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Kimball: Insurance and Public Policy

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INSURANCE AND PUBLIC POLICY. By *Spencer L. Kimball*. Madison: University of Wisconsin Press. 1960. Pp. xii, 387. \$6.00; augmented edition, \$7.50.

The reviewer of a book is appointed by the editor as a judge to sit in lonely final judgment without the aid of counsel, without a hearing and without briefs. There is only one thing for such a judge to do to alleviate his conscience and the defendant's lot: to abandon all pretense of impartial justice and to warn the parties and the public of all his biases, loves and hatreds that have gone into the making of his judgment. This I shall do, and I shall do so in the first person rather than speaking for the anonymous court of "the reviewer."

My first bias: That insurance is so crucially important for our society and economy that our "capitalist" order would collapse without the support of this "socialist" institution; that nevertheless insurance has been inexcusably neglected by those learned in its theory and practice;¹ and that, therefore, publication of a workmanlike book in this field is in any event a matter of great significance. From Kimball's other writings² it was obvious that his first book would be such a workmanlike job. But it is much more! Fortunately it is not what the author promises us in tired terms, "an investigation into the interplay of law and society — into the legal implementation of social and economic public policy" (p. v) but a lucid, conscientious and original introduction into that central problem of the business of insurance, the creation and protection of the Insurance Fund.

My second bias: That the title of a book should be descriptive and thus easily cited and located, and that the table of contents with the corresponding headings in the text should be properly coordinated and mutually exclusive. "Insurance and public policy"? Public "policy" would be a bad phrase to use in any book which deals with insurance and underwriting "policies." But more important is the fact that the term "public policy" in this context has a meaning so broad as to be virtually meaningless,³ and that the title, therefore, does not even come close to doing justice to a thoughtful and sober plan. Similarly, this work's fine structure is not fully revealed, to the lawyer at least, by such chapter and section headings as "validation of the insurance enterprise" (p. 8) (a splendid history of the recognition of insurance as a legitimate enterprise), or "relationship of

¹ See Ehrenzweig, Book Review (Carnahan, Conflict of Laws and Life Insurance Contracts), 12 J. LEGAL ED. 137 (1959); Ehrenzweig, *Per un diritto comparato delle assicurazioni*, 27 ASSICURAZIONI 3 (1960); Ehrenzweig, *Internationales Versicherungsrecht*, 15 VERS. RUND-SCHAU 269 (1960).

² Kimball, *Warranties, Representations and Concealment in Utah Insurance Law*, 4 UTAH L. REV. 456 (1955); Kimball, *The Role of the Court in the Development of Insurance Law*, 1957 WIS. L. REV. 520; Kimball & Boyce, *The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective*, 56 MICH. L. REV. 545 (1958); KIMBALL & CONKLIN, THE MONTANA INSURANCE COMMISSIONER (1960).

³ "Various prevalent attitudes, recognized by the lawmaking agencies and embodied in 'public policy,' whether articulated or undeclared, played upon and modified the corporate structure and practice of the insurance business." P. 65.

marketing practices to claims administration" (p. 250) (a fine analysis of the agency system), or "insurance in the larger society" (p. 223) (including valuable contributions on such disparate subjects as "insurance as capital mobilizer," (p. 250) a unique history of insurance taxation, and loss prevention).

The organization of this book is no doubt the result of much soul-searching of a lawyer as to how to tell his story to the layman, or, as the author put it, how to present insurance in "functional" rather than legal terms. But this review is written for lawyers and perhaps the following analysis of the contents as seen by a lawyer may prove helpful to the profession as a guide to many a hidden treasure. Written almost entirely around what might have been called "The Insurance Fund, its Creation and Protection," the book falls naturally into two parts. The first part on the creation of the fund starts with an analysis of its beginnings and conditions in history (pp. 8-32) and continues with excellent sections on types of insurers, the initial fund, insurance rates, the collection of premiums and marketing. (pp. 37-128) The second part on the protection of the fund, perhaps the most splendid and original contribution, logically includes the chapter on "The Distribution of the Fund" and much of the final chapter on "Insurance in the Larger Society," with taxation as an unwanted but necessary supplement to protection. This second part, in the lawyer's parlance, is largely devoted to administrative, judicial, and legislative control, although the author has apparently refrained from presenting and organizing his material under these headings so as to preserve the close relation of each problem of control to the business conditions which have produced it. Administrative control is discussed historically (pp. 174-208) in relation to investment, underwriting, and other management practices (pp. 129-174) as well as to the agency system (pp. 116-128) and loss prevention (pp. 288-300); judicial control in relation to the obsolete case law bearing on notice and proof of loss, adjustment and appraisal (pp. 213-219), and the federal impact (pp. 270-288); while legislative control is analyzed as to underwriting policy (pp. 143-149), policy terms (pp. 230-240), direct actions (pp. 219-223), valued policy laws, and taxation. (pp. 240-270) The historical and functional analysis of these topics is not to be found anywhere else, in this country or abroad. That this analysis is centered in Wisconsin has made possible a consistent and conclusive treatment which elsewhere has been usually frustrated by discursive and abortive descriptions of the national scene.

My third bias: That insurance law has become one of the most important fields of legal research because the language, and more rarely and yet too often the holdings, of our courts continue to be based on court decisions and concepts of 150 years ago, further encumbered, rather than aided by what has often been haphazard, amateur and sometimes outright ludicrous legislation; that, nevertheless, insurance law, like insurance, has been inexcusably neglected by those learned in its theory and practice; and that, therefore, publication of a book in this field would, in any event, be

a matter of great significance. But in this book Spencer Kimball has almost anxiously avoided the full use of his superb legal scholarship. Definitions, including the one of the very concept of insurance,⁴ are intentionally oversimplified, documentation is relegated to the back of the book, fossilized legal concepts such as those of insurable interest (pp. 32-35), warranties and representations (pp. 234-235) are discussed almost casually and without evaluation. Most conspicuously, and no doubt regretfully, due to limitations of space, the copious bibliography, with the few exceptions of leading texts and articles on automobile liability insurance, excludes legal materials. But after all, this book was written "from the vantage point of the business rather than from that of the conceptual framework of the law." (p. 5)

My fourth bias: I like Kimball the man and the scholar. And having read this book, I hold my bias even more strongly than before. The only man in sight in this country who can lift insurance law out of its abomination and stagnation is the author of this work.

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⁴ Insurance, defined as "the distribution of an adventitious economic loss" would exclude any life insurance that lacks relation to such loss. In continental literature the impossibility of embracing both indemnity and "sum" insurance in one definition has long been recognized. See, e.g., ALBERT EHRENZWEIG, SR., DEUTSCHES (ÖSTERREICHISCHES) VERSICHERUNGSVERTRAGSRECHT 56-57 (1952).