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The Ghetto's Need for Liability Insurance

by John R. Baylor*

What part is the insurance industry playing, what part can it play, in resolving or ameliorating the social and economic problems of the ghetto? The term "ghetto" is used as in the Report of the National Advisory Commission on Civil Disorders: "An area within a city characterized by poverty and acute social disorganization and inhabited by members of a racial or ethnic group under conditions of involuntary segregation."1 It is characterized more fully by the American Management Association's call for implementation of that Report:

The ghetto was created and is perpetuated by not only the successive waves of migrants from the South, but also by the fear, ignorance, superstitions, arrogance, exploitation, and paradoxically, the benevolence of the American white majority.

One looks at the ghetto dweller today and sees on the surface a disintegrating and broken world. The black man is perceived by the white man as the one that has the worst statistics as related to all the indices of social pathology. The black man has the highest percentage of his group on welfare, the greatest incidence of illegitimacy and venereal disease, the highest per capita incidence of criminality, homicide, rat infestation, drop-out rate, illiteracy, broken homes, and everything sociologists count except success.

The mournful conclusion that white America comes to is that the blacks are worthy of the white man's pity and the white man's charity, but not the white man's society. This perception . . . may be true, but it is so far from the whole

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truth as to thoroughly confuse symptom with disease and
doom the ghetto to a final, white mistake in judgment. Social
and economic impotence has come to be interpreted as racial
character.\textsuperscript{2}

The thoroughness of the Advisory Commission’s investigation
in addition to the supporting evidence and analysis demand re-
spect for their conclusions. Every citizen should be thoroughly
familiar with the entire report; everyone connected with in-
surance should know of the demonstrated involvement of the in-
surance industry with the problem. One learns from merely the
thirteen-page summary of the report that the insurance industry’s
involvement is minor compared with all elements of the total
problems, but that it is significant and worthy of study.

This is our basic conclusion: Our Nation is moving toward
two societies, one black, one white—separate and unequal.

Reaction to last summer’s disorders has quickened the
movement and deepened the division. Discrimination and
segregation . . . now threaten the future of every American.

. . .

The alternative is not blind repression or capitulation to
lawlessness. It is the realization of common opportunities for
all within a single society.

This alternative will require a commitment to national
action. . . .

. . .

Violence cannot build a better society. Disruption and dis-
order nourish repression, not justice. They strike at the free-
dom of every citizen. . . . Violence and destruction must be
ended. . . . Segregation and poverty have created in the
racial ghetto a destructive environment.

. . .

Our recommendations embrace three basic principles:

To mount programs on a scale equal to the dimen-
sion of the problems;
To aim these programs for high impact in the im-
mediate future in order to close the gap between
promise and performance;
To undertake new initiatives and experiments that
can change the system of failure and frustration that
now dominates the ghetto and weakens our society.\textsuperscript{3}

\textsuperscript{2} American Management Association, Mobilizing for Urban Action,
Challenge to Business 12 (1968). (This material is available at American
Management Association, Inc., 155 West 50th St., New York, N.Y. 10020.)

\textsuperscript{3} Report of National Advisory Commission, supra note 1, at 1.
One of the many economic, social and historic factors contributing to personal frustration and material deterioration is the unavailability of insurance. Business, to operate soundly in and to contribute to the economy of the ghetto, must have insurance. Slum landlords must have insurance to finance improvement and repair. Moreover, innocent victims must have reasonable assurance of compensation.

The Advisory Commission on Civil Disorders and the National Advisory Panel on Insurance in Riot-Affected Areas concerned themselves almost entirely with property-damage insurance and a notation concerning construction surety bonds. There was no discussion of liability insurance.

I. PROPERTY-DAMAGE INSURANCE

Impressively documented, the Report by the President's National Advisory Panel on Insurance in Riot-Affected Areas found:

Without insurance, buildings are left to deteriorate; services, goods, and jobs diminish. Efforts to rebuild our nation's inner cities cannot move forward. Communities without insurance are communities without hope.

The Advisory Panel then, with supporting detail and extensive explanation, recommended:

We propose a five-part program of mutually supporting actions to be undertaken immediately by all who have a responsibility for solving the problem:

We call upon the insurance industry to take the lead in

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4 Id. at 305; NATIONAL ADVISORY PANEL ON INSURANCE IN RIOT-AFFECTED AREAS, MEETING THE INSURANCE CRISIS OF OUR CITIES 1 (1968) [hereinafter cited as INSURANCE CRISIS OF OUR CITIES]; Comment, 77 YALE L.J. 541 (1968). (The cited Report may be obtained from U.S. Government Printing Office: 1968 0-291-749.)

5 INSURANCE CRISIS OF OUR CITIES, supra note 4, at 1; Comment, 77 YALE L.J. 541 (1968).


8 INSURANCE CRISIS OF OUR CITIES, supra note 4, at 1.
establishing voluntary plans in all states to assure all property owners fair access to property insurance.

We look to the states to cooperate with the industry in establishing these plans, and to supplement the plans, to whatever extent may be necessary, by organizing insurance pools and taking other steps to facilitate the insuring of urban core properties.

We urge that the Federal Government enact legislation creating a National Insurance Development Corporation (NIDC) to assist the insurance industry and the states in achieving the important goal of providing adequate insurance for inner cities. Through the NIDC, the state and Federal Governments can provide backup for the remote contingency of very large riot losses.

We recommend that the Federal Government enact tax deferral measures to increase the capacity of the insurance industry to absorb the financial costs of the program.

We suggest a series of other necessary steps to meet the special needs of the inner city insurance market—for example, programs to train agents and brokers from the core areas; to assure the absence of discrimination in insurance company employment on racial or other grounds; and to seek out better methods of preventing losses and of marketing insurance in low-income areas.

The fundamental thrust of our program is cooperative action. Thus, only those companies that participate in plans and pools at the local level, and only those states that take action to implement the program, will be eligible to receive the benefits provided by the National Insurance Development Corp. and by the Federal tax-deferral measures. We firmly believe that all concerned must work together to meet the urban insurance crisis. Everyone must contribute; no one should escape responsibility.9

These recommendations were implemented by the insurance industry in cooperation with state insurance authorities—under the so-called Urban Plan—in Boston, Detroit, Cleveland, Milwaukee, Buffalo, New York City, Philadelphia, Louisiana, the Twin Cities of Minnesota, San Francisco-Oakland, Los Angeles County, Wichita, and Chicago.10

The proposals are further implemented by the Federal Urban

9 Id. at 8; see also REPORT OF NATIONAL ADVISORY COMMISSION, supra note 1, at 309.
Property and Reinsurance Act of 1968. The latter provides for federal reinsurance conditioned upon the primary insurer's participation in a state FAIR plan (Fair Access to Insurance Requirements). So far as the slum property owner is concerned, the most important element of the FAIR plan is his right to obtain, without cost to him, an inspection of his property and, in the event of denial of coverage or imposition of surcharge rates, a written report of what must be done to the property to obtain coverage at normal rates. Moreover, "environmental hazards," i.e., any condition beyond the control of the property owner, such as a run-down neighborhood, cannot be a basis for denial of coverage.

There has been much unpublished commentary among industry and state insurance officials on the reinsurance provision of the Act, but an authoritative analysis of the effect and results of the reinsurance program should await the report, required by statute, of the Secretary of Housing and Urban Development on August 1, 1969. Suffice it to say that the private insurance industry overwhelmingly is cooperating both massively and successfully to supply the ghetto's needs for property insurance, and that there will be effective and sufficient reinsurance.

II. CONSTRUCTION BONDS

Without detailed support, the Report of the National Advisory Panel on Insurance merely noted:

Contractors bonds for urban core businessmen should be more readily available. . . . Obtaining these necessary bonds is difficult if not impossible for the small contractor [particularly one of minority race]. . . . Various approaches to provide these bonds are possible. For example the NIDC [National Insurance Development Corporation—see 12 U.S.C. § 1749 bbb-13] might consider providing reinsurance to surety companies that offer these contractors bid and performance bonds at reasonable rates. This recommendation has not been implemented by legislation or governmental regulation. The American Insurance Association

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14 Insurance Crisis of Our Cities, supra note 4, at 109.
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profoundly pointed out that indiscriminate financing or bonding of contractors "with marked deficiencies in experience, management and other skills in running construction jobs of more than limited scope . . . will not only anger owners left with unfinished projects, but will also inflict a mortal wound on the performance reputation of minority group contractors as a class."

In Oakland, Cleveland, New York City and Boston, the insurance industry, contractors associations, and civic groups, with help from the Ford Foundation and the Economic Development Administration of the Department of Commerce, have established Contractor's Assistance Boards. The Boards effectively have (a) formed trade associations, (b) provided contractor financing subordinate to sureties, and (c) furnished both technical and administrative assistance for minority contractors. With this assistance, minority contractors are becoming able to perform and thus are qualifying for surety bonds in the normal market. The Ford Foundation's conclusion seems accurate:

... [T]he approaches indicated are just a beginning. The organization and implementation of a contractor's bonding program on a national scale give promise of making available to minority contractors meaningful participation in the construction opportunities which lie ahead. Such a program can create access into the construction industry not only for minority general and subcontractors, but also for thousands of minority adults and youths who are now excluded from the building trades union. In addition, increased construction opportunities for Black people can spawn growth and opportunity in many related fields; better housing and community development programs, opportunities in real estate development programs, opportunities in real estate development and ownership, banking, mortgage and surety brokerage, insurance, real estate management and brokerage, law, accounting, etc.

This wide spectrum of opportunity adds up to a challenge: how can the nation harness the available resources not merely to rebuild the cities—but to develop in the process

16 Bonding Program, supra note 15.
new sources of economic strength within the black communities?  

III. LIABILITY INSURANCE

Although there was testimony before the President’s Advisory Panel on Insurance in Riot-Affected Areas concerning the unavailability of liability insurance, the Panel made no finding or even allusion in passing to that type of insurance. At least the possibility of a need for liability insurance deserves investigation and analysis.

It appears to be established as axiomatic that to ameliorate the problems of the ghettos, i.e., “areas within cities characterized by poverty and acute social disorganization and inhabited by members of a racial or ethnic group under conditions of involuntary segregation,” there must be amelioration of the social and economic frustrations of those inhabitants. Everyone agrees that the businessmen in those areas “have gotta have” fire insurance, and the builders “have gotta have” bonds. Perhaps at the outset of ghetto rehabilitation there is not yet the realization that there is the need for liability insurance. Still demoralized, the inhabitants do not bring suits for damages against landlords or local merchants since legal services have been unavailable. But as these services become available and develop, the Negro and other minority group businessmen, including building contractors, will feel the same pressing need for, and the same violent frustration over the lack of, liability insurance as they now do for property insurance and surety bonds. Accordingly, the insurance industry should be acting to develop those markets before the situation becomes so acute that government insurance becomes necessary. The analysis and conclusion with respect to the need for and the furnishing of liability insurance are the same as those with respect to property insurance insofar as we are concerned with ghetto businessmen and landlords.

On the other hand, the problem of liability insurance must be examined from the standpoint of claimants, a standpoint which is

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17 Id. at 25.
18 Red Line, supra note 7, at 255; REPORT ON HOUSING AND URBAN DEVELOPMENT ACT, supra note 7, at 87.
19 Note, Tenant Rent Strikes, 3 COLUM. J. OF LAW AND SOCIAL PROB. 1 (1967).
not present with regard to property insurance nor required for ghetto problems with regard to performance bonds. The trends in automobile insurance legislation and in court decisions interpreting the existence of liability coverage are sufficient evidence that such a viewpoint is mandatory.

Availability in the ghetto of the same equitable and efficient system for payment of negligent tort damages that now functions so well outside the ghetto would certainly lessen discrimination. If private insurance were available, the plan would function more equitably and efficiently from the claimant's standpoint than would a program of direct government payment to individuals.20

Yet the challenge to the insurance industry is not limited to developing ghetto markets for existing coverages. There are liabilities which are insured inadequately. It is submitted that insurers can profit as well as contribute to social improvement by developing this coverage rather than leaving it to government.21 These liabilities are for riot losses,22 common law intentional torts,23 and statutory civil rights.24

At least half the states have abolished government immunity so that municipalities or other units of government may be held liable for riot damage.25 Although the new Standard Comprehensive General Liability Insurance Policy probably provides coverage for such liabilities,26 many state insurers have approved the practice of excluding such liability by specific endorsement.27

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20 REPORT OF NATIONAL ADVISORY COMMISSION, supra note 1, at 199.
24 See Baylor, The Surety Industry's Involvement in the Civil Rights Movement, 34 Ins. C. J. 37 (1967).
27 Municipal Liability for Riot Losses, supra note 21, at 49, 51. Approval of the restrictive endorsement excluding coverage for "injury or damage arising out of riot, civil commotion or mob action or out of any act or omission in connection (Continued on next page)
It is argued that such liability is not insurable or not rateable, but a case-by-case study indicates that the uninsurable argument is not supported by recent authority.\(^2\) The fact that an individual's liability for "damage neither expected nor intended from the standpoint of the insured"\(^2\) \(\text{is rateable would seem to indicate that a governmental unit's liability would also be rateable, at least within limits.}\)

There would seem to be a similar social and economic necessity for compensating victims of civil disorders through liability insurance as there is for compensating them through property insurance. Moreover, the insurance industry as a whole will be strengthened if some of the property-damage insurers' risks are spread to the liability insurers through subrogation.

With respect to the other liabilities mentioned—common law intentional torts and statutory liabilities for invasion of civil rights—it is hypothesized (no study being available) that ghetto inhabitants are most likely to be the victims. The common law actions for torts referred to include false arrest or imprisonment, malicious prosecution, defamation, invasion of privacy, and abuse of process. The statutory civil rights actions are those for monetary damages authorized by chapter 42, section 1983 of the United States Code, which is summarized as follows:

> Every person . . . [connected with any state or local government] who subjects or causes to be subjected any . . . person within the jurisdiction [of the United States] to the deprivation of any rights, privileges, or immunities secured by the constitution and law, shall be liable to the party injured in an action at law. . . .\(^2\)

Under the latter statute, monetary damages have been awarded for acts analogous to the common law torts of false arrest,
false imprisonment, malicious prosecution, and invasion of privacy.\textsuperscript{31} The broader sweep of actions brought under the same statute, but praying only for declaratory or injunctive relief\textsuperscript{32} may preview broader liability for monetary damages. In permitting or denying the maintenance against public officials of either the common law or statutory actions, the judiciary has struggled to maintain a balance between society's interest in compensating the victim and its interest in not paralyzing the operation of government through its officials' fears of risk to their personal savings.\textsuperscript{33} In view of the present social crisis, particularly the problem of the ghetto, it is suggested that the balance is swinging toward damages for more of the victims with a compensatory assumption by government of the public officials' personal risks. Certainly for the ghetto victims it would be highly satisfactory were there to develop a system of claims handling whereby their actions for torts and deprivation of civil rights were processed with as much possibility of recovery and as much freedom from red tape as now exist in most areas of the country with respect to the processing of claims for damages from auto collisions. On the other hand no one suggests that the insurance industry can exist without profit or that its interest in the amelioration of the ghetto problem is other than incidental to such profit. But it is submitted that the industry should at least study the possibility of broadening its markets and profits by making more liability coverage available to public officials.

The question whether intentional wrongdoing would be encouraged by insurance may be not so much a matter of what is insured as of who is insured. Obviously some persons are better risks than others. Certain classes of persons can be isolated whose propensity for intentional wrongdoing would not be measurably affected by the availability of insurance.\textsuperscript{34}

\textsuperscript{33} Pearson v. Ray, 386 U.S. 547 (1967); see Baylor, The Surety Industries Involvement in the Civil Rights Movements, 34 Ins. C.J. 37 (1967), especially the discussion of "immunity" for public officials at 40-41.
\textsuperscript{34} Farbstein and Stillman, Insurance for Intentional Torts, 20 HAST. L. J. 1219, 1252 (1969).
A few insurers have operated extraordinarily profitably by limiting their underwriting of heretofore standard risks to government employees on the assumption that the overwhelming majority of them are especially careful, conservative, and conscientious. At least coinsurance or errors and omissions policies for government officials, whatever the premium cost required of the government to cover the expenses and profit of private insurers, would seem preferable to the present system where the officials have no certainty of protection from their governmental employers and the government red tape and procedural uncertainties exhaust both the officials and claimants.