Michigan Law Review

Volume 52 | Issue 6

1956

INSURANCE-MEANING OF 'WAR" IN INSURANCE POLICIES

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INSURANCE—MEANING OF "WAR" IN INSURANCE POLICIES—In June 1950, United States military forces in Korea embarked upon an engagement that has been variously described as "war," "police action," "hostilities," and "defense against aggression." No declaration of war was made by Congress nor was a state of war proclaimed by the Chief Executive or our Communist adversaries. This unprecedented commitment of military forces in response to the recommendation of an international organization was consummated by unilateral Presidential action,[1] with Congress only impliedly ratifying the step taken by enacting laws appropriating additional funds for the support of the armed forces in Korea.[2] The ill-defined character of the conflict in Korea has raised many problems, not the least of which regards the meaning of the term "war" in contractual undertakings by insurers where it is used to limit or control the risk assumed. The hazards of war have been regarded as uninsurable under policies of personal accident insurance and insurers have not charged premiums for this risk.[3] The purpose of this comment is to examine the judicial interpretations of the term "war" in insurance contracts and their implications for those who select policy language.

A typical clause excluding or reducing the liability of insurers is applicable where death occurs as a result of war.[4] These "war or act of war, or while in military service in time of war" exclusions first appeared in policies of accident insurance during the first World War

[1] See H. Rep. No. 127, 82d Cong., 1st sess., p. 1 (1951).
[2] Supplemental Appropriation Act, 1951, 64 Stat. L. 1044 (1950).
[3] Rogers, "Modern Warfare and Its Effect on Policy Construction," 1952 INS. L.J. 360.
[4] 2 RICHARDS, INSURANCE, 5th ed., §254 (1952). See 137 A.L.R. 1263 (1942).

and were considered adequate until Pearl Harbor, when new ways of conducting war introduced problems in construing the war exclusion clause.[5]

I. *The Background of Judicial Interpretation*

The decisions which analyze the word "war" as a contractual term in insurance policies are few in number and are almost evenly divided in the conclusions reached. They may best be considered in chronological order.

A. *World War I and II Prior to Formal Entry by the United States.* The provisions as framed first met judicial scrutiny in cases where the insured lost his life in ships sunk by German submarines prior to the existence of a state of war between the United States and Germany. Recovery was denied on the basis of the exclusion; "war" was held to be every contention by force between two nations under the authority of their respective governments.[6] These opinions reasoned that the existence of "war" was not dependent upon its formal declaration, but included wars in which the United States was not a formal participant.

B. *Pearl Harbor Before Declaration of War.* The puzzling question whether death which resulted from undeclared war was within the exclusion was more dramatically presented to the courts in actions for proceeds of policies where the insured met his death in the Japanese attack on Pearl Harbor of December 7, 1941 while the formal declaration of war was not forthcoming until the following day.[7] These courts generally allowed recovery and adopted the view that "war," within the contemplation of the various policies, meant a condition accepted and recognized by the political authority of government.[8] In holding that war began as of the date that Congress declared it, these courts declared themselves bound by the determination of the proper department of government that a war exists. Only one appellate court reached the conclusion that the parties intended

[5] Rogers, "Modern Warfare and Its Effect on Policy Construction," 1952 INS. L.J. 360.

[6] Vanderbilt v. Travelers' Ins. Co., 112 Misc. 248, 184 N.Y.S. 54 (1920); Stankus v. New York Life Ins. Co., 312 Mass. 366, 44 N.E. (2d) 687 (1942). See also 145 A.L.R. 1464 (1943).

[7] Pub. Res. 328, 77th Cong., 1st sess., 55 Stat. L. 795 (1941).

[8] Savage v. Sun Life Assur. Co. of Canada, (D.C. La. 1944) 57 F. Supp. 620; West v. Palmetto State Life Ins. Co., 202 S.C. 422, 25 S.E. (2d) 475 (1943); Pang v. Sun Life Assur. Co. of Canada, 37 Hawaii 208 (1945); Rosenau v. Idaho Mut. Ben. Assn., 65 Idaho 408, 145 P. (2d) 227 (1944). See also 19 TULANE L. REV. 629 (1945); 17 ROCKY MT. L. REV. 258 (1945); 24 NEB. L. REV. 264 (1945); 47 COL. L. REV. 742 (1947).

by the use of the word "war" to denote a limitation upon the risk assumed and that the hazard to human life contemplated by the parties could be fully as great in an undeclared war.[9]

C. *Termination of Hostilities Prior to Official Declaration.* The question again arose following the armistice after World War II but before any proclamation by the executive or legislative departments of the government announcing the formal termination of the existence of a state of war. The courts permitted recovery where the insurer had failed to make it obvious that the word "war" was intended to connote a technical meaning and the term was accordingly regarded as bearing the meaning that common speech imports.[10] Where the death of the insured occurred after the unconditional surrender of all enemies, a court reasoned that the parties contracted with reference to war in its real and practical sense in terms of hazard to human life.[11]

It is perhaps significant that the Constitution, while giving Congress the power to declare war, does not confer upon it the authority to conclude peace.[12] At any rate, as to when a war terminates, the courts have uniformly held that the term "war" in the exclusion clause refers to the end of hostilities as a fact and not as a matter of formal declaration.[13] This holds true notwithstanding broad language in cases in other areas to the effect that a state of war persists beyond the cessation of hostilities until officially terminated by a political act.[14]

D. *The Korean Conflict.* Recent decisions have found this same narrow question even more perplexing in light of the fact that the Korean conflict was not the sole responsibility of the United States, but rather was justified under the United Nations Charter which vested military powers in the Security Council and made it primarily

[9] New York Life Ins. Co. v. Bennion, (10th Cir. 1946) 158 F. (2d) 260, noted 56 YALE L.J. 746 (1947).

[10] Stinson v. New York Life Ins. Co., (D.C. Cir. 1948) 167 F. (2d) 233; Nat. Life and Accident Ins. Co. v. Leverett, (Tex. Civ. App. 1948) 215 S.W. (2d) 939; Mut. Life Ins. Co. of New York v. Davis, 79 Ga. App. 336, 53 S.E. (2d) 571 (1949); Girdler Corp. v. Charles Eneu Johnson & Co., (D.C. Pa. 1951) 95 F. Supp. 713. On a collateral problem involving interpretation of war exclusion clause see 25 CHI.-KENT L. REV. 171 (1947); 35 GEO. L.J. 401 (1947); 12 MO. L. REV. 212 (1947).

[11] New York Life Ins. Co. v. Durham, (10th Cir. 1948) 166 F. (2d) 874.

[12] 56 AM. JUR., War §13 (1947).

[13] Billings, "Of War Clauses," 1952 INS. L.J. 793 at 800.

[14] Bowles v. Ormesher Bros., (D.C. Neb. 1946) 65 F. Supp. 791 (Emergency Price Control Act); Ludecke v. Watkins, 335 U.S. 160, 68 S.Ct. 1429 (1948) (Alien Enemy Act). See also Palmer v. Pokorny, 217 Mich. 284, 186 N.W. 505 (1922); Samuels v. United Seamen's Service, (D.C. Cal. 1946) 68 F. Supp. 461; 168 A.L.R. 173 (1947).

responsible for the maintenance of international peace and security.[15] Only after the Security Council had denounced the aggression in Korea as a breach of the international peace and had recommended that member nations furnish such assistance as might be necessary did the President of the United States make a public announcement that our military forces had been authorized to aid the Republic of Korea.[16]

Once again the courts were called upon to determine whether a formal declaration of war by Congress was needed to bring hostilities such as those in Korea within the war exclusion clause.

1. *The Beley case.* Perhaps the most celebrated case grappling with the problem under these novel circumstances was *Beley v. Pennsylvania Mut. Life Ins. Co.*[17] The trial court denied recovery on the theory that the conflict had been politically recognized by the proper department of government and hence could be judicially noticed by the court.[18] As the parties had neither indicated an intention to use the term "war" in a technical sense nor had specified any particular kind or type of war, but had used an all-inclusive term, the court assumed they contemplated any type of war which involved hazard to human life. But this decision was overturned on appeal by the Superior Court of Pennsylvania which held that undeclared war was not excepted by the policy.[19] The Pennsylvania Supreme Court ultimately considered the case and affirmed the judgment of the superior court permitting recovery. In a much discussed opinion the majority concluded that it was incumbent upon the insurer, as the party selecting the contractual language, to make it clear that the term "war" was vested with a broader connotation than its "constitutional" intendment. The court recited a need for a definitive test of a right to recovery. This was found satisfied by the rule that the existence of a state of war was a political question of which judicial

[15] U.N. CHARTER, cc. V, VI and VII, 59 Stat. L. 1031 (1945). The Charter was implemented by the U.N. Participation Act, 59 Stat. L. 619 (1945). H. Rep. No. 1383, 79th Cong., 1st sess., p. 8 (1945), contains the interesting language: "Preventative or enforcement action by these forces upon the order of the Security Council would not be an act of war but would be international action for the preservation of the peace and for the purpose of preventing war. Consequently, the provisions of the Charter do not affect the exclusive power of the Congress to declare war."

[16] N.Y. TIMES, June 28, 1950, p. 1:2.

[17] 373 Pa. 231, 95 A. (2d) 202 (1953). See also Harding v. Pennsylvania Mut. Life Ins. Co., 373 Pa. 270, 95 A. (2d) 221 (1953).

[18] County Court of Allegheny County. See 15 LIFE CASES 328 (1951); see also 1953 INS. L.J. 475 at 478.

[19] Beley v. Pennsylvania Mut. Life Ins. Co., 171 Pa. Super. 253, 90 A. (2d) 597 (1952). See Goldstein, "The War Clause in Life Insurance Contracts,"1952 INS. L.J. 777.

cognizance could be taken only upon a formal declaration of war by the political department of the government. The insurer petitioned the United States Supreme Court for a writ of certiorari, but this was denied, probably for lack of a federal question.[20]

2. *The Weissman case.* The only federal court to pass upon the effect of the hostilities in Korea on the exclusion clause was the United States District Court for the Southern District of California, which rendered the decision in *Weissman v. Metropolitan Ins. Co.*[21] This decision departed from the recent precedents and denied liability on a policy insuring the life of one killed in Korea. It was held that "war" was possible without an official declaration and that unless it was indicated in the contract that the term was to be used in a strict legal sense, the parties had a right to assume that it was to be given its meaning as commonly understood. That most people in the United States regarded the struggle in Korea as "war" in stark reality weighed heavily with the court.

3. *The Stanbery case.* Another decision holding that the term "war" is employed in its real or factual sense when found in an exclusion clause is *Stanbery v. Aetna Life Ins. Co.*,[22] recently handed down by the Superior Court of New Jersey. The court followed a dissenting opinion in the *Beley* case and the holding in the *Weissman* case in determining that death of the insured in Korea was within the intention of the parties as expressed in the exclusion clause. It was felt that the word "war" when used in a private contract should not be construed on a public or political basis, or in a legalistic and technical sense, but rather should be given its ordinary, usual and realistic meaning.

4. *The Meadows case.* The latest judicial pronouncement by a court of last resort construing the term "war" in the context of a policy of insurance is *Western Reserve Life Ins. Co. v. Meadows.*[23] In reversing an appellate decision which relied on the *Beley* case and held that the parties contemplated that the word "war" be used in

[20] 346 U.S 820, 74 S.Ct. 34 (1953). See Goldstein, "The War Clause in Life Insurance Contracts," 1953 INS. L.J. 458 at 478.

[21] (D.C. Cal. 1953) 112 F. Supp. 420. The United States Court of Military Appeals has ruled that the United States was at war in Korea and that court martial offenses should be treated accordingly. United States v. Bancroft, 3 U.S.M.C.A. 3, 11 C.M.R. 3 (1953); United States v. Gann and Sommer, 3 U.S.C.M.A. 12, 11 C.M.R. 12 (1953).

[22] (N.J. 1953) 98 A. (2d) 134.

[23] (Tex. 1953) 261 S.W. (2d) 554, cert. den. (U.S. 1954) 74 S.Ct. 531. See Wheeler, "The War Clause," 1953 INS. L.J. 727.

its legal sense in which only the Congress could declare war,[24] the Supreme Court of Texas denied recovery under a double indemnity provision even though the insured did not meet death in Korea. The opinion stated that the court regarded acts of Congress passed in acknowledgment of the fact of the conflict in Korea and recognizing the existence of "war" as tantamount to a declaration of war and that the death of the insured would be within the exclusion even if a technical or legal definition were adopted. However, the court preferred to base its decision on a finding that the term "war" in its ordinary and accepted meaning is war in fact.

II. *Rationale Underlying the Opposing Interpretations*

After this sketch of the unsettled state of the law on this question, it should be profitable to examine more closely the rather cogent arguments supporting each view.

A. *The Broad Interpretation of "War."* There is substantial authority tending to support the broad proposition that war may exist without a formal declaration. Lincoln's conduct at the outset of the Civil War represented a wide use of unilateral presidential power without congressional sanction.[25] The Supreme Court considered the exercise of these powers in the *Prize Cases*,[26] where it stated that the existence of war was a question of fact and the President was bound to meet the danger in the shape that it presented itself without waiting for Congress to give it a name. Later a case arising out of the American participation in quelling the Boxer Rebellion in China in 1900 held that a state of war could exist without a formal declaration by Congress.[27] These decisions support the rather compelling conclusion that war is an existing fact and not a legislative decree and exists despite the absence of a declaration.[28] In this view, every contention by force between two or more nations, in external matters, under the authority of their respective governments, constitutes war.[29]

[24] Western Reserve Life Ins. Co. v. Meadows, (Tex. Civ. App. 1953) 256 S.W. (2d) 674. The court believed that it was without power to declare a state of war existed in Korea, thereby materially affecting contractual relations as between citizens, when this determination would necessarily depend on mere hypotheses. This power was said to be exclusive in the political department of the central government.

[25] See CORWIN, THE PRESIDENT: OFFICE AND POWERS, 3d rev. ed., 277 (1948).

[26] The Amy Warwick, 2 Black (67 U.S.) 635 (1862).

[27] Hamilton v. McClaughry, (8th Cir. 1905) 136 F. 445.

[28] Dole v. Merchant's Mut. Marine Ins. Co., 51 Me. 465 (1863).

[29] 56 AM. JUR., War §4 (1947); Arce v. State, 83 Tex. Crim. Rep. 292, 202 S.W. 951 (1918).

A declaration of war dignifies or perfects a conflict by a general authorization of all nationals to engage in hostilities against opposing belligerents, and all the rights and consequences of war attach to the situation.[30] But it is possible for hostilities to exist between nations which are more confined in nature and extent, and which constitute "war" although not prefaced by a declaration.[31] The "limited war" in Korea could fit into this category.

Further, it has been held that war may exist without declaration, but that some form of a public act, proceeding directly from the competent source, should announce to the people at home their new relations and duties growing out of the state of war, and should equally apprise neutral nations of the fact, to enable them to shape their conduct accordingly.[32] This operates to legalize hostilities, warranting the destruction of property and the taking of life on the ground of public war. Public statements by the President announcing that our troops had been dispatched to Korea might constitute such an official act.[33]

Perhaps the most significant factor underlying the broad interpretation of the term "war" is the consideration of its relation to the risk assumed by the insurer. It would seem reasonable to infer that the parties contemplated the hazard to human life incident to "war" when they used this word to denote a limitation or restriction on the risk undertaken.[34] Since the increased likelihood of death is fully as great regardless of whether the hostilities are denominated "constitutional war" or not, the broad interpretation seems more consonant with the intent of the parties.

The parties are free to contract with reference to "war" and give it such definition or connotation as they will, as a measure of liability, and the courts are obligated to construe that term in accordance with the intention so manifested.[35] Where the word "war" is not limited, restricted or modified by anything appearing in the policy, and refers to no particular kind or type of war, it applies generally to every situation that ordinary people would regard as war.[36] If nothing in the contract indicates that the word is used in a vague or indefinite sense,

[30] 56 AM. JUR., War §4 (1947).

[31] Montoya v. United States, 180 U.S. 261, 21 S.Ct. 358 (1901) (Indian wars); Bas v. Tingy, 4 Dall. (4 U.S.) 37 (1800) (reprisals against French).

[32] Marks v. United States, 161 U.S. 297, 16 S.Ct. 476 (1896). See 56 AM. JUR., War §5 (1947).

[33] N.Y. TIMES, June 28, 1950, p. 1:2.

[34] New York Life Ins. Co. v. Bennion, (10th Cir. 1946) 158 F. (2d) 260; Mut. Life Ins. Co. of New York v. Davis, 79 Ga. App. 336, 53 S.E. (2d) 571 (1949).

[35] New York Life Ins. Co. v. Durham, (10th Cir. 1948) 166 F. (2d) 874.

[36] Stankus v. New York Life Ins. Co., 312 Mass. 366, 44 N.E. (2d) 687 (1942).

the provision should be enforced in accordance with its popular meaning.[37] An ambiguity must be found before the rule of construction against the insurer can be invoked.[38] If the word "war" is used without modification, it should be construed as ordinarily understood, a technical construction being inappropriate.

B. *The Legal or Constitutional Interpretation of "War."* Courts are bound by a declaration of the proper department of government that a war exists.[39] The decisions which hold that the term "war" in the exclusion clause comprehends only declared war generally rely on the formula that the existence of a state of war is a political question and that judicial cognizance may be taken thereof only upon a formal declaration by the political authority.[40] There is a wealth of language in the cases supporting this rule, which seems to rest on the proposition that by the term "war" is meant not the mere employment of force, but the existence of the legal condition in which rights may be prosecuted by force.[41] This "legal" interpretation takes on appeal when it is remembered that forcible measures of redress, i.e., reprisals and embargoes, or even open hostilities with destruction of life and property under sanction of government, may constitute only provocations to "war," and may be atoned for and adjusted without "war" ensuing.[42]

Various juridical consequences may flow from the existence of a state of war, and to determine when these consequences are produced it is important that the dates of commencement and termination be ascertained and fixed with certainty.[43] The right of recovery under an insurance policy should not be dependent on the determination of a question not susceptible of some definite test;[44] the war exclusion clause should be interpreted according to a uniform standard, not a conjectural hypothesis.[45] War as a condition accepted or recognized by the political

[37] Ibid. See Wheeler, "The War Clause," 1953 INS. L.J. 727.

[38] See 45 C.J.S., Insurance §849 (1946).

[39] Rosenau v. Idaho Mut. Ben. Assn., 65 Idaho 408, 145 P. (2d) 227 (1944).

[40] 67 C.J., War §1 (1934); Bishop v. Jones & Petty, 28 Tex. 294 at 319 (1866): "There can be no war by its government, of which the court can take judicial knowledge, until there has been some act or declaration creating or recognizing its existence by that department of the government clothed with the war-making power." See also Verano v. De Angelis Coal Co., (D.C. Pa. 1941) 41 F. Supp. 954.

[41] 7 MOORE, DIGEST OF INTERNATIONAL LAW §1100 (1906).

[42] Bishop v. Jones & Petty, 28 Tex. 294 (1866).

[43] Pang v. Sun Life Assur. Co. of Canada, 37 Hawaii 208 (1945); Hudson, "The Duration of the War between the United States and Germany," 39 HARV. L. REV. 1020 (1926).

[44] Beley v. Pennsylvania Mut. Life Ins. Co., 373 Pa. 231, 95 A. (2d) 202 (1953), cert. den. 346 U.S. 820, 14 S.Ct. 34 (1953).

[45] Western Reserve Life Ins. Co. v. Meadows, (Tex. Civ. App. 1953) 256 S.W. (2d) 674, revd. (Tex. 1953) 261 S.W. (2d) 554, cert. den. (U.S. 1954) 74 S.Ct. 531.

authority of the central government, by actual declaration of war or unequivocal act, would serve more suitably as a definite criterion for the adjudication of rights than war as a conclusion of the judiciary inferred from the nature of hostilities.[46]

Further, if "war" is a word which imports various meanings, it would seem to be incumbent upon the insurer to make clear that it applies to undeclared war and that the parties intend to invest the term with a broader meaning than its "constitutional" sense. The contractual language is selected by the insurer and tendered in fixed form as a highly technical instrument to the prospective policy holder; if its language is susceptible of more than one construction, it must be interpreted liberally in favor of the insured.[47]

A "legal" interpretation may also be rationalized in terms of a presumed intent that the exclusionary provision was framed in contemplation of the law of the United States under which only the Congress is empowered to declare war and only this declaration can place the nation in a state of war.[48]

III. *Implications for the Insurer*

What has happened in Korea can happen elsewhere. If one lays aside the catastrophic role that atomic or biological weapons could play in modern warfare,[49] and considers only the commitments of the United States under the United Nations Charter,[50] the North Atlantic Treaty[51] and the Mutual Defense Assistance Program,[52] which are now national policies, it becomes apparent that Congress may never be called upon again to declare war in its originally accepted "constitutional" significance. These international responsibilities make it possible for the President to commit our military forces to action on foreign soil on a scale unknown in some of the congressionally declared wars of the past.[53]

If the parties do not intend their insurance contracts to cover the risk of death as a result of war in fact, and this is reflected in a lower premium, the policy language should completely exclude the hazards

[46] Savage v. Sun Life Assur. Co. of Canada, (D.C. La. 1944) 57 F. Supp. 620.

[47] 29 AM. JUR., Insurance §166 (1940); 44 C.J.S., Insurance §289 (1945).

[48] West v. Palmetto State Life Ins. Co., 202 S.C. 422, 25 S.E. (2d) 475 (1943). See 145 A.L.R. 1464 (1943); 168 A.L.R. 173 (1947).

[49] Rogers, "Modern Warfare and Its Effect on Policy Construction," 1952 INS. L.J. 360.

[50] 59 Stat. L. 1031 (1945).

[51] 63 Stat. L. 2241 (1949).

[52] 63 Stat. L. 714 (1949), 22 U.S.C. (Supp. V, 1952) §1571.

[53] See Beley v. Pennsylvania Mut. Life Ins. Co., 373 Pa. 231 at 257, 95 A. (2d) 202 (1953), cert. den. 346 U.S. 820, 74 S.Ct. 34 (1953).

of all warfare. Despite a desire for simplicity and clarity in policy phraseology, those who draft insurance policies must conclude that the exclusion used thus far is inadequate. While it may be somewhat undesirable to incorporate a compound or legalistic exclusion into policies, insurers will have to frame an exclusion clause which will encompass the hazards of war, however classified, and completely except them.[54]

Some insurers paid all the claims arising out of the Korean conflict, believing it the "proper thing to do,"[55] but most companies have responded, quite naturally, with revisions of their war exclusions, not to make the policy coverage more restrictive, but to define the same coverage in terms of modern warfare and international relations.[56] Over fifty companies have added, after the reference to war in the exclusionary provision, "declared or undeclared," while others have adopted more complex language in their effort to exclude the war hazard.[57]

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[54] Rogers, "Modern Warfare and Its Effect on Policy Construction," 1952 INS. L.J. 360.
[55] N.Y. TIMES, Aug. 9, 1953, §3, p. 1.
[56] Follmann, "Commercial Accident Insurance," 1952 INS. L.J. 737 at 744.
[57] Ibid.