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Statutory Liability of Insurance Agents

NOTES AND COMMENTS

CONFLICT OF LAWS

STATUTORY LIABILITY OF AGENTS IN INSURANCE

The defendants, officers of an Indiana insurance corporation not authorized to do business in West Virginia, induced policyholders to solicit insurance in that state. A West Virginia statute imposed personal liability upon agents of foreign insurance corporations not authorized to do business in the state for contracts made by or through them within the state. Plaintiff, beneficiary of such a policy made in West Virginia, sued defendants in Indiana on this statute. Held, for plaintiff. The West Virginia statute will be enforced in Indiana.[1]

The sundry liabilities of an officer or director of a corporation usually are determined by the law of the state of incorporation. He contracts with reference to all the laws of the state in which the corporation is organized.[2] It has been said frequently that foreign corporations may be excluded from a state entirely or admitted on conditions.[3] For this reason, if the officer of the foreign corporation is subject to the legislative jurisdiction of the state,[4] that state may impose statutory liability upon such officer for the acts or omissions of corporate agents within the state as a condition to doing business therein.[5]

A state may exercise legislative jurisdiction over an officer or agent of a foreign corporation in three instances: (1) where the articles of incorporation expressly authorize that business be carried on in that state;[6] (2) where the officer or agent is domiciled in that state;[7] and (3) where the officer or agent, directly or indirectly, has caused the acts or omissions in that state.[8] In the principal case, the

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[1] Karvalsky v. Becker, 29 N. E. (2d) 560 (Ind. 1940).

[2] Ball v. Anderson, 196 Pa. 86, 46 Atl. 366 (1900); notes (1911) 33 L. R. A. (N. S.) 895, (1891) 13 L. R. A. 56.

[3] Waters-Pierce Oil Co. v. Texas, 177 U. S. 28 (1900); State v. Insurance Co., 115 Ind. 257, 17 N. E. 574 (1888).

[4] Thomas v. Matthiessen, 232 U. S. 221 (1913); RESTATEMENT, CONFLICT OF LAWS (1934) § 191.

[5] BEALE, CONFLICT OF LAWS (1935) § 179.28; RESTATEMENT, CONFLICT OF LAWS (1934) § 188. In some states the agent is liable personally at common law to the party with whom he deals on an implied warranty of authority. Lasher v. Stimson, 145 Pa. 30, 23 Atl. 552 (1892). In several states all members of the corporation are liable as partners for acts of the corporation before compliance. Cunnyngham v. Shelby, 136 Tenn. 176, 188 S. W. 1147 (1916).

[6] Thomas v. Matthiessen, 232 U. S. 221 (1913); Thomas v. Wentworth Hotel, 158 Cal. 257, 110 Pac. 942 (1910); Pinney v. Nelson, 183 U. S. 144 (1901); Risdon Iron & Locomotive Works v. Furness [1906] 1 K.B. 49.

[7] RESTATEMENT, CONFLICT OF LAWS (1934) § 191.

[8] *Ibid.* The sole Indiana case which touches on these three instances of proper legislative jurisdiction rests squarely on the first, does not mention the second, and implies the existence of the third. Towle v. Beistle, 97 Ind. App. 241, 186 N. E. 344 (1933).

officers caused their agents to do acts in West Virginia. Since West Virginia had legislative jurisdiction over the officers, the statutory liability was valid if the liability were transitory and if the jurisdiction were not otherwise precluded from enforcing it.

Transitory acts, as distinguished from local, are those which can be brought wherever the defendant can be found.[9] However, some actions, nominally transitory, cannot be maintained apart from the place where they arise, for one of several reasons. A court may apply the doctrine of *forum non conveniens, i.e.* it admittedly has jurisdiction but refuses enforcement because substantial inconvenience would result.[10] A reason more often given is that it would conflict with the local public policy of the forum.[11] Nor will a court exercise its jurisdiction if the machinery for enforcement of the foreign claim is peculiar to the state where the action arose.[12] Finally, a court will not enforce a claim based on a "penal" law of another state.[13]

Two tests for penalty have been evolved. According to roughly half the states, the claim is penal if the permissable recovery includes more than bare compensation, or if it is measured by defendant's culpability or by any standard other than the extent of the injury.[14] The Supreme Court in *Huntington v. Attrill*[15] crystallized a second test which has been adopted by the other half of the states. "The question whether a statute of one state, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another state, depends upon the

[9] Mostyn v. Fabrigas, 98 Eng. Rep. 1021 (1774); Wheaton, *Nature of Actions—Local and Transitory* (1922) 16 Ill. L. R. 456.

[10] Blair, *Doctrine of* Forum Non Conveniens *in Anglo-American Law* (1929) 29 Col. L. Rev. 1; Foster, *Place of Trial in Civil Actions* (1930) 43 Harv. L. R. 1217.

[11] Public policy in the internal sense is defined in Kintz v. Harriger, 99 Ohio St. 240, 246, 124 N. E. 168, 170 (1919). That it may be something else in the conflict of laws sense is pointed out by Goodrich, *Foreign Facts and Local Fancies* (1938) 25 Va. L. Rev. 26. *See also* Kosters, *Public Policy in Private International Law* (1920) 29 Yale L. J. 745; Nutting, *Suggested Limitations on the Public Policy Doctrine* (1935) 19 Minn. L. Rev. 196. The present tendency is toward comity unless the action "in its nature offends our sense of justice or menaces the public welfare." Cardoza, J., in Loucks v. Standard Oil, 224 N. Y. 99, 110, 120 N. E. 198, 201 (1918). RESTATEMENT, CONFLICT OF LAWS (1934) § 612 uses the term "strong public policy."

[12] Mosley v. Empire Gas & Fuel Co., 313 Mo. 225, 281 S. W. 762 (1926). With respect to statutory liability of corporate officers, *see* Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 919 (1895). *Contra*: Bell v. Farwell, 176 Ill. 489, 52 N. E. 346 (1898).

[13] The Antelope, 10 Wheat. 123 (U. S. 1825); Carnahan v. Western Union, 89 Ind. 526 (1883).

[14] Cary v. Schmeltz, 141 Mo. App. 570, 125 S. W. 532 (1910); Nesbitt v. Clark, 272 Pa. 161, 116 Atl. 440 (1922); MINOR, CONFLICT OF LAWS (1901) § 10. The Restatement adopts the same view, but qualifies it so that "where the wrong makes the wrongdoer a statutory party to an already existing duty, the duty is not a penalty, since the injured person obtains only payment of his claim." Section 611.

[15] 146 U. S. 657 (1892).

question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act."[16] This test presupposes that the question of penalty is to be governed solely by the law of the forum uncontrolled by any decisions, relevant or irrelevant, of the state whose law raises the issue.[17]

Those courts adopting the non-compensatory theory refuse suits on foreign statutes providing for minimum recovery in certain negligence cases,[18] and on statutes allowing double or treble damages.[19] Likewise, under that theory, statutes creating personal liability upon officers and directors for acts or omissions are called penal.[20] These statutes are to some extent punitive with respect to those upon whom liability is imposed, however compensatory they may be to the one in whose favor the obligation runs. Nevertheless, the reasons for non-enforcement of the criminal laws of another state[21] do not seem to apply to civil claims, though the statutes giving rise to the claims may be called "penal." Therefore the *Huntington v. Attrill* test seems more desirable. The only justifiable grounds upon which a court might refuse to enforce such statutory claims would be a local public policy opposing them,[22] or the practical inconveniences, such as expense of trial, absence of a fair remedy, or undue hardship on the parties involved in the enforcement. At any rate, the refusal should not be based on penalty, aside from cases involving criminal statutes.[23]

W.D.B. Jr.

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[16] *Id.* at 673-674.

[17] *Id.* at 683; Daury v. Ferraro, 108 Conn. 386, 143 Atl. 630 (1928). *But see* Comm. Nat'l Bank v. Kirk, 222 Pa. 567, 71 Atl. 1085 (1909) expressing sympathy with the Huntington case, but refusing to enforce a foreign statute when regarded as penal in the state where enacted. Quaere, does it follow that because a state treats a statute as penal for some purposes, *e.g.*, strict construction, that it should be held penal, even by the same court, for purposes of international law? *Cf.* Nesbitt v. Clark, 272 Pa. 161, 116 Atl. 404 (1922). *See also* Davis v. Mills, 99 Fed. 39 (C. C. D. Conn. 1900); Cary v. Schmeltz, 141 Mo. App. 570, 125 S. W. 532 (1910).

[18] Leflar, *Extrastate Enforcement of Penal And Governmental Claims* (1932) 46 Harv. L. R. 193, n. 39-42.

[19] Taylor, Farr & Co. v. W. U. Tel. Co., 95 Iowa 740, 64 N. W. 660 (1895); Mohr v. Sands, 44 Okla. 330, 133 Pac. 238 (1914).

[20] Some courts have sought to avoid the issue by discovering a semi-contractual assumption of the statutory liability in the idea that the corporate official will be taken to have assented to the legal consequences of his voluntary acts. Farr v. Brigg's Estate, 72 Vt. 225, 47 Atl. 793 (1900). Or a quasi-contractual obligation arising either by reason of the creditor's assumed knowledge of the official's delinquency, which presumably led him to rely on the statutory right against the official as well as upon the credit of the corporation. Sherman & Sons Co. v. Bitting, 26 Ga. App. 299, 105 S. E. 848 (1921); Great Western Machine Co. v. Smith, 87 Kan. 331, 124 P. 414 (1912). Or by reason of a contradicting assumption that by the official's delinquency the creditor was led to rely unjustifiably upon the credit of the corporation alone. *Ibid.* *See* Leflar, *supra* note 18.

[21] *Id.* at 198-202.

[22] *See* Beach, *Uniform Enforcement of Vested Rights* (1918) 27 Yale L. J. 656 at 662.

[23] *See* Leflar, *supra* note 18 at 202, n. 28.