

PRINCIPLES OF INSURANCE LAW

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PRINCIPLES OF INSURANCE LAW

FOURTH EDITION

JEFFREY W. STEMPEL

*Doris S. & Theodore B. Lee Professor of Law
William S. Boyd School of Law
University of Nevada, Las Vegas*

PETER N. SWISHER

*Professor of Law
T.C. Williams School of Law
University of Richmond*

ERIK S. KNUTSEN

*Associate Professor
Queen's University Faculty of Law
Kingston, Ontario, Canada*

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Editorial Offices

121 Chanlon Rd., New Providence, NJ 07974 (908) 464-6800
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200
www.lexisnexis.com

MATTHEW  BENDER

Dedications

To Karen and Stephanie — For all your love and support

For Ann, Ryan, Shanon, and Reed

For Wenjue

Preface

There have been a number of important developments in liability insurance, property insurance, and life and health insurance that have significantly impacted insurance law. Accordingly, our Fourth Edition of *Principles of Insurance Law* has been substantially revised and updated in order to offer the insurance law student and practitioner a broad perspective of both traditional insurance law concepts and cutting-edge legal issues affecting contemporary insurance law theory and practice. We have retained the organization substantially begun in the Third Edition, with fifteen chapters, a division that enables an expanded scope of topical coverage and also segments the law of insurance in a manner more amenable to study, as well as facilitating recombination and reordering of the chapters as desired by individual instructors. We believe that this Fourth Edition is the most comprehensive insurance law course book available, a book that is both reflective and practical. In crafting the book's contents, we strived to maintain a realistic balance between insurance law theory and practice.

At the same time, we have retained the progressive and cumulative sequence of the previous editions:

- Introductory material;
- recent and landmark illustrative judicial cases; as well as
- applying, questioning, and testing these principles in relevant Notes, Questions, and Problems.

The “Notes and Questions” sections have been expanded and updated, usually containing one or more Problems, allowing insurance law students to apply their cumulative knowledge of insurance law topics to “real life” situations and legal disputes, and to make the type of difficult decisions with which a practicing attorney or judge would be faced.

Like the Third Edition, the Fourth Edition contains comprehensive introductory and orientation material. In particular, basic axioms of contract construction and insurance policy interpretation are discussed in greater detail (Chapter 2) to assist in orienting students to the case material (no matter how much the student may have daydreamed during first-year Contracts). In addition, history of insurance is examined in detail, as are the underlying concepts and theory of insurance (Chapter 1). As compared to earlier editions, considerably more attention is given to the definition of insurance and concepts of risk shifting, risk distribution, and risk management.

Materials concerning state and federal regulation of insurance are moved to an earlier section of the casebook (Chapter 3). Instructors may, of course, present casebook material in whatever order best fits the pedagogy of their own respective classes. We also realize that many instructors, particularly in a two-credit insurance course, will minimize coverage of insurance regulation.

Chapter 4 addresses insurance contract formation in significant detail. The Fourth Edition continues the tradition of earlier editions in devoting succinct but sustained analysis to issues of insurable interest (Chapter 5), warranties and representations (Chapter 6), waiver and estoppel (Chapter 7), and causation (Chapter 8).

The Fourth Edition of *Principles of Insurance Law* retains broad coverage of life and

Preface

health insurance, property insurance, and liability insurance issues. In order to make the casebook both more comprehensive and more accessible, the division of Chapters is organized more according to types of insurance products: property insurance (Chapter 10), liability insurance (Chapter 11), life and health insurance (Chapter 12), and automobile insurance (Chapter 13), as well as reinsurance and excess insurance (Chapter 15).

The casebook also provides a separate chapter on insurance bad faith (Chapter 14), with extensive treatment of the issue. Chapter 9, which discusses the duties of insurer and policyholder after loss, also gives considerable attention to problems that can arise for policyholder, insurer, and counsel in their “tripartite relationship” during litigation or claims adjustment.

The new edition further includes new and expanded treatment of important insurance law developments that have taken place since the prior edition:

- New caselaw about property insurance and recent mass disasters (i.e. Hurricane Katrina, valued policy laws);
- new cases highlight the problems of the innocent co-insured in property insurance contexts;
- new material about business interruption insurance (as played out in the aftermath of the 9/11 World Trade Center disaster);
- a re-organization of Chapter 8 (causation and accident) with updated cases;
- new cases and a re-organization of Chapter 13 (automobile insurance);
- a re-organization of Chapter 15 (Insurance Layers), including moving “other” insurance issues to this chapter; and
- new treatment of regulation (Chapter 3), including discussion of the Dodd-Frank Wall Street Reform and Consumer Protection Act, as well as new information about federal flood insurance, terrorist insurance, and updates relevant to ERISA cases.

The casebook also provides more extensive treatment than most coursebooks regarding:

- The critical role of insurance binders as temporary forms of insurance, as illustrated in the World Trade Center property insurance dispute resulting from the horrific terrorist attack of September 11, 2001;
- the continuing debate between “legal formalists” and “legal functionalists” for “the heart and soul of insurance contract law”;
- what constitutes a policyholder’s “reasonable expectation” regarding coverage;
- the current property and liability insurance “crisis”;
- risk management and self-insurance issues;
- emerging, and frequently conflicting, caselaw concerning the intersection of insurance law and federal antidiscrimination regulation;
- the Court’s *State Farm v. Campbell* decision, which struck down a \$145 million punitive damages award in an insurance bad faith claim as well as setting more restrictive parameters for the recovery of punitive damages generally;
- new issues over the dividing line between “tangible” property typically covered under a property insurance policy and “intangible” property, which is typically excluded — an issue of increasing importance in the digital and cyber age;

Preface

- refinement of liability insurance law regarding trigger of coverage, duty to defend, reimbursement of defense costs, and apportionment of insurer and policyholder responsibility for liability payments;
- the difficult-to-harmonize decisions concerning when a loss arises out of the “use” of an automobile;
- insurer bad faith and the availability, if any, of actions against a policyholder for “reverse bad faith”; and
- the degree to which excess insurance and reinsurance may be subject to modified approaches to insurance policy construction.

The Fourth Edition includes a new co-author, Professor Erik S. Knutsen, of Queen’s University Faculty of Law in Kingston, Ontario, Canada.

The authors gratefully appreciate and acknowledge the research assistance of the students who helped make *Principles of Insurance Law* a reality. Hilary Barrett Muckelroy (UNLV — Class of 2005) deserves special thanks for her excellent work as primary research assistant for the Third Edition. Thanks also to Mary Langsner (UNLV — Class of 2013), (Michael Newby, CPCU (Richmond — 2004), Kathleen Wilde (UNLV — Class of 2011), Shannon Gallo (UNLV — Class of 2010), Angela Morrison (UNLV — Class of 2005), Tabitha Fiddymment (UNLV — Class of 2003), Erin Spicer (Queen’s — Class of 2012), and Jonathan Chen (Queen’s — Class of 2012).

Thanks also to our long-suffering families and to our respective colleagues at Richmond, UNLV, and Queen’s, all of whom are probably more than a bit puzzled at our constant fascination with insurance — an interest we hope students will grow to appreciate as they read the materials in this casebook. Special thanks to UNLV Wiener-Rogers Law Library Director Jeanne Price and Assistant Director David McClure.

Insurance is often regarded as a topic that induces a feeling of “stirring cement with my eyelids” (to use Oliver Wendell Holmes’s memorable description of first-year law school), even as compared to other parts of the law school curriculum. We beg to differ. Insurance involves many of the most intellectually interesting issues in modern law as well as topics central to modern human existence: life; death; greed; money; property; business; cars; homes; family; lawsuits; deals made and broken; steadfastness; and sharp dealing. It’s all there in insurance law. We hope we have captured some significant part of this rich picture in *Principles of Insurance Law*.

Welcome to the fascinating and challenging world of insurance law!

Jeffrey W. Stempel
Peter N. Swisher
Erik S. Knutsen
June 2011

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