

ASPEN CASEBOOK SERIES

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**INSURANCE LAW
AND POLICY**
Cases and Materials

*Fourth
Edition*



Wolters Kluwer

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*For Sharon, Matthew, Rachel, and Noa
and
For Ruth Ann, Hannah, Molly, Thomas, Caroline,
Mary Claire, and Feleke*

Insurance ideas and practices define central privileges and responsibilities within a society. In that sense, our insurance arrangements form a material constitution, one that operates through routine, mundane transactions that nevertheless define the contours of individual and social responsibility. For that reason, studying who is eligible to receive what insurance benefits, and who pays for them, is as good a guide to the social compact as any combination of Supreme Court opinions.

Tom Baker, *On the Genealogy of Moral Hazard*,
75 Tex. L. Rev. 236, 291 (1996)

Preface

This casebook invites students and teachers to reimagine the field of insurance law, reflecting the centrality of insurance to American law, business, and society.

Insurance is already in the mainstream of U.S. law and policy, as well it should be. Entire sectors of the U.S. economy depend on insurance: health care, the housing market, and the civil justice system, to mention just three with particular significance for new lawyers. A large share of federal tax payments goes toward funding government insurance of one form or another. The average American family pays almost as much to purchase the various forms of insurance that make up the private safety net. And for most organizations, insurance is a substantial budget item. As a result, tens of thousands of lawyers make decisions every working day that require a detailed understanding of one form of insurance or another.

Yet insurance remains very much on the margin of the curriculum in most law schools. This marginal status hurts law students by sending them out into practice without a broad, conceptual understanding of insurance law and institutions to help guide them in their work. Further, it deprives the legal profession of the depth of understanding that law teachers have brought to the fields of law at the core of the law school curriculum.

Courses like contracts, torts, civil procedure, property, and criminal and constitutional law are rich intellectual experiences largely because they have been taught by generations of law professors who labored in those fields. The U.S. legal system is among the few in the world that compensates law teachers well enough to free them from the demands of the active practice of law. What the system gets in return is not only well-educated new lawyers, but also legal scholarship and other forms of academic knowledge.

Insurance Law and Policy: Cases, Materials, and Problems aims to make insurance law enjoyable and interesting to teach and learn, so that professors who usually teach torts, contracts, business organizations, health law, civil procedure, and other law school courses will embark into an insurance course—and so that the students who go on that journey will have a worthwhile experience, too.

The goal is to encourage more people to think and write about insurance, risk, and responsibility, so that the field develops the depth of law school subjects traditionally understood to form the core of the curriculum.

So what does this casebook do differently? There are four main things.

First, the book pares down, and in some cases eliminates, some of the arcane aspects of insurance law in favor of presenting a broad and conceptual overview of the field. Lawyers can teach themselves the details when they need to know them. This book focuses on the essential institutional arrangements and enduring tensions that animate the field.

Second, the organization of the book locates insurance law in the law school curriculum. As the book makes clear, insurance is both an upper-level contracts course (see Chapter 2) and an upper-level torts course (see Chapters 4 and 5). Insurance is also an essential aspect of health law (see Chapter 3) and the regulation of financial services (see Chapter 6), as well as a challenging variation on the usual pattern of federalism (see Chapter 6). In addition, insurance provides a window on the distribution of benefits and responsibilities in the United States (see, especially, Chapter 1, but also Chapters 3 and 4). In that sense, an insurance law course has much in common with a tax law course. It is the rare social issue that cannot be seen through a tax or an insurance lens. The difference is, however, that insurance law is more accessible to teachers whose core expertise lies in an allied field.

Third, the book introduces into insurance law many successful innovations from other law school casebooks. There are carefully constructed problems throughout. There are fewer and longer cases, providing students better grounding in the art of extracting useful knowledge from judicial opinions. There are more extensive and pervasive statutory materials, presenting students with a more realistic understanding of the importance of statutes and more practice working with them. There are fresh, contemporary cases, reflecting the major insurance law controversies of the past thirty years, from asbestos litigation to the World Trade Center to the ever-evolving relationship between liability and insurance (as represented in this edition by the extensive use of materials from the ALI's new Principles of the Law of Liability Insurance, for which we are the Reporters).

Finally, although the book continues the trend in insurance law casebooks of organizing teaching units around lines of insurance (e.g., health, liability), it integrates topics to a greater extent. All first party insurance topics are addressed in a single Chapter, with separate sections for different lines of insurance and a single comprehensive subrogation unit at the end. Similarly, after introducing the main types of liability insurance in separate sections in Chapter 4, the book presents liability insurance relationship issues in an integrated fashion in Chapter 5.

Tom Baker and Kyle Logue

January 2017

Acknowledgments

As with any casebook in a developing field, this one stands on the shoulders of others. Two deserve special mention: *Cases and Materials on Insurance Law*, by Spencer Kimball, and *Insurance Law and Regulation*, by Kenneth Abraham. We have taught with both books and both undoubtedly have shaped our understanding and organization of the insurance field more pervasively than we are aware.

Thank you to all of the adopters of the earlier editions for their confidence and their feedback. Thank you, especially, to Rhonda Andrews, Jennifer Bard, Peter Carstensen, Seth Chandler, Stephen Gilles, Stephen Halpert, Robert Jerry, Peter Kochenburger, Jay Naftzger, Chaim Saiman, Adam Scales, Peter Siegelman, Kathryn Sampson, Anthony Sebok, Shaubin Talesh, Jeffrey Thomas, and Jennifer Wriggins for their suggestions and materials. Thank you to the many lawyers who have entrusted us with their insurance problems, keeping us anchored to insurance practice and providing the raw material for many of the topics and problems that (suitably disguised) appear in this book.

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Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners*, 26 Fla. St. U. L. Rev. 625 (1999). Reprinted by permission of the Florida State University Law Review.

Tom Baker & Jonathan Simon. (2002). *Embracing Risk: The Changing Culture of Insurance and Responsibility*. © 2002 by The University of Chicago. All rights reserved. Published 2002. Printed in the United States of America.

Notes on the Text

All omissions from judicial opinions and other materials, except omissions of footnotes and other citations, are indicated by ellipses. Some internal citations and footnotes within cases and other materials have also been removed. All footnotes, including those in the cases and other excerpted materials, are numbered consecutively from the beginning of each chapter.

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