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Bungled Inspections: A Polemic Against Insurer Liability (With Special Reference to Boilers)

By Michael Sean Quinn*

Most industrial insurance companies inspect what they insure. They want to determine and monitor whether the property they insure is an acceptable risk, and they want to reduce their loss potential. Most of these inspections are both thorough and perceptive.

Should an insurer be legally liable if it blows one of these inspections? The answer is no. The reason is simple: Insurers inspect for their own benefit and not for the benefit of anyone else. Therefore, no one has a right to rely on them. For this reason, sound public policy dictates that insurers be immune from such liability, at least as a rule.[1] Unfortunately, the case law imperfectly articulates this policy, and there are doctrinal glitches as well. In particular, tensions exist in Texas law which need resolution. Case-by-case adjudication will not suffice. Therefore, the legislature should clarify and secure the position of inspecting insurers.

Botched inspections fall into many fact patterns. A review of several typical ones, plus some commentary, will provide insight into why insurers should not be legally liable for their inspections, why cases and doctrine inadequately express principle and policy, and why legislation should support common law. For each "hypo," assume the injured party sues an insurance company named "XYZ" which has inspected a business called "ABC."

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SOME PARADIGMS

Case No. 1. XYZ issues workers' compensation insurance to ABC. XYZ's inspector does not observe that a barrier guard on a die press violates OSHA regulations. Even though his inspection manual calls for him to examine such machines, he does not look at this one. Subsequently, an operator of that die press loses four fingers as a result of the barrier guard's failure to keep him from reaching inside the machine.[2]

Case No. 2. XYZ issues a general comprehensive liability policy to ABC. Even though his manual requires him to look for corrosion, XYZ's inspector fails to realize an electrical conduit he examined has corroded and the insulation surrounding the wire inside has likewise worn away. Shortly after the inspection, the exposed wire electrocutes a business invitee of ABC.

Case No. 3. XYZ issues a fire policy to ABC. XYZ's inspector notices, but fails to mention in his report, that ABC keeps volatile and flammable liquids in uncovered vats in the basement of a wooden storehouse on its premises. Shortly after XYZ sends ABC its report, the vats ignite, burning the building to the ground. The fire spreads to ABC's factory and office building. ABC sustains not only this property loss but an interruption in its business. As a result, ABC loses profits and secondary business opportunities.

Case No. 4. Same facts as Case No. 3, except the fire injures a workman employed by a firm which shares ABC's office building.

Case No. 5. XYZ issues boiler and machinery insurance to ABC. XYZ's inspector discovers that low water cut-off controls of a covered firetube steam boiler do not work. He realizes that this is a potentially very dangerous situation. He mentions the problem to ABC management but fails to emphasize the gravity of the problem. Also, he tells them that ABC may wait five days to repair the problem, if the boiler is carefully watched all the time. The day after the inspection, the boiler explodes, killing a workman.

QUERIES

Each of these cases involves distinct facts, somewhat different law, and varying narrow, particular questions. Among the myriad of particular questions are these. Are workers' compensation carrier inspections immunized by state workers' compensation law?[3] Should the law treat inspections by liability carriers and property carriers similarly? Should the type of injury make any difference to the liability of the inspecting carrier? For example, should it make any legal difference whether there is personal injury or damage to property only? Does it matter whose property is damaged? Should the insured's lost business opportuni-

ties be covered? What about profits lost by noninsured, such as the business next door in case No. 4?[4]

Why should an inspecting insurer be liable when really the negligence of its insured produces injury? How can an insurer be liable when it does not actually make the situation worse? Does it matter whether the missed problem results from not looking (nonfeasance) or not seeing (misfeasance)? Is insurer negligence negated if the insured has its own safety program?

What is an inspection anyway? Does an inspection include a routine report to the insured? Does it include a routine report to a public authority? Is negligent reporting simply part of the overall problem of negligent inspection, or is it conceptually distinct? Is not saying as bad as or worse than not looking or not seeing?

And what is the impact of statutory law on insurer inspections? For example, if inspectors for boiler and machinery carriers act as surrogates for state boiler commissions, does this affect insurer liability? Does it matter if the private inspectors have fewer legal powers?

Finally, cutting across all these particular questions is a broader issue. How would XYZ's liability be affected if its insurance policy contained language either disclaiming liability for negligently conducted inspections or disclaiming any intent either to inspect for safety or to benefit the insured?

Three truths form part of every sensible answer to all these questions. First, insurers uniformly inspect for their own benefit. Second, someone else always creates the problems which occasion suits for negligent inspection. That someone else is usually the insured. Third, insurers never worsen that problem.

PRACTICALITIES

The problem of negligent insurer inspections is at least a hundred years old. The Hartford Steam Boiler Inspection and Insurance Company introduced boiler insurance to the United States in 1866; within thirteen years it lost its first negligent inspection case.[5] Through the late 1800s and early 1900s, courts held HSB and other boiler and machinery carriers liable.[6]

In the early part of this century boiler and machinery carriers realized they should include language in their policies structuring and limiting the scope of their inspections and, they hoped, their liability. These insurers also intended thereby to notify insureds that inspecting carriers were not looking for safety-related hazards but were looking after their own risk-analysis concerns. Many other types of insurance policies now contain similar language.

Inspection disclaimers (IDs) have met with some success. In the last quarter century, courts have frequently honored these disclaimers and used no-duty theories to exonerate insurers.[7]

The pattern of reported cases is misleading, however, because many of the cases reflect summary judgments in favor of insurers.[8] Sometimes, when exposure is great or the facts are unattractive, if inspecting insurers lose a motion for summary judgment, they settle. Reported cases cannot reflect such settlements. To adapt somewhat the felicitous phrase of Justice Richard Neeley, insurers find themselves bargaining in the long shadow of impending jury trials.[9]

This situation is a chronic problem in Texas, where courts demonstrate reluctance to grant summary judgment on no-duty theories in negligence cases.[10] The Texas Supreme Court recently provided more impetus to the tendency in *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307 (Tex. 1983). In that case, the court reversed a no-duty summary judgment granted to an employer which sent a drunken employee home. While on a public roadway, the employee killed two people. The issue was: Did Otis have a duty to be more careful in dealing with a drunken employee?

Citing *Colonial Savings*, the court stated, "One who voluntarily enters an affirmative course of action affecting the interest of another is regarded as assuming a duty to act and must do so with reasonable care." *Id.* at 309. The court suggested that the ramifications of this broad rule are extensive and hence that the concept of duty should not be understood narrowly. The court pointed out that to see whether there is a duty, a number of factors must be reviewed, including "risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury and the consequence of placing the burden on [the actor]." *Id.* The precise action of the supreme court was to send the case back to the trial court to get jury findings on whether Otis acted in a reasonable and prudent manner. Given *Otis*, it is difficult to see how any court can now grant a no-duty summary judgment to a defendant in any relatively novel negligence action.[11]

Thus, the uncertainties of case law developed by reluctant courts have created more than a smattering of unjust results and thereby substantial and expensive economic inefficiency. (Plaintiffs attempting recovery for negligent inspection invariably seek judgments in the millions, and the cost of defending these technical cases is often astronomical.) Because insurers settle some large, legally unmeritorious claims based on the fear factor alone, justice requires that the liability potential of inspecting insurers be clarified authoritatively. Only statutes can do this. A reasonable component of "tort reform," therefore, is the legislative immunization of inspecting insurers.

RESTATEMENT SECTIONS 323 AND 324A

In recent years, insurer inspection liability has been governed by two sections of the Restatement (Second) of Torts (1965). Section 323 governs cases in which the insured is damaged, while section 324A governs injuries to third parties. Section 323, entitled "Negligent Performance of Undertaking to Render Services," states as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
> (a) his failure to exercise such care increases the risk of such harm, or
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Section 324A, entitled "Liability to Third Person for Negligent Performance of Undertaking," states as follows:

> One who undertakes, gratuitously, or for consideration, to render services to another which he should recognize as necessary for the protection of a *third person* or his things, is subject to liability to the *third person* for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
> (a) his failure to exercise reasonable care increases the risk of such harm, or
> (b) *he has undertaken to perform a duty owed by the other to the third person, or*
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking. [Emphasis on differences added.]

These two sections are almost the same. First, both require an undertaking. Second, both require that the undertaker recognize that his undertaking is necessary for the protection of something. In the case of section 323, the protection is for the undertakee's person or property, whereas in section 324A the undertaker must recognize that his undertaking is necessary for the protection of a third party or his property. Third, both section 323 and section 324A require that the undertaker exercise reasonable care in relation to his undertaking. Section 323 requires such care in *performing* the undertaking, whereas 324A requires such care in *protecting* the undertaking.

In addition to these three virtually identical elements, both sections have similar fourth elements with disjunctive components. In section 323, the fourth element is proved if *either* 323(a) or 323(b) is proved, and in the case of 324A, the fourth disjunctive element is proved if 324A(a) or 324A(b) or 324A(c) is proved. The components of the disjunctive element of 323 and 324A closely resemble one another. It is proved on either section if the undertaker increases the risk of harm *or* if the victim suffers because of reliance upon the undertaking. On 324A, the undertaker may also be liable if he undertakes to discharge a duty which his undertakee owes the injured third person.

Sections 323 and 324A are crucial for understanding negligent inspection decisions. Nationwide, almost uniformly, courts are using 323 to structure such decisions involving property damage,[12] and 324A for decisions involving personal injury.[13] The cases generally *appear* to take the elements of 323 and 324A very seriously.[14] We shall see that this is not completely true. Few Texas courts have employed these sections.

Texas Background

Under classic Texas common law, one was not liable for negligence in the absence of affirmative conduct increasing the risk of harm. For example, in *Buchanan v. Rose*, 138 Tex. 390, 159 S.W.2d 109 (1942), *the* authoritative case on interloper liability, the defendant lawfully drove his truck over a bridge. Its rear wheels crushed the bridge, making it dangerous to traffic. Someone informed the driver that his truck had broken the bridge and asked him to put up warnings. The trucker said he didn't have time and drove on. Six days later the plaintiff was severely injured. He conceded that the defendant was not negligent in damaging the bridge.

Therefore, as the court said, "[i]f the driver of the truck was negligent at all, it was because of his failure to do something — to give warning of the broken bridge." *Id.* at 110. The supreme court solved this issue in terms of the existence of a duty. It held that one who non-negligently causes a defective object to break down or locates such a defect is under no duty to warn others about the condition of the object. *Buchanan* implies that an insurer that merely inspects a defective object has no duty to warn.

One modern Texas appellate court has applied the doctrine of *Buchanan* to an insurer inspection. Curiously, however, it did not cite section 323. In *Brownstone Park, Ltd. v. Southern Union Gas Co.*, 537 S.W.2d 270 (Tex. Civ. App. — Austin 1976, writ ref'd n.r.e.), an apartment building owner sued the gas company over a boiler explosion. The gas company sued Hartford Steam Boiler, the boiler and machinery carrier, for negligent inspection. The jury found no negligence as to HSB and Southern Union Gas appealed. The court of appeals overruled Southern Union's "no negligence" point stating: "We are at a loss to understand what duty Hartford owed Southern Union Gas Company, or even to Brownstone Park. Its voluntary inspection of the boiler was for the purpose of determining its insurability and, as such, was for the benefit of Hartford only."[22] *Id.* at 274. This holding silently embodies the rule

of section 323, as glossed by the courts. After *Brownstone Park*, Texas courts turned explicitly to the *Restatement.*

Section 323

In 1976 the Texas Supreme Court adopted section 323 in *Colonial Savings Ass'n v. Taylor*, 544 S.W.2d 116 (Tex. 1976). There, an owner of two houses damaged by fire sued his mortgagee for the uninsured loss of one of the houses. Colonial Savings had told Taylor it would obtain insurance for the property. After the fire, Taylor discovered that the burned home was uninsured and sued the bank. His theory of recovery was that one who voluntarily undertakes affirmative conduct for the benefit of another has a duty to exercise reasonable care.

The court endorsed the established Texas rule[15] and then "codified" it by expressly adopting 323. In applying that section, the court paid particular attention to the requirement of 323(b). It held that Taylor had relied on the representation of Colonial Savings that it would procure insurance; this fact played a prominent role in the court's finding of liability.

In Texas, section 323 has been overtly applied to a negligent inspection allegation only once. In *Philadelphia Mutual Manufacturers Insurance Co. v. Gulf Forge*, 555 F. Supp. 519 (S.D. Tex. 1982), a boiler and machinery insurer, PMMI, inspected the premises of Gulf Forge one day before an explosion destroyed Gulf Forge's boiler and diminished its profits. PMMI inspected Gulf Forge's boiler pursuant to an insurance contract which contained the standard ID:

> The Company shall be permitted but not obligated to inspect, at all reasonable times, any Object designated and described in a Schedule forming a part of the policy. Neither the Company's right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking, on behalf of or for the benefit of the named insured or others, to determine or warrant that such Object is safe or healthful.

Id. at 526.

Factory Mutual Engineering Association, PMMI's inspection agency, routinely distributed Loss Prevention Reports to Gulf Forge which prominently displayed the following language:

> This report is intended to assist you in reducing the possibility of loss to the property insured with the Factory Mutual Companies by bringing to your attention hazards and lack of protection which need prompt consideration to prevent such loss to property. It is not intended to imply that all other hazards and conditions are under control at the time of this inspection. The liability of the Factory Mutual Companies is limited to that covered by their insurance policies. No other liability is assumed by reason of this report as it is only advisory in nature and the final decisions must be made by you.

Id.

On the basis of these IDs, the trial court determined that PMMI had not undertaken to render services to Gulf Forge and hence that Gulf Forge failed to prove the first element of section 323.

In *Gulf Forge*, the court carefully linked 323 to *Colonial Savings* and *Buchanan*. Thus, *Gulf Forge* could constitute a crucial case connecting the law of the *Restatement* to the past. However, the *Gulf Forge* court held that one undertakes to render services to another only if he intends to perform those services solely for the benefit of the undertakee. Moreover, it attributes this doctrine to *Colonial Savings*. *Id.* Thus, under *Gulf Forge* one does not undertake to render services to another if one intends to benefit both the other and oneself.

This holding is very unfortunate. It is contrary to reason, and *Colonial Savings* stands for no such proposition. Thus, *Gulf Forge* has partially undermined its own precedential value. This may be the reason *Gulf Forge* is not often cited. Indeed, in the most recent supreme court case on negligent inspection, the court makes no mention of *Gulf Forge* at all.[16]

That supreme court decision illustrates the ambiguous position of sections 323 and 324A in Texas jurisprudence. In *City of Denton v. Van Page*, 701 S.W.2d 831, 833 (Tex. 1986), the plaintiff-appellee suffered burns when fire broke out in a storage building near his residence. On the evening of his injury, Van Page heard noises in this building, went to investigate, and was hurt. Someone had attempted to burn this building several times before. On each occasion, the local fire marshal had investigated and filed a report. Van Page proceeded against the city of Denton under the Texas Tort Claims Act. His theory was that the fire marshal was negligent in inspecting the building and in failing to warn him.

The supreme court majority held that the city could be liable only if a private person would be liable for the same conduct. The court then observed that the city fire marshal entirely lacked control over the property and never "assumed a duty to discover any dangerous condition existing on the premises." *Id.* at 835. For this reason, the majority held that the city of Denton owed Van Page no duty and therefore could not be liable to him.

Although *Van Page* arose under the Texas Tort Claims Act, the decision has significance here because the *ratio decidendi* formulates doctrine relevant to inspecting in-

surers. Significantly, the supreme court majority avoided any reference to section 324A. Perhaps the court wished to adopt a doctrine that would impose a more onerous burden upon plaintiffs than 324A does. The majority of the supreme court finds liability only when the inspecting agency has contracted to find *and* remedy defects. *Id*. This is certainly harder on plaintiffs than the *Restatement*.

The holding in *Van Page* is too strong. First, an agency which contracts to inspect for defects may be liable for negligent inspection, even if it does not contract to remedy those defects. Second, it is not clear that a contract should be required for liability.[17] Sections 323 and 324A contain the better-reasoned position, since they allow for predicating liability on gratuitous promises.

Concurring in *Van Page*, Justice Kilgarlin — joined by Justice Ray — analyzed the case in terms of section 324A, which they noted was broader than the majority holding. Justice Kilgarlin observed that the city had undertaken to perform an inspection on the storage building and had not exercised reasonable care in performing it.[18] Nevertheless, he joined the majority because Van Page could not prove any disjunction in the fourth element of 324A.[19] Justice Kilgarlin's concurring opinion contains a genuinely frightening component. According to him, the first element of 324A, the undertaking element, is met if someone inspects. In Justice Kilgarlin's view, an insurance carrier which inspects at all undertakes to render services; this would be true no matter what the purpose of the inspection and apparently no matter what disclaimers were articulated.

Van Page suggests tension on the supreme court over section 324A. The majority refrained from relying on it, whereas Kilgarlin assumed that it was already the law of the state, although it has not been adopted,[20] and interpreted it very broadly. Nobody even alluded to the developing national jurisprudence of inspections by private concerns.

Hence, *Van Page* illustrates the uncertainty of Texas law. The *Van Page* majority impliedly ruled that an insurer which inspects has no duty to an injured third party, unless it promised its insured to find and remedy unsafe conditions. (No inspecting insurer ever promises to do any such thing. In fact, all of them disclaim any such intent.) But Justices Kilgarlin and Ray would rule that if an insurer undertakes to inspect at all, then the plaintiff meets the first and crucial element of section 324A. A starker split is hard to imagine. The legislature should resolve this uncertainty in favor of nonliability but within a clear, sensible rule.

INSPECTION DISCLAIMERS

IDs like the one in *Gulf Forge* have played important roles in virtually all of the negligent inspection decisions of the last quarter century.[21] Thus, several courts have resolved that insurers which inspect pursuant to policies containing IDs have not undertaken to render services to another.[22] Rather, they have undertaken to render services only to themselves. Similarly, it has been suggested that an inspecting insurer cannot be expected to know that its inspections are necessary to the protection of its insured, when it has issued an explicit ID.[23] Further, several courts have impliedly asserted that section 323(b) pertains only to rightful reliance by holding that when an insurer issues an ID, the insured has no right to rely on the insurer's inspections.[24] At least one court, in affirming a judgment based on negligent inspection, pointed out the insurer could have avoided liability by utilizing an ID. *Hill v. United States Fidelity & Guar. Co.*, 428 F.2d 112 (5th Cir. 1970).

The Supreme Court of Michigan has held that public policy supports immunizing insurer inspections from liability for negligence, at least when an ID is issued. In *Smith v. Allendale Mutual Ins. Co.*, 410 Mich. 685, 303 N.W.2d 702 (1981), a case involving injured workers at an exploded feed mill, that court wrote:

> The development of common law principles is shaped by considerations of public policy. *Amici Curiae* insurers contend that an adverse decision will either discourage insurance inspections or cause insurers to institute such thorough inspection programs that the cost of insurance will be greatly increased, perhaps beyond the reach of many businesses. . . . Insurer inspections can detect hazards before they manifest themselves in harm and thus reduce social costs of property damage and insurance. *Even a negligent inspector may detect far more hazards than he misses.*
>
> Imposition of liability upon insurers who conduct inspections, without regard to whether they have agreed to provide inspections as a service to their insureds, might *either drastically reduce inspections or raise premiums dramatically to meet the cost of more extensive inspection programs and judgments.* If fire insurers were to become responsible to those on the premises should a jury decide that the injury was attributable to negligence in inspecting for fire hazards, the *premium heretofore based on the risk of property damage must necessarily be substantially enlarged to reflect such public liability* exposure.
>
> *Imposing such liability would not improve the safety of the premises unless the insured acts on insurer's recommendations. Unless all insurers require the insured to implement insurers' recommendations,* many insureds will decline to do so, preferring to find a carrier willing to insure the risk at even greater costs.

> Imposing such responsibilities on fire insurers has *doubtful social utility in comparison to the aggregate cost* of the disruption of establishing underwriting relationships, the additional premiums charged insureds by other sources for insuring the same risk theretofore insured but now declined, the litigation generated against fire insurers, the general increase in all premiums to cover the additional exposure of fire insurers attributable to the newly imposed public liability and marginal repairs ordered by an overly cautious inspector. (Emphasis added.)

Id. at 720-21.

Thus, insurers which disclaim seem to be insulated from liability. Insurance carriers are even sometimes contrasted with inspection agencies that may be liable.[25] Alas, there are holes in this pattern. For example, in the case of *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 199 N.E.2d 769 (1964), the Illinois Supreme Court held an inspecting insurer liable for negligence. Applying Florida law, the court reasoned that volunteers are responsible for more than mere positive acts of negligence. If they omit to do something which should be done, that may lead to liability as well. Volunteers are not liable merely for acts which create dangers. As a result, pursuant to section 323, gratuitous inspections by insurers may create enforceable duties to unknown persons. In so holding, the court directly stated that such liability is not necessarily determined by contract but may arise out of tort. The court looked almost exclusively to foreseeability.

There are two interesting side features of *Nelson*. First, the defendant insurer argued that there was no evidence that a reasonably careful inspection would have found the problem which caused injury. The court brushed this reasoning aside, stating that all such matters are within the province of the jury. Second, the court held the insurer liable because of the insured's advertising campaign. The trial court permitted twenty-nine samples of advertising into evidence which suggested that the insured's "safety engineers" took an active part in the safety programs of the insured and saved lives, limbs, and money. Inspectors employed by the insurer testified that they were concerned with injury as well as property damage.

Other recent cases come to the same position as *Nelson* on liability.[26] Thus, there is a minority of cases on the basis of which allegations of insurer liability may be predicated.

Moreover, there are several theoretical problems which could undermine the edifice the courts have put together. We discuss only three of them. Two affect all sorts of insurance carriers; the other affects only boiler and machinery carriers. Each entails a need for legislation.

ADVERTISING

The largest potential problem in *Nelson* is its treatment of advertising. Since the court's view of advertising is wrongheaded and since IDs would probably not be effective against an action under the Texas Deceptive Trade Practices Act, *Nelson*'s view deserves special comment.

Insurers do not generally, and they certainly should not, advertise that they inspect for the purpose of benefiting their insureds. In fact, all advertising material making reference to inspections should make it quite clear that the inspections are for the purposes of insurer risk analysis. There is no harm, however, in pointing out that such inspections frequently have side consequences which are not explicitly intended but which the insured may find beneficial. In this context, insurers must point out that insureds may not rely upon such inspections. These actions should constitute an absolute legal impediment to claiming that advertising creates an undertaking or a legal obligation.

AMBIGUITIES OF SECTIONS 323 and 324A

There are four ambiguities in sections 323 and 324A which create difficulties for inspecting insureds. First, the term "undertaking" is fuzzy. Since this term is used in insurance policy IDs as well, its fuzziness creates particularly acute difficulties. Second, the obscurity of the term "undertaking" makes the scope of an inspective undertaking uncertain. Third, the concept of increasing a risk is not clear. And fourth, the notion of protecting an undertaking is problematic.

Definition of Undertaking

What the term "undertake" means for the purposes of 323 and 324A is opaque. There are two distinct senses of the term.

"Undertake": First Meaning. Historically, at common law, an undertaking was a promise — or — at the very least, an explicit commitment, to do something.[27] According to *Black's Law Dictionary*, the term "undertaking" is to be understood as a "promise, engagement, or stipulation. An engagement by one of the parties to a contract to the other, as distinguished from the mutual engagement of the parties to each other. It does not necessarily imply consideration."

Smith v. Allendale construes the concept of an undertaking this way by equating it with the "concept of acknowledged obligation." 303 N.W.2d at 711. Moreover, Comment (d) to 324A make it clear that the duties flowing from an undertaking are articulated and limited by the agreement which constitutes the first step of the undertaking. English legal usage is the same. According to the

Oxford Companion to Law (1980), the term "undertaking" means the following:

> A promise, frequently one given in the course of legal proceedings by one party or his counsel, and usually as a condition of some concession by the court or the other party. Thus, a court granting an interim or ex *parte* injunction may require an undertaking that the party obtaining it will pay damages if it turns out that the injunction was unjustified and causes the defendant loss. The term is also used in older Acts dealing with companies incorporated for the construction of public utilities, if the whole business, works and enterprises are promoted by the company in question.

When the concept of undertaking is construed in this way, an ID forms part of the insurance contract, where it plays three important roles. First, the insured promises to permit the insurer to inspect. Second, the insurer structures his overall system of promises in the policy by excluding certain things — to wit, the obligation to inspect and the obligation to inspect for safety features. Third, the insured waives any possible claim based on bungled inspections.

If an ID is interpreted in this manner, certain problems arise. The legal status of IDs not contained within the policy — but, for example, printed on subsequent inspection reports — becomes problematic. Also, it is difficult to see how any ID contained in a contract of insurance can affect a third-party-plaintiff proceeding under section 324A. Obviously, the insured cannot waive the legal rights of a third party if they have any independent foundation. Only that third party may waive his rights.

"Undertake": Second Meaning. There is another, non-promissory — even descriptive — meaning for the term "undertake." In ordinary English usage and in some cases that employ sections 323 and 324A, the term is used in a looser sense than it was in classical legal parlance. In that looser sense, someone undertakes to do something when he begins doing it. Thus, Webster's *New Collegiate Dictionary* gives "to take in hand: enter upon: set about: attempt" as the primary meaning of the term "undertake."

But if "undertake" is so understood, then what is the force of an ID in a policy? Perhaps it is merely a statement of the carrier's intent — simply extraneous language from a contractual point of view, by means of which the insurer attempts to describe his inspection activities. If so, IDs have limited force.

The reason is somewhat complicated. If an undertaking is a promise and if a disclaimer is included in the expression of a promise, then the disclaimer conclusively structures that promise. For example, if a person says, "I promise to do X but not Y," he has promised to do X, and he has not promised to do Y. Similarly for the inspecting insurer, if an insurance contract says,

> I promise to indemnify you if your property is destroyed; you promise to permit me to inspect your property; I may or may not inspect your property, but if I do it is for my benefit not yours, and I do not promise to find any particular defects, to guarantee that the property is safe, or to remedy any defects,

then the insurer has not undertaken a course of conduct upon which negligent inspection may be predicated. However, if an undertaking is not a promise but merely entering upon an action, then no verbal declaration as to what one is doing can definitively structure the undertaking.

This difference is rooted deeply in the nature of contracting and promising. To make a promise — and hence to contract — is to perform a kind of action. In these realms, saying is a kind of doing. Hence, when undertaking is promising, the verbal expression of an undertaking constitutes that undertaking, just as the verbal expression of a promise constitutes the promise. However, when undertakings are not promissory but behavioral, saying does not amount to doing. In that case, only doing amounts to doing. If undertakings are promissory, an inspecting insurer undertakes a safety inspection for the benefit of the insured only if he promises to do so. An ID anticipatorily rebuts any such promise. Thus, in Case No. 5, for example, if XYZ's policy contains an ID, XYZ cannot be liable as a matter of law. However, if undertakings are understood in the descriptive sense, the impact of the ID is completely transformed. In Case No. 5, for example, if the plaintiff produces evidence that an insurer's inspector routinely attends to some hazards to bodily safety, or if the plaintiff shows that the insurer promulgates and enforces instructions mandating attention to such hazards, then — arguably — the actual undertaking includes inspecting for safety hazards, no matter what the ID says.

Such evidence is not hard to find. First, insurers are proud of their inspection programs. They tend to extol them in broad terms. Second, safety hazards are frequently the same as hazards to insured property. Obviously, inspectors are mandated to search for these. Third, inspectors are decent, caring individuals, for whom equipment and plant integrity is a way of life. Such people are not going to say that they have no concern for the safety of their fellow man. Fourth, these people are not always prepared to draw an intellectual distinction between the intended purpose of an action (which in insurer inspections is to benefit the insurer) and the not intended but known beneficial side consequence of an action (which in insurer inspections may be increased safety). Finally, plaintiffs proceeding under section 324A bring actions for gross, as well as simple, negligence. Defendant insurers are reluc-

tant to say that they pay no attention to physical safety hazards when this may prove recklessness.

Thus there are two ways to think of undertaking. Construing the word in the second sense, however, is misguided. Obviously people should be permitted to structure their undertakings. In the law of contract, an offeror is the master of his offer. In litigation, the plaintiff is the master of his lawsuit. Just so, the undertaker should be the master of his undertaking. After all, sections 323 and 324A use the term "undertaking" advisedly.[28] This is not a particularly common term in English usage, and its employment suggests that something more formal is intended than merely the concept of starting to do something. This more formal sense of "undertaking" is the older, common-law use.

Unfortunately, there are unquestionably two separate meanings for the term "undertaking," and IDs appear in insurance policies. Technically, this makes the policies ambiguous. A fundamental rule of construction for insurance policies is that, as between insurer and insured, all ambiguities are resolved against the insurer.[29] The non-promissory sense of "undertake" clearly favors the insured; thus insurance policy ID's cannot definitively structure inspective undertakings. This means that under 323, a policy ID cannot necessarily resolve the matter of insurer liability. This is an absurd result which is contrary to policy, principle, and better-reasoned case law.

But this is not the worst of it. There is no rule of construction requiring ambiguous insurance contracts to be interpreted in favor of someone who is not insured.[30] It follows that the use of the term "undertaking" in insurance policies must be treated entirely differently for the purposes of actions under 324A than under 323. This means that personal injury cases will almost certainly be treated more favorably to insurers than property damage cases. It also permits the term "undertaking" in the same contract to mean one thing in one lawsuit and something else in another. This makes no sense at all.

The entire matter is complicated by the fact that many insurance policies contain provisos like the following, taken from a broiler and machinery policy:

> Upon the discovery of a dangerous condition with respect to any Object, any representative of the Company may immediately suspend the insurance with respect to an Accident to said Object by written notice mailed or delivered to the Insured at the Address of the Insured, as specified in the Declarations, or at the location of the Object, as specified for it in the Schedule of Endorsement.

This language appears to be inconsistent with typical IDs. Under a suspension clause, an insurer has the right to suspend coverage upon the discovery of a "dangerous condition." The conditions in the five cases set forth above are all in some sense "dangerous conditions." Thus, even if an insurer has structured his undertaking so that he need not look for such conditions, if he discovers one but fails to act, then — arguably — he can be found negligent. Hence, when a possible suspension decision is part of the inspection process, a failure to suspend coverage upon finding a dangerous condition may constitute negligent inspection, even when there is an ID.

Scope of Undertaking

It is entirely unclear in the context of insurer inspections what constitutes the scope of an undertaking. This is precisely Justice Kilgarlin's problem in *Van Page*. If an insured inspects, must he inspect for everything? When an insurer inspects, is he thereby undertaking to report his findings to the insured? Must he warn the insured about problems he finds? Must he warn those who work near a dangerous entity about the problems he finds?

This problem is exacerbated, not alleviated, by the standard ID. It distinguishes between inspections and reports or inspections. This differentiation suggests that they are two different things. If so, and if the term "undertake" is understood descriptively, then an insurer could undertake to report a found hazardous condition to an insured, even though it had not undertaken to look for it. Indeed, the standard disclaimer does not quite cover this circumstance. It says that the insurer does not undertake to inspect for safety hazards or to warrant objects as safe. However, it does not negate an undertaking to report adequately on a serendipitously found hazard.

Increased Risk

A third point of confusion in the *Restatement* arises from the phrase "increases the risk" in sections 323(a) and 324A(a). The problem is this: To what does the term "risk" refer? It may refer to the danger of the physical system which causes injuries; it may refer to the totality of circumstances which give rise to the injuries; or it might refer to what logicians sometimes call the "subjective probability" of the event's occurring.

If the term "risk" is understood in the first sense, then an inspecting insurer never increases the risk, because he never materially affects the physical system which causes injury but only examines it. Thus, he does not increase the probability that the physical system which fails will in fact fail.[31]

If the term "risk" is understood relative to the totality of circumstances leading to injury, then if an insurer locates a problem but fails to disclose it to the insured in the right sort of way, the insured may be lulled into a false sense of safety. Such lulling may increase the risk. Obviously, if

someone improperly lulls a person in danger, he increases his risk.[32] In this sense of "risk," an increase in the risk is related to reliance.

Finally, if the term "risk" is understood as "known risk," the mere act of inspecting for and locating increases the risk of an accident's occurring. By merely coming to know that a machine is dangerous, when no one knew that before, the risk of injury is higher because someone material to the context knows of the existence of the danger. Of course, objectively speaking, the danger does not change at all. But subjectively speaking, after a successful inspection, there is someone who knows about the danger. This makes the ultimate accident more avoidable. In a subjective sense, this increases the risk.[33]

Which sense do sections 323 and 324A intend? Obviously, courts should not switch from one to another as it suits them.

Protecting and Undertaking

Fourth, there is a hitherto unnoticed difference between 323 and 324A. Section 323 imposes liability for a "failure to exercise reasonable care in *performing* [an] undertaking," whereas 324A imposes liability for "failure to exercise reasonable care to *protect* [an] "undertaking." If this difference is taken seriously, then liability under 324A may be quite different from liability under 323. Under 323, liability accrues when an undertaking is botched. Under 324A, liability accrues only when the activity undertaken runs amok and itself causes injury. The latter might occur when an inspector accidentally electrocutes someone in the plant, locks a workman inside a boiler, or bumps somebody off a catwalk. Merely not looking, not seeing, or not saying does not amount to a failure to protect the undertaking.

Each of the foregoing discussions reveals a doctrinal quirk in the area of negligent inspection law, of which ambiguity of the term "undertaking" is the most serious. And there are more: for example, how much reliance is required before the fourth element is met? These difficulties should be resolved by clear and straightforward legislation.

BOILER CODE

For boiler and machinery carriers, there is an even more complex problem: the impact of state boiler codes such as the Texas Boiler Inspection Law ("TBIL"), Tex. Rev. Civ. Stat. Ann. art. 5221c (Vernon Supp. 1986). Many states have boiler inspection laws which require an agency of the state to inspect all high-pressure steam boilers. Uniformly, by statute states substitute boiler and machinery insurers for their own inspectors and, as a practical matter, state financing of boiler inspection programs depends upon this arrangement. States simply could not afford to do all their own inspections. Texas has only ten state boiler inspectors, but there are approximately 65,000 boilers within its borders.

State boiler commissions also certify the inspectors employed by boiler and machinery insurers. Usually, such personnel are called "Authorized Inspectors." The certification process is standardized nationally. All Authorized Inspectors must pass an examination devised by the National Board of Boiler and Pressure Vessel Inspectors, a private organization consisting of state and insurer inspectors.

Authorized Inspectors replace state inspectors, for inspection purposes only. They do not have the police powers state inspectors possess. They cannot, for example, order a boiler shutdown immediately, as a state inspector can.

State boiler codes typically announce as their statutory purpose the health, safety, and welfare of the populace, especially those who work around boilers. Unlike many boiler codes, TBIL does not state its police power purposes. However, it repeatedly refers to "safety" and "danger," and an early court decision held that TBIL was constitutional on the ground that it is a valid exercise of the state police powers.[34]

Under TBIL anyone who owns or operates a boiler must obtain a Certificate of Operation periodically. Art. 5221c, § 4. The state issues these certificates after a favorable internal inspection report, usually supplied by an Authorized Inspector. Internal inspections involve the inside, as well as the outside, of the boiler. In the trade, internal inspections are called "jurisdictional inspections." Following such an inspection, the Authorized Inspector, or his insurer-employer, submits a report to the state, and the state issues the annual certificate.

TBIL also requires external-only inspections.[35] The state does not require Authorized Inspectors to report the results of external inspections in the absence of a "hazardous condition."[36] However, pursuant to either a jurisdictional or an external inspection, as a practical matter, an Authorized Inspector — like anyone else — has the option of calling in the state if he feels the situation presents an emergency.

Insurers seldom invoke the draconian options of suspending coverage or calling in the state. As a general rule, insurers "work with" their insureds to correct any problems before taking drastic steps. Accordingly, if an inspector finds a problem, brings it to the insured's attention, and obtains assurances that the insured will correct the problem forthwith, the inspector will not likely call in the state or suspend coverage. This approach is sound. If leading

insurers elected a more immediate and rigorous approach, many insureds might choose to select lesser companies with more lax standards and thereby deprive the economic system of salutory inspections and consequent, albeit gently encouraged, improvements. Surely it make no sense to create insurer liability under these circumstances.

Moreover, the TBIL and the status of Authorized Inspectors thereunder raise tremendous purely legal problems. The boiler and machinery insurer claims that its undertaking does not include inspecting for safety. Yet most of its boiler inspections are, in part, mandated by a state statute part of the purpose of which is to enhance the safety of workers. Arguably, therefore, the TBIL invalidates the ID and leaves the insurer exposed. Fortunately, inspection litigation has not reached this point. There is a very real danger here, however, which should be solved. Furthermore, there are several additional problems.

First, the National Boiler Inspection Code incorporates most of the Boiler and Pressure Vessel Code of the American Association of Mechanical Engineers (1986). The ASME Code is a monumental achievement. However, it must be used with care, since — probably — there was never a boiler in the history of man which has ever met all of its requirements. Thus, in litigation, the ASME Code should be understood pragmatically and realistically and not mythically.

Second, the practicalities of authorized inspections dictate that pressure parts be the principal concern. These parts include piping, tubing, valves, safety valves, and the like. Indeed, statutory boiler codes, including TBIL, principally direct concern to pressure parts. Many boiler inspectors are trained in pressure-part problems — corrosion, cracking, scaling, welding, and the like — but not, for example, electrical problems. And yet, all sorts of things other than pressure-part failures go wrong with boilers and lead to injuries, including wiring problems, control problems, computer problems, and so forth. Surely, it makes no sense to hold inspectors who are principally concerned with pressure parts liable for inspecting wiring systems.

Third, inspections take time. Standard inspections of large boilers now last a day or so. If an Authorized Inspector were to check all wires, etc., in addition to pressure parts, each inspection could take a week or more. This would make insurance prices *much* higher.

Fourth, the boiler codes may imply unexpected duties for the Authorized Inspector. For example, may an Authorized Inspector leave a site where he has found a problem but received assurances of rectification from the insured? Obviously insurers cannot supervise the correction of each and every problem they find and still maintain an economically feasible insurance system. But don't insureds sometimes lie? Or forget? If so, then how far must a prudent insurer go to assure corrections are made? What does TBIL silently imply and therefore require?

Fifth, the legal use of TBIL in negligent inspection is not clear. Plaintiffs who bring actions seldom make it clear how they are using it. Are they are suing on the basis of TBIL, and therefore asserting an implied right of action? Or are they suing for simple negligence, attempting to utilize TBIL as the statutory standard for negligence per se?

This is an extremely important issue, and it presents plaintiffs with a difficult dilemma. TBIL does not contain the usual kinds of prohibitions which can be used to set up negligence per se.[37] In fact, as a general rule, the only precise imperative stated in TBIL governing Authorized Inspectors is that reports must be filed. Art. 5221c, § 5.

On the other hand, Texas jurisprudence is not sympathetic to implied rights of action. In fact, we have located no Texas authority for the proposition that courts may create causes of action based upon statutes which do not create those causes of action. In fact, there is Texas authority suggesting that no private right of action can be implied from a statute which has criminal penalties.[38] TBIL does provide some criminal penalties. Art. 5221c, § 12. Moreover, the Texas Boiler Code does not comfortably fit into the jurisprudence developed in the federal system for implied rights of action.

The court should not have to make this decision. It is easily avoidable. Statutory enactments of less than three lines apiece could solve the problem once and for all.

CONCLUSION

The panorama of problems reviewed herein cannot properly be solved using case-by-case adjudication. There are simply too many uncertainties and doctrinal anomalies, while broad social practices which on the whole are beneficial are at stake. Hence, case-by-case adjudication leads to erratic, inconsistent, and irrational results. The problems should be solved by statute.

In the case of boiler and machinery carriers, state boiler codes, such as TBIL, should be amended to include provisions immunizing inspectors and their employers from ordinary negligence. For fire and extended-coverage carriers, as well as perhaps other carriers, state insurance codes, including the Texas Insurance Code, should be amended to include provisions approving a standard ID and making it clear that this disclaimer applies to third-party plaintiffs.

The real problems, in the end, cannot be dealt with in a vacuum. The workers' compensation system is the real culprit here. The miserable pittances doled out to injured workers have driven entrepreneurial lawyers and the tort

system in general to find tortfeasors to replace the employers immunized by the workers' compensation system. This has led to farfetched actions against product manufacturers, research houses which test products, and inspecting insurers. In the late twentieth century the immunization extended to employers by the workers' compensation system is without policy justification.

The problems discussed herein are becoming larger and more complex. Partly this results from twentieth-century megatechnology. Partly it results from the greater range of insured and frequently litigated conduct. We conclude with four additional cases to illustrate this point.

Case No. 6. XYZ issues one layer of all-risk property coverage to ABC, a gigantic processing plant. XYZ refrains from exercising its rights to inspect, although another carrier does inspect. ABC changes its mode of operation against the advice of its engineer and suffers a loss. XYZ seeks to deny coverage of the grounds of increased hazard, and the insurer defends on the grounds that one of the other carriers did inspect and permitted the change.[38] What result?

Case No. 7. XYZ, a professional malpractice carrier requires a particular tickler system in lawyers' offices. XYZ issues coverage to the ABC law office, a small outfit. Its inspector notices that the implementation of the tickle system is incomplete. ABC is sued for professional malpractice. Client joins the liability insurance carrier who permitted coverage to stay in effect even though the tickler system was unsatisfactory. What result?

Case No. 8. XYZ provides all risk property insurance for a network of storage tanks owned by ABC which contain deadly gas. A pressure part breaks, the computerized monitoring system fails, and a worker does exactly the wrong thing, since he is untrained. Tons of the gas escape. Wind blows the gas, more or less as a body, 25 miles, wiping out Fort Stockton. XYZ routinely inspects these tankage and piping facilities. The failure took place one day before the annual inspection, while preparations therefor were being made. What result?

Case No. 9. XYZ issues director and officer insurance to ABC. ABC issues many millions of dollars worth of securities. The value of the securities is much less than anticipated. XYZ receives all minutes of all directors meetings and all reports presented to the directors. Contained within those minutes is an indication that ABC overlooked some oversight functions mandated by the securities laws. XYZ "inspectors" had read these minutes but failed to pick up the problem. What result?

NOTES

1. *Smith v. Allendale Mutual Ins. Co.*, 1410 Mich. 685, 303 N.W.2d 702 (1981). *See Cunningham v. Continental Casualty Co.*, 361 N.W.2d 780 (Mich. App. 1985). Negligent inspection cases against insurers are to be sharply distinguished from negligent inspection cases against businesses which may contract to inspect and remedy, such as pest extermination services. *Getz Services, Inc. v. Perloe*, 173 Ga. App. 732, 327 S.E.2d 761 (1985); *Gillis v. Orkin Exterminating Co.*, 172 Ga. App. 507 (1984); *Western Exterminating Co. v. Hartford Accident & Indemnity Co.*, 479 A.2d 872 (1984); *McNees v. Bone*, 448 So. 2d 1160 (Fla. App. 1984); *Dias v. Vanek*, 679 P.2d 133 (Ha. 1984); and *Davis v. Shubert*, 168 Ga. App. 420, 309 S.E.2d 415 (1983).

2. Misko, *Machine Guarding Cases*, 19 Trial Lawyers Forum (1984).

3. 2 A. Larson, *Larson's Workman's Compensation Law* § 72.90 (1968): Comment, *Insurer's Liability for Negligent Performance of Voluntary Safety Inspections*, 3 Cumberland-Stamford L. Rev. 118 (1972); Larson, *Workman's Compensation Insurer as Sueable Third Party*, 1969 Duke L.J. 1117 (1969); Comment, *The Workman's Compensation Insurance Carrier as a Third Party Tort Feasor*, 1 Conn. L. Rev. 183 (1968).

4. *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), probably resolves this question against liability, at least for profits. However, on property damage, see *Consolidated Aluminum Corp. v. C.F. Bean Corp.*, 772 F.2d 1217 (5th Cir. 1980).

5. G. Weaver, *The Hartford Steamboiler Inspection and Insurance Company*, 1866–1966 (1966). From the point of view of negligent inspection actions, this company had an unfortunate name. However, this does not appear to have made any material difference to the reported cases. In light of this potential problem, property insurers should sharply distinguish themselves from title insurers. When they issue policies of title insurance, title insurers undertake two duties. They undertake to issue a policy of insurance, but they also undertake to inspect title records. If persons dealing in real property rely on title reports by title insurers, a title insurer may be liable. *Heyd v. Chicago Title Ins. Co.*, 218 Neb. 296, 354 N.W.2d 154 (1984). For obvious reasons, no court has ever attributed twin duties to property insurers.

6. *Hartford Steamboiler Inspection & Ins. Co. v. Pabst Brewing Co.*, 201 F. 617 (7th Cir. 1912); *VanWinkle v. American Steamboiler Co.*, 52 N.J. 240, 19 A. 742 (1890); *Bradley v. Hartford Steamboiler Inspection & Insurance Co.*, 19 F. 246 (E.D. Pa., 1883).

7. *Taylor v. Jim Walter Corp.*, 731 F.2d 266 (5th Cir. 1984); *Thompson v. National Press Corp.*, 264 F. Supp. 668 (D.C.D.C. 1966); *Ranger Ins. Co. v. Hartford Steam Inspection Co.*, ___ Ala. ___, 410 So.2d 40, 42 (1982); *Kennard v. Liberty Mutual Ins. Co.*, 277 So.2d 170 (La. App. 1973); *American Mutual Liability Ins. Co. v. St. Paul Fire & Mutual Ins. Co.*, ___Wis. ___, 179 N.W.2d 864, 871 (1970).

8. See, for example, *Philadelphia Mfg. Mut. Ins. Co. v. Gulf Forge*, 555 F. Supp. 519 (S.D. Tex. 1982).

9. R. Neely, *The Divorce Decision* (1984).

10. Hittner, *Summary Judgments in Texas*, 35 Baylor L. Rev. 207, 211 (1983).

11. For an interesting recent analysis of the concept of duty similar to that of *Otis*, see *City of Kotzebuev v. McLean*, 702 P.2d 1309 (Alaska 1985), and *Sanem v. Home Ins. Co.*, 119 Wis. 2d 154, 350 N.W.2d 89 (1984).

12. See, for example, *Colonial Savings Assn. v. Taylor*, 544 S.W.2d 116 (Tex. 1976), and *Philadelphia Mfg. Mut. Ins. Co. v. Gulf Forge*, 555 F. Supp. 519 (S.D. Tex. 1982).

13. For example, *Canipe v. National Loss Control Service Corp.*, 736 F.2d 1055 (5th Cir. 1984); *Philadelphia Mfg. Mut. Ins. Co. v. Gulf Forge Co.*, 555 F. Supp. 519 (S.D. Tex. 1982); *Trosclair v. Bechtel Corp.*, 653 F.2d 162 (5th Cir. 1981).

14. *Canipe v. National Loss Control Service Corp.*, 736 F.2d

1055 (5th Cir. 1984); *Trosclair v. Bechtel Corp.*, 653 F.2d 162 (5th Cir. 1981); *Davis v. Liberty Mut. Ins. Co.*, 525 F.2d 1204 (5th Cir. 1976); *City of Denton v. Van Page*, 701 S.W.2d 831, 835 (Tex. 1986) (Kilgarlin, J., concurring).

15. *Colonial Savings* relies in part on *Fox v. Dallas Hotel Co.*, 111 Tex. 461, 240 S.W. 517 (1922), which sets forth the following rule:

> In every situation where a man undertakes to act or to pursue a particular course, he is under an implied legal obligation or duty to act with reasonable care, to the end that the person or property of others may not be injured by any force which he sets in operation or by any agent for which he is responsible. If he fails to exercise the degree of caution which the law requires in a particular situation, he is so liable for any damage that results to another just as if he had bound himself by an obligation promise to exercise the required degree of care.

Id. at 521.

16. *City of Denton v. Van Page*, 701 S.W.2d 831 (Tex. 1986). *See also Richendollar v. Diamond M Drilling Co.*, 784 F.2d 580, 584–85 (5th Cir. 1986).

17. Even if an undertaker has acquired a duty to inspect, it does not follow that he has a duty to remedy. *Clark v. Employers Mutual of Wausau*, 297 F.2d 286 (E.D. Pa. 1969). *See Hubbard v. Aetna Insurance Co.*, 37 Ill. App.3d, 666, 347 N.E.2d 396 (1976), and *Rogers v. Highland Insurance Co.*, 270 So.2d 277 (La. App. 1972).

18. Apparently, Justice Kilgarlin assumes that since section 323 was adopted in *Colonial Savings*, the court has impliedly adopted section 324A. Obviously, the action of the majority here belies that assumption. Moreover, that assumption fails to distinguish between performing and undertaking and protecting and undertaking, one important difference between 323 and 324A.

19. Justice Kilgarlin concludes that Van Page did not rely on the fire marshal's inspection (therefore defeating recovery under 324A) because Van Page testified he did not know whether the fire marshal was making an inspection to look for things. This conclusion views the plaintiff's words in a vacuum, totally ignoring the large picture. Just prior to the utterance of Van Page upon which Justice Kilgarlin relies, the plaintiff testified he saw the fire marshal go through the barn and walk all around the perimeter to see if he could find a discarded can or something of that nature. Clearly, whether Van Page relied on these activities as an inspection is a question open to interpretation — an interpretation much less open and shut than Kilgarlin implies.

20. *Colonial Savings* adopted section 323 and does not even address 324A. Section 324A has recently been applied in Texas in a noninspection case, *Feuge v. Texaco Inc.*, 634 F. Supp. 213 (E.D. Tex. 1986). In *Feuge*, the plaintiff was injured while attempting to lift and attach a hose that was on a dock next to a ship. When the plaintiff could not move the hose, he requested assistance from the crew of the ship. The ship's mate authorized the use of the ship's winch to assist. The plaintiff was still unable to lift the hose, and the winch was withdrawn. The plaintiff asked for no further assistance from the crew, and none was given. In his third attempt to move the hose, the plaintiff was injured. He sued the owner of the ship, alleging liability under 324A, because the ship's crew had undertaken to assist him. The trial court entered judgment for the shipowner on the grounds that an undertaker is not required to continue his services indefinitely, or even until he has done everything in his power to aid or protect the other. The actor may normally abandon his effort at any time unless, by giving the aid, he has put the other in a worse position than he was before the actor attempted to aid him. *Id.* at 217. The result here is surely correct, and it emphasizes the importance of the disjunctive elements in both 323 and 324A.

21. For example, *Taylor v. Jim Walter Corp.*, 731 F.2d 266 (5th Cir. 1984); *Trosclair v. Bechtel Corp.*, 653 F.2d 162 (5th Cir. 1981); *Hill v. S. Fidelity & Guar. Co.*, 428 F.2d 112 (5th Cir. 1970).

22. *Taylor v. Jim Walter Corp.*, 731 F.2d 266 (5th Cir. 1984); *Trosclair v. Bechtel Corp.*, 653 F.2d 162 (5th Cir. 1981); *Hill v. S. Fidelity & Guarantee Co.*, 428 F.2d 112, (5th Cir. 1970), among others.

23. *Hartford Steam Boiler Inspection & Ins. v. Cooper*, 341 So.2d 665, 667 (Miss. 1977).

24. *Hill v. U.S. Fidelity & Guar. Co.*, 428 F.2d 112, 120 (5th Cir. 1970); *Gray v. Charles Beck Mach. Corp.*, 495 F. Supp. 250, 253 (S.D. Ga. 1980); *Hartford Steam Boiler Inspection & Ins. Co. v. Cooper*, 341 So.2d 665 (Miss. 1977). *See also Trosclair v. Bechtel Corp.*, 653 F.2d 162 (5th Cir. 1981) (must have proof of actual reliance on a contractual undertaking or representation by defendant to impose a 324(a) liability). However, the Supreme Court of Georgia has held that if a defective instrumentality is utilized by a third person, and he is injured thereby, if an insured conducted an inspection of that instrumentality, if the third person knows of the inspection, and if the third person does not know of the defect, then the third person has relied upon the inspection. *Universal Underwriters Ins. Co.*, 253 Ga. 588, 322 S.E.2d 269, 272 (1984). Of course, this doctrine is absurd as a matter of literal truth. What it does is to set up a legal fiction which permits third-party recovery from inspecting insurers.

25. *Canipe v. National Loss Control Service Corp.*, 736 F.2d 1055 (5th Cir. 1984).

26. *Hill v. United States Fidelity & Guar. Co.*, 428 F.2d 112 (5th Cir. 1970); *Sheridan v. Aetna Cas. & Sur. Co.*, 100 P.2d 1024 (Wash. 1940).

27. *Alexander v. State*, 28 Tex. App.186, 12 S.W. 595 (1889). For a recent case concerning the function of written documents articulating and limiting the scope of an undertaking, see *Moody v. United States*, 774 F.2d 150 (6th Cir. 1985).

28. The use of the term "undertake" elsewhere in the *Restatement* reinforces this point. For example, in section 299A, the term "undertake" is used, and Comment c thereto explicates the meaning to the term at some length:

> c. *Undertaking* in the ordinary case, the undertaking of one who renders services in the practice of a profession or trade is a matter of contract between the parties, and the terms of the undertaking are either stated expressly, or implied as a matter of understanding. The rule here stated does not, however, depend upon the existence of an enforceable contract between the parties. It applies equally where professional services are rendered gratuitously . . .

Clearly, the promissory sense of "undertake" is used here.

29. *Blaylock v. American Guar. Bank Liability Ins. Co.*, 632 S.W.2d 719 (Tex. 1982).

30. *Keystone Ins. Co. v. Allstate Ins. Co.*, 633 F. Supp. 1358, 1360 (W.D. Pa. 1986).

31. *See, e.g., City of Denton v. Van Page*, 701 S.W.2d 831 (Tex. 1986).

32. *Laaperi v. Sears Roebuck & Co., Inc.*, 787 F.2d 726 (1st Cir. 1986).

33. *See Clark v. Ross*, 328 S.E.2d 91, 103 (S.C. App. 1985).

34. *Nickles v. Park*, 119 S.W.2d 1066 (Tex. Civ. App. — San Antonio 1938, no writ). *See also* TBIL, art. 5221c at § 6. This section provides the Commissioner with emergency power to promulgate rules if he finds "an imminent peril to the public health, safety, or welfare . . ."

35. TBIL, art. 5221c, §§ 4, 4a. *Id.*, § 4a and *Texas Department of Labor and Standards, Boiler Division: Rules and Regulations*, § 65.108 (1982) [hereinafter cited as "Boiler Regs"].
36. Boiler Regs, § 65.32.
37. *Southern Pacific v. Castro*, 493 S.W.2d 491 (Tex. 1973).
38. *Ex parte Hughes*, 133 Tex. 505, 129 S.W.2d 270 (1939).
39. *Newmont Mines Ltd., v. Hanover Ins. Co.*, 784 F.2d 127 (2d Cir. 1986).

Case Notes

DISCOVERY. PRIVILEGE

Editor's Note: The following four case notes contain the Texas Supreme Court's and one appellate court's most recent rulings concerning the investigatory privilege established by Rule 166b(3)(d) of the Texas Rules of Civil Procedure. The following matters are not discoverable under Rule 166b(3)(d):

> *with the exception of discoverable communications prepared by or for experts, any communication passing between agents or representatives or the employees of any party to the action or communications between any party and his agents, representatives or their employees, where made subsequent to the occurrence or transaction upon which the suit is based, and made in connection with the prosecution, investigation or defense of the claim or the investigation of the occurrence or transaction out of which the claim has arisen; . . .*

In Stringer, Robinson, Turbodyne Corporation, and Service Lloyd's, the courts seemingly ignore the clear language of Rule 166b(3)(d) and greatly restrict the privilege and discovery exemption established by that rule. These recent supreme court cases stand for the proposition that only information obtained by a party after there is good cause to believe a suit will be filed, or after the institution of a lawsuit, is privileged under Tex. R. Civ. P. 166b(3)(d). Although in these cases the supreme court has imposed a severe limitation on the exemption provided in Rule 166b(3)(d), it has yet to provide sufficient guidance in the application of this rule.

Only information obtained by a party after there is good cause to believe a suit will be filed, or after the institution of a lawsuit, is privileged under the Texas Rules of Civil Procedure.

Stringer v. Eleventh Court of Appeals, 29 Tex. Sup. Ct. J. 502 (July 2,1986).

FACTS: This mandamus proceeding arose from a lawsuit brought by Stringer against the Atchinson, Topeka, and Santa Fe Railway Company for negligently causing her husband's death while he was employed as a brakeman for another railway company. After the accident, a Santa Fe special agent conducted an investigation. During the course of discovery, Santa Fe permitted this special agent to testify regarding information he obtained on the day of the accident.

However, Santa Fe asserted that the information later obtained by the agent, including the agent's interview with the Santa Fe train conductor the day after the accident, as well as his investigation notebook, were privileged under Tex. R. Civ. P. 166b(3)(d). The trial court ordered disclosure of this information. The court of appeals then entered a mandamus order finding that the information obtained in the post accident investigation was privileged under Rule 166b(3)(d). This compelled the trial court to vacate its order in favor of producing that information.

DECISION: The supreme court reversed the court of appeals holding and conditionally granted a writ of mandamus against the court of appeals to vacate its orders. The court held that only information obtained by a party after there is good cause to believe a suit will be filed, or after the institution of a lawsuit, is privileged under Rule 166b(3)(d). The court stated that the mere fact that an accident has occurred is not sufficient to clothe all post-accident investigations, which frequently uncover fresh evidence not obtainable through other sources, with a privilege.

An investigation report prepared by an investigator for a workers' compensation carrier, in response to an employee's personal injury claim, is not exempt from discovery under Tex. R. Civ. P. 166b(3)(d) in a subsequent suit against the employer by a person who is injured in the same accident as the workers' compensation claimant.

Robinson v. Harkins Co., 29 Tex. Sup. Ct. J. 414 (June 11, 1986).

FACTS: The plaintiff, Mrs. Robinson, accompanied her husband to a work site where he worked as a mechanic for the defendant, the Harkins Company. The Robinsons left the job site in the afternoon and then went to visit relatives at a bar. After the Robinsons left the bar at approximately midnight and were driving home, their truck collided with a train. Mrs. Robinson's injuries from the accident caused her to become a paraplegic. Though her husband was not seriously injured, he filed a worker's compensation claim.

Before trial, the trial court denied the plaintiff's request to discover an investigation report prepared by an investigator for the defendant's worker's compensation carrier, Texas Employer's Insurance Association, in response to the claim filed by Mrs. Robinson's husband.

DECISION: The supreme court held that the investigation report prepared by the worker's compensation carrier was not privileged under Rule 166b(3)(d). The court cited