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Chapter 18: Insurance

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CHAPTER 18

Insurance

FRANKLIN J. MARRYOTT

The high degree of public interest in the institution of private insurance continues to be reflected in Massachusetts, as elsewhere throughout the country, by the number of legislative bills introduced or enacted which would regulate this "constructive corollary to enterprise." At the same time, the satisfactory ratio between the large number of opportunities for conflict between insurance carriers and their policyholders or beneficiaries and the relatively small number of insurance cases being submitted to the courts for solution is reflected in the rather sparse crop of judicial decisions involving insurance law.

The 1954 legislature considered almost 300 bills having to do with insurance. But the Supreme Judicial Court rendered only seven decisions involving insurance law, apart from automobile or workmen's compensation cases merely involving questions of liability of policyholders or the extent of damages or benefits.

A. AUTOMOBILE INSURANCE

§18.1. Financing automobile insurance premiums. While in many states legislative attention in recent years has tended to focus on the question of what to do about uninsured motorists, in Massachusetts that problem seems virtually quiescent because of the presence here of the only broad-scale compulsory automobile liability insurance law in the country, in spite of some gaps in the compulsory scheme. Here specific problems which develop out of the fact that insurance is compulsory or out of established habits of handling such insurance are more apt to be grist for the legislative mill. A case in point is the matter of financing premiums for automobile insurance.

For years, agents and brokers had considered themselves unaffected by the small loans law, since that statute exempts from its scope transactions which involve evidences of indebtedness of a buyer to the

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§18.1. 1 G.L., c. 140, §96.
§18.3

seller. Thus, when the Commissioner of Banks, late in October, 1953, held that the “seller” of insurance was the insurance company rather than the agent, there was reason for consternation among those agents who customarily provide automobile insurance financing services for their clients. There was talk of some 400,000 motorists being off the highways because of inability to secure acceptable financing in time to buy insurance for the January 1, 1954, effective date of all compulsory motor vehicle insurance policies. The solution was found in Chapter 464 of the Acts of 1954, which added Section 162B to Chapter 175 of the General Laws. Under the new legislation agents and brokers are treated as sellers of insurance for the purpose of financing insurance premiums. They may accept payment of insurance premiums in installments to be evidenced by notes running to the agent, and may charge rates fixed as equitable and nondiscriminatory after public hearing by a board comprising the Attorney General, the Commissioner of Insurance, and the Commissioner of Banks, or designated employees in those departments.

§18.2. Agents’ and brokers’ “service charges” under the assigned risk program. The problem of the unwanted insurance customer has become more acute in all sections of the country. This is a by-product of the spread and increased effectiveness of modern automobile financial responsibility laws, which have the effect of virtually compelling poor drivers to become insured. It would seem that the problem will continue so long as administrators of motor vehicle laws continue to be reluctant to deny the use of the highways to those drivers whom insurance companies would prefer not to insure. The working solution has been to create “assigned risk plans” for apportioning these risks among insurance carriers. That the insurance carriers have been willing to accept such undesirable customers under any circumstances is a sign of their keen awareness of the near indispensability of the automobile to many persons and of the responsibilities which this situation has thrust upon the insurance carriers.

A small but not to be ignored facet of this problem is the matter of compensating the insurance agents or brokers who render valuable help to those in need of the facilities of the assigned risk plan. While the plan filed under the statute provides for modest commissions to the agent or broker of record, the making of additional “service charges” was widespread. To regulate such service charges legislation was enacted. The Commissioner of Insurance is required to fix and establish a schedule of fair and reasonable service charges, together with enabling rules and regulations.

§18.3. Availability of medical reports. A loosely drawn amendment to the Compulsory Motor Vehicle Insurance Law requires any company issuing a motor vehicle liability insurance policy, which

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makes a medical examination of a person injured in an automobile accident, to furnish copies of the medical reports upon request. The injured party is placed under a corresponding duty with respect to treatment and examination by the attending physician.

Apart from the general looseness stemming from failure to refer to written requests, absence of time limitations, etc., it is curious to find what would normally be a matter of legal procedure cropping up in the Compulsory Motor Vehicle Insurance Law. How and by whom is this to be enforced—the courts or the Insurance Commissioner? Is it intended that this apply only to accidents in the future or is there a retroactive intent? Why separate treatment for accidents involving compulsory coverage?

B. ACCIDENT AND HEALTH INSURANCE

§18.4. Uniform law on accident and health policy provisions: Background. During the survey year the most noteworthy enactment pertaining to this rapidly growing and problem-creating field of insurance was the adoption of the Uniform Individual Accident and Sickness Policy Provisions Law.¹

Uniform legislation in this field goes back to 1911. In that year a committee of insurance lawyers was created to devise action corrective of bad claim practices reported to have been engaged in by a few companies. The committee recommended model legislation,² which became law, often with modifications, in twenty-seven states and the District of Columbia. The theory of the law was that abuses in claim practices could be corrected by requiring the policy to be printed in type of satisfactory size and to contain, "in the words and in the order" of the statute, certain required provisions. Massachusetts never enacted this law as such, although its statute,³ enacted in 1910, had imposed many of the same requirements, but called for only "in substance" compliance rather than verbatim reproduction.

Because of the modifications with which the model law was often enacted and because of variations in state requirements made possible under "in substance" laws, it became difficult to design a policy form for nation-wide use. Sometimes the necessity for complying with such a multiplicity of requirements hindered the development of new policies. Thus efforts were made to obtain greater flexibility and greater uniformity in state laws.

§18.5. Uniform law on accident and health policies: New model law. The efforts toward improvement culminated in new model legislation called the Uniform Individual Accident and Sickness Policy Provision Law. It was approved by the National Association of Insurance Commissioners in 1950 and is now law in thirty-three states and

² It was known as the Standard Provisions Law for Accident and Health Insurance Policies.
Insur. §18.6

the District of Columbia. It is this law which Massachusetts enacted in 1954 — with modifications.¹

The new model law covers much the same ground as the older law. There is, however, an important difference in approach, namely, that the "in substance" concept, long prevalent in Massachusetts, rather than the "in the words and in the order" concept, has been adopted. Significant substantive changes include the addition of an incontestable clause as a required provision (the Massachusetts variation changes the period from three to two years), a mandatory provision for a grace period, the elimination of the requirement for a "brief description" (Massachusetts retains something akin to a request for a brief description because it requires a reference to the schedule of benefits on the filing back of the policy), and a change in the type face requirements. Under the old law, exceptions, exclusions, and reductions are to be printed in larger type than other provisions. Under the new law, no "undue prominence" may be given to any portion of the text.

Perhaps it is inescapable that espousal of a theory of statutory regulation of the form of insurance contract carries with it the means whereby the approach becomes self-defeating, certainly in so far as the objectives of uniformity are involved, because of the inevitability of the development of numerous variations. But if the objective is to assure that the business remain reasonably free of a type of regulation which might seriously interfere with rate and forms competition or with desirable and vigorous growth, this is probably secured to a degree because apparently there is some tendency to rely upon a standard provisions law as sufficient, thus avoiding more confining regulation. That the new model law will do more for the policyholder, by way of assuring fairness in policy provisions relating to formal and procedural matters, than was done by the old is clear. But since this approach to the problem of regulation does not concern itself at all with the matter of reasonableness of the price to be paid, some may be reminded of the remark, attributed to Solon, that laws are like cobwebs for "... if any trifling or powerless thing falls into them, they hold it fast, while if it is something weightier it breaks through them and is off.”


§18.6. Automobile liability policy: Cooperation clause. Several opinions of the Supreme Judicial Court interpret provisions of insurance policies. In Williams v. Travelers Insurance Co.,¹ the cooperation

clause of the automobile policy was considered. Compulsory insurance was not involved since the accident happened "off the ways." The company denied coverage because the insured gave a materially different version of the accident to the investigator than he gave at the trial. The Court, in upholding the finding below that the company was prejudiced and that the clause was breached by intentionally false testimony at the trial, is in accord with the usual view. The comment to the effect that the furnishing of information known to be false and of a material nature "either before or at the trial" would be a breach seems not entirely necessary to the decision but foreshadows a rejection in Massachusetts of the view held in some states that a breach does not occur if the testimony at the trial is true even if the prior statements were false, on the basis that public policy is to encourage telling the truth at the trial, regardless of prior falsehoods. Logic would seem to be with the Massachusetts view.

§18.7. Compulsory automobile liability policy: An injury "upon the ways." The case of Desmarais v. Standard Accident Insurance Co., appears to be the first case making a clean-cut decision that an accident in which a person injured "off the ways" by being struck by a vehicle partly upon and partly off the highway is covered under the compulsory automobile liability insurance policy. Since the policy itself seems clear in covering liability for injuries, wherever sustained, caused by operation of the motor vehicle upon the ways, the real point would seem to be that "upon the ways" means "... partially at least upon a public way." 2

The Court distinguished Santa Maria v. Trotto, since that case turned upon the correctness of a requested instruction that the question of illegal registration is immaterial where the plaintiff is not a traveler on the highway, is treated as "not followed" to the extent that it may be inconsistent. Another early case, Milliman v. Coulter, involved an accident in which a person off the highway was struck by a vehicle which may have been partially on and partially off the way. That case did not, however, involve construction of the compulsory automobile insurance law or the Massachusetts Motor Vehicle Policy.

§18.8. Boiler and machinery policy: Coverage of "sudden and accidental breaking." The Court was called upon in New England Gas & Electric Assn. v. Ocean Accident and Guarantee Corp., to decide whether the cracking of a turbine spindle of a generator was an "accident" covered by a boiler and machinery policy.

The policy covered loss of property directly damaged by accident and defined "accident" as "a sudden and accidental breaking, deform-

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4 301 Mass. 320, 17 N.E.2d 162 (1938).

In the instant case the words of the policy "sudden and accidental" modify "breaking, etc." and describe a result rather than the means, and the Court had no trouble in distinguishing earlier cases. Even though the spring setting was intentional and so not accidental as to means, it was not done with intent to damage the turbine, and even if it had been negligent, it would not have detracted from the accidental quality of the result. The cracking of the spindle was an accident as the term is generally understood. The word "sudden" as used in the policy required that the result, not the cause, be sudden. Thus, though the turbine had been operated for nearly a year and the changes in the molecular structure of the spindle which resulted in cracking were occurring throughout this period, nevertheless the Court, relying on the primary meaning given to the word by lexicographers, said that the result was "sudden" in that it happened without previous notice and occurred unexpectedly.

This appears to be the first case in Massachusetts discussing this particular aspect of the accident problem. It is particularly interesting in view of its application to property damage. Similar cases have been decided in other jurisdictions involving bodily injury claims. In these cases the question of whether or not injury is accidentally caused is determined from the viewpoint of the person injured and hence the element of suddenness is supplied by the awareness of injury. Two cases in other jurisdictions involving property damage under policies similar to that in the instant case reached opposite conclusions on this point. In the first, City of Detroit Lakes v. Travelers Indemnity Co., the sudden rupturing of a steam boiler, even though causative factors may have been slow and gradual, was held an accident. The jury verdict was regarded as within the ambit of reasonable inference. In the second, Cornell Wood Products Co. v. Hartford Steam

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4 See, e.g., Canadian Radium & Chromium Corp. v. Indemnity Co. of North America, 411 Ill. 325, 104 N.E.2d 250 (1951).

5 201 Minn. 26, 275 N.W. 371 (1939).
Boiler Inspection Co., damage caused by the swelling of wedges on a
generator due to sixty hours' submersion in water was held not to be
sudden or accidental. The instant case seems to imply that in Massa-
chusetts, evidence of gradual accumulation of effects will not be suffi-
cient to negative a finding of accident.

§18.9. Group insurance: Insurers writing insurance for their own
employees. As a result of statutory changes in 1954, both group life
insurance and group accident and health insurance may be written by
the insurance company which employs the persons covered by the pol-
icy. Previously, life insurance companies could write such group life
insurance contracts, but only if a contributory plan was involved.
While the practical wisdom of permitting such arrangements seems
unassailable, the net effect, which is to permit a corporation to make a
contract with itself, is on first glance a bit bizarre. But corporations
have become such complex creatures that the practical necessity of oc-
casionally allowing them to “wear two hats” at the same time does not
seem very shocking. Actually, all that is involved, certainly as to acci-
dent and health benefits, is allowing an insurance company employer
to do for its employees, through pieces of paper it is used to using,
what other employers can do for their employees by using other pieces
of paper to provide the legal structure under which employee bene-
fits are furnished.

§18.10. Group insurance: Coverage extended. A slight broadening
in the description of groups eligible for group accident and health
coverage was made by statute in 1954. Standing alone this is of small
general importance, but must be oriented with the marked growth of
this form of coverage and the bearing that such growth has upon the
problem of governmental action in the field of accident and sickness
insurance.

D. LIFE INSURANCE

§18.11. Effective date: Age of the applicant. For over forty years
Massachusetts has prohibited the issue or delivery in the Common-
wealth of a policy of life or endowment insurance which purports to be
issued or effective at an age lower than the age of the applicant at his
birthday nearest the time of the application. This rule is now modi-
fied. Today the prohibition runs to dating the policy more than six
months before the application date if thereby the applicant would rate
at an age younger than his age at the birthday nearest the time of the
application. The rule as to annuities remains at the nearest birthday,


§18.9. 1 Acts of 1954, c. 75 (group life); id., c. 247 (group accident and health).

§18.10. 1 Acts of 1954, c. 327.

§18.11. 1 G.L., c. 175, §130.

that is, annuities must take effect at an age \textit{no higher} than the age of the applicant at his nearest birthday. But life insurance may take effect \textit{at an age no lower} than the age of the applicant at a date up to six months prior to the application.

Apparently, there is some sales appeal in giving the applicant a choice of paying a lower rate for the future if he will pay back to an early effective date.

As a general rule, it is competent for the parties to an insurance contract to agree that it shall be antedated.\(^3\) Where antedating has been regarded as an evil it has been on the basis that insureds were being deceived into thinking that they got something for nothing,\(^4\) whereas in fact the company was getting a premium for a period during which it had no obligation under the contract. Of course, the reduction in the amount of the annual premium is valid consideration for the antedating.

\section*{§18.12. Group insurance: Incontestable clause clarified.} Massachusetts has long provided that policies of group life insurance must contain a provision that the \textit{policy} shall be incontestable after two years from its date of issue.\(^1\) (There are some exceptions.) But does this mean that the policy is incontestable as to the employer only? Or that the insurance on any member of the group is incontestable after two years?

The rewritten first paragraph of the Act Relative to the Incontestable Clause\(^2\) provides that the insurance on any person insured under the group policy shall be incontestable after two years (with certain exceptions). Presumably, insurance on any person in the group is contestable within two years of the effective date of the insurance as to that person. This seems fair enough, considering the increasingly large amounts of insurance in force on members of groups and the beneficent results of the continuing growth of this type of insurance.

The courts generally seem to apply a rather strict construction against the company to incontestable clauses in group contracts. In \textit{Allison v. Aetna Life Insurance Co.}\(^3\) it was held that the insurer could not succeed with a defense that the employee was not in active service at the time the insurance was to take effect, even though the policy provided that the insurance was to be effective only if the employee was in active service. The view taken was that the question went to

\(^{2}29\text{ Am. Jur., Insurance }\S 219.\) \textit{Appleman, Insurance Law and Practice }\S 104 (1948). In Massachusetts, see \textit{8 Ops. Atty. Gen. }459 (1928). As to the relationship between problems of the incontestable clause (G.L., c. 175, \S 132, cl. 2) and antedating, see also Note, \textit{31 A.L.R. }102 (1924).

\(^{3}\text{ See N.Y. Insurance Dept. note to 1937 Revision of the N.Y. Insurance Laws. New York now has a statute (Insurance Laws }\S 156\text{) similar to the new Massachusetts provision. The New York statute contains an explicit statement that policies issued in violation thereof are not invalidated. In Massachusetts, G.L., c. 175, }\S 193\text{ is to the same effect.}
validity rather than coverage. The incontestable clause is not, of course, aimed at changing the coverage, but only at preventing questions of validity being raised at a later date, thus presenting the beneficiary with a lawsuit instead of the proceeds.

*Equitable Life Assurance Society v. Florence*⁴ and *John Hancock Mutual Life Insurance Co. v. Dorman*⁵ both involved defenses that the claimant’s decedent was not an employee and both held such a defense to be barred after the period had passed. But in *Rasmussen v. Equitable Life Assurance Society*,⁶ where the policy excluded employees over forty years of age and the defense was that the employee was over forty, the exclusion was sustained as affecting coverage.

§18.13. Participating policies clarified. Chapter 318 of the Acts of 1954, amending Section 149 of Chapter 175 of the General Laws, makes clear that domestic life insurance companies which issue individual participating accident and health policies may also issue life insurance contracts on a nonparticipating basis. The need for amendment arose because, literally read, the section seemed to say that if the company issues any participating policies of any description, it must issue all its life or endowment policies on a full participating basis.

Freeing domestic companies of either charter power or mere policing restrictions which do not apply to companies from other states would seem to be highly desirable unless the restrictions contribute in some substantial way to the benefit of the company or its policyholders. No such benefit appears to result from old Section 149.

§18.14. Writing down real estate investments. A new enactment¹ gives greater flexibility to life insurance companies in writing down the value of certain real estate held for investment purposes. Under the previous law, the write-off could not be less than 2 percent each year. A write-off is now permitted that will average not less than 2 percent per year, thus permitting a high rate of write-off which might be desirable in income-producing years and a rate lower than 2 percent in later years.

§18.15. Court decisions. Two 1954 decisions of the Supreme Judicial Court involving life insurance should be mentioned here. In the first case, *Taylor v. Sanderson*,¹ it was held, following other cases, that where the beneficiary under an annuity policy predeceases the annuitant, his share of the proceeds goes to the annuitant’s estate, not to the beneficiary’s. In each of the two contracts involved in the case, there is a blank to designate beneficiaries, followed by the printed words “if living.” Elsewhere in the form is a provision for payment to the annuitant’s estate if no beneficiary is living. In *Kruger v. John Hancock Mutual Life Insurance Co.*,² decided in 1937, it had been

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⁵ 108 F.2d 220 (9th Cir. 1939).
⁶ 293 Mich. 482, 292 N.W. 377 (1940).
¹ Acts of 1954, c. 68.
³ 298 Mass. 124, 10 N.E.2d 97.
held that a designation of two beneficiaries followed by the words "if living" required payment to the insured's estate of the share of the dead beneficiary. In the first of the contracts involved in the Taylor case, however, there was a change of beneficiaries designated on an endorsement without the words "if living." In the second, the blank was filled by a reference to an endorsement, the words "if living" were stricken through, and the endorsement contained no requirement of survivorship. The endorsement on the first contract merely established new fill-ins in the blank, without altering the printed "if living" clause. As to the second contract, the Court alluded to the draftsmanship reasons for striking out "if living," to the absence of any showing that the annuitant had asked to have the clause stricken, and to the retention of the other provision requiring payment to the annuitant's estate if no beneficiary were living as indicating an intent to exclude the estate of deceased beneficiaries.

In the second 1954 case, Callahan v. John Hancock Mutual Life Insurance Co., the premium on a life insurance policy was due "on or before" January 21 of each year. It was held that where the insured died on January 21, the company was entitled to the premium due "on or before" that day. The familiar rule that the law takes no account of a fraction of a day was held applicable, and Bouvier v. Craftsman Insurance Co., which held the company liable for an injury occurring late in the day of February 1 under a policy for which the plaintiff paid a premium "which will carry the insurance . . . until February 1 . . ." was regarded as not controlling.

E. MISCELLANEOUS

§18.16. Boiler and machinery insurance: Inspections. To keep losses at a minimum boiler and machinery insurance companies have normally spent a large percentage of their premium income in inspections of the boilers and machinery they insure. The skills thus developed and accumulated in the staffs of these institutions engendered demands for their services in connection with inspections of objects which are not insured and not in the hands of the ultimate buyer of the machine. Thus there developed a practice of performing, for a fee, inspections of boilers and other machines in the hands of dealers or manufacturers. These inspections had as the end result the ability of the manufacturer or dealer to state that the machinery conformed to the standards of the American Society of Mechanical Engineers. Legislation in Massachusetts in 1954 makes an express grant of this authority to conduct inspections of boiler machinery and apparatus whether or not insured by the company. The statute was enacted to put at rest any question of the corporate power of such an insurance


§18.16. 1 Acts of 1954, c. 266

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company to do and to charge for work which may not be, under a narrow view, incidental to the powers which the corporation possesses.

§18.17. Corporate insurance agents: Writing own coverage. The general rule is that an agent is without power to issue a policy covering his own property,\(^1\) even where his interest is partial or incomplete.\(^2\) In Massachusetts an application of the rule is found in Section 174 of Chapter 175 of the General Laws, which forbids a corporate agency to place insurance on its stockholders. This is now relaxed by 1954 legislation\(^3\) to the extent of permitting such placements where the premiums do not exceed 2 percent of the total premiums written by the corporate agency.

Probably it is wise to settle these matters, but one wonders whether the practice here explicitly authorized might not be regarded as permissible, even in the face of prohibition, since a mere nominal interest in the property insured has usually been held insufficient to disqualify the agent.\(^4\) In any event, it would seem that policies issued in violation of the statute would be merely voidable.\(^5\) Of course, this would be small comfort to the corporate agency officers when the question of punishment is involved. The usual formidable formula of "a fine of not less than $100, nor more than $1000, or by imprisonment for not more than 30 days or both,"\(^6\) probably furnished reason enough for seeking the legislative blessing.

§18.18. Investments of insurance companies. Several enactments of the legislature in 1954 affect the powers of insurance companies in the investment of funds. They are briefly described in this section.

Domestic insurance companies are authorized\(^1\) to make or acquire loans guaranteed or insured under the Servicemen's Readjustment Act of 1944. Parking rights, purchase options, liens for nondelinquent taxes, and assessments are added to the list of things that are not deemed encumbrances within the meaning of the requirements that loans of domestic companies be upon "unencumbered" real property.\(^2\)

Fraternal benefit societies are granted an additional outlet for investment funds, namely, stock of a Massachusetts trust company or a national banking association incorporated under federal law or located in New England.\(^3\) Some restrictions running to investments by domestic life insurance companies in Massachusetts voluntary associations and trusts have been removed.\(^4\)

\(^{1}\) 29 Am. Jur., Insurance §100.

\(^{2}\) Ibid.

\(^{3}\) Acts of 1954, c. 294.

\(^{4}\) Note, 83 A.L.R. 1520 (1933).

\(^{5}\) 29 Am. Jur., Insurance §102.

\(^{6}\) G.L., c. 175, §174.

\(^{1}\) Acts of 1954, c. 176.

\(^{2}\) Id., c. 65.

\(^{3}\) Id., c. 203.

\(^{4}\) Id., c. 111.
These amendments seem merely a means of adjusting the statutes to the changing times rather than indicating any trend toward a revision of the basic philosophy, now well imbedded in the insurance statutes of the country, that investments are to be closely regulated. One seldom hears any grumbling about the substantial interference with managerial exercise of investment powers which is involved in the statutory plan. Perhaps this acquiescence reflects mere passive acceptance of things as they are or possibly some memories are long enough to recall the serious abuses disclosed by the Armstrong Committee in 1906. Delicate problems almost always associated with the likelihood that members of the boards of insurance companies are also important and influential in other areas of business life are perhaps made less troublesome by detailed regulation of investment activities. The making of investment decisions by men of affairs with broad and far-flung activities sometimes generates suspicion of self-interest motivations even if the sense of trusteeship is sustained at a satisfactorily high level.

§18.19. Regulation of fraternal benefit societies. While, strictly speaking, fraternal benefit societies are not insurance companies, principles of insurance law govern many of their relationships with members and beneficiaries. It seems probable that as fraternal insurance societies place relatively greater emphasis upon the insurance rather than the ritualistic and social aspects of their work, additional regulation will follow. Even now there is a very substantial body of statutory and case law on the general subject of fraternal and mutual benefit insurance. Two enactments of the 1954 legislature are illustrative.

Chapter 103 of the Acts of 1954 eliminates certain restrictions on the amount of death benefits payable on lives of children under eighteen.

Chapter 398 of the Acts of 1954 permits certain fraternals to contract with an insurance company for the payment of benefits due under the certificate of the fraternal. Previously such contracts were allowed only to the primarily social societies.

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