Marketing liability in Finnish insurance law – implications for contract law

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The aim of this study is to analyze the theoretical implications of the marketing liability rule, section 9.1 in the Finnish Insurance Contract Act (543/1994), for general contract law. The analysis is applied to the situation where marketing or sales information gives a wrong impression about subsequent detailed contract terms. Specifically the questions are 1) how can indefinite marketing promises become the content of a contract and 2) what can be learned from the historical attempts to legislate this issue. The analysis draws from literature and historical primary sources, and legal praxis is mostly referred to through these sources. The chosen method can be characterized as a pronounced self-awareness of the power, actions, logic and preconditions of law.

In Nordic contract law, unspecified or unaddressed marketing information is treated mainly as an invitation to buy, not an offer. In the sale of goods, defective marketing is sanctioned by non-conformity, when marketing information relates to the properties or use of a product. According to the trailer-principle, identified in Nordic consumer law, the impression given by marketing information concerning all kinds of contract terms or their performance can be legally protected. This can be the case for example when there are only a few of certain advertised items actually in stock, or when marketing implies that certain limitations do not apply. Good business practice is the benchmark of the trailer-principle, but the appropriate private law sanctions are an open question in Nordic legal literature.

The Finnish insurance rule mandates that if the insurer or its representative has failed to provide the necessary information, and that the Contracts Act is the right place for this rule.

The history of the insurance rule exemplifies particularly well the technique of normalization, where the law and legal practice define and describes what is normal and expose deviance, while hiding their own power. In contract economics, an efficient contract has been the primary benchmark for legal rules, but this standard is imperfect, as complete contracts are also consistent with social norms. The conclusion is that a balanced content for contract law rules is needed. This kind of a balance can be seen in the Finnish insurance rule.

In the past, there have been authoritative attempts to marketing liability into Finnish contract law (in 1990) and Nordic consumer law (in 2001), but the Finnish insurance rule is the only one that was enacted. This rule was crafted during an inter-Nordic reform of insurance contract law in the 1970’s and 80’s. The protocols of the Nordic insurance law committees show that the Finnish legislator attempted to persuade the other Nordic states to adopt a similar rule. Nordic insurance contract law diverged on this issue because of different needs. Finland wanted to protect policyholders from misleading statements by part-time insurance agents that lacked the authority to change policy terms. Sweden however opted for a limited rule whereby onerous contract terms could be made ineffective. This was because Sweden was concerned that insurers would be negatively affected by vexatious claims, if a general private law liability for marketing information was codified into law.

The Nordic Contract Acts have proven quite resistant to reform. This study proposes, de lege ferenda, that the immutable insurance rule could be adapted as a general default rule, and that the Contracts Act is the right place for this rule. The Finnish experience shows that marketing liability works, when it is combined with balanced rules on proving a buyers wrong impression.

### Avainsanat – Nyckelord
- insurance contracts
- indefinite promise
- duty to advise
- binding effect
- contract theory
- norms
- normalization
- contract failure
- legislative history
- marketing liability
- marketing information
- trailer-principle
- inter-Nordic legal cooperation
- PEICL

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Contents

1. Introduction ........................................................................................................................................... 1
   1.1 Structure ........................................................................................................................................... 2
   1.2 Method and sources .......................................................................................................................... 3

2. Indefinite marketing promises and the content of contracts ............................................................. 6
   2.1 The private law responses to indefinite promises and the trailer-principle .................................. 6
   2.2 Attempts to codify a contractual rule ............................................................................................. 12
   2.3 The difference between a defect and the insurance rule ............................................................... 14
   2.4 Further points of tension ................................................................................................................ 18

3. The theoretical implications of the insurance rule ............................................................................. 23
   3.1 The power of reason and interaction .............................................................................................. 24
   3.2 Norms and the law .......................................................................................................................... 26
      3.2.1 The law and normalization ....................................................................................................... 28
      3.2.2 Rules, principles and the duty to adjudicate ........................................................................... 30
   3.3 Contracting and the law .................................................................................................................. 33
      3.3.1 The economic purpose of contracting ....................................................................................... 35
      3.3.2 Mutually beneficial contracting ............................................................................................... 37
      3.3.3 Could the insurance rule make for better contracts? ............................................................... 39
      3.3.4 Does the rule not undermine contractual agreement? ............................................................ 40
      3.3.5 Is the insurance rule optimal? ................................................................................................. 42

4. The implications of the legislative history of the rule ........................................................................... 47
   4.1 1970’s: The reform process begins and the problem are identified .............................................. 48
   4.2 1980-1984: The debate over an appropriate rule to regulate agents ................................................. 50
   4.3 1985: The Finnish rule is crafted .................................................................................................... 53
   4.4 1986: A final attempt to avoid Nordic divergence ......................................................................... 56

5. Conclusions .............................................................................................................................................. 59

Bibliography ............................................................................................................................................... 61
Abbreviations

CPA  The Consumer Protection Act
CSD  Consumer Sales Directive
ICA  Insurance Contract Act
IDD  Insurance Distribution Directive
IMD  Insurance Mediation Directive
KKO  Supreme Court of Finland (Korkein oikeus)
KKV  Finnish Competition and Consumer Authority (Kilpailu- ja kuluttajavirasto)
NJA  Decisions of the Swedish Supreme Court (Nytt Juridisk Arkiv)
PEICL  Principles of European Insurance Contract Law
Rt  Judgments of the Norwegian Supreme Court (Retstidende)
SGA  Sale of Goods Act
UCPD  Unfair Commercial Practices Directive
VKL  Finnish Insurance Complaints Board (Vakuutuslautakunta)
1. Introduction

“The world of contracting has changed over time.” “Mass marketing is a modern way of making offers to consumers, and marketing information is often decisive when a purchase decision is made.” “It is therefore right that marketers have a more extensive responsibility for their advertising than previously.”

In the 1960’s and 70’s, consumer protection emerged as a cross-cutting policy in Western Europe. The modern market economy was seen to exacerbate the imbalance between consumers and businesses, and one factor behind this was the increasing and intensifying pressure of marketing. As markets became more competitive, competition with quality and price was not enough. Instead businesses had to direct ever greater resources to marketing. The traditional distinction between buyer and seller was also blurred in marketing, as it was also in the interest of producers, wholesalers and branch organizations to promote products. Most contracting of today is anonymous and standardized. The century-old Nordic Contract Acts does not adequately regulate this type of contract formation, where marketing information is an essential element in the decision to purchase.

The Finnish insurance contract act (543/1994) section 9.1 (referred to as “the rule” henceforth) is a stark example of an extensive responsibility for marketing with a direct benefit for consumers and small businesses that are in a comparably weak negotiating position towards the insurer. The rule mandates that if the insurer or its representative has failed to provide the necessary information or has given incorrect or misleading information to the policyholder when marketing the insurance, the insurance contract is considered to be in force to the effect understood by the policyholder on the basis of the information received.

The rule was crafted in the mid 1980’s during the protracted, pan-Nordic reforms of the insurance contract acts. Similar rules have been authoritatively been proposed for Finnish contract law, in 1990, and for the Nordic consumer protection laws, in 2001. The insurance rule is still exceptional in a Nordic and EU context, as insurance law and contract law in

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1 KKV 2008. Finnish consumer ombudsman’s guidelines for marketing. All translations from Finnish or Swedish to English are my own.
2 Yritysoikeus 2014 p.1001
3 Yritysoikeus 2014 p.1002
4 André 1984 p.586
5 André 1984 p.586
6 (Emphasis added)
general maintain a sharper distinction between the contract and any preceding marketing information. The rule is also unique in Finnish contract law.

In this thesis I aim to analyze the theoretical implications of the marketing liability rule for contract law. The analysis is applied to the situation where marketing information or sales information gives a wrong impression about the subsequent detailed contract terms. The study addresses two overarching questions: 1) How can indefinite promises become the content of a contract, 2) what can be learned from the historical attempts to legislate this question? To clarify, by indefinite promise I mean a statement that is unequivocal (the meaning is clear) but which, like an untargeted advertisement, does not qualify by itself as a binding offer. This kind of (non-)promise can also be by made by leaving out information, or made by a third party that has no authority to give a binding offer.

1.1 Structure

In this first chapter I present the method and sources. The second chapter presents the problem of indefinite marketing promises, and recaps the Nordic legislative attempts to craft new contractual rules to solve the issue. The aim is to reflect why these attempts failed, with insurance law being the notable exception.

The 3rd chapter of this thesis reflects on the implications of the insurance rule on contract law theory. The chapter looks at the wider interaction between law, norms and economic behavior. Secondly, the chapter examines the implications of the insurance law on contracting and legislative techniques.

The 4th chapter examines the legislative history of the rule. The aim of the chapter is to show how the points of tension between insurance contract law and general contract law influenced the outcome of the process.

The 5th chapter presents the conclusions of the study.

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7 In German insurance law, insufficient marketing information can lead to the insurance being in force as the policyholder has understood it, but this consequence is not codified in the German ICA. Luukkonen & Mäntyniemi 1996 p.107.
8 Koponen 2008 p.84
1.2 Method and sources

That there is interaction and dialogue between industry-specific and general contract law is widely recognized but studying this interaction is methodologically challenging.\(^9\) Insurance contract law has been studied by Juha Häyhä as part of general contract law and as an instrument to assess changes in general contract law.\(^10\) Contract law can also be approached from the specific point of view of a particular profession or type of interaction.

In his research on liability for misleading information, Jan-Ove Færstad claims that if a researcher chooses both the general and specific approaches, the inherent difficulty of this method means that he or she in reality also chooses to delimit both approaches from the research, as it would not be feasible to focus on both aspects in a balanced way.\(^11\) However, in his research on precontractual information duties, Thomas Wilhelmsson employs a dual approach. He notes that in the acquis communautaire of the EU, the general obligations and specific information duties have different functions, and both are needed for principled reasoning.\(^12\)

Contract law research, traditionally, interprets the content of state law. Stephen Smith claims that other social norms, that explain the behavior of contracting parties, need to be recognized by the legal authorities, either explicitly or implicitly, to qualify as part of contract law.\(^13\) Likewise, Marko Mononen claims that contract law research is intrinsic to the legal system, and thus it has a purpose, to create stability. Mononen warns that legal research should not attempt to assess or change contract law on purely moral grounds.\(^14\) In practice, as the modes of contracting are changing at an increasingly fast pace, the static nature of legal research means that while economic theories can adapt to model these changes, legal theories do not evolve at the same pace.\(^15\)

Contract law theories answer two types of fundamental questions. These are the analytic question of how the law functions and the normative question that examines the justification

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\(^9\) Häyhä 1996 p.26
\(^10\) Häyhä 1996 p.26
\(^11\) Færstad 2014 p.33 ref. 87 According to Færstad a research with a dual approach could contribute to jurisprudence, but such research still necessarily focuses on either the specific or the general.
\(^12\) Wilhelmsson 2006 p.20
\(^13\) Smith 2007 p.8-11
\(^14\) Mononen 2001 p.458
\(^15\) Timonen 1997 p.39
for contract law. Neither of these questions can be fully understood without a wider social context. A legal rule does not in itself reveal when it serves a valid formal purpose in the interest of legal certainty, or when it is unnecessarily and stubbornly formalistic, even though society has changed.

Pöyhönen has asked if the fundamental aim of contract law theory is always to justify forms of power of the state, or if the aim has become to facilitate emancipation. His question highlights the methodological gap between the law and its societal functions. One way to bridge this gap is through a pronounced self-awareness of the power, actions, logic and preconditions of law.

A researcher needs to be aware of the legal professions need for practical and applicable knowledge, and should explain exceptional complexity and discontinuance with established dogmatic views. When the aim of a research is only to examine which norms are binding, it is enough to say that they are binding, instead of reflecting on who or how they are seen as binding. The main reason for the more abstract approach, or meta-level, in this research is the practical methodological problem that the insurance rule, that is de lege lata (the law as it is), is very similar to contract law and consumer protection rules that were never enacted. These latter rules are thus potential rules or de lege ferenda (the law as it should be).

To determine whether the potential rules should be enacted, the insurance rule has significant implications that can be deduced through conceptual analysis. This study draws in particular from the philosophical works of John Searle, François Ewald, and Mikko Wennberg.

The liability for marketing in Finnish insurance law has been examined by authors such as Häyhä, Esko Hoppu, Kari Hoppu, Mika Hemmo and Jaana Norio-Timonen as a part of more general overviews of Finnish insurance contract law or the marketing of investment products. These authors have drawn from domestic case law, especially the non-binding decisions of the Finnish Insurance Complaints Board (VKL), as relatively few insurance

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16 Smith 2004 p.43–49
17 cf. Atiyah 1986 p.95
18 Pöyhönen 1986 p. 378
19 Koulu 2014 p.71, ref. 154;
20 As research needs to be controlled and understood by the academic community. Siltala 2002 p.483, 488
21 Koulu 2014 p.71, ref. 154;
22 see bibliographic references
cases are adjudicated in courts. Consequently, this study refers to legal praxis mostly as indicated by other authors.

The examination of the historicity of the insurance rule looks at how the legal community at the time of legislation conceptualized the rule. The legal historical method can be used to assess legal change or continuity. Historical examination can also reveal if the legislative decisions were strictly rational, fulfilling predefined interests, or if interests evolved during the process, influenced by cultural factors, social interaction and the persuasive capabilities of the participants. Specifically, I examine the legislative process that resulted in the insurance law rule. My source materials are the meeting protocols, speeches and personal letters of the Nordic insurance law committees.

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23 The section 9.1 has been analyzed in at least two Master’s thesis at the University of Helsinki, by Anne Piirainen in 2004 and by Tommi Koponen in 2008.
24 Kekkonen 1987 p.2
25 Hyvärinen 2012 p.7
2. Indefinite marketing promises and the content of contracts

In Finnish law, marketing as a legal term covers commercial communication extensively, such as advertisements and information given in conjunction with sales or otherwise, with the aim of promoting sales or the image of the business.\textsuperscript{26} The legal question of indefinite marketing promises and the content of contracts can be distinguished by looking at the other legal responses that have developed due to the increasing pressure of marketing.

Mathias André has noted that the common feature of all of these responses is that they aim to promote the value of information in marketing.\textsuperscript{27} In the Nordic states, this response has predominantly been through special acts on marketing and fair trading, and not as a question of contract law.\textsuperscript{28} The Nordic states have since the 1970’s enacted regimes of trade regulation on what is acceptable marketing, imposed mandatory information duties in the sale of different products and services, and negotiated sector specific standard terms.\textsuperscript{29}

Trade regulation is a form of collective consumer protection and thus benefits individual consumers only indirectly.\textsuperscript{30} Specific disputes between a consumer and an entrepreneur are dealt through private law.\textsuperscript{31} Trade regulation operates mostly on a macro-economic level, whereas individuals need protection on the micro-economic level.\textsuperscript{32}

2.1 The private law responses to indefinite promises and the trailer-principle

That a marketing liability exists is, to some extent, a general principle of Nordic contract law.\textsuperscript{33} Peter Møgelvang-Hansen has noted that the “precontractual, binding statement rule” extends beyond positive statutory rules.\textsuperscript{34} The principle is not very precise, as marketing can

\textsuperscript{26} HE 32/2008 vp p.19; The Unfair Commercial Practices Directive (UCPD) uses the term ‘commercial communication’ including advertising and marketing, directly connected with the promotion, sale or supply of a product to consumers. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market;
\textsuperscript{27} André 1984 p.592
\textsuperscript{28} Møgelvang-Hansen 2007 p.170
\textsuperscript{29} André 1984 p.587, KKV 2006, KKV 2014
\textsuperscript{30} Yritysoikeus 2014 p.1005
\textsuperscript{31} Yritysoikeus 2014 p.1005
\textsuperscript{32} Krüger & Møgelvang-Hansen 2001 p.179
\textsuperscript{33} Møgelvang-Hansen 2007 p.170, André 1984 passim,
\textsuperscript{34} Møgelvang-Hansen 2007 p.171
include many types of statements that are not clearly distinguishable from other statements in contracting. A rough distinction can be made between the legal recourse that is available when 1) sufficiently definite marketing qualifies as a binding promise or offer, 2) marketing information is grounds for general private law remedies 3) the information given can be regarded as being the seller’s and 4) indefinite marketing promises become part of the contract.

The first recourse is distinguished by the traditional presupposition that marketing information does not constitute an offer, but an invitation to offer, and for information in marketing to have binding effects, as an offer, it needs to be precise and confined to a certain target group. This question of contract formation strongly influences the interpretation of the content of contracts. In Nordic Contract Law, any statement meant to be binding is a unilaterally binding statement, which means that statements become irrevocable sooner than in other legal systems. Standard terms are part of the offer, only if they are incorporated into the contract. Older legal praxis has shown that the when the insurer has not explicitly referred to these terms, the courts have increasingly denied binding effect, in order to influence the content of the contract in favor of the policyholder.

According to the will theory the intentions of the parties, rather than the actions, are paramount in determining the contractual obligations. The reliance theory instead focused on the how the offer itself could be objectively understood, as a way of compensating for trusting the other party. In consumer sales, this objective understanding is seen in how certain marketing information is almost automatically classified as a binding offer, such as price tags in shops, as well as specified information, usually prices, in personally addressed marketing (post, email, sms), as well in online marketing (cf. section 5:23 of the Finnish Consumer Protection Act 1978/38). Also information about giveaways or bonuses are binding offers.

However, conceptualizing marketing information as an offer is only one starting point in determining the content of contracts, as marketing also contains information that cannot be constructed as a binding offer, but that still prompts legal responses.

The second recourse is distinguished by a presupposition that Nordic contract law is flexible and, especially after the introduction of the general clause 36 in the Nordic Contract Acts, can respond effectively to marketing pressure. The ensuing contract can be deemed unfair in light of the circumstances that preceded the contract. These circumstances including marketing information. This information can thus constitute grounds to annul, set aside or adjust unfair contract terms.\(^4^2\) Surprising or onerous standard terms may be also be set aside, if these had not been emphasized to the weaker party that had not drafted them. Also, marketing information may constitute grounds for damages during contract negotiations, when a contract is after all not concluded or other loss is incurred.\(^4^3\) These remedies however are not specific to marketing information, and the threshold for applicability of the general clause for example in insurance contracts has been relatively high. (NJA 1992 s. 782, KKO 1983 II 49). Wilhelmsson has noted that courts also exercise a hidden control of onerous terms through for example a restrictive interpretation of the unclear wording of the contract contra stipulatorem (against the drafter), thus avoiding having to make judgments on the fairness of the contract terms.\(^4^4\)

The last two available recourses, when indefinite marketing promises become the content of the contract, or when such promises can be regarded as being the seller’s, are based on the presupposition that marketing creates legally protected expectations.\(^4^5\) In Nordic contract law, this protection can be approached through the concepts of non-conformity, identification and commercial effect. These concepts are found in the section 18 of the Nordic Sale of Goods Acts (SGA), according to which goods are defective, if they do not conform to concrete information that can be presumed to have had an effect on the contract, given in marketing, by the seller or a person other than the seller, either at a previous level of the chain of supply or on behalf of the seller, about the properties or use of the goods.

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\(^4^2\) André 1984, p. 441  
\(^4^3\) Krüger & Møgelvang-Hansen 2001 p.62  
\(^4^4\) Wilhelmsson 1977 p.370-371  
\(^4^5\) Krüger & Møgelvang-Hansen 2001 p.180
The SGA has in Finnish jurisprudence been seen to reflect general principles of contract law, and thus have implications beyond its scope,\(^{46}\) especially in complementing the near identical provision of section 2:13.1 of the Finnish Consumer Protection Act (CPA). The CPA rule was initially also limited to goods, but the scope has been expanded also to include certain consumer services (8:13 § Work related to movables and buildings, and 9:14.1 § Construction contracts). The primary remedy for defect in both the SGA and CPA is rectification or delivery of non-defective goods. If this is not possible, the purchase price may be reduced, or ultimately the contract can be cancelled. The Consumer Sales Directive (CSD) reinforces these principles of the SGA, as according to article 2(2) of the CSD goods are defective if they do not conform to the consumer’s reasonable expectations created by advertising.\(^{47}\)

In his seminal systematization from 1984, Mathias André examined only the prerequisites for liability for marketing information, but not the sanction systems, for example whether marketing information allowed for avoidance of a contract or a reduction in price. Instead, he contended that “these questions are certainly important for the marketer as well as the recipient of marketing, but the content of the liability is not dependent on whether the liability was triggered by marketing, or something else, for example the naturalia negotii\(^ {48}\) of the contract”, and that the liability was the same regardless of medium by which the information was transmitted.\(^ {49}\) André also limited his examination to information that was voluntarily disclosed, and did not examine rules that prescribe a precontractual duty to disclose. He noted that the duty to disclose was a particular and extensive question, and strongly dependent on the needs of the recipient for that information.\(^ {50}\)

Marketing liability also functions as a sanction for neglecting pre-contractual information duties.\(^ {51}\) According to section 5.1 of the ICA, the insurer must provide the applicant with necessary information before the contract is concluded, so that the applicant can determine his or her need for insurance and choose a suitable insurance. The insurer must also point out to the applicant any material restrictions to the coverage. This section mandates a minimum level of disclosure, against which the insurer can be held liable for not providing

\(^{46}\) Hoppu 2004 p. 305-306
\(^{48}\) In roman law the rights naturally flowing from any contract of sale
\(^{49}\) André 1984, p. 26, 281, 411
\(^{50}\) André 1984 p.24
\(^{51}\) Møgelvang-Hansen 2007 p.170
necessary information. However, the insurer can be held liable for all information that is given voluntarily, if this information is incorrect or misleading and gives the applicant a mistaken impression of the insurance contract.

According to Thomas Wilhelmsson, disclosure duties have varied functions and purposes. He notes that these are achieved through general obligations of honesty and specific, formalized information duties towards weaker parties. The problem with extensive information duties, is that consumers are inundated with information that they usually do not read. Thus, liability for marketing information should be seen through this function: it can limit the need for mandatory information, make it more accessible and give the client a right impression of the product.

In Finnish contract law, the principle of marketing liability (‘markkinointivastuu’), refers in particular to the rules of the SGA, CPA and the ICA. In the other Nordic states, this term (‘marknadsföringsansvar’), introduced by André in 1984, is not as widely used. Kai Krüger and Møgelvang-Hansen have in their report “Reklamens bindende virkning: om kontraktsrettslige og markedretslege rettsvirkninger av reklame etter nordisk rett” systematized the binding effects of advertising in Nordic law in 2001. This report was commissioned by the Nordic Council of Ministers and subsequently endorsed by the Nordic consumer ombudsmen. The reason that the report is not entitled with the term “marketing” was that the authors made the distinction that marketing, when understood beyond advertising, included commercial communications in relation to contracting, whereas advertisements influence the recipients’ initial decision to purchase goods.

Krüger and Møgelvang-Hansen have identified in Nordic contract law a “trailer-principle” which in my opinion aptly reflects the wider implications of the Finnish insurance rule. The principle covers the legal praxis of assessing marketing information as a short-version (like a movie trailer) of an extensive offer that in turn has caveats and restrictions. This principle is quite weak, as the starting point for legal assessment is that it is generally accepted that

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52 Hoppu 2004 p.316
53 For Wilhelmsson the main purposes of information duties are the protection of real consent, facilitating rational market behavior, upholding informational clarity, controlling fairness and upholding a moral duty of honesty. He writes: “Personally I think this moral component of law and its society-building function have been seriously underestimated when discussing duties to inform.” Wilhelmsson 2005 p.8.
54 Wilhelmsson 2005 p.17
56 one Swedish example is Svenssons & Stenlund & Brink & Ström 1996 p.465
57 KKV 2008
58 Krüger & Møgelvang-Hansen 2001 p.54
marketing does not preclude onerous contract terms. For example, the terms for a banking service might be so complex that these cannot be expressed meaningfully in an advertisement.\textsuperscript{59}

However, the trailer-principle shows that there is a legal limit to how much marketing can distort expectations, and this limit can be derived from the good business practice. Krüger and Møgelvång-Hansen present the examples that in the travel agency business, it is not good practice to advertise discount last minute trips without caveats, if there are less than 10 seats available, and the Swedish National Board for Consumer Disputes has awarded in such a case the difference between the ordinary and discounted price. Likewise, the Norwegian Consumer Complaints Board has awarded the difference between a discounted ferry ticket and an ordinary ferry ticket, when the advertisement did not contained limitations on the height of a vehicle. The trailer-principle is of course most relevant to insurance, and for example according to a Norwegian precedent (Rt. 1997.1807) the insurer bore the risk, as it marketed and sold standardized insurance products, that information about the restrictions to the cover reached the insured.\textsuperscript{60}

The question of an appropriate sanction, when the trailer-principle is violated, is an open legal question in Nordic law. Krüger and Møgelvång-Hansen noted that to always base sanctions solely on the circumstances of the case, “creates an impression of a disorderly coupling of the administrative trade regulation and private law elements in the chain of events”. To solve the problem de lege ferenda the authors called for a choice between the alternatives of administrative sanction, negative interest\textsuperscript{61} or a treating the marketing information as a binding offer.\textsuperscript{62} A choice of an appropriate sanction, according to Krüger and Møgelvång-Hansen, needs to consider that:

“The veiledende synspunkt matte trolig være at ‘ekte’ tilbudsvirkning må forutsette at utsagnet språklig og kontekstualt vanskelig kan forenes med den snevre tolkning som utsagnsgiveren senere vill legge til grunn når han vil anføre at tilbudet har begrensninger. Igjen kan rettspedagogiske, reelle hensyn tilsi at man i større grad innstiller seg på å sanksjonere denne slags prokontraktuelle culpa (in contrahendo) med de for selgeren mer ubekvemme bundenhetssanksjoner enn de tradisjonelle basert på markedsrettslige inngrep og (mer unntakvis) erstatning for negativ kontraktsintresse.”

\textsuperscript{59} Krüger & Møgelvång-Hansen 2001 p.138
\textsuperscript{60} Krüger & Møgelvång-Hansen 2001 p.136, 139
\textsuperscript{61} “en tentativ grunn for erstatningsansvar utmålt som negativ kontraktsintresse”
\textsuperscript{62} Krüger & Møgelvång-Hansen 2001 p.138
The trailer-principle shows that contrary to what André claims, marketing liability should be examined together with the system of sanctions. In the Finnish ICA the sanction is triggered by marketing information, and not the “natural” characteristics of an insurance contract.

2.2 Attempts to codify a contractual rule

In addition to the legal responses outlined above, there have been several attempts to codify these “sanctions of binding effect” into Nordic Contract Law. Already in 1984, André proposed adding a new rule to the Nordic Sale of Goods acts:

"Har säljaren lämnat uppgift om priset, varans egenskaper eller avtalsprestationer i övrigt och har uppgiften ingått i köparens beslutsunderlag utgör den avtalsinnehåll.".64

This contractual rule should have been complemented, according to André, with a flexible rule on tort liability, for situations beyond contract negotiations, where marketing information caused any type of direct damage. As an example of easily quantifiable damage under such a rule, André pointed out the effects of the insurer’s information about the extent of coverage on the policyholder’s behavior.65

Working between 1987 and 1990, a Finnish legislative committee unsuccessfully proposed reforms of the Contracts Act (228/1929), as well as a new law on standard form contracts.66 Norway also appointed a similar reform committee in 1990, but it never finished its work.67

The Finnish committee noted that a legal reform where promises given in marketing were treated as binding offers would not be enough, as marketing could cause even other kinds of loss for which the marketer should bear responsibility, for example in situations when there are only a few of the advertised items in stock.68

The proposed new section on the effect of indefinite promises was as follows:

“1c § If a party to a contract has in connection with its marketing given information about a price, characteristics of a product or other information on the performance of the

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63 André 1984 p.26
64 André 574
65 André 1996 p.584
66 Kom 1990:20
67 Woxholt, Geir 2006 p.462
68 Kom 1990:20 p.118; 144–148
contract, and this information can be assumed to have had influenced when the contract was entered into, shall such information be deemed part of the contract."69

This liability would have extended to information given by someone acting on behalf of the contracting party, unless the contracting party could have shown that it did not and should not have known about this information.70

The Finnish proposal was jointly reviewed by experts from the Nordic consumer protection agencies at a seminar entitled “Konsumentkrav på ny avtalslag”71. Although some experts pondered whether contract law theory itself should be revised, others countered that it was not feasible to think of consumer protections free from existing contract law, and that such an unbound legislative approach would not produce relevant knowledge, especially as the European Community initiatives were already making it difficult to even maintain the present level of “consumer friendly contract law”.72 However, the agencies nevertheless agreed that these proposals reflected common Nordic law, and they would create a desirable preventive effect on the individual, micro-level against reprehensible marketing behavior. Also, “fresh and clear” legislation would have intrinsic informative value on the fact that violations of trade regulation were also sanctioned by civil law. The agencies felt that a main benefit of a codification would be that Nordic consumers could effectively use it to negotiate settlements with entrepreneurs.73

The question of a codification came up again in 2001, in the report by Krüger and Møgelvang-Hansen referred to above. The report proposed a new section to be incorporated into Nordic marketing legislation, applicable for consumer sales and to subject to similar identification rules as the SGA:

“§B. Information displayed in commercial advertising shall be considered part of a subsequent contract with a consumer concerning the product or service in question unless there are reasons to assume that the information displayed had no impact on the consumer’s evaluation of the contract.”74

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69 Kom 1990:20 “Har en avtalspart i samband med marknadsföring givit uppgifter om pris, produktens egenskaper eller avtalsprestation i övrig, vilka kan antas ha inverkat på avtalet, utgör uppgifterna en del av det avtal som ingåtts.”
70 Kom 1990:20
71 Held between 21-22.11.1990 in Espoo, Finland
72 Nybergh 1992 p.101
73 Nybergh 1992 p.107
74 Krüger & Møgelvang-Hansen 2001 p.187
These attempts at a codification showed the point of tension between contract law and marketing information. That these attempts failed indicated that the proposals were too radical to enact, considering that contract law is inherently quite static. In particular, the sanction systems proposed were a general binding effect of marketing information. It was most likely that the legislator did not see that there would be a benefit in adjusting the rules of contract formation. Consequently, any future codification of a marketing rule would probably not be feasible if it did not also contain a more developed sanction system.

2.3 The difference between a defect and the insurance rule

My hypothesis is that it was the refined sanction system of the Finnish insurance rule that led to its enactment when the other proposals, outlined above, failed. This point of tension, focuses attention on the difference between the insurance rule and the construction of non-conformity or defect in the SGA.

The Finnish insurance rule sanctions unacceptable marketing through the rules of contract formation, so that the contract is considered to be in force to the effect understood by the policyholder. The rule thus merges the duty of disclosure and the liability for voluntary marketing information. The rule signifies that in cases where an advertisement or sales pitch gives an unacceptable impression about a subsequent contract, the buyer is protected, even against standard contract terms to the contrary or in situations where the seller is unaware of the buyer’s mistake. At the same time, the rule gives the buyer a right to a performance, and the contract that regulates the performance changes to reflect the information given in marketing.

Kari Hoppu has compared the Finnish SGA (together with the CPA) to the ICA, and found that only the ICA regulates the content of a contract, whereas the two other acts regulate what is a breach of contract, by constructing a defect in the product sold, due to marketing information. Hoppu suspects that this difference, that the ICA covers all types of information and the SGA only information on the properties and use of the product, was due to the different nature of the products that were regulated.

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75 Hoppu 2004 p.302
76 Hoppu 2004 p.309
In insurance, the product is the contract itself, which means that legislation affects single contracts as well as pools of mass standardized insurance products. Insurance has originated from probability calculus that gave rise to a new kind of rationality, a way of thinking about the world that was based on the regular occurrence of actual events, instead of the reasons behind these events. Contracting norms affect directly the product development and marketing strategies of insurers. The clauses in insurance policies are individualized terms and standard terms, which can be categorized into particular standard terms relating to the insurance product in question, for example a home insurance, as well as general standard terms, that concern for example the payment of premiums.

The different nature of goods and insurances does not entirely explain why other marketing information about goods, unrelated to properties or use, does not trigger a defect in the SGA. After all contract clauses refer basically to two facts, those that exists because of the contract, such as the contract terms themselves or their performance or breach, and those that that exist independent of the contract, such as taxation law or the properties and use of the goods that were sold. Hypothetically, it would thus be possible to extend binding effects of marketing information to all aspects of contracting, so that the aspects that parties can control would change, and the aspects that they cannot control would be remedied through damages. At the same time, the defect construction would become unnecessary.

The established sanction system in the SGA is however based on the concept of defect (non-conformity) in the good that has been sold, and it seems to be this basic concept of constructing a defect, rather than the different products themselves, that explains why the SGA and ICA differ.

The defect construction originates from Roman law and has entered Nordic law through German jurisprudence. It is comprised of two elements. The seller is firstly liable for any guarantees he or she has made about the properties of the goods to the buyer. This is a specific liability (called vendito-emptio in Latin), that is based on the agreement between the parties. The second form of liability is based on an abstract determination of the general properties of a certain category of goods (in ancient Rome such “pre-guaranteed” goods were

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77 Ewald 2003 p.30-31
78 Norio-Timonen 2012 p.47
79 Norio-Timonen 1997 p.2
for example slaves and draught animals) that the seller is liable for regardless of any guarantee.\textsuperscript{80}

In the SGA, this second form of liability is seen in the rule that goods must also be fit for the purpose for which similar goods are ordinarily used (section 17§). André has noted that there has been a distinction between the two forms of liability in the remedies which were available according to the SGA (i.e. correction, price reduction, avoidance of the contract or damages), but that this distinction was disappearing, and thus marketing information could lead to all applicable remedies.\textsuperscript{81}

The sanction system of the Finnish insurance rule is based on the marketing itself, as the marketing influence the content of the contract. Thus the threshold for sanctions is lower and awards can be significantly higher than what the rules on non-conformity would allow. The applicant’s understanding is determined, according to the preparatory works, with objective criteria that correspond to the reasonable understanding of an average applicant in the same situation. Objectivity means that applicants are for example presumed to read, with reasonable care, the written material that the insurer provides them.\textsuperscript{82} The applicant’s subjective criteria are also legally relevant, for example the applicants advanced age or special circumstances, if the insurer or its representative knew or should have known about them.\textsuperscript{83}

These loose criteria of the applicants understanding can be interpreted in the light of section 31:1 of the Insurance Company Act (2008/521) according to which marketing that does not contain necessary information on the financial security of the client, is always unfair business practice, and in light of the general rules of second chapter of the CPA on the regulation of marketing.

Comparison of liability for marketing violations in the sale of goods and insurances in Finland\textsuperscript{84}

<table>
<thead>
<tr>
<th>Situation</th>
<th>Goods (SGA and CPA)</th>
<th>Insurances (ICA)</th>
</tr>
</thead>
</table>

\textsuperscript{80} André 1984 p.274
\textsuperscript{81} André 1984 p. 274, 589-590
\textsuperscript{82} HE 114/1993 vp p.29, On how these objective criteria have been clarified in legal praxis see Norio-Timonen 2010 p.67-72
\textsuperscript{83} HE 114/93 p. 31 cf. Norio-Timonen 1997 p.139; Hoppu 2004 p.310
\textsuperscript{84} Hoppu 2004 p.308-314;
<table>
<thead>
<tr>
<th>The seller is in good faith.</th>
<th>If the information concerns properties or use → non-conformity.</th>
<th>If the information is incomplete, misleading or incorrect → the contract is in force as understood by the policyholder.</th>
</tr>
</thead>
<tbody>
<tr>
<td>The information is provided by third parties.</td>
<td>If the information is given by the previous level of the chain of supply or on behalf of the seller → information is treated as the seller's unless the seller is in good faith.</td>
<td>If the insurer’s representative has authority to give information on the policy and the information is incomplete, misleading or incorrect → the contract is in force as understood by the policyholder.</td>
</tr>
<tr>
<td>The information is corrected as efficiently as the wrong information by the conclusion of contract.</td>
<td>The correction is assumed to have reached the buyer.</td>
<td>The insurer needs to prove that the applicant has received the correction.</td>
</tr>
<tr>
<td>The information does not influence the decision to purchase.</td>
<td>There is no commercial effect → seller is not bound to the information.</td>
<td>This situation is irrelevant. If the information is incomplete, misleading or incorrect → the contract is in force as understood by the policyholder.</td>
</tr>
</tbody>
</table>

Finnish legal literature presents a generally supportive view of the insurance rule. The Finnish rule has created an accessible protection for policyholders and replaced the need to rely on other types of sanctions when the insurer neglects its information duties. Norio-Timonen has noted that for a consumer, the normal consequences of non-conformity would in most situations be unsatisfactory.\(^{85}\) The compensation for non-conformity in the sale of goods depends on the applicable remedy, for example negative interest or a refund of the insurance premiums would not be in the interest of the policyholder if the accident has already occurred. Consequently, the concrete “remedy” of the insurance rule is that the insurance cover is extended, either by increasing the insurance money or amount of risk that is insured.\(^{86}\) Koponen writes that the rule is effective, as it provides the right type of protection for insurance products, it highlights the responsibility of both parties and it works when it should.\(^{87}\)

\(^{85}\) Norio-Timonen 1997 p.137; One practical benefit of the extension of coverage is that according to good insurance practice the insurer has an obligation to use its resources and expertise to evaluate the extent of the damage.

\(^{86}\) In case the insurance was not bought, due to marketing information, and this causes loss, general rules of tort apply. Norio-Timonen 2010 p.74

\(^{87}\) Koponen 2008 p.84. Koponen adds: “By this I mean that the criteria for applicability are relatively stringent, and when the rule is applied, the circumstances of particular cases are adequately considered. The loss is channeled to the party that is responsible for it. If the policyholder neglects his or her duty to check the policy [selennonottovelvollisuus], he or she bears the loss. If the insurer neglects its duty to inform [on syystistynytt tiedonantovirheeseen], it bears the loss.”
2.4 Further points of tension

In the light of these differences between the Finnish insurance rule and contract law, it is interesting to look at how some points of tension presented by the Finnish ICA have been described in legal literature and other sources. I will focus on the questions of contract formation, liberalist theory and finally on how the Swedish and the “European ICA” differ from the Finnish ICA.

The first point of tension is whether the Finnish rule regulates contract interpretation or contract formation. According to the preparatory works of the reformed ICA, the section reflected the legal principles of the defect rules of the sale of goods act and consumer protection law, whereby the insurer’s precontractual information was essential to the interpretation of the contract.\(^{88}\) Consistent with this conception of a remedy for defect, the Insurance Complaints Board has in its recommendations, for example in case VKL 636/04, said the policyholder had the right to have a mistake corrected.

Interpretation and mistake are however not entirely accurate terms to describe the rule, as it actually does not influence the interpretation of the contract as much as determine the contract terms themselves.\(^{89}\) While the language of the rule has been the same since 1994,\(^{90}\) subsequent preparatory works have gradually recognized that the rule changes contracts.\(^{91}\)

When the old Insurance Company Act (1062/1979) was amended in the year 2000, the formulation in the preparatory works was that a mistake caused by incomplete, incorrect or misleading marketing was “sort of corrected”, by changing the policy to reflect the information that had been given.\(^{92}\) Finally, in the preparatory works of 2009, when the ICA was amended, the rule was described straightforward as one that “influences the content” of the contract.\(^{93}\)

\(^{88}\) HE 1993/114 vp p.13  
\(^{89}\) Norio-Timonen 1997 p.137 note 159  
\(^{90}\) The scope of the rule was expanded in 2010 also to investments that may be linked to the insurance (Section 5.1)  
\(^{91}\) It is outside the scope of this research to examine whether legal praxis in applying the rule has also evolved since 1994. Koponen has noted that the Insurance Dispute Board VKL has shown restraint in applying the rule restrictively, and that the rule is secondary to the applicant’s duty to check the policy. Koponen 2008 p.85  
\(^{92}\) HE 206/2000 vp p.16 “virhe ikään kuin korjataan”  
\(^{93}\) HE 63/2009 vp p.4;
The second point of tension is whether the rule adjusted to contracting practice or whether it steered contracting. Häyhä and Norio-Timonen have had differing views on how the new ICA relates to liberal tradition. Häyhä published his dissertation, “Contract, Law and the Insurance Business”94 in 1996, two years after the ICA entered into force. Häyhä examined if contract law had undergone, as other academics have proposed, a transformation from the liberal free-market model towards a “welfarist” model that protects weaker parties. He used insurance contract law to test this proposed change, and concluded that many changes in contract law that had been classified as consumer protections could in fact be understood as continuing the liberal tradition. This was especially the case for insurance law, as contracting had changed from individually negotiated contracts to contracts of mass-character.95 Häyhä thus criticized the notion that insurance contract law primarily reflected consumer protections and that the particular nature of the insurance business best explained why the ICA was different from general contract in many respects.96 He claimed that attempts, by the Finnish state, to steer the insurance business were quite limited, and that the new ICA primarily codified established trade practices.97

In her critique of Häyhä’s theory, Norio-Timonen noted that the absence of regulation is a fundamental element of liberalist contract theory, which did not support Häyhä’s hypothesis that insurance contract law regulation, such as increased information duties, were compatible with liberalism. Norio-Timonen claimed instead that the ICA reflected a market rationality that was geared towards correcting market failures, as well as towards promoting the principle of loyalty in contracting.98 This critique of Häyhä by Norio-Timonen, in my view boils down to the question whether the modern collectivist system of contract law, that promotes collective and public interests, really is the antithesis of liberalist contract law that emphasizes private autonomy.99

The third point of tension is that from abroad the Finnish rule is not well understood. This can be seen specifically in Sweden and in the “European ICA”, that is the Principles of European Insurance Contract Law (PEICL). The PEICL are the result of an academic

94 Häyhä 1996 Sopimus, laki ja vakuutustoiminta
95 Häyhä 1996 p.361–362
96 Häyhä 1996 p.87
97 Häyhä 1996 p.214, 116
98 Norio-Timonen 1997 p.148-149 Norio-Timonen points out that the duty to disclose essential limitations of the insurance coverage is also compatible with the doctrine of the regulating surprising and harsh standard terms.
99 Timonen 1997 p.37
exercise, and it is envisioned that PEICL could be issued as a voluntary optional instrument, in the form of an EU-regulation.

In the Swedish ICA (2005:104), a notable difference to the Finnish ICA is that the insurer’s failure to emphasize clauses that contain surprising or essential limitations to the insurance cover does not change the policy to the effect understood by the applicant like the Finnish rule does, but only renders these clauses ineffective. 100 Professor Bertil Bengtsson 101 was a member of the Swedish ICA committee in the 1970’s and 80’s, when the Finnish and Swedish acts were reformed. Thirty years later, in 2015, he reflected on how the Swedish ICA turned out:

“The Swedish ICA rules on civil liability are difficult to reconcile with general principles of contract law. It is after all an unusual consequence that a contract automatically changes due to the breach of one of the parties (without annulment or termination). One is tempted to ask, whether we could not have, like Finland, relied on general principles of contract law in the case of defective information, which at times could bring about an extension of coverage.” 102

Bengtsson’s view is interesting, as the Finnish insurance rule is usually seen as an exception to general contract law. 103 Bengtsson writes that he nevertheless prefers the current Swedish rule, and he then implies that the Finnish rule complicates contracting. He notes that policyholders often ask for a specific type of coverage, and such a rule would force insurers to emphasize limitations at this very early stage, which would make precontractual information harder to digest. 104

Bengtsson’s concerns are however not shared in Finnish legal literature. The Finnish VKL has given numerous recommendations for disputes where the client had asked for specific coverage (For example VKL 742/06 and 54/02). 105 The Finnish doctrine is that even though

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100 2§ Innan en konsumentförsäkring meddelas skall försäkringsbolaget lämna information som underlättar kundens bedömning av försäkringsbehovet och val av försäkring. Informationen skall på ett enkelt sätt återge det huvudsakliga innehållet i de försäkringsvillkor som kunden behöver ha kännedom om för att kunna bedöma kostnaden för och omfattningen av försäkringen. Viktiga begränsningar av försäkringsskyddet skall tydligt framgå. […]

4 § Snarast efter avtalsslutet skall försäkringsbolaget […]upplysa om försäkringsvillkorens innehåll och särskilt framhålla […] villkor som med hänsyn till försäkringens beteckning eller övriga omständigheter utgör en oväntad och väsentlig begränsning av försäkringsskyddet […]

8 § Om ett villkor av sådant slag som anges i 4 § inte har särskilt framhållits av försäkringsbolaget vare sig före eller efter avtalsslutet, för det inte åberopas av bolaget.” (Emphasis added)

101 Professor emeritus of insurance law, at the University of Stockholm

102 Bengtsson 2015 p.211. (Emphasis added)


104 Bengtsson 2015 p.211

105 Koponen 2008 p.18
the applicant asked for a specific type of coverage, the insurer must still inform the client about other relevant policies that it sells. In Finnish insurance law, the duty to inform the client about major exclusions depends on two questions: 1) what would an ordinary applicant regard as a major exclusion and 2) if the insurance was purchased face-to-face, what can be regarded as a major exclusion based on the applicants specific circumstances.

On the contrary, the way the Swedish ICA deals with precontractual information seems very complicated. Eva Lindell-Frantz has noted that in Swedish contract law the relevant trade regulation and private law rules are not to be found in one place, and as the insurers defective information can lead to different consequences in different circumstances, it is difficult to know exactly what the duties of the insurer are. Lindell-Frantz also noted that the Swedish rules, while they guarantee a lot of information to the policyholder, do not really address the real problem that applicants mostly choose insurances haphazardly and do not have the time, energy or interest to read this information. The implication seems to be that Swedish insurance law does not find the right balance between too much and too little information.

The PEICL purport to reflect the status quo of contract law in the EU member states. The comparative notes of the PEICL present the different ways that member states deal regulate insurance contracts, grouped into legal families or regimes of law. The PEICL do not regulate marketing, but focus instead on insurers a duty to assist the applicant in selecting an insurance policy. According to the notes of the PEICL, if the insurer fails its duty to assist the policyholder, some member states allow for the modification of the insurance contract to accommodate reasonable expectations, and that Sweden has one of the more extensive duties to assist. Consequently, the PEICL ignore the facts that 1) the Finnish marketing liability rule also applies to any information given when the insurer or its representative assists the applicant, and 2) that the rule regulates contract formation, not modification. This distinction is important, because the general clause 36 of the Nordic Contract Acts allows for the adjustment of contracts, with regard to conditions prevailing at the conclusion of contracts. The threshold for any adjustment (if this is indeed meant by the term modification in PEICL)

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106 Norio-Timonen 1997 p.116
107 HE 114/1993, p.27
108 Lindell-Frantz 2007 p.343, 350
109 PEICL 2016 p.6 19; In PEICL, the insurer’s information duties are limited to the provision of pre-contractual documents and a duty to warn about inconsistencies in the cover. To avoid liability for a breach of this duty, the insurer needs to prove it acted without fault, and the circumstances and mode of contracting determine the extent of the duty to warn about inconsistencies.
110 PEICL 2016 p.124 (C5) and p.126 N6
of a contract is thus much higher in Sweden, than the threshold for contract formation in Finland, on the basis of the expectations of the policyholder.

This question of precontractual assistance is topical, as the Insurance Distribution Directive (IDD)\textsuperscript{111}, to be transposed by February 2018, introduces a demands-and-needs test for all sellers of insurance products that sell directly to customers.\textsuperscript{112} The IDD requires sellers to ask about these demands and needs from the applicant and to make an objective recommendation, so that the applicant can make an informed decision (art. 20.1). The PEICL in turn propose, as a common European rule, only the duty to warn about inconsistencies in cover, and the insurer is still excused if it was not negligent:

**Article 2:202 Duty to Warn about Inconsistencies in the Cover**

(1) When concluding the contract, the insurer shall warn the applicant of any inconsistencies between the cover offered and the applicant’s requirements of which the insurer is or ought to be aware, taking into consideration the circumstances and mode of contracting […] (2) In the event of a breach of para. 1 (a) the insurer shall indemnify the policyholder against all losses resulting from the breach of this duty to warn unless the insurer acted without fault […]

To conclude, as it is not well understood in Finland that the insurance rule affects contract formation, instead of non-conformity, it is no surprise that the rule is not well understood abroad. The rule might be better understood if it is looked at on a higher level of abstraction.


\textsuperscript{112} It will replace the previous Insurance Mediation Directive (IMD). The IDD contains minimum harmonization, so member states can ‘gold-plate’ it by adding their own requirements. Out-law.com. 2016.
3. The theoretical implications of the insurance rule

The different points of tension outlined above had are closely connected on an abstract level. The theoretical problems these points of tension raise are the questions of 1) how can contract law accommodate indefinite promises (that are not offers) becoming part of a contract, 2) are autonomy and increased regulation compatible or incompatible and 3) what are the criteria for good contract law. A need for refined arguments about what is better or worse is made evident by the history of failed attempts to reform the Nordic Contract Acts, as well as by the pressures of European harmonization to the Nordic consumer protection model.

Bert Lehrberg has in his book on practical legal method noted that legal rules are only understandable in relation to the reality where the rule is applied, and in relation to the values rules fulfills. To this end, he presents legal rules in a three-dimensional field.\textsuperscript{113}

\begin{center}
\begin{tikzpicture}
\node (values) [rectangle, draw] {Values (Objectives)};
\node (rules) [rectangle, draw, below of=values] {Legal rules};
\node (reality) [rectangle, draw, below of=rules] {Reality};
\draw[->] (values) -- (rules);
\draw[->] (rules) -- (reality);
\draw[->] (values) -- (reality);
\end{tikzpicture}
\end{center}

In his process, a) reality influences values so that b) rules acquire new content through lawmaking (objectives). c) Reality is directly influenced by legal rules as people generally follow them, but legal rules mainly influence (d) the values of society. These values then (e) reflect in the way people behave. Finally, (f) real circumstances significantly determine when and how legal rules are applied.\textsuperscript{114}

This complex process shows that a change in law serves different functions and can have unintended consequences.\textsuperscript{115} The significant effect of the insurance rule, if it would become a general contract law rule, is that the role of promise and agreement between the parties would change, as marketing information would increasingly determine the content of the contract. After all the legal consequence of the insurer’s contractual liability for information

\textsuperscript{113} Lehrberg 2014 p.103
\textsuperscript{114} Lehrberg 2014 p.104
\textsuperscript{115} Lehrberg 2014 p.104
in marketing, is that the contract is considered to be in force to the effect understood by the policyholder. As promise and agreement are also very much moral and economic question, the consequences of such a change in contract law can be examined in social norms and economic behavior (values and reality in Lehrberg’s presentation).

3.1 The power of reason and interaction

The interaction between law and reality, like the interaction between law and values, works both ways. As a starting point, it can be noted that Lehrberg’s terminology might give the impression that values are not real, with the implication that the effects of law on values are not that important. However, such an impression does not recognize that it is possible to study subjective phenomenon, and find verifiable truths about them. In fact, changes in the law are only conceivable because the law, just like economics, is a human science. Philosopher John Searle has noted that humans have the unique capacity, among the living creatures, to actively create their own subjective reality, through a biological process in the brain. Without a human observer, in his subjective capacity, there would be just the brute facts of the world that would exist regardless of us.¹¹⁶ Banknotes and contracts, as brute facts are just fibers and molecules.¹¹⁷

Lehrberg’s values, just like legal rules, are thus an observer relative and ontologically (having to do with existence) subjective phenomenon. It is nevertheless possible to give an epistemically (having to do with knowledge) objective account of both values and the law, even though values and the law would not exist (as ontologically objective things) without us observing them. In other words, research can say, verifiably, what is true or false about values and the law.

According to Juha Pöyhönen, there is a mechanism, at the deep structures of society where economics, politics and law are not distinct.¹¹⁸ As I understand it, Searle describes this mechanism when he notes that through “speech acts”, representations of ontological subjectivity become epistemically objective status functions declarations. This means people can collectively assign functions to objects that go beyond their physical properties. The

¹¹⁶ Searle 2006 p. 13-15; Searle 2015 lecture
¹¹⁷ Searle 1995 p.2
¹¹⁸ Pöyhönen 1986 p.374, 376 Pöyhönen calls this ethical rationality material law that is founded on societal justice. Formal law would be a contradicting rationality, based on private autonomy. Pöyhönen p.375 n.13
constitutive rules of a status function, as a formula, tell us that X counts as Y in C. In practice the rules can instruct that a bishop moves diagonally in a game of chess, or that the winner of a democratic election will be the president of a nation. Because people accept the deontic powers (of or relating to moral obligation) of status functions, societies hold themselves together. 119

The purpose of this long-winded philosophical introduction is to emphasize that the effect of deontic power (of status functions) is that people accept reasons to act independent of their preferences (Searle uses the term desires). According to Searle, this powerful motivating force is not adequately represented in economics, a discipline that focuses on the fulfillment of preferences. Behavior is not exhaustively explained by preferences, because when people accept valid reasons to honor their obligations, they only form the preference afterwards to do the required action. For example, because people accept their obligations, they form the preference to get up early in the morning to go to work and pay their debts.120

Another misunderstanding that might arise from Lehrberg’s chart is that real circumstances do not only determine when and how legal rules are applied, because “reality” also directly influences the content of legal rules. Individual self-interest drives economic action, but this action also produces social co-operation. 121 Adam Smith has called this the ‘invisible hand’.122 Compared to Searle’s deontological power of status functions, the invisible hand operates primarily not through reason, but through the forces of supply and demand. While Searle notes status functions are pretty much everywhere123, we are also faced with innumerable interactions over the course of our lives. The key difference, as I understand it, is that repeated human interactions produce a strong non-rational power that steers social order, and this power is distinct from the equally strong deontic power that steers rational behavior.124

These two powers can be seen in action in the type of legal regulation that has been characterized in jurisprudence as “market rationality”, which interferes into the market system in order to fulfil collective or public goals. Of course, the goals may vary from facilitating rational behavior through information duties to correcting market failures on

119 Searle 2012 lecture
120 ibid.
121 Aldridge 2005 p.10-15, 38
122 Smith. 1776. p293
123 Searle 2010 p.7
124 Searle 2010 p.145
welfarist grounds. Market failures are situations of non-pareto optimality when prices fail to reflect the full social costs and benefits of activities. Markets fail not only due to lack of efficiency, but also when they produce politically, socially or ethically undesirable effects. According to Pöyhönen, in order to influence economic activity, the legal system must be distinct from economic activity as otherwise the existing state of affairs is only reinforced.

The premise for market rationality is economic analysis that exposes the economic operational environment and regularities in human behavior. The variables that influence real world economics are innumerable, so the economic analysis of law is necessarily based on dynamic models. Markets can for example be observed through prices and how sellers and buyers organize themselves. The price mechanism fulfills the functions of transmitting information, providing incentives and distributing income.

There is of course no clear delimitation when non-rational power becomes rational power, because as soon as systematic non-rational behavior is identified, it acquires a status function or rational explanation. An example of market rationality is that courts accept the price on the market as a starting point for determining whether to correct an unjust price agreed between the parties. On the other hand, the tendency to let the markets alone is seen in the criticism of courts, when they directly intervene in market relationships, that they are paternalistic and redistributive.

3.2 Norms and the law

Proposals for a new legal rule, examples of which were presented in chapter 2, are usually not enacted if they are not accepted by the representatives of a sufficient majority. A proposal should thus primarily make sense, and rely on the authority of the lawmaker. In other words,

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125 Norio-Timonen 1997 p.37-38
126 Pareto-optimum signifies a situation where no-one can be made better off without someone being made worse off. Aldridge 2005 p.67
127 Aldridge 2005 p.67
128 Pöyhönen 2000 p.XI
129 Timonen 1997 p.40
130 Aldridge 2005 p.15-18
131 Tolonen 1996 p.8. The phenomena are called market transference and market substitution.
why do people accept deontic power? According to Searle the term acceptance, is interchangeable with “collective recognition and does not imply approval.” He writes:

The procedures [for representing states of affair], or at least some of them, become conventionalized, become generally accepted [...] given collective intentionality, if anyone intentionally engages in one of these procedures, then other members of the group have a right to expect that the procedures are being followed correctly [...] conventions are arbitrary, but once they are settled they give the participants a right to specific expectations. They are normative.

The key point in why a proposed rule would be accepted by for example a parliament is that the rule reflects what is or should be normal, because when something is recognized as normal, that which deviates from it is abnormal. This duality of meaning is captured in the term norms. Norms are difficult to conceptualize, as the word has two distinct and established generic meanings, as an order or obligation, and as a description or standard, but at the same time these meanings are interdependent.

Like norm and normal, prescription and description express is and ought and constantly interact with each other, so that a statistical average can become a prescription to be obeyed, or obeying a rule can become so common that it forms a descriptive average. In other words, it is normal to obey a prescriptive norm, and normal to conform to a descriptive norm. Norms, when their dual qualities are recognized, can be understood in the ordaining sense of normal. Norms are a common denominator and a relationship benchmark. This means that a norm is both a standard and a means through which a group communicates with itself.

A legal rule also has a descriptive, norm-producing function. The dual function of norms is often omitted when describing the law, with the inherent risk that societal effects are not adequately accounted for. The word legal norm is commonly used only in its prescriptive,
There is no concept of “legal normal”. Some empirical average, for example a baseline for emissions, might be codified, but the codification itself is not understood as “normal”, it is a prescription to be obeyed. Law-breaking is also usually sanctioned in a targeted and specific way, and the sanctions are enforced. The law recognizes rough categorizations of behavior and is usually indifferent to the social context.

Like the term “values”, the terms “morals” and “morality” do not convey the duality of meaning of norms, of being simultaneously descriptive and the prescriptive. A finer distinction between the norms and morals can be found in Foucauldian ethics. There are moral systems and humans have a moral faculty. Institutions such as the church, school or family or the legal system, propose moral systems and moral faculty is reflected in the actions and reflections of the ethical individual. The individual in turn recognizes his or her morally problematic areas and establishes, through self-reflection, his or her moral obligations.

Searle claims that most normative constraints of a society (specifically presuppositions, attitudes, dispositions, capacities and practices) are not a type of power that would be exercised by any subject, because such power is are not codified, explicit or conscious. However it is clear that regal rules can affect our attitudes and that many social conventions are not arbitrary, which is seen in the way legislation has intruded into many spheres of life that were previously private affairs.

### 3.2.1 The law and normalization

According to Michel Foucault and his student, François Ewald, power has evolved and with it the law. The juridical concept of the law is that the state, symbolized by a sovereign, is generally uninterested in the lives of its people, and ensures obedience of the population.

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139 According to Mårten Knuts, verifiable generalizations about the real world are empirical general knowledge, and this knowledge needs to be assimilated for it to become normative dogmatism that can be used to resolve a case. Knuts 2010 p.53-58. Confusingly, other researchers use the term norms to only describe the non-legal. Erik Posner for example notes that people who violate norms are sanctioned by private third parties, whereas the state sanctions lawbreakers. Posner (1995-1996) p.1699
140 Koivisto 2008 p.8.
141 cf. Koivisto 2008 p.17–18
142 michel-foucault.com. 2007; Robinson (undated). These sources do not list the legal system as proposing a moral system.
143 Searle 2010 p. 114, 155, 160
144 Former head of École Nationale d'assurances of Paris
by sporadic displays of spectacular violence. With the advent of modernity and technological
development, the *normative state* has replaced the juridical state, because a new way of
managing society was called for in particular by expanding trade and the demands of the war
industries. These needed for standardized products, workers and soldiers.\(^\text{145}\)

The normative state uses the dual function of norms as a way to manage society without
requiring force or obedience.\(^\text{146}\) For example, in armies, prisons and schools new types of
discipline, surveillance and final exams placed each individual under surveillance, within
ever more detailed and efficient relational categories. Foucault’s famous example of this
development is the panopticon, or central tower in new prison architecture, that let the guards
observe prisoners without the prisoners knowing it. Eventually, the same effect was achieved
with the guard tower empty, because the prisoners still behaved as if someone was watching.
Norms offered a “matrix by which to interpret society and a scale by which to judge and
differentiate each individual from the next”\(^\text{147}\).

This technique of management is called *normalization*. Normalization entailed that the
individuals observe themselves in relation to that which is the standard, or the new normal.\(^\text{148}\)
Normalization is at once “a minimal threshold, as an average to be respected or as an
optimum towards which one must move”.\(^\text{149}\)

Legal norms are a combination of natural and artificial norms, as law both creates norms and
expresses norms that would exist regardless of the legislator.\(^\text{150}\) Ewald claims that actually,
there is no true legislator and that the task of the parliaments and other institutions that make
the law is not to create norms, but to decide which norms should be binding.\(^\text{151}\) To Ida
Koivisto, this means that the world of facts contains within itself a normative order, based
on social conventions, that prevents anarchy even if no lawmaker would exists. Law thus
creates norms, but also expresses those norms that would exist also without any act of
recognition.\(^\text{152}\)

The theory of normalization is hard to reconcile with the traditional view of contracting. This
contradiction was seen in Norio-Timonen’s critique of Häyhä, referred to above. Doesn’t

\(^\text{145}\) Ewald 2003 p.12  
\(^\text{146}\) Ewald 1990 p.155  
\(^\text{147}\) Martire 2012 p.26  
\(^\text{148}\) Ewald 2003 p.21, 74  
\(^\text{149}\) Foucault 1977 p.183  
\(^\text{150}\) Koivisto 2008 p.13  
\(^\text{151}\) Ewald 2003 p.54  
\(^\text{152}\) Koivisto 2008 p.11
freedom of contract, whether a natural right or guaranteed by positive law, precede any standard or common practice when interpreting contracts? This contradiction can be solved by distinguishing a norm from a command. Normalization created a cohesive social group, unto which the law placed the universal status of legal subjects. On the other hand, the law activated, facilitated and implemented the techniques of normalization, which distinguished and revealed every individual to the common benchmark of being a legal subject. The rule of law can only exists on an area that has been normalized. Freedom to make choices and to enter into contracts is essential to normalization, because freedom separates a command from a norm.\textsuperscript{153}

The rule of law not only protects individual freedom, but is in itself a benchmark of normalization. The shift from command to norm means that authority disappears, and what is left is the “discourse of power” that makes human interactions predictable. A command only serves its giver and nothing else that would have a wider purpose. A command does not allow for its object to decide how to fulfill the action that is demanded. A norm, on the other hand, gives guidance to an actor that decides for him or herself.\textsuperscript{154} Thus, on a deep societal level there is no dilemma between power and emancipation. On the contrary, as the state does not have the power to enforce its will without the technique of normalization, the state has a vested interest in maintaining party autonomy.

\subsection*{3.2.2 Rules, principles and the duty to adjudicate}

Legal norms are conceptualized as rules and principles. The basic distinction is that rules are applied in an “all-or-nothing” way to solve the case, they typically categorize their object in a binary fashion and ascribe a precise legal consequence. Also, the exceptions to a rule can be enumerated precisely. Principles, on the other hand, do not entirely dictate the outcome of a case, but instead identify the constituent elements for a certain judgment, but the judgment can ultimately be different due to the circumstances of case or other stronger principles.\textsuperscript{155} Contract law is inherently oriented towards principles, as they connect the law to contracting practices and social norms.\textsuperscript{156} Siltala notes that principles are intertwined with

\textsuperscript{153} Martire 2011 p. 20
\textsuperscript{154} Martire 2011 p. 21
\textsuperscript{155} Pöyhönen 1988 p.20–23
\textsuperscript{156} Tolonen 1996 p.1
different societal values and objectives.\textsuperscript{157} The distinction between a rule and a principle is quite fluid, as many legal rules are very open-ended. Likewise, the codification of a legal principle, developed in jurisprudence, gives it some characteristics of a rule, but not all of them. According to Pöyhönen, using open terms does not in itself change a rule into a principle. This is because, if the court can determine that the term is applicable, the rule is applicable, not as much as possible, but fully, to its mandated legal consequence.\textsuperscript{158}

On closer analysis, the insurance rule is devoid of content without a connection to contracting practice, because it is written in very open terms. It obliges the insurer to provide the \textit{necessary} information and sanctions for giving \textit{incorrect} or \textit{misleading} information, by mandating that otherwise the policy is in force to the effect understood by the policyholder. According to section 5 of the act, unless the applicant does not want such information, the insurer must provide \textit{any information that the applicant may need} to assess his insurance requirement and select the insurance, such as details on the insurer’s insurance products, insurance premiums and insurance terms and conditions, as well as point out any major exclusions in the cover provided. This raises the question of what the content of insurance contracts is, if the terminology of the key terms are open. Seen in a societal context, this open terminology highlights the power of courts and the VKL to influence the (non-legal) norms of insurance contracting.

Nordic jurists, by and large, seem reluctant to use the term gap-filling, and instead prefer the term interpretation. If legal rules or custom do not give an answer, Nordic legal practice hides the problem of “gap-filling” by constructing an artificial common will of the parties or by applying the doctrine of necessary conditions.\textsuperscript{159} The term interpretation has traditionally been used for example textual, contextual and risk-division considerations. Increasingly, legal interpretation is detached from what the parties would have wanted. Instead, courts can determine, with the help of default rules, what result would be reasonable and societally acceptable (for example NJA 2009 s. 672).\textsuperscript{160} The reluctance to use the term gap filling, is due to the constitutionally limited and fine-tuned norm-producing mandate of the Nordic courts. Contract law precedents have higher interpretative value if they help to understand a

\begin{flushleft}
\textsuperscript{157} Siltala 2003 p.378 \\
\textsuperscript{158} Pöyhönen 1988 p.16 \\
\textsuperscript{159} Adlercreutz 2001 p.22–25; cf. Pöyhönen 1986 p.376 \\
\textsuperscript{160} Wilhelmsson & Nyberg 2013 p.295, cf. NJA 2009 s. 672
\end{flushleft}
legislative clause that is widely applicable than if the precedent concretely specifies a contract clause.

The norm-producing function of precedents is controversial, but this political lawmaking of the court is a fact that can be seen in the way Nordic courts have regularly changed the law, often because the legislator has remained passive and intentionally leaves known but wicked problems to the courts.\textsuperscript{161} This is possible, because the courts’ duty to adjudicate is accepted, in other words the rulings, though they are prescriptive, are perceived as normal. Without this duty, the rule of law would be undermined. This duty includes the notion that judgments for any given legal problem need to be unambiguous. In the process of arriving at a judgment, judges weigh and balance different arguments and facts of the case, but the judgments inevitably arrive to a single outcome. Adjudication by the courts produces norms, explicitly or implicitly, as legal rules could not evolve if judges or norm-enforcers only applied preexisting rules.\textsuperscript{162}

In applying legal principles the courts define a \textit{precise level of applicability in a precise set of circumstances}. This is simultaneously interpretation and gap filling. In other words, the court presents a truth about the law, because any other level of applicability in the same circumstances would not be more or less applicable or relevant, but indeed false. Ronald Dworkin has proposed that there is a single right answer to be found for legal problems, whereas a legal realist would argue that laws are intentionally vague and porous, so a judge has discretion based on his convictions, and law is reduced to politics.\textsuperscript{163} Dworkin argued that skeptical legal theories are logically unsustainable, as skepticism is in itself an unprovable interpretation about the nature of law.\textsuperscript{164} Dworkin maintained that legal interpretation is not arbitrary, but derives from a practitioner's instinct, experience and training. The judge knows instinctively that he or she belongs to a collective tradition of legal interpretation, and can \textit{feel} the right answer to the problem. The single right answer is the one that acquits the interpreter from interpretive responsibility towards this tradition.\textsuperscript{165}

Keeping in mind that the law and social institutions are ontologically subjective, the idea of normalizing judgments seems compatible with Ronald Dworkin’s principle of one law, according to which there is a single right answer to even the hardest cases, with the twist that

\textsuperscript{161} Andersen 2015 p. 77–78
\textsuperscript{162} Posner 1995-1996 p.1699; Ayeres & Gertner 1986 p.89
\textsuperscript{163} Rosenfeld 2005 p.5
\textsuperscript{164} Dworking 2009 25:02
\textsuperscript{165} Dworking 2009 lecture
the right answer does not exist ex ante but manifests itself ex post. Dworkin’s theories have been criticized as incompatible with complex pluralist societies where different groups have different ideas of what is right and wrong. However, even in pluralist societies, different groups necessarily have a basic common understanding of what the law is, even though the groups disagree on what the law should be. As regards the discretion that judges have, the one right answer is found equilibrium between with the different powers, outlined above, that bear on lawmaking.

A single right answer is correct as an epistemically objective account of the law, but it does not preclude the norm producing function of the judge, because he or she has the recognized (does not imply approval) power to do so. To conclude, I have tried to show that norm production is not arbitrary, but follows the logic of normalization. Consequently, the legislator can subtly change the perception of what is seen as normal contract formation, to include indefinite promises. The open terms of the insurance rule also emphasize the norm producing function of courts and the instrumental relationship to good business practice.

3.3 Contracting and the law

The theoretical problem of the criteria for good contract law needs to be examined in relation to contracting, where the effects of legal rules can be observed and analyzed. The implications of insurance contract law on general contract law can be formulated as a question: Would the insurance rule work as a general rule?

The first starting point for this analysis is that at the two regimes are different as to the parties’ possibilities to negotiate contract terms. The Finnish ICA is semi-immutable (or semi-mandatory) for the benefit of consumers as well as a wide range of small businesses and legal entities such as housing associations that are deemed to be in a weaker party in the contractual relationship with the insurer. This means that the terms of the contract cannot be worse than the ICA allows, but they can be better. The rules of contract formation in the Nordic Contract Acts are on the other hand default rules that parties can change by mutual agreement for example through an “entire-agreement” clause.

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166 Rosenfeld 2005 p. 2-3
Legislation, even when it is not binding, promotes standardization and predictability. Agreement rules in a jurisdiction prescribe when promises become binding agreements. Another set of rules is needed to prescribe what the content of a contract is. The lawmaker can enact two distinct classes of background rules, default rules that parties can contract around, or immutable rules. Immutable contract law rules override explicit contract terms. The function of default rules, in addition to guiding interpretation, is to fill in gaps in incomplete contracts.

Immutable rules typically protect weaker parties within the contract, or are designed to protect parties outside the contract by internalizing externalities. According to Ian Ayeres and Robert Gertner, the academic community is in consensus over the normative bases for immutability, but can disagree on the threshold and contexts when parentalistic concerns or externalities justify immutable rules. Immutable rules sometimes primarily reflect societal interests, such as maintaining the value of the currency by forbidding index-clauses.

Default rules are applied to the contract only after examining the explicit contract terms, established practice between the parties and established trade practice, in this order. The content of the contract depends on the contract terms, the applicable rules and established practices as well as the type of contract in question.

The problem of marketing pressure does not only concern consumers but affects also business to business contracting. Consequently, the proposed Finnish general marketing liability rule (in 1990) was intended to cover these contracts as well. Individual consumer law seems to be slowly evolving into “customer law” and expanding into the realm of business contracts. Business contracting can be instrumental, for future economic profit, or immediately satisfactory, where the buyer consumes the goods and no future transactions with the goods are expected. Many small entrepreneurs’ resources and bargaining power and skills are comparable to consumers, and many legal entities, such as housing

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Häyhä 1996 p.123
Posner defines default rules as those that govern in the absence of contrary agreement. Posner 2005 p.3, whereas Schwartz sees default rules as those that parties are free to change”. Schwartz 1994 p.390
Ayeres & Gertner 1986 p.89.
Finlands civil- och handelsrätt 2013 p.298
Hemmo 2006 3. Sopimuksiin sovellettavien normien soveltamisjärjestys-Lainsäädännön toissijaisuus
Hemmo 2006 7. Sisällön määäntyminen
Yritysoikeus 2014 p.1011
Russi 2006 p.3-4
associations, are habitually comprised of amateurs. Such parties are disadvantaged when they contract outside their regular activities or for their own essential non-profit usage.

The extended concept of consumer in the Finnish ICA seems to reflect general trends in contract law to protect weaker parties that are not consumers in the traditional sense. Below, I will examine the theoretical questions outlined above by looking at how a default rule on marketing liability could promote both protection of the weaker party and economic efficiency.

3.3.1 The economic purpose of contracting

As the market based economy is almost universally accepted as the basis of the economic system, contract law should primarily serve economic purposes, as the parties’ behavior is mainly influenced by economic interests.\(^\text{175}\) This purpose became apparent already in the discussion of the significance of will and reliance in determining why contracts are binding. It was the question of why a promise *that was not relied upon* should ever be enforced. Such reliance could not be justified on purely corrective grounds, as the promisee had not lost anything. The answer, beyond distributive justice, was to be found in the need to facilitate economic efficiency.\(^\text{176}\) The possibility of resorting to the legal system if things go wrong, is not the focus of economic transactions, and only a tiny fraction of contracts are ever tested in court. The guiding principles of contract law can thus be assumed to be inherently economic.\(^\text{177}\)

In economics, the aim of exchange is the effective and value-adding allocation of resources,\(^\text{178}\) and law facilitates this by creating the necessary institutional framework, as well as through incentivizing and corrective legislation. Economists contend that redistributive ends should generally be kept outside of contract law, as the appropriate means for redistribution are through tax-and transfer. The economist sees efficiency that avoids wasting as the benchmark for private law.\(^\text{179}\)

\(^\text{175}\) Klami-Wetterstein 2016 p.16
\(^\text{176}\) Benson 2001 p.2-4
\(^\text{177}\) Tolonen 1996 p.7
\(^\text{178}\) Ahtonen 2015 p.8-10
\(^\text{179}\) Cooter & Ulen 2014 p.7
Pöyhönen sees that the role of the legislator is best understood as a provider of a public utility, the *law of property* that consists of three interlocking elements: ownership, contract and liability for damages.\(^{180}\) The law of ownership makes the exploitation of the economic values of goods possible. Liability for damages protects this exploitation from outside interference. The role of contract is, according to Pöyhönen, to let those parties that place a value on the goods agree on the details of how the goods are to be exploited.\(^{181}\) It is after all usually the maximum realization of human potential that tells us which endeavors are worthwhile and how to spend money well.\(^{182}\)

Melvin A. Eisenberg proposes that a better benchmark, for good contract law, is a perfect legislator that exercises good judgment by properly weighing moral, policy and empirical propositions. After this exercise, the legislator should subordinate different contract law rules to achieve “the best vector of propositions.”\(^{183}\) Ola Svensson proposes instead that it is the freedom of contract that enables people to realize their life goals. Svensson’s benchmark is a rational and informed person who, in addition to legal freedom, has the actual freedom to enter into contracts. According to Svensson actual freedom of contract includes sufficient means and a just background law.\(^{184}\)

The economic benchmarks of contract law can however be criticized on several grounds. According to Erik Lagerspetz, the purpose of contract law should not be derived uncritically from economics, as choice is not the same as preference, preferences are not necessarily egoistic, economic efficiency is not the same as cumulative benefit, and actors are not always rational individuals that maximize benefit.\(^{185}\) Also, according to Alan Aldridge, economic argumentation displays a recurring logical slippage. This is seen in how economists in the same argument, fluctuate between describing how actual markets perform (*is*), model the market analytically (*as if*) and prescribe what kind of policies would be needed for a functioning free market (*ought*).\(^{186}\) Finally, in advocating the satisfaction of individual preferences, economic efficiency fails to connect actual consent with subsequent events that change preferences. If hypothetical consent is benchmark for subsequent events, the

\(^{180}\) Pöyhönen 2000 p.3,15  
\(^{181}\) Pöyhönen 2000 p.3  
\(^{182}\) Gordley 2001 p. 333  
\(^{183}\) Eisenberg 2001 p. 241  
\(^{184}\) Svensson 2012 p.21  
\(^{185}\) Wennberg, Mikko 2001b  
\(^{186}\) Aldridge 2005 p.80
justification for the enforcement of actual consent is lost, and the resulting guidance for the court is vague, at best.\textsuperscript{187}

The implication here is that a general rule to regulate marketing, which critically respects the economic purpose of contract law, should strive for a balance between normative and economic arguments, and the benchmark good contract law, should reflect this balance.

### 3.3.2 Mutually beneficial contracting

Empirical studies have shown that people actually behave in a radically different way than what a traditional economist’s model of a perfectly selfish person would lead to assume. The classical \textit{homo economicus} only follows norms out of fear of legal or social sanctions. Real people actually have strong other-regarding preferences. In experimental games, test situations can verifiably be constructed so that no selfish person would ever cooperate, because the payoff for selfish behavior is higher. In these experiments however unselfish altruistic or spiteful behavior is as common as selfish behavior.\textsuperscript{188}

In social dilemma games, people often benevolently cooperate even though the best strategy individually is defection. Conversely, people often vengefully harm others, even though the best strategy for a selfish individual would be cooperation. In ultimatum games, the set-up is that there is a proposer of a sum of money and a responder. If the responder accepts a proposal, both become better off, but if the proposal is rejected, neither party gets anything. A selfish responder would rationally accept any offer in order to at least get something. In practice, offers that are too low are routinely rejected. The responder thus incurs a personal cost to harm the greedy proposer. Proposers intrinsically know that responders can be spiteful, and thus offer more than in dictator game situations where a recipient has no say and just has to accept what a dictator gives. Dictators altruistically still give something, but less than in ultimatum games. Stout says that this knowledge of the other parties’ spitefulness creates second-order effects that forces even selfish proposers to be more altruistic.\textsuperscript{189}

Altruistic and spiteful behavior allows social organisms to benefit their kin and group members by reinforcing cooperation and punishing deviants. This kind of behavior

\textsuperscript{187} Benson 2001 p. 5-7
\textsuperscript{188} Stout 2006 p.16
\textsuperscript{189} Stout 2006 p.21–22
contributes to an individual’s survival and reproductive success, and thus reinforced by natural selection.\textsuperscript{190} Consequently, rules that are “significantly other regarding” have a tendency to be become established and directly accepted by the society. It is efficient to treat others as you want to be treated. Even though non-efficient norms such as use of the necktie sometimes last persistently, it is more likely that efficient norms persist.\textsuperscript{191} Cooperation and spitefulness are as prevalent as selfishness. These other-regarding traits and sanctions are economically effective, as norms are followed even though no-one would be watching or enforcing the norm. The role of the legal system in this aspect is to lower the cost of cooperation and spitefulness in order to punish those that are too selfish.

The difference in the way economists and jurists see contract law indicates that any change in contract law risks being systemically assessed in different ways by the two sciences. Pekka Timonen suggests that in lawmaking, the sciences need to have a common perception or benchmark about the fundamentals of the society that is being regulated.\textsuperscript{192} This can be done by deriving the objectives of regulation from the values of a market-based society. For example, to achieve equality, people should have equal opportunities, buyers and sellers should have equal bargaining power and income equality should be limited.\textsuperscript{193}

The freedom of contract is a central tenet of the market economy, but I propose that it is a means to an end, not an end itself. In doctoral thesis “Beyond Offer and Acceptance. Contract Law as a Response to Contract Failures” philosopher Mikko Wennberg develops the argument that the purpose of contract law is to facilitate mutually beneficial contracting. Wennberg starts his analysis from the binding force of contracts and ends with a synthesis of the justifications and functions of contract law. State enforcement is needed to overcome the risk of defection that would otherwise preempt contracting. The state of nature is a classic example of prisoner’s dilemma scenario, where cooperation would be beneficial for both parties, but where the benefit of one party is greater if she chooses to defect and the other party chooses to cooperate. As both parties know this risk, both defect and the benefit is less than cooperation.\textsuperscript{194}

\textsuperscript{190} Stout 2006 p.32
\textsuperscript{191} Stout 2006 p.29-30
\textsuperscript{192} Timonen 1997 p.34
\textsuperscript{193} Timonen 1997 p.35
\textsuperscript{194} Wennberg 2001 p.81-93
When cooperation is beneficial, it must be beneficial for both parties, as otherwise parties would not seek out a contract or agree on the division of gains.\textsuperscript{195} The optimal cost level of negotiation is when the transaction costs (search, negotiation and safeguarding) are the same before and after the contract is entered into as well as lower than the marginal benefits of the contract. The level of potential gain determines how much of their resources the parties are willing to use in contracting.\textsuperscript{196} By reducing transaction costs, contract law increases this available amount of resources for contracting.

\subsection*{3.3.3 Could the insurance rule make for better contracts?}

The precondition for the insurance rule to work as a general contract law rule is thus that the rule would facilitates mutually beneficial contracting. This assessment requires however more precise criteria or benchmarks.

According to Robert Cooter and Thomas Ulen the fiction of a \textit{perfect contract} is the best way to connect law and economics, and they define such a contract as having zero transaction costs, which in turn is a sufficient prerequisite for rational parties to allocate entitlements efficiently.\textsuperscript{197} However, their definition is insufficient, as transaction costs are only one reason to why contracting fails. According to Wennberg, a perfect contract is both \textit{complete} and \textit{efficient}. This means that whatever happens, the contract stays efficient for both parties and both parties never want to rewrite the contract.\textsuperscript{198} When the purpose of contract law is to facilitate mutually beneficial contracting, a change in agreement rules can be assessed in relation to whether subsequent contracts are more complete and efficient.

A failed contract lacks in completeness, which means that the contract does not perfectly and consistently provide for all possible contingencies.\textsuperscript{199} An inefficient contract can be complete, if the contract still reflects what one or both of the parties wanted, due to for example moral constraints, social norms or status quo bias\textsuperscript{200}, but only a complete and efficient contract can be perfect. A perfect contract is a counterfactual and ideal tool, because

\begin{footnotes}
\footnote{Wennberg 2001 p.94-96}
\footnote{Wennberg 2001 p.97}
\footnote{Cooter & Ulen 2014 p.283-284}
\footnote{Wennberg 2001 p.102}
\footnote{Wennberg 2001 p.113}
\footnote{Wennberg 2001 p.109}
\end{footnotes}
absolute perfection in all possible contingencies is not really possible but for a Herculean contract jurists. A perfect contract is nevertheless not a useless construction, because only an actual promise reveals preferences and justifies enforcement.\textsuperscript{201}

The traditional academic consensus has been that default rules should as precisely as possible reflect what the parties would have wanted.\textsuperscript{202} This hypothetical consent based method has been shown by Wennberg to be problematic in many situations, not only because it is much harder for the courts \textit{ex post} to determine what the parties would have wanted that for the parties to specify this in advance:

“appeals to hypothetical consent are often either unjustified, or when they seem to be justified, they can be presented in welfarist terms, and the whole idea of hypothetical consent becomes pointless […] if the parties know that the court will \textit{ex post} impose exactly those terms the parties would have agreed to \textit{ex ante}, then the parties seem to have the incentive to maximize the extent to which they rely on the courts. The problem is that if the parties know that the court will impose those terms the parties would have wanted (assuming the court is capable of doing so) it provides incentives for the parties to leave out explicit terms from their contract.”\textsuperscript{203}

The insurance rule mandates an objective assessment of the impression made by marketing information, but it also allows also for subjective criteria, so it does not rely on a hypothetical consent. To understand how the rule can place “consent” where it traditionally does not belong (marketing and subjective understanding) this legislative technique requires distinguishing agreement rules from substantive background rules, which is done below.\textsuperscript{204}

3.3.4 Does the rule not undermine contractual agreement?

A contract is a particular type of norm, as it is created by the parties instead of a legislator. The combination of the predominantly written form of contracts and the immediate binding legal effects of contracts have according to P.S. Atiyah produced a phenomenon of legal reification, that dominates the classical model of contract. In this model, a contractual relationship is treated as a concrete thing or object, instead of just an abstraction, and contracts are seen to have an objective existence before any performance. \textsuperscript{205}

\textsuperscript{201} Eisenberg 2001 p.242
\textsuperscript{202} Wennberg 2001 p.20
\textsuperscript{203} Wennberg 2001 p.44
\textsuperscript{204} Wennberg 2001 p.12-13
\textsuperscript{205} Atiyah 1986 p.14
Contracts are commonly defined as legally enforceable agreements. This definition reflects a similar conceptual merging of written form and legal effects. The reified contract is an all-or-nothing issue; the contractual obligations derive from the consensus of the parties at the single moment of creation. The problem is that such reification is inherently inconsistent with prior expectations created by marketing information. The insurance rule is incompatible with this all-or-nothing concept of agreement, because under the current law, the original agreement may be set aside. Marketing information can become a legally enforceable part of the contract, even many years after the policy was concluded, and irrespective of whether the information actually influenced the applicant's decision to get the policy.

It is difficult to encompass the binding contractual effects of marketing information in this all-or-nothing concept of contractual agreement without convoluted hypothetical assumptions. If contract is the same as agreement, the result is that the insurer would have implicitly agreed to be bound by the impression the policyholder had received of the marketing information, even though the insurer had actually provided the policyholder with policy terms to the contrary.

One way deconstructing the agreement from the contract is to look at wealth as a process that has a history and a future, and where there is a dynamic relationship between different parties and their rights. If contract formation is a gradual process, instead of a single point in time, precontractual information can more easily be connected with contractual agreement. The detachment of the parties’ consensus and contractual obligations is developed even further by Wennberg, who proposes that interpretation of the agreement is an insufficient way to determine the content of contracts. Wennberg’s thesis is that contractual agreement is not the contract itself. The contract is born of a voluntary agreement, “but what exactly counts as a contract is always dependant on the rules of the jurisdiction.” A multitude of norms within a jurisdiction are independent of the actual promise and constrain the enforcement and interpretation of the promise.

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206 Pöyhönen 1986 p.384
207 Pöyhönen 2000 p.XVII
208 Pöyhönen 1986 p.221
209 Wennberg 2001 p.2
210 Wennberg 2001 p.6
211 Eisenberg 2001 p.243
According to Wennberg, agreement is an important justification for enforcement of a contract, but agreement is only a minimal condition.\textsuperscript{212} It is thus not necessary to trace all of the elements of an enforceable contract to the agreement itself. Consequently, courts have the power to interpret, construct and reconstruct contracts.\textsuperscript{213}

Contract interpretation is not interpretation of an agreement, but an interpretation of the parties’ legal relation.\textsuperscript{214} The court may interpret the express wording of the agreement, or fill in the gaps if the agreement was silent on an issue or ambiguous. In addition, a contractual agreement may deal with an issue in an unacceptable way. The unacceptability can according to Wennberg be due to a mistake or subsequent impossibility to fulfill the contract.\textsuperscript{215} In Finnish insurance law, marketing information can cause the contractual agreement to be unacceptable. In these situations of unacceptability, courts can reconstruct the contract terms.\textsuperscript{216}

In conclusion, the conceptual deconstruction of a contract into agreement and jurisdiction explains the particular feature of the insurer’s marketing liability, that there is no requirement for the marketing information to be constructed as an offer or to have a commercial effect on the decision to buy the insurance.

3.3.5 Is the insurance rule optimal?

In this chapter I propose that the insurance rule is conceptually consistent with the purpose of contract law, and it is apt to facilitate mutually beneficial contracting, because it promotes more efficient and complete contracts in an optimal way. This can be argued by assessing the rule in relation to contract failure.

As a starting point, in relation to mutually beneficial contracting, a contract has \textit{not failed} just because one party breaches a contract, does not perform, or when the contract proves not to be beneficial for one party. Such events are a normal part of economic activity and often quite beneficial, as these events can free resources and weed out ineffective actors. To

\textsuperscript{212} Wennberg 2001 p.6
\textsuperscript{213} Wennberg 2001 p.7-11
\textsuperscript{214} Wennberg 2001 p.10
\textsuperscript{215} Wennberg 2001 p.11
\textsuperscript{216} Wennberg 2001 p.12
expose contract failures, contracting needs to be examined over time and the pool of
contracts and against its effects on norms and behavior.

Concretely, the legislator sees contract failures when similar issues give rise to grievances
and litigation. In the case of insurance contracts, for example, grievances can arise due to
the fact that the policy is too complex for the client to understand, the salesperson has
misrepresented the contents of the policy or the policyholder engaged in fraud.

Wennberg has proposed that the appropriate default rule depends on the source of contract
failure.\textsuperscript{217} The different ways that marketing information can cause insurance contracts to
fail can be traced to bargaining costs, strategic behavior, limited rationality and adverse
selection.

In coming to an acceptable agreement, parties do not plan for every contingency. It is simply
impractical and costly to plan for everything, as otherwise the bargaining costs for research,
drafting, and legal fees would be prohibitive. Transaction costs for contracting include
search and information costs, bargaining costs and policing and enforcement costs.\textsuperscript{218}

The default rules’ impact on bargaining costs should be formed in a way that bargaining
costs for the majority would be reduced, while keeping the number of actual people that want
to contract around the default rule as low as possible. A majority rule that reduces cost, that
might disappoint parties in a small minority of cases, is better in this aspect than a minority
rule that increases bargaining costs, for example one that lets courts consider in every
particular case what the parties wanted. The best evidence of what the majority would want
is usually existing contracts, especially if there is no well-established default rule.\textsuperscript{219}

Good marketing increases sales, and at the same time decreases the sellers overall bargaining
costs, as much of the basic information about products can be transmitted on a massive scale
to buyers, instead of individually during each sale. The contractual liability for information
in marketing also lowers transaction costs for buyers, since if buyers can rely on that
information, individual negotiations are shorter. The content of marketing information is
also generally easy to prove. Instead, the effect of the marketing information on the buyer’s
decision to buy is difficult to prove.

\textsuperscript{217} Wennberg 2001 p.79
\textsuperscript{218} Wennberg 2001 p.118;
\textsuperscript{219} Wennberg 2001 p.125;
In Finnish insurance law the policyholder does not have to prove that the marketing information actually affected the decision to buy. Bargaining costs are most important in insurance, as the contracts are complex. Only the insurer has the expertise to calculate the likelihood and costs of different risks and create insurance products to reflect these calculations and profit requirements. Due to the mass character of insurance, the individual customers save in bargaining costs that otherwise would make the business impossible if each customer had to bargain the contract from scratch. As insurance contracts, in aggregate, are very frequent and long term contracts, the parties (pool of insured and companies) trust each other and strive for cheaper ways to manage their transactions.

When there is a significant imbalance of information between the parties, default rules should discourage strategic behavior.\(^\text{220}\) This is done by penalizing the party that does not reveal pertinent information that it has or could cheaply acquire\(^\text{221}\). Strategic behavior might also be bilateral, so that parties decide to leave certain issues up to the courts to decide. This should be discouraged if it is extremely difficult or costly to adjudicate the issues afterwards. Sometimes imbalance of information is economically effective, and should not be altered by the law. For example, if in a negotiation, where one party knows that it would be ruined if the other party does not perform, a default rule that forces the exposed party to reveal its precarious situation would induce the other party to offer a contract that guarantees performance, but at the same time that party would extract a very high price from the exposed party, with lower joint benefits.\(^\text{222}\) In insurance practice, an example of strategically important information for insurers might be their practices concerning the prevention of fraud.

Misleading marketing is often done by agents during individual negotiations. Consumer contracts are mostly standard form, so the agents do not have the authority to change terms. This calls for an extensive definition of marketing. In Finnish insurance law, insurance agents act on the behalf and at the risk of the insurer. The insurer is responsible for what its agents promise, even if no actual policy existed that matched the agent’s promises. According to the preparatory works of the Finnish ICA “Because the representatives of the insurer, such as part-time agents, are part of the insurer’s marketing system, the insurer is also responsible for these representatives, so that the information they provide is not

\(^{220}\) Wennberg 2001 p.126  
\(^{221}\) Wennberg 2001 p.126  
\(^{222}\) Wennberg 2001 p.132-133.
incomplete, incorrect or misleading.” The historical analysis will show that conceptualizing a single marketing system of the insurer and its agents was important for the development of Finnish insurance law, as such a presupposition in itself implies legislative solutions that would regulate the insurer and its agents together and not separately.

Human sciences have put into question the liberalist fiction that rational, informed people know what is best for them by showing how limited rationality undermines contracting in a systematic and quantifiable way. The most salient limitations are the imperfect capabilities of acquiring and processing information, unfounded optimism and systematic errors in decision making. Decision making errors can be seen in the tendency to base decisions on the data and scenarios that are most readily available to the mind from memory or imagination, the tendency to regard only a subset of data as covering the whole issue, the tendency to systematically give too little thought to future benefits and costs compared to the present state of affairs, and the tendency to underestimate or ignore risks.

The implication is that free will does not equate with true freedom in case of mistake, when a party is not free to act differently, that is to act rationally. A mistake, be it about an expression or motive, does not give rise to reasonable expectations, if the other party should have been aware of the mistake. The role for the legislator is to approximate a right amount of carefulness into contracting, which is different from paternalistically prescribing what the content of the contract should be. Certain types of contract clauses such as liquidated damages or non-performance terms in preprinted standard terms can impose onerous costs for practically unavoidable events, when parties contract on an optimistic note about the future and concentrate on their intention to perform. On the other hand, in situations where proof of actual damage due to nonperformance is difficult to obtain, a certainty of damages may facilitate contracting. Marketing information can easily exacerbate the limited rationality of buyers. It is a common adage that most applicants do not read insurance policy terms, so the marketing information is the primary source of information about the policy for most customers.

223 HE 1993/114 vp p.13 (Emphasis added)
224 The psychological terms for these phenomena are bounded rationality, irrational disposition, defective capabilities, availability, representativeness and telescoping. Eisenberg 2001 p.249-254.
225 Mäkelä 2010 p.281-282
226 Wennberg 2001 p.146–151; Eisenberg 2001 p. 249-256
In contracts of a mass character, adverse selection can lead to the failure of all other similar contracts. Examples of mass character contracts are, in addition to insurance, corporate mass relations with stockholders, creditors, and employees.\textsuperscript{227} In a pool of insurance contracts, if some members are seen as unfairly subsidized to the detriment of other members, the collective incentive for the net-payers to defect from the pool can overcome the individual benefits of staying within the pool, and the pool eventually collapses because the remaining net-receivers cannot cover the costs. This happens for example if groups of high-risk and low-risk members have the same insurance premiums and policies.\textsuperscript{228}

Mass character contracts call for default rules that work against adverse selection. Private enforcement of claims is important to maintain trust with the pool. If one member of the pool is compensated for misleading marketing, other affected members should be compensated as well, in a relatively easy and cheap way, bearing in mind that the individual interest in consumer cases is usually small. Procedurally, class action lawsuits, or free alternative dispute resolution mechanisms like consumer boards are the preferred instruments for small claims. Substantively, the burden of proof is of primary importance. If each consumer has to prove that the marketing information affected his or her business decision, the integrity of the pool is jeopardized. In Finnish insurance law, the objective evaluation of marketing information is a rule that maintains the entire pool. An example of this effect was seen in case KKO 2010:25 (Skandia Life), where misleading profit calculations in marketing materials for an investment-type pension insurance led to the entire affected pool to be compensated for excessive administrative costs.

\textsuperscript{227} Svensson 2012 p.108
\textsuperscript{228} Svensson 2012 p.107
4. The implications of the legislative history of the rule

A feature of modern contract law is that the weight of legal sources has changed. The hierarchy of legal sources is not always the primary reference when courts justify their decisions. Instead, according to Pöyhönen, legal sources are chosen contingently for their information value on questions of morality or policy.\(^{229}\)

The traditional distinction between “subjective” historical knowledge of the legislator’s intention and “objective” legal knowledge has become problematic,\(^{230}\) as the historical method produces pertinent information on the motives of the legislator.\(^{231}\) In his research, Ewald emphasizes that law should be reconciled with its history and not be conceptualized in essentialist terms. He proposes that the law is a “qualifier of different historical practices” of rationality, normativity, policy, coercion and social sanction.\(^{232}\)

I propose that information about the actual motives behind the insurance rule could be relevant, should the rule would ever become part of general contract law. As the other attempts to craft a similar rule for contract law and consumer law failed, it should be possible to identify some tipping point in the legislative process behind the insurance rule that could explain why the reform succeeded.

Häyhä has proposed that when the insurance contract law was reformed, while mostly concerned with practical problems, the lawmaker was guided on an abstract level by two, somewhat contradictory views on the purpose of legislation. The first view was that legislation is only possible for behavior that is sufficiently regular, so that law fits into a pre-existing normative structure. The second view was that order is possible precisely because the law manages people’s expectations.\(^{233}\)

Pöyhönen has noted that preparatory works have acquired an increased importance, not as authoritative sources of law, but as sources that explain the rationale of the law.\(^{234}\) However, the short passage in the preparatory works, that insurance agents are part of a marketing system, does not elaborate on why insurance agents are, in Finland, deemed to be part of the

\(^{229}\) Pöyhönen 1986 p.104–105
\(^{230}\) Kolehmainen 2015 p.11
\(^{231}\) Kolehmainen 2015 p.11
\(^{232}\) Ewald 1986 p.30
\(^{233}\) Häyhä 1996 p.122–123
\(^{234}\) Pöyhönen 1986 p.376
insurer’s marketing system, when other countries see them as “distributors”. This discussion took place over five years before the preparatory works were published.

In most legal research, unpublished documents are not seen as a source of law whereas preparatory works are recognized by the legal community and they constitute weakly binding grounds for judgment, i.e. a court may deviate from the preparatory works but must explain its reasons for doing so. This distinction is problematic, if the aim is to find epistemically objective truths about the rationale of a law. As evidence of the actual motives of the legislator, internal documents written at the time when the decisions were made are more reliable than recollections and documents drafted for wide public circulation. In the historical method, the more convincing documents are classified as primary sources, whereas the less convincing documents are secondary sources.

4.1 1970’s: The reform process begins and the problem are identified

The reform process of the Nordic Insurance Acts began at a time of decline in inter-Nordic legal cooperation. Bernitz notes that “eager politicians” complained about the unnecessarily protracted and cumbersome process, and “staked out each country’s right to lead the way, acting as groundbreaker and pioneer among the Nordic countries”, which lowered ambitions and paved the way for increasing national deviations. The inter-Nordic meetings nevertheless brought together highly qualified, learned jurists “in a spirit of confidentiality and cooperation, far away from the political conflicts of the day.”

For insurance contract law, in 1974, Sweden took on the role of pioneer, by announcing to the other Nordic countries that the ICA was in need of reform. Norway, Denmark and

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235 Kolehmainen 2015 p.9
236 Bernitz characterizes the 1950’s and 1960’s as the “golden age” of Nordic legal cooperation and the codifications in tort law, company law and intellectual property law of as “highly advanced legislative products.” Bernitz 2007 p.23-25; The Nordic countries had jointly formulated their first Insurance Contract Acts between 1915 and 1925, and as a result the acts were almost identical. Nordic legislative cooperation intends Finland, Sweden, Denmark and Norway, with Island sometimes participating. The acts were enacted somewhat later: Denmark (1932), Norway (1930), Finland (1933), Sweden (1927) Island (1954). These laws did not contain any regulations on the insurer’s precontractual duties towards the applicant. SOU 1977:84 p.35,79,81, 83
237 Bernitz 2007 p.23
238 SOU 1977:84 p.3; The Swedish committee was specifically instructed to improve the policyholder’s protections against unreasonable contract terms. KOM 1977:70 p.25; The Norwegian committee was formed in 1975, the Danish committee in 1976 and the Finnish committee in 1977.
239 NOU 1983:56 Lov om avtaler om personforsikring p.4
Finland in followed suit in the subsequent years and created their own reform committees.\textsuperscript{240} The different committees operated nationally, although they met regularly to coordinate their activities.

The national meetings, as well as joint Nordic meetings were in general organized so that general, thematic issues were discussed more extensively during the first meetings and when draft statutes had been drafted the discussions were organized under specific clauses.\textsuperscript{241} The reform process covered a wide range of issues, so the question of marketing liability was only one area of concern that developed gradually over the years.

In 1977 when the Finnish reform committee started its work it was uncertain whether it had a mandate to regulate marketing. The committee members were divided over whether marketing should be understood in a narrow technical sense of advertisements, or in a wide sense as including home sales by part-time agents.\textsuperscript{242} In its first report, the committee nevertheless noted the problems that the lack of regulation of these issues caused to the policyholder. Firstly, when accidents did occur, the insurance cover was often not as wide as the consumer had believed. Secondly, the payments often did not amount to what the consumer had expected.\textsuperscript{243} The committee proposed examining whether consumer law and its rules on the administrative control of standard contract terms could be applied directly to insurance law, or if special legislation was needed.\textsuperscript{244}

In 1978, the Finnish committee concluded that, similar to what the Norwegian commission had proposed, special legislation to was indeed needed, to regulate situations where the “actions or negligence of the part-time agent caused loss [of a legal right] to the applicant”.\textsuperscript{245}

The pressing need to regulate insurance agents in Finland had to do with the particular characteristics of the national insurance market. While the role of agents as insurance distributors was at the time diminishing, due to increasing direct sales by the insurance companies, the number of agents still counted in the thousands which was according to the

\textsuperscript{240} SOU 1977:84 83; Denmark quit the ICA legislative cooperation in 1983 and contended thereafter with following European Community legislative actions on the harmonization of insurance law HE 114/93 p.10
\textsuperscript{241} During 1977-1987 there were approximately 200 national meetings of the Finnish committee and 15 joint Nordic meetings. The Nordic meetings rotated between the capitals and were most often held during two consecutive.
\textsuperscript{242} OM 2703/06/76 Committee protocol 18.3.1977
\textsuperscript{243} KOM 1977:70 p.53
\textsuperscript{244} KOM 1977:70 p.65
\textsuperscript{245} OM 2703/06/76 Committee protocol 14.2.1978
committee much more than in other countries. The agents were usually specialized in specific types of insurances. The insurances were distributed by 1) agents that distributed life-insurance as a side-job, 2) agents that could distribute insurance due to their particular position as a bank manager or similar 3) agents that distributed insurance as part of customer service when selling other commodities such as cars or package 4) other institutional distributors such as shipbuilders or sports associations. Most of the agents that had insurance sales as a side-job were so called “hint-agents” that gave tips about clients to full-time sales staff.

In general, all the agents had distributor contracts with the insurer that distinguished them from employed insurance salesmen. The agents did not have authority to bind the insurer or to change policy terms, nor did they collect premiums except for travel- and automobile insurance. The Finnish committee noted that the agents nevertheless acted as representatives of the insurer, and the clients were unclear of the extent of the agent’s authority.

4.2 1980-1984: The debate over an appropriate rule to regulate agents

The decline in inter-Nordic Legal coordination was recognized in the ICA committees. Some Swedish committee members in particular found it hard to balance Nordic unity and national interests, and they questioned the practical needs for coordination, while others maintained that legal coordination had an intrinsic value in itself, as well as the value of facilitating Nordic labor mobility. Bertil Bengtsson noted in 1981 that legislative coordination was a general goal, but that the Swedish committee’s willingness to compromise depended on their wishes for particular solutions, as well as a case-by-case evaluation of the practical needs for coordination.

During the first years of the ICA reform process there was no consensus among the Nordic reform committees that insurance agents were indeed part of the “marketing system” of the insurer. In 1980, the Finnish committee noted that any private law sanctions against the

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246 OM 2703/06/76 Committee protocol 11.4.1980
247 OM 2703/06/76 Committee protocol 2.4.1980; memorandum “23.3.1983/JJ”
248 OM 43/41/84 Binder 3 Bundle 4 2.chapter Järventaus speech 27.10.1986.
249 OM 2703/06/76 Committee protocol 2.4.1980; see also memorandum “23.3.1983/JJ”
250 YK nr 3997 A1:1 Committee protocol nr. 43, 20.02.1981
insurer would create opportunities for the policyholder to engage in speculation, but that it would also create problems of interpretation, if information given to the policyholder, after the contract was concluded, would be more binding than information given beforehand. 

As an alternative solution to the problem, an official registry of agents and a mandatory “agent’s card” that agents would need to show clients, was proposed.

Increased administrative control of contracting seemed to partly fulfill the need for private law sanctions. This is what happened in Sweden in 1982, when an industry-wide agreement on the relationship between agents and insurers was achieved. The agreement would make administrative control of agents more effective by introducing a registry for agents and banning them from representing more than one insurer at a time.

The question of insurance agents returned to the Finnish agenda in the spring of 1983, after a hiatus of several years. As chair of the Finnish property insurance working group was appointed Jussi Järventaus, Senior Adviser to the Ministry of Justice. Under his stewardship, the Finnish working group gradually adopted the extensive definition of agents as part of the insurers marketing system. The Finnish working group noted that the selling of insurances caused a substantial amount of misunderstandings, and in many disputes the policyholders were claiming that insurance agents had acted wrongfully. According to a memorandum by Järventaus, the marketing of insurance at the time was done to a substantial degree via the insurance agents, but on the other hand this marketing information had not had binding effects on the contract terms, in legal praxis. In a decision by the consumer dispute board, a policy had been found defective due to misleading marketing, but the only remedy had been that the insurer was reimbursed for the premiums that had been paid, instead of having the damage covered in full.

To solve the problem of insurance agents, the working group re-examined in 1983 an earlier draft provision from 1980 on the authority of insurance agents. The provision bound the

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251 OM 2703/06/76 Committee protocol 18.1.1980
252 OM 2703/06/76 Committee protocol 31.1.1980
253 OM 2703/06/76 Committee protocol 11.4.1980
254 OM 2703/06/76 Committee protocol 24.3.1983
255 The autonomous committee concluded its work in 1983 and a new committee continued as part of the Ministry of Justice. This latter committee produced a proposal for a casualty insurance law in 1985 and a proposal for a property insurance law in 1988. Hoppu & Hemmo 2006 p.12-13
256 OM 2703/06/76 committee protocol 11.3.1983
257 OM 2703/06/76 memorandum “23.3.1983/JJ” p.11
258 OM 2703/06/76 memorandum “16.3.1983/JJ” p.2
insurer to the statements of the agents. According to the complex provision, if the agent “overstepped the authority given by the insurer and granted exceptions to the insurer's policy terms, or engaged in other juridical acts toward the applicant, these acts would bind the insurer.” The working group considered this draft superfluous, while recognizing that the uncertain question should be “normed” with a positive law regulation.

In early 1984 the Finnish ministry of Justice gave unequivocal instructions to the Finnish working group, to look into how it could be guaranteed that the applicant gets sufficient information, in order to evaluate his or her needs and choose an appropriate policy, “on the premise that the insurance company is liable for the insurance agents’ actions and negligence”.

The system of sanctions was discussed at the inter-Nordic meeting in Helsinki on 14-15.5.1984. The Norwegians at the time proposed limited duties for the insurer to advise the client, sanctioned by a clause on the ineffectiveness of limitations clauses. This remedy was understood by the Nordic meeting to cover the applicant’s expectation interest. For his Nordic colleagues Bengtsson noted that the Swedes were “tempted” to add a clause on the insurer’s civil liability, but only for the most outrageous cases. However he warned that the determination of culpa would be very difficult, and added that any clause on damages should clearly state that damages can be awarded only in exceptional cases.

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259 OM 2703/06/76 Attachment to committee protocol 2.4.1983: 3d, Vakuutusasiamiehen valtuutus (the provision was apparently proposed in 1980 by Thomas Wilhelmsson who was secretary for the first committee, this is suggested by his name on the proposal text). The style is typical of the older legal texts: “Jos vakuutusasiamies, ylittäen vakuutusasiamiehen valtuutuksen, solmii vakuutusasianottajan kanssa vakuutusopimukseen, myöntää tälle poikkeukseen vakuutusasianottajan soveltamista yleisistä vakuutusehdosta tai maksutaulukosta, antaa vakuutusta haettaessa [...] menettelyohjeita, ottaa vastaan vakuutusmaksun taikka suorittaa muun oikeustoimen vakuutuksenottajaa tai vakuutettua kohtaan, on tämä oikeustoimi vakuutuksenantajaa sitova, jollei vakuutuksenottaja tai vakuutettu tiennyt tai hänön olisi pitänyt tietää, että vakuutusasiamies ylitti valtuutensa.”

260 FI- “Epäselvä tilanne tulisi normeerata positiivisella säännöksellä” OM 43/41/84 Binder 3 Committee protocol 29.4.1983

261 Extract from the list of decisions of the Finnish Ministry of Justice Jan. 1984. OM 43/41/84; The Finnish Insurance Contract Act reform committee had noted already in 1977 that the role of insurance agents in the insurer-insured relationship should be clarified. Kom 1977:70 p. 18,23

262 OM 43/41/84 Binder 4 Bundle 7e Helsinki 14-15.5.1984 Skadeforsikringsloven, Draft text May 1984: §2-3 (selskapets plikt til å orientere forsikringstageren om dekningsmuligheter) Kan en begrensning av forsikringsdekning etter standardvilkårene unngås gjennom bruk av standardiserte spesialvilkår, skal selskapet gi forsikringstageren klar orientering om dette. [...] Har selskapet ikke gitt slik orientering, svarer det som om forsikringsavtalen var ingått uten vedkommende begrensning [...]

263 Järventaus uses the term “Positiva avtalsintresset” OM 43/41/84 Bundle 4 Binder 7e Helsinki 14–15.5.1984 Förslag till discussionsämnen p.2
turn insisted on a clause on civil liability to protect applicants from being misled, something he claimed administrative sanctions could not directly achieve. 264

The reason for the Swedish reluctance is revealed in the tone of the internal protocols of the Swedish committee. After the abovementioned Nordic meeting, the Swedes were mainly concerned that it would “look bad” if their insurance contract act did not have a similar rule, now that Finland and Norway were proposing on private-law sanctions. The main Swedish reservation against such sanctions was a concern that these could be misunderstood by “querulous persons”. The committee therefore decided to stick with a “vague rule” that referred to general principles of liability for damages.265

The debate over an appropriate rule to regulate agents shows that there were fundamental differences between the Nordic states in their presuppositions for insurance contract law. For the Finns, the practical need to regulate the authority of agents drove the evolution of a rule that also needed to encompass the binding effects of advertising. The chosen path was to adopt an extensive definition of marketing and to eventually steer contract formation itself.

4.3 1985: The Finnish rule is crafted

Initially, the Finnish committee leaned towards a formulation, according to which the insurer could not call upon an essential provision about which the applicant had not been informed. However, in the spring of 1985, the Finnish working group reasoned itself to what would be the rule on the contractual liability for information in marketing. On the margins of the original rule proposal, there is a handwritten commentary, most likely by Järventaus, where he notes that this original rule can almost be understood as regulating contract formation. Järventaus listed two imperative needs that the original rule did not fulfill: The first need was that administrative sanctions were not enough to force the insurer to align its claims handling, organization, product development and marketing. The second need was that administrative sanctions were of little solace to policyholders that had been targeted by misleading marketing.

264 OM 43/41/84 Binder 4 Bundle 7e protocol Helsinki 14–15.5.1984 p.13; Förslag till diskussionsämnen p.2
265 YK nr 3997 A1:1 Protocol nr. 59, 21.05.1984
In May 1985 the Järventaus formulated a new alternative rule to accommodate these needs, which stated that if the policy deviated from the applicant’s justified understanding of the pre-contractual information that the insurer was obliged to provide, “the insurance contract is considered to be in force to the effect understood by the policyholder.”

266 Files of the property insurance working group OM 43/41/84 Binder 3 Draft law text Bundle 3 23.2.1985 MJ
After the working group had decided on the rule, it needed to consult and convince its stakeholders, the insurance industry and the consumer protection authorities. The stakeholders were asked about both options, the original “insurer cannot rely on”-rule and the alternative “to the effect understood by the policyholder”-rule. The Finnish insurance industry, much like the other Swedish insurance committee, were concerned the rule would have serious adverse effects. The objections of Pohjola group, a major Finnish insurer, are indicative of the position of the industry:

“The alternative text would turn the entire insurance product into a loose, uncontrollable entity. Any legal efforts to afterwards determine its content would be dominated by the opinions of policyholders that had been disappointed in their unfounded wishes. These opinions do not necessarily have any connection with the information the policyholder had when he took the policy. Without documentation, no-one can remember, after years have passed, what kind of discussions took place when the policy was made.”

267 OM 43/41/84 Binder 3 Draft legislation, Bundle 3, 3.5.1985
268 OM 43/41/84 Binder 3 Vahinkovakuutustyöryhmän kokous 23.1.1985 p.3; OM 43/41/84 Binder 4 Nordiska överlägningar angående skadeförsäkring Helsingfors 10–11.3.1986 p.9
The key legal issue about the alternative rule, that the other Nordic committees and the Finnish industry objected to, was the question of proof. Järventaus emphasized time after time that policyholders would still need to prove their claims in court, and that eventual cases that did not rely on written evidence would be rare.\(^{270}\)

Despite the objections of the industry, the rule was incorporated into the subsequent Finnish proposal for a Casualty Insurance Act, in October 1985. The proposal noted that agents had a significant role in the marketing of insurance. According to the proposal, general contract law principles of defect, due to marketing information, had not influenced the decisions of insurance complaint board. Administrative sanctions did not guarantee that the applicant received all the information he or she needed, nor did they provide remedy for the “grave consequences” of an inadequate insurance coverage. Therefore, the information given by these agents would be judged on the same bases as any other information given in the marketing of insurance, with ensuing contractual effects.\(^{271}\)

The new rule would, as a remedy for defect, grant the policyholder a right to demand a corrected insurance and to get an eventual claim paid as had been promised by the agent.\(^{272}\)

For insurance companies, there would be a need to train or trim their sales organization. The rule was not seen to affect the supply of insurance products, as trimming would only affect the passive sales force, such as travel agents that also sell insurance.\(^{273}\)

### 4.4 1986: A final attempt to avoid Nordic divergence

The case KKO 1986 II 84 had a major influence in the process that eventually saw the proposed rule becoming enacted law.

“KKO 1986 II 84: The insurance agent A had, when negotiating with B for and insurance for a market garden, given an impression of the content of the policy terms that clearly deviated from their wording [concerning technical faults]. The policy was made according to the written policy. As the insurer had not authorized A to deviate from the policy terms, and A had no such authority based on law or common practice, the insurer was not liable towards B on the basis of A’s statements.”

\(^{270}\) OM 43/41/84 Binder 4 Nordiska överläggningar angående skadeförsäkring Helsingfors 10–11.3.1986 p.9

\(^{271}\) LAVO 16/1985 p.21-23

\(^{272}\) ibid.

\(^{273}\) ibid.
The ruling ran counter to several prior decisions by the Insurance Complaints Board that had ascribed the insurer a liability for the agent’s statements. When the case was discussed in inter-Nordic meetings, the other countries said that they could not envision a similar outcome in their jurisdictions with the same facts. For the Finnish working group, the ruling showed that without reform, “the agent was entitled to tell the applicant about the insurance, but the applicant was not entitled to believe the agent.” At the time, it was of course not know that the same applicant with the same facts would win a new case on the grounds of vicarious liability (KKO 1990:20) after he sued for damages instead of payment according to the policy.

The Swedes, as already mentioned in chapter 2, decided on the “insurer cannot rely on”-rule. In addition to the fear that insurers would be flooded with vexatious claims, the Swedish committee’s main objection to the Finnish rule was that in their view, an agent’s defective promises could be corrected by sending the policyholder the terms of the policy after acceptance. The reasoning was that it was common knowledge that any insurance cover is regulated in an insurance policy, whereby a client could not solely rely on an agent's vague statements concerning the suitability of the cover. The Swedes also reasoned that the sale of insurance was different from the sale of goods, and that advertisements were not the reason why insurance were bought and thus advertisements did not really influence the content of insurance contracts. Notably, the Swedish rule does not cover omissions by the insurer (situations when the insurer had not given any information).

In August 1986 Järventaus wrote a letter to the Swedish committee urging it to reconsider and to adopt the Finnish rule. Acceptance, not payment, was for Järventaus the crucial

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274 Häyhä 1996 p.213, p.214 ref.97
275 OM 43/41/84 Matti L. Aho memorandum of the Nordic meeting in Oslo 7-8.10.1986
276 OM 43/41/84 Binder 3 Bundle 4 2.chapter Järventaus speech 27.10.1986.
277 “KKO 1990:26: [A] had through his actions caused the property to be uninsured against the risk in question and that [B] was caused a loss amounting to the insurance money that was not awarded. [A] and his employer, the insurer, were ordered to compensate for [B] for its loss.”
278 OM 43/41/84 Binder 4 Bundle 7b Försäkringsrättskommitten 1986-02-13 Skadeförsäkringslag, utkast 7: 2:2 § [...]Härvid skall tydliga upplysningar ges om villkor som väsentlig begränsar försäkringsbolagets ansvar i förhållande till vad en försäkringstagare vid sådan försäkring i allmänhet har att räkna med[...]
2:6 § Försäkringsbolaget får inte åberopa att bolagets ansvar är begränsat på visst sätt, om detta avviker från vad en försäkringstagare har anledning att anta med hänsyn till bolagets informationsskyldighet enligt denna lag och de uppgifter bolaget lämnat om försäkringen.
279 SOU 1986:56 s.498
280 SOU 1977:84 p.126-127
281 OM 43/41/84 Binder 4 Nordiska överläggningar angående skadeförsäkring Helsingfors 10–11.3.1986 p.9
moment for contract formation in Nordic law. If the Swedes did not change their minds, Järventaus warned that “even though the two committees pursued a common material law, the results would at the end diverge.”\textsuperscript{282}

Also the Norwegians rejected the Finnish rule, preferring to base their sanction on general rules on damages, instead of the Finnish “interpretative construction”. For the Norwegians, the biggest objection was that the rule would have been difficult to implement, when agents did not have the legal authority to bind the insurer.\textsuperscript{283} Norwegian had initially proposed a rule on the insurer’s liability for damages resulting from defective information, but this rule was not codified.\textsuperscript{284}

At the time, the Swedish committee also thought that a codification on damages for was impractical and the amount of damages difficult to quantify, and thus the issue was better left to general principles of law.\textsuperscript{285} In 2015, Bengtsson reflected on this decision:

“These arguments are partly not convincing. I do indeed bear a certain responsibility for them, as I might have written them myself. But one can sometimes get wiser with age.”\textsuperscript{286}

\begin{footnotes}
\footnote{OM 43/41/84 Letter from Jussi Järventaus to Hans Jacobson 19.8.1986}
\footnote{OM 43/41/84 Binder 4 Referat fra Nordisk FAL-møte i Oslo 7 og 8 oktober 1986 s.7}
\footnote{OM 43/41/84 Mappi 4: nippu 7d Tekstutkast november 1984 § 2-1 (informasjon i forbindelse med tegningen) and § 2-4 (ansvar for mangelfull informasjon)}
\footnote{Bengtsson 2015 p. 213}
\footnote{Bengtsson 2015 p. 213 Bengtsson still sees a rule on damages as especially problematic in relation to the duty to inform about major exclusions, as such a rule could result in unreasonable claims by policyholders about risks that could never have been covered by the insurance.}
\end{footnotes}
5. Conclusions

In anonymous, mass-character contracting, it is has become evident that the ideal of rational decision-making does not correspond to reality. Nordic law has responded in many ways to the increasing pressure of marketing information. However, the private law response has been varied. When the contradiction between the marketing and the contract exceeds acceptable business practice, consumers have been protected in Nordic legal praxis, according to a trailer-principle. The principle marked a shift from the traditional reified model of contracts, and has gradually extended the binding effect of indefinite promises on the content of the contract beyond the sale of goods.

The open legal question for marketing liability has been, whether the appropriate sanction should be administrative sanction, negative interest or a binding effect. The failed attempts at legislating a binding effect show that a general liability for all marketing statements that have a commercial effect would go too far in diluting the legal certainty that written contracts after all offer. This is because such a change, without further qualifications, would have significant unintended effects on (non-legal) norms as well as on efficient and careful contracting.

The Finnish insurance rule shows that it is better to normalize marketing. Normalization in is seen in the way the categories of incomplete, misleading and incorrect marketing were written into private law, because this defined what is the new normal and at the same time exposed deviant marketing by insurers and agents alike. This technique altered the relationship between the Finnish insurer and the policyholders, as they accepted a new way of understanding normal marketing. This kind of private enforcement, by the entire pool of insured, is a powerful and effective way to deal with marketing.

Market rationality has long held economic benchmarks for contract law rules, but these standards are imperfect, as complete contracts are also consistent with social norms. The best content for contract law rules can be found by in balancing economic and social norms. Contract law should facilitate mutually beneficial contracting, by promoting as complete and efficient contracts as possible. The insurance rule could, due to its open terminology, also work well as a general default rule, as it addresses many sources of contract failure, such a transaction costs, limited rationality and strategic thinking, that the majority of parties would want to have regulated by default.
Procedural rules on proof are of great importance for any rule on marketing liability, to avoid adverse consequences for mass contracting. A buyer should prove his or her claim of a mistaken impression, if this impression is not objectively apparent. As only actual consent reveals actual preferences, the insurance rule thus allows for a subjective understanding. The content of the sanction should be determined by the unacceptable marketing information that triggers it. The insurance rule alters the content of a contract beyond the agreement of the parties by determining what the content of the contract actually is. The theoretical and historical examinations have shown that the dogma of contracts as legally enforceable agreements affects, in a negative way, the private law responses to marketing information.

The historical rationale of the Finnish insurance rule can be found, in the 1970’s and 80’s, in the legislator’s pragmatic reaction to two issues that had arisen in Finnish insurance disputes, firstly that advertising had not had binding effects and secondly that the statements, the “sales pitch”, of insurance agents had not had binding effects. The wording of the rule originated primarily from the legislator’s determination to reign in opportunistic and unprofessional insurance agents. The rule was designed to force insurers to streamline their marketing, including the agents, with the other functions of the insurance business. Also, the aim was to provide affected policyholders access to private law remedies that trade regulation and administrative sanctions could not provide.

From the legislative history of the insurance rule we can learn that much of the resistance against the rule was related to legal certainty. It was feared that the rule would be misused by fraudsters and that it would make the insurance product into an uncontrollable entity. The insurance industry and the other Nordic committees were concerned that if a codification was allowed, the burden of proof rules would in practice be against the insurer and in favor of opportunistic and dishonest policyholders. While these fears have not materialized to any relevant degree, at the time they were decisive in the inter-Nordic legislative split that occurred, although the Finnish legislator went to great lengths to emphasize that a policyholder would still need to prove his or her claim of a wrong impression caused by marketing.

This study has explored many tension points between the Finnish insurance rule and contract law. It has shown that the contradiction between consumer protection and liberalist values disappears on a higher level of abstraction, because private autonomy is essential to the normalizing techniques of the state. In everyday contracting, the rule levels the playing field between insurers and policyholders.
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