LIABILITY OF INSURERS FOR NEGLIGENCE IN INSPECTION OF INSURED PREMISES

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I. INTRODUCTION

The potential liability of an insurer arising out of its inspection of its insured's premises has expanded substantially over the years.[1] There has been vigorous debate as to the bases for holding an insurer liable, and whether an inspecting insurer should be immune from suits by its insured, the insured's employees, and other third parties.[2] While people may not be held liable for the

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1. Amy Schulman, *Recent Developments in Self-Insurance and Risk Management*, 31 TORT & INS. L.J. 479, 479 (1996).

2. *Id.*

failure to do anything, they may be liable for undertaking a task and performing it poorly or negligently.[3]

For underwriting and loss control purposes, insurers often inspect the premises, equipment, and operations of potential and existing insureds, to determine whether to accept or continue on the risk, and if so, what rates and premiums should be charged.[4] The breadth of these inspections covers a wide spectrum, from "a simple and cursory survey" to a fairly "detailed, thorough and lengthy survey of many technical aspects of large, complex manufacturing facilities."[5] Insurers usually consider these inspections to be solely for their own benefit, and not for the benefit of the insured or third persons.[6] In fact, since these inspections often result in fewer future losses, they do constitute a benefit to insureds and third parties, as well as to the insurer.[7]

Injured plaintiffs and their attorneys can be very creative in finding ways to increase the likelihood of compensation for their injuries.[8] One of these theories is to sue an insurer for negligent inspection of the premises on which the injury occurred.[9] The issue then becomes whether, by inspecting for purposes of

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3. *See generally* Van Winkle v. Am. Steam Boiler Ins. Co., 19 A. 472, 475 (N.J. 1890) ("The defendant, the insurance company, as soon as it took part, . . . became subject to a duty . . . to conduct itself with care and skill, . . . and it is the violation of this latter duty which, we think, forms a legal foundation for this action.").

4. Thomas M. Bower, *Insurers' Potential Liability to Third Parties for Negligent Inspections*, FED'N OF INS. & CORP. COUNS. Q., Spring 1994, at 301, 302.

5. *Id.* at 302.

6. *Id.*

> [M]any policies, particularly property and workers' compensation policies, typically contain a provision substantially similar to the following: 'The Company shall be permitted but not obligated to inspect the Insured's property and operations at any reasonable time. Neither the right to make inspections nor the making thereof, nor any advice or report resulting therefrom shall constitute an undertaking on behalf of or for the benefit of the insured or others, to determine or warrant that such work places, operations, machinery or equipment are safe.'

Id. at 303-04 (citing Leroy v. Hartford Steam Boiler & Ins. Co., 695 F. Supp. 1120 (D. Kan. 1988)). As will be discussed hereafter in this Article, insurers often point to their safety programs and loss prevention in their marketing and advertising in hopes of attracting business. *See infra* notes 67-68 and accompanying text.

7. *Id.* at 303 ("Improved safety practices, however, are merely an incidental byproduct of the inspection's actual aim of improving the profitability of the insurer's business . . . . [B]enefit to policyholders and third parties is an unavoidable, incidental byproduct of the process.").

8. There are a variety of possible parties to a suit. *See, e.g.*, Roberts v. Auto-Owners Ins. Co., 374 N.W.2d 905 (Mich. 1985) (owner and operator of a vehicle); Deines v. Vermeer Mfg. Co., 752 F. Supp. 989 (D. Kan. 1990) (manufacturer of an allegedly defective and unreasonably dangerous machine); Krieger v. J.E. Greiner Co., Inc., 382 A.2d 1069 (Md. 1978) (engineer who designed dangerous premises); Fossum v. Kraus-Anderson Const. Co., 372 N.W.2d 415 (Minn. App. 1985) (general contractor supervising a construction site).

9. Schulman, *supra* note 1, at 481-82.

underwriting and loss control, the insurer may become liable for injuries resulting from negligent inspection of the insured premises.[10]

> [The] plaintiffs in these actions generally claim that the insurer, by inspecting the premises at all, has assumed a duty to the [insured], the [insured's] employees, and even members of the general public . . . on the subject premises or using the [insured's] equipment. . . . [The] duty is to exercise reasonable care in making inspections.[11]

Many of these suits are brought by injured workers against a workers' compensation insurer, but many have also been brought successfully against property and liability insurers for inspections related to boilers, machinery and equipment, products liability, and so on.[12] As I will discuss further in Part II, although some courts distinguish between inspections made solely for the insurer's benefit—for underwriting and loss prevention—and inspections made at least partly for the benefit of the insured and others, other courts may not so distinguish if certain criteria are met.[13] These criteria are: reliance by the insured or others, assumption of a duty owed by the insured to third persons, or an increase in the risk of harm caused by the inspection.[14]

II. BASIS OF LIABILITY FOR NEGLIGENCE

A. Glanzer v. Shepard

Alleged liability for negligent inspection is based on a statement made by Justice Cardozo in the 1922 case of *Glanzer v. Shepard*:[15] "[O]ne who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all."[16]

The common law that developed from this principle has been interpreted by the writers of the *Restatement (Second) of Torts* in section 324A.[17] The principles of this section have more recently been referred to as the "Good Samaritan Rule."[18] Section 324A provides:

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10. *Id.* at 482.
11. Bower, *supra* note 4, at 304-05.
12. Schulman, *supra* note 1, at 479-80.
13. *Id.* at 480.
14. *See* RESTATEMENT (SECOND) OF TORTS § 324A (1965) (defining liability to third persons for negligently performing an undertaking).
15. Glanzer v. Shepard, 135 N.E. 275 (N.Y. 1922).
16. *Id.* at 276.
17. RESTATEMENT (SECOND) OF TORTS § 324A.
18. Bower, *supra* note 4, at 305.

> 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.[19]

B. *The Threshold Requirement: An Undertaking*

To establish a cause of action for negligent inspection against the insurer of the premises on which he was injured, a plaintiff must show first, as a threshold requirement, that the insurer undertook "to render services to another which he [the insurer] should recognize as necessary for the protection of a third person or his things."[20] Insurance companies often defend claims of negligent inspection by saying that the inspection was done for their own benefit in underwriting and loss prevention, and was not done to provide any benefit to the insured.[21] Courts finding that the inspection was primarily self-serving to the insurer, and thus of only incidental benefit to the insured, generally decline to find an undertaking; this defeats the cause of action for negligent inspection even before analyzing the three elements of section 324A.[22]

A good example of this can be found in *Smith v. Allendale Mutual Insurance Co.*,[23] wherein the court reasoned that:

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19. RESTATEMENT (SECOND) OF TORTS § 324A. The *Restatement* provides a parallel section dealing with the liability for negligent performance of an actor to one for whom he has undertaken to render services. *Id.* Thus, the only real difference is that § 324A concerns liability to third persons. *Id.*; *see also* Huggins v. Aetna Cas. & Sur. Co., 264 S.E.2d 191, 192 (Ga. 1980) ("[R]eliance by either the employee or the employer on their [insurance companies'] inspections is sufficient to give rise to a cause of action in tort for negligent inspection by the insurance companies . . . ."); Seay v. Travelers Indem. Co., 730 S.W.2d 774, 776 (Tex. App. 1987) (discussing Texas' adoption of the rules underlying RESTATEMENT (SECOND) OF TORTS §§ 323, 324A).

20. RESTATEMENT (SECOND) OF TORTS § 324A.

21. *See, e.g.*, Patton v. Simone, 626 A.2d 844, 848 (Del. Super. Ct. 1992).

22. *See* Smith v. Allendale Mut. Ins. Co., 303 N.W.2d 702, 718 (Mich. 1981) (inspecting for fire hazards does not constitute an undertaking); James v. New York, 457 N.Y.S.2d 148, 150 (App. Div. 1982), *aff'd*, 457 N.E.2d 802 (N.Y. 1983) (explaining that an inspection does not imply an undertaking).

23. Smith v. Allendale Mut. Ins. Co., 303 N.W.2d 702 (Mich. 1981).

> An inspection for fire hazards does not in itself represent that the insurer has done more than seek to reduce claims or determine whether it is willing to underwrite or remain on the risk. Identification of fire hazards and the making of recommendations to the insured do not in themselves suggest an objective other than to reduce the insurer's losses on the policy or to justify a decision by the insurer to raise or lower rates or to decline or remain on the risk; such conduct does not imply an undertaking to warn the insured of reasonably identifiable fire hazards.[24]

This view was similarly stated in *James v. State*.[25] The court explained that the rule of *Glanzer v. Shepard*[26] is limited "to those situations wherein the action taken is for the benefit of another and not in furtherance of the interest of the one who assumes to act."[27] "The language of the insurance contract expressly disclaims that any inspection or report thereon is conducted for the benefit of the employer or others. . . . [T]he inspection was conducted for the [insurer's] own protection to reduce risks that might give rise to liability or possibly for the purpose of ratesetting."[28]

Consistent with this view is the holding in *Starks v. Commercial Union Insurance Co.*[29] that a contractor's general liability insurer does not have a duty to undertake a safety inspection of the insured premises for the protection of a member of the general public as a third-party beneficiary under the policy.[30] But if the insurer does voluntarily inspect the insured premises or equipment, and the insured or a third party relied on this inspection and expects to be warned of any dangerous conditions, there is now an undertaking that may result in liability if there is negligence in the inspection.[31] In this situation, there is no requirement that the injured party and the insurer be in privity of contract.[32]

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24. *Id.* at 718.
25. James v. State, 457 N.Y.S.2d 148 (App. Div. 1982), *aff'd*, 457 N.E.2d 802 (N.Y. 1983).
26. Glanzer v. Shepard, 135 N.E. 275 (N.Y. 1922).
27. James v. State, 457 N.Y.S.2d at 150 (citation omitted).
28. *Id.*
29. Starks v. Commercial Union Ins. Co., 501 So. 2d 1214 (Ala. 1987).
30. *Id.* at 1216-17; *see also* City of Amsterdam v. Lam, 703 N.Y.S.2d 606 (App. Div. 2000) (stating insurer had right, but not duty, to inspect, when there was no privity of contract between insurer and third-party claimant).
31. Starks v. Commercial Union Ins. Co., 501 So. 2d at 1217.
32. Prince v. Wright, 541 S.E.2d 191, 195 (N.C. App. 2000).

C. *The Bases for Liability Under Section 324A*

The first basis for liability under section 324A of the *Restatement* is: the actor's "failure to exercise reasonable care increases the risk of harm."[33] Despite a diligent search, we have not found a case in which liability was imposed on an insurer because its negligent inspection increased the risk of harm.[34] Therefore, the cases suggest that when liability has been imposed, it has always been on the basis of either requirement (b) or (c) of section 324A.[35]

1. *Insurer Undertook a Duty of the Insured*

In accordance with section 324A,[36] many courts have held an insurer is liable if it assumes a duty of inspection owed by its employer-insured to the insured's employees, and the employer relied on the insurer's inspections and neglected its own safety inspection program, or if an employee's injury resulted from reasonable reliance on the insurer's undertaking.[37] Some courts have stated the duty very broadly: "[W]hen an insurer undertakes to inspect an insured employer's premises for safety, it assumes the duty of the insured employer to provide a safe place for its employees to work."[38] However, this duty applies only to "the class of persons covered by the policy," in most cases, employees of the insured, and not any and all injured third parties.[39]

Other courts, however, have applied a much more limited rule of insurer liability.[40] In *Hutcherson v. Progressive Corp.*,[41] the widow of a victim killed by

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33. RESTATEMENT (SECOND) OF TORTS § 324A (1965).

34. *See, e.g.*, Thompson v. Bohlken, 312 N.W.2d 501, 508 (Iowa 1981) (noting there is no evidence that workers' compensation insurer's actions increased the risk of injury from an unsafe press machine).

35. *See* RESTATEMENT (SECOND) OF TORTS § 324A(b).

36. *Id.*; *see also supra* text accompanying note 20.

37. *See, e.g.*, Stacy v. Aetna Cas. & Sur. Co., 484 F.2d 289, 293-95 (5th Cir. 1973) (finding no evidence that a poultry processing plant ever delegated its duty to maintain a safe workplace to its workers' compensation insurer, nor that the plant relied on the insurer's consultation services such that the plaintiff's injuries resulted).

38. Armstrong v. Aetna Ins. Co., 448 So. 2d 353, 355 (Ala. 1983).

39. *Id.*

40. *See, e.g.*, Hutcherson v. Progressive Corp., 984 F.2d 1152, 1156-57 (11th Cir. 1993) (limiting insurer's liability unless insurer assumed a duty of the insured); Obernauer v. Liberty Mut. Ins. Co., 908 F.2d 316, 317 (8th Cir. 1990) (affirming that insurer's inspections "did not replace [manufacturer's] duty to [injured] to design a safe product and did not constitute an 'undertaking' under section 324A"); Smith v. Allendale Mut. Ins. Co., 303 N.W.2d 702, 712 (Mich. 1981) (holding an insurer "who inspects its insured's premises for fire hazards does not, merely by making the inspections, however thorough and frequent they may be, undertake to render services to the insured").

41. Hutcherson v. Progressive Corp., 984 F.2d 1152 (11th Cir. 1993).

a negligent truck driver sued the employer of the driver and its fleet insurer.[42] The court held the insurer would only be liable if it completely assumed a duty of its insured.[43] Here, the insurer's undertaking to monitor the insured's drivers was only a supplement to the insured's duty of care—not a complete delegation of the duty.[44] Other courts have found liability for an inspecting insurer if the insurer undertook, at least in part, the duty of a manufacturer to warn and to design reasonably safe products.[45]

2. *Reliance on Insurer's Inspection by Insured or Third Person*

The third basis for liability of an inspecting insurer is that there was reliance by the insured or a third person.[46] Where an insurer exercises its right to inspect, and the purpose of the inspection is merely to determine whether to insure and to calculate insurance premiums, the insurer will ordinarily incur no liability where the insured did not rely on the insurer's inspection, but rather relied on maintenance workers to inspect the equipment on the premises.[47]

A few cases, such as *Nelson v. Union Wire Rope Corp.*,[48] have held reliance was not required since the insurer could reasonably have foreseen that the insured's employees would be endangered as a result of the insurer's negligent performance.[49] Most courts reject this position.[50] Indeed, the three

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42. *Id.* at 1154.

43. *Id.* at 1156.

44. *Id.* at 1156-57; *see* Obenauer v. Liberty Mut. Ins. Co., 908 F.2d at 317 (holding insurer's inspections of product did not constitute "undertaking" under § 324A). *But see* Smith v. Allendale Mut. Ins. Co., 303 N.W.2d at 712 ("[I]f the insurer's advertising or communications with its policyholders represent that its inspection services will relieve the insured of the burden of monitoring its own facilities, it has undertaken to render inspection services for the benefit of the insured and is subject to liability if it fails to exercise reasonable care in performing that undertaking.") (citation omitted).

45. *See* Deines v. Vermeer Mfg. Co., 752 F. Supp. 989, 996-97 (D. Kan. 1990) (holding insurer's safety inspection of hay baler on manufacturer's behalf subjected insurer to liability on products liability claim).

46. *See* RESTATEMENT (SECOND) OF TORTS § 324A(c) (1965).

47. Ranger Ins. Co. v. Hartford Steam Boiler Inspection & Ins. Co., 410 So. 2d 40, 42 (Ala. 1982); *see* Mueller v. Daum & Dewey, Inc., 636 F. Supp. 192 (E.D.N.C. 1986) (precluding liability of insurer where plaintiff did not rely on insurer's inspections as proof of safety).

48. Nelson v. Union Wire Rope Corp., 199 N.E.2d 769 (Ill. 1964).

49. *See id.* at 778 (finding liability of insurer arising from negligent performance of gratuitous inspections, though there was no showing that the insured relied on these inspections).

50. *See* Hartford Steam Boiler Inspection & Ins. Co. v. Pabst Brewing Co., 201 F. 617 (7th Cir. 1912) (finding that absent evidence the defects were discoverable at the time of insurer's inspection, "the charge of liability must fail"); Clark v. Employers Mut. of Wausau, 297 F. Supp. 286, 290 (E.D. Pa. 1969) (finding no evidence the insurer agreed to correct defects discovered upon inspection); Huggins v. Aetna Cas. & Sur. Co., 264 S.E.2d 191 (Ga. 1980) (holding "that reliance

dissenters in *Nelson* said that the insurer should not be liable since there was no evidence of reliance by either the insured or its workers.[51]

Over the years many courts have held an insurer will be liable to an injured employee of the insured when the employer relied on the inspections conducted by the insurer and the employee was injured as a result of such reliance.[52] A common example of evidence of reliance is the insured's elimination, reduction, or neglect of its own safety program because the insurer is now performing that function.[53] A similar view was applied to a nonemployee third person in *Hill v. United States Fidelity & Guaranty Co.*,[54] in which a guest sued the hotel's liability, workers' compensation, and fire insurer for her injuries and her husband's death, allegedly due to the insurer's negligent inspection of the hotel.[55] The court held the complaint stated a cause of action because it alleged that the hotel bought insurance in reliance on representations concerning the insurer's safety engineering service, and "relied on the inspections actually made, and relied also by not availing itself of safety engineering service obtainable from others."[56]

Frequently the issue of reliance rests on a question of fact. In *Hutcherson v. Progressive Corp.*,[57] the court held summary judgment was improperly granted, as there was conflicting evidence as to whether the insured allowed the safety services of the insurer to supplant safety activities the insured would otherwise have conducted, so reliance could be found.[58] The dissent assessed the

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by either the employee or the employer on their inspections is sufficient to give rise to a cause of action in tort for negligent inspection by the insurance companies").

51. Nelson v. Union Wire Rope Corp., 199 N.E.2d at 796-97. The dissenters urged that the majority's rule would discourage safety services by insurers. *Id.* (Schaefer, Underwood & House, JJ., dissenting in part). For further discussion of this issue, see *infra* Part V. *Nelson* was effectively negated by an amendment to the Illinois Workers' Compensation Act which granted immunity to an employer's insurer for negligent inspection. 820 ILL. COMP. STAT. ANN. 305/5 (West 1993 & Supp. 2001).

52. *E.g.*, Thompson v. Bohlken, 312 N.W.2d 501, 508 (Iowa 1981) (holding that sufficient evidence can demonstrate that reliance is proper when insurers' inspectors represent themselves as possessing superior expertise in the area of plant safety).

53. *See, e.g.*, Stacy v. Aetna Cas. & Sur. Co., 484 F.2d 289, 293, 295 (5th Cir. 1973) (recognizing that actual proof of reliance on either the insurer's representations or on a contract, which results in the insured's acts or omissions, leads to an insurer's liability for accident victims' injuries).

54. Hill v. United States Fid. & Guar. Co., 428 F.2d 112 (5th Cir. 1970).

55. *Id.* (applying Florida law).

56. *Id.* at 120.

57. Hutcherson v. Progressive Corp., 984 F.2d 1152 (11th Cir. 1993).

58. *Id.* at 1157 (applying Georgia law); *see* Pratt v. Liberty Mut. Ins. Co., 952 F.2d 667, 671 (2d Cir. 1992) (applying Vermont law and noting there was evidence of insurer's substantial loss prevention activities and of employer's reliance on insurer for loss prevention expertise); Phillips v. Liberty Mut. Ins. Co., 813 F.2d 1173, 1175 (11th Cir. 1987) (applying Georgia law and

evidence differently, stating it indicated that the insured did not neglect or reduce its existing safety program when insurance was placed with the new insurer.[59] Further, the dissent contended there was no evidence demonstrating that without the insurer's help, the insured fleet owner would have more closely monitored its drivers.[60]

A number of cases have held an inspecting insurer may also be liable to an injured employee of the insured, or to an injured third person, if they rely on the insurer's inspection. An example of reliance by an employee can be found in *Cline v. Avery Abrasives, Inc.*,[61] in which the court denied summary judgment as to a complaint in which an injured employee of the insured alleged that he and other employees acted in response to and relied upon the insurer's recommendations.[62] An example of reliance by a nonemployee third party can be found in *Prince v. Wright*.[63] A hurricane caused initial roof damage and water leakage; a heavy rainstorm caused further damage.[64] Thereafter, the landlord's insurer inspected the house.[65] No repairs were made, and the tenants were not warned of any dangerous conditions.[66] Four days after the insurer's inspection, a fire killed one tenant child and injured another.[67]

The plaintiff in *Prince* alleged that the insurer expressly undertook to conduct an inspection to determine "'the suitability of the house for residential purposes, including . . . damage or potential damage to the electrical system.'"[68] The plaintiff further alleged that during the inspection, one of the tenants requested notice of any dangerous conditions discovered, and that the plaintiff relied on the insurer's "'express undertaking of the inspection to warn [the

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noting there was circumstantial evidence that employer had reduced or neglected its safety practices due to reliance on its insurer's inspections); *see also* Deines v. Vermeer Mfg. Co., 752 F. Supp. 989, 997 (D. Kan. 1990) (applying Kansas law). In *Deines*, the insurer offered to conduct safety inspections for benefit of its insureds and insured relied on such inspections, *id.* at 993-94, and insured relied extensively on insurer for advice as to safety aspects of products, and therefore neglected or reduced its own safety practices, *id.* at 996-97.

59. Hutcherson v. Progressive Corp., 984 F.2d at 1158 (Morgan, J., concurring in part and dissenting in part).

60. *Id.* at 1158-59 (Morgan, J., concurring in part and dissenting in part).

61. Cline v. Avery Abrasives, Inc., 409 N.Y.S.2d 91 (Sup. Ct. 1978).

62. *Id.* at 100.

63. Prince v. Wright, 541 S.E.2d 191 (N.C. Ct. App. 2000).

64. *Id.* at 194.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 196 (quoting the trial court).

tenants] of any dangerous conditions, including fire hazards.'"[69] The court held the trial court erred in granting the insurer's motion to dismiss.[70]

A question that arises occasionally is whether, in order to demonstrate reliance, specific acts or omissions by the insured or third person must be shown—things which were done or not done because of reliance on the insurer's inspection. In the only case we have found which is directly on point, *Smith v. Universal Underwriters Insurance Co.*,[71] the Eleventh Circuit Court of Appeals certified that question to the Georgia Supreme Court, which answered it in *Universal Underwriters Insurance Co. v. Smith*.[72] The Georgia Supreme Court answered that employee reliance may be shown "by the employee's testimony that he relied on the inspections together with his reasons for relying."[73] Therefore, the Eleventh Circuit reasoned that "[a]cts or omissions of the employee need not be shown."[74] The use of a defective instrumentality in its customary manner demonstrates reliance by a third person on the insurer's safety inspection.[75] Reliance is typically "demonstrated by continuation of business as usual in the belief that any necessary precautions [will] be taken or called to the user's attention."[76]

III. NORMAL DISCLAIMER IN POLICY

Several courts have held an inspection carried out only to benefit the insurer in its underwriting and rate setting will not give rise to liability for the insurer.[77] The rationale is that if the insurer acts only for its own purposes it cannot be held to have undertaken a duty to others.[78] Thus, to prevent a court's finding of an undertaking, insurers often place a provision in their policies negating any claim that there was an undertaking because the insurer inspected. The language of these provisions is usually similar to the following:

> We have the right, but are not obligated to inspect your workplaces at any time. Our inspections are not safety inspections. They relate only to the

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69. *Id.* (quoting the complaint).
70. *Id.*
71. Smith v. Universal Underwriters Ins. Co., 752 F.2d 1535 (11th Cir. 1985).
72. Universal Underwriters Ins. Co. v. Smith, 322 S.E.2d 269 (Ga. 1984).
73. *Id.* at 272-73.
74. Smith v. Universal Underwriters Ins. Co., 752 F.2d at 1536.
75. *Id.* at 1537.
76. *Id.*
77. *See, e.g.*, Kent v. Jomac Prods., Inc., 542 So. 2d 99, 101 (La. Ct. App. 1989) (finding the express language of the policy negated suggestions that safety inspections were conducted on the insured's behalf); Hill v. Sonitrol, 521 N.E.2d 780, 786 (Ohio 1988) (holding defendants' product was a service for the insured, not third persons).
78. Kent v. Jomac Prods., Inc., 542 So. 2d at 101.

> insurability of the workplaces and the premiums to be charged. We may give you reports on the conditions we find. We may also recommend changes. While they help reduce losses, we do not undertake to perform the duty of any person to provide for the health or safety of your employees or the public. We do not warrant that your workplaces are safe or healthful or that they comply with laws, regulations, codes or standards.[79]

Courts accept this disclaimer at face value and hold the insurer is not liable for a negligent inspection absent evidence to bring the situation within one of the three exceptions in section 324A.[80] A typical judicial statement can be found in *James v. State*:[81] "The language of the insurance contract expressly disclaims that any inspection or report thereon is conducted for the benefit of the employer or others . . . . [T]he inspection was conducted for the carrier's own protection to reduce risks that might give rise to liability or possibly for the purpose of ratesetting . . . ."[82]

In at least one case, the court held a policy provision disclaiming that any inspections are not for the benefit of the insured or third persons is void as against public policy, which imposes a duty running to third persons when negligence will create a danger to the public.[83] Other courts have found the facts in the case indicate that the inspection was not *solely* for the insurer's own internal purposes. For example, in *Nelson v. Union Wire Rope Corp.*,[84] the court reviewed the evidence and found:

> [The insurer] constantly represented that those who insured with it would receive countless extra safety and monetary benefits through the services of defendants "safety experts" or "safety engineers." An advertising symbol referred to as "Mr. Friendly" was adopted, and by a series of advertisements

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79. *Id.* (citing Travelers Insurance workers' compensation policy provision).

80. RESTATEMENT (SECOND) OF TORTS § 324A (1965); *see supra* Part II.A (describing the principles of § 324A).

81. James v. State, 457 N.Y.S.2d 148 (App. Div. 1982), *aff'd*, 457 N.E.2d 802 (N.Y. 1983).

82. *Id.* at 151; *see also* Kent v. Jomac Prods., Inc., 542 So. 2d at 101 (citing a policy provision which "clearly indicated that any inspections . . . were solely for benefit of the parties to the contract" and "specifically excluded any suggestion that the inspections were 'safety inspections' conducted for the benefit of [the insured's] employees"); City of Amsterdam v. Lam, 703 N.Y.S.2d 606, 608-09 (App. Div. 2000) (explaining that insurer's contractual right to inspect was for its own protection and reduction of its risks); Jansen v. Fid. & Cas. Co., 589 N.E.2d 379, 380 (N.Y. 1992) (finding no liability when a safety inspection is conducted in an effort to reduce the risk of loss covered by an insurance policy); Rosenhack v. State, 447 N.Y.S.2d 856, 859 (Ct. Cl. 1982) (noting when insurer's inspections were "solely for its own benefit and to avoid unnecessary risks . . . [the insurer] may not be liable for . . . conduct . . . [which is] for one's own protection and not for the purpose of aiding another").

83. Deines v. Vermeer Mfg. Co., 752 F. Supp. 989, 997 (D. Kan. 1990).

84. Nelson v. Union Wire Rope Corp., 199 N.E.2d 769 (Ill. 1964).

> placed in both national and trade publications, such representations as the following were made: (1) "In case after case, month after month, American Mutual's safety engineering service has helped contractors all over the country reduce accidents and costs;" (2) that insureds "have worked hand in hand with American Mutual Safety Engineers to build safety into every job;" (3) after explaining that one insured had saved money, the method was stated to be: "Close cooperation between Hittig Management and American Mutual Safety Engineers in designing and operating an effective safety program;" (4) "Thanks to thorough investigation and hazard analysis * * * and immediate investigations when accidents have occurred, this nationally known firm has been able to maintain a good accident record and to lower operating costs." . . . From all of the evidence it appears that [the insurer's] safety engineers, and the various financial and safety benefits claimed to inure to insureds as a result of their safety engineering services, were its chief stock in trade. Just as certainly, it appears beyond a shadow of a doubt that the services gratuitously given by the engineers were not solely for [the insurer's] own purposes.[85]

It is often deemed to be a question of fact whether the insurer's inspection services were solely for its own benefit or if they were partly for the benefit of the insured or others.[86]

A basis for insurer liability that courts rely on is the insurer's advertising and sales proposals. In *Deines v. Vermeer Manufacturing Co.*[87] the court held the insurer's advertisements and original coverage proposal implied benefits to the insured from the insurer's inspection services.[88] Similarly, in *Riverbay Corp. v. Allendale Mutual Insurance Co.*,[89] the court observed that the insurer's advertising brochure, touting the effectiveness of its loss prevention and control services, including inspections, as part of a single package combining risk management and insurance coverage, suggested benefit to the insured.[90]

Courts, however, do not impose liability on an insurer merely because the insurer's inspection and safety activities conferred *some* benefit on the insured or others. As the court stated in *Smith v. Allendale Mutual Insurance Co.*,[91]

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85. *Id.* at 776 (asterisks in original).

86. *See, e.g.*, Cleveland v. Am. Motorists Ins. Co., 295 S.E.2d 190, 194 (Ga. Ct. App. 1982) (holding that grant of summary judgment in favor of insurer was in error due to the fact that the facts of the case failed to clearly show that insurer "did not gratuitously perform inspection services in part for the benefit of [plaintiff's employer] or its employees").

87 Deines v. Vermeer Mfg. Co., 752 F. Supp. 989 (D. Kan. 1990).

88. *See id.* at 997.

89. Riverbay Corp. v. Allendale Mut. Ins. Co., No. 83-CIV-8271, 1988 WL 52783 (S.D.N.Y. May 18, 1988).

90. *Id.* at *8. The *Riverbay* court found, however, that the cause of action was based on negligence and not on the contract and therefore imposed no duty on the insurer. *Id.*

91. Smith v. Allendale Mut. Ins. Co., 303 N.W.2d 702 (Mich. 1981).

"[e]vidence demonstrating merely that a benefit was conferred upon another is not sufficient to establish an undertaking which betokens duty. Persons pursuing their own interests often benefit others in the process."[92] The court went on to say:

> An inspection for fire hazards does not in itself represent that the insurer has done more than seek to reduce claims or determine whether it is willing to underwrite or remain on the risk. Identification of fire hazards and the making of recommendations to the insurer do not in themselves suggest an objective other than to reduce the insurer's losses on the policy or to justify a decision by the insurer to raise or lower rates or to decline or remain on the risk; such conduct does not imply an undertaking to warn insured of reasonably identifiable fire hazards.[93]

IV. INSURER IMMUNE FROM SUIT?

A. *Public Policy*

Insurers usually advance the argument that imposing liability for negligent inspections will either discourage insurers from making safety inspections or greatly increase the cost of insurance to cover this exposure.[94] The argument then continues by pointing out "that working conditions left to the inexpert administration of employers, particularly the smaller ones, would deteriorate."[95] Particularly in the case of workers' compensation the court noted a primary goal of the system—to foster safe working conditions—would be defeated.[96]

On the other hand, this argument is sometimes rejected because the insurer's "undertaking is not entirely motivated by altruistic considerations," as

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92. *Id.* at 712; *see* Jansen v. Fid. & Cas. Co. of N.Y., 589 N.E.2d 379, 380 (N.Y. 1992) (finding isolated language in letters sent by insurer's inspector to insured, when taken in context, revealed that inspections were undertaken to assist employer in its program to reduce insurer's exposure to claims, and any benefit to employer was incidental).

93. Smith v. Allendale Mut. Ins. Co., 303 N.W.2d at 712. The court recognized, "The insurer's inspections undoubtedly benefited and assisted [the insured] because in seeking to contain its own losses, [the insurer] necessarily reduced [the insured's] losses as well." *Id.* at 713.

94. *See id.* at 720 (referring to amici curiae briefs submitted by insurers that "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"). One might well attack this argument as purely speculative because insurers advancing it rarely, if ever, produce statistics to prove their proposition. *See id.* (referring to the amici curiae contention that "these scenarios are fanciful").

95. State Comp. Ins. Fund v. Super. Ct., 46 Cal. Rptr. 891, 896 (Ct. App. 1965).

96. *Id.*; *see* Gerace v. Liberty Mut. Ins. Co., 264 F. Supp. 95, 97 (D.D.C. 1966) (holding public policy favors such inspections, which help protect people and would be discouraged if insurer is liable).

the insurer "itself benefits from . . . improved safety procedures . . . [which reduce] claims."[97] It is also noted that insurers often "advertise their safety programs as sales promotions, so . . . [insurers may well have] enough self-interest at stake to continue their safety inspections even without immunity from tort liability."[98]

A further argument points out that public policy generally favors imposing the burden of paying for the injuries they cause on tort feasors.[99] Should immunity be granted universally, even where an insurer's inspection is "limited, casual and supplemental"?[100] Perhaps it would be best to make the insurer's responsibility all-or-nothing, and assume that an inspecting insurer "will do a complete job and take the responsibility for it."[101]

Those who argue against immunity urge that it is not a deprivation of immunity that will cause insurers to exercise due care.[102] Rather, their main motivation is their liability for the injuries of workers, damage to the insured property, and harm to members of the public.[103] It serves the economic interest of insurers to eliminate or reduce their exposure to claims.[104]

B. *If There Is Immunity*

Many states have given insurers immunity from suits based on a negligent inspection of the insured property.[105] Such immunity will usually be available to the workers' compensation insurer of an employer's workers, and often to any

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97. Fireman's Fund Am. Ins. Co. v. Coleman, 394 So. 2d 334, 345 (Ala. 1980) (Jones, J., concurring).

98. *Id.*

99. Arthur Larson, *Workmen's Compensation Insurer as Suable Third Party*, 1969 DUKE L.J. 1117, 1141-42.

100. *Id.* at 1142. One author has countered, however, that even a limited or careless inspection may "detect[] and initiate[] a cure for far more hazards than are missed . . . [and thus are] arguably better than no inspection at all." Bower, *supra* note 4, at 317.

101. Larson, *supra* note 99, at 1142.

102. Cline v. Avery Abrasives, Inc., 409 N.Y.S.2d 91, 98 (App. Div. 1978).

103. *Id.*

104. *Id.*

105. *See, e.g.*, Johnson v. Am. Mut. Liab. Ins. Co., 559 F.2d 382, 393 (5th Cir. 1977) (finding additional liability imposed on an insurer when an inspection fails should be imposed by the legislature not the court); Kotarski v. Aetna Cas. & Sur. Co., 244 F. Supp. 547, 560 (D.C. Mich. 1965) (finding the Michigan Workmen's Compensation Act did not reveal an "intention on the part of the legislature to allow the [insurer] . . . to be sued as a negligent third party"); Gerace v. Liberty Mut. Ins. Co., 264 F. Supp. 95, 98 (D.C. Civ. 1966) ("[T]he Court is of the opinion that no cause of action exists against an insurance company as a result of a permissive clause giving it authority to inspect the premises of the insured . . . .").

insurer.[106] A typical provision can be found in the Illinois Workers' Compensation Act:

> No common law or statutory right to recover damages from the employer, his insurer, his broker, any service organization retained by the employer, his insurer or his broker to provide safety service, advice or recommendations for the employer or the agents or employees of any of them for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act . . . .[107]

When immunity is granted, either by statute or case law, an express or implied reason is always that the immunity will encourage safety activities by insurers and thus promote and foster the safety of workers and others.[108]

V. CONCLUSION

While it may be overlooked at times in actions brought under the guidelines of section 324A, a plaintiff in a negligent inspection suit must always allege and prove at the threshold that the injury was proximately caused by the insurer.[109] Such proof must demonstrate that the insurer's inspection detected, or should have detected, the particular danger which caused the injury, should have reported it to the insured, and had it done so, the insured would have corrected it and thus avoided the subsequent injury.[110] Such proof may be difficult for the plaintiff to accomplish.

The next question is the extent of an inspecting insurer's duty if a hazard is discovered. What must it do?[111] Presumably the insurer should report the discovered condition to the insured.[112] But if the insured ignores or rejects the insurer's report, must the insurer attempt to notify the insured's employees and others of the problem?[113] To do so might well invite a suit by the insured for

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106. *See, e.g.*, Mier v. Staley, 329 N.E.2d 1, 10 (Ill. App. Ct. 1975) (finding immunity granted to employer's insurer is not limited to workmen's compensation carrier).

107. 805 ILL. COMP. STAT. ANN. 305/5(a) (West 1993 & Supp. 2001).

108. *See, e.g.*, Mier v. Staley, 329 N.E.2d at 10 (stating that granting immunity may improve industrial safety).

109. *See* Bower, *supra* note 4, at 316 (asserting that neither § 324A nor any case law dispenses with the prima facie case requirement that the plaintiff prove the defendant is the proximate cause of the injury).

110. *Id.*

111. *Id.*

112. *Id.* at 318.

113. *Id.*

defamation or some other tort theory.[114] The boundless creativity of plaintiff's attorneys would surely be up to such a challenge![115]

Because the most common basis for liability is that there was reliance by the insured or others on the insurer's safety inspection activities, it has been suggested that insurers should try to create evidence that there was *not* reliance. In addition to the normal disclaimer in insurance policies,[116] insurers can fill their records and those of their insureds with clear statements that the insurer's activities should not be deemed to be "part of [or] a substitute for the insured's own safety programs," and should not be relied on by anyone "to guarantee . . . a safe workplace."[117] Of course the obvious objection to this strategy is that it will have a most negative impact on the insurer's public relations and its marketing goals and activities. As is so often the case, there is no happy answer that will be acceptable to both the claims department and the marketing people.

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114. *Id.*
115. *Id.*
116. *See supra* text accompanying note 79.
117. Bower, *supra* note 4, at 316.