find much of interest in this narrative of "one of the most significant black enterprises of the twentieth century" (p. 13).

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The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11. *By Kenneth S. Abraham*. Cambridge, Mass: Harvard University Press 2008. ix + 274 pp. Notes, index. Cloth, $45.00. ISBN: 978-0-674-02768-8.

Reviewed by Tom Baker

The Liability Century opens with a metaphor that may change tort law. The metaphor is that of the binary star. Tort law and liability insurance are distinct institutions, but they often converge, forming a twinned system.

Watching from a great distance, we may assign to such a formation the name of one component: "tort law." But looking through Kenneth Abraham's telescope, we see two separate bodies that form a single star. Using his map of the heavens, we see this star within several overlapping constellations—one composed of institutions that compensate injured victims; another made up of institutions that prevent injuries; and, finally, a third one, which is harder to make out, composed of institutions that define moral obligations within a civil society.

Abraham may be uniquely qualified to tell this story. A student of Guido Calabresi at Yale Law School, a participant in the liability-insurance coverage wars of the latter twentieth century, a player in the tort-law projects of the American Law Institute, and a torts and insurance professor at the University of Virginia School of Law, Abraham has forged strong connections with the people and institutions involved in much of the history that he documents.

His account of the long liability century begins in the 1880s with the invention of employers' liability insurance, which was followed, early in the twentieth century, by the workers' compensation movement. Further expansion came with the introduction of automobile liability insurance in the interwar years and, in the 1960s, with the growth of medical and product liability and insurance. Abraham's chronology concludes with the extraordinary after-the-fact federal insurance provided to the victims of September 11.

Although there are common themes, Abraham appropriately emphasizes the point that each type of liability insurance, like the tort-law domain with which it is paired, differs significantly from the others. One good example comes at the beginning of his chapter on medical malpractice liability. "Auto liability," he writes, "has considerable economic importance, but low political visibility." By contrast, "medical malpractice liability occupies a place in contemporary policy debates far out of proportion to its seemingly minor economic importance" (p. 104).

In both automobile and medical liability, the real-life defendants almost never have to pay claimants any of their own money; the litigation is really about collecting insurance money. This fact makes automobile liability and insurance such nonevents that they nearly disappear from the public agenda. But this same connection between medical malpractice and medical malpractice liability insurance causes the health-care policy debate to dance to the rhythm of the insurance business cycle, with loud drums beating out demands for change in medical liability when malpractice insurance premiums periodically spike.

Abraham is not hopeful about the possibility of an end to this cycle, nor does he predict that medical malpractice insurance will become, like auto insurance, "part of the background cost of living" (p. 102). Instead, he writes, "tort reforms [will] have only a modest impact, the price of insurance [will be] volatile, and physicians [will] remain dissatisfied" (p. 137). This is not the fault of liability insurance, but is rather the result of the complex gravitational field of the binary star and perhaps —my thought, not Abraham's—the willful refusal of medical policymakers to pay enough attention to the liability insurance market.

As Abraham explains, product and environmental liability differ from auto and medical liability in the degree to which insurance institutions are willing to provide insurance. Insurers' reluctance to cover mass products liabilities, such as pharmaceutical suits and toxic torts, calls into question the ability of products liability to internalize cost or spread risk. If liability insurance companies—the expert risk predictors —believe that products and environmental liability cannot be anticipated with sufficient accuracy, how would ordinary businesses be able to do so? And if the risks cannot be predicted, how can the associated costs be internalized or spread?

Among the themes most commonly voiced, three stand out as most important: First, liability follows liability insurance at least as much as liability insurance follows tort law. Indeed, by explaining how liability insurance has failed to follow product and environmental liability, Abraham could be read as supporting the claim that the causal arrow points more reliably *from* liability insurance *to* liability. His account of liability for negligently inflicted emotional distress also supports that

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claim. Because liability insurers have largely refused to provide coverage for emotional distress, except when linked to bodily injury, this kind of "liability has never expanded to nearly the extent that it might otherwise have been expected to" (p. 189).

Second, the close connection between liability and insurance means that liability insurers intermediate between victim and injurer, and also between tort litigants and legal institutions. Tort litigation is a repeat-player game, in which a nonparty, the liability insurer, plays the dominant role.

Third, tort liability and insurance have so affected each other that they now serve overlapping functions. In theory, tort law forms the substantive rules governing the rights and obligations of *particular* parties with regard to *particular* injuries, and it is insurance that spreads the costs of injuries. But because of liability insurance, tort law has become a risk-spreading enterprise. Similarly, deterrence is conventionally understood to lie within the domain of tort law, not that of insurance. But once liability insurers assume the costs of future liabilities, they have an incentive to prevent liabilities, or at least to reduce the cost, with the result that insurance may assume a deterrent role. "Over time, then, tort becomes insurance, and insurance becomes tort" (p. 105).

It is rare that even excellent description can change the common understanding of a field of law, particularly a field as doctrinally encrusted and theoretically adorned as torts. Abraham's *Liability Century* has this potential. Tort law is not just theoretically and conceptually related to insurance principles, as both legal realists and economists have explained. Rather, tort law as we know it is institutionally inextricable from liability insurance. They form a binary star.

Tom Baker is professor of law at the University of Pennsylvania School of Law. He recently published The Medical Malpractice Myth *(2005) and* Embracing Risk: The Changing Culture of Insurance and Responsibility *(2002) (with Jonathan Simon), and is currently writing about the relation between liability and insurance in securities litigation.*

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The Rise of Mutual Funds: An Insider's View. *By Matthew P. Fink*. New York: Oxford University Press, 2008. 308 pp. Bibliography, notes, index. Cloth, $34.95. ISBN: 978-0-195-33645-0.

Reviewed by Edwin J. Perkins

In writing about mutual funds, Mathew P. Fink tackles a subject that has not been adequately addressed by financial historians. Despite its