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## May Harvey Rest in Peace: Lakin v. Postal Life and Casualty Company

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# MAY HARVEY REST IN PEACE: *LAKIN V. POSTAL LIFE AND CASUALTY COMPANY*

Robert H. Jerry, II\*

You know, the Stone was really not such a wonderful thing. As much money and life as you could want! The two things most human beings would choose above all – the trouble is, humans do have a knack of choosing precisely those things that are worst for them.<sup>1</sup>

More than a quarter-century has passed since I entered law school as a first-year student and began what has become a career of reading, among other things, cases. I cannot even guess the number of cases I have read in the ensuing years. Most of them have been fairly ordinary, but many have been wonderful for one reason or another. Because I hope to read at least as many cases during my next twenty-five years (or more) of legal study, I am not yet ready to crown any particular case with the title of “my favorite,” “the most significant,” or a similar salutation.

There is, however, one case that has piqued my interest in recent years. *Lakin v. Postal Life & Casualty Co.*<sup>2</sup> is, in many respects, an unlikely choice. Unlike *Ryan v. New York Central Railroad Co.*,<sup>3</sup> *Lakin* does not reflect an important chapter in the development of our nation, when the expansion of the railroads ushered in a period of unprecedented economic growth and courts were forced to articulate tort and insurance law rules that would either facilitate or hinder this expansion.<sup>4</sup> Unlike *Pilot Life Insurance Co. v. Dedeaux*,<sup>5</sup> *Lakin* does not involve a statute of nationwide applicability, the interpretation of which has profound consequences for not only federal-state relations but also policyholders’ remedies for insurers’ breaches of their duties under policies provided by employers as fringe benefits.<sup>6</sup> Unlike *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*,<sup>7</sup> which interpreted a policy exclusion relating to war and similar catastrophes in the context of a terrorist group’s destruction of a jetliner in Lebanon, *Lakin* is not relevant, as the *Pan American*

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<sup>1</sup> J.K. ROWLING, *HARRY POTTER AND THE SORCERER’S STONE* 297 (1997).

<sup>2</sup> 316 S.W.2d 542 (Mo. 1958).

<sup>3</sup> 35 N.Y. 210 (1866).

<sup>4</sup> For more discussion of *Ryan*, see David A. Fischer & Robert H. Jerry, II, *Teaching Torts Without Insurance: A Second-Best Solution*, 45 ST. LOUIS UNIV. L.J. 857, 878-81 (2001).

<sup>5</sup> 481 U.S. 41 (1987), remanded to 821 F.2d 277 (5th Cir. 1987).

<sup>6</sup> For a discussion and critique of *Pilot Life*, see ROBERT H. JERRY, II, *UNDERSTANDING INSURANCE LAW* 78-80 (2d ed. 1996).

<sup>7</sup> 505 F.2d 989 (2d Cir. 1974).

case suddenly is, to insurance coverage issues arising out of the most expensive man-made catastrophe and the most destructive terrorist act in the history of the planet.<sup>8</sup>

*Lakin* is a relatively simple story of two men whose paths crossed in Kansas City, Missouri, more than forty years ago. One was a down-in-the-luck drifter, and the other a con-artist who made his living by taking advantage of others. These two men would be long forgotten but for the fact that their final interactions during a hunting trip near Pleasant Hill, Missouri, raised some insurance law issues that ultimately made their way to the Missouri Supreme Court. *Lakin* stands for the unremarkable proposition that the legal relationship of one partner to another is not, by itself, sufficient to establish an insurable interest. If one partner takes out insurance on the life of the other partner in circumstances where the partner *cestui que vie*<sup>9</sup> has neither capital nor skills to contribute to the partnership, it does not automatically follow that the partner who owns the policy on the other's life has an insurable interest sufficient to support the policy.

Indeed, *Lakin* is not even the most notorious case involving guns, hunting, and insurance. The common fact pattern involves someone procuring insurance on the life of another, taking the *cestui que vie* on a hunting trip, and the *cestui que vie*'s mysteriously perishing in what is claimed to be an "accident."<sup>10</sup> In this genre, *Rubenstein v. Mutual Life Insurance Co. of New York*<sup>11</sup>

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<sup>8</sup> On September 11, 2001, terrorists hijacked four U.S. commercial aircraft and succeeded in using three of the planes, including the civilians inside them, as missiles to destroy the World Trade Center towers in New York City and a portion of the Pentagon in Washington, D.C. At this writing, the death toll is unknown, but will run far into the thousands, and the economic losses, which will take years to determine, will probably be measured in terms of some percentage of the United States' gross domestic product. Although the insurance implications of this event are trivial relative to the human dimensions of the tragedy, the attack is the most significant and complex event in the history of the insurance business.

<sup>9</sup> *Cestui que vie* (often shortened to "CQV") is a French term meaning the person whose life is the subject of the policy. The CQV may or may not be the owner of the policy. For example, a parent may purchase a life insurance policy for a child CQV. The beneficiary can be anyone chosen by the owner. See JEFFREY W. STEMPEL, LAW OF INSURANCE CONTRACT DISPUTES §§18.01, 18.02 (2d ed. 1999 & Supp. 2001); JOHN F. DOBBYN, INSURANCE LAW IN A NUTSHELL 7 (3d ed. 1996).

<sup>10</sup> For another example, see *Overstreet v. Ky. Cent. Life Ins.*, 747 F. Supp. 1195 (W.D. Va. 1990), *affirmed in part, rev'd in part*, 950 F.2d 931 (4th Cir. 1991) (hunting "accident" later found to be murder, and murderer implicates owner and beneficiary of policy on decedent's life in murder plot). For a variation on the facts (husband takes wife on fishing trip, and wife perishes due to gun "accident" on boat), see *Craig v. State*, 347 S.W.2d 255 (Tex. Crim. App. 1961), *overruled in part by* *Mays v. State*, 536 S.W.2d 260 (Tex. Crim. App. 1978).

A hunting trip is not, of course, necessary to carry out a kill-for-profit scheme. Consider, for example, *Sun Life Assurance Co. of Canada v. Allen*, 259 N.W. 281 (Mich. 1935), where the partnership was the named beneficiary on policies on the lives of two partners, and one partner died due to "hemorrhage following ruptured gastric ulcer" after he was "wrestling or struggling" with the other partner. *Id.* at 282. The court specifically observed that "[t]he mortality among the partners of Charles Elson [the surviving partner] was rather high," and the court mentioned the suspicious circumstances of the deaths of three other partners, including one who died from a fall down a stairway. *Id.* The court sustained the insurer's refusal to pay on the ground of false representations and fraud in the application. *Id.* at 286. Insurance has figured prominently in many other murders and intentional killings, some of which were disguised by the perpetrators in an attempt to make them seem to

is probably the most famous, even if the most recent activities of the central figure in the case are not well known. A brief excursion through the facts of *Rubenstein* is an appropriate way to set the stage for a look at *Lakin*.

### I. MAY HAROLD, DARRELL, EVELYN, AND KRystal REST IN PEACE

Until 1979, Alan Rubenstein's principal business accomplishment had been owning and driving a taxi cab in New Orleans. Rubenstein was not without ambition, however, and this led him to attend a seminar that prompted his interest in starting the sort of periodical that takes paid advertisements and is distributed without charge to the public. It appears, however, that Rubenstein did not see the paid advertisements as the most direct path to financial success.

Rubenstein placed a notice through the Louisiana Unemployment Commission seeking assistance in developing the *TV Journal*, and a twenty-three year old named Harold Connor responded to it. Rubenstein (only about thirty years of age himself) and Connor met shortly thereafter, and on August 7, 1979, they entered into a business arrangement under which Connor agreed to pay Rubenstein \$1,000 a month for a franchise. This was a substantial fee, given the fact that the publication had no reasonable prospects of success for a host of reasons,<sup>12</sup> but Connor did take a twenty-five percent stake in the operation. On that same date, the men also met with a Mutual of New York (MONY) insurance agent, who recommended that Rubenstein purchase \$240,000 of credit life insurance (to secure Connor's "debt" to Rubenstein) on Connor. This was a stunning recommendation, given that Connor had no experience in the publishing business and no education past high school and had worked, without success, only for about two months as a furniture salesman.

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be accidents. *See, e.g.*, *State v. Castor*, 632 N.W.2d 298 (Neb. 2001) (wife's murder of husband in circumstances where she stood to benefit from insurance proceeds); *Cont'l Assurance Co. v. Diorio-Volungis*, 746 N.E.2d 550 (Mass. App. 2001) (wife held not an accessory before the fact in murder of her husband, in circumstances where she had arranged for several policies to be issued on his life shortly before his death); *State v. Roth*, 881 P.2d 268, 277 (Wash. App. 1994) (defendant convicted of first-degree murder of his fourth wife, who died in a rafting "accident"; defendant's first wife died in fall from 300-foot cliff while hiking; court reasons that "a rational trier of fact could find that Roth was the 'mastermind' of an overarching plan to marry, insure, and murder women in order to obtain large insurance recoveries"); *Lunsford v. W. States Life Ins.*, 908 P.2d 79 (Colo. 1996) (wife purchases more than \$200,000 of life insurance on husband in six months before she arranges his murder); *Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co.*, 819 F.2d 1471 (8th Cir. 1987) (half-brother murdered half-sister as part of scheme to recover insurance proceeds on half-sister; approximately \$3.5 million of insurance at issue under various policies); *Lopez v. Life Ins. Co. of Am.*, 406 So. 2d 1155 (Fla. Dist. App. 1981) (plaintiff, who survived physical attack, states cause of action against insurers who issued policies to wife on his life); *Ramey v. S.C. Life Ins. Co.*, 135 S.E.2d 362 (S.C. 1964) (insured has cause of action against insurer for injuries sustained when wife attempted to murder him by arsenic poisoning to recover insurance proceeds); *Liberty Nat'l Life Ins. Co. v. Weldon*, 100 So. 2d 696 (Ala. 1957) (father of deceased daughter can sue insurer for negligence in issuing insurance policies to aunt-in-law of deceased, who murdered insured daughter to recover insurance proceeds).

<sup>11</sup> 584 F. Supp. 272 (E.D. La. 1984).

<sup>12</sup> A multitude of facts on this point are set forth in the court's opinion. *See id.* at 275-77.

Moreover, no magazine had been published, and no advertisements had been sold.<sup>13</sup>

According to the testimony of three witnesses who knew Connor well, Connor had “never been hunting before and was disgusted by the idea of killing animals.” This, however, did not deter Connor from going on the hunting trip with Rubenstein (unless one surmises that Connor made the trip against his will), although it is curious that Connor did not pack the proper clothing for this trip.<sup>14</sup> With the hunting expedition starting on such a promising note, it is not surprising that the court would summarize what was known about the circumstances surrounding Connor’s death during the trip as “bizarre,” with the evidence from the five eyewitnesses “largely in dispute and somewhat irreconcilable.”<sup>15</sup>

On November 5, 1979, Rubenstein, three of his relatives (two step-children and one of their cousins; one of the step-children was Darrell Perry, who was about twelve years old at the time<sup>16</sup>), and Connor left New Orleans, staying overnight at Rubenstein’s parents’ house. The next morning, the party was joined by Rubenstein’s brother and Michael Fournier, a convicted felon then on probation who was one of his brother’s friends. They went to a secluded location in the woods; the cousin proceeded to lock the car keys in the car. After the locked car door was finally opened, Fournier, who was standing about ten feet behind Connor with a single-shot twelve-gauge shotgun (even though he was prohibited by the terms of his probation from carrying firearms), discharged a single shot into Connor’s back, killing him.

Fournier claimed that he tripped and that the gun discharged when the butt of the gun was close to the ground and while the barrel was pointed diagonally upward in Connor’s direction. This contradicted expert testimony that the shotgun pellets had a lateral path through Connor’s body, as well as expert testimony that because of the gun’s safety device, the gun could not have fired simply by striking the ground. In other words, the gun would not fire unless it were loaded and cocked and the trigger pulled (presumably by Fournier, who admitted he was holding the gun when it fired). In these circumstances, the court concluded that Connor “was killed under highly suspicious circumstances, circumstances that suggest something far more sinister than a mere ‘accident.’”<sup>17</sup>

When Rubenstein claimed the proceeds of the policy in his status as the owner and designated beneficiary in the policy on Connor’s life, the insurer declined to pay. Rubenstein sued, and the insurer’s defense cited numerous misrepresentations on the application and Rubenstein’s lack of insurable interest. The latter argument was based upon the “grossly disproportionate” amount of insurance Rubenstein purchased relative to the value of Connor’s contribu-

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<sup>13</sup> *Id.* at 274-75, 277.

<sup>14</sup> *Id.* at 277.

<sup>15</sup> *Id.*

<sup>16</sup> The court in *Rubenstein* would spell the step-son’s name as “Darryl,” but news reports in 2000 about the step-son’s murder consistently spell his name “Darrell.”

<sup>17</sup> *Id.* at 278.

tion to this anemic, undercapitalized business venture. The court agreed with both of the insurer's defenses and dismissed the plaintiff's complaint.<sup>18</sup>

Whether the agent for MONY should have ever solicited the policy is a fair question to ask, of course. But this raises a set of questions separate from whether Rubenstein should have received the proceeds. As the court's thinly veiled speculations suggest, the odds seem quite high that Rubenstein was involved in a plot to murder his business partner in order to strike it rich at the expense of an insurance company. No doubt the adjusters for MONY desired that Rubenstein should be disqualified as a slaying beneficiary (or as one who purchased insurance on the life of another with a simultaneously held intent to murder the *cestui que vie*), but desire based on hope and disqualification based on evidence are two very different things. With the lack of sufficiently strong evidence to establish Rubenstein's responsibility for the slaying beyond a preponderance, MONY turned to misrepresentation and insurable interest arguments to escape the possibility of paying proceeds to someone whose involvement in the *cestui que vie's* death seemed all too likely.

One might have hoped that Rubenstein's interest in making money through the purchase of insurance on the lives of others might have waned after his unsuccessful effort to recover on the policy on Connor's life. Tragically, this was not to be the case. Darrell Perry, Rubenstein's step-son, would later enter adulthood and marry a woman named Evelyn Ann, with whom he would have a daughter, Krystal Ryan, in 1989. In 1991, Rubenstein purchased a \$250,000 insurance policy on the life of Krystal, his then two-year-old step-granddaughter, and named his wife, Doris, as the beneficiary.

According to media reports on the contents of court records, in the fall of 1993, Rubenstein took his step-son Darrell, his daughter-in-law Evelyn, and his step-granddaughter Krystal to a cabin he owned in Mississippi, supposedly to give them a place to work through marital difficulties. Rubenstein made at least two trips to the cabin before Thanksgiving 1993.<sup>19</sup> After Doris did not hear from her son, Rubenstein drove to the cabin on December 16th to look for them and reported discovering their three bodies, all murdered. Although the precise time of their deaths is subject to some dispute, Darrell and Evelyn had been stabbed, and Krystal had been strangled.<sup>20</sup> Later, Rubenstein would testify that he collected the insurance proceeds and "blew" the money.<sup>21</sup> After a lengthy investigation, Mississippi authorities charged Rubenstein in September 1998 with the three murders, but a trial in June 1999 ended in a hung jury, with jurors voting eleven to one to convict him of capital murder. Rubenstein was tried again, and in February 2000 he was convicted of three counts of first-degree murder and sentenced to death.<sup>22</sup> Rubenstein now awaits execution in Mississippi; his conviction and sentence are on appeal.<sup>23</sup> In September 2000,

<sup>18</sup> *Id.* at 278-79.

<sup>19</sup> See Tara Young, *Marrero Man Guilty of Killing 3 Relatives*, NEW ORLEANS TIMES-PICAYUNE, Feb. 8, 2000, at B1.

<sup>20</sup> Associate Press Newswires, Feb. 7, 2000.

<sup>21</sup> *State News in Brief*, COMMERCIAL-APPEAL (Memphis, Tenn.), Feb. 8, 2000, at DS5.

<sup>22</sup> *Id.*

<sup>23</sup> For information about and a photograph of Alan Rubenstein, see <http://www.mdoc.state.ms.us/Death%20Row/Death%20Row%20Inmates%20PDF%20Files/Rubenstein,%20Alan%20Michael.PDF> (last visited Sept. 24, 2001).

Darrell's father brought a \$15 million lawsuit against Rubenstein, his wife, and the New York Life Insurance Company, which sold the policy on Krystal's life. Among the allegations in the suit is the claim that Doris knew that her husband had murdered Connor in 1979 in an attempt to collect insurance proceeds and did nothing to thwart Rubenstein's scheme with respect to Krystal.<sup>24</sup>

Hunting, guns, and insurance do not mix well. Throw in some whiskey, and the delicate mixture becomes even more unstable. That recipe is part of the story of Harvey Hankinson and Henry Lakin.

## II. MAY HARVEY REST IN PEACE

The tragic character in this story is W. Harvey Hankinson. A World War II veteran who was discharged from the military in 1949, Harvey returned to his hometown in South Carolina to work in his father's garage as an auto mechanic and to operate a wood and coal business. One can only speculate as to why Harvey abandoned his wife and four children in early 1954, but plainly Harvey's world was not on an upward trajectory. He worked in the kitchen of a railroad section gang for a time and was a patient in the Kansas City Veterans Hospital from August 9 to 19, 1954.<sup>25</sup> Harvey had a problem with alcohol; his brother Earl would later testify that Harvey's excessive drinking was the reason his business failed in the early 1950s and that Harvey was "a drunkard, a derelict and a floater."<sup>26</sup> Keeping track of his financial portfolio was not particularly important to Harvey; he let his life insurance, obtained as a member of the Armed Forces, terminate for nonpayment of premiums. Indeed, by mid-August, 1954, insurance must not have been particularly relevant in a life that must have seemed, even from Harvey's perspective, rather empty, if not in utter shambles. Sadly, things only got worse when Henry Lakin entered the story.

Henry Lakin was a small-time roofing and siding contractor with an office in his home. In the August 19, 1954, Kansas City newspapers, he placed an ad in the "help wanted" sections, which read as follows: "MAN—Age 25 to 30, single, start as helper and learn trade; wages plus room and board; prefer person with no family ties."

Harvey saw the ad and replied by telephone. Henry suggested that they meet at a drug store near the Veterans Hospital, and Henry hired him on the spot. Would Henry have us think that Harvey was a strong interviewer, particularly just after his release from the hospital? Or that Henry saw great potential in him? Apparently, it mattered little to Henry that Harvey was homeless, penniless, and certainly without resume in hand.

Henry not only hired Harvey but also took Harvey home and let him move into the Lakin residence. The first couple of jobs Harvey performed for Henry were compensated through room and board. After the first week, Henry paid Harvey some money, but the amount was variable because he did "piece work."

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<sup>24</sup> *Victims' La. Family Sue Miss. Inmate*, BATON ROUGE ADVOCATE, Sept. 14, 2000, at 9B.

<sup>25</sup> Harvey was not hospitalized for an alcohol-related illness. He had problems with his teeth, two of which were extracted under general anesthesia during the stay in the VA hospital. Statement, Brief, and Argument for Respondent at 2, *Lakin v. Postal Life & Cas. Co.*, 316 S.W.2d 542 (Mo. 1958) (No. 46075) (citing Exhibit 65).

<sup>26</sup> *Lakin v. Postal Life & Cas. Co.*, 316 S.W.2d 542 (Mo. 1958).

But Harvey caught on quickly, Henry would say, which led Henry to conceive the plan to make Harvey his partner. Under the "percentage arrangement" that Henry devised, Harvey's shares "grew rapidly," as Henry would testify later, even though no books or records documented the financial aspects of their relationship. Indeed, there was no written partnership agreement, no partnership name ("we hadn't got to that," Henry said), no letterhead, no business cards, no invoices, and no contract that mentioned Harvey's name. Harvey purchased no share of Henry's equipment and made no capital contribution to the partnership.

Interestingly, Harvey was not Henry's first business partner. Three prior partnerships had short durations, but a fourth with a fellow named Frederick E. Scott lasted about three years. Consistent with Henry's manner of doing business, no written agreement evidenced that partnership either. The Lakin-Scott partnership was supposedly a "fifty-fifty" relationship, but Henry was plainly the senior partner in the deal: Scott "gave" his share of the money to Henry, and then Henry gave Scott "what he needed." Like Harvey, Scott also lived at Henry's home, and insurance figured in both the Lakin-Scott and the Lakin-Hankinson partnerships. Indeed, Henry described himself as a "believer" in insurance; he carried approximately \$80,000 of insurance on his own life. Thus, Scott and Henry each took out insurance on their own lives naming the other as beneficiary, although Scott would testify that he thought Henry had named Henry's spouse as beneficiary. Adding to the curiosity was Scott's testimony that he could not remember ever seeing the policies or paying any premiums. Scott's relationship with Henry took a definite turn for the negative after Henry attacked Scott with an iron pipe, although Scott stayed with Henry after the attack because he had nowhere else to go.<sup>27</sup> Scott left for good shortly after he had an accident with Henry's car. No record existed of the dissolution or settlement of the Scott-Lakin partnership (if, we might fairly wonder, it ever existed).

Henry testified that his interest in insurance proved influential to Harvey. Henry was good friends with a Prudential agent, Tom Ballard. On August 26, 1954, less than a week after Henry and Harvey became acquainted, Ballard took Harvey's application for a \$50,000 ten-year term double indemnity policy, on which Henry would be named as the beneficiary. The Prudential home office, though, had some doubts, and it asked Ballard to justify the application. Ballard explained that Harvey was to receive twenty-five percent of the profits in exchange for his investment of \$5,000 in the enterprise. Although Prudential apparently did not know that Ballard's explanation was false, it rejected the application anyway.

But Tom Ballard had a brother, Dayton Ballard, who was both an agent for Prudential and a soliciting agent for Postal Life. Tom asked Dayton whether Postal Life might issue the policy, and Dayton suggested that Harvey apply to Postal Life for a five-year term policy in the amount of \$25,000 with double indemnity and with a proposed designation of Harvey's wife as the beneficiary. Harvey was willing to apply for this kind of coverage, and Dayton

<sup>27</sup> On cross-examination, Scott admitted he had been subject to some black-out spells. Statement, Brief, and Argument of Appellant at 9, *Lakin v. Postal Life & Cas. Co.*, 316 S.W.2d 542 (Mo. 1958) (No. 46075) (citing trial transcript at 461-62).



wrote out Harvey's answers on the application form. It turned out that several false answers appeared on this form: the question on whether the applicant had ever been refused insurance was answered incorrectly; Harvey's financial worth and net income were misrepresented; and one answer represented that Harvey had always been "a person of good habits and reputation."

Dayton delivered this application, along with Harvey's check for \$58.75 for the first premium, to Postal Life's "city manager," along with the explanation that if Postal Life issued the policy, the beneficiary would be changed to Henry and an additional policy of \$25,000 for business insurance would be requested, as all of this was what Harvey really wanted. Dayton testified that he added a notation to the application requesting issuance of an additional \$25,000 policy with the "same beneficiary," but he did not explain why Harvey's wife would be named as beneficiary on a policy intended to insure the business. Harvey later had a medical examination and purportedly gave a number of false answers here as well: that he had never had a life or health policy rejected; had never been in a hospital or other institution for treatment (except for the extraction of two teeth in 1954); had never had any disease, injury, or illness; and had not consulted a physician during the past seven years.

Postal Life, it turned out, was not without some reservations about the application, although Postal Life had less reluctance than Prudential. Postal Life was willing to issue one \$25,000 policy with an up-rated premium; apparently, Harvey's drinking habits were of some concern. Dayton, interestingly enough, called Henry to discuss this development, and Henry said that Postal Life should go ahead and issue the policy. The policy, which had an issue date of October 13, 1954, was not, however, the one requested; instead, the Postal Life policy was a \$25,000 endowment policy with no double indemnity, with Harvey's wife designated as the beneficiary. The quarterly premium for this policy was \$276, much more than Harvey anticipated. When Harvey saw this figure, he said (according to Dayton's testimony) that he did not want the policy because of its high cost. But Dayton interjected the possibility of using the policy as business insurance, and, after some discussion, Henry "took it as business insurance" (according, again, to Dayton's testimony). Henry paid the additional premium (\$217.88 beyond the \$58.75 previously paid), and Dayton took steps "right away" to secure forms to effect a change of ownership and beneficiary of the policy, as per the understanding reached at this meeting. Harvey signed these forms on November 29, 1954. Similar forms were executed by Henry to substitute Harvey as the beneficiary of the \$25,000 policy issued by Prudential on the life of Henry, with respect to which Scott had previously been designated the beneficiary.

The \$25,000 policy on Harvey's life and the \$80,000 of insurance on Henry's life were more than ample to cover whatever income the Lakin-Hankinson partnership generated in 1954. In fact, as the court would reconstruct the financial aspects of the insurance package, the monthly premium for the Pilot Life policy on Harvey's life was \$92.21, and the cost of the insurance on Henry's life was about \$100 a month. Henry's 1954 individual income tax return showed \$1,338.16 of "partnership profit," which made up a significant portion of his gross income for the year of \$3,346, which after deductions netted out to \$2,857 – a figure only a few hundred dollars more than Henry's

insurance premium obligations for the calendar year. The “business insurance” aspects of the Pilot Life policy were also forgotten by Henry when he completed the 1954 income tax return for the Lakin-Hankinson partnership, because he took no deduction on the return for the cost of the business insurance policy.

The first quarterly premium on the Postal Life policy was due on January 13, 1955, but this premium was not paid. Henry would testify that neither he nor Harvey intended to pay it. Events would overtake, however, whatever intentions Henry and Harvey had with respect to the policy. On January 17, 1955, a date conveniently within the policy’s thirty-day grace period, the two men went on a hunting trip together near Pleasant Hill, Missouri, and only Henry came back alive.

Henry, the only eyewitness to Harvey’s death, explained Harvey’s demise as an accident. Under Henry’s version of the events, Henry had permission to hunt on a farmer’s property, and he and Harvey decided to do so. They also took some whiskey with them because, as Henry testified, “that kind of goes with hunting.” The guns they took as part of this odd combination were owned by Henry – a new .410 bolt action shotgun and an “over and under gun” (*i.e.*, a .22 rifle over a .410 shotgun). The hunting was poor, so the two men went to a nearby town where they purchased more whiskey and played some pool. The hunting resumed in the mid-afternoon at another location where they had hunted before. Henry testified that they went down into a “little gully affair”; a location where “there wasn’t any farm houses visible down in there where we were hunting.” That makes sense, some would say, as it would be more convenient for Henry if no one could see what would happen next.

Henry had the .410 shotgun, and Harvey had the “over and under gun,” they had exchanged the guns they had been using in the morning with hopes for some better luck. After about an hour of fruitless hunting, Harvey described, as summarized by the court, the next set of events:

Hankinson, who was walking behind [Henry], “said something,” and [Henry] turned around. They were then facing each other, about two to three feet apart, with Hankinson a little to [Henry’s] right. Hankinson was carrying his gun with his right hand eight to twelve inches down from the muzzle, the barrel pointed forward and the butt down. [Henry] testified that Hankinson said, “Hell, I can’t hit anything with this either,” and that he “flipped it [the gun] up to me.” [Henry], with the .410 shotgun in his right hand with his finger on the trigger and the barrel pointed down, grasped the “over and under gun” at the small of the stock when it was above his waist but below his shoulder. He stated his left index finger must have hit the trigger and that the gun discharged when the muzzle was eight to ten inches from Hankinson. The charge struck him in the chest. [Henry] could get no response from Hankinson and he went for help.<sup>28</sup>

At this point, Harvey was almost certainly dead. Help eventually arrived, and Harvey was carried a quarter-mile to a car that was used to transport him to the doctor, who made the official pronouncement that Harvey was no more. The next day, Henry contacted Tom Ballard, who in turn called Dayton Bal-

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<sup>28</sup> *Lakin*, 316 S.W.2d at 548.

lard, for the purpose of requesting forms on which a proof of loss could be filed.<sup>29</sup>

Harvey's version of events perished with his last breath, but one can surmise what explanation of the events Harvey might have given based on the testimony of the experienced pathologist who examined Harvey's clothing and his exhumed body on June 2, 1956. First, the pathologist did not find any evidence of burning or scorching, which would be expected if the fatal gunshot were fired from a weapon the barrel of which was less than a foot from Harvey's chest. Second, the pathologist's reconstruction of the path of the shotgun charge did not square with Henry's story. Under Henry's version of events, "the course of travel of the shot would have been from right to left through Harvey's body and on an upward or level course," but the pathologist found that "the course of the shot was from left to right and downward."<sup>30</sup> Third, Harvey's body revealed some broken bones in the chest area that were unrelated to the shotgun wound. Specifically, the pathologist testified that "the manubrium (top) bone of Hankinson's breast bone showed an unhealed transverse fracture and that there was a vertical fracture of the right second costal cartilage through its junction with the breast bone, and that these were above the shotgun wound and not caused by the shotgun charge."<sup>31</sup> One can only speculate how those bones were broken; curiously, Henry testified that Harvey had not been injured in any other accident.

What, then, did Harvey's eyes see at the moment of his death? If Henry put the "over and under gun" to his shoulder and fired at Harvey, the path of

<sup>29</sup> Statement, Brief, and Argument for Respondent at 6, *Lakin v. Postal Life & Cas. Co.*, 316 S.W.2d 542 (Mo. 1958) (No. 46075) (citing trial transcript at 59, 93, 109).

<sup>30</sup> *Lakin*, 316 S.W.2d at 548. The pathologist testified that

the shotgun charge entered the body in the third intercostal space approximately two and one-fourth inches to the left of the breast bone; that "the line flight of the shotgun charge was from left to right slightly downward from horizontal and backward at an angle of about 45 degree[s]" and that the death was almost immediate.

*Id.* Similar testimony was given by the undertaker who had embalmed the deceased. Statement, Brief, and Argument for Appellant at 8, *Lakin v. Postal Life & Cas. Co.*, 316 S.W.2d 542 (Mo. 1958) (No. 46075) (citing trial transcript at 421). Lakin's story, in contrast, was that he caught the gun Harvey tossed to him with his left hand, grabbing it at the small portion of the stock and apparently hitting the trigger with his left index finger. Thus, it was the gun that Henry caught which fired and killed Harvey. Although I have never tried to catch with one hand a loaded rifle which has been tossed to me, it is hard to imagine catching any kind of tubular object with one hand in a manner that would involve the end opposite from the end where the object is caught being lower than the end which is caught. Indeed, it is hard to imagine throwing a rifle in a manner that would cause the stock to be higher than the end of the barrel at the moment it is caught, unless one were flipping it end over end – which seems unlikely, even for an experienced gun-thrower. Another possibility would have the deceased being bent at the waist and leaning forward – as if to bow to Henry – at the time the weapon was fired, although this seems an unlikely attitude for Harvey immediately after throwing a gun. As appellant conceded in its brief, "[t]he doctor's testimony that the gun was at a forty-five degree angle would tend to contradict [Henry's] testimony, if it be material." Statement, Brief, and Argument for Appellant at 35, *Lakin v. Postal Life & Cas. Co.*, 316 S.W.2d 542 (Mo. 1958) (No. 46075). Another possibility is that Harvey was on his knees, begging for mercy, at the time he was shot. Alternatively, he might have been disabled by crushing blows to the chest (which broke some of his bones) and shot while laying on the ground.

<sup>31</sup> *Id.*

the charge would have been downward. If Harvey had been struck with the butt of the gun with enough force to break bones in his chest and if he were on his knees begging for his life, the path of the shot would have been downward. If the lack of scorching meant the gun must have been fired from some distance, is it possible that Henry broke bones in the chest of a man already dead out of spite for a man not savvy enough to figure out Henry's evil scheme?

Henry was not prosecuted for Harvey's death. One can only speculate as to why this did not occur. The inquest into Harvey's death the night of the shooting concluded that the shooting was accidental.<sup>32</sup> The pathologist's testimony was secured almost eighteen months after Harvey died, so this testimony was not available to the prosecutor. Perhaps the prosecutor did not see any particular reason to question Henry's facially plausible story. Perhaps the prosecutor shared the court's suspicions, but he thought the odds of marshaling enough evidence to secure a jury's finding of guilt beyond a reasonable doubt to be too low to justify the expense of a prosecution. But Postal Life had its suspicions. Without the ability to demonstrate beyond a preponderance that Henry intentionally slew Harvey, the insurer turned to other doctrines to reach, what it thought, would be the reasonable outcome in the circumstances.

### III. MORAL HAZARD

In the world of inextricably linked pairs, one finds the likes of Rogers and Hammerstein, Richard Nixon and Watergate, Neil Armstrong and the moon, golf and Tiger Woods, and insurance and moral hazard. Of course, each part of the pair has a separate identity for some purposes. For example, one can think about golf without having Tiger Woods in mind, and Tiger undoubtedly has personal friends who know him as someone other than a golfer. But most of us will not dwell upon one part of the pair for long without at least a fleeting thought about the other. Such is the case with insurance and moral hazard.

As Professor Tom Baker has demonstrated in his careful study of moral hazard's "genealogy," moral hazard's cultural and technical meanings have evolved over time.<sup>33</sup> Baker explains that nineteenth-century insurers understood moral hazard as "an unwholesome mix of bad character and temptation which the insurers had a responsibility to ferret out from the insurance enterprise."<sup>34</sup> This conception survives to the present,<sup>35</sup> but it is now accompanied by neoclassical economists' explanation of moral hazard as insurance's "inevitable" tendency to "increase[ ] the occurrence, magnitude, or cost of that which is insured against" by altering incentives to prevent or reduce loss.<sup>36</sup>

These two strands are evident in modern discussions of moral hazard. For example, one prominent insurance treatise distinguishes the "physical characteristics of the risk" from the "human element in the insurance relationship"

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<sup>32</sup> See Statement, Brief, and Argument for Appellant at 8, *Lakin v. Postal Life & Cas. Co.*, 316 S.W.2d 542 (Mo. 1958) (No. 46075) (citing trial transcript at 291 and Exhibit 42).

<sup>33</sup> See Tom Baker, *The Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996).

<sup>34</sup> *Id.* at 240.

<sup>35</sup> See *id.* at 265-67.

<sup>36</sup> *Id.* at 241, 267-75.

and refers to the latter as “moral hazard.”<sup>37</sup> By “human element,” the authors refer to the “condition where an insured deliberately brings about the event insured against or deliberately ‘pads’ a claim” and state that moral hazard “arises from a combination of moral weakness and financial difficulty.”<sup>38</sup> Then, the writers draw a distinction between “moral hazard” and “morale hazard,” considering the latter to be a closely related “attitude problem” involving the “absence of a desire to safeguard property or the absence of concern over the reasonable settlement of a liability or compensation claim.”<sup>39</sup> Thus, this presentation of moral hazard distinguishes between intentionally bringing about (or exaggerating, in the context of claims processing) a loss and the insured’s failure to take reasonable precautions to prevent loss (or lack of enthusiasm for reasonable claims processing outcomes), but it anchors moral hazard in the insured’s immoral tendencies, which may become manifest when the insured confronts the temptations wrought by economic hardship and, presumably, the desire for economic gain. In contrast, Professor Abraham embraces the economists’ moral hazard when he explains that insurers seek to base premiums on the expected losses of their insureds, but this effort is frustrated because “insureds to some extent control the probability that losses will occur. Once an individual has purchased insurance, his or her incentive to control losses decreases.”<sup>40</sup> This leads to a definition of moral hazard as “the resulting tendency of an insured to under allocate to loss prevention after purchasing insurance.”<sup>41</sup> This is consistent with my own effort to explain moral hazard in the context of the economics of insurance.<sup>42</sup>

Both conceptions of moral hazard are evident in the facts of *Lakin*. Although the precise circumstances of the hunting trip are forever hidden from view, we are left with the inescapable conclusion that Henry’s moral bankruptcy and his desire for money led to his engineering of the insurance arrangement and the destruction of Harvey’s life. If one peels away the moral dimensions of Henry’s acts, one is left with an illustration of the inherent tendency of insurance to increase the probability of loss. The insurer’s effort to escape responsibility under the policy then stands as an effort to preserve the integrity of the risk pool, which is otherwise compromised by the operation of the phenomenon of moral hazard.

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<sup>37</sup> S.S. HUEBNER, KENNETH BLACK, JR., & BERNARD L. WEBB, PROPERTY AND LIABILITY INSURANCE 605 (4th ed. 1996).

<sup>38</sup> *Id.* at 605-06.

<sup>39</sup> *Id.* at 606.

<sup>40</sup> KENNETH S. ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY 14 (1986).

<sup>41</sup> *Id.* For more examples of economic formulations of moral hazard, see Baker, *supra* note 33, at 267-75.

<sup>42</sup> See JERRY, *supra* note 6 (explaining moral hazard, stating that the existence of insurance can have the perverse effect of increasing the probability of loss). See also STEMPPEL, *supra* note 9, § 1.05 (reviewing concept of moral hazard as including both the concept of carelessness and temptation toward skulduggery).

## IV. THE DARK SIDE OF INSURANCE

In the fantasy world of Star Wars,<sup>43</sup> the characters who place their faith in the peace and harmony of the “Force” compete with those who have succumbed to the Force’s “dark side,” thereby threatening the well-being of the entire galaxy. Of course, the Star Wars story is, among other things, a metaphor for the struggles between good and evil, freedom and tyranny, and community and self-aggrandizement. Just as the Force has its good and bad dimensions, insurance is a force for good which, with the slightest tweaking, can evolve into a means of channeling evil.

The earliest examples of insurance show insurance as a force for good. These are found in the risk distribution mechanisms devised by Babylonian and Greek merchants who, in ancient times, accompanied their goods on voyages to distant markets across the Aegean and Mediterranean Seas. Sudden storms were among the perils of these voyages, and the merchants’ goods could be tossed overboard upon the orders of the ship’s captain to lighten the vessel and preserve the lives of those on board and such cargo on the vessel as might be saved. To reduce the risk of the catastrophic losses which could be visited on individual merchants, shippers and merchants devised a system whereby each merchant would share, if the ship completed its voyage safely, the loss of any one of them pro rata among themselves. This system, which has survived fundamentally intact to the present in admiralty law as the principle of “general average,” was a mutual aid society on a very small scale – an *ex ante* allocation of the risk of uncertain loss.<sup>44</sup>

The precise details of how these arrangements among merchants on a voyage evolved to more sophisticated systems of risk transfer and distribution are obscure, but at some point it probably became apparent that pooling the risks of many voyages was a more effective way to distribute risk than simply pooling the risk among the shippers on one voyage. The emergence of commercial insurance also had something to do with how the ancient merchant financed his business. It was common for these early traders to borrow funds, but in ancient Greece, the consequence of failing to repay the loan (which could happen if the cargo was lost at sea or the shipper failed to survive the voyage) was that the merchant or his heirs might become slaves upon the loan’s foreclosure. To address this problem, the “bottomry loan” arrangement emerged, under which the lender took full responsibility for the loss of the ship or cargo. The rates of interests on these loans were very high (sometimes as much as one hundred percent), but functionally the loan served as both an investment in the business and insurance against the risk of loss. At some point, the insurance aspects of the bottomry loan must have been separated from the loan’s investment pur-

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<sup>43</sup> See DAVID W. REYNOLDS, *STAR WARS: THE VISUAL DICTIONARY* (1998).

<sup>44</sup> For more discussion, see JAMES A. JOYCE, *A TREATISE ON THE LAW OF INSURANCE OF EVERY KIND* 1-4 (1917); RICHARD LOWNDES, *THE LAW OF GENERAL AVERAGE: ENGLISH AND FOREIGN* 2-3 (4th ed. 1888); ROBERT H. JERRY, II, *THE COMMUNITARIAN VALUES OF INSURANCE* (Aug. 1999) (unpublished manuscript, on file with the NEVADA LAW JOURNAL). See generally PETER BERNSTEIN, *AGAINST THE GODS: THE REMARKABLE STORY OF RISK* (1994).

poses, and one result of this separation would have been the emergence of the commercial business of insurance.<sup>45</sup>

In both its ancient and sophisticated modern forms, insurance makes business possible that would not otherwise occur. In a macro sense, it is no exaggeration to assert that insurance has been an essential element of economic development throughout history and around the world. In a micro sense, insurance enables entrepreneurs to substitute certain, periodic payments for the possibility that a catastrophic loss will destroy one's entire investment. For individuals, insurance makes possible the preservation of work and accumulated savings, the maintenance of lifestyles and prosperity, and the realization of future dreams that would be dashed by unexpected loss but for the presence of insurance. Embedded in the insurance arrangement is the contribution of individuals to a communitarian enterprise, out of which the miseries of the unfortunate are alleviated. As Professor Deborah Stone explains,<sup>46</sup> insurance provides an opportunity for individuals to contribute to the collective "for the benefit of others who might suffer from loss when [the individual] does not," thereby "call[ing] forth [the] moral motives . . . of charity, compassion, civic responsibility, and justice."<sup>47</sup> This is insurance at its best.

*Lakin* summons the sobering reality, however, that insurance, like the Force, has a dark side. For centuries, there have been those who would use the insurance contract to take advantage of others, to provide a means to undeserved gains, and to effectively steal an undeserved allocation from the collective. *Lakin* is a prime exhibit in this category, for the story of Harvey Hankinson reminds us that insurance, notwithstanding all the good it facilitates and its important role in maximizing wealth and security, is sometimes used to promote suffering and despair. In fact, a significant component of insurance law is aimed directly at those practices that would convert insurance from a force for good into a tool for evil.

## V. THE DOCTRINAL CONTENT OF *LAKIN*

In addition to providing a foundation for reflection on the themes discussed above, *Lakin* is interesting as a source of insurance doctrine. Because it appears to involve a killing-for-profit scheme, *Lakin* puts in play the various principles that seek to deter and remedy a person's intentional destruction of life for the purpose of profiting under an insurance contract. If Henry did murder Harvey, Henry would have been disqualified from receiving the proceeds under one, and perhaps two different, rules. First, as a slaying beneficiary, he would have been considered the functional equivalent of a predeceasing beneficiary, meaning that he would have been disqualified from taking any proceeds.<sup>48</sup> Second, if Henry secured his ownership interest in the policy on

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<sup>45</sup> For more discussion, see C.F. TRENERRY, *THE ORIGIN AND EARLY HISTORY OF INSURANCE* 243-82 (1926); WILLIAM R. VANCE, *HANDBOOK ON THE LAW OF INSURANCE* 10-11 (3d ed. 1951); LIONEL CASSON, *ANCIENT TRADE AND SOCIETY* 26 (1979); JERRY, *supra* note 6.

<sup>46</sup> See Deborah A. Stone, *Beyond Moral Hazard: Insurance as Moral Opportunity*, 6 *CONN. INS. L. J.* 11 (1999).

<sup>47</sup> *Id.* at 14.

<sup>48</sup> JERRY, *supra* note 6, at 296-99.

Harvey's life with the simultaneously held intent of slaying Harvey, the policy would have been void *ab initio*, which would also prevent Henry from receiving any benefit under it.<sup>49</sup>

Although the two rules impact Henry identically in that each prevents him from receiving proceeds under the policy, the rules have vastly different implications for third parties. Under the "slaying beneficiary" rule, the policy is not void, and any designated contingent beneficiaries take proceeds; further, at least under modern policy forms, in the absence of any qualified beneficiary the proceeds are paid to the estate. Under the "fraud in the inducement" rule, the policy is treated as never having become effective, and the remedy is rescission. In this event, neither contingent beneficiaries nor the *cestui que vie*'s estate is entitled to the proceeds. Thus, if the insurer's denial of Henry's claim were premised on Henry's alleged role in intentionally causing Harvey's death, Harvey's heirs – presumably his wife and children – would have had a stake in how the case were resolved. Having Henry's claim denied under the slaying beneficiary rule would have preserved their ability to acquire the proceeds through the rules of intestate succession. There is no indication in the court's opinion, however, that Harvey's wife, who presumably still lived in South Carolina at the time of the proceedings, pressed any claim upon or interest in how the insurance proceeds were disposed. Indeed, there is reason to think that she had no knowledge of the existence of the policy; Postal Life's brief made the point that Henry's attorney wrote to Harvey's wife regarding her possible claims on another insurance policy but made no reference to the Postal Life policy at issue in the case.<sup>50</sup>

Because the insurance company was contesting the policy, the insurer was inevitably attracted to insurance law doctrines that would invalidate the policy *in toto*. Postal Life argued that Henry's conduct in bringing about Harvey's death prevented him from taking proceeds, but the insurer also alleged the invalidity of the policy on account of misrepresentations in the application and Henry's lack of an insurable interest in Harvey's life.<sup>51</sup> The court ultimately decided the case based on the insurable interest argument. Under the general rule, one cannot take out an insurance policy on the life of another without an insurable interest in the life of that person.<sup>52</sup> The insurable interest can be based on a close familial relationship – the court called this "blood or affinity"<sup>53</sup> – or on an economic or pecuniary relationship, such that the person taking out the insurance stands to benefit or be advantaged from the continued living of the *cestui que vie*. The logic of this rule is directly related to moral hazard: if the owner of the policy benefits from or is dependent upon the *cestui*

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<sup>49</sup> See *id.* Complicating the application of this rule is the fact that the policy at issue was initially issued to Harvey on his own life, and Henry became the owner by virtue of Harvey's assignment to Henry. It would seem, however, that if a party secures an assignment of a policy on someone else's life with a simultaneously held intent to slay the *cestui que vie*, the assignment should be void under the same logic that the issuance of a policy under the same circumstances is void.

<sup>50</sup> Statement, Brief, and Argument for Respondent at 6, *Lakin v. Postal Life & Cas. Co.*, 316 S.W.2d 542 (Mo. 1958) (No. 46075) (citing Exhibit 25).

<sup>51</sup> See *Lakin v. Postal Life & Cas. Co.*, 316 S.W.2d 542, 545 (Mo. 1958).

<sup>52</sup> See generally *JERRY*, *supra* note 6, at 250-54.

<sup>53</sup> See *Lakin*, 316 S.W.2d at 549.



*que vie's* continued living, it follows that the owner will not seek to bring about the *cestui que vie's* death in order to secure insurance proceeds.

Henry countered Postal Life's assertion of this defense in two ways. First, he argued that he did have an insurable interest in Harvey's life because the two men were business partners. Not surprisingly, the court said it "taxes one's credulity"<sup>54</sup> to find the existence of a bona fide partnership in these circumstances. But even if there were some indications of a "legal partnership," such a circumstance, standing alone, would not be enough to create an insurable interest, notwithstanding frequent references in insurance law to partners having insurable interests in the lives of each other. In the absence of a mutual dependence based on a legitimate economic relationship, no insurable interest would exist.<sup>55</sup> In other words, substance would be elevated over form.

Second, Henry argued that even if he lacked an insurable interest in Harvey's life, none was necessary because Henry's interest in the policy was secured through Henry's assignment of his ownership rights in the policy to Henry and the change of beneficiary (to Henry) which accompanied this transfer. In other words, Henry argued that the policy was issued to Harvey, with Harvey's wife named as beneficiary; as the owner of the policy, Harvey was free to both name any beneficiary he chose and assign the policy to anyone he desired, whether or not the beneficiary or assignee possessed an interest in Harvey's life. Henry's statement of the relevant insurance law principles was correct. Harvey had an unlimited insurable interest in his own life and could designate any beneficiary, including one without an insurable interest.<sup>56</sup> Moreover, in a majority of states, the owner of a policy can assign it to someone who lacks an insurable interest in the owner's life, provided the assignment is not a cover for wagering.<sup>57</sup> The rationale underlying both rules is that it is not against public policy for one person (a beneficiary or assignee) to be in a position where profit will be gained from the *cestui que vie's* death, provided the *cestui que vie* consents to the person stepping into that position. The assumption is that the consent will not be given if the *cestui que vie* has concerns that moral hazard will be manifested in the assignee or beneficiary attempting to terminate the life of the *cestui que vie*.

The court might have reasoned that the assignment in this case was, in fact, a cover for a wagering contract, meaning a contract speculating on the longevity of another in circumstances where the wagerer has no stake in the *cestui que vie's* survival. The antiwagering rationale for the insurable interest doctrine dates to seventeenth- and eighteenth-century England, when it became popular in some segments of society to purchase insurance on the life of an unrelated third party as a wager or bet on whether the *cestui que vie* would

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<sup>54</sup> *Id.* at 550.

<sup>55</sup> *Id.* ("While it is true that partners usually, and perhaps in most cases, have an insurable interest in the life of a copartner, it is the existence of circumstances which arise out of or by reason of the partnership, and not the mere existence of the partnership itself, that give rise to an insurable interest.")

<sup>56</sup> See JERRY, *supra* note 6, at 250.

<sup>57</sup> See *id.* at 306. Missouri would later change this rule by statute, opting instead to prohibit the assignment of a policy to someone lacking an insurable interest except in particular circumstances. See Mo. REV. STAT. § 377.080 (2000).

survive past the time designated in the policy.<sup>58</sup> This theme is only one part of the life insurance business's effort in those centuries to rebut claims that the insurance business is, at its root, an illegitimate gambling enterprise,<sup>59</sup> and the antiwagering theme of the insurable interest cases is fairly read as an effort to help legitimize the industry. The antiwagering theme ultimately returns to moral hazard concerns, *i.e.*, concerns that insurance contracts would encourage those who would benefit from the payoffs to hasten the demise of those whose lives were insured, which brings one back to the situation presented by *Lakin*.

Obviously, Henry's procurement of the policy on Harvey's life was not a gaming bet in the classic sense. "Insurance contract as wager," however, is appropriately given a more expansive meaning in the context of commercial relationships. When partners insure the lives of each other or when employers insure the lives of key employees, the insuring party "wagers" on the life of the *cestui que vie* if the amount of the coverage is disproportionately larger than the value (discounted to the present) of the economic contribution the copartner or key employee makes to the business. A similar situation exists if a creditor insures the life of the debtor in an amount disproportionately larger than the debt.<sup>60</sup> If the policy would produce a windfall to its owner in the event of the *cestui que vie's* death, then the insurance policy functions as a wager, with the attendant problems of moral hazard. This kind of analysis enables an *ex poste* assessment of an insurance arrangement and provides a basis for invalidating it if the amount of insurance is unreasonably disproportionate to the risk being insured.

The foregoing "wager analysis" is not sufficient, however, to dispose of *Lakin*, given that one aspect of Henry's second argument was that Harvey had voluntarily changed the beneficiary to Henry, as the owner of a policy is entitled to do. The court's rejection of Henry's claim indicates that even beneficiary designations are not immune from *ex poste* evaluation. If the beneficiary designation, like an assignment, serves as a subterfuge to escape the constraints of the insurable interest doctrine, the designation will not be enforced and the policy will be deemed void.<sup>61</sup> A policyholder's consent to the change, standing alone, does not trump the subterfuge consideration. Such a conclusion is even easier to reach in circumstances where there is substantial reason to doubt, as was the situation in *Lakin*, whether the policyholder understood the implications of the transaction.<sup>62</sup> Again, substance triumphs over form.

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<sup>58</sup> For more discussion of the history of the origin of the insurable interest requirement, see JERRY, *supra* note 6, at 233-36.

<sup>59</sup> In the early centuries of the business, life insurance was "condemned as immoral wagers upon human life, and in many states prohibited by law. They were not permitted in France until 1820 . . . . [T]hey evidently were not regarded with favor [in England], for no effort to provide life insurance through any organized association appears to have been made until 1706 . . . ." VANCE, *supra* note 45, at 20-21.

<sup>60</sup> This was the situation in *In re Estate of Bean v. Hazel*, 972 S.W.2d 290 (Mo. 1998).

<sup>61</sup> This implication from *Lakin* was specifically endorsed by the Missouri Supreme Court in *In re Estate of Bean v. Hazel*, 972 S.W.2d 290.

<sup>62</sup> *Lakin v. Postal Life & Cas. Co.*, 316 S.W.2d 542, 552 (Mo. 1958) ("This unquestionably constituted one transaction whereby [Henry] caused to be issued for his own benefit a policy of insurance, for which he paid the premium, on the life of Hankinson in which he had no insurable interest.").

VI. *LAKIN'S* LESSONS FOR LEGAL PROCESS

As discussed above, insurance law has no shortage of rules to prevent one who slays another from securing the proceeds of an insurance policy. But the implementation of such rules depends on the existence of evidence to justify their invocation, and this was undoubtedly one problem facing Postal Life in the *Lakin* case. Henry was the only surviving eyewitness to Harvey's death, and, although the circumstances were extraordinarily suspicious, no one was available to testify against Henry's version of the events. In the absence of evidence sufficient to establish beyond a reasonable doubt that Henry intentionally slew Harvey, it is understandable that prosecutors and other law enforcement officials would not be enthusiastic about pursuing criminal proceedings. Indeed, establishing an intentional slaying beyond a preponderance of the evidence was not a given, particularly without the evidence produced by the exhumation of Harvey's body and the expert testimony of the pathologist. In circumstances where the evidence invoking the disqualification rules was relatively weak, the insurable interest doctrine served as a "fall-back" doctrine to prevent Henry from gaining access to the proceeds.

Thus, *Lakin* stands as an example of how the common law – in this circumstance, the common law of insurance – flexes to promote justice, or at least what is thought to be the just outcome. The facts of *Lakin* show facially appropriate changes in beneficiary designations and ownership interests, but a closer look reveals a deliberate effort to evade the rules that seek to prevent insurance from being used to generate profits from the intentional killing of others. As we would hope, the common law does not respond mechanically to such wrongs, but instead finds enough flex in the rules to prevent such profiteering. Assignments and beneficiary designations that are subterfuges to escape the insurable interest doctrine will be invalidated. This approach allows subjective assessment of the circumstances of particular cases, thereby securing both the justice and efficiency advantages of disqualifying slaying beneficiaries. The technicalities of the form of the transaction do not triumph over fair resolution of the underlying substance. This is the common law at its best.

## VII. EPILOGUE

*Lakin* is now a fairly old case, and the principal players in the drama have dwindled in number. For example, Postal Life no longer exists; it was acquired in April 1962 by Republic National Life Insurance Company, which was in turn acquired by American General a few years ago. Postal Life's records must exist somewhere, but I had no success in locating them. It would be interesting to read internal memoranda recording the deliberations leading up to the insurer's decision to contest the claim. The computer records of American General do have a curious reference to a life policy on someone named "Hankinson." A staff person with whom I spoke on the telephone, and who was willing to check these records, expressed puzzlement at the entry, as she had not seen that sort of entry before.<sup>63</sup> That curious digital record is what one

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<sup>63</sup> Telephone Interview with "Nikki" (May 24, 2001).

might expect for a case as unusual as this one, but it was impossible to learn anything more about this reference. My letter to American General's legal department received no response, but I was not surprised; answering this kind of request is the sort of thing that has no up-side for an insurer's staff, who have more important matters on their agendas than tracking down fifty-year-old case files.<sup>64</sup>

As best I can tell, the attorneys who were involved in the case are either retired or deceased.<sup>65</sup> But I have reason to think that *Lakin* was a memorable experience for the lawyers who worked on it. I noticed that Laird Bowman<sup>66</sup> was one of the attorneys for Postal Life in the Supreme Court proceeding; by coincidence, my path had crossed with his at the University of Kansas some years back, and I had the opportunity to visit with Mr. Bowman about the case.<sup>67</sup> He remembered the case well, even though he was a young attorney in the "third chair" when the case was appealed. James Moore, the lead attorney for Postal Life, went on to a distinguished career as a circuit judge in Jackson County, Missouri, for many years. Mr. Bowman strongly encouraged me to visit with Judge Moore because the Judge viewed *Lakin* as one of the most interesting cases of his career. In the summer of 2001, however, Judge Moore was in ill health, and at the time of this writing, the odds of ever getting the benefit of his perspectives on the case are quite low. It was easy to secure copies of the briefs in the case from the Missouri Supreme Court Library. Efforts to locate the trial transcript and inspect some exhibits were less successful, meeting the same fate as the search for the insurance file. Not surprisingly, the Jackson County Clerk's office rarely handles requests for case files from the mid-1950s, and the staff was unable to provide much assistance.<sup>68</sup>

Roger Henderson put *Lakin* in the first edition of his insurance law casebook,<sup>69</sup> and it survived to the second.<sup>70</sup> The case is not cited in other

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<sup>64</sup> A staff person advised me to write to the insurer's office of legal counsel. I did so on May 31, 2001, but as of September 25, 2001, had received no reply.

<sup>65</sup> I visited with Don G. Stubbs, who represented Henry on appeal. Mr. Stubbs remembered the case but did not remember many details; it was his recollection that another member of his firm, James Williams, tried the case. Mr. Williams would later move to another state, and it is Mr. Stubbs' understanding that Mr. Williams is now deceased. Telephone Interview with Don G. Stubbs (Sept. 25, 2001).

<sup>66</sup> I was a member of the faculty at the University of Kansas Law School from 1981 to 1994, and served as the law school dean there during the last five years of that tenure. At that time, Laird P. Bowman worked for the Kansas University Endowment Association.

<sup>67</sup> Telephone Interview with Laird P. Bowman (May 24, 2001).

<sup>68</sup> During June 2001, when I sought the assistance of the Jackson County Clerk's office, the *Kansas City Star* reported that from 1990 to 2000 the office had reported less than half of the 3425 felony driving convictions to the State Department of Revenue, which in turn did not know to suspend the drivers' licenses of these persons, a group which included some cases of drunken driving and vehicular homicide. See Joe Lambet, *Crackdown on drivers falls short; Over half of felony cases are not reported*, KANSAS CITY STAR, June 15, 2001, at A1; *Jackson County clerical errors put people at risk on state's roads*, KANSAS CITY STAR, June 16, 2001, at B6. Needless to say, I was not optimistic that an office, which at the time was seeking to explain this alleged lapse with respect to over 1700 felonies, would be able to lend much assistance in locating a fifty-year-old civil case file.

<sup>69</sup> ROGER C. HENDERSON, *INSURANCE LAW: CASES AND MATERIALS* (1986).

<sup>70</sup> ROGER C. HENDERSON & ROBERT H. JERRY, II, *INSURANCE LAW: CASES AND MATERIALS* (2d ed. 1996).

casebooks. When we prepared the third edition of the casebook in 2000, I reluctantly suggested to Roger that *Lakin* be removed from the third edition because a more recent Missouri case<sup>71</sup> provided a broader range of instructional options. Roger agreed with that assessment, so *Lakin* became the subject of a note in the third edition.<sup>72</sup> It is, therefore, unlikely that *Lakin* will receive much attention in insurance law classes in the twenty-first century.

In the final accounting, then, there is not much else we are likely to learn about *Lakin*. We are forced to be satisfied with a few scraps of information about a winter day in January 1955, when two men, with whiskey and guns in hand, took a walk in the Missouri countryside. I imagine them in overalls and winter coats, with warm hats and gloves to protect them from the crisp winter breeze. The dormant grass underfoot must have swished and crackled as they walked, and the leafless trees would have permitted them to see landscapes that would otherwise be hidden by the green leaves of summer. Harvey probably enjoyed being outdoors as he walked through the fields and surveyed the horizon, the near-by woods, the creek beds, and the fence rows. The infected teeth that bothered him a few months before were probably healed by then. The whiskey he had consumed probably relaxed him, making the troubles of his personal life seem more distant, and he might have had some measurable sense of hope for his future. Although he had experienced much in his hard life and no doubt had made enough mistakes to last a couple of lifetimes, he had enough innocence to prevent him from having any premonition of his fate. As they walked toward the drama's final scene, Henry no doubt pretended to be his friend and to share in the joy of the expedition on this winter day. Though pausing occasionally to admire the landscape around them, Henry was probably relentlessly focused on the execution of his plan – and his companion. Harvey must have seen the shotgun pointed at him, and he must have heard the blast and seen the flash when it fired.

Of course, exactly how all of this unfolded is impossible to know. But it is from stories like these, including both their certainties and uncertainties, that the law is made. We reconstruct as best we can, and we use our experience to fill in the gaps. Of multiple possible versions of the story, we pick the most plausible. We then apply legal principles to answer the questions the story raises, and the story then exerts a push or a pull that might lead to a change in the law or a nuance on a familiar principle. And we remain wondering what stories the future will bring and how some of them will become manifested in cases that affect the law and ultimately the lives of those governed by it.

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<sup>71</sup> The more recent case is *In re Estate of Bean v. Hazel*, 972 S.W.2d 290 (Mo. 1998). The *Estate of Bean* case implicates a broader range of issues than *Lakin*, and the two opinions in the four-three decision offer two distinct perspectives on the issues involved. For one perspective on the case, see John M. Limbaugh, Note, *Life Insurance as Security for a Debt and the Applicability of the Rule Against Wager Contracts*, 64 Mo. L. REV. 693 (1999).

<sup>72</sup> HENDERSON & JERRY, *supra* note 70, at 86.