INSURANCE LAW AND REGULATION

CASES AND MATERIALS

FOURTH EDITION

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UNIVERSITY CASEBOOK SERIES

For Katherine and Michael

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PREFACE TO THE FOURTH EDITION

In the years since the earlier editions of this casebook were published, interest in insurance law has continued to grow within the law schools, in the practicing bar, and in the domain of public policy. Once an obscure specialty, the issues that arise in modern insurance law have become part of the mainstream, and a mature body of legal doctrine has grown up around them. For example, the events of 9/11 spawned a series of insurance issues that are reflected at various points in this edition. Other new issues also have arisen – the materials on the Attorney General of New York's exposure of contingent-commissions paid to brokers in Chapter Three, and on mold-coverage issues included in Chapter Four, are examples. A decades-long debate about our health-care system has also brought health insurance into prominence. Chapter Five contains revised materials addressing issues that have figured, and probably will continue to figure, in this debate. Similarly, many of the mega-liability insurance cases that were in the early stages of litigation more than a decade ago have now produced a series of authoritative decisions that analyze well-developed case law from many different jurisdictions. The most significant of these are included, as principal cases or in notes, in Chapters Six and Seven. Finally, in this edition I have added cases on Professional Liability and Directors & Officers Liability insurance, the latter addressing issues that have arisen out of the corporate scandals of the early 21st century.

Aside from these major revisions and updating throughout, however, both the structure of the casebook and its emphases remain the same:

Organization by Type of Insurance. Chapter One takes up doctrines governing applications for insurance and representations made by the applicant, Chapter Two examines the law governing contract formation and meaning, and Chapter Three addresses the regulation of insurance. Beyond these chapters, however, the structure of the casebook is not determined by general themes, but by types of insurance. Although certain themes run through all of insurance law, it is extremely difficult to understand a particular insurance law problem without also understanding the kind of insurance the problem involves. Consequently, in Chapters Four through Nine, I focus on particular types of insurance: property, life, health, disability, liability, and auto insurance, and on the "secondary" market for such products as reinsurance. Within each chapter, of course, a series of themes is developed, but the themes are introduced as part of the examination of the kind of insurance to which the chapter is devoted.

A Focus on Insurance Policies and Policy Language. The starting point for the study of any contractual relationship should be the terms of the contract itself. In insurance, that contract is the insurance policy. The significance of the individual policy provision that is at the center of any given case cannot be fully appreciated in isolation. Rather, a sense of the entire contractual relationship between the insurer and insured—starting with the insurance policy itself—is necessary. Consequently, at the beginning of the Chapters on Property, Life, Liability, and Automobile Insurance I have set out complete copies of insurance policies providing these forms of coverage. An entire insurance policy is a forbidding document to the uninitiated; but the ability to read an insurance policy is a skill that every insurance lawyer must have mastered.

At the outset of each chapter, students should become familiar with the structure and organization of the sample policy it contains: the terms of its Insuring Agreement, the location and general focus of the Exclusions, the nature of the Conditions of coverage, and so forth. Then, as each case or problem is addressed, the individual policy provision at issue in the case or problem should be compared with the analogous provision in the sample policy to determine (among other things) whether the terms of the sample differ and if so, how this difference in wording would have affected the result in the case under study. In this way, students can become familiar not only with the function of individual policy provisions, but also with the overall structure and purpose of the policies in which they are contained.

Equal Emphasis on Commercial and Personal Insurance. I believe that the traditional emphasis in insurance law courses on personal insurance, and especially on automobile and homeowner's insurance, gives law students a misleading impression of the nature of the subject and of the shape of insurance law doctrines. The consumer-protection motive is much stronger in personal than in commercial insurance law, and nowhere is this motive more evident than in automobile insurance disputes. Consequently, I have tried throughout the casebook to provide a representative mix of personal and commercial insurance issues and cases, and I have chosen to treat automobile insurance issues in a separate chapter devoted exclusively to the very special problems of this field.

A Sustained Examination of Insurance Regulation. Chapter Three is devoted entirely to an examination of the administrative and statutory regulation of insurance. Virtually all of insurance law, however, is designed directly or indirectly to regulate insurance. Consequently, running through this entire casebook is a concern about the nature of insurance regulation. Since insurance is sold in fairly well-developed markets, the central question to be asked about regulation is whether and when the law should intervene in the insurance markets and for what purpose or purposes. Because the purpose of insurance regulation is to influence insurance activity, consideration of the possible impact of different forms of regulation on that activity seems to me an essential component of any study of regulation—and this is the purpose of a number of different approaches to understanding law, including economic analysis. Throughout the casebook, therefore, I have brought economic analysis to bear on regulatory issues, but I have also raised questions about such analysis in order to suggest alternative, non-economic ways of looking at the issues examined.

The Use of Descriptive Introductions and Essays. One of the best ways to study a legal subject is to know the state of the law at the outset, and then to train one's critical faculties on the law as it stands in order to evaluate its strengths and weaknesses. In order to facilitate this process, materials in the casebook are often preceded or followed by brief essays that describe the state of the law on a particular question, analyze it from a particular point of view, or introduce ideas that students are unlikely to develop on their own. In addition, whenever possible I have included cases that not only resolve difficult questions, but also contain brief discussions of the shape of the law on the set of issues under study, so that students are not kept in the dark about the answers to common and straightforward problems.

Of course, I have not hesitated to ask hard questions—some of which do not have definitive answers, or which are designed to encourage students to think critically about the material they have read before they come to class. Rather, the overall strategy of the casebook has been to provide the easiest possible access to descriptive material, so that the hard work of thinking about what has been described can take priority. In this way, ideally, students will enter class with knowledge of the law governing the issues to be discussed in class, and more class time can be devoted to analysis and evaluation of these issues.

For convenience, I have heavily edited some cases, often omitting references to the Record in the case, string citations, and footnotes, and renumbering the latter in consecutive order, all without specific notation that I have done so. This approach helps opinions to be read more smoothly and quickly, and allows the reasoning employed by the court to be fully exposed. At a few points where reference to leading cases in the field on a given issue has seemed useful, I have retained string citations.

No work of this scope can be prepared entirely alone. For nearly a decade now, my fellow insurance law teachers at other law schools have generously commented on aspects of the book that they have found useful or difficult; Mr. Eben Hansel, of the University of Virginia Law School Class of 2006, provided extraordinary research assistance; and my colleagues at the law School have enriched my ability to think about legal issues, including insurance law, in countless ways over the years. I am grateful to all three of these sources of assistance.

Finally, I thank Northwestern Mutual Life for permission to reprint the Term Life Policy set out in Chapter Five, and the Insurance Services Office, Inc., for permission to reprint the Homeowners, Commercial General Liability Insurance, and Automobile Insurance policies set out in Chapters Four, Six, and Eight, respectively. The Insurance Services Office, Inc., requires that the following statement be included: Information which is copyrighted by and proprietary to Insurance Services Office, Inc. ("ISO Material") is

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TABLE OF CASES

Principal cases are in bold type. Non-principal cases are in roman type. References are to Pages.