

理论来自实践，是理论升华的规矩
理论指导实践，并在实践的检验中完善

保险理论 之研究

Studies of Insurance Theory

胡文富 著

中国市场出版社

保险理论之研究

胡文富 著

中国市场出版社

图书在版编目(CIP)数据

保险理论之研究/胡文富著. —北京:中国市场出版社, 2004. 10.

ISSN 7—80155—812—X

I. 保… II. 胡… III. 保险—经济理论

IV. F840

中国版本图书馆 CIP 数据核字(2004)第 095423 号

书 名: 保险理论之研究

著 者: 胡文富

责任编辑: 郝向前

出版发行: 中国市场出版社

地 址: 北京市西城区月坛北小街 2 号院 3 号楼 (邮编: 100837)

电 话: 编辑部 (010) 68032104 读者服务部 (010) 68022950

发行部 (010) 68021338 68020340 68024335 68033577

经 销: 新华书店

印 刷: 北京黄佳印刷有限公司

规 格: 710×1092 1/16 印张: 22 字数: 325 千字

版 本: 2004 年 10 月第 1 版

印 次: 2004 年 10 月第 1 次印刷

书 号: ISBN7—80155—812—X/F. 546

定 价: 48.00 元

(如有印装错误 印刷厂负责调换)

自序

此书的付梓是将一些零散的论文汇编成书,实现了我多年的夙愿,也是对我十五载研究保险理论,夙兴夜寐之回报。

我自 1989 年 6 月调入《保险研究》编辑部,在担任编辑到主编期间,著了不少书,写了不少文章。所著的书无论从形式到内容,在当时讲是创新的;随着时间的推移,有的书应该修订再版了,却没有时间;所写的文章有的并未公开发表,或只以笔名发表。对此,不少朋友劝我收集一下,汇编整理后出一本书。于是,我将保险理论文章充实了一下,又将一直想做而无力顾及的保险法理论文章收编在一起,还把如何写保险理论文章放进去,总算找到它们的最大“公约数”——保险理论,也就有了《保险理论之研究》的书名。

理论来自实践,并指导实践,且接受实践的检验,这个规矩不能破。我所写的文章,一向是自己的感悟、认知,而不是抄袭、摘引别的东西,或是附和别人的观点。例如,“论保险的积德保障职能”一文,是受到又兴起研究保险功能问题与教授们在一起谈天说地引发的思考。写出来了,又怕不恰当,先送一些朋友看一看,听一听他们的意见,收入此书中也是这个想法。在我看来,这是一个重大保险理论问题,应该慎之又慎。又如“论动植物生命保险”是在日常工作中所思所想蓄积已久的产物,而又是一闪念的想法,讲出来之后,引起大家的热烈反响,也就写了这篇文章。文章内容没有什么新意,只是名称新,但它从根本解决了涉及对农业、农村、农民的“三农”保险认识问题的混乱,尚未公开发表。类似这样的文章我写了不少,这次一并汇集于书中。

第一篇,保险一般理论之研究,是有我独特见解而不是随波逐流之作。

第二篇,保险法理论之研究,是我关注的一个问题。相对一般保险理论,相关法律研究的人还比较少,由于我担任过 3 年法官,又在最高人民检察院工作过 3 年,而且两次攻读法律专业,深知法律关系的重要。为了推动这一理论研究,我在 1996 年《保险法》颁布实施一年之际撰写了《商业保险

法通论》。此书的特点是推出了保险法是部门法的系统理论。后来,我又利用授课机会,多次讲授这一理论。2000年初,我将授课的内容整理成《保险·法律·写作》一书出版,受到不少读者的青睐。一位热心法律研究的朋友告诉我,我所撰写的有关保险法是部门法的理论观点,引起了国外一些法律专家的关注。这次又将此内容重新作为专门研究之理论收入此书,一是《保险法》进行了修改,相应的理论也需修改,二是我却没有时间修改长达43万余字的《商业保险法通论》,只好将几篇主要的保险法律理论文章修改一下,先让其面世。

第三篇,保险论文写作之研究,是指保险论文的写作。虽然它与别的论文写作在文体上基本相同,但内容上具有特殊的要求,尤其是保险案例分析类的文章,不同于刑事案例和民事案例,重在通过分析案例的同时宣传保险知识和保险法律知识。1993年,我著的《保险理赔索赔指南》一书,创新了保险案例写作的文体,这种文体被报刊认知。2000年,我又在《保险·法律·写作》一书中得到发挥。这次又将十多篇案例修改,并收入此书中。在这部分中,吸收了我所著《通用公文写作》的精华。

此书中,《保险法》是特指《中华人民共和国保险法》,而保险法是泛指。在书中不再注明。

特别感谢李艳卿女士为此书所作封面、自序和目录做英文翻译!

感谢夫人程爱华为此书所作设计封面以及版式设计!

感谢《保险研究》杂志社各位编辑为此书出版付出的辛勤劳动!

虽然本书中大部分是不同时期的文章汇集,但书中之错在所难免,在此不吝赐教。恳请专家、学者们及广大热心读者批评指正。

欢迎不同观点的商榷!

对于您的真心,预致衷心谢意!

2004年8月15日

Foreword

It's been my long-cherished hope to compile these separate articles into a book as a reward for the great efforts I made in studies of insurance theory in the long span of 15 years.

Since June, 1989 when I started to work in the Editorial Office of "Insurance Studies", initially as an ordinary editor and now as the Chief Editor, I wrote numbers of books and articles, which were new and advanced both in style and contents. However, with the elapse of time, some of them need to be amended and reprinted. But I didn't have time to do the job. There were also some articles that were written without being published or published in pen names. Quite a few of my friends persuaded me to compile them into a book. I, therefore, collected and amended the articles on insurance theoretical studies and those on insurance laws and regulations as well as on insurance thesis writing all together and found a common divisor for them--'Insurance Theory' and a name for this book --"Studies of Insurance Theory".

Theory derives from practice and in turn serves as guide of practice and is further perfected in practice. That's the law for establishment of a theory. Opinions and views stated in the articles were all my real thinking and understandings of insurance theoretical and practical issues instead of those copied from or chimed in with others'. For example, the article "Function of 'Virtue Guarantee' of Insurance" was written by enlightenment of discussions with university professors on the problem of functions and roles of insurance commonly talked about in insurance community. Taking theoretical study as a serious and prudent problem, I put the article into the book only for the purpose of listening to comments and views of specialists or any readers. The article "Life Insurance for Livestock and Crops", which has not been published either, came initially out of an idea in my mind on how to resolve the phenomena of irregular insurance activities in rural areas, and written by the encouragement of warm responses from friends and colleagues when I proposed the idea. Although there was nothing new in the contents, the new concept in wording could help a lot to clarifying the definitions of farmer insurance, livestock and crops insurance and other insurance activities in rural areas. Quite a few of such kind of articles that had not yet been published but represented my inventive understandings and views were collected into Chapter I.

Chapter II collected the articles on theoretical study of insurance laws and regulations, which was one of issues to which I also payed a lot of attention. As compared with study of general insurance theory, it did not attract much attention of China's insurance professionals. Because of a 3-year judge experience and another 3-year work experience in the Supreme People's Procuratorate, I knew better the important roles of laws and

regulations in cultivating and regulating China's insurance market. To promote the study of insurance laws and regulations, I had my book "An Introduction to Commercial Insurance Law" published in 1996, just one year after the enforcement of "Insurance Law". In this book, I introduced a theory system that insurance laws and regulations should be regarded as department laws and regulations. To make the viewpoint more clearly, I made explanations many times when I gave lectures in universities and colleges, and compiled the teaching materials into a book "Insurance ●Law● Writing" which was published at the beginning of 2000. The book gained good graces of many people. One of my friends interested in law study told me that the theory of 'Department Law' stated in my book even attracted attention of overseas law experts. Articles of such contents specially on insurance laws and regulations were again collected into this book. One reason to do so is that "Insurance Law" has already been amended, understandings of the 'Law' presented in my articles should also be amended accordingly. Another reason is that I do not have much time to amend the book "An Introduction to Commercial Insurance Law" of over 430 thousands of words but can only be able to make amendment on the most important parts of that and have them published in the first.

Chapter III compiled some of my articles on insurance thesis writing. Although there is no difference in style between writings of insurance theses and other kinds of articles, it's quite different and special in the requirement for their contents, especially for those of insurance case analysis articles. As compared with criminal and civil case analysis, insurance case analysis stresses popularizing awareness of insurance and insurance laws and regulations. I summarized theoretically the ways, modes and techniques in writing of common documents in my book "Writing of Common Official Documents" published in 1989, initiated writing styles of insurance case analysis in my book "Guide for Holding or Settling an Insurance Claim" published in 1991 and further perfected them in the book "Insurance ●Law● Writing". A dozen of articles about insurance case analysis were collected in this book, which represent the quintessence of the mentioned books.

"Insurance Law" mentioned in the above refers to the Insurance Law of the People's Republic of China. Insurance laws and regulations refer to all those applicable to insurance activities.

Old articles as they are, it's hard to avoid possible errors and oversights in the process of emendation and proofreading. Any criticism and comments from specialist, scholars or any readers are warmly welcome, and I would like to express my hearty thanks in advance.

Aug. 15, 2004

目 录

第一篇 保险一般理论之研究

| | |
|--------------------------------|-------|
| 论保险的积德保障职能····· | (3) |
| 从保险业的特殊性谈完善司法解释草案的意见····· | (22) |
| 加强信用体系建设是做大做强保险业的基石····· | (31) |
| 防范经营风险是发展保险事业的前提····· | (43) |
| 论做大做强保险业的策略····· | (53) |
| 资金运用——保险业的生死结····· | (69) |
| 日本人寿保险市场概况····· | (84) |
| 迎接加入 WTO 国有保险公司的改革再来“一板斧”····· | (92) |
| 迎接 WTO 挑战的障碍与对策····· | (98) |
| 培养保险意识是发展保险事业的基础····· | (105) |
| 勇于登攀的新成果 | |
| ——评《商业保险法通论》····· | (113) |
| 论人寿保险经营的风险与对策····· | (115) |
| 论保险与保险公司的关系····· | (121) |
| 论国有保险公司法人治理结构的建设····· | (127) |
| 论保险、消费、经济发展的三角关系····· | (134) |
| 论“动植物生命保险”····· | (141) |
| 加强保险基础理论研究 为发展保险事业服务····· | (157) |

第二篇 保险法理论之研究

| | |
|------------------------|-------|
| 保险合同与民事合同基本理论的比较····· | (163) |
| 保险合同的性质····· | (170) |
| 保险合同与经贸合同的比较····· | (173) |
| 保险合同的地位和作用····· | (178) |
| 商业保险合同的法律关系要素····· | (182) |
| 商业保险合同的适用原则····· | (193) |
| 保险责任是举案例讲保险讲法律的核心····· | (206) |
| 确定赔偿或给付保险金额的原则····· | (213) |
| 赔偿或给付方式的确定····· | (223) |
| 《保险法》实施后的概况····· | (230) |
| 创立保险法律关系的依据····· | (236) |
| 创立保险法律关系的基础理论····· | (242) |
| 保险法律关系的确立····· | (249) |
| 保险法的主体、客体、内容····· | (254) |

第三篇 保险论文写作之研究

| | |
|------------------------|-------|
| 学习保险论文写作的现实意义····· | (261) |
| 保险论文的文体····· | (273) |
| 保险论文的要素构成····· | (280) |
| 保险论文论证的基本方法····· | (295) |
| 保险论文的选题····· | (301) |
| 保险论文的写作····· | (307) |
| 保险案例分析的写作····· | (313) |
| 保险论文实例研究····· | (320) |
| 保险论文写作常用词和点号的使用问题····· | (322) |
| 保险论文形式的新要求····· | (331) |

CONTENTS

Foreword

CHAPTER I STUDIES OF GENERAL INSURANCE THEORY

| | |
|---|-------|
| On Function of 'Virtue Guarantee' of Insurance | (3) |
| On Importance of Perfecting Law Interpretation | |
| Draft in View of Specialties of Insurance Industry | (22) |
| Building-up of Credit System the Corner- | |
| stone for a Stronger Insurance Industry | (31) |
| Preventing Operational Risks the Pre- | |
| requisite for Development of Insurance Industry | (43) |
| Strategies to Make Insurance Industry Bigger and Stronger | (53) |
| Fund Utilization --the Key Knot for Insurance Industry | (69) |
| Life Insurance Market of Japan | (84) |
| "Another Push" for Reform of State-owned | |
| Insurance Companies in Preparation of Entering WTO | (92) |
| Barriers and Countermeasures in Preparation of Entering WTO | (98) |
| Raising Public Awareness of Insurance the | |
| Foundation to Develop Insurance Cause | (105) |
| Another Achievement in Insurance Development | |
| ---Comments on the Book "An Introduction of Commercial Insurance Law" | (113) |
| Risks and Countermeasures in Life Insurance Operation | (115) |
| On Relations between Insurance and Insurance Companies | (121) |
| On Building-up of Corporation Management | |
| Structure for State-owned Insurance Companies | (127) |
| On Triangle Relations of Insurance, | |
| Consumption and Economic Development | (134) |
| On 'Life Insurance for Livestock and Crops' | (141) |
| Strengthening Studies of Basic Insurance | |
| Theory to Serve Development of Insurance Cause | (157) |

CHAPTER II

THEORETICAL STUDIES OF INSURANCE LAWS & REGULATIONS

| | |
|---|-------|
| Comparisons of Insurance Contract and Civil Contract in Basic Theory | (163) |
| Characters of Insurance Contracts | (170) |
| Comparisons of Insurance Contract and Trade Contract | (173) |
| Roles and Functions of an Insurance Contract | (178) |
| Key Elements in Legal Relations of a Commercial Insurance Contract | (182) |
| Principles Applicable to a Commercial Insurance Contract | (193) |
| Insurance Liabilities the Core in Analyzing Insurance Cases | (206) |
| Principles in Determining Ways and Amount of Payment in Insurance Claim Settlement | (213) |
| Determination of Payment and Paying Ways | (223) |
| General Situations after Enforcement of 'Insurance Law' | (231) |
| Basis for Establishment of Legal Insurance Relations | (236) |
| Basic Theory for Establishment of Legal Insurance Relations | (242) |
| Establishment of Legal Insurance Relations | (249) |
| Subject, Object and Contents of Insurance Laws and Regulations | (254) |

CHAPTER III

STUDIES OF INSURANCE THESIS WRITING

| | |
|--|-------|
| Practical Significance of Learning Insurance Thesis Writing | (261) |
| Style of an Insurance Thesis | (273) |
| Key Elements of an Insurance Thesis | (280) |
| Basic Ways of Expound and Proof for Insurance Thesis writing | (295) |
| Subject Selection of an Insurance Thesis | (301) |
| Writing of an Insurance Thesis | (307) |
| Writing of an Insurance Case Analysis | (313) |
| Studies of Example Insurance Theses | (320) |
| Punctuations and Words Commonly Used in Insurance Thesis Writing | (322) |
| New Requirement for Insurance Thesis | (331) |

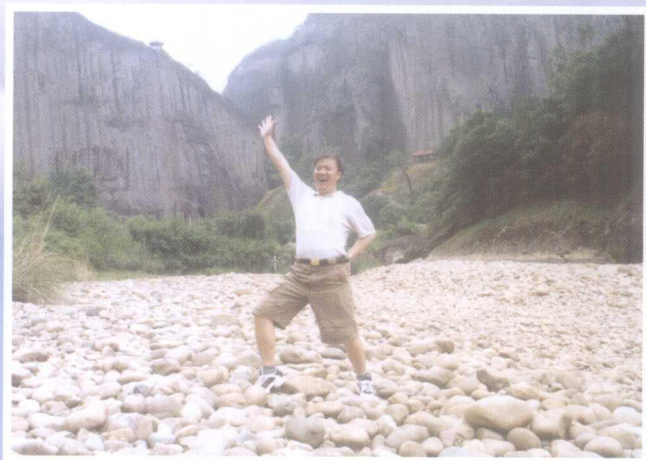
Postscript

Studies of Insurance Theory

第一篇

保险一般理论之研究

STUDIES OF GENERAL INSURANCE THEORY

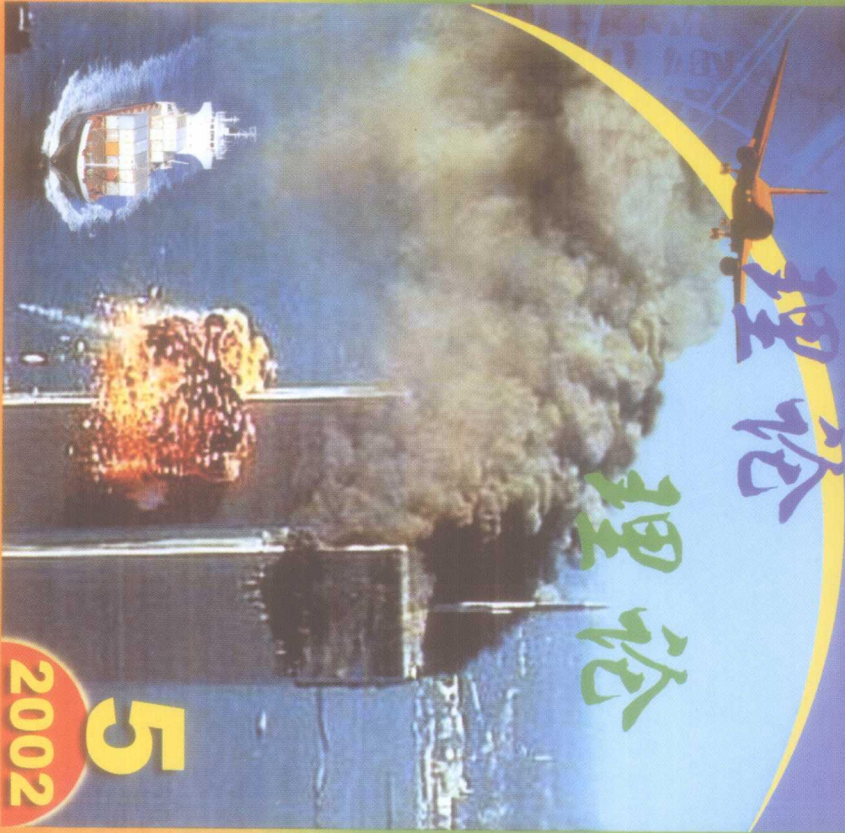


INSURANCE STUDIES

保险研究

理论

理论



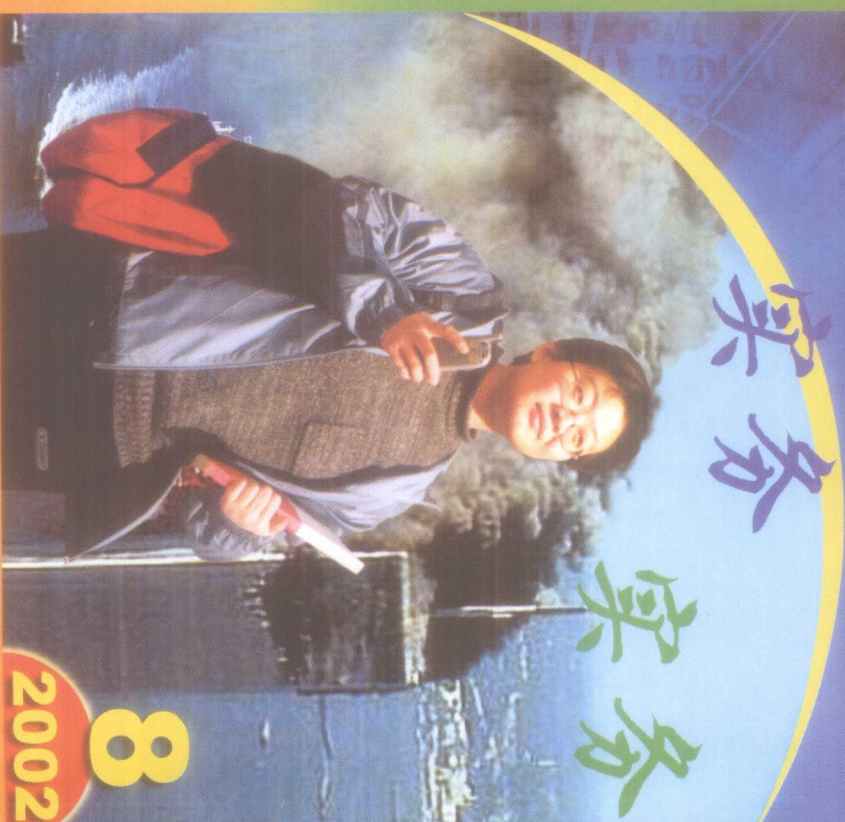
5
2002

INSURANCE STUDIES

保险研究

实务

实务



8
2002

论保险的积德保障职能^{*}

〔关键词〕 积德保障；不确定性；规避风险；心理状态；约定赔付；经济援助；与时俱进；人文环境

〔摘 要〕 要坚持科学发展观、实事求是、与时俱进，积极推进理论创新，要自觉地贴近实际、贴近生活、贴近群众，立足当代又继承民族优秀传统文化，立足本国又充分吸收世界文化优秀成果，准确把握我国保险事业的发展趋势，搞清楚保险的职能与功能的联系与区别，搞清楚保险、保险公司、保险业、保险事业之间的联系与区别，把握本质与现象，认识保险的积德保障职能是指人们在参加保险活动中，为规避财产、人身以及信用方面的不确定性风险，一方面具有主动地助人为乐，不盼回报而长期奉献的心理状态；另一方面具有对约定的风险提供经济援助的制度，这两方面所应有的作用。

保险的积德保障职能是指人们在参加保险活动中，为规避财产、人身以及信用方面的不确定性风险，一方面具有长期奉献的主动地助人为乐，并不图回报的心理状态；另一方面具有对约定的风险提供经济援助的制度，这两方面所应有的作用。

为什么要提出保险的积德保障职能，是现有的保险职能概括的不够完善吗？还是新的保险理论创新？两者兼而有之！

《中共中央关于进一步繁荣发展哲学社会科学的意见》中指出，要坚持解放思想、实事求是、与时俱进，积极推进理论创新，要自觉地把思想认识从那些不合时宜的观念、做法和体制的束缚中解放出来，从对马克思主义的错误的和教条式的理解中解放出来，从主观主义和形而上学的桎梏中解放出来。贴近实际、贴近生活、贴近群众，立足当代又继承民族优秀传统文化，立足本国又充分吸收世界文化优秀成果，准确把握当今世界的发展趋势，深刻认识当代中国经济社会发展的规律，努力

^{*} 此文成稿于2004年5月，尚未在报刊公开发表。

建设哲学社会科学理论创新体系,积极推动学术观点创新、学科体系创新和科研方法创新。“坚持运用保险的基础理论和应用理论相结合,不断推进保险理论的创新,坚持学以致用,推动制度创新,为加快保险事业的发展提供不竭动力”^[1]。这就是本文提出保险的积德保障职能的指导思想,但由于学识有限恐怕是一孔之见,盼望通过本文抛砖引玉,与学者、专家以及同行们商榷,以求得保险职能理论的进一步完善。

一、保险职能的内涵是随着时代的发展不断丰富的

职能是每个行业的旗帜。它具有宣传性、号召性、鼓动性。它使人们自愿地集中在这面旗帜下,为一项事业的成功而奋斗,为此,人们都对自己的行业进行高度概括、归纳,力争用简短的语言,说明行业的职能。到目前为止,保险理论工作者对保险的职能、功能、本质,已经推出多种观点,形成多种学派。各种学派或从整体而言,或从局部而言,或从保险人的角度,或从被保险人的角度,或从监管的角度,或从发展业务的角度,等等,分别表达了其不同的观点,真是赤橙黄绿青蓝紫,不同角度有不同的光谱;横看成岭侧成峰,远近高低各不同,可谓仁者见仁,智者见智。

(一)保险理论界有关保险职能的表述

研究保险职能,保险名词的概念必须有统一的内涵,否则无法进行讨论。但是,我国保险事业目前正处于初级阶段,保险理论同样处于初级阶段,我们必须尊重历史,尊重各位保险理论研究者。

1. 保险的职能、功能与本质的各自表述

“保险的职能指保险本身具有的功能或应起的作用,它是由固有属性决定的,能够发挥的作用;而保险功能指保险所发挥的有利作用,及作用于现实产生的效果。功能决定于职能,但还取决于发挥的环境和手段。保险具有的职能与功能是其有别于相似事物而存在。”^[2]

“保险职能,也称保险功能,是保险本质的表现形式。保险的本质决定保险的功能,保险的功能反映保险的本质。”^[3]

“保险本质相对保险职能而言,是本质和现象的关系。本质是事物

比较深刻的一贯的和稳定的发展方面。现象是本质在外部的表现,一般是人的感官所能直接感受到的,是事物的比较表面的零散的和多变的方面。本质和现象是统一的,但又并不直接相符合。”^[4]我们探讨保险职能,就是要人们在实践的基础上,进行科学研究,就在于透过现象揭示本质,把握事物发展的方向。

通过列举以上几种说法,可以看出在本文第一部分中的职能、功能与本质“视为”同一概念,这样就打开了视野,便于剖析同类观点,找到本文论点的论据。

2. 保险、保险公司、保险业与保险事业的联系与区别

在人类社会发展的进程中,人们对保险职能的表述多种多样,这是感知点不同。主要是由于保险、保险公司、保险业与保险事业四个概念存在着密切的联系,在一定条件下可以相互替代。例如,保险的补偿与给付功能,将“保险”用后三个名词替代,都不会感觉有错。但是,研究学问就是要透过现象揭示本质,因此,研究它们之间的联系和区别便于研究保险的职能。

保险是指社会经济保障制度的组成部分;保险公司是指依法登记成立,以营利为目的的经营实体;保险业是保险公司、保险中介机构和保险监管机构的总称;保险事业是保险活动的总称(如图1)。

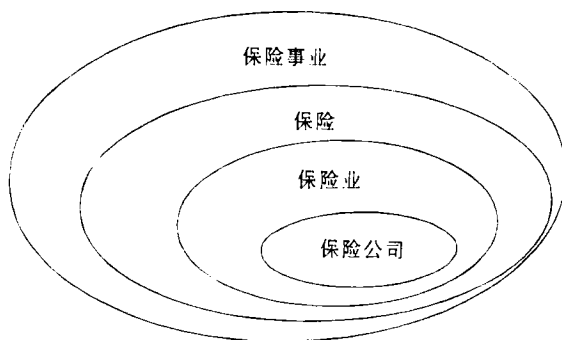


图1 保险、保险公司、保险业与保险事业的种属关系

可见,它们之间是种属关系,内涵不同而已。正如我国《保险法》第1条规定:“为了规范保险活动,保护保险活动当事人的合法权益,加强

对保险业的监督管理,促进保险事业的健康发展,制定本法。”法律已经把保险、保险公司、保险业与保险事业的联系与区别规范得非常清楚。

当我们设定了统一的概念之后,就可以进行“剥皮式”研究。

(二)国外有关保险功能学派的简述

为了论证保险的积德保障功能,有必要阐述一下国外各个时期各种学派的观点,借鉴他们精髓。保险功能是保险本质的表现形式。为了对保险功能准确定位,20世纪早期以前,国外对保险性质的研究有“19大学派”^[5]之说。现将其列表进行分析(详见附表1)。

附表1 有关国外“19大学派”对保险功能的描述逻辑与简评对比表

| 学术观点 | 描述 | 揭示路径 | 逻辑方式 | 简评 |
|----------|--|-----------------|------|---|
| 1. 损失补偿说 | 人们参加保险活动是为了规避不确定风险,约定双方权利义务。当被保险人的不确定风险发生后,可以获得约定经济损失的援助方式 | 从部分投保人的动机与结果上揭示 | 必要条件 | 此观点只对发生保险事故者有作用,而对未发生保险事故者没有说法,因此,它为部分本质现象的概括 |
| 2. 损失分担说 | 人们参加保险活动是为了将自己不确定的经济损失风险,通过约定由同类风险的参加者互助互利的方式 | 从投保人分担风险的过程揭示 | 充分条件 | 它是从公平互利角度讲保险的科学性,重在讲损失分担,是从保险大数法则应用过程中的现象概括的 |
| 3. 危险转嫁说 | 人们参加保险活动是为了将自己的不确定的危险转嫁给同类风险者,从而获得约定的经济损失利益的方式 | 从投保人自身经济利益揭示 | 充分条件 | 它是从投保人的动机上结合保险科学原理讲的,是对未发生保险事故者的安抚,是一部分现象的概括 |