Louisiana Law Review

Volume 15 | Number 4
June 1955

Constitutional Law - Constitutionality of Louisiana Direct Action Statute - Suits on Out-of-State Contracts Containing No-Action Clauses

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against permitting the court to act beyond its jurisdiction." Significantly, among the factors listed that might justify permitting such collateral attack is "the fact that the determination as to jurisdiction depended upon a question of law rather than of fact."[23]

In conclusion, it may be said that the court's suggestion that all states adopt the rule laid down in its decision seems neither sound nor likely to be accepted. Should the court's decree be entitled to full faith and credit, one more step in the encouragement of migratory divorces would be taken. If it is valid in New York but not entitled to full faith and credit elsewhere, an unfortunate instability in the status of the parties as they move from state to state has been made possible.

Maynard E. Cush

CONSTITUTIONAL LAW—CONSTITUTIONALITY OF LOUISIANA DIRECT ACTION STATUTE—SUITS ON OUT-OF-STATE CONTRACTS CONTAINING NO-ACTION CLAUSES

Plaintiff, a Louisiana resident, brought a direct action against defendant insurer, a British corporation, to recover damages for injuries resulting from the use in Louisiana of a product manufactured by the insured, a Delaware corporation. Suit was removed to the federal district court on the ground of diversity. The contract of insurance was issued in Massachusetts and delivered there and to a subsidiary corporation in Illinois. It contained a provision, valid and enforceable in Massachusetts and Illinois, prohibiting actions against the insurer until the amount of the insured's obligation to pay had been determined either by judgment against the insured or by written agreement. As a condition to doing business in Louisiana, the defendant insurer had consented to be sued[1] under the Louisiana direct action

23. RESTATEMENT, JUDGMENTS § 10 (1942). The date of the *Restatement* of course indicates that the American Law Institute did not have in mind the problems of divorce jurisdiction that have recently arisen. The 1948 supplement to the *Restatement* does not alter the section quoted. However, the original comment (b) of this section states: "[I]f a suit for divorce is brought in the court of a justice of the peace, which has no jurisdiction to grant a divorce, and judgment is given granting the divorce, the judgment is void and subject to collateral attack even though the defendant appeared in the action and the question of the jurisdiction of the court to grant a divorce was litigated and determined adversely to the defendant."

1. Consent is required under La. Acts 1950, No. 542, p. 986, now LA. R.S. 22:983E (1950): "No certificate of authority to do business in Louisiana shall

statute, R.S. 22:655.[2] In the United States district court suit was dismissed and the Louisiana direct action provisions were held to be unconstitutional when applied to an out-of-state contract containing a "no-action" clause.[3] The Court of Appeals for the Fifth Circuit affirmed. On appeal, *held*, reversed. The legitimate interest of Louisiana in the welfare of persons injured within the state justified the application of its own law and the refusal to enforce the provisions of the out-of-state contract. Neither the due process nor the full faith and credit clause is violated by the Louisiana direct action provisions. *Watson v. Employers Liability Assurance Corp.*, 75 Sup. Ct. 166 (1954).

From its beginning in act 55 of 1930, the constitutionality of the Louisiana direct action statute has been the subject of considerable litigation in the lower federal courts.[4] The 1930 act was generally held to be procedural rather than substantive and its constitutionality upheld on this basis even when applied to out-of-state contracts.[5] Shortly after Louisiana passed its Insurance Code,[6] in which act 55 of 1930 was re-enacted as section 14:45, it was held in *Belanger v. Great American Indemnity Co.*[7] that the legislature did not intend the direct action provisions

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be issued to a foreign or alien liability insurer until such insurer shall consent to being sued by the injured person or his or her heirs in a direct action as provided in Section 655 of this Title, whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not, and whether or not such policy contains a provision forbidding such direct action, provided that the accident or injury occurred within the State of Louisiana. The said foreign or alien insurer shall deliver to the Secretary of State as a condition precedent to the issuance of such authority, an instrument evidencing such consent."

2. The statute provides in part: ". . . The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy . . . and said action may be brought against the insurer alone or against both the insured and the insurer jointly and in solido. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the state of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana."

3. Watson v. Employers Liability Assurance Corp., 107 F. Supp. 494 (W.D. La. 1952), *aff'd*, 202 F.2d 407 (5th Cir. 1953).

4. For a detailed discussion of the decisions which have considered the constitutionality of the statute, see Comment, *Direct Actions—Insurance Contracts*, 13 LOUISIANA LAW REVIEW 495 (1953).

5. Rogers v. American Employers Ins. Co., 61 F. Supp. 142 (W.D. La. 1945); Hudson v. Georgia Casualty Co., 57 F.2d 757 (W.D. La. 1932); Robbins v. Short, 165 So. 512 (La. App. 1936). See also Richburg v. Massachusetts Bonding & Ins. Co., 74 F. Supp. 442 (W.D. La. 1947). *But see* Wheat v. White, 38 F. Supp. 796 (E.D. La. 1941).

6. La. Acts 1948, No. 195, Vol. I, p. 508.

7. 89 F. Supp. 736 (E.D. La. 1950).

to apply to out-of-state contracts. In dictum in that case the court also stated that the Louisiana act could not constitutionally apply to such contracts if they contained "no-action" clauses valid under the law of the place of contract. By act 541 of 1950[8] the legislature specifically provided that the direct action provisions should apply even where out-of-state contracts were involved, so long as the accident or injury occurred in Louisiana. In addition, all insurance companies were required by act 542 of 1950[9] to consent to be sued under the direct action statute as a condition to doing business in this state. In *Bouis v. Aetna Casualty & Surety Co.*[10] the federal district court gave act 541 of 1950 retroactive effect and enforced the direct action provisions against an out-of-state insurance contract containing a "no-action" clause. The decision was based on a finding that the statutes were procedural or remedial and not substantive. However, in a later decision by the same court, *Bayard v. Traders and General Ins. Co.*,[11] the statute was held to be substantive. Its attempted application to an out-of-state contract was held to be unconstitutional.[12] Since that case, with the exception of *Buxton v. Midwestern Ins. Co.*,[13] the federal courts have consistently followed the *Bayard* decision.[14]

In the instant case, the first time the United States Supreme Court has considered the constitutionality of the Louisiana direct action statute, the defendant contended that it violated the equal protection, contract, due process and full faith and credit clauses of the Federal Constitution. The Court dismissed the equal protection and contract clause arguments with very brief comment.[15] Because the contract was made outside of Louisiana and the direct action provisions clearly altered the obligations

8. Amending LA. R.S. 22:655 (1950).
9. See note 1 *supra*.
10. 91 F. Supp. 954 (W.D. La. 1950).
11. 99 F. Supp. 343 (W.D. La. 1951).
12. The court relied on the decision in Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934).
13. 102 F. Supp. 500 (W.D. La. 1952). The court relied upon the consent to be sued given by the defendant in compliance with LA. R.S. 22:983E (1950).
14. Employers Mut. Liab. Ins. Co. v. Eunice Rice Milling Co., 198 F.2d 613 (5th Cir. 1952), *cert. denied*, 344 U.S. 876 (1952); Fisher v. Home Indemnity Co., 198 F.2d 218 (5th Cir. 1952); Mayo v. Zurich General Accident & Liability Ins. Co., 106 F. Supp. 579 (W.D. La. 1952); Bish v. Employers Liability Assurance Corp., 102 F. Supp. 343 (W.D. La. 1952).
15. The Court found the equal protection argument "wholly void of merit," since the statute's provisions apply equally to all domestic and foreign insurers. As to the contended impairment of contract, the Court simply stated that the direct action provisions became effective before the contract was made.

of the defendant, so that the statute would seem to some extent to have extra-territorial effect, the Court considered the due process contention in more detail. After stating that in the decisions relied on by defendant[16] it had been carefully pointed out that a situation might arise in which the interest of a state was so important as to justify non-enforcement of an out-of-state contract, the court found the interest of Louisiana[17] in taking care of persons injured within the state to be of this type, and that Louisiana had a legitimate concern in the local activities in connection with the policy. It was held that there was no denial of due process in the refusal of Louisiana to enforce the "no-action" clause of defendant's contract. Relying largely on the same reasoning, the court held that there was no violation of the full faith and credit clause in Louisiana's refusal to apply the law of the place of contract, under which the no-action clause was valid and enforceable. The court felt that the interest of Louisiana was not outweighed by the interest of the state in which the contract was made; therefore Louisiana was free to enforce its own laws and policies. The Court found it unnecessary to consider the contention of defendant that the requirement of consent to be sued as a condition of doing business in Louisiana forced defendant to surrender its constitutional rights,[18] because as the court stated: "Louisiana has a constitutional right to subject foreign liability insurance companies to the direct action provision of its laws whether they consent or not."[19]

Since its enactment the Louisiana direct action statute has been subjected to almost every conceivable attack on its constitutionality. The lower federal courts, in sustaining some of these attacks, had considerably limited the application of the statute.

16. Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934); Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

17. This interest was described as that of safeguarding the rights of and caring for persons injured in this state, who might become destitute, and needing treatment, would call upon the public for help. The Court stated that Louisiana has "manifested its natural interest by providing remedies for recovery of damages." Watson v. Employers Liability Assurance Corp., 75 Sup. Ct. 166, 170 (1954).

18. Justice Frankfurter, in a concurring opinion, stated that the majority's reasoning in terms of the constitutional issues involved was unnecessary. The concurring opinion was based solely on the ground that Louisiana, having the power to "exclude the insurance company from coming into the state to do business," could constitutionally require the company to consent to suit under the direct action provisions, the requirement being neither unreasonable nor arbitrary and being "strictly related to the protection of serious interests of its own citizens." 75 Sup. Ct. 166, 171 (1954).

19. *Id.* at 170.

In the instant decision the Supreme Court considered and rejected the arguments which, in the past, have been successful in preventing its use. The decision should at long last put an end to recurring litigation over the constitutionality of the statute.[20]

Sidney B. Galloway

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—FLUORIDATION OF WATER SUPPLY BY CITY

The Shreveport City Council adopted a resolution authorizing the fluoridation of the city water supply as a means of combating tooth decay in children. The plaintiffs, as residents, citizens, taxpayers, and purchasers of water from the city, sought to enjoin the fluoridation, contending (1) that the contemplated action was not authorized by the city's charter, and (2) that even if authorized by the charter, the measure was nevertheless repugnant to the due process and equal protection clauses of the fourteenth amendment. The trial court issued the injunction, stating that the measure was strictly within the realm of private dental hygiene and bore no reasonable relation to the public health. On appeal, *held*, reversed. The city's fluoridation of its water supply did bear a reasonable relation to the general health and welfare of the community, was therefore authorized by the city's charter, and violated neither the due process nor equal protection clause of the fourteenth amendment. *Chapman v. City of Shreveport*, 225 La. 859, 74 So.2d 142 (1954).

Concerning the constitutionality of state legislation enacted for the public health and welfare, the Supreme Court of the United States has stated: "Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment."[1] In accordance with this view, the Court has upheld a state statute providing for the sterilization of idiots to prevent an increase in the number of

20. Lumbermen's Mutual Casualty Co. v. Elbert, 75 Sup. Ct. 151 (1954), decided the same day as the *Watson* case, also settled an issue concerning the Louisiana direct action statute which has often been involved in litigation. Federal jurisdiction was upheld on the ground that the "matter in controversy . . . is between: (1) Citizens of different States" (28 U.S.C. § 1332(a) (1952)) whenever an out-of-state insurer is sued directly (without joinder of the insured) by a Louisiana citizen, regardless of the fact that the insured wrongdoer is also a Louisiana citizen.

1. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937).