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Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol36/iss6/4
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Workmen's compensation laws as means by which industry shares part of the burden of the human toll incident to the cost of production are reaching the maturity of their development. The adoption of such laws has been wide; all but two states in the union now have some provision by which employees engaged in most lines of work are compensated without regard to fault for injuries caused by their work.¹

The concept that the human element is part of the cost of doing business is so widespread that no longer are workmen's compensation acts viewed as socialistic.² Indeed the desire for the more abundant life has carried legislatures, both federal and state, into fields much further beyond the concept of laissez faire.³ There is much that can be said for social security in our new Utopia; indeed with its ultimate object many persons have no quarrel. Social legislation has been enacted with great rapidity—one law has been piled upon another without time

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¹ Association of Casualty and Surety Executives, Digest of Workmen's Compensation Laws, 15th ed., vi-vii (1937); 1 Schneider, The Law of Workmen's Compensation, 2d ed., 7-8 (1932) (three of the states listed therein as not having workmen's compensation laws, North Carolina, South Carolina and Florida, have since enacted such legislation); Dodd, Administration of Workmen's Compensation 35 (1936). The two states at present which have no workmen's compensation legislation are Mississippi and Arkansas. There is pending in Mississippi a bill to provide for and adopt "a comprehensive workmen's compensation law" for that state.

² Martindale-Hubbell, Law Directory, 70th ed. (1938), contains brief summaries of the workmen's compensation laws in the Law Digests section for each state.

³ The emphasis now is shifted rather to the question of applying remedies by way of workmen's compensation to so-called occupational diseases. See Angerstein, "Occupational Diseases," Report of A. B. A. Section on Insurance Law (1937). It is interesting to compare such present-day discussions with those of a quarter of a century ago. See Nichols, "An Argument against Liability," 38 Annals 159 at 164 (1911): "There is no more reason in the nature of things why a freeman who contracts for his manual labor should impose on the party with whom he contracts responsibility for injuries which are due to no fault of the latter than why a like responsibility should not attach to other forms of contract. . . . I take it that the manhood of the future American citizen and the political equality which is his birthright may be worth even more than the material advantages of socialistic laws."

between in which to learn from experience. If this desire to give the worker some measure of protection against all the normal hazards of life has shifted emphasis from the basic protection needed against injuries caused by his work it is not surprising.

Two phases of our modern social legislation serve, however, to bring the question of workmen's compensation sharply to the fore. Unemployment compensation laws, as generally enacted by the states in the pattern supplied by the federal government, are limited in their benefits to those unemployed yet capable and available for work. It is the obvious contemplation of such legislation that those not capable for work because of injuries properly chargeable to industry should have other remedies. It would be poor logic to discriminate against the employee injured by industry in favor of the able-bodied. Such wolfish intent should not be imputed to our law makers. Any hiatus that thus might exist deserves careful examination. Secondly, our new security is not without its cost. The payroll taxes are large and have their necessary effect on the margin of business profits. Their effect is immediate when borne by the employer and mediate through the creation of consumer resistance when passed along to the ultimate purchaser. That


6 N. Y. Laws (1935), c. 468, § 1, 30 Consol. Laws (McKinney, Supp. 1937), § 502 (10); Mass. Acts (1935), c. 479, § 5, being c. 151A of the General Laws. These terms are generally used both as to the employee's usual occupation or any other occupation for which he is reasonably fitted, whether subject to the particular act or not.

7 In that they do not have unemployment compensation, whatever remedy they have would be outside its sphere.

8 Ultimately a tax of 3 per cent on the employee's wages or salary and on the employer's payroll by 1948 is contemplated by the Social Security Act (to be used for the various purposes of the act, including old age benefits) plus an additional tax of 3 per cent (already effective) for unemployment compensation (subject to rebate up to 90 per cent thereof for payments made into an approved unemployment fund under state law). 49 Stat. L. 636 (1935), 42 U. S. C. (Supp. III, 1937), §§ 1001, 1004, 1101. Economically speaking, the cost of employing labor will be raised nine per cent (plus whatever the particular state unemployment compensation act requires from the employee), for the tax on the employee is deducted by the employer from the wages. The division of the taxes between employer and employee has no lasting economic significance (i.e., unless an employee is worth the total of wages plus taxes he would not be hired and unless what he receives is sufficient for his requirements he would not work).
their effect varies according to such factors as the elasticity of the demand for a given product does not lessen the reality of their effect. Such cost factors cannot be entirely ignored by the lawyer. The cost of our newer social experiments of necessity makes the businessman seek savings in other directions. It is thus possible that the newer security both leaves the door open for neglect of the more fundamental security—i.e., protection for the direct loss caused by injury—and at the same time supplies an added impetus to secure whatever savings in the cost of production are legally possible.

Workmen's compensation laws were nurtured under a different constitutional attitude than that at present prevailing, and largely because of this difference vary considerably in their essential structure from state to state. With many of these variations we are not here concerned. Some of them reflect true local differences; many are due to fortuitous legislative developments. Perhaps in no field of the law is uniformity less. The main difference with which we need concern ourselves is the difference between the so-called compulsory and elec-


As a matter of historical interest, a crude workmen's compensation law was passed in Maryland in 1902. See Md. Acts (1902), c. 139. This act was held unconstitutional in an unreported decision of the Court of Common Pleas at Baltimore in Franklin v. Union Railway & Electric Co. (1904).

11 DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 31 (1936).


13 Kemper v. Gluck, (Mo. App. 1929) 21 S. W. (2d) 922 at 923: "Roughly speaking, and without any intention of being entirely accurate, it may be said that compensation laws fall into two principal classes: Those that are compulsory as to certain designated employments only, which are usually termed hazardous or extrahazard-
tive acts. Most acts are elective in the case of private employment. Nevertheless, acts compulsory at least as to certain employments prevail in many states. Many of the compulsory acts are confined to hazardous employments. This was caused in the main by fears of attack on constitutional grounds; however, the special hazard in some of the industries covered by such acts approaches the vanishing point.

The elective acts are drawn on a general pattern which deprives an employer who does not "elect" to come thereunder of the common-law defenses of "assumption of risk," "fellow servant rule" and "con-

ous, and leave all other employments unaffected by the act, unless by voluntary acceptance; and those that are elective as to all employments, save for certain designated employments, which are left unaffected by the act in the absence of a voluntary election to come within it. The elective acts may be themselves subdivided into two groups: The minority group, in which an election is required to be evidenced by some affirmative act on the part of the employer, or the employé, or both; and the majority group, in which an election to come under the act is presumed by the terms of the law itself, in the absence of the giving of some sort of notice to the contrary. Cf. 1 Schneider, The Law of Workmen's Compensation, 2d ed., § 4 (1932).


16 Arizona, California, Florida, Idaho, Illinois, Indiana, Iowa, Maryland, Minnesota, New York, North Dakota, Ohio, Oklahoma, Utah, Washington, Wisconsin, Wyoming. See Association of Casualty and Surety Executives, Digest of Workmen's Compensation Laws, 15th ed., p. viii, table (1937). The assignment of particular states to categories such as this necessarily varies with the particular view of the writer. The compulsory acts often apply only to designated industries. In the list here given the present author has changed the list appearing in the cited authority by excluding Texas, where the act is compulsory only as to motor bus companies, and by including Florida, where an employer who rejects the act is liable for compensation as though he had elected otherwise. The bill now pending in Mississippi is similar in this respect to the Florida act. The states not included in the above list, other than Arkansas and Mississippi, have elective acts.


18 Thus the New York act lists 532 employments as hazardous, as well as employments "in which there are engaged or employed four or more workmen or operatives regularly, in the same business or in or about the same establishment either upon the premises or at the plant or away from the plant of the employer, under any contract of hire, express or implied, oral or written, except farm laborers and domestic servants." 64 N. Y. Consol. Laws (McKinney, 1922), § 3 (18). The last mentioned clause was sustained against constitutional attack. Ward & Gow v. Krinsky, 259 U. S. 503, 42 S. Ct. 529, 28 A. L. R. 1207 (1922) (actual inherent hazard treated as universal).
tributary negligence.” The non-assenting employee (whose failure to elect must usually be shown at the time of employment or when the employer first elects) is met with these defenses. The employer’s election is evidenced in many ways, some of the more common of which are the statutory presumption of election in the absence of contrary notice to the proper department or to the employee, the filing of notice of election with an administrative board, or the securing of insurance and giving proper notice to employees.

In the states having elective acts, common-law recovery against an employer who elects to remain outside the workmen’s compensation act is still predicated upon negligence. Generally, even with the defenses removed, the employee still has the burden of proof on the issue of negligence. At any rate the employee will not always prevail. Thus the sword of Damocles does not always fall on the employer who is not under the compensation act.


20 Ibid.

21 In the majority of the elective acts an election to come under the act is presumed by the terms of the law in the absence of some sort of notice to the contrary. Kemper v. Gluck, (Mo. App. 1929) 21 S. W. (2d) 922.

Two other types of election may be illustrated. In Michigan an employer elects the compensation act by filing with the Department of Labor and Industries a written statement to the effect that he accepts the provisions of the act for all his businesses. He must adopt one of the four methods prescribed for securing payments, i.e., insurance in the state accident fund, a liability insurance company, a mutual association, or proof of financial ability to pay compensation. Mich. Comp. Laws (1929), §§ 8412, 8460. Employers electing the act must post notice to that effect in the plant within ten days after the approval of the election by the Department. Mich. Comp. Laws (1929), § 8412. Employees are deemed to have accepted the act unless the employee at the time of hiring or within 30 days from the time the employer became subject to the act gives the employer notice in writing that he, the employee, elects not to be subject to the act. Mich. Comp. Laws (1929), § 8414.

In Massachusetts the employer’s election is shown by procuring insurance for workmen’s compensation and giving his employees notice. Mass. Gen. Laws (Ter. Ed. 1932), c. 152, §§ 1 (6), 21, 22, 26. Employees are held to have elected the act if the employer has elected, unless written notice to the contrary is given the employer at the time of hiring or within 30 days after employer’s notice of insurance. Mass. Gen. Laws (Ter. Ed. 1932), c. 152, § 24.

22 Palmer v. Sumner, 133 Me. 337, 177 A. 711, 97 A. L. R. 1292 (1935), holding that the act taking away the common-law defenses of an employer who rejected it did not create an independent cause of action.

Evasion of Elective Laws—The "Stop Loss" Plan

A recent development in the states having elective acts has taken place by which employers seek to avoid the costs of electing the acts and yet obtain the immunity from common-law liability. This is nothing other than evasion. The scheme briefly involves a combination of two elements. The first is the purchase of a claims and engineering service. The second is the purchase of insurance against losses which exceed a certain percentage, usually fixed at seventy-five per cent, of the premium the employer would have to pay if insured for workmen's compensation liability. This latter insurance, commonly designated "stop-loss" insurance, is an essential feature of the scheme. The two together, the service and the insurance, may be called for convenience of treatment the "stop-loss plan." The theory of the plan is to limit the total cost to that of workmen's compensation and to give the employer a saving of any differential there may be between this amount and the total costs of (a) the service, (b) moneys paid in settlements, and (c) the "stop-loss" insurance. Taking the cost of workmen's compensation insurance as 100 per cent, the division of cost items is commonly as follows: 15 per cent for the service, 10 per cent for the cost of stop-loss insurance and 75 per cent for the payment of ordinary losses not covered by the stop-loss insurance. It is to this latter category that the employer looks for savings in cost.

Does the stop-loss plan meet the reasonable expectations of the employee, the employer and society generally? These are the questions that must be answered if the plan is to be judged from a jurisprudential point of view. The answers to these questions should de-

24 That the elective acts were not designed to give an employer any real choice of conduct is illustrated by the following language from Ocean Accident & Guarantee Corp. v. Industrial Comm., 32 Ariz. 275, 257 P. 644 (1927): "Most of the Workmen's Compensation Acts of the second decade of this century show on their face an attempt to introduce a radical extension of the principle that the state may regulate the conditions of industry as it will in the interests of the public, under language which preserved the form of freedom of contract, while denying it in effect. Many, if not most, of the statutes which insisted they were entirely optional in character gave no more real choice than does the highwayman who presents a pistol at the head of his victim with the 'choice' of 'your money or your life.'"

25 The writer's statements in regard to such insurance are based on actual policies examined. He is aware of no published source in which they can be obtained. The provisions of such policies are important to those who must advise on such schemes. They are in the main similar. Herein the writer is forced to state or summarize them in the text without supporting annotations.

26 Included in this are the legal expenses, expenses of litigation, court costs and judgments in cases litigated. In connection with such litigation, cf. Western Indemnity
termine the attitude of those who must advise legally on such matters, of those who advocate changes in our laws, and of the legislators themselves.

i. The Employee's Point of View

From the employee's point of view, the first question in which he would naturally be interested is the amount of payments he could expect to receive. In practical operation the stop-loss plan varies tremendously according to the facts surrounding a particular injury. If the injury is one for which there is a substantial possibility of common-law liability with the defenses removed, the employer and those administering the service are most anxious to obtain his release. In such a situation there is a good chance that the employee may obtain what is roughly the equivalent of compensation payments. He might obtain more. If, on the other hand, the situation is one where there is no liability even with the defenses removed, the employee is practically forced to accept whatever is offered. This latter classification would include most of the usual back strain and hernia cases as well as many of the industrial diseases, so-called. In the liability classification the release is often secured by representations that vary from downright

Co. v. Pillsbury, 170 Cal. 686 at 693, 151 P. 398 (1915), wherein the court said "the common-law remedy by action, with the requirements of proof incident to that remedy, involves intolerable delay and great economic waste, gives inadequate relief for loss and suffering, operates unequally as between different individuals in like circumstances, and . . . whether viewed from the standpoint of the employer or that of the employee, it is inequitable and unsuited to the conditions of modern industry." This applies with equal force to common-law negligence actions with the defenses removed.

27 The release is embodied in the agreement made between the employer and the employee pursuant to which payments, usually periodic during disability, are made to the employee under the stop-loss plan. Here again the author bases his views on such agreements as he has examined and which are unavailable in a published source for citation.

28 Normally this would require litigation, although, of course, pending suits based upon common-law liability with the defenses removed may be settled.

29 Ordinarily recovery for negligence would be defeated where the defendant neglected no reasonable means of preventing the disease. See Louisville & N. R. R. v. Wright, 183 Ky. 634, 210 S. W. 184, 4 A. L. R. 478 (1919). The general rule is that the master is under a duty to warn the employee of conditions liable to engender disease where the master is in a position to have greater knowledge of the danger than the employee. O'Connor v. Armour Packing Co., (C. C. A. 5th, 1908) 158 F. 241, 15 L. R. A. (N. S.) 812. See Schmidt v. Merchants Despatch Transp. Co., 270 N. Y. 287, 200 N. E. 824, 104 A. L. R. 450 (1936), reargument denied, 271 N. Y. 531, 2 N. E. (2d) 680 (1936), for an example of liability of this type predicated on statute.
fraudulent statements that the payments to be made are workmen's compensation benefits to sanctimonious declarations that although the employer is not insured he wishes the employee to receive what he would be entitled to if under the act. In any case, the employee's assent to the arrangement (coupled with his release of liability) is influenced by the fact that the employer has immediate access to him; and in the case of injuries not permanently disabling a further influence is the employee's desire to retain his job. For the present discussion we may ignore cases of immediate death not accompanied by great suffering, as the liability under most death statutes is in the aggregate not greatly disproportionate to liability under the compensation acts, at least where the employee leaves dependents.\footnote{In many states the maximum damages for wrongful death is fixed by statutes at amounts varying from $5,000 to $10,000. 8 R. C. L. 846 (1915). In others it is subject to judicial review as to excessiveness and is often, as under the Federal Employers Liability Act, limited to the pecuniary loss of the dependents. See Illinois Central R. R. v. Humphries, 174 Miss. 459, 164 So. 22, 102 A. L. R. 549 (1935). In the case of death under workmen's compensation acts, benefits are generally paid to certain designated dependents for varying periods, the average period being about four years. 2 Schneider, The Law of Workmen's Compensation, 2d ed., § 365 (1932). Oklahoma is apparently alone in not applying its workmen's compensation act to accidents resulting in death. Okla. Stat. (1931), § 13403.}

One way or another, we can assume that the service representatives manage to secure the employee's release in return for a "voluntary" payment of compensation. A danger to the employee who does not take what is offered him under the stop-loss plan might be mentioned in passing. In the case of possible liability with the defenses removed he might be influenced by legal advice, sound or otherwise, into allowing lawyers to take what proves to be an unprofitable gamble at the employee's expense.

What does the employee who has given his release and accepted what is offered him under the stop-loss plan receive? Most workmen's compensation acts are so drawn as to give benefits, based upon a proportion of the employee's average wage.\footnote{2 Schneider, The Law of Workmen's Compensation, 2d ed., § 429 (1932).} Commonly the acts contain provisions for regarding the wages of other employees similarly situated where the average of a particular employee cannot fairly be determined.\footnote{Ibid.} Under a stop-loss plan the employer and those furnishing the services can place in the agreement with the employee whatever calculation they wish as to average wages. That these provisions...
will, especially in the no-liability cases, be less favorable to the employee than the provisions of the workmen’s compensation acts can be readily assumed. It is sufficient to note that they are not subject to administrative or judicial review. The provision, common in agreements with employees under the stop-loss plan, that disputes are to be determined by arbitration is of no real protection to the employee. The terms are fixed in the agreement before the dispute arises. Likewise, arbitration is not always the simple and summary process sometimes supposed; on the contrary it is extremely technical and full of much possibility for delay. It follows that the profit motive in industry is bound to work against the employee in making doubtful computations of this sort.

Similar considerations exist as to the disability and medical features of the compensation acts. Workmen’s compensation acts in the main give benefits (other than for specific loss of portions of an employee’s body) only in relation to disability. Likewise they provide for a fair amount of medical treatment. Under the stop-loss plan the time of disability may be fixed in the agreement with the employee. So, too, the medical treatment for the employees could be determined in like contracts. So long as the employer lives up to the contract so made there would be no review thereof. The employee is thus met with what closely resembles an ex parte determination, by the party most adversely interested, of these two important factors.

Closely akin to this is the possibility that exists under the stop-loss plan that in order to end the period of disability the employee will be forced to return to work before reasonably fit therefor. So advised by the physician to whom he is compelled to resort under his


84 In some states, such as New York, California, Illinois and the District of Columbia, the medical benefits are unlimited; in others, as Michigan, Indiana and New Hampshire, there is an absolute time limit (Michigan, ninety days after injury); in others there is an absolute cost limit; in still others, as Massachusetts, Maine and Pennsylvania, further treatment in excess of the time or cost limits may be ordered. Association of Casualty and Surety Executives, Digest of Workmen’s Compensation Laws, 15th ed., xviii (1937).

85 The employer under such schemes has complete freedom of selecting physicians, whereas under workmen’s compensation acts either the employee is given the choice or the employer’s selection is subject to various restrictions in the employee’s interest. Association of Casualty and Surety Executives, Digest of Workmen’s Compensation Laws, 15th ed., xviii, xix (1937).

In this connection it should be noted that while workmen’s compensation acts
agreement and acting under fear of losing his job, he has no other course open to him. The human toll that this could cause through the possibility of further injuries to such an employee or to other employees is appalling.

So, too, in the matter of the release, even in the case of a scrupulously honest employer, the stop-loss plan is not always fair to the dependents of a deceased employee. Workmen's compensation acts generally contain provisions for benefits to dependents of an employee where the employee if he lived would have been entitled to compensation. On the other hand, in states having death acts requiring a showing that the employee could have recovered had he lived, and in states having acts patterned after Lord Campbell's Act, the release of the employee precludes recovery by the dependents. Likewise, the dependents have no rights, whatever the provision of the death statute, where the death is caused without fault of the employer or those for whom he is responsible legally.

Preventive law, like preventive medicine, is one of the products of our age. One of the brightest spots in the history of workmen's bar action against employers for malpractice of physicians attending employees, the common-law rule is otherwise and allows recovery for aggravation of the original injury caused by malpractice. See 7 WASH. L. REV. 363 (1932). This common-law liability would probably be within the terms of the release executed by the employee, although the aggravation might in severity exceed the original injury. Under workmen's compensation an employee may generally receive benefits for the aggravation caused by malpractice. 7 WASH. L. REV. 363 (1932).


A similar result is reached where the statute provides for proof of facts which would, if death had not ensued, have entitled the party injured to maintain the action and recover damages. See Collins v. Hall, 117 Fla. 282, 157 So. 646, 99 A. L. R. 1086 (1934).

Where, however, the death statute is punitive in character, it is regarded as creating a new cause of action for designated beneficiaries. This is not affected by settlement with the injured party; his release does not bar recovery in the death action. Wall v. Massachusetts Northeastern St. Ry., 229 Mass. 506, 118 N. E. 864 (1918).

compensation is the effect of these acts in reducing work accidents. The chief beneficiary of this socially desirable result is the uninjured employee, for money damages can never fully compensate for loss of physical well-being. That much has been accomplished in the way of safety promotion under the profit system speaks well for the system. The chief motive in the research as to the cause of injuries (which is necessary for effective accident prevention systems and devices) is the desire of insurance companies to widen, though only temporarily, the differential between loss and premiums. Industry and the ultimate consumer of the products thereof also profit. In the case of the services under the stop-loss plan, there is no real incentive to thoroughgoing accident prevention research. System and study is needed for effective accident prevention. There is little reason to believe these will be had at the hands of small organizations chiefly concerned with obtaining releases. The injured employee who might otherwise have escaped injury is without doubt the loser.

Where losses are high and resort under the stop-loss plan must be had to its insurance feature, another problem is presented, viz., the availability of payments thereunder. That the insurance is indemnity insurance and that it is in the main written by companies not licensed to do business in the state in question are factors that concern the employer and as such will be discussed hereinafter. In the case of large or catastrophic losses, especially where the employer’s solvency is not of the best, these factors concern the employee as well. The amendments to Section 63 (a) of the Bankruptcy Act making judgments in negligence actions instituted prior to the adjudication provable would not in many cases materially help the employee. In 77B reorganizations the claims would be provable where liability existed. Priority, however, would depend upon whether the claim was such that it “would have been entitled to priority over existing mortgages if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition or answer.”


40 Bankruptcy Act, 30 Stat. L. 562 (1898), § 63 (a) (6½), as amended, 11 U. S. C. (Supp. III, 1937), § 103. As a holder of a provable claim, the employee could at most share in the pro rata distribution of the estate. So, too, where the employee’s claim is based upon an agreement with the employer, he would share under this same section as other contract claimants. Bankruptcy Act, § 63 (a) (4).

41 Bankruptcy Act, § 77B (b), 11 U. S. C. (1935), § 207 (b).

42 Bankruptcy Act, § 77B (b), 11 U. S. C. (1935), § 207 (b). The words of the
This incorporates the old "six months rule" with all its detailed ramifications. It can thus be seen that there are purely legal considerations that may delay an employee possessed of a liability claim. The employee as to whom there is no liability is probably completely out once creditors start fighting over an insolvent enterprise. The stop-loss insurance, being purely indemnity against losses paid, does not apply until the employer has paid. So, too, there are probably opportunities for delay apart from the purely legal. Opposed to this is the situation under the workmen's compensation act. Under bankruptcy, the employee's claim for benefits for injuries occurring prior to adjudication, where a direct liability on the employer, would be both provable and entitled to a priority. The insurance protection would be immediately available, regardless of the employer's solvency, for the obligation of the insurer under the standard workmen's compensation policy is to pay promptly to the person entitled thereto benefits due under the workmen's compensation laws. That justice delayed is often justice denied is axiomatic. That because of the legal and the human elements the employee is subject to delay, if not complete denial of benefits, under the stop-loss plan in cases where his employer's solvency is questionable seems clear. The denial of justice is apparent.

statute are highly unfortunate. Literally, tort claims never had "priority over existing mortgages" even where they accrued within six months of an equity receivership. The only priority they had in those situations was as to income earned within six months of the receivership and secondarily as to corpus where the income was diverted so as to benefit bondholders. Cutcheon, "Recent Development in Federal Railroad Foreclosure Procedure," SOME LEGAL PHASES OF CORPORATE FINANCING, REORGANIZATION AND REGULATION 79 at 105-110 (1931).


44 The stop-loss policies are so drawn. See 6 COOLEY, BRIEFS ON THE LAW OF INSURANCE, 2d ed., 5696 et seq. (1928).

45 Bankruptcy Act, § 63 (a), as amended, 11 U. S. C., (Supp. III, 1937), § 103. The situation in reorganizations is superficially the same as with tort claims, as the cited section of the Bankruptcy Act does not apply to reorganizations under Section 77B. See note 42, supra. However, the courts are more liberal in ordering the payments of accrued workmen's compensation liability by operating receivers. Bowen v. Hockley, (C. C. A. 4th, 1934) 71 F. (2d) 781, noted in 34 Col. L. Rev. 1558 (1934) and 19 Minn. L. Rev. 253 (1935). The payments are ordered as necessary operating expenses. Judgments for tort claims are not generally so regarded. Pitcairn v. Fisher, (C. C. A. 8th, 1935) 78 F. (2d) 649.

46 Where the policy provides for payment of the insured's liability, payment of judgment by the employer is not a prerequisite to action against the insurer. 5 COUCH, CYCLOPEDIA OF INSURANCE LAW 4120 (1929). See 2 SCHNEIDER, THE LAW OF WORKMEN'S COMPENSATION, 2d ed., § 467 (1932).
2. The Employer’s Point of View

These possibilities of abuse from the employee’s point of view might not be enough to dissuade some employers from participating in stop-loss plans. Possibly they may feel that through fair dealings these difficulties might be overcome. However, it is hard to define “fair dealings” on uncertain issues. Possibly, too, an employer feels that he is forced to make whatever savings are legally permissible. Again, the employer’s motives may be less high. Whatever his motives the question arises as to the sheer expediency of participation in a stop-loss plan. Members of the profession may be called upon to advise an employer from this point of view alone. We shall now turn to some of the matters that should be considered in giving such advice.

First we shall consider the items of cost. The service contract portion of the stop-loss plan generally provides that the servicing company is not obligated to furnish legal services in connection with claims against an employer. The portion of the sum equal to the employer’s normal workmen’s compensation premium that goes to defray losses and from which the employer hopes to derive benefit from the stop-loss plan is thus forced to bear the legal expenses, such as attorney’s fees and fees of expert witnesses and the other costs of defending suits against the employer. The disinterested attorney should so advise his employer-client.

The service company, under the usual type of stop-loss plan, contracts to make necessary investigation of claims and to use reasonable efforts to adjust and settle such claims. The service organization thus has no financial interest in the investigation and settlement of claims. Its fee is the same regardless of the efficiency with which it handles such claims. If the handling thereof is inefficient, the employer in the first instance bears the costs of the service company’s mistakes. On the other hand, with workmen’s compensation insurance the insurer’s direct pecuniary interest compels it to give these matters proper and efficient treatment. So, too, the larger and better managed insurance companies, because of the larger volume of such work, are in the main better equipped to render investigation service. Their risks are so distributed that they are able to make a thorough study of the claims that require it.

We have already alluded to the possibility that accident prevention work may be seriously neglected under the stop-loss plan. This is also

47 The author is aware of no published source and his remarks are based on such of these contracts as he has examined.
of interest to the employer. Although the service company may contract to make what they deem adequate safety inspections of an employer's plant, it is doubtful if it can in fact supply proper safety engineering work. Careful planning and study are necessary for accident prevention. Mere inspection without proper research will leave the employer far in the wake of industrial progress. Even though the service contracts may sometime provide for the service organization supplying the employer with a safety engineer's report as to the physical condition of his plant, the result is not true accident prevention. Keeping up the old methods is of course important; but without research for the future there can be no progress. It is thus apparent that the employer subscribing to the stop-loss plan would be without many of the benefits resulting from careful control of work hazards. Not the least of these benefits would be the result over a period of time of accident prevention in reducing, through a system of experience rating, an employer's normal workmen's compensation premiums. In this respect an employer entering the plan is permanently choosing the level of industrial progress prevailing at the time he adopts stop-loss. This would be an exaggeration only in the rare case where progress results suddenly.

The distinction between contracts for indemnity against losses paid and contracts for payment in the event of the happening of other contingencies is fundamental in insurance law. The hardships worked by the pure indemnity-against-loss type of contract have been recognized and in many situations we have gotten away from them. The stop-loss insurance policies, as at present drawn, are nevertheless of this

48 Such a clause is found in some such contracts.

49 Experience rating is a system for rewarding employers for low loss ratios and low rate of accidents by reducing their future workmen's compensation premiums. Dodd, Administration of Workmen's Compensation 708 at 711 (1936): "Yet these devices are not as important deterrents as is the safety service rendered by the better insurance carriers. Here, again, however, the result may be reduced to financial terms, for an efficient safety service may mean a smaller loss ratio to the insurance carrier, and lower insurance cost to industry as a whole."

50 "The term 'indemnity insurance' is applied to contracts which provide for indemnity against liability." 7 Cooley, Briefs on the Law of Insurance, 2d ed., 5616 (Supp. 1932).

51 Thus courts are prone to construe policies as insurance against liability where the insurer contracts to defend the suit. Barney v. Preferred Automobile Ins. Exchange, 240 Mich. 199, 215 N. W. 372 (1927); Brucker v. Georgia Casualty Co., 326 Mo. 856, 32 S. W. (2d) 1088 (1930). Commonly in workmen's compensation acts an employee is given a direct right against the insurer, at least where his employer does not pay. Equitable Casualty Underwriters v. Industrial Comm., 322 Ill. 462, 153 N. E.
The employer must pay before he is considered as sustaining a loss. Thereafter if his loss exceeds the agreed percentage (usually 75 per cent) of his normal workmen's compensation premium he can seek reimbursement from the stop-loss insurer. These policies are written at present only by companies, not only foreign to and usually unlicensed in a particular state, but by alien companies whose home offices are located outside the United States. We note at this point only the possible effect on the employer's solvency of being obligated to pay first and seek reimbursement later.

Of like possible effect is the provision invariably found in the stop-loss insurance policies limiting the total liability of the insurer to a specific amount. Usually this amount is sufficiently high to take care of losses which could reasonably be expected to occur. However, catastrophes can and do occur. Should this happen, the employer would have no protection above the total set forth in his policies. On the other hand, the standard workmen's compensation policy has no provision limiting the total liability assumed. The employer should not be unmindful of this distinction between full and partial protection.

Another feature in the stop-loss insurance policies deserves consideration. The policies contain provisions amounting to warranties that the employer will utilize a particular service. The employer also in effect warrants that the service will comprise, among other things, the discharge of state and federal employer's liability obligations to his employees. It is possible that this may include duties imposed by law.

In some states statutes in effect prevent conditions in insurance policies that an insured pay a judgment before liability attaches to the insurer. Mass. Gen. Laws (Ter. Ed. 1932), c. 175, § 113.

The policies which we have examined provide for reimbursement of the employer for payments made in excess of a specified percentage of what would be his normal workmen's compensation premium. Such clauses are in general valid. 6 Cooley, Briefs on the Law of Insurance, 2d ed., 5696 (1928).


"The man without capital or credit might be powerless to meet his obligation and put himself in position to recover against the insurer. The man of slender resources doing a considerable business on small capital might be forced into bankruptcy, and get little or no benefit from the insurance for which he had paid." Lorando v. Gethro, 228 Mass. 181 at 189, 117 N. E. 185 (1917).
or departmental regulations with respect to employees.\(^{56}\) The distinction between warranties and representations is well-settled in insurance law.\(^{57}\) Literal compliance with the former are required; even unintentional violation will render the insurance void.\(^{58}\) Workmen's compensation policies on the other hand involve no such danger.\(^{59}\)

In the case of employees of contractors or sub-contractors the stop-loss plan furnishes the employer little protection. His common-law liability exists as to such employees.\(^{60}\) In many lines of work, notably

\(^{56}\) The language of the policies in this respect is probably purposely indefinite. Strict discharge of employers' liability obligations would probably encompass statutes requiring certain employers to install protective devices of various sorts where violation of such statutes results in liability. See Boll v. Condis-Bray Glass & Paint Co., 321 Mo. 92, 11 S. W. (2d) 48 (1928) (statute requiring adequate and approved respirators).

\(^{57}\) 3 COOLEY, BRIEFS ON THE LAW OF INSURANCE, 2d ed., 1864 et seq. (1927).

\(^{58}\) "A warranty is a part of the contract itself upon the literal truth or fulfillment of which the validity of the entire contract depends. The falsity or breach of a warranty releases the insurance company from liability, even though the insured was innocent of its presence in the policy the same as would a mutual undertaking in any other kind of contract. The question of materiality of the statements does not arise in the case of a warranty." See Globe Indemnity Co. v. Daviess, 243 Ky. 356 at 365, 47 S. W. (2d) 990 (1932).

Although the effect of warranties generally has been greatly mitigated by statute, these statutes are ordinarily confined in their operation to statements made in the application or negotiation for insurance. Usually they do not effect promissory warranties in the nature of conditions. 4 COUCH, CYCLOPEDIA OF INSURANCE LAW, § 8578 (1929). Other statutes limit the effect of the doctrine of warranties to breaches thereof which contribute to the loss or increase the risk in various specified ways. PATTERSON, ESSENTIALS OF INSURANCE LAW 310 (1935); Mich. Comp. Laws (1929), § 12572.

\(^{59}\) The inspection service provided by workmen's compensation insurance companies is conducted directly by the insurer; it is usually provided that such inspection of work places will be made when and as deemed desirable by the insurance company. In any event, workmen's compensation policies contain no warranties or conditions of the above nature.

\(^{60}\) Indermaur v. Dames, L. R. 1 C. P. 274 (1866), affirmed L. R. 2 C. P. 311 (1867); Arizona Binghampton Copper Co. v. Dickson, 22 Ariz. 163, 195 P. 538, 44 A. L. R. 881 (1921). See 4 A. L. R. 891 at 893 (1926): "the contractor [and his employees] is entitled to recover for any injuries which he may sustain by reason of the negligence of the contractee while the stipulated work is in course of performance. The initial question, whether such negligence is predicable in a given instance, is, of course, affected by the consideration that the duties to which a contractor is subject in regard to a contractee are not identical with those imposed upon a master in regard to a servant. But, both on principle and authority, it is apparent that the liability of the contractee becomes a necessary inference whenever it is proved that the injury complained of was caused by a breach of one of the duties which he owed to the contractor under the circumstances involved." See Watkins v. Gabriel Steel Co., 260 Mich. 692, 245 N. W. 801 (1932).
construction activities, the danger of injuries to such employees is large. The standard workmen's compensation policy would furnish protection against such claims, for generally such employees of contractors or sub-contractors doing the employer's work on his premises or under his direction come under the workmen's compensation acts. If both the principal employer and the contractor or sub-contractor, as the case may be, are under the act, the employee is usually precluded from recovery from the principal employer. Where, however, the principal employer is not under the act, the employees of contractors and sub-contractors may retain their common-law rights against him—and this even though the employees' immediate employer may be under the workmen's compensation act. Indeed, in this situation in many states the company insuring the contractor or sub-contractor could bring an action in the nature of a subrogation action and recover from the principal employer. In spite of these provisions in the law subjecting the principal contractor who does not come under the workmen's compensation act to liability greater than that existing in the case of such employers who operate under workmen's compensation, the stop-loss plan is almost entirely silent on this. The service contract in the usual form used relates only to claims by employees. The employer thus receives no claim investigation service as to employees of contractors or sub-contractors. The stop-loss insurance policy is but little better in this respect. It generally provides that employees of sub-contractors are not included, with the added provision that they may be included if their remuneration is included in the amount upon which the premium is calculated. The employer must thus determine

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62 The various acts generally limit the liability to pay compensation to employees of contractors and sub-contractors to situations where their immediate employer is not under the compensation act. Mass. Gen. Laws (Ter. Ed. 1932), c. 152, § 18; Mich. Comp. Laws (1929), § 8416. Likewise, tort recovery by employees of contractors and sub-contractors is not generally allowed against principal contractors who are subject to workmen's compensation acts. White v. George B. H. Macomber Co., 244 Mass. 195, 138 N. E. 239 (1923).
65 Here again the writer necessarily relies on such of these policies as he has examined.
at his peril whether or not his business is so conducted as to expose him to liability to such employees. In many cases it would be hard, if not impossible, to determine this in advance. These policies contemplate premium settlement on the basis of payroll audits at the end of each policy period. But since the policies usually provide for notice to the insurer within thirty days of the employment of a sub-contractor brought thereunder, it seems doubtful whether the stop-loss insurer would allow the remuneration of employees of sub-contractors to be included after injury to such an employee if not originally included in the advance estimate. In making this determination in advance a cautious employer would doubtless include employees whom he would not have to include in his payroll for workmen’s compensation premiums. This would of course increase his costs. If not cautious, the employer would find himself without the stop-loss insurance as well as without the claims service in the case of such employees of contractors and sub-contractors. We have indicated enough to show that the question of liability to employees of contractors and sub-contractors involves many highly technical considerations. In the case of business making use of contractors or sub-contractors, these observations should weigh heavily against the advisability of the stop-loss plan.

The provision in the usual stop-loss insurance policy that the insurance carrier will reimburse the employer upon receipt of a monthly or quarterly statement showing excess losses paid for the period is highly ambiguous. Would excess losses paid one month, which were balanced by savings during other months, entitle the employer to reimbursement? Indeed, would excess losses one quarter be subject to deductions by savings during the balance of the policy year? The policies as at present drawn are not clear in this respect. It would not be surprising if the insurance company involved should interpret the doubtful language in its own favor. This would cause litigation further increasing the employer’s costs.

Another feature of the stop-loss insurance makes the protection furnished thereby inadequate. The policy generally provides that,

66 For, in general, it is only where the contractor or subcontractor carries on the work of the principal that his payroll need be included in the audit upon which workmen’s compensation premiums are determined. On the other hand, the scope of possible common-law liability would include all employees of contractors or subcontractors which the principal might injure negligently.

67 The policies examined are so worded with alternative periods for loss statements. Whether one or the other of such periods or the entire policy period should be considered in arriving at loss is not stated.
where an injured employee is receiving periodical payments, the employer must make a claim against the insurer within two years after the accident and the insurance company may redeem further payments by a lump sum payment fixed by an actuary or appraiser. The agreement between the employer and the injured employee generally provides for payment during the employee's disability. It may thus well be that the lump sum fixed by the actuary or appraiser is insufficient to take care of future payments to be made by the employer. Future disability is not always easy to estimate. It will be especially hard for an employer who may have no special training in such matters to tell whether or not the lump sum offered is sufficient. Though the actuary or appraiser be mutually appointed by the employer and the stop-loss insurance company, he may make errors. These might serve to increase the employer's costs. There is no like provision in the usual workmen's compensation policy relieving the insurer from payments in the very type of case that may prove the most dangerous.

That a dispute between the employer and the stop-loss insurance company is a not unlikely occurrence is apparent from the foregoing. In the event of such a dispute there are several legal problems that would beset the attorney for the employer. The stop-loss policy in its present form has an arbitration clause. In its simplest form, arbitration is not always speedy and summary. Where, as here, the employer is dealing with a foreign or alien company there are further difficulties. Even if the place where arbitration is to be had is included in the contract, what laws will the arbitrators follow? The provisions that the insurance company will accept service in the event of litigation in a particular city in this country and will upon due notice designate an attorney for the acceptance of service may be insufficient to give the courts of the state in which such city is located jurisdiction. Compliance with the arbitration provisions may be conditions precedent to suit. If jurisdiction is had in a court in this country what law will be applied? The policy is signed outside the United States. Presumably it is delivered here. If the law of the state where the employer's

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68 This provision is generally referred to as a “commutation clause.”
70 Conflict of Laws Restatement, § 81, comment c (1934): “Whether an acceptance or waiver of service is a consent to the exercise of jurisdiction depends upon the fair interpretation of the language and conduct of the defendant.”
71 If the policy is sent directly by mail to the assured or to a broker, the place of contracting—the law of which determines the validity of the policy—would be the
business is conducted is applied,\(^\text{72}\) the unauthorized policy may be illegal and void.\(^\text{73}\) If it is held nevertheless binding on the insurer,\(^\text{74}\) the judgment obtained would merely furnish foundation for a suit abroad, if assets of the defendants could not be found within the state.\(^\text{75}\) Thus, even if the foreign law is applied, this would not end the matter, as the question of enforcing judgments might still arise. If, on the other hand, jurisdiction could not be established here, the employer would have to resort to a foreign suit in the first instance. This would be a costly process. Even in the foreign suit the foreign court might allow the defense that the contract was illegal according to the law of the place of contracting.\(^\text{76}\) These are difficult questions of law, neither

law of the place where the policy is posted. \textit{Conflict of Laws Restatement}, §§ 317, 319 (1934). Where, however, it is delivered by the agent of the company, the law determining its validity would be that of the place where it was delivered to the assured. \textit{Conflict of Laws Restatement}, § 318 (1934). The cases, however, are far from uniform, especially where a policy is delivered through a broker. In this situation many courts treat the place of contracting as the place where the broker delivers the policy and apply its law to the determination of the validity of the contract. Sun Ins. Office, Ltd. of London v. Mallick, 160 Md. 71, 153 A. 35 (1931) (distinguishing the \textit{Restatement} rule on the ground that the broker was the agent for the insurance company in delivering the policy and collecting the premiums).

\(^{72}\) See note 71, supra. Some cases apply the law of the place of performance in determining the validity of insurance policies. See Sovereign Camp of Woodmen of the World v. Havas, 217 Ky. 846, 290 S. W. 690 (1927).

\(^{73}\) Thus Massachusetts has a statutory provision that a policy “the purpose of which is to insure an employer in whole or in part against liability on account of injury or death of a employee, other than a domestic servant or a farm laborer, shall be void unless it also insure the payment of the compensation provided for by this chapter.” Mass. Acts (1935) c. 425, being § 54A of the workmen’s compensation act. In Colorado a contract of insurance by a foreign company, the risk of which has not been approved by a duly licensed resident agent as required by statute, is void. United American Ins. Co. v. Union Fire Ins. Co., 82 Colo. 72, 257 P. 246 (1927). Space does not permit detailed analysis of the various laws regulating insurance companies. It is sufficient to note that stop-loss insurance is frequently written by companies not authorized to do business in the state in question.

“And in some states the statutes expressly declare that contracts of insurance entered into by companies which have not complied with the provisions relating to the transacting of an insurance business in the state shall be unenforceable.” 1 Couch, \textit{Cyclopedia of Insurance Law} 576-577 (1929).

\(^{74}\) Many states do not allow an insurer to set up the illegality of the contract to avoid liability on a policy. 1 Couch, \textit{Cyclopedia of Insurance Law} 573-574 (1929).

\(^{75}\) \textit{Conflict of Laws Restatement}, §§ 433, 434 (1934).

\(^{76}\) “If the statutes expressly declare the contracts of foreign corporations, which have not complied therewith, unlawful and void and of no effect, such invalidity affects the contract in other jurisdictions, including the state in which the insurer was organized.” 1 Couch, \textit{Cyclopedia of Insurance Law} 578 (1929).
well nor uniformly settled. At least, they would cause delay and expense to the employer; at most, they would make stop-loss protection illusory.

**Remedies**

We submit that the stop-loss plan fails to secure fair and equitable treatment to employees and offers many possibilities of harm to employers. Under it many injuries will be uncompensated or inadequately compensated. Socially this is undesirable. A good deal of compulsion was originally intended in order to make employers come under the so-called elective workmen’s compensation acts. In some instances this has failed to work out as intended. What, then, is the remedy?

The gap would be closed if all workmen’s compensation acts were made compulsory. We believe that this could be done under our constitutional framework. Fictions have their place in developing law; but when the development has been achieved and the result attained, the fiction should be frankly recognized and if no longer serviceable discarded. That workmen’s compensation acts are most appropriate for industries possessed with a special hazard is a fiction of just such a character. Where the hazard is less, the loss would be less; if the hazard is there at all, injuries caused thereby should be compensated.

There are various practical difficulties incident to the adoption of a compulsory workmen’s compensation act. They are all based upon the primary premise that it must be possible to do business under such an act. That is, compliance with the act must be made reasonably

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77 See note 24, supra.

78 Ward & Gow v. Krinsky, 259 U. S. 503, 42 S. Ct. 529 (1922). See Horowitz and Bear, “Would a Compulsory Workmen’s Compensation Act Without Trial by Jury be Constitutional in Massachusetts?” 18 Bost. Univ. L. Rev. 1 (1938) (in which the authors advance the opinion that such an act would be constitutional). See also note 18, supra.

79 Arizona Copper Co. v. Hammer, 250 U. S. 400 at 429, 39 S. Ct. 553 (1919): “It hardly is necessary to add that employers in non-hazardous industries are in little danger from the act, since it imposes liability only for accidental injuries attributable to the inherent dangers of the occupation.” Holmes, J., concurring, said (p. 432): “A man employs a servant at the peril of what that servant may do in the course of his employment, and there is nothing in the Constitution to limit the principle to that instance.”

In Massachusetts there is now pending a bill that would require all employers to adopt the workmen’s compensation act. See Mass. Senate Bill No. 168 (1938). Another bill would make failure to secure the insurance necessary for adopting the act serious and wilful misconduct, entitling the employee to double compensation from the employer. Senate Bills Nos. 170 and 171.
possible to everyone. All of the seventeen states which may now be classified as having compulsory acts recognize this and provide for satisfaction of the requirements of the law either by proof of financial responsibility or by state fund insurance, or provide that insurance companies must accept all lawful risks offered. These alternatives incident to compulsory workmen's compensation acts involve economic and political considerations of a special nature. The writer cannot do more than point out a few of these. Financial responsibility cannot secure the detached point of view possessed by an insurance company. Without a deposit of funds or securities it cannot assure complete solvency. Even with such a deposit it may give insufficient protection to employees in the event of catastrophic losses. State fund insurance, even when competitive in name, involves possibilities of increased costs and inefficient management due to political meddling. The questions there are in the main similar to those arising in other cases of public ownership. The taxpayers may have to foot the eventual bill. Requiring all insurance companies doing business in a particular state to take all lawful risks offered involves the establishment of official rating bureaus. It may be objected to by some insurance companies. On the other hand, it offers insurance companies a chance to have official sanction for much of their accident prevention work. On the whole, this last is probably the best of the necessary incidents to compulsory workmen's compensation acts.

Even though a particular state be unwilling to adopt a compulsory act, there still remains much that it can do to prevent uncompensated personal injuries caused by industry. The elimination of the evils arising under stop-loss plans can be accomplished by putting more teeth in the liability of employers who do not elect to come under the workmen's compensation act. Besides abolishing the common-law defenses in the case of employers who reject the act, a legislature may provide that such an employer is also liable to employees in an amount


81 The rates must be reasonable. Apparently the penalty for non-compliance with the statute could constitutionally involve only suspension of the right to do business and could not result in a contract of insurance to which the insurance company did not in fact assent. Employers' Liability Assur. Corp. v. Frost, 48 Ariz. 402, 62 P. (2d) 320 (1936) (construing an Arizona statute which provided "Such corporation or association shall write and carry all risks or insurance for which application may be made to it which are not prohibited by law"). See Opinion of the Justices, 251 Mass. 569, 147 N. E. 681 (1925) (involving this principle in the Massachusetts Compulsory Insurance Act relating to motor vehicles).
equal to compensation if elected.\(^8^2\) While from an employer’s point of view such an act is compulsory in effect, it still retains elective features as to employees (although, of course, employees rejecting the act in advance would be met by the common-law defenses). Whether or not such an act would be valid without providing a choice as to compliance by proof of financial responsibility, state fund insurance, or compulsory acceptance of risks by insurance companies is somewhat of a question.\(^8^8\) In the personal opinion of the writer it would be valid, for the discrimination against the uninsured employer is only in degree different from that prevailing in the usual abolition of the common-law defenses. In effect, such employer becomes a self-insurer for workmen’s compensation benefits which may be claimed at the employee’s election.

The evils incident to stop-loss plans may be reached directly without changing the workmen’s compensation acts where such changes are deemed inadvisable. We have seen that an essential feature in the agreement between the employee and the employer under the stop-loss plan is the clause in such agreement releasing the employer from claims for the injury suffered. If the release were invalid, the whole plan would fail. There are many possibilities which we have already examined by which the employee’s acquiescence in the agreement might be obtained through fraud. However, the agreement is usually care-

\(^8^2\) Such a provision is in effect in Florida. Fla. Gen. Laws (1935), c. 17481, § 10. A bill to enact such a provision is now pending in Massachusetts. Senate Bill No. 171 (1938). The bill pending in Mississippi which would enact a workmen’s compensation act for that state contains a similar provision. This provision should be carefully distinguished from provisions like those in the New Hampshire act which would allow the employee to elect \textit{after an injury} whether to proceed at common law or under the workmen’s compensation act. N. H. Pub. Laws (1926), c. 178, § 11. Provisions of the latter type mentioned are indefensible from a rational point of view, as the object of workmen’s compensation acts is to remove the question of fault by making industrial injuries a cost of doing business. The Florida provision just referred to, on the other hand, is a form of penalty, like the abolition of the common-law defenses, directed as a means of coercion toward the socially desirable end against employers who do not “elect” to operate under workmen’s compensation acts.

\(^8^8\) For instance, under the Florida Workmen’s Compensation Act of this type the employer can elect the act by filing proof of financial responsibility. Fla. Gen. Laws (1935), c. 17481, § 38. We have already pointed out the objections to self-insurance. Open to less objection is the provision also found in the cited Florida act allowing election upon deposit of an indemnity bond or securities if required by the Insurance Commission as a condition for authorization of direct payment of compensation benefits (e.g., self-insurance). Even with this safeguard, there is the danger that a particular employer could indulge in more practices harmful to an employee than could an insurance carrier.
fully drawn so as not to show this on its face. The burden of proving fraud in this situation in order to set aside the release would normally be on the employee. Such a burden is not easy to sustain. Nevertheless, the legislatively intended penalty, against employers not under the workmen's compensation act, of liability to common-law actions with the defenses removed would be ineffectual if employers could obtain agreements of this nature under the guise of paying workmen's compensation benefits. The danger of this type of overreaching by an employer or those acting in his interest could be greatly mitigated by the creation of a statutory presumption of such a nature as to require the employer to show affirmatively that the agreement was made with full disclosure of the facts to the employee. Such a presumption would be valid against attack on constitutional grounds if there were a rational connection between the fact proven and the fact presumed.

The precise scope of the presumption would have to be worked out. A few suggestions may be made. It should be limited in its application to contracts between employers and employees in businesses or occupations subject to the workmen's compensation act of the particular state. Releases for claims based on personal injuries arising out of and in the course of employment could be made presumably fraudulent where the consideration on the part of the employer amounted to a periodic payment based on a percentage of the employee's wages. It could be provided that the presumption could be rebutted by facts showing fair dealings. The general idea is to place the employer in this type of situation in a position analogous to that of a fiduciary dealing with his cestui. Dealings between an employer and injured employees

84 Florida East Coast Ry. v. Thompson, 93 Fla. 30, 111 So. 525 (1927); Walsh v. Fore River Shipbuilding Co., 230 Mass. 89, 119 N. E. 680 (1918).

85 Ibid.

86 2 Wigmore, Evidence, 2d ed. § 1356 (1923), expresses some doubt whether a rebuttable presumption must be tested by a standard of rationality. It is now settled, however, that a statute creating a presumption that is arbitrary or operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Manly v. State of Georgia, 279 U. S. 1, 49 S. Ct. 215 (1929); Western & A. R. R. v. Henderson, 279 U. S. 639, 49 S. Ct. 445 (1929). Where a presumption does no more than create a burden to produce evidence to the contrary and cannot itself then be weighed as evidence, it may more readily be viewed as rational. Atlantic Coast Line R. R. v. Ford, 287 U. S. 502, 53 S. Ct. 249 (1933). Such provisions in some workmen's compensation acts creating prima facie presumptions of negligence of employers who do not elect the act are valid. Lykes Bros. S. S. Co. v. Esteves, (C. C. A. 5th, 1937) 89 F. (2d) 528.

87 The strict liability of a trustee dealing with the beneficiary has been expressed as follows: "The trustee in dealing with the beneficiary on the trustee's own account is under a duty to the beneficiary to deal fairly with him and to communicate to him all
are necessary where the employer is not under workmen's compensation. It should be recognized, however, that the parties are not dealing at arms length and that protection of the employee is necessary if he is not to be victimized by stop-loss plans.

Other provisions which might be made to protect employees from stop-loss plans can be suggested. Policies of insurance purporting to insure an employer against liability to an employee (in situations which would normally fall within the workmen's compensation law) could be rendered void by statute unless they also insure the payment of workmen's compensation payments. More effectively, such policies could be treated as including workmen's compensation insurance. This last would not be greatly different from other statutory provisions relating to standard policies. It could apply to all policies issued, delivered, or performable in the state. This would strike at the stop-loss plans from one of the necessary incidents of such schemes, viz., the stop-loss insurance.

Furthermore, the common-law liability of the employer who operates outside the workmen's compensation act could be increased. The doctrine that the employer must provide a safe place to work has never

material facts in connection with the transaction which the trustee knows or should know. Trusts Restatement, § 170 (2) (1935). Other fiduciary relationships may raise a presumption of fraud and require the fiduciary to show the fairness and good faith of the transaction. Connor v. Harris, 258 Mich. 670, 242 N. W. 804 (1932) (sisters). This has been applied to various intimate relationships, especially where one in such a relationship has drafted or advised as to the terms of a written instrument. 5 Wigmore, Evidence, 2d ed., § 2503 (1923). The presumption herein advocated could be rebutted by showing such facts as that the employee was represented by attorney or was advised of the facts that his employer was not under the workmen's compensation law and of his common-law rights.

Massachusetts has such a statute. Mass. Acts (1935), c. 425, adding § 54A to the workmen's compensation act.

This would make it inadvisable for the issuing company to write stop-loss insurance at other than workmen's compensation rates.

Under standard policy provisions, policies in other than the standard form are often construed as including the standard provisions. 1 Couch, Cyclopaedia of Insurance Law, §§ 72, 72 a (1929).

A state cannot constitutionally prescribe the terms or control the construction and effect of contracts made and to be performed beyond the borders of that state. 1 Couch, Cyclopaedia of Insurance Law, § 245 (d) (1929). A state may, however, alter its conflict of laws rule as to provide that contracts of insurance payable to residents of the state made by companies doing business therein should be governed by the laws thereof. Metropolitan Life Ins. Co. v. Worton, (Tex. Civ. App. 1934) 70 S. W. (2d) 216. But quaere if the insurance company is not "doing business" in the state. Boseman v. Connecticut General Life Ins. Co., 301 U. S. 196, 57 S. Ct. 686 (1937).
been extended to its logical conclusion.\textsuperscript{92} It could be further amplified in the employee's interest.\textsuperscript{93} It represents the fundamental social concept behind workmen's compensation.

The liability of an employer who fails to elect the workmen's compensation law could be increased by changing the burden of proof as to negligence in actions by employees against such employers. Limited to injuries and persons otherwise within the act, this type of provision would go far toward creating universal election of workmen's compensation. The mere happening of an injury in this situation could be made prima facie evidence that it was caused by negligence for which the employer was responsible.\textsuperscript{94} A few jurisdictions now have laws to this general effect providing that, in actions for personal injuries by employees against employers who have rejected the workmen's compensation law, it shall be presumed that the injury was the direct result of the negligence of the employer.\textsuperscript{95} Whether or not such statutes

\textsuperscript{92} It is generally held that the employer is under no duty to inspect the working conditions for defects reasonably discoverable by the employee. This has been held unchanged by the abolition of the defense of assumption of risk in actions against employers rejecting the workmen's compensation act. Newbern v. Great Atlantic & Pacific Tea Co., (C. C. A. 4th, 1934) 68 F. (2d) 523; Maher v. Wagner, 62 S. D. 227, 252 N. W. 647 (1934) (simple tool doctrine applied).

\textsuperscript{93} The cases cited in note 92, supra, are based upon the theory that the employer is not guilty of actionable fault. The employer's duty to provide a safe place to work could be further extended along the line earlier adopted by various employer's liability acts. These acts generally allow recovery to an employee injured by "defects of the ways, works or machinery" used in the employer's business which the employer negligently caused or negligently failed to remedy. See, for example, Mass. Gen. Laws (Ter. Ed. 1932), c. 153, § 1. The liability herein suggested could be absolute liability for certain or all defects in the place where the employee worked. It would, of course, apply only to employers who, subject to a workmen's compensation act, nevertheless reject the act.

\textsuperscript{94} Massachusetts has pending House Bill 1492 (1938), which would amend the provision in the workmen's compensation act dealing with actions by employees against employers who have not elected the act by providing that "The mere happening of such injury [e.g. injuries which would otherwise be compensable] shall be prima facie evidence that such injury was caused by the negligence of the employer. . . ."

\textsuperscript{95} California and Iowa. The California provision is in addition to a provision requiring employers to secure the payment of compensation and allowing common-law actions against employers who do not so secure compensation payments. Cal. Stat. (1937), c. 90, §§ 3700, 3706. "In such action it is presumed that the injury to the employee was a direct result and grew out of the negligence of the employer, and the burden of proof is upon the employer to rebut the presumption of negligence." Cal. Stat. (1937), c. 90, § 3708. The presumption thus created is apparently of such a nature that it in itself amounts to evidence and may be weighed as such. Grady v. Canfield, 9 Cal. App. (2d) 341, 49 P. (2d) 402 (1935). A like provision in the elective Iowa act was sustained by the United States Supreme Court. Hawkins v. Bleakly, 243 U. S. 210, 37 S. Ct. 255 (1917). The reason for treating such pre-
raise a presumption of negligence on the part of persons for whose con-
duct the employer is responsible under the doctrine of respondeat
superior is hard to determine. They might well be interpreted to in-
clude this, or, better still, drawn with this in mind. The establish-
ment of such presumptions affecting the burden of proof has been
held within the constitutional power of a state. Analytically, such a
presumption would differ but little from the familiar res ipsa loquitur.
Where, as in this situation, one party is better able than another to
obtain necessary evidence it is only fair that the burden of so
doing be placed on him. Such practical treatment of the difficul-
ties besetting an employee suing his employer is neither arbitrary nor
unreasonable. That it would incidentally cause more employers to
comply with the workmen’s compensation act is a desirable result.

We have examined the stop-loss plan and the mischief incident to
such plans and have advanced a few ideas as to possible remedies. These
plans must be ended before the problem of the uncompensated indus-
trial injury can be considered fully solved.

Assumptions liberally is set forth in Lykes Bros. S. S. Co. v. Esteves, (C. C. A. 5th,
1937) 89 F. (2d) 528 at 530 (involving presumption in Puerto Rico workmen’s
compensation act), in which the court pointed out that it relates to a situation where
“the state in the exercise of its police power may impose absolute liability upon the
employer regardless of the existence of actionable negligence.”

The general duty of the master to provide a safe place to work is generally con-
sidered as non-delegable. Agency Restatement, § 492 (1933). Even where the
only liability is that imposed because of the negligence of another servant, the pre-
sumption might be viewed as covering this, as a master’s liability for the tortious con-
duct of a servant within the scope of his employment is part of the master’s general
liability for torts. Agency Restatement, c. 7, “scope note,” and § 219 (1933). On
the other hand, statutes creating a presumption of due care on the part of a person
injured have been held not to extend to the agents or servants of such person. Bullard

The negligence presumed could be that for which the employer was legally
responsible.

Schneider, “The Presumptive Rule of Negligence or When Do the Facts
Speak,” 13 Bost. Univ. L. Rev. 50 (1933).
Lykes Bros. S. S. Co. v. Esteves, (C. C. A. 5th, 1937) 89 F. (2d) 528;