

CONFLICT OF LAWS: FIFTH CIRCUIT DECISION GIVES SUPREME COURT OPPORTUNITY TO GIVE FURTHER DEFINITION TO THE SCOPE OF THE DUE PROCESS CLAUSE

COURTS HAVE traditionally resorted to a body of choice of law rules and ancillary principles for solution of conflict of laws problems¹ without formally considering the legitimate interests of the forum state. However, the only limitation on a court's choice of its own state's law is the general principle of comity² with the further restraint of the United States Constitution.³ In reviewing the Fifth Circuit Court of Appeal's decision in *Sun Ins. Office, Ltd. v. Clay*,⁴ the United States Supreme Court will have an opportunity to give further definition to the extent to which the due process clause precludes a state from giving extraterritorial effect to its own legislation concerning contractual obligations.

The plaintiff, an Illinois resident, had obtained a personal property floater insurance policy in that state before moving to and becoming a resident of Florida. The policy contained a clause, valid under the laws of Illinois, requiring that suit be brought within one year after discovery of loss.⁵ A Florida statute purported

¹ See, e.g., RESTATEMENT, CONFLICT OF LAWS (1934). Such traditional rules have been the subject of increasing criticism. See generally, COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942); Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1, 39.

² Comity has been defined as neither a matter of absolute obligation nor of mere courtesy but a recognition which one state or nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

³ Of principal concern here are the full faith and credit clause and the due process clause. Also operative in the area of conflict of laws are the privileges and immunities clause and the equal protection clause. See generally, Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958). The Constitution grants Congress the power of implementing the effect of those clauses in the area of conflict of laws. U.S. CONST. art. IV, § 1; *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 306 U.S. 493, 502 (1939). However, with slight exception, Congress has failed to exercise that power and the Supreme Court continues in the task of giving case by case definition to their effect on conflict of law. Cook, *op. cit. supra* note I, ch. IV.

⁴ 319 F.2d 505 (5th Cir.), *cert. granted*, 375 U.S. 929 (1963).

⁵ The suit clause provided: "No suit, action or proceeding for the recovery of any claim under this Policy shall be sustainable in any court of law or equity unless the same be commenced within twelve (12) months next after discovery by the Assured of the occurrence which gives rise to the claim. Provided, however, that if by the

to invalidate all such suit clauses.⁶ After becoming a resident of Florida the insured sustained a loss of property located in that state, but failed to bring suit until fifteen months after discovery of the loss. The Court of Appeals held that the due process clause is violated by application of the Florida statute.⁷ Certiorari has been granted.⁸

The United States Supreme Court has held in workmen's compensation decisions that *prima facie* every state is constitutionally entitled to enforce its own statutes,⁹ in its own courts, and that regardless of the place of the employment contract,¹⁰ residence of the parties to that contract,¹¹ and, under certain circumstances, even the place of injury,¹² if the forum has a legitimate interest in applying its own state's policy the application of a local statute will be sustained. Economic and physical protection of employees in-

laws of the state within which this Policy is issued such limitation is invalid, then any such claims shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted by the laws of such state to be fixed herein." *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 215 n.8 (1960).

⁶ FLA. STAT. § 95.03 (1961). Relevant portions are: "All provisions and stipulations contained in any contract whatever . . . fixing the period of time in which suit may be instituted . . . at a period of time less than that provided by the statute of limitations of this state, are hereby declared . . . to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section." FLA. STAT. § 95.11(3) (1961) provides a five-year limitation for actions on written contracts not under seal.

⁷ Upon certiorari after an earlier identical holding by the Court of Appeals, the Supreme Court abstained from the constitutional question and remanded for certification to the Florida Supreme Court. *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207 (1960). The Florida court found that state's "contact with the subject contract and parties" sufficient for the statute to be applicable. *Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735, 738 (Fla. 1961). Although the Court of Appeals, in its latest decision, recognized the binding effect of a state's choice of law on the federal courts, application of the Florida statute was held again to be precluded by the due process clause. The significant contacts test, apparently used by the Court of Appeals and the Florida Supreme Court to determine the constitutional question, generally has been used as a choice of law rule rather than in determining the constitutionality of that choice. As a choice of law rule it has been stated: "The validity of a contract is determined by the local law of the state with which the contract has its most significant relationship . . ." RESTATEMENT (SECOND), CONFLICT OF LAWS § 332(a) (Tent. Draft No. 6, 1960). The contacts test differs from the traditional rules mentioned *supra* note 1, but is superficially similar to the governmental-interest analysis characteristically used by the Supreme Court in conflict of laws questions with a constitutional basis. See *Currie, supra* note 1, at 39. The leading case in the use of governmental-interest analysis is *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935).

⁸ *Clay v. Sun Ins. Office, Ltd.*, 375 U.S. 929 (1963).

⁹ *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532, 547-48 (1935).

¹⁰ *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 306 U.S. 493 (1939).

¹¹ *Ibid.*

¹² *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935).

jured within the state¹³ and of those injured elsewhere who have returned and may burden that state's welfare system¹⁴ are typical legitimate interests which justified application of the forum's statute. Although these decisions turn primarily on the full faith and credit clause, they illustrate the governmental-interest analysis characteristically used by the Court in determining the constitutionality of a court's choice of its own state's law.¹⁵

Three cases, turning primarily on the due process clause, appear to be most pertinent to *Sun Insurance*. In *Home Ins. Co. v. Dick*,¹⁶ a policy had been obtained by a Mexican citizen from a Mexican insurance company to insure a tugboat, only while in Mexican waters. An assignee of that policy, a Mexican resident technically domiciled in Texas, sought to recover from two New York insurance companies, reinsurers of the Mexican company. The Court held that application by the Texas courts of a Texas suit clause statute had deprived defendant of property without due process of law.

In *Hartford Acc. Indem. Co. v. Delta & Pine Land Co.*,¹⁷ defendant had insured the plaintiff, a Mississippi corporation with its principal place of business in Tennessee, against defalcations by its employees. The policy contained a clause, valid under the laws of Tennessee, requiring that all claims of loss be made within fifteen months after expiration of the policy. Plaintiff corporation subsequently moved its office to Mississippi where, more than fifteen months after expiration of the policy, it brought suit to recover losses resulting from defalcations by its treasurer there. Application of a Mississippi statute invalidating the claim limitation clause was held to be unconstitutional.¹⁸

¹³ *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 306 U.S. 493 (1939).

¹⁴ *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935).

¹⁵ See generally, Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581 (1953); Currie, *supra* note 3, at 9-14. The Brief for the Appellant (defendant) in the Court of Appeals proceeded generally on the basis of governmental-interest analysis.

¹⁶ 281 U.S. 397 (1930).

¹⁷ 292 U.S. 143 (1934).

¹⁸ Similar cases denying the validity of applying the law of the forum are: when a life insurance policy had been obtained by a New York resident in that state, and in which the insured had died before his beneficiary wife moved to and brought suit in Georgia, *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936); and when an insurance policy had been obtained in Tennessee by a resident of that state who later moved to Texas, obtained a conversion policy in exchange for the original, and subsequently brought suit there, *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389 (1924). *Dunken* involved a Texas statute imposing 12% interest and reasonable attorney's fees for failure to pay claims within thirty days of demand.

However, in *Watson v. Employers Liab. Assur. Corp.*,¹⁰ application of a statute of the forum state was upheld. Defendant had issued a liability insurance policy to a Massachusetts manufacturer of home permanents. A clause in that policy prohibited direct actions against the insurer until after final determination of the obligation of the insured. A Louisiana statute, permitting direct action before final determination of obligation, had been applied in an action by plaintiff to recover for personal injury resulting from use of the product. After distinguishing *Dick* and *Delta & Pine*²⁰ Mr. Justice Black wrote for the Court: Some contracts made locally, affecting nothing but local affairs may well justify a denial to other states of power to alter those contracts. But, as this case illustrates, a vast part of the business affairs of this nation does not present such simple local situations.²¹ Louisiana had manifested its natural interest in the injured by providing remedies for recovery of damages and had a similar interest in policies of insurance which are designed to assure ultimate payment of such damages. Because of these legitimate interests, the due process clause had not been violated; and for similar reasons, the full faith and credit clause did not compel Louisiana to subordinate its statute to the contract rules of Massachusetts.²²

Although both *Dick* and *Delta & Pine* were relied on by the Court of Appeals as controlling in the instant case, each can be factually distinguished. *Dick* only denies a forum's choice of its

Although apparently on point with *Sun Insurance, Dunken* may be of limited vitality in that the decision did not consider the interest of Texas in the litigation. There is no reference to the case in the Brief for the Appellant. See also *New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914), which held that the state in which a contract was made *could not* apply its own law when neither party was a resident of that state either at time of contracting or of suit.

¹⁰ 348 U.S. 66 (1954).

²⁰ As to *Dick*, Mr. Justice Black said, "the subject matter of the contract related in no manner to anything that had been done or was to be done in Texas.... But this Court carefully pointed out that its decision might have been different had activities relating to the contract taken place in Texas upon which the state could properly lay hold as a basis for regulation," and as to *Delta & Pine* he said, "Mississippi activities in connection with the policy were found to be so 'slight' and so 'casual' that Mississippi could not apply its own law.... Again, however, the Court carefully noted that there might be future cases in which the terms of out-of-state contracts would be so repugnant to the vital interests of the forum state as to justify nonenforcement." 348 U.S. at 71.

²¹ *Id.*

²² *Id.* at 72-73. Claims under other clauses of the Constitution were summarily dismissed: the direct action statute was valid under the equal protection clause because it had no discriminatory effect, and under the contract clause because the statute had become effective before the contract was made. *Id.* at 70.

own law when that state's only interest is the technical domicile of the plaintiff; and *Delta & Pine* dealt not with a clause requiring suit within one year after knowledge of the loss, but with a clause requiring notice of claim within fifteen months after expiration of the policy.²³ Furthermore, Mr. Justice Black has suggested that the result might have been otherwise if *Delta & Pine* had been decided in more recent years.²⁴ Although these cases define the scope of the due process clause with regard to their particular facts, it is inherent in the concept of that clause that its scope be determined by a "gradual process of judicial inclusion and exclusion."²⁵ In *Watson* the state's interest brought the application of its direct action statute within the scope of due process. Whether Florida's interest, under the facts of *Sun Insurance*, is of the same nature is the question before the Court.

Prior decisions indicate no standard used by the Court in determining the constitutionality of the extraterritorial application of legislation such as Florida's suit clause statute. However, an analogy can be found in cases involving retroactive legislation.²⁶ In both situations a state's legislative policy operates to enlarge pre-

²³ The *claim* clause protects the insurer from stale claims without shortening the insured's action time. The *suit* clause protects the insurer from stale claims but also shortens the insured's action time in a manner declared inoperative by the laws of a majority of the states. See, CARNAHAN, CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS § 26 (h) n.83 (1958).

²⁴ "I, myself, have grave doubts that the *Delta & Pine Land Co.* case would be treated the same way today on its facts." *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 220 (1960). It may be significant that both *Dick* and *Delta & Pine* were decided before *Alaska Packers*, the leading case in governmental-interest analysis. *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935).

²⁵ *Davidson v. New Orleans*, 96 U.S. 97, 104 (1877).

²⁶ Currie, *The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws*, 28 U. CHI. L. REV. 258, 290-94 (1961); Currie, *supra* note 1, at 50-52. Retroactive legislation and extraterritorial legislation are distinguishable in that the retrospective effect of the former eventually expires while the effect of the latter will exist as long as the legislation itself exists. However, a countervailing distinction can be made. Subjection of a contract to otherwise constitutional legislation having extraterritorial effect might reasonably have been within the expectation of the parties; whereas, retrospective legislation must come as a surprise.

It has been suggested that in conflict of laws situations such as *Sun Insurance* the constitutionality of the extraterritorial legislation might sometimes turn on whether, at time of enactment, that legislation had been declared retroactive. *Ibid.* Such a declaration of retroactivity would be an indication of the exigency of the state's policy, particularly if the legislation had been recently enacted. However, the Florida suit clause invalidation statute was enacted in 1913. Although that legislation was, in fact, not declared retroactive, its most significant aspect would seem to be that it purported to declare void all suit clauses in "any contract whatever" and commanded that no court in that state give effect to any such clause. FLA. STAT. § 95.03 (1961).

existing rights or obligations. Yet, not all retroactive legislation violates due process, the test essentially being one of reasonableness in light of all the circumstances.²⁷ It also has been suggested that, in conjunction with the reasonableness test, the Court considers whether a party has changed his position in reliance on the existing law²⁸ and whether the retrospective aspect of the legislation gives effect to the reasonable expectation of the parties.²⁹

Fundamental to any consideration of *Sun Insurance* is an understanding of Florida's interest in it. The elements of that interest might be characterized as (1) the interest of a state in the economic welfare of its citizens,³⁰ (2) its interest in all personal property located within its borders,³¹ and (3) its interest in the regulation of insurance within the state.³²

There is little doubt that Florida could have asserted its interest if the contract had been entered into in that state³³ or that it could have been asserted if Clay had been a Florida citizen at the time of obtaining the insurance in Illinois.³⁴ Because Clay was, instead, a citizen of Illinois at the time of contracting, the insurer seeks to stand on a clause which is inoperative under the laws of Florida. The criteria used by the Court in retroactive legislation cases would seem to be peculiarly applicable since Florida's interest arose only after the contract had been made, when Clay became a citizen of that state.

²⁷ See, e.g., *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), in which Chief Justice Hughes said: "Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends." *Id.* at 442.

²⁸ Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 696 (1960).

²⁹ *Ibid.*

³⁰ *Watson v. Employers Liab. Assur. Corp.*, 348 U.S. 66 (1954). Referring to the Florida statute in *Sun Insurance*, Mr. Justice Black has said "[It is] in line with the protective safeguards, that States have felt it necessary to create so as to preserve a fair opportunity for people who have bought and paid for insurance to go to court and collect it." *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 215 (1960).

³¹ For example, the state has exclusive power of taxation of all tangible personal property located within its borders. *Carstairs v. Cochran*, 193 U.S. 10 (1904). The presence or absence of the personal property within the state of the forum might be determinative under some circumstances. See examples, *infra* note 41.

³² *Hoopston Canning Co. v. Cullen*, 318 U.S. 313 (1943); *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201 (1941).

³³ See *Mutual Life Ins. Co. v. Liebing*, 259 U.S. 209 (1922).

³⁴ See *New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914).

In *Watson* a similar extraterritorial application of a statute was held to be constitutional. Arguably, application of the direct action statute in that case had been within the reasonable expectations of the parties. The same might be said of *Sun Insurance*. The policy purported to insure against "all-risks," "World-Wide," for a term of three years.³⁵ No less than thirty-one states and the District of Columbia had suit clause invalidation statutes,³⁶ and the Florida statute purported to declare void all such clauses "in any contract whatever."³⁷ Furthermore, it might be argued that, after moving to Florida, the insured reasonably relied on the Florida law as invalidating the suit clause in his policy.

Ultimately, however, this case would seem to turn on the more general criteria of reasonableness, *i.e.*, the reasonableness of allowing Florida to assert its interest. Although the Court has not used the term in its conflict of laws decisions, the standard of reasonableness would seem to be implicit in the governmental-interest analysis it characteristically employs. The reasonableness, and thus the constitutionality, of the application of the Florida statute in this case should be determined, in effect, by considering the strength of the state's interest in the light of any unfairness created by the statute's extraterritorial operation.³⁸

The mere statement of the test points up the possible complexity of considerations which might be made. Yet, in the instant case that complexity must result in great part from the increasing mobility of the nation's population.³⁹ And that mobility of popula-

³⁵ *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 208 (1960).

³⁶ *CARNAHAN, op. cit. supra* note 23.

³⁷ *FLA. STAT. § 95.03* (1957).

³⁸ A consideration of the unfairness to the defendant, as well as of the strength of the state's interest to be served, would seem essential to the determination of any due process issue. However, due process determinations would not call for any consideration of the interest of states other than of the forum, *e.g.*, Illinois in the instant case, since such interests do not fall within the protection of the due process clause. See also *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532, 547 (1935), as to consideration of the interests of other states in regard to the full faith and credit clause.

³⁹ This change in our national character has presumably resulted in a maturing in other areas of the law. For obtaining jurisdiction without actual personal service of process, due process requires only that a foreign corporation have "certain minimum contacts with it [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). *Cf. McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). The workmen's compensation cases illustrate a similar attitude toward that mobility in an area of conflict of laws which, although most accurately

tion would seem to strengthen the interest of Florida and of any other state under similar circumstances, *i.e.*, an interest in preserving adequate and uniform legal remedies for *all* of its citizens holding insurance policies on personal property owned by them in that state.

Reasonable men, of course, can and do disagree as to the constitutionality of application of Florida's statute in the instant case.⁴⁰ Seemingly, however, Florida's interest should be sufficient. The state's traditional concern with matters of insurance, personal property and legal remedies are interrelated. In an age when the migration of potential litigants is commonplace, the state's policy of providing fair and uniform contract remedies should not be thwarted because of the place of contract or residence of the parties at the time of contract. In other cases, circumstances may demand the denial of the forum's freedom of choice of laws.⁴¹ But such facts must stand on their own, without arbitrary reliance on place of contract or residence of the parties. In *Sun Insurance* those facts do not exist.

characterized as statutory, may be said to contain elements of both tort and contract law.

⁴⁰ When *Sun Insurance* was first before the Supreme Court, Mr. Justice Frankfurter, for the majority, termed the constitutional question a serious one. 363 U.S. at 209. Mr. Justice Black, who thought the "answer to the constitutional question is... clear," would have held the statute valid as applied. *Id.* at 214. The Chief Justice and Mr. Justice Douglas concurred in his dissent from the majority's abstention.

⁴¹ For example, if in *Sun Insurance*, Clay had lost property at a home retained by him in Illinois, even though he had moved to and become a citizen of Florida, or if the Florida statute had imposed double liability on insurance companies for failure to promptly pay valid claims, a different result might be called for.