To whom do DM 1,500 Billion belong ?
Discussion about the Fundamental Basis of the German Insurance System

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If legal questions are judged on the basis of their financial consequences, the weightiest legal problem will soon face government, politicians, legislators, the courts and academicians with respect to the question: "To whom do the DM 1,500 billion belong which are administered in the German insurance field ?" - How this question, which affects 550 million insurance contracts, all German citizens, and many legislative initiatives, should be answered and why, up to now, it has nt been answered - indeed, has not even been asked - will be explored in the following pages.

I. Contradictions

The invested capital of all German insurance companies reaches an admitted value of DM 1,500 billion. To this must be added the hidden reserves, such as the difference between book values and actual values (e.g. written off real estate or securities valued at less than their current value). Giving consideration to these hidden reserves, the German insurance companies administer assets approximating DM 1,300 billion. To whom do these huge assets belong? - Here, terms such as "ownership", "property", "belong", and the like, are used, for purposes of simplicity, in the legal and constitutional sense of property and include issues of legal constitutionally protected title. Professor Alex Moeller, general manager of a stock life insurance company, and formerly Minister of Finance (in Germany, the overall head of the Insurance Supervision Authority) has said: "The collected capital belongs to the insureds".

Dr. Georg Buechner, general manager of stock insurance company, and former president of the Association of the German Insurance Industry, says, however, that: "The assets belong to the insurance companies". Between these two totally incompatible positions, the former president of the German Federal Supervisory Authority, Dr. Walter Rieger, treads cautiously and uneasily with the baffling statement that: "Although nothing is written in the laws, the insurance companies administer the money quasi-fiduciary" is quite difficult to comprehend, but it would seem to be somewhat like "quasy-pregnancy". One would think that either someone is a fiduciary, or he is not.

These obvious inconsistencies, noted above, can be found even in the statements of the company, institution, or person. Thus, the marketing and legal departments, as well as the board and the general manager of the Allianz Life Insurance Company regularly refer, in their correspondence and marketing material, to their enterprise as a "trustee of entrusted savings money of the customers". However, after a consumer group filed a complaint accusing the company of embezzlement for its consistent drawing down of profits from this purportedly fiduciary money, the board proclaimed itself, to the public prosecutor and the Supervisory Authority, the proprietor of all the money and other assets it administers. On the basis of this latter claim, the information for embezzlement has now been expanded to include a count for misleading and deceptive advertising. Up to 1983 in a brochure, published by the Life Insurers Association ("Your Future in Save Hands"), it was written

that the companies "fiduciarily administer the money of the insureds". In 1984 the managers changed their minds and cancelled the above statement in a new edition. Now they proclaim that all the money belongs to them. Although the president of the Supervisory Authority spoke of a "quasi-fiduciary relationship", he knowingly allowed the surplus yields and value increase from this money and assets to be taken in by the companies as profits, even though the director of his institution, Gottfried Claus, as well as the Parliamentary State Secretary of the Minister of Finance, Dr. Boehme, have both stated that risk surplusses and interest yields are not operating profits and must be repaid in full to the insureds.

While the former president of the Association of the German Insurance Industry maintained, on the one hand, that the assets and investments belong to the insurance companies, another member of the board of the association, Dr. Bach, general manager of the Continentale Insurance group, has stated, on the other hand, that "the insurance industry is a fiduciary investor of extraneous financial means". Similarly, the editor of the same association's periodical, Dr. Fritz Feigler, has written that "the money was left fiduciarily with the insurers". Professor Dr. Dieter Farny, an insurance and economics academic, has developed a "production theory of insurance" which postulates that the permium is the price paid for the product "insurance". According to this reasoning, logically, there would have to be a complete transfer of title in the property of the money to the insurance company. Yet, in the very same book in which Professor Farny presents his production theory, he writes the astonishing statement that: "The biggest part of the considerable assets are only administered fiduciarily". Every clue is lacking as to how fiduciary money could conceivably arise from the payment of a price for a product.

II. Lack of Investigations and Definitive Decisions

This basic question, "property or fiduciary money", and the inconsistencies in the myriad statements dealing with the subject have never been seriously investigated. Seemingly, the manifest contradictions have never struck the people charged with responsibility or else they have simply overlooked these contradictions intentionally. Understandably, the insurance companies have no interest in clearing up this question since they handle the money left with them by the insureds as if it were their own and take from it as much as they want in the way of expenses and profits. By acknowledging the relationship as only a fiduciary status, their current practice of taking profits from the insureds' money would contain all of the elements of the offense of embezzlement. The explosive effect of the situation is best demonstrated by the fact that the board of the Association of the German Insurance Industry had forbidden all of its members to enter into any public discussion of the question.

The Government and Supervisory Authority, charged by the Insurance Supervision Law with responsibility for preventing abuses in the insurance field, have also displayed very little interest in confirming the fact that they have overlooked or ignored the expropriation from millions of insureds of billions of DM over the years.

The insureds themselves, what with the mystique surrounding insurance and the total intransparency of the premiums, simply do not know and lack the means of knowing what has occurred and is occurring. Moreover, because of the host of special legal regulations on insurance and the existence of State supervision, the insureds would rather believe that the question of ownership has been asked and answered. The fact is that the insureds have the wrong impression, produced and conserved by the "insurance industry", that they have paid their money as a price for the purchase of security and that, having paid, they

have no later claims to the surpluses arising from the loss pooling. It is in this fashion that the insurance companies have, in the course of the years, built up "their" assets of DM 1,500 billion.

The Supervision Board itself consistently asks for "considerable safety margins in ratemaking" (Gottfried Claus, director of this board) which, generally, lead to large surpluses in the loss pooling funds. The German insurance companies have an annual income of DM 250 billion in premiums and DM almost 100 billion in investment income (excluding any consideration of asset appreciation), or a total annual income of DM 350 billion from which they pay out less than DM 150 billion for real losses. Although some academics and officials of the Supervisory Board and Government admit that risk surpluses and interest yields do not constitute operating profits, such statements are addressed only to the companies and are not made for general public consumption. How, then, is the single insurance consumer to understand these technical niceties involving billions of DM and recognize his possible legal ownership of fractions of this money?

In the autumn of 1980, the "Scientific Services of the German Parliament" performed a study for members of the Parliament in which the one-sentence statement was made, without analysis or investigation: "The premiums pass over, in any event, into the property of the insurers. They are not entrusted funds". In saying this, they rely upon Professor Rudolf Gaertner who also says, without analysis or reasoning: "There is no question that the assets of the insurers are their property and are not administered fiduciarily. It would be a curious concept that someone could be considered trustee of others' fortune while at the same time he has in his hand and can appropriate to himself parts of this fortune". To this, one can only reply that it is a curious situation when an academic attempts to substantiate his belief by the incredibility of the opposite; the money cannot possibly belong to the insureds because then, the current practice of drawing down profits from this money would constitute embezzlement. This is incredible for the academics - but, in fact, this embezzlement is committed daily to the tune of billions of DM.

The courts have never had to deal with this 1,500 billion question because this problem has never, this far, become a legal issue. As to insurance science - it is a pity that only special insurance academics have dealt with these questions of the insurance field. In all too many instances, their insurance academics have personal or financial ties with the insurance companies or their associations. Indeed, the Association of the German Insurance Industry is not afraid to point to their harmonious co-operation and to proclaim the insurance scientists to be their best helpers.

Descriptive of the state of the insurance science is the statement of Professor Dr. Dr. Schmidt-Rimpler who said: "When a quarrel in a scientific field does not find an end, even the end of a clearly dominating thesis, but only, ultimately, a cemetry end, namely the resigned dying off of interest in the quarrel, then this is very often caused by a wrong problem-setting".

III. Erroneous Understanding and its Effects

As of this time, there is no uniform and generally accepted definition of insurance nor is there a uniform and generally accepted opinion as to what constitutes performance and counter performance of the insurance contract or to whom the insurance money and assets belong. The whole world seems to believe that the premiums pass title to the money over to the insurance companies because the latter produced insurance and sold it for a price, i.e. the premium. This belief introduced about 150 years ago, and fostered

chiefly by the "stock insurers", reveals itself as a monumental error if one looks at the National Accounts and at the way transactions in the insurance field are accounted for in the computation of the Gross National Product (GNP). For the latter purpose, the production performances of the whole economy are divided and allocated to those who produced them. Accordingly to the National Accounts, insurance, as the provision of money, results from an income redistribution which is quite definitely allocated to the insured as being their performance, whereas the insurance companies, incident to this redistribution process, can perform and sell only an organizational or administrative service for which their remuneration is only the expense portion of the premium, not the total premium. In short, in the computation of the GNP, the contributions for loss pooling are excluded and only the expense and profit portions of the premiums are included. Thus, he who would be seriously address himself to a solution of the problems in the insurance field must first rid himself of the notion that the insurance companies have "produced" and "sold" an "insurance product". In fact, the insurance companies, like a common carrier, the postal authority, or a bank, do nothing more than distribute the goods, mail or money with which they are entrusted. It is evident that the insurance companies, under the current "premium equals price practice", allow themselves to be paid for performance and claim profits for a performance which they cannot, and do not, actually perform but which is, rather, performed by the insureds as a group, as is clearly established by the computation of the GNP.

a) Lack of Competition Prerequisites

From the above findings, there also follows the surprising fact that the insurance companies do not quote a price for their "organizational services" (the expense and profit portions of the premium) which is their only performance as contrasted with the insurance (loss pooling), which is performed solely by the insureds. This failure to quote a price for their service definitely appears to violate the German Price Quotation Law according to which everyone who offers a product or service in the market is legally required to quote a price for it to the consumer. The German Federal Cartel Board, as the supreme "Price Supervision Board", although it has been appraised of this abuse has not, up to now, acted against it. It is self-evident that competition of the insurance companies' services cannot function in the absence of price quotation for those services, a fact confirmed by a high official of the Federal Insurance Supervisory Authority, Gottfried Claus. It is an essential and basic principal of competition that, in addition to several offerers, competition requires visibility of the market and a free and informed consumer capable of making his own price-influencing decisions. The ten year, since 1995 five year non-cancellable (by either party) insurance contracts, normal in Germany and excepted from a prohibition against long-term contracts in the German Contractual Conditions Law, also hinder competition since a change to another insurance company is rendered impossible. Thus, the insurance companies are not forced to compete with regard to their services through reduction in expense or improvement of services. In 1964, the "Concentration Study" of the German Government stated: "In competition in the insurance field, neither price nor performance are decisive, but, rather, the size of the middlemen organization" (is decisive). Along the same line, Professor Grossmann says: "Therefore, the insurance customer gropes totally in the dark. An especially wide scope is afforded for influencing the insurance customer through the personal explanations of the agent". By reason of the latter, the insurance companies pay out billions for advertising and for their middlemen organizations - without economic efficiency. Many economists criticize this as an "economic waste".

b) Uncontrolled and Arbitrary (Liberal) Extraction of Expenses and Profits from Fiduciary Funds

Because of the lack of allocation of property ownership between the loss pooling (pure premium) and service price (expense and profit) portions of the premiums, the insurance companies are at liberty to draw off expenses and profits from insurance contributions provided by the insureds for purposes of pooling losses. Such processes appear to possess all of the attributes of embezzlement since the insurance contributions and the surpluses arising out of them can, under our legal system, belong only to the insureds.

c) Life Insurance Abuses

The considerations mentioned in (a) and (b) above are especially valid with respect to capital (permanent, cash value) life insurance which has the peculiarity that, through the premiums, the companies are also entrusted with the savings contributions of the insureds. In this field, because of the so called "Zillmer-process" (according to which the German life insurance companies can generally use the first years' premiums for themselves) any revision of the insurance and savings decision or any change to another company involves considerable financial loss of the insured and is rendered practically impossible. In permanent life insurance, left totally unregulated is the question of any participation of the insureds in the hidden reserves which the insurance companies draw from the investment of the money left with them by insureds for long terms of up to 30 years or more under completely unregulated circumstances. Currently, the life insurance companies employ, and draw upon, these huge hidden reserves as they see fit.

d) Profits from Claim Settlements

In view of the possibilities, which the insurance companies now enjoy, of drawing off as profits the surpluses arising out of the loss pooling funds contributed by insureds, it is quite understandable why the insurance companies have a keen interest in reducing loss payments to the absolute minimum, which may be the reason for the oft-lamented "trouble in the case of loss". Claim cutting and avoidance automatically lead to greater "profits" for the insurance companies.

e) Inequality in Treatment of Compulsory Insured Car Owners

The unlawful profit-employment of surpluses arising from the entrusted losspooling contributions of the insureds is the ultimate reason for the unequal treatment of like car owners in the automobile liability insurance field. According to the present rating structure for Compulsory Insurance, a worker in a city currently pays a 60 percent higher premium than is paid by a state employee in a rural area, even though each drives the same make and model car and has an identicial driving record. This clearly controverses the insurance technique which requires equal contributions from like risks of insureds. It is inevitable that regional or occupational grouping results in different premiums for the individual insureds - in the same fashion that differing income tax rates would result for citizens with the same income if someone had the notion of determining the tax rates according to the average income of regional or occupational groups instead of the individual income of the tax payer. This splitting of the nationwide rating process into regional and occupational groups must inevitably lead to an inequitable differentiation between the like individuals in accordance with their group allocation depending upon residence or occupation. This unequal treatment, a violation of the fundamental human and constitutional right of equal protection, is currently being practiced in the nationwide compulsory automobile insurance

field through its regional and occupational group tariffs. Because differing surpluses arising from the loss contributions are accruing to the companies owing to the regional or occupational compositions of their respective portfolios, the Government and Supervisory Authority, at the insistence of the insurance companies, (which are compelled to accept all owners), allowed regional and state employee tariffs with the result of splitting the nationwide group of insureds. All of this was admittedly done in the name of producing, for the companies, "change equality" in surplus- (or, as the companies would contend "profit"-) making. It is readily apparent that the granting of this permission stemmed directly from the false notion that surpluses arising from the loss-pooling constitute "operational profits" and is squarely contradictory to the statements quoted earlier, to the effect that "risk surpluses and interest yields are not operating profits" of that loss pooling contributions are fiduciarily held.

In taking such action, it should have been obvious that the State had to influence purported "profits" by legislative actions because the insurance companies themselves were unable to influence them. Logically, however, one would expect that everyone should be able to influence profits through his own performance. Moreover, the underlying rationale for this authorization, must have overlooked the fact that the GNP computation would require that only a separately quoted service price should represent the profit area for insurance companies.

f) Lack of Understanding as to the Appropriate Function of State Supervision

Apparently, what no one has seen is the fact that it is precisely because of this wrong structure of the insurance field, with all its attendant invitations to arbitrary expense and profit appropriations from fiduciary funds, that government supervision was demanded and created. Thus, it should be the task of state supervision to direct the insurance contributions to their appropriate and reasonable employment for loss pooling through adequate controls and the creation of a suitable regulatory framework. But since this incorrect structuring in the insurance field is not even recognized, as of now, the Supervisory Authority has not understood, nor fulfilled, its proper function to replace the lacking property allocation and competition prerequisites.

g) "Creation of an understanding prejudicial to the insureds"

Although government, ministries, supervisory authorities, and the cartel board have, for years, been informed of this complex of problems, its consequences, and the present system's contradictions to the legal and economic system, they have done nothing, not even to the point of investigating. If any studies were ordered, it was only for the purpose of proving that the present system is right, never for the purpose of ascertaining if it is just possible that the present system might be wrong. All those bearing legal responsibility, as well as the insurance scientists and the so-called "insurance industry", have thrown up a stone wall of silence to all questions. It almost seems as though the above mentioned decision of the Association of the German Insurance Industry is binding upon a whole nation - even including its media. It surpasses understanding why not even a public discussion has come to pass on these questions which involve DM 1,500 billion 550 million insurance contracts, and every citizen.

The suspicion of a collaboration arises from a reading of the following statements: Hans Joachim Vogel, former German Minister of Justice, has said: "For a long time, the insurance companies and their associations have lived in peaceful co- existence with my house".

Hans Apel, former Minister of Finance (overall head of the Supervisory Authority) has said: "State and insurance industry got along quite well during the years behind us. But, along the way, the suspicion could arise with third persons that here an understanding prejudicial to the insureds was created". One is reminded of the statement of U.S. Senator Howard M. Metzenbaum who said: "The fact is that neither the insurance commissioner nor the Legislature ever really make the regulations. They do what the industry tells them to do".

In this connection, in view of the vaunted "harmonious co-operation of insurance industry and insurance science" and taking into consideration the recent statement of the president of the Supervisory Authority in which he said that he had only the "function of a night watchman", it can be seen that this apparently simple but consequentially weighty, legal question involving ownership of DM 1,500 billion becomes a juridicial issue of tremendous importance. Not less important becomes the issue regarding adequate representation of the insureds' interests and their participation in the control over their money supplied for pooling of losses.

IV. The Imperfect Regulation of the Insurance Contract

This whole complex of related problems would not exist, and the question of the actual ownership of the insurance funds would not arise if there were a clear, legal regulation of the insurance contract. He who believes that such clarity is created by a 200-sections German Insurance Contract Law is, unfortunately, wrong. Indeed, a more precise consideration of section #1 of this 90 year-old law shows that this law is no "masterpiece of legislation", as the "insurance industry" and their academics (who together, drafted it) seek to portray it. Nor does such consideration confirm the correctness of the view of the former Minister of Justice, Vogel, that the "permanence of this legal sector indicates the quality of this codification". However, wrong, a thing can be permanent and enduring so long as there exists a self-admitted "peaceful co-existence" between the legislator and the persons concerned as co-legislators. According to section #1 of the Insurance Contract Law (ICL) "the insurer is bound to the payment of an insurance performance", and "the insured is bound to the payment of the premium". Out of this arises a whole catalogue of questions which are as much of an economic nature as they are of a legal nature.

What is "insurance" and what is an "insurer"? - Who is the "insurer", the company or the group of the insureds who pool their contributions to cover their losses? - How, and by whom, is rendered the payment of the insurance performance in fulfilling the economic and contractual obligation? - What does that insured, who paid his premium but had no loss, get by the way of counter performance from the insurance company or from the group of insureds? - If the majority of the insureds do not receive insurance performances, can the premium be a price for the insurance performance as an equivalent counter performance by the insurance company? - Is section #1 of the German ICL binding, in the same fashion, upon stock insurance companies, mutuals, upon all insurance branches, including life insurance with its combined saving process? - Is the paying out of the sum, saved by the insured through a part of the life insurance premium, an insurance performance by the company and the premium, in that context, a price?

This catalogue of questions could easily be extended. In the study conducted by the Scientific Services of the German Parliament it is said: "Up to now, there are no uniform and generally accepted definitions" for questions regarding the insurance contract. Continuing, it says: "In this long existing controversy over the nature of the insurance contract, an investigation is lacking as to whether there is any way that one of the theories can cover the insurance contracts of all insurance branches. This is highly doubtful.

Moreover, no one has tried to substantiate in the literature, that the insurance contract could be a "service contract", which consists of the organization of a redistribution of entrusted money of the insureds". This latter statement is not quite accurate. The author himself, some years ago, endeavoured to substantiate such a theory but the "literature" refused to print it for reasons such as "economic regard for the established insurance industry, which is our exclusive and most important target group" or that such theory "does not correspond to our opinion". Yet, it is only this, up to now, suppressed conception and framework for all the problems in the present insurance system, solutions in theory as well as in practice.

a) The Present Legal Insurance Conception

Insurance science could not forever overlook or ignore the manifest contradiction that, according to the text of section #1 of the ICL, the "not befallen" (those who have no loss), do not receive any counter performance for their premium. Thus, the only generally accepted opinion among insurance scientists appears to be that section #1 ICL is an imperfect regulation, something which, for a period of 90 years up to date, has not concerned anyone, even the legislature, and despite the fact that this regulation governs matters running into billions of DM.

To make the "insurance performance" a performance by the insurance companies, and thus to make the insurance contract one of mutuality of performance, suitable to the market as a "market object", a "risk-bearing theory" was postulated. Under this, the counter performance is alleged to consist of the taking over of the risks, taking measures for risk compensation by covering a corresponding money-need, providing reinsurance, building up reserves, and generally bearing risks for the insureds. The concept of counter-performance is clearly not described in this way in the ICL. The risk bearing theory is revealed as the nonsense which it is when one considers what insurance really is. Insurance is a means of making something certain, of converting uncertainty into certainty. Here it is to make certain that there is no longer a financial risk for the insureds in respect to the subjects of the insurance. Thus, insurance results in the elimination of (financial) risk through the combining or pooling of the money of the insureds into a common fund the size of which is determined by the law of large numbers as applied to the subject of the insurance. Consequently, the risk having been eliminated, the insurance companies have no further need to bear, transfer, or compensate risks. This risk-bearing theory also ignores the fact that risk-bearing can never constitute a contractual performance but that the measures taken during the intervening time can only, at best, constitute preparatory action for the promised insurance performance (i.e. the payment of loss) which, alone, even according to this theory, can constitute the particular contract performance and fulfillment action.

Thus, the question of mutuality and performance exchange as regards the insurance contracts of those not substaining loss remains unanswered by this theory. After rejecting the risk-bearing theory, the ICL commentary of Professor Proelss and Dr. Martin says without examination of exposition: "This controversy has no great importance because the insurance contract is also a mutual contract according to the opinion represented here". In so stating, the commentators refer to the "solution attempt" of Professor Dr. Schmidt-Rimpler who says that an "unconditional premium payment and a conditional insurance performance can very well stand in a "synallagmatic" (reciprocal) relationship depending solely on the agreement of the parties as to the evaluation basis". Such an opinion completely ignores the fact that to define a mutual contract it is not the question whether the parties to the contract agree upon an evaluation basis or not but whether there is a

generally accepted basis for such evaluation. Otherwise, for example, the regulation provided by section #306 of the German Civil Law Code, which invalidates a contract which has as its object something impossible of performance, might not be applicable for the purchase of a ticket to the moon if the buyer considers a flight to the moon next Sunday as being possible. Such a transportation contract would not only be effective, according to the "party evaluation theory", but the ticket buyer would be without compensation or any action for unjust enrichment against the seller, notwithstanding the entire absence of counter-performance. One might argue, paraphrasing the words of Professor Schmidt-Rimpler: "For it goes without saying that it can be seen as just for one party to bind himself unconditionally and simply to perform his obligation the other party being only conditionally bound (or bound to an impossible performance)". Such "evaluation" could, perhaps, be interpreted as a renunciation of the repayment of advance performance or as the renunciation of a counter-performance or as the renunciation of a counter-performance (hence, as a donation), but the fact remains that such contracts can never constitute mutual contracts under which there must be an exchange of actual and unconditional performance and counter-performance.

It can thus be stated that according to the manner in which the insurance contract is now regulated and performed in practice, the insurance contract is not one of mutuality of performance. The contract between the insurance company and the insured can be a mutual contract only when it is certain as to which performance can be performed for all insureds and that such performance is, in fact, rendered.

b) The Present Economic Conception of Insurance

Totally incorrect opinions suggest that the insurance premium represents the price paid for the intangible product insurance. According to this reasoning, insurance would have to be classified as the production of goods and the insurance contract would have to be constituted a purchase contract. Such a view of the matter is as nonsensical as would be the contention that the performance by the physician consisted of the selling of the intangible product health rather than a service, i.e. the treatment of the patient.

The prevailing view can be stated to be that insurance is a "service" which is "produced by the insurance companies" and "sold" to the insureds in return for the payment of the premium. According to this view, the loss payments constitute "costs", the premiums constitute "prices", and the premium surpluses constitute "profits". Such a theory is obliged to concede the existence of many "peculiarities" which are outlined in the following in the form of questions.

How can the loss payments constitute costs when the money with which they are paid is provided free of cost by the insureds? - Clearly, the companies do not provide this money, how, therefore, can it be reckoned as a production factor when it is only redistributed by the companies as the so-called "object factor" of their service? - What is to be said of a "service insurance" wherein the external object of the service has to remain the property of those for whom the service is performed (as for example, the suit left at the clearners, or the money deposited in the bank), but where, in the insurance environment, it is contended that the money provided for redistribution as loss payments passes ove to become the property of the insurance companies through payment of the premiums? - How can premiums be said constitute prices when representatives of Government, of the Supervisory Authority, and some academics say that the "risk surpluses are not operational profits, but must be repaid to the insureds" (which, in fact, is actually done or prescribed in certain branches of insurance such as life and automobile nsurance)? -

Above all, why is the total premium income of the insurance companies not taken into account in the computation of the GNP as the reflection of the value of their services rather than only including the administration expenses portion as the actual price, that price being, oddly enough, ascertainable only through estimation?

Insurance, that is money provision by the insureds for a common fund and for a common loss pooling, can never be a service of a company but is rather the economic performance of the insureds. Thus, it makes no sense to speak of an insurance "industry" when, at best, there can only be an insurance services industry. Loss payments provided by cost-free funds supplied by the insureds can never lead to costs for the insurance companies. Therefore, it is simply insane to speak of "costs" in connection with loss payments or to speak of "cost-based pricing" or "premium calculation" in connection with ratemaking. The premium cannot possibly constitute a price for the actual services of the insurance company as is attested by the National Accounts computation of the GNP.

Currently, the insurance companies intermix the internally calculated service price with the external object factor of their service, left to them to perform the service upon, i.e. the money for loss payments, which legally remains the property of the insureds.

This intermixing results in the earlier described advantages for the insurance companies; they need not quote a price for the services which they actually render, therefore, they need not calculate carefully and competitively. They need not perform competitively as to these services, hence, they need not strive for reduction in expenses or increases in productivity. They are at liberty to take large amounts from the money entrusted to them by the insureds to cover expenseexcesses or as profits because the insureds' ownership of this money is no longer recognizable.

c) No Transmission of Title to the Insurance Contributions

Before money can properly be claimed as profits title to it must be transmitted so that it becomes the property of the company. Just as the insurance academics failed in converting the premiums into "price", so, also, have they failed to substantiate the transmission of title to the loss funds to the insurance companies as the necessary predicate for employing any part of such funds as "profits" by the companies. In the absence of such a transmission of title, no legal regulation concerning the accounting of insurance companies and no Stock Corporation Law can nullify the property guarantees established by the constitution nor destroy property rights arising under the laws governing property. To put it more bluntly: No one can legalize the embezzlement of entrusted money, and nothing is changed through an "orderly accounting or balancing of the money of others as the property of the company".

V. The New "Insurance/Service Theory"

To find the right framework for a solution of the moribund controversy over wrecked theories, it was necessary to start from the contradictions raised by these legal and economic conceptions and by the present insurance system in the face of our legal and economic system.

First, there was the legal framework within which hitherto unresolved legal questions had to be posed, such as no counter performance for the not befallen - no mutuality of performance - no transmission of title - no justification for profit taking. Then, there was the economic framework, posing unsolved problems along lines of economic questions such

as incompatibility with the National Accounts - no price quotation - no competition prerequisites - no object factor of the companies' services - the fact that cost-free money provided by the insureds for loss payments can never constitute a production factor and lead to costs for the insurance companies.

The starting point for a solution is the analysis of the economic process in the insurance field. Here, the National Accounts record two separate processes: a money provision aimed at a redistribution of income (insurance), and the organization of the redistribution process (companies' services). The first process is performed by the group of insureds, the second by the companies. It is in the breakdown of these two insurance processes, until now erroneously considered as a unit, that solution of the outstanding theoretical and practical problems in the insurance field is to be found. Through a separation of these performances and their allocation, respectively, to the insureds and the companies, correspondence with the handling of the National Accounts is achieved. Such a separation of the economic processes naturally requires a breakdown of the insurance contract, which also has hitherto been seen as a unit, into two contracts, that is, the actual insurance contract between the single insured and the group of insureds (the real insurer) and a "remunerated provision of service contract" which is concluded between the single insured and the insurance company and which has, as its object, the administration and redistribution of the insurance contributions for loss pooling. In this fashion, there arises a mutual contract between the insurance company and every insured. For every insured, even those who do not receive an insurance performance (i.e. loss payment) there is a counter performance rendered by the company, the services of concluding the insurance contract, organizing the group of insureds, and administering, redistributing, and investment of the funds provided by the insured for loss pooling. This money is the, hitherto lacking, object factor of the companies' services upon which the service is performed. The premium must be broken down, accordingly, into its components. The insurance companies must be required to quote a price for their services, which will obviate the necessity of estimating the value of those services for the purposes of ascertaining the GNP. In this fashion, too, there is compliance with the requirements of the Price Quotation Law as well as fulfillment of the prerequisites for effective competition. It is the service price alone which becomes the absolute property of the insurance companies, and the companies are entitled to profit only from surplus arising out of these service prices. In addition to the service price, an insurance contribution must be charged which is rated jointly with representatives of the insureds, and the resulting common fund must be administered, invested, and accounted for as the property of the insureds.

Such a system abolishes the anomalous situation in the claim settlement process whereby the avoidance, delay, or diminution of payments automatically lead to increased profits for the insurance companies. The insurance companies would no longer be concerned with surpluses, differing from company to company, arising from loss pooling in connection with compulsory automobile liability insurance. Regional and occupational classes (and all other group-criteria-based classes) could be abolished so that like compulsory insureds could be treated equally, as required by the constitution (after a pooling of the contributions for loss pooling and their surpluses, differing from company to company due to the composition of the portfolios).

Through such a premium breakdown and clear definition of property ownership, problems in the life insurance field would likewise be resolved, since the insurance companies would find it necessary to quote interest rate offers from time to time, as do banks, and the insureds could change companies without detriment (after a pooling of the risk portions of all premiums). The strained relationship between State supervision and competition would

be resolved through a separation of the insurance field into a supervised insurance area and an uncontrolled competition area relating to company services.

VI. Outlook

From the statements outlined above, there results a clear challenge for a complete investigation and total reform of the present insurance system which must occur if there is to be achieved a correspondence with the principles surrounding the legal and economic systems. No one should any longer refer to existing laws and the permanence of these laws and the present insurance system. These laws and the present practices clearly violate the Constitution (property guarantees and equal protection) as well as generally accepted legal and economic principles. Nor does an appeal to state supervision offer any promise of assistance. The State Supervisory Authority has never done what it should have done under existing circumstances, namely, prevent an improper expense and profit expropriation from the money supplied by the insureds for loss pooling. Nor has it rectified the lack of competition or required distinction between the property rights of the insureds and of the insurance companies.

Up until this time, the courts have not addressed these issues, but since those charged with responsibility have been informed of these manifest abuses for years, and have done nothing looking toward their abolition or redress, it would appear likely that constitutional and/or civil rights issues will be raised or suits seeking damages from State or public officials for derelictions of their official duties may be filed requiring the courts to deal with these questions which could involved judgements of imponderable amounts.-

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