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Conflict of Laws - Due Process and Full Faith and Credit - Direct Action Statute

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CONFLICT OF LAWS—DUE PROCESS AND FULL FAITH AND CREDIT—DIRECT ACTION STATUTE—Defendant issued a liability insurance policy to the manufacturer of a hair-waving product, an Illinois subsidiary of a Delaware corporation having its headquarters in Massachusetts. The policy, issued in Massachusetts and delivered in Massachusetts and Illinois, was to protect the insured against damages that might be suffered by users of the product anywhere in the United States or Canada. It contained a "no action" clause enforceable under Massachusetts and Illinois law prohibiting direct actions against the insurer until final determination of the insured's liability, either by judgment or agreement. Alleging injuries sustained in Louisiana where the product was bought and used, plaintiff sued the insurer under the Louisiana direct action statute which was applicable even though an insurance contract was made in

another state and contained a clause forbidding such direct actions.[1] Another provision, complied with by the defendant, compels foreign insurance companies to consent to such direct suits in order to do business in the state.[2] The district court, affirmed by the court of appeals, dismissed the action, holding the statutes repugnant to the due process clause of the Federal Constitution. On appeal, *held,* reversed. Louisiana could apply its own law rather than that of Massachusetts or Illinois. The interests of the states where the insurance contract was negotiated and delivered cannot outweigh the contacts and interests of Louisiana in taking care of persons injured in Louisiana; hence the due process and full faith and credit clauses of the Constitution do not compel Louisiana to subordinate its policy interests in a direct action to other state's contract rules. Justice Frankfurter concurred on the ground that Louisiana had validly exacted consent from the defendant to such direct actions as a condition of doing business within the state. *Watson v. Employers Liability Assurance Corp.,* 348 U.S. 66, 75 S.Ct. 166 (1954).

In order to overcome the hardships of the general rule denying an injured party a right of action against the tortfeasor's insurer in the absence of a contractual provision to the contrary,[3] numerous states have enacted statutes permitting the injured party to sue the insurer directly. Although most direct action statutes are narrow in scope,[4] the modern trend is typified by the Louisiana statute which permits an immediate direct action by all injured parties no matter where the policy of insurance was issued.[5] In applying a direct action statute, the courts reach different results depending on the jurisdiction's choice of the applicable conflict of laws rule.[6] Although not all courts are in accord, a characterization of a direct action statute by the forum as procedural will auto-

[1] La. Rev. Stat. (Supp. 1950) tit. 22, §22.655.

[2] Id., §22.983.

[3] Chamberlin v. Los Angeles, 92 Cal. App. (2d) 330, 206 P. (2d) 661 (1949); Arnold v. Walton, 205 Ga. 606, 54 S.E. (2d) 424 (1949).

[4] Such statutes provide that the bankruptcy or insolvency of the insured will not release the insurer from liability and that after an unsatisfied judgment against the insured, the insurer may be sued directly. E.g., Cal. Ins. Code Ann. (Deering, Supp. 1953) §11580; Iowa Code Ann. (1949) §516.1; Mass. Gen. Laws (1932) c. 175, §§112, 113; Mich. Comp. Laws (1948) §522.33; 27 N.Y. Consol. Laws (McKinney, 1949) §167(1)(a), (b); R.I. Gen. Laws (1938) c. 155, §1.

[5] La. Rev. Stat. (Supp. 1950) tit. 22, §22.655. Likewise, Wis. Stat. (1953) §§85.93, 260.11, permits direct actions by an injured party against an automobile liability insurer. However, Wisconsin courts have limited the impact of the statutes by refusing to invalidate no-action clauses when valid in the state where issued and delivered. Byerly v. Thorpe, 221 Wis. 28, 265 N.W. 76 (1936); Ritterbusch v. Sexmith, 256 Wis. 507, 41 N.W. (2d) 611 (1950). On the modern trend of the law, see Lassiter, "Direct Actions Against the Insurer," 1949 INS. L.J. 411; Leigh, "Direct Actions Against Liability Insurers," 1949 INS. L.J. 633.

[6] For a detailed analysis of the fundamental choice of law problems of direct action statutes, see 3 UTAH L. REV. 490 (1953); 39 VA. L. REV. 655 (1953).

matically cause the forum to apply its own law allowing[7] or disallowing[8] the direct action. The situation is otherwise when the statute is interpreted to be substantive as the forum may then apply foreign law by contract or tort rules of conflict of laws. A few cases have followed a tort choice of law theory and looked to the place of injury[9] to determine whether an injured party might directly sue an insurance company. Yet the fundamental problem in such a suit is not the actual tort liability of the insurer but rather the mere preliminary right of the injured party to bring the action directly.[10] Hence the majority of courts in deciding whether a direct action can be maintained first decide the contract question and look to the place of making[11] of the contract of insurance before determining the secondary issue of tort liability. However, the use of the place of making creates an incentive for insurance companies to issue policies in states which are prone to permit no-action clauses to exist although the policy itself will cover a risk in a direct action state.[12] Hence direct action forums have attempted to use theories of place of performance,[13] place of intention of parties,[14] or place of substantial contacts[15] in order to circumvent the results reached under a doctrine looking to the place of making. Regardless of the appropriate conflict of laws rule, a forum may feel that its local law denying the right of direct action expresses a substantially strong public policy to override normal conflict of laws principles.[16] Until the principal case, it was doubtful whether the public policy of a direct action forum could be sufficiently strong to counteract provisions of contracts made in other states.[17] It has long been held that for a state to apply local law to alter an insurance policy made and issued elsewhere would result in a deprivation of due process unless substantial contacts were

[7] Robbins v. Short, (La. App. 1936) 165 S. 512; Anderson v. State Farm Mutual Auto Ins. Co., 222 Minn. 428, 24 N.W. (2d) 836 (1946).

[8] McArthur v. Maryland Cas. Co., 184 Miss. 663, 186 S. 305 (1939); Wells v. Irwin, (D.C. Tex. 1942) 43 F. Supp. 212, affd. sub nom., Wells v. American Employers' Ins. Co., (5th Cir. 1943) 132 F. (2d) 316.

[9] Andrews v. Poole, 182 S.C. 206, 188 S.E. 860 (1936); Hildalgo v. Fidelity & Cas. Co., (D.C. La. 1952) 104 F. Supp. 230.

[10] HANCOCK, TORTS IN CONFLICT OF LAWS 240 (1942).

[11] Riding v. Travelers Ins. Co., 48 R.I. 433, 138 A. 186 (1927); Boisvert v. Boisvert, 94 N.H. 357, 53 A. (2d) 515 (1947); Ritterbusch v. Sexmith, note 5 supra; Fisher v. Home Indemnity Co., (5th Cir. 1952) 198 F. (2d) 218.

[12] Employers Mutual Liability Ins. Co. v. Eunice Rice Milling Co., (5th Cir. 1952) 198 F. (2d) 613; Mayo v. Zurich General Accident & Liability Ins. Co., (D.C. La. 1952) 106 F. Supp. 579.

[13] Martin v. Zurich General Accident & Liability Ins. Co., (1st Cir. 1936) 84 F. (2d) 6; Ritterbusch v. Sexmith, note 5 supra.

[14] Duncan v. Ashwander, (D.C. La. 1936) 16 F. Supp. 829.

[15] See the dissent in Employers Mutual Liability Ins. Co. v. Eunice Rice Milling Co., note 12 supra.

[16] Lieberthal v. Glens Falls Indemnity Co., 316 Mich. 37, 24 N.W. (2d) 547 (1946).

[17] Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143, 54 S.Ct. 634 (1934); Ritterbusch v. Sexmith, note 5 supra; Mayo v. Zurich General Accident & Liability Ins. Co., note 12 supra.

evidenced in the forum.[18] It would seem that the principal case is an inroad on former decisions. Previously, state insurance legislation has been limited to regulatory measures rather than enforcement of contracts contrary to the undertaking of the parties.[19] In the principal case, Louisiana, besides being the place of injury and one of the places of performance, had also exacted consent from the defendant insurer to do business in the state. As suggested by Justice Frankfurter's concurring opinion, it is questionable whether the Court would have considered Louisiana's connection sufficient if the insurer, served by some means, was not doing business in the state. It is even more speculative if the insurer, having no activities in the state but only assets in the form of debts owed to it, were proceeded against quasi in rem. Apparently the Court's opinion can be interpreted as saying that the interest of a state in protecting its inhabitants from the hardships of the traditional action against the insured is a sufficient motivation to permit such direct action even as against normal conflict of laws rules. If the principal case is construed as holding that the forum had sufficient contacts with the insurer to ignore normal conflict rules, it similarly might be interpreted as a retraction from the *Hughes v. Fetter*[20] doctrine of compelling full faith and credit to the laws of sister states except when the policy of the forum is substantially opposed thereto.[21] The principal case, by holding that a direct action statute is founded upon such a legitimate policy interest, indicates the Court's possible inclination to yield to state policy in areas outside of the traditional workmen's compensation cases.[22]

On the other hand, the law which Louisiana was permitted to reject was Illinois and Massachusetts *common law.* No foreign *statute* being involved, there occurred no abridgment of the normal restriction[23] on the extent to which a forum may use public policy as an excuse for ignoring foreign law. Hence the principal case would indicate that, in proper circumstances, a forum without any strong public policy might be compelled by full faith and credit to apply foreign case law besides foreign statutory law when settled conflict of laws rules

[18] American Fire Ins. Co. v. King Lumber & Mfg. Co., 250 U.S. 2, 39 S.Ct. 431 (1919); Home Ins. Co. v. Dick, 281 U.S. 397, 50 S.Ct. 338 (1930).

[19] Osborn v. Ozlin, 310 U.S. 53, 60 S.Ct. 758 (1940); Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 63 S.Ct. 602 (1943). See Justice Frankfurter's concurring opinion in the principal case, at 78.

[20] 341 U.S. 609, 71 S.Ct. 980 (1951).

[21] Alaska Packers Assn. v. Industrial Accident Commission, 294 U.S. 532, 55 S.Ct. 518 (1935); Pacific Employers Ins. Co. v. Industrial Accident Commission, 306 U.S. 493, 59 S.Ct. 629 (1939).

[22] See note 21 supra.

[23] Broderick v. Rosner, 294 U.S. 629, 55 S.Ct. 589 (1935); Order of United Commercial Travelers v. Wolfe, 331 U.S. 586, 67 S.Ct. 1355 (1947); Hughes v. Fetter, note 20 supra; First National Bank v. United Air Lines, 342 U.S. 396, 72 S.Ct. 421 (1952). Though apparently overlooked, it might well have been argued that Louisiana was rejecting statutory foreign law in that Mass. Gen. Laws (1932) c. 175, §§112, 113, permitting direct actions only after an unsatisfied judgment against the insured, could be deemed to be a statutory declaration of foreign law validating the no-action clause of the insurance policy.

demand it. The principal case, therefore, might be interpreted as an expansion, rather than a contraction, of the *Hughes* doctrine. Such a construction would also indicate that conflict of laws problems are increasingly becoming constitutional problems.

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