The provisions of Section 9(f), (g), and (h) of the Taft-Hartley Act, then, are really quite limited in their applicability. While intended to increase governmental control over internal union administration and discourage Communism in American labor, they impose only certain limited disabilities on unions which do not comply with their requirements. They are therefore quite unrelated to the Indiana "little Norris-LaGuardia Act." The policy of the Indiana statute is not only to settle labor disputes peaceably whenever possible, but to allow the use of injunctions only as a last resort.

As Judge Bowen pointed out in his dissent,[22] the Indiana Act applies to all labor disputes, regardless of whether a union is involved. On the other hand, Section 9(f), (g), and (h) of the Taft-Hartley Act relates only to unions. Yet the complaint in the instant case named a large number of individuals as defendants, and the result of the majority decision was to enjoin these individuals from mass picketing and certain other specified acts.

Even if the injunction in the instant case were directed only at the union, the decision of the court would not seem justified. Registration and filing of non-Communist affidavits entitle the union to certain advantages under the Taft-Hartley Act. Indiana's "little Norris-LaGuardia Act" provides certain prerequisites for the granting of an injunction in a labor dispute. If the union wishes to use the facilities of the NLRB, let it comply with the prerequisites of registration and filing. If the employer wishes to secure an injunction from an Indiana court, let him comply with the prerequisites of first making a reasonable effort to settle the dispute by whatever means are available. Section 9(f), (g), and (h) of the Taft-Hartley Act does not justify the issuance of an injunction in the face of a state anti-injunction statute requiring negotiation as a prerequisite to the granting of an injunction in a labor dispute.

PROPORTIONATE RECOVERY AS INSURER'S REMEDY FOR FRAUD CAUSING UNDERESTIMATION OF RISK

The defendant laundry company insured customers' goods in its possession under a bailees' customer policy taken out with the plaintiff insurance company. When a fire destroyed the laundry company's plant, customers claimed losses of goods amounting to $211,410.56, of which the insurance company paid $209,103.56. The policy provided that the insured was to keep accurate records of its business and was to report its total gross receipts to the insurer monthly. It was a relatively new type of policy, giving the insured complete coverage[1] but allowing for variation in the premium payments according to the amount of business during the period. On the basis of actuarial experience the insurer

[22] Fulford v. Smith Cabinet Mfg. Co., Inc., 77 N.E. 2d 755, 757 (Ind. App., 1948).

[1] In addition "[t]he policy was a continuing contract, subject, however, to cancellation by either party by the giving of 15 days' notice in writing." Automobile Ins. Co. v. Barnes-Manley Wet Wash Laundry Co., 168 F. 2d 381, 382 (C.C.A. 10th, 1948), cert. den. 69 S. Ct. 132 (1948).

was to estimate its approximate liability from the amount of gross receipts reported each month. The premium rate was accordingly based on a percentage of each $100 of gross receipts. At the time of the fire the insurer had estimated its liability at about $40,000, and it became suspicious when the customers' claims exceeded that figure. When the claims reached $90,000 the insurance company caused an audit to be made, which disclosed that the insured had reported only 43 per cent of its gross receipts and, accordingly, had paid only 43 per cent of what it should have paid as premiums.[2] Nevertheless, the insurer continued payment on the customers' claims.

The primary issue in the case under discussion concerned the proper form of relief. After the trial court had awarded judgment for plaintiff but allowed recovery only for the unpaid premiums, the insurance company appealed on the ground that the wrong measure of damages had been applied. The Circuit Court of Appeals for the Tenth Circuit reversed, holding that the proper measure of damages should have been that amount of the total liability of the insurance company which was proportionate to the amount of gross receipts concealed. Since the insured had concealed 57 per cent of its actual gross receipts, the insurer should have recovered 57 per cent of the amount paid out on the customers' loss claims. *Automobile Insurance Co. v. Barnes-Manley Wet Wash Laundry Co.*[3]

At least four possibilities for recovery suggest themselves under the circumstances of the instant case: 1) rescission of the insurance contract and recovery from the laundry company of an amount equivalent to the claims paid by the insurance company to the customers; 2) recovery of the difference between the total liability of the insurer and $65,000, the alleged top-limit of estimated risk which the insurer would have accepted without reinsuring;[4] 3) recovery of the unpaid premiums; and 4) proportionate recovery.

Rescission was denied on the ground that the insurance contract had been affirmed by the insurance company when it continued to pay customers' claims after discovering the laundry's fraudulent reporting of gross receipts. The court based its result on the rule denying rescission of contracts where the defrauded party, while knowing of the fraud, acts in such a way as to disclose an intention to let the transaction stand. This rule relies on the assumption that rescission, as a repudiation of the contract, is inconsistent with actions which affirm the

[2] The laundry reported only $1,823,914 as gross receipts rather than $4,097,138 and paid as premiums only $10,100.27 instead of $22,359.87. The evidence was submitted to the jury by special interrogatory as an issue of fraud and the finding was "that the Laundry Company, during the period the policy was in force, intentionally and knowingly reported its gross receipts in amounts less than they actually were, with intent to defraud and deceive the Insurance Company." Ibid., at 383.

[3] 168 F. 2d 381 (C.C.A. 10th, 1948), cert. den. 69 S. Ct. 132 (1948).

[4] This form of relief was requested with others in the alternative by the plaintiff insurer. Appellant's brief at 3–4, 40–50.

contract.[5] But the court did not appear to recognize that the insurer may have had substantial reasons, foreign to any intention to affirm the contract, for continuing to honor customers' claims. Nothing was said as to the insurance company's standing in the business community. Undoubtedly its good will would have been adversely affected if, after settling a large percentage of the claims, it had suddenly refused to pay those remaining. Furthermore, if such a course had been adopted, the insurer would probably have been confronted with numerous law suits.[6] Thus, the continuation of payments did not necessarily indicate an intention to affirm the contract. And if there was no affirmation of the contract, the right to rescind should not have been lost on this ground.

However, even in the absence of affirmation, rescission is an appropriate remedy only insofar as it places the parties in the position they would have occupied had no contract been entered into.[7] In the absence of contractual liability, a bailee is liable only for damage caused by his lack of due care,[8] and there was no indication that the fire resulted from negligence on the part of the laundry. If the laundry were not liable to its customers, the result of allowing rescission and recovery by the insurance company of the claims paid would be to force the laundry into the position of an involuntary insurer. Hence, the laundry would ultimately bear a loss which it could not have been compelled to assume had it not been insured. Of course, if the laundry were liable to its customers on a basis other than negligence, a decision requiring full restitution to the insurance company would be consistent with the theory of rescission. In this connection, the insurance company alleged that the laundry had collected a 1 per cent service charge from each customer to cover insurance.[9] In remanding the case the circuit court ordered that the truth of this allegation be determined, stating that "[i]f the Laundry Company collected a charge from its customers for insurance, it had a primary obligation to protect its customers against loss."[10]

The laundry company offered still another argument against rescission. It contended that the insurer was estopped from asserting a right of rescission,

[5] Prosser, Torts § 90, at 775 (1941); 5 Williston, Contracts §§ 1527–28 (ref. ed., 1936); Patterson, Essentials of Insurance Law § 76 (1935); 1 Rest., Contracts § 484 (1932); Vance, Insurance §§ 131–32 (2d ed., 1930); 1 Bigelow, Fraud c. ii, § 8, at 434–38 (1888).

[6] Although many claimants would probably sue, it is doubtful whether many would continue their suits once the insurance company successfully established its defense.

[7] Return to the status quo is a condition precedent to rescission which will only be overlooked if it is impossible of achievement and if the equities of the situation nevertheless demand rescission. 5 Williston, Contracts § 1500 (rev. ed., 1936). Since, in the instant case, the plaintiff has other forms of relief available, the equities would not seem to demand rescission.

[8] "[A] bailee is not liable for the loss, injury, or destruction of the bailed property without fault on his part, unless he expressly contracts, as he may, to assume the risk of such accidental loss or injury." 6 Williston, Contracts § 1946, at 5452–53 (rev. ed., 1936); 4 ibid., at § 1045.

[9] Automobile Ins. Co. v. Barnes-Manley Wet Wash Laundry Co., 168 F. 2d 381, 383, 386 (C.C.A. 10th, 1948), cert. den. 69 S. Ct. 132 (1948).

[10] Ibid., at 386.

since by paying the customers' claims the insurer deprived the laundry of any defenses which might have been available had the claims been pressed directly against the laundry.[11] Though the defendant did not allege or prove any particular defenses of which it might have been deprived, an example of such a defense might be an agreement between the laundry and its customers that the laundry was not to be responsible for any goods left over thirty days. But under the "clean hands" doctrine the defendant's fraudulent conduct would have precluded the assertion of estoppel even if the laundry could have shown that a defense had been lost.[12]

A second possible form of recovery would have given the insurance company the difference between its total liability and $65,000. The plausibility of such a recovery[13] depends upon the ability of the insurance company to prove that it would have reinsured had it estimated its risk as more than $65,000. The insurance company argued that the laundry's actual gross receipts were sufficiently large to require an estimated risk greater than $65,000.[14] Presumably, then, the insurer would have reinsured had the true gross receipts been reported. If such reinsurance could have been obtained, the insurance company's liability would have been limited to $65,000. The plaintiff therefore claimed that all liability in excess of that amount was the direct result of the fraudulent reports by the laundry company.

Proof that the insurance company would have reinsured was apparently not conclusive, since the trial court rejected evidence on this point as immaterial. The principal evidence offered was the deposition of one of the insurer's underwriters. While the majority of the appellate court claimed that they were unconcerned with such evidence,[15] they still appeared to take judicial notice of the practice of insurance companies to reinsure. The court also listed as "undisputed facts" the determination that "a top estimated risk of $65,000 . . . was the extent of the estimated risk [the insurer] was willing to assume and carry."[16] At any rate, the circuit court did not seem to take the argument seriously enough to prompt a clear articulation of its position. Perhaps the court took

[11] Appellee's brief at 24–38.

[12] Vance, Insurance §§ 138–39, at 524 (2d ed., 1930).

[13] The amount would be $144,103.56, the difference between what the insurer paid, $209,103.56, and $65,000. Presumably the insurer would not pay the remaining outstanding claims, but if it did then $211,410.56 would have to be substituted for $209,103.56 and the resulting figures adjusted accordingly.

[14] If on the basis of 43 per cent of the gross receipts the insurer estimated its liability at $40,000, then it would have estimated its liability in excess of $65,000 on the basis of 100 per cent of the gross receipts. Assuming a straight-line relationship between the reported receipts and the estimated liability, on the basis of the total gross receipts the estimated risk would have been approximately $93,000.

[15] "We are not concerned with the question of whether testimony was admissible to the effect that the Insurance Company would have reinsured the estimated risk when it rose above $65,000." Automobile Ins. Co. v. Barnes-Manley Wet Wash Laundry Co., 168 F. 2d 381, 385 (C.C.A. 10th, 1948), cert. den. 69 S. Ct. 132 (1948).

[16] Ibid., at 385–86.

notice of the fact that the insurance company estimated its risk at "about $40,000" on the basis of the laundry's reported gross receipts—43 per cent of the true gross receipts. As it turned out, 43 per cent of the total claims exceeded $90,000. If the insurance company could do no better in its estimation than to come within $50,000 of what proved to be its actual risk, the court was justified in treating this argument lightly.

It should also be pointed out that the insurer made no showing that it could have obtained reinsurance even if it had attempted to do so. The insurance policy is of a new type which leaves the actual risk unascertained until loss is sustained. Since the indirect estimates which must be made can be extremely erroneous, as demonstrated in this case, it might well be that reinsurance would have been unobtainable.

If, however, the matter of reinsurance could have been proved, it would seem to be an appropriate measure of damages for the defendant's deceit. In the words of the dissenting judge, "The general rule in cases of fraud is that the defendant is liable for damages that are the natural and proximate result of his wrong-doing." But the judge added that "[t]he damages which are the proximate result of the wrong are those which must be presumed to have been within the wrong-doer's contemplation at the time he committed the fraud."[17] This contemplation rule seems hardly appropriate in an action of deceit involving deliberate misrepresentation, since there is no reason for the law to be solicitous of intentional wrongdoers.[18] In any event, the rule should not be a bar in the instant situation. The laundry was informed that the gross receipt reports were to be used by the insurer to enable the latter to estimate its liability.[19] Hence, the insured must have contemplated that its reports would be relied upon by the insurer in the management of its business. Since the precise injury does not have to be contemplated[20] and since the insured must have contemplated some business reliance upon its reports, the added liability caused by failure to reinsure might well have been considered as a measure of damages.

A third possible relief is recovery of the unpaid premiums. However, this measure of recovery would enable the insured to have his interests fully protected while he received the benefit of a lower premium rate as the result of his fraudulent representations. The insured would get a certain amount of his insurance free unless a loss greater than the estimated risk caused investigation of the circumstances, and only then would the insurer receive adequate premi-

[17] Ibid., at 387.

[18] See Selman v. Shirley, 161 Ore. 582, 627, 91 P. 2d 312, 318 (1939); McCormick, Damages § 121, at 450 n. 9 (1935); ibid., § 122, at 460 nn. 52, 53; 1 Sutherland, Damages § 16, at 52–59 (4th ed., 1916); 1 Sedgwick, Damages §§ 139–42 (9th ed., 1912); 1 Bigelow, Fraud c. xi, § 1, at 634 (1888).

[19] Automobile Ins. Co. v. Barnes-Manley Wet Wash Laundry Co., 168 F. 2d 381, 383 (C.C.A. 10th, 1948), cert. den. 69 S. Ct. 132 (1948).

[20] 1 Sutherland, Damages § 16, at 52–59 (4th ed., 1916); 1 Sedgwick, Damages § 111c (9th ed., 1912).

ums for the real risk assumed. Such a retrospective method of premium payment is inconsistent with general insurance practice, in which premium rates are determined on the basis of calculated prospective risks.

The remedy allowed by the circuit court was proportionate recovery. The court stated that "[t]hrough its fraud, the Laundry Company induced the Insurance Company to assume and carry a risk greatly in excess of the risk which the Insurance Company contemplated and believed it was carrying and which it was willing to carry. If the Laundry Company collected a charge from its customers for insurance, it had a primary obligation to protect its customers against loss. Through its fraud, it induced the Insurance Company to carry that obligation and the Insurance Company, to the extent of 57 per cent of the amount paid out under the policy for loss of customers, discharged the obligation of the Laundry Company and would be entitled to restitution for that amount from the Laundry Company."[21] In other words, the only risk the insurer had bargained for was one proportionate to the reported gross receipts, and any additional risk was assumed by the laundry company. Although the insurer agreed that the policy was for unlimited coverage, that fact loses significance in light of the possibility of cancellation. Not only do equity principles permit cancellation where actual fraud has been discovered,[22] but the policy itself provided that either party could cancel by giving fifteen days' written notice.[23] Therefore, the crucial determinant of the risk assumed was the reported gross receipts, and on that basis the insurer had only assumed 43 per cent of the risk.[24]

Misrepresentation in insurance contracts often causes the insurer to assume a risk which, although acceptable, would require the payment of higher premiums. Proportionate recovery has been recommended in these situations as fairer to the insured than the harsh doctrines of rescission and cancellation for false warranties.[25] Rather than precluding the insured from recovering anything on a policy, the proportionate-reduction-of-recovery principle prevents forfeiture by allowing the insured to recover that amount to which he would have

[21] Automobile Ins. Co. v. Barnes-Manley Wet Wash Laundry Co., 168 F. 2d 381, 386 (C.C.A. 10th, 1948). The court also states that "[i]f the reports of the gross receipts had been true, the liability of the Insurance Company would have been approximately 43 per cent of $211,410.56." This is misleading, since it would seem that if the reports had been true the insurer would have been liable for the total loss, not merely 43 per cent. There would have been no misrepresentation. Any discrepancy between its estimate of risk and its actual risk would be attributable to actuarial error or to the inadequacy of the liability-estimate theory used.

[22] Compare Hesselberg v. Aetna Life Ins. Co., 75 F. 2d 490 (C.C.A. 8th, 1935), cert. den. 296 U.S. 623 (1935); Mutual Life Ins. Co. of New York v. Lambert, 34 F. 2d 215 (D.C. Mo., 1929); New York Life Ins. Co. v. Sisson, 19 F. 2d 410 (D.C. Pa., 1926).

[23] See note 1 supra.

[24] The validity of this type of recovery depends upon there being a straight-line relationship between the reported gross receipts and the estimated risk. Otherwise the insurer's formula for estimating its risk would have to be used to ascertain the risk bargained for.

[25] Ehrenzweig and Kessler, Misrepresentation and False Warranty in the Illinois Insurance Code, 9 Univ. Chi. L. Rev. 209 (1942); Patterson, Essentials of Insurance Law § 75 (1935).

been entitled on the basis of the actual premiums paid had there been no misrepresentation. It is interesting to note that in this decision the court, without referring to such analogous situations, adopted a remedy which has been provided for in other instances by statute.[26] The principle is generally adopted in connection with misrepresentations as to age in life insurance contracts.[27] Proportionate recovery has also received recognition in statutes relating to fire insurance[28] and in other legislation prescribing the effects of changes of occupation[29] and the carrying of other insurance[30] on liability under accident insurance policies.

Although there are differences between the situation in the instant case and the few other situations in which the proportionate-reduction-of-recovery principle has been applied, the essential elements are the same: Had no misrepresentation been made, the insurer's only action would have been an assessment of higher premiums, not a refusal to insure. The fact that the beneficiaries under the policy were the customers rather than the insured, as in the usual situation, would seem to be no reason to preclude application of this doctrine. While the principle is ordinarily employed to protect the insured against forfeiture, it is appropriate, if not necessary, in the instant case in order to protect the insurer against fraud. The insurer is as deserving under these circumstances as is the insured in the typical proportionate-recovery case. The insurance company should be allowed a remedy which adequately provides that protection.

RES IPSA LOQUITUR IN AIRLINE ACCIDENTS

On June 13, 1947, a Capital DC-4 airliner on a regularly scheduled flight crashed into a mountain in West Virginia, killing all fifty occupants. In a consolidated action before the Federal District Court of the District of Columbia damages were sought for the wrongful death of two passengers on the plane. The defendant's motion to strike from the complaint allegations seeking to invoke the doctrine of res ipsa loquitur was denied by the court. *Smith v. Pennsylvania Central Airlines Company.*[1]

The court held the doctrine of res ipsa loquitur to be part of the substantive law and found that, under local conflict of laws rules, the applicable law was that of West Virginia, where the fatal injuries were incurred. As the question

[26] Reasoning from analogous statutes has been recommended by Roscoe Pound: The Relation of Courts to Legislation Not a New Question, 77 Cent. L.J. 219 (1913); Common Law and Legislation, 21 Harv. L. Rev. 383, 388 (1908).

[27] Authorities cited note 25 supra; Okla. Stat. Ann. (1941) tit. 36, § 218; N.Y. Insurance Law (McKinney, 1940) § 155, 1(d) (life insurance), § 159, 1(d) (annuities and pure endowment contracts), § 161, 1(d) (group life insurance), § 163, 1(d) (industrial life insurance).

[28] N.H. Rev. Laws (1942) c. 326, § 4.

[29] N.Y. Insurance Law (McKinney, 1940) § 164, 3(a) Form D.

[30] Ibid., § 164, 4(b) optional provision 17; Okla. L. (1947) tit. 36, c. 18, § 6 optional provision 2.

[1] 76 F. Supp. 940 (D.C., 1948).