract.<sup>41</sup> Such statutes will be the subject matter of most of the discussion in this paper. But there are some provisions which are designed to regulate only the form of the contract. They exist to protect the policyholder from deception by giving him access to full information about his coverage. Still other statutory provisions are aimed at developing a procedural mechanism for enforcing the substantive or formal provisions.

### 1. Formal and Procedural Requirements.

a. Formal requirements. In the United States, most insurance codes require that policies in certain kinds of insurance, in particular in life and disability insurance, “contain the entire contract.” They may operate directly<sup>42</sup> or by requiring the insertion in the policy of a special provision to the same effect;<sup>43</sup> it is quite common, though hardly necessary, for an insurance code to contain both kinds of statute.<sup>44</sup> The

39. Address by Mr. George Sanderson, in PROCEEDINGS, FIRE UNDERWRITERS' ASSOCIATION OF THE NORTHWEST 40 (1894).

40. *Kenton & Campbell Benevolent Burial Ass'n v. Goodpaster*, 304 Ky. 233, 200 S.W.2d 120 (1946). *Contra*, *Metropolitan Funeral Sys. Ass'n v. Forbes*, 331 Mich. 185, 49 N.W.2d 131 (1951).

41. By a “reasonable” contract is meant one whose terms treat the whole body of policyholders properly. See Kimball, *The Purposes of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law*, 45 MINN. L. REV. 471, 490 (1961). By an “equitable” contract is meant one that does not improperly classify or fail to classify policyholders. *Id.* at 491.

42. *E.g.*, N.Y. INS. LAW § 142(1) (enacted in N.Y. Laws 1906, ch. 326, § 16).

43. *E.g.*, N.Y. INS. LAW § 155(2), enacted in N.Y. Laws 1909, ch. 301. For a short period New York seems to have had only the direct-effect statute.

44. *E.g.*, N.Y. INS. LAW § 142 (life, accident, health) and, 155 (c); MICH. INS. CODE §§ 4004, 4014 (1956).

“entire policy provision” is usually accompanied by a provision directing that a copy of the application be attached to and made a part of the policy, if it is to be admissible in evidence.<sup>45</sup> These rules have a double function. First, they seek to ensure that the prospective policyholder receives full information about his rights and duties from a single document and its attachments, and that nothing can be made part of the agreement by reference, without being fully quoted in the policy. This function of providing information and assurance will be termed the formal function. The second consequence, no less important, is one of substantive law. The impact of the old common-law representations, which were statements made outside the policy, is eliminated,<sup>46</sup> as no representation by the policyholder can any longer adversely affect his coverage in a judicial proceeding unless it is formally made a part of the policy.

In a second group of formal requirements are provisions enumerating certain subjects which must be covered in the policy to prevent it from being misleading to an uninformed or naive policyholder. An example is the New York law requiring life insurance contracts to contain a “statement as to principal amount of insurance, the entire money and other consideration therefor, the time at which the insurance thereunder takes effect and terminates, the period of grace, if any, for payment of premiums, lapsation and cancellation, duties and obligations of the assured, (and) the right to arbitration, if any. . . .”<sup>47</sup> If the content of such clauses is specified by statute, they would be classed as substantive provisions, not formal requirements. For example, the life insurance standard provisions laws customarily require a provision giving a period of grace of 30 days, a month or some similar period.<sup>48</sup>

In the same sense, the standard nonforfeiture law is partially formal, for considerable freedom remains in the company to determine the figures to be inserted in the statutory clauses. The company is compelled only to give the policyholder precise information about the benefits to which he is entitled.<sup>49</sup> This serves to emphasize the formal aspect of all required-provisions laws, as contrasted with laws that have direct effect only; while both give the policyholder rights, only the former class of laws helps to inform him of his rights. This combination of form and sub-

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45. *E.g.*, N.Y. INS. LAW § 142.

46. Kimball, *Warranties, Representations and Concealment in Utah Insurance Law*, 4 UTAH L. REV. 456, 468-77 (1955), discusses the complexities of interpreting these statutes, especially where they overlap in coverage and are not precisely the same in effect.

47. N.Y. INS. LAW § 408(2) (dealing with insurance of life of property). See also MICH. INS. CODE §§ 2226-32.

48. See text accompanying note 86 *infra*.

49. N.Y. INS. LAW § 208-a.



stance, with a dual purpose of giving the policyholder rights and informing him of them, is seen most clearly in the New York requirement that an accident and sickness policy contain, "prominently printed on the first page thereof or . . . attached thereto a notice . . . that during a period of ten days from the date the policy is delivered to the policyholder, it may be surrendered to the insurer together with a written request for cancellation of the policy and in such event the insurer will refund any premium paid therefor. . . ." <sup>50</sup>

Finally, certain statutory requirements are formal in the strictest sense. They provide that the policy must show the name of the insurer, that it must be printed legibly in type of at least a certain minimum size, that certain clauses must be printed in bold face, that exclusions and limitations shall be printed with no lesser prominence than benefits or that there shall be a special unmistakable notice of any limited character of the policy.<sup>51</sup> The objective of all these clauses is to protect the prospective policyholder from being confused or misled. Although they have given rise to some litigation, they do not present questions deserving exhaustive consideration in this study.

b. Procedural requirements. Procedural requirements aid in enforcement of the substantive requirements. A filing or approval requirement is useful in ascertaining that the companies comply with statutes, even when a statute gives little or no discretion to the commissioner, and of course, an approval procedure is indispensable if a statute allows him more freedom for decision. Since the interesting questions respecting approval arise only when the commissioner exercises discretion, this subject will be dealt with in connection with administrative control over policy forms.<sup>52</sup>

2. Substantive requirements. Statutory provisions having effect on the substantive content of insurance contracts have greatly varying character: A complete policy may be prescribed, or only a part of one. Individual terms may be prescribed, prohibited or made optional. All of these may require literal or only substantial compliance. Some of these variations will now be considered.

a. The statutory standard policy and its implementation. Statutory prescription of every word of an insurance contract is both the most

50. N.Y. INS. LAW § 164(2)(B)(8).

51. See, e.g., N.Y. INS. LAW, § 164(2)(B)(4) (accident and health insurance). A requirement that policy forms bear an identifying number seems to serve merely administrative convenience in facilitating control, and thus to be procedural rather than formal in the sense of the classification used here. N.Y. INS. LAW § 164(2)(B)(6).

52. See article referred to in the text following note 2 *supra*.

substantial and the most inflexible interference with freedom of contract that may be found in the insurance market. It has an important place in American control of insurance contract terms, both historically and at the present time. Theoretically, the statutory standard policy could be either fully or semi-compulsory; in practice it has generally been fully compulsory in American systems.

i. The standard fire insurance policy. Though unfair treatment of policyholders is perhaps the most important motive behind the regulation of policy terms, it apparently was not what first moved a legislature to prescribe a standard fire policy.<sup>53</sup> The evil that prompted legislative action, in New York at least,<sup>54</sup> was a more technical one: the diversity of the policies issued by different insurers, which led to serious difficulty in the settlement of claims in cases involving multiple insurers. The industry appreciated the need for uniformity before any legislature did; as early as 1867 the National Board of Fire Underwriters became interested in uniformity,<sup>55</sup> and the New York Board of Fire Underwriters produced a policy which was adopted by many of its member companies. Unfortunately not all adopted it and some did so only with amendments. Voluntary uniformity apparently being impossible, some sentiment developed within industry circles for enforced uniformity, and an industry-drafted bill was unsuccessfully introduced in the legislature. But even so, when two large fires, affecting one senator as owner and another as legal counsel, stimulated them to press for a uniform policy, there was official industry opposition to passage of the particular bill, because it delegated power to draft the policy to the

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53. Large insureds, at least, were quite able to defend themselves against unfair policy conditions. Kennedy, *supra* note 23, at 21-22, reports action by commission merchants who succeeded, after joint cancellation of 84 policies, in forcing an insurer to remove a newly introduced exclusion clause. Of course, not all policyholders were in such a good position. In many cases exclusions and limitations of coverage, introduced to fight unwarranted claims and undue extensions of coverage, were abused in rejecting even well-founded claims of honest policyholders. See also Shaver, *Pitfalls in Insurance Policies*, 1950 ABA PROCEEDINGS OF THE SECTION ON INSURANCE LAW 55; Crichton, *The Statutory Fire Insurance Policy*, 1951 ABA PROCEEDINGS OF THE SECTION ON INSURANCE LAW 131.

54. New York's standard fire policy law was not the first, but it is the one about the origins of which the most is known, probably because it was the one that became the model for other states. It was enacted by N.Y. Laws 1886, ch. 488, § 1. Conn. Laws 1867, ch. 121 enacted a standard policy law long before New York; it was repealed by Conn. Laws 1868, ch. 8, no policy having been issued under it. See Crichton, *supra* note 53, at 131. AMRHEIN, *op. cit. supra* note 14, at 54, assumes that legislative action was taken so early in fire insurance because there were more important limitations on coverage there than in life insurance. Perhaps a more likely explanation is that fire insurance was already of vital importance in America society, while life insurance was not as yet. Massachusetts had a much earlier statute than did New York, but of a different type. See note 60 *infra*. The Michigan statute also preceded the New York one. See note 59 *infra*.

55. AMRHEIN, *op. cit. supra* note 14, at 54.

Superintendent.<sup>56</sup> The ultimate result was a compromise; the Superintendent was authorized to draft a standard fire policy form unless, within a limited period, the New York Board of Fire Underwriters should file one.<sup>57</sup> After six months of assiduous labor, the Board's committee submitted its policy which thereupon became the official standard policy. Neither the legislature nor any policyholders had any part in shaping its terms; it was entirely an industry-prepared document. The primary aim of the policy seems to have been uniformity, though the circumstances of its preparation suggest that "reasonableness" must also be counted among its objectives,<sup>58</sup> even if that goal was scarcely achieved, judging from twentieth century standards. Enacted prior to the New York statute, the Michigan Act of 1881 had more elaborately stated objectives, which explicitly included ideas of justice, in addition to the technical objectives of the New York statute.<sup>59</sup>

Nearly all subsequently drafted standard fire policies of other states, whether prepared by legislatures or by insurance commissioners, relied heavily on the New York form.<sup>60</sup> Some of the early statutes adopted the sensible expedient of delegating the technical and complicated task of drafting the actual contract to an insurance commissioner or administrative body. But this eminently appropriate division of labor in the body politic caused the authorizing statutes to be declared unconstitutional by some state courts as an improper delegation of legislative power. The doctrine was first enunciated in Pennsylvania in 1895 and then spread quickly across the country, affecting even states where

56. Kennedy, *supra* note 23, at 22-24.

57. N.Y. Laws 1886, ch. 488, § 1. See also PATTERSON, *THE INSURANCE COMMISSIONER IN THE UNITED STATES* 249 (1927).

58. For the meaning of "reasonable," see note 41 *supra*.

59. It authorized a special commission to prepare a standard policy form which shall be so worded and printed as to secure as far as practicable the accomplishment of the following results, viz.:

First, Fairness and equity between the insurers and the assured;

Second, Brevity and simplicity;

Third, The avoidance of technical words and phrases;

Fourth, The avoidance of conditions, the violation of which by the assured would, without being prejudicial to the insurer, render the policy void or voidable at the option of the insurer;

Fifth, The use of as large and fair type as is consistent with a convenient size of paper or parchment;

Sixth, The placing of each separate condition in a separate paragraph, and the numbering of the paragraphs.

Mich. Pub. Acts 1881, No. 149, § 2.

60. By 1913 about thirty states had adopted it, sometimes with modifications. 3 RICHARDS, *INSURANCE* 1589 (5th ed. 1952).

the courts had previously expressly recognized a statute as valid.<sup>61</sup> The legislatures responded directly by enacting the existing standard policy forms in statutory form. These laws were upheld by the courts.<sup>62</sup> Since that time, standard fire policy forms have continued to be formally enacted by legislatures though current constitutional doctrine is more liberal.<sup>63</sup> Only such an extraneous consideration as this can justify the ponderous and pontifical enactment of the detailed provisions of a complicated and intricate contract.

In the course of time, the 1886 New York Standard policy came to be regarded widely as a technical and illiberal document which treated policyholders with unseemly harshness.<sup>64</sup> The 1913 New York legislature directed the Insurance Superintendent to request that the NCIC appoint

61. *King v. Concordia Fire Ins. Co.*, 140 Mich. 258, 103 N.W. 616 (1905); *Anderson v. Manchester Fire Assur. Co.*, 59 Minn. 182, 63 N.W. 241 (1895); *Nalley v. Home Ins. Co.*, 250 Mo. 452, 157 S.W. 769 (1913); *O'Neil v. American Fire Ins. Co.*, 166 Pa. 72, 30 Atl. 943 (1895); *Phenix Ins. Co. v. Perkins*, 19 S.D. 59, 101 N.W. 1110 (1905); *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 65 N.W. 738 (1896). The Wisconsin Supreme Court had previously assumed the statute to be valid in *Bourgeois v. Northwestern Nat'l Ins. Co.*, 86 Wis. 606, 57 N.W. 347 (1893), as had the Minnesota court in an earlier stage of *Anderson v. Manchester Fire Assur. Co.*, 60 N.W. 1095 (Minn. 1894). In general, see PATTERSON, *op. cit. supra* note 57, at 250-56.

62. *Re Opinion of Justices*, 97 Me. 590, 592, 55 Atl. 828 (1903); *Att'y General ex rel. Michigan Lubricator Co. v. Commissioner of Ins.*, 148 Mich. 566, 112 N.W. 132 (1907), upholding Mich. Acts 1905, No. 277. The Wisconsin Legislature anticipated invalidation of the earlier statute and enacted the standard policy in statutory form before the court had rendered its opinion. KIMBALL, *INSURANCE AND PUBLIC POLICY* 231 (1960).

63. See, e.g., *Travelers Ins. Co. v. Industrial Comm'n*, 71 Colo. 495, 208 Pac. 465 (1922); *State ex rel. Martin v. Howard*, 96 Neb. 278 (1914). In 1928 the Wisconsin Supreme Court said in dictum that *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 65 N.W. 738 (1896) would have to be decided differently if it came up again. *State ex rel. Wisconsin Inspection Bureau v. Whitman*, 196 Wis. 472, 505, 220 N.W. 929, 941 (1928). See PATTERSON, *op. cit. supra* note 57, at 255-56.

64. For a particularly devastating analysis, see Goble, *supra* note 23. One judge thought that the

basis of the policy seems to be an assumption that every man who insures his property is necessarily a rogue, and will undertake to cheat the company, and that the poor, honest companies must be protected against the villainy of the people who pay their money and get insurance.

It seems to be framed in the interest of dishonest companies and insurance brokers, and puts an honest insurance company and honest officers of a company at a very great disadvantage. . . .

*O'Neil v. American Fire Ins. Co.*, 166 Pa. 72, 74 (1895). For a classic diatribe against an earlier insurance policy, see *De Lancey v. Rockingham Farmers Mut. Fire Ins. Co.*, 52 N.H. 581, 587 (1873). But as late as 1910, a legislative committee, after investigation of the business of fire insurance in New York, found nothing objectionable in the standard fire policy and recommended no changes save those proposed by the companies. I REPORT OF THE JOINT COMMITTEE OF THE SENATE AND ASSEMBLY OF THE STATE OF NEW YORK APPOINTED TO INVESTIGATE CORRUPT PRACTICES IN CONNECTION WITH LEGISLATION, AND THE AFFAIRS OF INSURANCE COMPANIES OTHER THAN THOSE DOING LIFE INSURANCE BUSINESS 128 (1911).

a committee to revise the standard policy.<sup>65</sup> After much work had been done cooperatively by various insurance departments and insurance companies, a new form was completed and subsequently adopted in New York and a substantial number of other states.<sup>66</sup> Comparison of the 1918 policy with the older form demonstrates the impact of the notions of the twentieth century; the new document favored the policyholder more and constituted a more "reasonable" contract. Though the influence of the insurance industry was still substantial, participation in the drafting by public representatives was more significant. Even this contract had its unreasonable elements—especially the continued existence of moral hazard conditions that might easily result in the loss of protection because of an unimportant and merely technical violation by the insured.<sup>67</sup> Continued criticism of the illiberality of the standard policy led the NAIC to adopt and recommend a revision of the 1918 form which had much more generous terms; its "reasonableness" seems beyond question. More recently, critics have urged that the standard policy system be abandoned in fire insurance in favor of a system of standard provisions that leaves room for variation and development.<sup>68</sup>

All states of the United States currently have laws prescribing a fire policy and forbidding insurers to issue any other form;<sup>69</sup> almost all statutes are based upon the New York Standard Policy of 1943.<sup>70</sup> The law does permit riders or endorsements providing for certain extended coverage, which must not be in conflict with the terms of the standard policy and which are usually subject to the commissioner's approval.<sup>71</sup> Sometimes the statutes detail limits within which the endorsements must be framed. The Michigan law, for example, prescribes that the business interruption coverage endorsement must be limited to a twelve month indemnity, and that the sum to be paid must be based upon the average

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65. MOWBRAY & BLANCHARD, *op. cit. supra* note 15, at 98, state this without providing any sources of information. They also maintain that a more liberal California revision of the 1886 standard policy led to the agitation for revision of the form.

66. N.Y. Laws 1917, ch. 440, § 3. See PATTERSON, *op. cit. supra* note 57, at 249, 462-63; 3 RICHARDS, *INSURANCE* 1589 (5th ed. 1952).

67. Goble, *supra* note 23.

68. Crichton, *supra* note 53, at 137-38.

69. The Massachusetts legislature preceded that of New York with a standard fire policy form enacted in 1873, but the standard form it set forth was not made compulsory. Forms that differed even to the disadvantage of the insured were permitted after filing with the insurance commissioner, whose only duty was to note the variations from the standard form and, upon request, to communicate them to interested persons. Thus, the Massachusetts law was merely dispositive and not even semi-compulsory. Mass. Gen. Laws 1873, ch. 331. N.H. Laws 1885, ch. 93, § 3 followed the dispositive pattern of Massachusetts.

70. 3 RICHARDS, *INSURANCE* 1589-91 (5th ed. 1952).

71. *E.g.*, N.Y. INS. LAW § 168(5).

business experience for the previous twelve months.<sup>72</sup> Perhaps such specific and inflexible prescriptions should not be surprising, since the endorsements are intended to modify a contract prescribed by statute in its smallest detail.

ii. The standard life insurance policy. Much legislative concern has been expressed for the terms of the life insurance contract. Though it was by no means the beginning of such control, New York's Armstrong investigation played a considerable role by recommending the adoption of standard policy forms for life insurance, following the fire insurance example.<sup>73</sup> In 1906 the New York legislature provided standard forms for ordinary life, limited payment life, endowment and term insurance. Other forms could be approved by the Superintendent under a procedure that included hearing competing companies.<sup>74</sup> These policies were fully compulsory, apart from the possibility of obtaining variations through an administrative procedure. This method of regulation soon appeared to be a failure, perhaps as an obstacle to development; it had a purely technical and remediable defect, too—foreign insurers were not required to use the New York standard policy forms and could offer more attractive policies, thus gaining a competitive advantage.<sup>75</sup> In 1909, New York abandoned the scheme of standard policy forms in favor of a system of required provisions.<sup>76</sup> No other states appear to have prescribed compulsory standard forms for life insurance,<sup>77</sup> though

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72. MICH. INS. CODE § 2824 (1956).

73. "It is deemed advisable that standard forms of policies of these classes should be established." Report of the Joint Committee of the Senate and Assembly of the State of New York Appointed to Investigate the Affairs of Life Insurance Companies, Assembly Doc. No. 41, vol. 10, at 439 (1906).

74. N.Y. Laws 1906, ch. 326, § 37 (adding new § 101 to the Insurance Law). See also Michaelson & Goodridge, *Filing and Approval of Policy Forms*, in EXAMINATION OF INSURANCE COMPANIES, 367, 368-69 (N.Y. State Ins. Dep't ed. 1955); AMRHEIN, *THE LIBERALIZATION OF THE LIFE INSURANCE CONTRACT* 49-59 (1933). Harris (of the New York Department), *State Legislation Affecting the Life Insurance Contract*, in *THE LIFE INSURANCE POLICY CONTRACT* 337, 339 (Krueger & Waggoner ed. 1953) says that the superintendent did promulgate four standard forms differing from the statutory models.

75. Appleton, *Wherein Have Insurance Conditions Improved During the Past Twenty Years in the Field of Life Insurance*, 1915 NCIC PROCEEDINGS 97; AMRHEIN, *op. cit. supra* note 74, at 58-59.

76. Laws of 1909, ch. 301, §§ 6 (repealing former § 101 of the Insurance Law), 7 (adding new § 101). See also Michaelson & Goodridge, *supra* note 74, at 369. A student comment in 29 IND. L.J. 635 (1954) recently urged adoption of standard forms in life insurance.

77. Harris, *supra* note 74, at 339 reports, without authority, that four other states followed New York in 1907. No such statutes have been found. A bill introduced in the Wisconsin legislature in 1883 would have required that uniform policies for life, fire, accident and extended coverage insurance be approved by the Commissioner and Attorney General. Ass'y Bill 192. Undoubtedly a thorough search in legislative materials would reveal many such attempts, and perhaps some statutes, but the search would be too time-consuming to be worth the effort.

a few have introduced optional standard policy forms, alternative to a system of required standard provisions and prohibited provisions.<sup>78</sup>

iii. The standard automobile insurance policy. Standard policies exist in the automobile insurance business. They are required by administrative action in some states and in all states there has traditionally been substantial uniformity as a result of cooperative effort within the industry itself.

iv. The implementation of standard policies. The standard policy requirement can be implemented by public law means. Under the Michigan statute, for example, a monetary penalty of \$250 can be imposed for each offense of issuing any policy or contract in violation of the standard fire policy law; the commissioner is also authorized to revoke the license of an insurer violating these provisions.<sup>79</sup> Also, the standard policy can be, and generally is, given effect by private law means. For instance, the Michigan statute provides that noncomplying provisions are void and that the policy will be enforced exactly as if it did comply with the statutory terms.<sup>80</sup> This private law, or self-executing, character of a statute prescribing an entire policy or standard provisions, or prohibiting other provisions, permits a direct and natural method of enforcement that makes the statutory prescription or prohibition of policy terms closely akin to the European method of enacting compulsory rules of law into the insurance contract code.<sup>81</sup>

b. Standard provisions laws and their implementation. The requirement that a policy contain specified individual provisions has become the most common device of insurance contract control in the United States. Required provisions can be found in all kinds of policies of life insurance (individual and group, annuities and disability, industrial),<sup>82</sup> accident and sickness insurance (individual and group), liability insur-

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78. See AMRHEIN, *op. cit. supra* note 74, at 60 n.19; Smith, *Statutory Regulation of the Terms and Conditions of a Life Insurance Contract*, in 1953 ABA SECTION OF INSURANCE LAW PROCEEDINGS 110. One such statute still exists. N. DAK. CENT. CODE §§ 26-03-26 to 03-36 (1960).

79. MICH. INS. CODE § 2866 (1956).

80. MICH. INS. CODE § 2860 (1956); N.Y. INS. LAW § 143.

81. See notes 152-72 *infra* and accompanying text.

82. The life insurance standard provisions laws usually include required provisions allowing a grace period (usually of a month), making the policy incontestable after one or two years, altering the effect of misrepresentations made by the insured, adjusting the amount of the policy in case of misstatement of age, providing for participation in surplus, governing policy loans, defining and prescribing nonforfeiture benefits and cash surrender values and providing for reinstatement after lapse. Often required, too, is a provision that the policy and its attached application shall constitute the entire contract between the parties. Other prescriptions appear somewhat less frequently. Smith, *supra* note 78, at 112-18, deals with these required provisions in some detail.

ance and credit life and credit accident and health insurance.<sup>83</sup>

It was once surprisingly common for a statute to require that standard provisions be inserted in policies in the exact wording and order of the statute; in effect, such a statute supplied a partial standard policy. Some statutes of this nature are still in force, but the trend in standard provisions laws has been toward allowing greater flexibility in wording, requiring the provisions to be inserted "in substance" only, or more frequently, permitting different language if it is not less favorable to the insured.<sup>84</sup> As the "in substance" approach presupposes the existence of an authority to decide whether the requirement is met, statutes generally direct that the altered language must be approved by the commissioner.<sup>85</sup>

Another set of statutes requires insurance provisions that deal with specified subjects in certain ways, without indicating the exact language to be used. For example, Michigan requires the life insurance contract to contain a provision

for a grace of 1 month for the payment of every premium after the first year, which may be subject to an interest charge, during which month the insurance shall continue in force, which provision may contain a stipulation that if the insured shall die during the month of grace the overdue premium will be deducted in any settlement under the policy.<sup>86</sup>

Such provisions, of which there are a great number, direct the company to draft a clause that incorporates the sense of the statute—the language of the statute may be more or less apt to the purpose and may need adaptation. Statutory provisions like the foregoing are by nature semi-compulsory.

83. See, *e.g.*, N.Y. INS. LAW §§ 155, 158-64; MICH. INS. CODE §§ 3004-08, 3406-24, 3608, 3620, 3640, 4008-36, 4060, 4204-38, 4430-42 (1956); Mich. Pub. Acts 1958, No. 173; WIS. STATS. §§ 204.31(3) (a), 206.18, 206.181, 206.61 (1959).

84. See Michaelson & Goodridge, *supra* note 74, at 373. Compare the 1912 NCIC Uniform Accident and Health Provisions bill with the 1950 version. They are found as Appendices A and B in ACCIDENT AND SICKNESS INSURANCE 263-85 (McCahan ed. 1954). The latter provides for change in language with permission of the commissioner, if no less favorable to the policyholder. New York already had the "in substance" approach in 1910 (N.Y. Sess. Laws 1910, ch. 636, § 1, adding new § 107 to the Insurance Law) but abandoned it when the NCIC bill was adopted (N.Y. Sess. Laws 1913, ch. 155, § 1-2. It has now followed the liberalization in the 1950 NAIC model bill. N.Y. INS. LAW § 164.

85. *E.g.*, N.Y. INS. LAW § 155: "No policy of life insurance . . . shall be delivered . . . unless it contains in substance the following provision or provisions which in the opinion of the superintendent are more favorable to policyholders. . . ." PA. STAT. ANN. § 40-753 (Purdon ed. 1954): "[e]ach such policy . . . shall contain the provisions specified . . . : Provided, however, That the insurer may, at its option, substitute . . . provisions of different wording approved by the commissioner which are . . . not less favorable . . . to the insured. . . ."

86. MICH. INS. CODE § 4012 (1956).



The most important standard provisions are those in life insurance and accident and sickness insurance. In life insurance there is to be found, among others, the carefully worked out standard nonforfeiture law.<sup>87</sup> In the latter field is to be found the Uniform Individual Accident and Sickness Policy Provisions Law, adopted by NAIC in its June, 1950 meeting, and enacted into law by 45 states by 1957.<sup>88</sup> This uniform law contains twelve required provisions. It also contains optional provisions, of which more will be said below. The required provisions deal with such things as a grace period for the payment of premiums, reinstatement, incontestability, claim notices and other equally important matters. They provide a substantial amount of protection to the policyholder against unfair treatment and seem to be very acceptable terms.

Closely related to standard provisions are "prohibited provisions," clauses deemed so injurious or unfair to the insured that the legislature intervenes to prohibit them. In life insurance it is common to prohibit provisions that exclude coverage in the event of death caused in a specified manner, with certain exceptions that permit war and aviation clauses.<sup>89</sup> Some other prohibited provisions are those providing for forfeiture for nonpayment of indebtedness, limiting the time within which an action must be brought, back-dating the policy more than a specified length of time, providing for settlement at less than face value, or purporting to make the solicitor an agent of the policyholder.<sup>90</sup>

In standard provisions laws there are also "optional" provisions that require the insurer to deal with certain subjects in prescribed ways, if it chooses to deal with them at all. Thus the Michigan statutes, adopting the Uniform Individual Accident and Sickness Policy Provisions Law, permit a company writing disability insurance to deal with change of occupation, misstatement of age, other insurance, relation of earnings to insurance, unpaid premiums, cancellation, conformity with state statutes, illegal occupations, intoxicants and narcotics, but only in the terms prescribed in the statutes.<sup>91</sup>

Variations among the standard provisions laws of the states are numerous; to the extent the state laws are inconsistent with each other they present potential impediments to successful multi-state operations of insurers. But the problems can largely be solved by enacting appropriate statutes giving some flexibility. New York provides, for example, that a

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87. *E.g.*, N.Y. INS. LAW § 208-a.

88. See notes 26 & 84 *supra*.

89. See, *e.g.*, N.Y. INS. LAW § 155(2); MICH. INS. CODE §§ 4046, 4244(c) (1956).

90. Smith, *supra* note 78, at 118-19.

91. MICH. INS. CODE §§ 3430-54 (1956). See also WIS. STAT. § 204.31(3) (b) (1961).

foreign or alien insurer . . . may, with the approval of the superintendent, insert in its life, accident or health insurance policies or annuity contracts delivered or issued for delivery in this state any provisions required by the laws of the state or country in which such insurer is domiciled if such provisions are not substantially in conflict with any law of this state.<sup>92</sup>

What was said about the implementation of standard policy laws applies also to standard provisions laws. In general, the American statutes provide both public law and private law consequences for failure to conform. Thus a \$100 monetary penalty or fine can be assessed for each offense against any person willfully violating any of the Michigan policy provisions requirements for disability insurance.<sup>93</sup> But the Michigan statute also provides private law effects for disability insurance: "A policy delivered or issued for delivery to any person in this state in violation of this insurance code shall be held valid but shall be construed as provided in this code."<sup>94</sup> This dual enforcement of the requirement is typical of the states. Much less common are self-executing rules of law that do not also require insertion in the policy. They may easily be found, of course.<sup>95</sup>

### III. JUDICIAL CONTROL OF POLICY TERMS IN THE UNITED STATES

This paper would not be complete without brief discussion of judicial control of policy terms. Judicial control lacks plan, for it depends on the accidents of litigation. Nonetheless it is far-reaching. Of necessity, it is also subtle, because of the basic assumption from which judicial action begins: that apart from certain basic public policy limitations which are grounded in fundamental moral conceptions, parties to contracts are free to make contracts as they choose unless the legislature imposes restrictions. The role of the court, so goes the theory, is to apply the law and not to make it—hence, on the whole to effectuate the "will" of the parties. Normal judicial action serves only to determine whether contracts comply with legislative standards and to enforce them to the extent that they do. The fact is not quite so simple as the theory; the theory is not wholly demonstrable by the fact.

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92. N.Y. INS. LAW § 144.

93. MICH. INS. CODE § 3480 (1956).

94. MICH. INS. CODE § 3468 (1956).

95. The valued policy laws are illustrations of such self-executing laws. See, e.g., Wis. Laws 1874, ch. 347 (now WIS. STAT. § 203.21 (1961)); see also KIMBALL, *op. cit. supra* note 62, at 240-49, and the Mississippi valued policy statute referred to in *Palatine Ins. Co. Ltd. v. Nunn*, 99 Miss. 493, 55 So. 44 (1911). The Missouri statute providing that suicide shall be no defense in life insurance is self-executing. See *Whitfield v. Aetna Life Ins. Co.*, 205 U.S. 489 (1907). Warranty and representation statutes often are in this form, though frequently another separate section of the statutes requires insertion as well. See, e.g., Kimball, *supra* note 46, at 468-71.

### A. *The Public Policy Restrictions*

As used by the courts in the insurance context, public policy has a very limited meaning. It has imposed the doctrine of insurable interest on insurance policies; they are contrary to public policy and void unless the interest insured is regarded by the courts as insurable. Though this doctrine bulks large in textual discussions of insurance law, it has relatively little practical significance, since the conservative and often overly cautious insurance industry is not anxious to undertake obligations where insurable interest is doubtful.

Equally limited in importance are the few other instances in which insurance policies have been declared invalid or unenforceable for violation of public policy. In England, for example, a life insurance policy may not cover suicide while sane,<sup>96</sup> though in the United States the authorities are divided, with one line holding that there is no such public policy limitation.<sup>97</sup> Murder of the insured by the beneficiary under a life insurance policy raises similar questions.<sup>98</sup> It should be noted that, unlike the insurable interest limitation, these latter limitations do not invalidate entire policies but merely exclude certain coverages.

A catalogue of public policy limitations does not seem necessary. The above illustrations should suffice to show the judicial method of controlling insurance contracts through public policy doctrines.

### B. *Control Through Interpretation*

The freedom of contract doctrine and the rule of construction *contra proferentem*, which interprets ambiguities against the drafting party (a rule stringently applied in contracts of adhesion and therefore in insurance contracts), provide the framework within which the courts exercise significant control over the terms of insurance policies. A doctrine reserving to the contracting parties the freedom to stipulate as they will means that an insurer can, if it is willing to pay a large enough price in patience and determination, refine its contracts to produce almost any desired result. There does not exist in the common law any general requirement that a contract satisfy certain "minimum decencies"<sup>99</sup> in order to be enforceable, nor can a court overtly reconstruct the contract

96. *Beresford v. Royal Ins. Co.*, [1938] A.C. 586 (H.L.).

97. See GOBLE, *CASES ON INSURANCE* 297-303 (2d ed. 1949). See also MO. REV. STAT. § 376.620 (1959) (suicide no defense under policy contract, even when stipulated for, unless insurer proves contemplation of suicide at time of entering into contract). The statute was said not to be subject to constitutional challenge. *Whitfield v. Aetna Life Ins. Co.*, 205 U.S. 489, 495 (1907) (dictum).

98. See PATTERSON & YOUNG, *CASES ON INSURANCE* 294-98 (4th ed. 1961).

99. The expression is borrowed from a provocative short essay on the subject of this section. Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1939).

to supply such minimum decencies. Instead a court purports only to construe—to ascertain what the parties intended. But a doctrine of construction *contra proferentem* makes it possible for an imaginative and unsympathetic court to put the price in patience and determination required for achievement of the company's goals at a very high figure indeed. Interference by the courts has permanent effect only if the policy drafters acquiesce, but even if they do not, it can be very effective while it lasts.<sup>100</sup>

One example of the extent of judicial control of policy terms is to be found in the interpretation of the insuring clause of an accident policy. The cases in which the courts have broadened the "accidental means" clause to include situations where there were no accidental means but was only an accidental result have provided legal counsel of insurance companies with a liberal education in the plasticity of language.<sup>101</sup> Cases in which a notion of "constructive delivery" was used to defeat company efforts to delay the effective date of a life insurance policy until actual, physical delivery to the insured have given an object lesson in the capacity of courts to extend liability to a number of circumstances the company did not intend to cover.<sup>102</sup> The classic case that shows how close a court can come to legislating required policy terms (or prohibited policy terms) in the guise of contract interpretation is the celebrated case of *Gaunt v. John Hancock Mut. Life Ins. Co.*<sup>103</sup> There Justice Learned Hand interpreted the language "shall be in effect . . . if this application . . . is, prior to my death, approved by the Company at its Home Office . . ." to provide coverage despite an absence of approval at the home office, on the theory that, in context, a man in the street would have so understood the language. Justice Clark would have elevated the question to one of public policy and denied the company the right, under the circumstances, to exclude coverage with any language. In his concurring opinion he showed great insight into the nature of the subtle control of courts over contract terms. Condemning Justice Hand's approach, which

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100. See Kimball, *The Role of the Court in the Development of Insurance Law*, 1957 WIS. L. REV. 520, where the development in Wisconsin is described. KIMBALL, *INSURANCE AND PUBLIC POLICY* 209-13, 237-39 (1960) also deals with the Wisconsin development. 1 MACGILLIVRAY, *INSURANCE LAW* 340-52 (5th ed. Browne 1961) provides a good statement of the received doctrinal apparatus for contract interpretation as applied to insurance. It is believed the doctrine should not be taken too seriously, however, at least in the American setting, and probably in England as well.

101. PATTERSON & YOUNG, *op. cit. supra* note 98, 319-26.

102. See GOBLE, *op. cit. supra* note 97, at 34-40. But Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 221 (1919) asserts that a majority of courts give the language its literal meaning and do not distort it.

103. 160 F.2d 599 (2d. Cir. 1947). See also the thoughtful views of Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

rested on an asserted ambiguity, as certain to produce continuing uncertainty in such contracts, Justice Clark maintained that the court had an obligation to exercise some control over the course of contract negotiation by forbidding certain courses of conduct and certain stipulations as "unpardonable."

The courts' practices "purport to construe, and do not really construe, nor are intended to, but are instead tools of intentional and creative misconstruction. . . ." <sup>104</sup> Yet this leads to confusion and unpredictability, for "covert tools are never reliable tools." <sup>105</sup> Under the guise of construction, they are used to distort, to remodel, to avoid, to misconstrue, to supply the "minimum decencies" that cannot be overtly compelled by the court. The rule of construction *contra proferentem* thus has two disparate uses, as applied in insurance cases: (1) to settle doubts against the person who could have avoided them by better drafting and (2) to impose the court's (society's) moral views on the parties by creating ambiguities where none exist and then resolving them against the drafting party. There is, perhaps, a better justification for the first use than that the drafter could have removed the ambiguity. At the moment of claim, the insured is likely to be in need of the help provided by valid insurance protection; his financial need rather than the drafter's negligence justifies the resolution of doubts in his favor and for that reason his reasonable expectations should be fulfilled.

Recital of a number of interpretation problems suggests the conclusion that company and court are always antagonists, with the company seeking always and sometimes vainly to find language a court cannot distort, even if it reads the policy in bad faith. In truth there have been instances of long-lasting "struggles" over forms, but an unqualified assumption of hostility would be an unwarranted oversimplification. The cases that established the distinction between hostile and friendly fires <sup>106</sup> make clear that a court is not always anxious to impose excessive liability upon a company. The interaction is more complex than that.

Within the framework of contract construction the courts have a considerable, though sometimes only temporary, control over the content of an insurance policy. Sometimes, and especially where a company has no serious objection to the results reached, the effect may be long-lasting, or even permanent. At least, the interaction of court and policy drafter is a major cause of the complexity of insurance contracts, since many

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104. Llewellyn, *supra* note 99, at 703.

105. *Ibid.*

106. GOBLE, *op. cit. supra* note 97, at 752-56.

new clauses and much complicated phraseology can be traced to the drafter's desire to overcome the impact of cases.

The construction of insurance contracts creates, in effect, rules of law. Since they can usually be displaced, in theory at least, by contrary stipulation of the parties, it is appropriate to characterize them as dispositive rules of law. Where basic public policy prevents displacement even for the benefit of the insured, as with the insurable interest doctrine, the rule of law is truly and fully compulsory—*ius cogens*. When a court, though relying on techniques of interpretation, has in fact made it impossible for the parties (more accurately, the insurer) to displace the rule, it has again created a rule of law compulsory in practice though not in theory. Such a rule might better be described as quasi-compulsory. For the most part, such rules are at most semi-compulsory; alteration to the benefit of the insured is rarely precluded by court action.

Often difficult questions of insurance economics and even of actuarial science are involved in the control of insurance policy terms. Lawyers and judges ordinarily have only the slightest of competence in these questions. In Germany the courts occasionally ask the federal insurance department for an advisory opinion, without any obligation to adopt it, of course. American courts might make use of that possibility through the institution of the *amicus curiae*, but there is no discernible disposition to do so. Courts could also insist that they be better informed by attorneys, few of whom take the trouble to understand the complexities of the insurance business.

1. The displacement of the rule *contra proferentem*. In most statements of the rule of construction *contra proferentem*, it has been justified by the fact that the insurance company drafted the contract. When that basis for the rule disappears, as when the legislature stipulates the terms of the contract, or when it is in fact prepared by the policyholder himself, by a broker for the benefit of the policyholder who is his client, by a trade association of which the policyholder is a member, or when the policy is prepared and used by a participating mutual, in which the policyholder is both insurer and insured, or when the policy is subject to administrative control, there is said to be reason to reconsider and perhaps to abrogate the rule. Thus industry spokesmen often express the view that the standard policy, the standard provisions of policies that are left partly free, and contracts of the other listed classes should not be construed against the insurance company but in accordance with the fair meaning of the language they contain.<sup>107</sup> This viewpoint fails

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107. Compare Smith, *supra* note 78, at 125, and VANCE, INSURANCE 809 (3d ed. 1951), with 3 RICHARDS, INSURANCE 1315 (5th ed. 1952).

to acknowledge the significant role of industry representatives in drafting standard policies. Standard policies and provisions are not necessarily imposed on unwilling companies by a vindictive legislature; the industry organizations have their chance to influence the terms. Moreover, the early standard policies were entirely industry-drafted and the usual rule should apply there, at least.

Nor does the suggestion that these should be a new rule of interpretation consider the dual character of the rule. Partly it is intended to and does settle doubtful cases; partly it imposes minimum decencies on the drafting party. The second aspect of the rule disappears in the listed cases, but the first does not. True, not manufactured, ambiguities will always exist, and though there is no justification for deciding them against the insurance company as punishment for its negligence, there is a strong argument that they should be decided in favor of coverage in order that the insurance institution may more adequately perform its social function. This argument does not depend on the relative strength of the parties but on the stabilizing function of insurance. It would convert the rule from one *contra proferentem* to one in favor of protection, which would operate only where a true ambiguity existed. The cases provide very little enlightenment on this question.<sup>108</sup>

#### IV. STATUTORY CONTROL OF POLICY TERMS IN EUROPE

##### A. *Historical Background*

The historical development of the law dealing with the terms of the insurance contract was not the same everywhere in Europe. A code came relatively early in Switzerland and Germany, for example, and rather late in France. The various patterns of control reflect to some extent the points of time at which they developed. One can generalize only with caution about contemporary European control, which differs from state to state, but perhaps one can conclude that in general the European systems other than the English differ basically from that of the United States as a consequence of the modern civil law method, in which legal rules are normally passed in code form by the legislature rather than developed through court decisions. Even this generalization ignores many important variations in Europe.

##### 1. England. Significant legislation on insurance contracts has de-

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108. Shephard, *Current Developments in the Construction of Contracts of Insurance, Which Contain Actual or Alleged Ambiguities*, 1959 *VERSICHERUNGSWISSENSCHAFTLICHES ARCHIV* 465, provides relevant cases and comments upon them. See also VANCE, *INSURANCE* 808-10 (3d ed. 1951).

veloped in England only for industrial life insurance<sup>109</sup> and marine insurance. The latter is a branch that is elsewhere generally free from much intervention. But the English exception for marine is more apparent than real. A uniform policy was developed in the 18th century among the marine underwriters at Lloyds, and in 1906 that policy was included in a Schedule to the Marine Insurance Act with numerous attached interpretative notes. While it was not made compulsory, the legislative blessing encourages its use, and it is very commonly employed in the marine insurance business. The act also contains a variety of statutory "rules of law" affecting the contract.<sup>110</sup>

2. Switzerland. Switzerland established a regulatory agency very early, in 1885. In most cantons, there already existed some laws regulating insurance, though the main objective was not to control but to collect as much revenue as possible from insurance companies.<sup>111</sup> The statute creating the regulatory agency was only partly developed, as befitted the date of its appearance, and it was gradually supplemented by other statutes and governmental orders elaborating the system of administrative surveillance. Nevertheless it provided for wide powers of control over all insurance enterprises, except locally restricted concerns and public law institutions based on cantonal law.<sup>112</sup> When discussion began in the 1890's about the desirability of codifying the law of the insurance contract, the *Eidgenössisches Versicherungsamt* or Swiss Insurance Department was able to assign Dr. Hans Roelli, a legally trained staff member, to prepare a draft of an insurance contract law. After over two years' work, he published his proposal in 1896. It was debated thoroughly and then formed the basis of a 1908 law<sup>113</sup> which has been little changed since.

3. Germany. The idea that the insurance business should be regu-

109. The Industrial Assurance Act, 1923, 13 & 14 Geo. V, c. 8. It had elaborate provisions including nonforfeiture benefits and other minimum benefits. They create self-executing rules of law, the more important of which must be contained in the policy. Similarity of English method to American makes it unnecessary for present purposes to deal in further detail with it.

110. The Marine Insurance Act, 1906, 6 Edw. 7, c. 41.

111. HAYMANN, *LA SURVEILLANCE DES SOCIÉTÉS D'ASSURANCES EN SUISSE ET LA JURISDICTION ADMINISTRATIVE DU TRIBUNAL FÉDÉRAL* 21-22 (1932).

112. Law of June 25, 1885, [1885] Bundesgesetz betreffend Beaufsichtigung von Privatunternehmungen im Gebiete des Versicherungswesens § 1, as amended (hereinafter referred to as the Swiss VAG), in 2 NEUES RECHTSBUCH DER SCHWEIZ 329 (Bundeskanzlei ed. 1946).

113. Law of April 2, 1908, [1908] Bundesgesetz über den Versicherungsvertrag (hereinafter referred to as Swiss VVG), in 1 NEUES RECHTSBUCH DER SCHWEIZ 536 (Bundeskanzlei ed. 1946). For details of the development and the close interrelation between the German and Swiss codes, see 4 ROELLI-JAEGER, *KOMMENTAR ZUM SCHWEIZERISCHEN BUNDESGESETZ ÜBER DEN VERSICHERUNGSVERTRAG VOM 2. APRIL 1908* 70-76 (1933).



lated nationally rather than by single states was advanced early in Germany; in 1851 the participants of a convention of economists called for nationwide legislation.<sup>114</sup> Insurance was enumerated among the matters subject to federal control in the constitution of the *Norddeutscher Bund* of 1867.<sup>115</sup> Meantime, however, the individual states had already developed some regulatory statutes. By the end of the nineteenth century most German states had some supervision, and the major ones, such as Prussia, Bavaria, Saxony and Wurttemberg, exercised considerable control, comparable to the modern form of substantive regulation.<sup>116</sup> The statutes of the various states varied widely, with great divergence in the extent of power given to the regulatory agencies and in the treatment of the different kinds of insurance. Lack of qualified personnel made much of the supervision perfunctory.

As the insurance companies began to operate nationally, a request for a national law was repeated with increasing urgency. Though the constitution of the *Norddeutscher Bund* of 1867 gave the federal government power to regulate insurance, it was only after much travail that in 1901 a law was passed establishing a federal regulatory agency and giving it extensive power to control all aspects of the insurance business, including the terms of contracts.<sup>117</sup> Only small local mutuals and public law institutions remain subject to state control. The law was well conceived and developed, and no major changes have been made since with respect to control of policy terms.

The need for legislation dealing with the substantive law of the

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114. MANES, DAS REICHSGESETZ ÜBER DIE PRIVATEN VERSICHERUNGSUNTERNEHMUNGEN VOM 12. MAI 1901 2-3 (1901).

115. *Verfassung des Norddeutschen Bundes*, July 26, 1867, [1867] *Bundesgesetzblatt des Norddeutschen Bundes* 2, art. 4, no. 1. This was continued in the constitution of 1871 and the Weimar Constitution of 1919. *Verfassung des Deutschen Reichs*, April 16, 1871, [1871] *Reichsgesetzblatt* 63, art. 4, no. 1; *Verfassung des Deutschen Reichs*, Aug. 11, 1919, [1919] *Reichsgesetzblatt* 1383, art. 7, no. 17. The 1949 Constitution provides for "concurring" legislative power; the states may legislate until the federal legislature acts. *Grundgesetz für die Bundesrepublik Deutschland*, May 23, 1949 [1949] *Bundesgesetzblatt* 1, art. 74, no. 11. But the federal *Versicherungsaufsichtsgesetz*, section 153, leaves little room for state law, other than state public law institutions such as for compulsory fire insurance. Very small enterprises are also subject to state control, though under the federal statutes. *Gesetz über die Errichtung eines Bundesaufsichtsamtes für das Versicherungs- und Bausparwesen*, July 31, 1951 (known as *Bundesaufsichtsgesetz*), §§ 2-4 [1951] *Bundesgesetzblatt* 480.

116. Büchner, *Die Entwicklung der deutschen Gesetzgebung über die Versicherungsaufsicht bis zum Bundesgesetz vom 31. Juli 1951*, in *FÜNFZIG JAHRE MATERIELLE VERSICHERUNGS-AUFSICHT NACH DEM GESETZ VOM 12. MAI 1901*, at 7 (Rohrbeck ed. 1952).

117. *Reichsgesetz über die privaten Versicherungsunternehmungen*, May 12, 1901, [1901] *Reichsgesetzblatt* 139. After some changes it was repromulgated as *Gesetz über die Beaufsichtigung der privaten Versicherungsunternehmungen und Bausparkassen*, June 6, 1931, [1931] *Reichsgesetzblatt I*, at 315, 750 (or *Versicherungsaufsichtsgesetz*). The situation before 1901 and the reasons for the law are illuminated in Büchner, *op. cit. supra* note 116, at 7-19.

insurance contract was also felt in Germany in the latter part of the nineteenth century, after insurance had become a large and important business. As with the Swiss development, the basic question was how the law of the insurance contract should be related to the commercial codes that were developing during that period. The ocean marine insurance contract was dealt with by the general German Commercial Code of 1861;<sup>118</sup> not until 1908 were the rules pertaining to the other insurance contracts codified in the Insurance Contract Law, which was applicable to all kinds of insurance except ocean marine and reinsurance.<sup>119</sup> Only minor changes have been made in the statute since 1908. Both the Swiss and German insurance contract laws are essentially self-executing; they create rules of private law directly applicable in the enforcement of the insurance contract by the courts.

4. Austria. Austria was the first European country to establish a comprehensive central administrative supervision over insurance.<sup>120</sup> The organic act, the *Versicherungsregulativ* of 1880, stated in a short preamble the principles governing all regulatory activity: "To ensure the constant capacity of the insurance enterprises to perform the obligations assumed and to safeguard the interests of the insured. . . ."<sup>121</sup> While the greater part of the regulation was concerned with requirements for company organization, it also required that general contract terms have government approval and that certain specific points be treated in them.<sup>122</sup> The similarity of these points to the corresponding section of the later German *Versicherungsaufsichtsgesetz* establishes the fact that the Austrian legislation was to some extent the model for the German.

An amending *Verordnung* issued in 1896 required life insurers to insert in their *Allgemeine Versicherungsbedingungen*—the general terms of the insurance contract—specified nonforfeiture benefits and cash surrender values. This seems to be the only provision in the German-Austrian-Swiss family of laws using a technique similar to the American one of requiring certain provisions. It appeared to trench upon the field

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118. BRUCK, DAS PRIVATVERSICHERUNGSRECHT 7-14 (1930).

119. Reichsgesetz über den Versicherungsvertrag, May 30, 1908, [1908] Reichsgesetzblatt 263 (or Versicherungsvertragsgesetz).

120. Verordnung der Ministerien des Innern, der Justiz, des Handels und der Finanzen, Aug. 18, 1880 (hereafter referred to as *Versicherungsregulativ*), [1880] Austrian Reichsgesetzblatt 398, amended by Verordnung, March 5, 1896, [1896] Austrian Reichsgesetzblatt 63, and revised by Verordnung, March 7, 1921, [1921] Austrian Bundesgesetzblatt 403.

121. "Zur Sicherung der steten Erfüllbarkeit der von den Versicherungsanstalten übernommenen Verpflichtungen und zur Wahrung der Interessen der Versicherten werden für die Errichtung und staatliche Beaufsichtigung von Versicherungsanstalten die nachstehenden Bestimmungen aufgestellt. . . ."

122. Versicherungsregulativ § 10.

of private law, and this attempt to affect private law relationships by an administrative *Verordnung* met with severe criticism.<sup>123</sup>

The late development of an Austrian insurance contract law stands in marked contrast to the early development of a system of regulation. When it came in 1917,<sup>124</sup> it relied heavily on the German law of 1908.<sup>125</sup> After *Anschluss* with Germany in 1938, amendments were made in the German law to adopt some of the Austrian innovations and create a uniform code for all of the German *Reich*.<sup>126</sup> In 1958 an independent Austria reenacted the insurance contract code with little more than formal changes.<sup>127</sup> The German and Austrian codes are now essentially identical. Likewise, in 1939 the German regulatory law was made effective in Austria, and today the two laws are substantially the same.<sup>128</sup>

5. France. Except for marine insurance, which was dealt with in the *Code de Commerce* of 1807, the French law of the insurance contract remained free from legislative restrictions (other than those applying to all kinds of contracts) until 1930, except for some miscellaneous acts dealing with such problems as payment to creditors of the policyholder, court jurisdiction in insurance matters, the legality of insurance on the life of children under 12 years, and the termination and renewal of insurance contracts.<sup>129</sup> Perhaps the necessity for state control was somewhat lessened by policyholder self-protection. A *Ligue des Assurés* was formed by policyholders and bargained with insurers to produce, in 1912, a fire insurance policy with reasonable terms.<sup>130</sup> Life insurance was thought unlawful by some authors since Section 334 of the *Code de Commerce* provided that only things with an ascertainable value could be insured.<sup>131</sup> After repeated discussions continuing from 1902, a comprehensive Insurance Code was enacted in 1930,<sup>132</sup> applicable to all kinds

123. 1896 *Juristische Blätter* 123-24. See p. 730 *infra*.

124. Gesetz über den Versicherungsvertrag, Dec. 23, 1917 (known as Austrian Versicherungsvertragsgesetz), [1917] *Austrian Reichsgesetzblatt* 50. For the development, see EHRENZWEIG, *DEUTSCHES (ÖSTERREICHISCHES) VERSICHERUNGSVERTRAGSRECHT* 11-12 (1952).

125. 4 ROELLI-JAEGER, *op. cit. supra* note 113, at 76.

126. Verordnung zur Vereinheitlichung des Rechtes der Vertragsversicherung, Dec. 19, 1939, [1939] *Reichsgesetzblatt* 1, at 2443.

127. Bundesgesetz, Dec. 2, 1958, über den Versicherungsvertrag (Versicherungstragsgesetz 1958), [1959] *Austrian Bundesgesetzblatt* 297.

128. See EHRENZWEIG, *op. cit. supra* note 124, at 10.

129. See PICARD ET BESSON, *LES ASSURANCES TERRESTRES EN DROIT FRANCAIS* 58-59 (1950); OECD, *SUPERVISION OF PRIVATE INSURANCE IN FRANCE* 10 (1963) (hereinafter referred to as OECD STATEMENT (France)). This statement was prepared for the OECD by the Direction des Assurances.

130. FRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* 23 (1937).

131. Hubrecht, *Die Geschichte der Versicherung in Frankreich*, in 1958 *VERSICHERUNGSWISSENSCHAFTLICHES ARCHIV* 349, 362.

132. For more detail see 4 ROELLI-JAEGER, *op. cit. supra* note 113, at 76-78.

of insurance contracts except marine, inland navigation, air transport, fidelity and reinsurance.<sup>133</sup> Marine insurance is still governed by the *Code de Commerce*; the other excepted branches of insurance law are subject to no special statutory rules.

Public law legislation developed slowly, step by step, in single fields of insurance. As early as 1787 the government in authorizing the formation of a life insurance company, demanded that a guarantee sum of money be paid and that the general policy terms and premium rates be submitted for royal approval.<sup>134</sup> An 1868 act contained detailed provisions concerning the formation and the functioning of insurance enterprises but did not establish a special agency for effecting this control. This act became the basis for the new legislation of 1938. The first line of insurance to be subjected to organized and permanent control by a specially designated administrative body was workmen's compensation insurance in 1898; control was exercised by *Commissaires Contrôleurs* acting under the authority of the Minister of Commerce.<sup>135</sup> Life insurance followed in 1905. After the association of automobile insurers made urgent demand for protection against unfair competition by rebating, the Minister of Labor was authorized to supervise automobile liability insurance in 1935.<sup>136</sup>

Different statutes for different lines of insurance led to inconsistency and prevented the control agencies from acting effectively. This and the desire to help the insurance industry recover from the disastrous effects of the depression resulted in the act of June 14, 1938, which established a general license requirement for most insurance companies and conferred upon the Minister of Labor broad powers concerning the general conduct of insurers; government reorganization has led subsequently to the transfer of insurance supervision to the Ministry of Finance.<sup>137</sup> Some of the far-reaching powers, however, such as those to make the general policy terms agreed upon by a majority compulsory for all companies, were subsequently repealed before they had ever been applied in practice.<sup>138</sup>

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133. Loi du 13 juillet 1930.

134. OECD STATEMENT (France) 7; 1 HÉMARD, THÉORIE ET PRATIQUE DES ASSURANCES TERRESTRES 180 (1924).

135. Loi du 9 avril 1898, art. 27 (France); see OECD STATEMENT (France) 7-8.

136. Loi du 17 mars 1905 and Décret-Loi du 8 août 1935; see also OECD STATEMENT (France) 9.

137. Décret-Loi du 14 juin 1938; OECD STATEMENT (France) 10. Loi du 23 février 1941. For the motives, see the report accompanying the statute as reproduced in 1938 REVUE GÉNÉRALE DES ASSURANCES TERRESTRES 578-79; for the historical development, see Picard, *L'Unification du Contrôle de l'Etat et de l'Organisation de l'Industrie des Assurances*, in 1938 REVUE GÉNÉRALE DES ASSURANCES TERRESTRES 646-47.

138. Décret-Loi du 14 juin 1938, arts. 32-33; repealed by loi du 16 août 1941.

Important political and constitutional changes in France since 1939 have led to conflict among the different statutes which are still in force. Moreover, some provisions are not actually applied. For example, the department does not enforce compliance with the provision requiring the filing of policy forms in certain lines of insurance, including marine and suretyship, nor in group insurance. Similarly the department has not yet exercised its broad power to impose upon the industry the use of standard policy forms or rates.<sup>139</sup>

### B. *The Preparation and Enactment of Statutes*

It is tempting to make facile generalizations about the manner of preparation and enactment of statutes in Europe; in fact, however, the variety in manner is as great in Europe as it is in America. But it does seem to be true that there are fewer differences among the continental European countries than between them and the United States, so that for some purposes it is appropriate to speak of a "European" method of statutory enactment.

The legislative pattern of the continental insurance regulatory systems is partly a function of general ideas about legislation and codification, which contrast sharply with those of the common-law countries. In the civil law theory, statutes are considered the main source of the law, not a supplementary one; the law embodied in the codes is assumed to be a coherent and complete system. Consequently, statutes are usually drafted with care to make them cohere with the system and provide a reliable basis for the solution of problems.

A difference in political structure and method also plays an important role in distinguishing the legislative pattern of continental European countries from that in the United States. Drafts of new statutes or of amendments usually are prepared in a government department by government officials. Bills seldom originate in a legislature, though a legislature may ask a department to prepare and submit a bill.<sup>140</sup> Likewise, a draft prepared by persons outside the government may induce a government department to prepare a bill of its own. Thus, while the

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PICARD ET BESSON, *op. cit. supra* note 129, at 818. Marine and reinsurance, carried on separately, were exempt from supervision under the 1938 act, but marine has subsequently been included. Décret-Loi du 14 juin 1938 art. 1 5°, as amended by loi du 18 août 1942.

139. For the former, see Décret du 30 décembre 1938, art. 181; for the latter, Ordonnance du 29 Septembre 1945, art. 8. Statements about French developments not supported by specific citations are based on interviews in the French department in April 1962 and July 1964, and on internal instructions in use there.

140. Thus the legislative committee which considered the bill for the German Versicherungsaufsichtsgesetz of 1901 not only recommended the adoption of the amended bill but also asked the Reichskanzler to submit as soon as possible a bill on the law of the insurance contract. Büchner, *op. cit. supra* note 116, at 15.

initiative for drafting legislation may originate with the legislature or private interest groups, the basic responsibility for the preparation of statutes lies in the governmental department. The more important bills are published before they are submitted to the legislature to give an opportunity for public discussion. Usually there are also formalized discussions, sometimes protracted, between representatives of the department and interested groups. With the resulting modifications, the bill is finally introduced in the legislature, accompanied by an official comment, often of considerable length and detail. A standing committee of the legislature then discusses the bill and submits a report, and the legislature in plenary session makes the final decision. Committees generally do not conduct hearings but may receive and consider petitions submitted to the legislature by interested persons.

1. Germany. The creation of the German *Versicherungsaufsichtsgesetz* is an example of the continental statutory process. The first practical step toward the legislation was taken in 1869 by resolution of the *Bundesrat*, the representative body of the *Norddeutscher Bund*, when it asked the *Bundeskanzler*, or federal chancellor, to submit a draft for such a law. The *Bundeskanzler* thereupon started an inquiry into the existing legislation of the states; drafts were submitted by officials of two of the states. After unavoidable delay, in 1879 and 1881 the *Reichskanzler* sent new circulars to the member states requesting statistical data on the insurance business. On the basis of these preliminary studies a draft was written in 1883 by an Interior Department official, who consulted with various insurance experts. The fundamental principles and arrangements of this draft formed the core of the final law. Discussions with other departments of the imperial government and with the state governments ensued, but the matter remained in abeyance until an amended draft was published in 1896. Public discussion led to some important changes, and the resulting draft went to the legislature in 1900. A legislative committee held 26 meetings in which it disposed of about 500 motions; it also considered 14 petitions submitted by associations of insurers and single insurers and by associations of policyholders and businessmen having an interest in insurance.<sup>141</sup>

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141. See Büchner, *supra* note 116, at 10-15; MANES, *op. cit. supra* note 114, at 1-22. It is customary for the legislature or drafting departments to consult any group with any interest in the matter. Since its creation, the insurance department has been an active participant in the preparation of insurance statutes, though it is subordinate to the Minister of Economics, and actual drafting usually takes place in the Ministry of Justice. See, e.g., 1924 VERÖFFENTLICHUNGEN DES REICHAUFSICHTSAMTS FÜR PRIVATVERSICHERUNG 16-19 where the insurance department proposed amendments to both the *Versicherungsaufsichtsgesetz* and the *Versicherungsvertragsgesetz* in order to remedy some of the adverse effects of the inflation. In 1903 the department submitted an

2. France. The French legislative method is basically similar to the German. As a rule, bills are drafted carefully by government departments, and are thereafter subject to public discussion before going to the legislature. For example, the law of February 27, 1958, establishing compulsory motor vehicle liability insurance, was discussed thoroughly in roundtable meetings by government officials and representatives of automobile and tire manufacturers and automobile clubs before being submitted to the legislature. As a subdivision of the Ministry of Finance, the French Insurance Department takes an active part in the drafting and subsequent discussion of legislative bills.

3. England. In England the government department plays a more important role in the preparation of legislation than is the case at the state level in the United States. But, of course, an English statute is seldom expected to be a comprehensive codification; in this respect an English statute is more like an American than a continental one.

### C. *Legislative Control of Contract Terms*

1. Formal and procedural requirements. Unlike the American statutes, the German statutes contain no purely formal or procedural provisions. Rather, these rules form a part of the administrative system and will be discussed in that connection. The Swiss law likewise has few formal provisions. The Swiss provision making a policy incontestable must be inserted in the insurance policy, but this is a rare example of a statute that itself provides for full information to the policyholder. The sanction against noncompliance is nowhere indicated, though an authority has contended that such contracts are not void but that the policyholder retains his right to contest the policy.<sup>142</sup>

On the other hand, the French law is in this respect like the American and contains a number of provisions fixing formal requirements for the policy. For example, the term of the policy must be indicated in prominent type; all policies of nonlife insurance must mention the right of both parties to terminate the contract after a period of ten years, and there must also be a reference to the statutory provision that automatic continuation of a contract cannot be for a longer period than one year at a

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elaborate opinion on the draft for the proposed Insurance Contract Law (*Versicherungsvertragsgesetz*), prepared by the Department of Justice, and took part in further discussions on the bill. 1904 VERÖFFENTLICHUNGEN 101. [Both the "Veröffentlichungen des Reichsaufsichtsamtes" (formerly Kaiserliches Aufsichtsamt) and the "Veröffentlichungen des Bundesaufsichtsamtes für das Versicherungs- und Bausparwesen" (since 1952) will hereinafter be cited as "Veröffentlichungen."]

142. Swiss VVG § 12. 1 ROELLI-JAEGER, *op. cit. supra* note 113, at 184.

time.<sup>143</sup> Surprisingly, in Great Britain the terms of the marine insurance contract have received considerable attention from the legislature, and the statute contains a number of provisions relating to the form of the marine insurance policy. For instance, it provides that a contract of marine insurance may not be admitted in evidence unless embodied in a policy conforming to the statute, and that the policy must specify the name of the insured, the subject-matter insured and the risk insured against, the voyage or period of time, which must be not more than twelve months, the sum insured and the names of the insurers.<sup>144</sup>

## 2. Substantive requirements.

a. Standard policies or standard provisions. The statutory standard policy is completely foreign to the methods of the German-Austrian-Swiss family of laws. Even required provisions are unusual there. Such a standard policy would not necessarily be inconsistent with the French method, but no statutory standard policies exist in France or elsewhere in Europe, so far as can be ascertained.

However, the emergence of compulsory liability insurance in recent decades has produced statutes setting forth certain minimum benefits that will be permitted under the statute. This legislation has not usually become part of the insurance contract codes but is to be found in separate acts, such as the motor vehicle codes. The statutes normally do not prescribe the entire policy but instead often stipulate minimum terms or delegate the power to fix the terms to an administrative agency, not necessarily the insurance department.<sup>145</sup>

Such control of the terms of the insurance contract is of a different nature from that previously discussed. It is imposed to guarantee protection to certain groups of persons, such as traffic victims, victims of hunting or other accidents, or sufferers from professional misconduct, who will benefit indirectly from the coverage, rather than to protect the policyholder, the insurer or others for the reasons commonly underlying insurance regulation. In consequence, the statute often does no more

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143. There are further formal requirements. Insurance contracts must be in writing and must contain the names and addresses of the parties, the property or person insured, the nature of the risk insured against, the effective date and the term of the policy, the insured sum, and the premium. Life insurance policies must contain additional information about the name and birthdate of the person whose life is insured, the name of the beneficiary, if any, the event upon which the insured sum will become due, and details of nonforfeiture and cash surrender values. Exclusion clauses must be in prominent type; if they are not, they are void. *Loi du 13 juillet 1930*, arts. 5, 9, 60.

144. *Marine Ins. Act*, 6 Edw. 7, c. 41, §§ 22-23.

145. Similar statutes exist in the United States but need not be discussed in this paper.



than specify minimum sums of coverage. Sometimes, however, more detailed provisions may be prescribed, and occasionally a uniform policy exists. The result is much like that produced by standard provisions or standard policy laws in the United States.

It should be noted that the European compulsory insurance statutes are basically police measures directed against the citizen (automobile owner, hunter, etc.). They are enforced by public law means, by subjecting noncomplying citizens to fine or other punishment. They have no direct private law effect on the relationships of the parties; insurance contracts made in violation of the statutory minimum requirements would nevertheless be binding and enforceable in the courts in accordance with their terms.

In Germany, the statute introducing automobile owners' compulsory liability insurance<sup>146</sup> contained two delegations of different kinds. First, the minimum benefits of the policy were to be fixed by administrative regulation of the Minister of Economics. Second, the statute directed that the insurance contract be issued in accordance with uniform contract terms (AVB) approved by the insurance department. To achieve complete uniformity and equality, a supplementary ministerial regulation authorized the insurance department to make new AVB applicable to existing contracts. The department exercised this authority with respect to automobile liability insurance.<sup>147</sup> However, in other kinds of compulsory insurance, no uniformity is required,<sup>148</sup> and the AVB ordinarily used in each branch of insurance are applicable.

In France, there are minimum provisions for various kinds of compulsory insurance. For instance, a law of February 27, 1958, requires automobile owners to buy liability insurance, the minimum benefits of which are to be fixed by government regulation made with the advice of the *Conseil National des Assurances*.<sup>149</sup> A regulation of January 7, 1959, which should be regarded as legislative in character, enumerated a set of minimum policy provisions, while allowing the insurers to develop

146. Gesetz über die Einführung der Pflichtversicherung für Kraftfahrzeughalter und zur Änderung des Gesetzes über den Verkehr mit Kraftfahrzeugen sowie des Gesetzes über den Versicherungsvertrag, Nov. 7, 1939, [1939] Reichsgesetzblatt I:2223, §§ 3, 4.

147. Verordnung über die Anwendung Allgemeiner Versicherungsbedingungen, Nov. 29, 1940, [1940] Reichsgesetzblatt I:1543.

148. For a list of compulsory insurances, see 1 BRUCK-MÖLLER, KOMMENTAR ZUM VERSICHERUNGSVERTRAGSGESETZ UND DEN ALLGEMEINEN VERSICHERUNGSBEDINGUNGEN 115-17 (8. Aufl. 1961).

149. §§ 1, 10. The Conseil is an advisory body composed of representatives of various areas of public life, established by loi du 25 avril 1946. It is patterned after a similar and much older German institution, the Beirat. See PRÖLSS, VERSICHERUNGS-AUFSICHTSGESETZ 58-63 & *passim* (4 Aufl. 1963). OECD STATEMENT (France) 40-41 lists the more important compulsory insurances.

policy forms containing benefits at least as generous as those required by the regulation. In practice, all companies use a model form promulgated by the Insurance Department. The minimum stipulations were made self-executing from the effective date of the law, *i.e.*, they were given private law effect similar to that in the United States. It is in notable contrast to American notions that the stipulations had effect even upon existing automobile liability policies, any contrary policy provisions notwithstanding.<sup>150</sup>

In England the Marine Insurance Act of 1906 provides an optional form of standard policy which is widely used, despite its quaint and esoteric language. Its acceptance is an outgrowth of the statutory blessing given to it, as well as to the "Rules for Construction of the Policy," the development of that ancient document by Lloyd's, and the certainty and reliability which accompany a document well tested and definitively interpreted by the courts<sup>151</sup>

b. Control through insurance contract codes. The normal method by which the legislature itself controls the terms of insurance policies is, however, through the enactment of insurance contract codes. Almost totally foreign to the Anglo-American system of law, this method is utilized extensively in Europe. German legislation on the insurance contract primarily serves the purpose of fixing rules of law which develop in cases in the United States. In the European systems the expressions "private law" and "public law" have fairly precise, technical meanings; they mark two areas of law which are governed by different principles and administered by different courts. In insurance, rules affecting the contractual relation of insurer and policyholder are governed by private law, and rules pertaining to government supervision of insurance enterprises are within the scope of public law. Though there is some overlap,<sup>152</sup> separate codes basically cover the two sets of rules: the *Versicherungsvertragsgesetz* (VVG) of 1908 for the former, and the *Versicherungsaufsichtsgesetz* (VAG) of 1901 with ancillary statutes like the *Bundesaufsichtsgesetz* (BAG) of 1951 for the latter. The Swiss legislative pattern closely resembles the German on this matter, while the Austrian is identical.

150. Loi N° 58.208 du 27 février 1958, Décret N° 59-135 du 7 janvier 1959. A similar method was used in introducing compulsory hunter's liability insurance. Here the Ministers of Finance, of the Interior, and of Agriculture were authorized to prescribe the minimum benefits by joint regulation. The insurers use the terms fixed in this regulation rather than developing individual policy forms of their own. Loi N° 55-1524 du 28 novembre 1955. Arrêté du 28 mai 1956.

151. See note 144 *supra*. See also DOVER, A HANDBOOK TO MARINE INSURANCE 233-34 (6th ed. 1962).

152. Swiss VAG §§ 14, 77(3) have immediate private law effect.

One consequence of the clear distinction between public and private law is a limitation of the scope of judicial review of contract terms in a suit between insurer and policyholder. The judge considers only self-executing provisions (private law rules) that directly affect the contractual relations between the parties, coming mainly from the VVG. Compliance of the company with public law provisions of the statutes or with administrative orders, requiring the insertion of certain stipulations in the policy or the printing of some parts of the contract forms with greater prominence than others, is sanctioned only by administrative means and does not automatically become part of the contract. A provision may have both public and private law effects, but this is uncommon in the German system.

Whether a requirement is to be enforced by administrative means (public law) or is to be self-executing (private law) is a choice to be made by the legislature. So also is the determination of whether rules of the former kind should be made by the legislature or the administrator. For instance, the German code contains no provisions concerning the mere form of the insurance contract, relegating such provisions entirely to administrative determination and enforcement. On the other hand, the Swiss code of 1908 requires that the policyholder be furnished a copy of the general contract terms before he signs the application, and if the insurer fails to provide this copy, the policyholder is not bound by the application.<sup>153</sup> That gives private law effect to the requirement, *i.e.*, the policyholder is not bound by the application unless he has received a copy of the terms, or is estopped to assert invalidity of the contract by accepting the certificate of insurance and paying the premium without objection.<sup>154</sup> The French code of 1930 requires prominent type for certain clauses and voids the clauses unless this requirement is met;<sup>155</sup> this approach is similar to the American statutes that contain formal requirements which are self-executing, with noncomplying policy provisions being void.

The decisions of whether the legislature should itself make the rule, and then whether it should make the provision self-executing, depend on the importance of the matter and how it can best be implemented. Some problems require more flexibility than others and thus are more suited to administrative than to legislative handling. Even if flexibility is desirable, the legislature will delegate its rulemaking power only if it can expect the agency to implement adequately the general purposes of

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153. Swiss *Versicherungsvertragsgesetz* art. 3.

154. See KOENIG, *SCHWEIZERISCHES PRIVATVERSICHERUNGSRECHT* 61 (2. Aufl. 1960).

155. *Loi du 13 juillet 1930*, arts. 8, 9.

the law. Where a permanent rule can be promulgated easily or the legislature cannot rely on effective administrative rulemaking, it may itself prescribe a rule with direct effect on contracts.

To grasp German handling of the insurance contract, it must be understood that the German word *Police* is not the same as the American word "policy." The German *Police* or *Versicherungsschein* refers to a simple document containing only such data as the name and address of the insured, the description of the insured property, the amount of insurance and the premium to be paid. It is translated here as "certificate of insurance," since its main purpose is to give evidence of the existence of an insurance contract. It corresponds most nearly to the first page of the typical American policy. The *Police* is then supplemented by detailed provisions usually called general or standard provisions (*Allgemeine Versicherungsbedingungen*—hereafter abbreviated AVB), though there are also some special clauses for individual risks called *Sonderbedingungen*. These provisions may be printed in the same document with the *Police*, but need not be. While regulation in America is focused upon the insurance policy itself, in Germany it is concerned mostly with the AVB, the standard clauses used by the company and incorporated by reference into the policy. Like statutes, these clauses are carefully drafted and are seldom amended. Indeed, in many types of insurance the same forms are used by all companies, being printed as separate brochures and distributed widely. While a copy of the AVB is usually given to the prospective policyholder before he signs the application, he is considered to have subjected himself to them by his signature whether or not he has received, read or understood them. Although in principle AVB are parts of private contracts between the parties, in practice they are handled and construed like statutes.

(1) Private law controls. Not all rules of private law statutes dealing with the insurance contract are made for the benefit and protection of the policyholder or to correct abuses in business practice. On the whole, statutory provisions in German, Austrian and Swiss law do not curtail the freedom of the parties to make their own agreements; most rules of general contract law as well as of the law of the insurance contract (found in the VVG) apply only so far as the parties have not otherwise agreed. They are *ius dispositivum*. But the position of weakness of the ordinary policyholder vis-à-vis the insurer, as well as the other peculiarities of the insurance contract, together with the feeling that administrative control over the AVB was not sufficient, led the

legislature to make certain minimum rules compulsory.<sup>156</sup> Thus the VVG contains a number of rules that are *ius cogens*, *i.e.*, that may not be altered by agreement (compulsory rules), or may be altered only to a limited extent (semi-compulsory rules). Depending on the purposes to be achieved, the strictness of the law varies. The Swiss and Austrian lawmakers favored compulsory provisions more than the Germans.<sup>157</sup>

A few provisions are deemed so important that they must be complied with or the entire contract will be void. Thus, for instance, a life insurance contract on the life of a person who is not a party is void unless the third person whose life is insured has given his written consent.<sup>158</sup> Violation of other provisions leads only to the invalidity of a particular clause, leaving the rest of the contract unaffected and in force. The invalidated portion of the contract is governed entirely by statutory rules, as the non-complying clause is disregarded for all purposes. That approach is comparable to the United States' technique of reading required standard provisions into a policy if it does not conform to the statutory requirements. Inconsistent agreements are declared invalid in some individual sections of the German law.<sup>159</sup> Such provisions are absolutely compulsory, and inconsistent stipulations are void even if they are advantageous to the policyholder.<sup>160</sup>

Other rules are semi-compulsory and prohibit deviations unfavorable to the policyholder, the insured, the purchaser of the insured property or third persons in general, as the case may be. Inasmuch as semi-compulsory clauses may not be used as a defense by the insurer,<sup>161</sup> the rights of the protected persons are determined by the statutory provisions or by the agreement, whichever is more favorable. These provisions are similar to the standard provisions in the American statutes that need not be adopted in precise terms but may be replaced by language more favorable to the insured. Swiss law has many such provisions.<sup>162</sup> Some of these semi-compulsory provisions allow conflicting agreements in

156. BRUCK, *op. cit. supra* note 118, at 20.

157. The 1880 *Regulativ* permitted individual agreements to vary the approved *Allgemeine Versicherungsbedingungen* without limitation. But the *Verordnung* of 1896 (*supra*, p. 31) allowed only deviations in favor of the insured. It was silent as to the legal consequences of noncompliance. The subject of nonforfeiture and cash surrender values is now usually dealt with in the private law (*i.e.*, self-executing) codes on the insurance contract.

158. See, *e.g.*, Swiss VVG § 159(2). For a detailed enumeration of all provisions which are compulsory to any extent, see 1 BRUCK-MÖLLER, *op. cit. supra* note 148, at 67-68.

159. See, *e.g.*, Swiss VVG §§ 8, 64(3), 81(3), 87, 89(1).

160. A list of such provisions is found in the Swiss VVG § 97.

161. See, *e.g.*, VVG §§ 15a, 34a, 42, 68a, 72, 115a, 158a, 178.

162. Swiss VVG § 98.

certain cases, if consent is given by the insurance department.<sup>163</sup>

The statute seeks to avoid so far as possible the danger that compulsory statutory provisions may unduly impede sound development by confining restriction to those types of insurance where it seems indispensable.<sup>164</sup> Thus ocean marine and reinsurance contracts are not affected at all by the provisions of the VVG.<sup>165</sup> Elaborate but noncompulsory rules (*ius dispositivum*) for ocean marine insurance are contained in the Commercial Code (*Handelsgesetzbuch*) but in practice are almost completely replaced by the standard form of the *Allgemeine Deutsche Seeversicherungsbedingungen*. Reinsurance also is largely free from regulation.<sup>166</sup> For transport insurance, credit and fidelity insurance, insurance against the risk of loss from the compulsory redemption of bonds for less than market value (*Versicherung gegen Kursverlust*) and any kind of property insurance on an open policy (*laufende Versicherung*), the provisions of the VVG are made noncompulsory.<sup>167</sup> Swiss law makes fewer distinctions among classes of insurance, exempting only transport insurance from the semi-compulsory provisions.<sup>168</sup> The German law also grants, partly to the Minister of Justice and partly to the government, the authority, as yet unexercised, to exempt certain groups of contracts from the compulsory parts of the statute.<sup>169</sup>

In France, the same distinction between private and public law is made as in Germany. While in its basic principles the French code is patterned after the Swiss and German laws of 1908,<sup>170</sup> there is an important difference in the binding force of the provisions. The German VVG adheres to the principle of freedom of contract; as a rule, its provisions may be replaced by contradictory agreements, and relatively few rules are compulsory. Contrariwise, the French law is compulsory by principle and expressly forbids any modification of the various provisions, except for twenty-two sections which by their language offer certain particular contract modifications to the parties.<sup>171</sup> Strictly con-

163. Swiss VVG §§ 89(2), 189.

164. See BRUCK, *op. cit. supra* note 118, at 22-23.

165. Swiss VVG § 186.

166. There is only limited supervision of the financial affairs to secure the soundness of the enterprises. See Verordnung über die Beaufsichtigung der inländischen Rückversicherungsunternehmungen, Dec. 2, 1931, [1931] Reichsgesetzblatt 1:696.

167. Swiss VVG § 187(1)-(2). These are lines of insurance where policyholders are usually economically strong and technically experienced.

168. Swiss VVG § 98.

169. Swiss VVG §§ 187(3), 188. The language of the code still refers to the authorities having jurisdiction in 1908 (Kaiser, Reichsrat); adjustment to the new constitution is effected by Article 129 of the Grundgesetz.

170. The law of the insurance contract is contained in the loi du 13 juillet 1930. PICARD ET BESSON, *op. cit. supra* note 129, at 59.

171. Loi du 13 juillet 1930, art. 2.

strued, the words would even prohibit modification for the benefit of the policyholder. Most French authors agree, however, that the statute should be construed in a sense that permits deviating contract stipulations which are more favorable to the insured.<sup>172</sup> Nevertheless, insurers in France are bound by compulsory private law rules much more than in Germany or other European countries. The area left for the free determination of the parties or for negotiation between insurers and regulatory agency is comparatively small.

In Great Britain insurers generally are unrestrained in the drafting of contract forms, except by the principles of law applied by the courts. To this statement there are two notable exceptions. First, for industrial life insurance, elaborate provisions are made in the Industrial Assurance Act of 1923, granting nonforfeiture values and other minimum benefits.<sup>173</sup> These provisions are cast in the form of self-executing rules of law; the more important ones also must be literally inserted in the policy. The statute permits the Industrial Assurance Commissioner to consent to the policy containing statements setting forth sufficiently the substance or effect of the statutory provisions.<sup>174</sup> The other exception is the law of marine insurance, codified by special statute in 1906.<sup>175</sup> The Marine Insurance Act not only contains many self-executing substantive provisions similar to those of the German VVG, but it also establishes certain other requirements for the form and contents of the marine insurance policy.<sup>176</sup> An optional form of policy covering loss of ship and goods, identical with the policy form used by Lloyd's insurers, is printed in a schedule to the act, which further contains "Rules for Construction" to be applied to the terms and expressions used in marine insurance policies unless the context otherwise requires.<sup>177</sup>

The fact that the law of marine insurance is thus codified when other branches are not may be explained by the great importance of marine insurance to England and by the fact that a great number of contracts with foreigners are subject to British law. From the very beginning of insurance regulation, marine insurance has attracted the attention of the government.<sup>178</sup>

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172. See PICARD ET BESSON, *op. cit. supra* note 129, at 59-60; EHRENZWEIG, *op. cit. supra* note 124, at 18 n.1; SICOT ET MARGEAT, *PRÉCIS DE LA LOI SUR LE CONTRAT D'ASSURANCE* 19 (4th ed. 1962).

173. 1923, 13 & 14 GEO. 5, c. 8.

174. 13 & 14 GEO. 5, c.8, § 21, and Third Schedule.

175. Marine Insurance Act, 1906, 6 Edw. 7, c. 41.

176. Marine Insurance Act, 1906, 6 Edw. 7, c. 41, §§ 22-31. See note 110 *supra*.

177. Marine Insurance Act, 1906, 6 Edw. 7, c. 41, § 30, and First Schedule.

178. In the 18th and 19th centuries, requirements as to the contents of marine contracts were set forth in statutes which on their face were tax measures. They were accompanied by several standard forms of policies, though the use of other forms was not

In the other types of insurance, the only check on a development of policy forms adverse to the policyholders is provided by the courts in the ordinary course of enforcing and interpreting insurance contracts. A curb on the retention or introduction of terms too unfavorable to the insured is also said to lie in the traditionally high standard of business ethics in the British insurance business and in the competition which exists between the companies organized in tariff offices on the one side and the independent insurers and Lloyd's on the other.<sup>179</sup>

(2) Public law controls. Public law comprises those rules which are concerned with the duties of the insurer or other persons towards the public, without reference to the effect on the private law relationships between the parties to the insurance contract. The most important public law provision in Germany affecting the terms of the insurance contract requires approval by the insurance department not only for the introduction of new AVB but also for change in existing forms.<sup>180</sup>

#### V. JUDICIAL CONTROL OF INSURANCE CONTRACT TERMS IN EUROPE

As with the corresponding treatment of American judicial activity, this section is intended only to provide a reasonably rounded picture—it would be impracticable to provide an exhaustive analysis of this complex subject within the framework of the present article. The analysis here is based mainly on German law.

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entirely prohibited. See the Acts, 35 Geo. 3, c. 63, § 5, 11-13 (1798); 30 & 31 Vict. c. 23, §§ 5, 7-8 (1867). For details of the historical development, see RAYNES, *A HISTORY OF BRITISH INSURANCE* 41-75 (1948).

179. See BOHLINGER & MORRILL, *INSURANCE SUPERVISION AND PRACTICES IN ENGLAND* 73-77 (1948); Kessler, *Forces Shaping the Insurance Contract*, in UNIVERSITY OF CHICAGO LAW SCHOOL CONFERENCE ON INSURANCE 3, 11-12 (Conference Series No. 14, Jan. 15, 1954). For psychological factors which may account for the success of the English system, see MOWBRAY & BLANCHARD, *INSURANCE* 493 (5th ed. 1961). Regulation in the Netherlands is similar to that in Great Britain, but the distinction between private and public law is continental. There are virtually no public law provisions about insurance and only relatively few special private law provisions contained in the Civil and Commercial Codes, which were enacted in the first part of the 19th century. *Burgerlijk Wetboek*, entered into force on October 1, 1838 (Besluit, April 10, 1838, [1838] Staatsblad No. 12), is printed in DE NEDERLANDSCHE WETBOEKEN § 1811 (Fruin ed. 1959), where insurance is listed among gambling contracts. *WETBOEK VAN KOOPHANDEL* §§ 246-308, 592-695 (1959). A revision now under way will make the Civil Code deal more adequately with the insurance contract. See Schreiber, *Die Niederländische Versicherungswirtschaft*, in 1959 *VERSICHERUNGSWISSENSCHAFTLICHES ARCHIV* 51, 52-53. Contract terms must be filed with the insurance regulatory agency for its information, but are not subjected to control. Some extension of regulatory control is contemplated, but without introducing new principles. No extension of control of the insurance contract is contemplated. *Wet tot regeling van het Levensverzekeringsbedrijf*, Dec. 22, 1922, [1922] Staatsblad No. 716; for details see Schreiber, *supra* at 51-54.

180. For the insurance department's distinction between "Allgemeine Versicherungsbedingungen" and "Besondere Versicherungsbedingungen," see 1908 *VERÖFFENTLICHUNGEN* 111-14.



The methodological differences between common law and civil law in the decision of cases are fewer than prevailing doctrine in the two systems would suggest. It is true, of course, that the European judge is normally engaged in the interpretation of a statute and its application to the facts of a case. But the sophisticated lawyer in the civil law system is as aware as his counterpart in the United States of the creative role of the judge, even though that role may indeed be less important than that of the common-law judge, particularly the American judge.

In the civil law, public policy principles are enacted by statute much more extensively than in the common law; in the latter they grow gradually out of the decisions of cases. The ostensible duty of the civil-law judge is to apply the principles established by the legislature, but the difference in result is not very great in ordinary cases. Though in the common-law system the basic principles are the result of cases, they develop over decades or even centuries, and the individual judge in the ordinary course of his daily work has only to apply them, altering and developing them only marginally. Furthermore, though *stare decisis* is not an official doctrine of the continental system, the weight of a well-considered case may be very considerable indeed, and in the interpretation of policies it may be decisive and defeat the contradictory views of policy-drafters.

For both statutory and contract interpretation in German law, elaborate rules and principles have been developed through academic discussion and the practice of the courts, in addition to those prescribed by statute. The most important rules of construction in Germany are that contract terms must be interpreted in order to give effect to the real intentions of the parties rather than to the literal meaning of the language used, and that in the interpretation of contracts both good faith and general usage are factors that must be considered.<sup>181</sup> In addition, the nature of the contract and the goals sought by it are weighed heavily in the process of interpretation.<sup>182</sup> The search for the intention of the parties is a method used in common with the Anglo-American system, but express incorporation of good faith and general usage into the process are departures from the ostensible common-law method. It should be noted that what the common-law judge does covertly, his civil law counterpart is authorized by statute to do overtly. In this respect

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181. Bürgerliches Gesetzbuch § 133: "Bei der Auslegung einer Willenserklärung ist der wirkliche Wille zu erforschen und nicht an dem buchstäblichen Sinne des Ausdrucks zu haften." Bürgerliches Gesetzbuch § 157: "Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern."

182. For contract interpretation generally, see 2 ENNECERUS-NIPPERDEY, *op. cit. supra* note 6, at 1246-65.

the civil-law judge has more extensive authority than the common-law judge.

In determining the extent of coverage of insurance contracts, the fact that the contract is intended to provide security is thought to justify the extension of coverage in doubtful cases, including restrictive interpretation of exclusionary clauses.<sup>183</sup> In the common-law system the same results would be reached in such a case, but would ordinarily be grounded on the *contra proferentem* doctrine, which would also be applicable to problems other than coverage. The civil-law formulation used here would overtly interpret ambiguity in favor of broader coverage, and thus would remain intact even if the state approves or dictates the terms; that also might be an appropriate rule for the common law.<sup>184</sup> But the civil law judge may deny recovery where extension of coverage would be inconsistent with actuarial science or insurance economics; the idea of the "community of policyholders" is invoked to deny unjustified preferences to individual policyholders.<sup>185</sup>

In civil law theory, as in the common law, there is said to be no place for interpretation of unambiguous language. This principle is difficult to reconcile with others already stated. As with common-law rules of interpretation, consistency can be achieved only by excessive refinement of the rules. Despite the literal meaning rule, in practice the civil-law judges, like common-law judges, often have created an ambiguity in order to extend coverage for the purpose of treating the policyholder fairly as determined by the bench.<sup>186</sup>

Categorization of the insurance policy as a contract of adhesion is important for interpretation. Since AVB are not made for individual contracts but for a multiplicity of contractual relationships, the true intentions of the parties, particularly the policyholder, seem irrelevant. Courts and academic writers agree that AVB and other contracts of adhesion must be interpreted as statutes are interpreted, without reference to the personal views or situation of the litigant-policyholder.<sup>187</sup>

The rule *contra proferentem* is also used in continental jurisprudence. The German *Reichsgericht* has held that this rule may only be used as a supplementary doctrine to reconcile an existing ambiguity,

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183. 1 BRUCK-MOLLER, *op. cit. supra* note 148, at 72-75.

184. This suggestion is discussed p. 807 *supra* and p. 729 *infra*.

185. See note 183 *supra*.

186. See, e.g., a decision of the German Reichsgericht of Feb. 5, 1932, 135 Entscheidungen des Reichsgerichts in Zivilsachen 136.

187. See PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW (1937); RAISER, DAS RECHT DER ALLGEMEINEN GESCHAFTSBEDINGUNGEN (1936).

when no other method leads to a solution,<sup>188</sup> but lower courts have frequently declared an ambiguity to exist in order to extend coverage through use of the *contra proferentem* rule.

Not only can the German judge achieve justice through the interpretation of the contract, but he also has another powerful statutory tool for the purpose. The Civil Code requires that obligations be *performed* according to the standards of good faith.<sup>189</sup> There seems to be an increasing tendency of German courts to use this provision as an indirect way to modify contractual stipulations they regard as unfair. A recent decision of the *Bundesgerichtshof* demonstrates the potency of this tool. In his proof of loss, a policyholder fraudulently misstated the value of part of his property. Despite a clear provision in the AVB denying *any* protection in that event, the court thought that such a forfeiture would contravene the Civil Code principle; it held that he only lost the portion of his claim which was applicable to the misrepresented property.<sup>190</sup>

Decisions of the courts have various effects on the content of the contracts. Sometimes the insurer will revise its AVB to evade an unfavorable interpretation. This was the case with a clause requiring repair as a prerequisite to recovery on marine (hull) insurance.<sup>191</sup> On the other hand the insurer may decide to acquiesce in the court's interpretation by not amending its policy. Finally, new legislation may be prompted by court decisions. For example, the German courts developed a restrictive interpretation of certain exclusion clauses (moral hazard clauses) to provide that policyholders would only lose their claims under them if they had acted negligently. This view was then incorporated in the insurance contract code.<sup>192</sup>

## VI. COMPARATIVE OBSERVATIONS AND CONCLUSIONS

The evolution of the standardized contract, according to one view of the matter, is bringing a new regime of status and reversing the development described in Maine's celebrated aphorism about the progress of society from status to contract.<sup>193</sup> At any rate, whether or not it is proper to describe the consequence of contracts of adhesion as the

188. Decision of Oct. 30, 1934, [1935] JURISTISCHE WOCHENSCHRIFT 1010.

189. Bürgerliches Gesetzbuch § 242: "Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu and Glauben mit Rücksicht auf die Verkehrssitte es erfordern."

190. Decision of Nov. 28, 1963, [1964] VERSICHERUNGSRECHT 154-56.

191. SCHLEGELBERGER, SEEVERSICHERUNGSRECHT 186 (1960).

192. RAISER, *op. cit. supra* note 187, at 265-66.

193. Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917). See also Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

creation of a new relationship of status, widespread use of the contract of adhesion is creating many difficult problems for the legal system.

Traditional views about freedom of contract are widely felt to require considerable modification in the face of the disappearance from the market of the kind of equality of bargaining power presupposed by the dogma. When persons on one side of the contract are as a normal matter quite unable to bargain effectively because of their ignorance and their insignificance, as individual units (the ordinary insurance policyholder), then freedom of contract may no longer deserve acceptance as a major assumption of the legal system, at least without serious qualification. The weaker party to the contract is thought to need and deserve protection against overreaching. Although one can fairly assume that a majority of professional insurance men regard themselves as trustees of the welfare of their policyholders and do not deliberately overreach or cheat, such honesty is by no means universal, and it is questionable if the law can afford to abandon even a very small minority of policyholders to the tender mercies of avaricious men. This felt need for protection of some policyholders against overreaching has contributed substantially to the developments described in this paper. The point of view described in this paragraph is a widely accepted one—prevailing in the legislation of most countries. It is clearly rejected only in the United Kingdom and the Netherlands.

On the other hand, it is too easy and would be quite erroneous to assume that imposition of control over insurance policy terms is solely a product of the need to prevent overreaching and protect the policyholder against the industry. In fact the industry, on the whole, seems to have been favorably disposed toward uniform laws, which not only control legitimate enterprise but also protect it from the unfair competition of the minority. For example, the production of uniformity for the benefit of the companies seems to have been a more basic motive than the protection of policyholders against overreaching in the development of the earliest American standard fire policy laws. Careful sifting of the materials examined for the production of this paper has disclosed no fundamental objection of the insurance industry to compulsory imposition of contract terms. Indeed, there is considerable evidence that it was welcomed. This is easier to understand when one recalls that the companies have been quite able to make their views felt in the process of writing such terms. It is the policyholders who are unrepresented most often, at least in any formal way. In this respect the German system has some advantages over the American, for the German policyholders are protected to some extent by institutionalized and regularized arrange-

ments. Some are represented by well organized societies, though this is more true of business insureds represented by their trade associations than of ordinary citizens.

Especially in earlier days, the American companies had no reason to regret state intervention. For example, an 1895 Missouri standard policy statute provided that the companies were to prepare the policy—the commissioner merely had to approve it and his approval would likely be a rather formal matter.<sup>194</sup> It will be recalled that the first New York policy was prepared by the Board of Fire Underwriters. Even in the continental systems under which the industry has exerted less pressure, the industry has had its opportunity to participate, usually in a more regular and institutionalized fashion than in the informal American system. Therefore, it would be a serious error to think of policy regulation in either America or Europe as an arbitrary imposition of the public will on private enterprise. There is more interaction than that.

It seems curious, at first, that the American statutes should have developed in the direction of requiring insertion of provisions in the policy, when it would have been easier simply to enact them as binding rules of law (*ius cogens*). But a little reflection shows the justification. Even in some of those instances where the rules of law have been changed, it has appeared to the legislature worthwhile *also* to require insertion in the policy. Warranty statutes provide an illustration. The justification is the purpose of informing the policyholder—of making his rights as clear to him as the matter allows. This may be called the formal aspect of the provision. Every statutory section that requires an insertion in the policy has an important formal element, as well as its substantive one. One may ask, then, why the German insurance contract law should have so little emphasis on form. It is not because the Germans do not feel it important to inform the policyholder, but because the compulsory rules of law found in the VVG have a habit of finding their way into the *Allgemeine Versicherungsbedingungen*, the German equivalent of our policy terms. Normally AVB are delivered to policyholders, who may read them though they are not likely to do so; that is, the process of administrative supervision ensures that the formal needs are met. Both systems feel the same need to inform the policyholder and succeed in doing so to some extent by employing different techniques.

This leads to a related observation. It is noteworthy that the German VVG has very few formal provisions. The French code, on the

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194. Mo. Laws 1895, p. 194, § 1. The section was held to be an unconstitutional delegation of legislative power in *Nalley v. Home Ins. Co.*, 250 Mo. 452, 157 S.W. 769 (1913).

other hand, has a good many, though German and French laws are otherwise quite similar. And it has been shown that not only do the American statutes contain numerous purely formal provisions but that in a certain sense *most* American statutes are formal. The difference in the degree of formality may well be dependent partly on the effectiveness of the supervisory activity that was contemplated as the counterpart of the legislative control. The German VAG preceded the contract act (VVG) by seven years, and the drafters of the latter could rely on the efficiency and orderliness of the German civil service to provide the necessary formal element. On the other hand, the French contract law preceded development of a regulatory agency with extensive powers and thus had to supply the formal element.

For American law, finally, it must be said that much American regulation has been ineffective despite its comprehensive character, because of the small size of the states in which it characteristically operates and because of the haphazard way in which it has tended to develop. Moreover, American statutes have developed in such an unplanned way that one could hardly expect the rational decisions that were perhaps made in the German and French cases. An interesting by-product of our lack of system is the surprisingly great volume of statutory law affecting the insurance contract—greater than in any continental country despite the greater importance of the courts in the development in the United States. The cause is the “case-law” nature of even our legislative activity, *i.e.*, the legislators respond only to specific problems, on the whole, and the ultimate result is great complexity.

The lesser degree of system in the American development of insurance regulation has both advantages and disadvantages. One of its advantages is that it adapts more rapidly to new or changed forms. American legislatures respond more readily to new developments in a field of this kind than do European ones, as they worry less about the “elegance” of the statutes. The German VVG, for example, did not mention sickness insurance in 1908 when the code was first enacted, probably because that line of insurance was not important enough. Today when such insurance has assumed sizeable proportions, the German legislature still has not taken the trouble to deal with it, even though the principles enacted for life insurance are analogous and would provide a reasonable, simple and fairly effective solution. Instead the system-maker, *i.e.*, the academician, must fit this new form, as well as others, into the existing system. The place of the text writer, the academician, in the German legal system is of sufficient importance that new problems are given fairly adequate treatment in successive editions of systematic

treatises. Naturally the administrative agency plays a large role in this adaptation, too. Group life and accident and sickness insurance as well as credit life and accident and sickness insurance, all treated in recent American statutes, remain unmentioned in the relevant German statutes, though not for that reason undealt with by the law. Not only are general provisions of the statutes applied, but in one way or another the administrator and academician decide which of the existing specific provisions are applicable to the new forms.

The degree of flexibility of statutes varies a great deal in response to a number of variant factors. The constitutional difficulties with delegation of legislative power have produced an unfortunate rigidity in the American market by leading to the production of standard policies which are hard to modify. Even after the constitutional difficulty has disappeared, the technique remains. Probably the constitutional difficulty has also contributed to the tendency to use complex standard provisions laws. Over a period of time the resulting rigidity has produced a reaction, leading to suggestions to abandon the standard policy form in fire insurance, and leading legislators to require compliance only "in substance" and also to leave a loophole to escape the clauses through the exercise of administrative discretion. Another factor affecting the degree of rigidity of legislative prescription is the extent to which the administrative control machinery is developed. The German VVG is one of the most liberal of all systems on the continent; it was enacted in contemplation of an existing effective administrative machine.

It is doubtful that significant differences can be detected among the major states of the occidental world as to the relative importance of the doctrine of freedom of contract. Generally it was felt to be of especial importance about the turn of the century. It has tended gradually to lose its force since then, though in Germany it perhaps reached its apex in the Weimar Constitution of 1919, plunged to a low under the National Socialist regime, and was reinstated in considerably muted form under the Bonn Constitution.

The apparatus expressing the level of importance placed on freedom of contract varies more, however. Traditionally in the United States, the legislature interfered in contract terms only when important public interests were at stake, but the relatively limited legislation that resulted was couched in compulsory or semi-compulsory terms. Such a limited legislative role in the freedom of contract area caused the courts to create dispositive law through interpretation—to search for "implied terms." As a result of the legislature's inactivity on particular matters, courts created what one might call "quasi-compulsory" terms by going beyond

the task of interpretation and distorting the meaning of a contract. In European law, on the other hand, the legislature created dispositive law at an early date and with it provided the necessary compulsory law, leaving little room for the courts to intervene, even if they had not already been substantially deterred by the lesser role they enjoy in the continental system. However, by authorizing interpretation in accordance with good faith and the intent of the parties, the statutes themselves provide the continental court more freedom of action within the framework of the statutory rules than does the common law.

It is not easy to generalize about the justification for judicial intervention in policy terms. It is hard to doubt that in the American system, at least, there is justification for some misconstruction of policy language on general public policy grounds, though the deception—even self-deception—seems an unfortunate way to intervene. On this Justice Clark's strictures seem justified: intervention should be overt and not covert. But it is also difficult to avoid the conclusion that judges tend to intervene in complex matters about which they know very little. Unless courts can become better informed on the technical aspects of insurance, there ought to be more self-limitation in judicial intervention; the judges should attempt more often to construe contracts in accordance with the natural meaning of the language and should assume somewhat less dogmatically than they now do that they and only they know what the "minimum decencies" require.

On the other hand, there seems to be justification for the view that the rule of construction *contra proferentem* should not be changed as a result of statutory or administrative intervention in insurance contracts. The likelihood that insurance industry representatives have participated effectively in the preparation of legislation plus the fact that a liberal construction (where there is genuine and not artificial ambiguity) is best suited to make insurance perform its social role make a *prima facie* case for a continuance of judicial liberality. The rule would then become frankly what it now is covertly—a rule of interpretation against the company. It bears repetition, however, that this is only justifiable for *real*, not artificially created ambiguities. Nor is this suggestion made dogmatically—the problem is not free from doubt and difficulty.

It is not easy to judge the comparative effectiveness of differing techniques of control. Indeed, it is probable that most of the techniques in all the systems have their uses, and the problem is only one of choosing the technique best adopted to the particular need of the moment. Perhaps it is hardest to justify the standard policy law, though even that had its great merit as the solution of a particular constitutional difficulty that no



longer plagues the legislator to the same extent. Its disadvantage is obvious: the relative rigidity and backwardness of this product in this section of the market, deprived as it is of the incentive to improvement offered by free competition.

The standard provisions law is a better method for controlling contract terms, if the legislature feels the necessity of involving itself in the details of the matter. Through this device it is possible to leave most of the contract free, or subject to the more flexible and constant control of the insurance commissioner, while intervening decisively on those matters deemed sufficiently important. The early standard provisions laws had their own source of rigidity in insistence on literal compliance. The tendency more recently has been to use an "in substance" approach as well as to change from fully compulsory to semi-compulsory provisions. The "in substance" requirement permits flexibility of formulation and improvement in formulation, while semi-compulsory provisions are undoubtedly more appropriate than fully compulsory ones to the extent that such provisions are intended to protect the policyholder against the company. On the other hand, fully compulsory provisions are better suited for the imposition upon both parties of principles of public policy that transcend the interest of the insured, such as the insurable interest doctrine or a suicide exclusion clause. The necessary concomitant of a more liberal and less rigid statutory regime, however, is an increase in administrative discretion and in the amount of administrative participation in the control process. This seems also to be the direction of historical development.

If one compares techniques in the systems, he is struck by the relative sharpness of the continental European distinctions as compared to the American. So far does the distinction between public and private law go, for example, that the issuance of an administrative *Verordnung* in Austria requiring companies to insert provisions in AVB met criticism as an invasion of private law matters by a public law agency. The assumption was that only legislative activity should be used to create private law effects while the activity of an administrative agency should have only public law consequences. But even in Europe the distinction is far from clear, as is shown by the German provision authorizing the department to order a change in AVB with effect even upon existing contracts. There has been a strong tendency to limit activity under this provision to serious emergencies—a reflection of contemporary constitutional attitudes in the West German republic. The section also trenches upon a public policy that has received vigorous expression in the United States: the notion that existing contractual relationships should

not be interfered with by *ex post facto* governmental activity, which has received concrete expression in the contracts clause of the United States Constitution.

The Austrian objections to the blurring of the distinction between private and public law has its counterpart in the American emphasis on separation of powers, reflected here in the constitutional inhibitions against administrative formulation of standard policy terms. Though the two ideas are not quite the same, they are related and have somewhat the same effect.

Indeed, though one cannot press the point too far, a striking thing about these disparate developments in systems that are technically quite divergent is that when viewed in their totality they seem to accomplish much the same purpose. In saying this, one must make an exception for the regimes of the United Kingdom and the Netherlands, which for reasons deeply rooted in history and in the special circumstances of those particular insurance markets have valued much more highly than any other systems the common tradition of freedom of contract, and have not permitted it to become overwhelmed by the demands for "protection of the policyholder." With this general observation, the fuller demonstration of which must await the subsequent and related article, this article must end.