

# Conflict of Laws in Automobile Insurance\*

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One week last February our claim department in quick succession propounded these two cases:

(1) Automobile theft insurance had been issued in State *A*, the car suffering damage in State *B* at the hands of a teen-ager who unlawfully appropriated the car for a joy ride. Under the decisions of State *A*, such a conversion did not amount to a "theft" within the meaning of the insurance; the reverse was true under the decisions of State *B*. Accordingly, was the company obligated for the loss by reason of it having occurred in State *B*, instead of in the state where the policy was issued?

(2) Automobile liability insurance had been issued in State *X*, an accident occurring in State *Y* arising out of the delivery of merchandise from the car to the upper floor of a building. Under the decisions of State *X*, the language of the policy, which afforded coverage for "use of the automobile, including the loading and unloading thereof", had been given a broad interpretation and the case would have been regarded as covered under such form of policy. However, under the decisions of State *Y*, this reference in the policy to "loading and unloading" had received a narrower interpretation, so that the policy would not have been regarded as covering the case. Accordingly, could the company take advantage of the favourable case law of State *Y* because the accident occurred in State *Y*?

Both these cases turned on the same basic question: Did the fact that the accident or loss occurred in a different state from that where the contract was consummated alter the substantive construction to be given the coverage of the policy? That is, when

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the subject-matter of the insurance is "ambulatory" by nature, as in the case of an automobile, and without a fixed situs as with real property, will the place of the occurrence of the insured event be held to govern the substantive construction of the insurance contract?

As to the construction of commercial contracts generally, and insurance contracts in particular, the United States courts have been somewhat divided over the choice-of-laws rules which should apply: the rules of the place of making, the rules of the place of performance and the law intended by the parties to govern all having some theoretical advantages over the others. In his *Treatise on the Conflict of Laws*,<sup>1</sup> Professor Beale has stated that "courts who are uttering their instinctive views, the expression of their general knowledge of legal principle uninfluenced by authority, invariably speak of the law of the place of contracting as the law that governs", thus explaining in part why the majority of the courts have adopted the law of the place of making to determine the validity, construction and interpretation of contracts. Professor Lorenzen<sup>2</sup> concluded that the rules which should govern the effects of contracts were in part as follows:

1. The effects of contracts are governed by the law of any state chosen by the parties.
2. If the intention of the parties is not expressed, the effects of the contracts shall be governed by the law of the *specified* place of performance.
3. If the intention of the parties does not appear and no place of performance is specified, the law of the place of contracting shall control."

Cases in the field of conflict of laws in relation to casualty insurance have been relatively infrequent, and even the more numerous conflicts cases involving personal insurance have been fewer than might generally be supposed, bearing in mind the many cases decided each year on insurance contracts and the various inter-state elements which might raise conflict of laws problems as to them. Professor Carnahan, in an address delivered to the Insurance Law Section of the American Bar Association at Kansas City in 1937, suggested that *Paul v. Virginia* may have been partly responsible, since with insurance not amounting to interstate commerce and with foreign corporations admitted to do business upon conditions, the result has been to accentuate the element of state control over the contract. If Professor Carnahan's instinct

<sup>1</sup> Vol. 2, s. 332. 57.

<sup>2</sup> Selected Articles on the Conflict of Laws, chap 10, p. 321; originally published in (1921), 30 Yale L. J. 565, 655 and 31 Yale L. J. 53.

is correct, a further eventual consequence of the decision of the Supreme Court in *U.S. v. South-Eastern Underwriters Association* in 1944, which overruled *Paul v. Virginia*, may be an increase in the proportion of insurance contract cases which are recognized and decided as conflict of laws cases.

It also seems likely that many potential conflict of laws cases have not developed as such because courts have overlooked the conflicts factor, instinctively applying their own general or internal rules of insurance law, to which process counsel for claimants and insurers have contributed by themselves not raising conflict of laws issues.

An answer to my problem whether casualty insurance policies were susceptible of a varying interpretation, depending upon the state in which the loss or accident occurred, was shortly forthcoming in a carefully considered decision of the Supreme Court of Wisconsin in March 1950 in *Ritterbusch v. Sexsmith*.<sup>3</sup> The case involved a so-called "joint schedule" automobile liability policy issued in Massachusetts, covering a corporation and certain of its employees with respect to certain automobiles. One of the covered employees employed in Wisconsin met with a Wisconsin accident. The policy contained a provision, valid in Massachusetts, to the effect that no action should be brought against the insurer except after final judgment rendered against an insured. Under the Wisconsin statutes, a liability insurer might be joined with the individual insured-defendant in the initial trial of a damages action.

The injured party-plaintiff argued that, as to the Wisconsin employee whom he was suing, the policy was to be performed within Wisconsin and related to a Wisconsin resident and insurance risk; that therefore Wisconsin was the place of the insurer's performance and the Wisconsin laws should control, including the Wisconsin statutes permitting joinder of the insurer. The court disposed of plaintiff's contention in these words:

Automobile liability policies differ from policies insuring real estate against loss or damage by casualty and from contracts such as [contracts to cut specific timber] . . . In such cases, the place of performance is known and agreed upon, while few things could be less certain than the place where the assured might require performance of the promises contained in an automobile liability policy covering him everywhere in the United States and Canada. When we have held that the law of the place of performance controls the performance of the obligation, the place of performance has been made definite and certain by the contract itself. A careful examination of the cases which have come before us where the place of

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<sup>3</sup> 41 N.W. 2d 611.

performance might not be known when the contract was made shows we have recognized the law that the place of contracting controls the extent of the obligation. . . .

While we think it is evident that the place of performance of this contract is the place where suit happens to be brought on the risk against which the policy insures, even if the respondent's premise was true that Wisconsin is the place of performance of the contract because assured lived and kept his automobile in Wisconsin and generally used it here, it would not follow that the law of such place of performance would control.<sup>4</sup>

To nullify [the right of action lying only after judgment against an insured] would be a material alteration of the insurer's obligation and as such would not be permitted under the rules propounded in the Restatement.

No case has been cited to us from the decisions of this court or any other which holds that the obligations of an automobile liability policy is to be interpreted by any law other than that of the state where the contract was made. Considering the great volume of litigation growing out of automobile accidents, this dearth of authority is significant and not to be explained except of acknowledging the principle that the law of the state where the contract is made determines the obligations of the contract, not the law of the state where performance happens to be required.

Thus, while conceding that the Wisconsin statute was merely remedial (procedural) in nature, the court recognized that to apply it in the instant case would have induced a substantive alteration of the original contract and therefore, by a division of 5 to 2, the court held that the Wisconsin joinder statute was inapplicable to the Massachusetts policy before it. The dissenting judges, one of whom was the Chief Justice, apparently were impressed by the plaintiff's argument that the insurer's obligation to the particular employee-insured to investigate the accident and defend resultant litigation on his behalf amounted to performance by the insurer in Wisconsin, which thus properly should be governed by the laws of Wisconsin.

An examination of the various types of case where a conflict of laws question has arisen in the interpretation or construction of an automobile or other casualty insurance contract supports the conclusion of the Wisconsin court that the principle is well established that such contracts are governed by the law of the

<sup>4</sup> Citing section 358, Restatement of Conflict of Laws, comment (b): "While the law of the place of performance is applicable to determine the manner and sufficiency and conditions under which performance is to be made, it is not applicable to the point where the substantial obligation of the parties is materially altered. . . . When the application of the law of the place of performance would extend to a regulation of the substance of the obligation to which the parties purported to bind themselves so that it would unreasonably determine the effect of an agreement made in the place of contracting, the law of the place of performance will give way to the law of the place of contracting."

state where the contract is made. The dearth of authority in favour of applying any rule of the place of performance is nearly as complete as indicated by the Wisconsin court.<sup>5</sup>

Necessarily outside the scope of this discussion are the fairly numerous conflict of laws cases over an insured's liability in tort, since the conflicts questions there arising would occur whether or not the defendant were an insured. Examples of these questions are those relating to agency; liability to one's spouse or minor child; the effect of settlement with less than all the joint tortfeasors; when negligence may be imputed; who has the burden of proof; what tort actions survive; whether a guest law is applicable.

### *Cases Interpreting "Coverage" Provisions*

Without exception, the small number of cases interpreting the "coverage" provisions of a casualty insurance policy to date have construed them in accordance with the law of the place of contracting. Typical is *Maryland Casualty v. Martin*,<sup>6</sup> which concerned the statutory form of motor vehicle liability policy under the Massachusetts compulsory law, when written to include the optional coverage for accidents off the ways of Massachusetts. An accident occurred in New Hampshire, in the course of frequent trips to a New Hampshire work-site on which the insured carried several fellow-workmen under an arrangement for sharing expenses.

The question before the New Hampshire court was whether this express arrangement violated the policy exclusion as to carrying passengers for a consideration. Several Massachusetts cases had so held, but the plaintiff sought to show that there were New Hampshire cases allowing a contrary result. The New Hampshire court rejected any evidence of the local cases on the ground that "the policy is to be construed in accordance with the law

<sup>5</sup> Thus in *Compania Transatlantica Centro-Americana, S.A. v. Alliance Assurance Co.* (1943), 50 F.S. 987 (S.D. N.Y.), involving marine policies issued in England by English underwriters on a vessel of Panama registry, the loss being payable to English brokers, the court stated that both the place of contracting and the place of performance were entitled to special attention in attempting to discover the intent of the parties as to the laws which should govern interpretation, and held it to be the presumed expectation of the parties that a contract made in England with an English insurer, wholly performable by all parties in England, should be governed by English law. This case is typical of a number which give theoretical recognition to the possible application of the law of the place of performance but arrive at a conclusion not practically different from a frank espousal of the law of the place of contracting.

<sup>6</sup> (1937), 189 Atl. 162 (N.H.).

of Massachusetts. It was issued there, and even performance there at least in some measure was contemplated by it."

This decision is the stronger because of the distinct division of the policy coverage between that applicable to accidents on the public ways of the state of issuance and that applicable to accidents elsewhere, normally those in other states. The court refused its opportunity to seize on the specific "extra-territorial" coverage as warranting any application of the law of the place of performance.<sup>7</sup>

*Myers v. Ocean Acc. & Guarantee Corp.*<sup>8</sup> gave the same result to the similar exclusion of the "standard" automobile liability policy. The policy had been executed in New York and counter-signed and delivered in Ohio to an Ohio risk having branch locations in other states. The accident occurred in Georgia, suit being brought in the federal court for North Carolina.

To like effect are *Archer Ballroom Co. v. Great Lakes Cas. Co.*<sup>9</sup> (as to an asserted defence of assault under a general liability policy issued in Nebraska on a local dance-hall — a less positive authority because the state where the contract was made and the locus of the accident were the same) and *Hardware Mutual Cas. Co. v. Wendlinger*<sup>10</sup> (as to the interpretation of the "used principally in garage operations" limitation of an Illinois garage liability policy issued to an Illinois risk).

*Cain v. American Policyholders Ins. Co.*<sup>11</sup> is an interesting decision on the construction of the "additional insured" provision of an automobile liability policy. A Massachusetts named insured was driving to New York City and picked up a hitch-hiker, whom he allowed to drive after he himself became sleepy. In Connecticut, the hitch-hiker ran into a truck and the dozing insured was severely injured. The insured obtained a Connecticut judgment against the hitch-hiker, which, not too surprisingly, could not be satisfied by the defendant, and then brought suit on the judgment in Connecticut against the automobile liability insurer.

The decisive question was whether, as the insurer argued, the named insured was impliedly excluded from being a beneficiary of the liability policy taken out by him in his own name. The Connecticut court held that the contract had to be construed in

<sup>7</sup> Cf. *Hartford Acc. & Indem. Co. v. Wolbarst* (1948), 57 Atl. 2d 151 (N.H.), decided on other grounds.

<sup>8</sup> (1938), 99 Fed. 2d 485 (4th C.C.A.).

<sup>9</sup> (1941), 295 N.W. 702 (Wis.).

<sup>10</sup> (1944), 146 Fed. 2d 984 (4th C.C.A.).

<sup>11</sup> (1936), 183 Atl. 403 (Conn.).

accordance with the law of Massachusetts — the state of contracting — and gave judgment for the insurer, since Massachusetts cases supported its argument. There was some indication that the case might have gone the other way if the court had felt free to make its own interpretation of the policy instead of following the Massachusetts cases.

Similarly, the forum (which also was the locus of the accident) has followed the courts of the state of contracting on the interpretation to be given the permissive use requirements of the same "additional insured" provision.<sup>12</sup>

*Hawkins v. Agricultural Ins. Co.*<sup>13</sup> comes close to providing a case authority for the type of automobile theft case mentioned at the start of this paper. A Rhode Island automobile rental agency took out insurance in Rhode Island against the risk of theft by its rentees. A rentee for a single day disappeared with the car and was apprehended eight days later in Texas. A conflicts question was presented as to whether the facts made out a case of "theft" within the meaning of the insurance. Previous Rhode Island cases had held for the insured, interpreting "theft" broadly and without requiring evidence of criminal intent or intent permanently to deprive the owner. It was thus almost routine under the cases before it for the Rhode Island forum to hold that Rhode Island law would control on the facts of the particular case on this issue of interpretation.

If the Rhode Island forum had not coincided with the state of contracting, and if it had been clear from the facts that the rentee's violation of the bailment had commenced outside Rhode Island, this case obviously would be a clearer and more significant authority for rejection of the rule of the place of performance as to "ambulatory" insurance risks.

Oddly enough, no conflicts cases appear to have arisen over the "loading and unloading" phrase, the doctrines of waiver and estoppel or the "other insurance" provision.

### *Cases Interpreting Policy Conditions*

A. Conflict of laws questions have occasionally arisen over the interpretation and enforcement of those important liability-policy conditions subsequent, as to notice of accident or loss and as to the co-operation of the insured. In only one case, *Brookville*

<sup>12</sup> See *Shane v. Commercial Cas. Co.* (1942), 48 F.S. 151 (E.D. Pa.), affirmed 132 Fed. 2d 544, and *Harrison v. Carroll* (1943), 139 Fed. 2d 427 (4th C.C.A.).

<sup>13</sup> (1937), 190 Atl. 858 (R.I.).

*Elec. Co. v. Utilities Ins. Co.*,<sup>14</sup> has the court suggested that the law of the place of performance has significance here. An Indiana utility had taken out general liability insurance in Missouri with a Missouri reciprocal. The insured notified the reciprocal of an accident to a minor, but, when suit was brought some twelve years later, the insured neglected to give notice of the action for some fifteen months, whereupon the insurer disclaimed for breach of condition.

The Missouri court first determined that Indiana law should control, since all the insured operations were local to Indiana; the court then found for the insured because the Indiana cases had required evidence of prejudice in support of any such defence of breach of condition, not evidence of the breach alone. This would appear the equivalent of giving gratuitous recognition to the law of the place of performance, since the Missouri rule was similar to that of Indiana.

Other courts have adhered uniformly to the test of the place of contracting, in cases arising under such policy conditions, even when dealing with the separate "extra-territorial" coverage of the Massachusetts statutory automobile liability policy.<sup>15</sup>

B. The so-called "private" statutes of contract limitations were considered by the United States Supreme Court in a case where their validity conflicted with the law of the state of the forum, which was also the place of incidental performance of the contract. In *Hartford Acc. & Indemnity Co. v. Delta & Pine Land Co.*<sup>16</sup> the Supreme Court upheld the provisions of a fidelity bond which were valid in Tennessee, the state of issuance, in an action in Mississippi by the indemnitee, a Mississippi corporation. One Mississippi statute prohibited private statutes of limitations and another deemed to be made in Mississippi "all contracts of insurance on property, lives or interests in this state". The court held that "a state may limit or prohibit the making of certain contracts within its own territory but cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operating within its jurisdiction, and lawful where made". Thus, although the bond contemplated that the covered employees might be in any state, the issue was one of the substantive construction of an instru-

<sup>14</sup> (1940), 142 S.W. 2d 803 (Missouri).

<sup>15</sup> See *Sheldon v. Bennett* (1933), 184 N.E. 722 (Mass.), *Searls v. Standard Acc. Ins. Co.* (1944), 56 N.E. 2d 127 (Mass.); *Trinity Universal Ins. Co. v. Moody* (1942), 47 F.S. 327 (D.C. N.J.); *American Fidelity & Cas. Co. v. Sterling Express Co.* (1941), 22 Atl. 2d 327 (N.H.).

<sup>16</sup> (1934), 292 U.S. 143, 54 S.C. 634.



ment which the laws of Mississippi could not control simply because casual or incidental performance occurred within its borders. A by-product of the decision was the ruling as unconstitutional of Mississippi's statutory attempt to define "place of making" in terms of a conclusive presumption, with consequent alteration of normal conflict-of-laws rules.

All the more clearly, such a private statute of limitations should be enforced by a forum which is disinterested as to all elements of the transaction between the parties and which, if it applied its local rule of prohibition, would be causing substantive interference with defensive contract rights valid where the contract was made.<sup>17</sup>

On the relation between the insurer's contract rights and statutes of tort limitations, the courts of Rhode Island and Massachusetts provided a bit of humourous confusion a few years ago. An automobile accident occurred in Massachusetts, the defendant being covered by the Massachusetts statutory form of motor vehicle liability policy. The injured party sued the insured in Rhode Island after the expiry of the Massachusetts one-year statute of limitation, and recovered judgment. Plaintiff then sued the insurer in Rhode Island on the judgment and the Rhode Island court somewhat curiously held that plaintiff's right of action depended upon the Massachusetts compulsory insurance law, since it did not exist at common law, and therefore that the liability of the insurer was restricted to suits which had been brought within the period of the Massachusetts statute of limitations. Judgment therefore was rendered for the insurer.<sup>18</sup> The insured then sued the insurer in Massachusetts for breach of contract and recovered, the Massachusetts court recognizing that the company's contractual obligations under its policy were measured by those of its insured under the valid Rhode Island judgment.<sup>19</sup> The Rhode Island court thus got no credit for its elaborate pains to subordinate its more liberal law of limitations to the law of the place of contracting.

C. Questions of interpretation arising under the cancellation provisions of liability policies likewise have been held to be governed by the law of the place of contracting.<sup>20</sup>

D. The effect of a misrepresentation properly seems a matter

<sup>17</sup> See *Holderness v. Hamilton Fire Co. of N.Y.* (1944), 54 F.S. 145 (S.D. Fla.)

<sup>18</sup> *Byron v. Great American Indem. Co.* (1934), 173 Atl. 546 (R.I.).

<sup>19</sup> *Brown v. Great American Indem. Co.* (1937), 9 N.E. 2d 547, 111 A.L.R. 1065 (Mass.).

<sup>20</sup> See *Baranski v. Mass. Bonding & Ins. Co.* (1938), 197 Atl. 390 (R.I.), and *Cohen v. Penn. Cas. Co.* (1944), 38 Atl. 2d 86 (Md.).

to be governed by the laws of the place of contracting, unless the entire performance under the contract was to be in another jurisdiction. Surprisingly, there would appear only two recent cases in point on this issue. In *Trinity Universal Ins. Co. v. DeMartini*<sup>21</sup> the case turned on an alleged misrepresentation of ownership, under a California policy on a California registered automobile, the court holding the effect of the misrepresentation to be controlled by California law. In *Hartliep Transit Co. v. Central Mut. Ins. Co.*<sup>22</sup> an Illinois court held an alleged misrepresentation on the extent of a trucker's operations to be governed by Iowa law (Iowa being the place of contracting) and rejected the defence which would not have been good in Iowa because the application containing the representation was not physically attached to the policy.

### *Claims between Husband and Wife under a Liability Policy*

In 1937 New York abolished the traditional disability attending personal injury claims between spouses except that, as a matter of public policy, the abolition was not to apply to claims asserted against liability insurers under policies which did not specifically permit them.<sup>23</sup> This insurance exemption has already produced one bizarre case in the conflict of laws field and conceivably could lead to others. In *Bradford v. Utica Mutual Ins. Co.*<sup>24</sup> the New York trial court considered the rights of an insurer under a Massachusetts statutory automobile liability policy, whose insured had negligently killed his wife in a New York automobile accident. Massachusetts retained the traditional common law disability as to suits between the spouses, and the insurer would thus have been obliged to pay nothing had the accident occurred in Massachusetts. Likewise, the insurer would have been obligated to pay nothing had the policy been issued in New York, by the insurance exemption — this regardless of where the accident might have occurred.<sup>25</sup>

The decision gives the paradoxical result that, when the accident occurs in New York, the insurer under a policy issued outside New York will be obligated for claims between spouses, a

<sup>21</sup> (1938), 118 S.W. 2d 901 (Texas).

<sup>22</sup> (1937), 5 N.E. 2d 879 (Ill. App.).

<sup>23</sup> Insurance Law, s. 167 (3), as amended in 1941: "No policy or contract shall be deemed to insure against any liability of an insured because of death of or injuries to his or her spouse or because of injury to, or destruction of property of his or her spouse unless express provision relating specifically thereto is included in the policy".

<sup>24</sup> (1943), 39 N.Y. Supp. 2d 810 (N.Y. Sup.).

<sup>25</sup> *Coster v. Coster* (1943), 46 N.E. 2d 509 (N.Y.).

result virtuously arrived at by the court in these words:

Massachusetts permits insurance companies to undertake risks which transcend its boundaries and the limitations of its municipal [sic] laws of tort liability. It does not restrict such liability between a husband and wife if incurred under the municipal laws of another state to contracts where there is express provision to that effect. That New York frees a carrier of such a risk without such a provision is a detail in our internal regulation of insurance contracts, probably exercised in view of the broadening of the base of liability at the same time. It is reasonable to suppose that Massachusetts knew of our extension of tort liability and of the trend of extension in other states. We created a protection to carriers. Massachusetts permitted the writing of contracts for extra-territorial liability without such protection. That is all there is to the point raised. Surely we are not at liberty to impose our policy upon Massachusetts contracts because our treatment of this regulatory subject differs from hers, or to withhold our enforcement of such a contract in a proper case, upon the theory that it is offensive to morals or public policy. Nor are we at liberty to fill the gaps or suggest the direction of regulation or exception in Massachusetts. It is enough that we have a contract valid where made and broad enough to contemplate this risk. *Comity impels enforcement.*

Any formula, even one in the conflict of laws field, can on occasion, if literally carried out, give an apparently paradoxical result. The quarrel one can have with the *Bradford* decision is not so much over the actual result of the case as over the non-realistic bases asserted by the court in sustaining its lofty forbearance to apply what clearly was the strong public policy of the forum and locus of the accident. Must "comity impel enforcement" when the result would presumably be offensive to both states involved — and possible under only one of the permutations? Or may this reviewer be pardoned recalling the remark of Hamlet's mother about the play-queen, "The lady doth protest too much, methinks".

*Lumbermens Mut. Cas. Co. v. Blake*<sup>26</sup> indicates that a New York policy of liability insurance will be recognized abroad as containing the inter-spouse exemption. The decision is also of interest because of the emphasis given by the court to New Hampshire as the principal place of performance contemplated by the parties (under a schedule form of automobile liability insurance covering certain named employees of a corporation, the defendant-employee having arranged to be named in order to be covered for a vacation trip to New Hampshire) although the finding does not appear to have been essential to the decision.

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<sup>26</sup> (1946), 47 Atl. 2d 874 (N.H.).

*Joinder and Direct Action Cases*

Those few states (most prominently Louisiana and Wisconsin) whose statutes permit a tort-plaintiff to proceed in the first instance against the liability insurer of an alleged tortfeasor have produced a body of conflicts cases and law which is of general interest although directly of only parochial concern. A special point of interest in these cases is that they include the most direct attempts (unsuccessful) to establish a governing rule of the place of performance, based on the inherent nature of an automobile risk.

In *Lowery v. Zorn and Maryland Cas. Co.*<sup>27</sup> an Alabama insured was hired to transport plaintiff, his family and effects to a Louisiana farm. En route, the car met with an accident in Louisiana. Plaintiff sued the insured in Louisiana and attempted to join the liability insurer as permitted by Louisiana statute. The law of Alabama, where the policy was issued, did not permit joinder. Part of plaintiff's argument in support of the joinder was that the policy contemplated the operation of the car in any state in the Union, was a contract made in one state to be performed in another and therefore was to be governed by the law of the place of performance — in this case, the place of occurrence of the accident.

The court flatly rejected this proposition, stressing that the only obligation of the policy was indemnity of the insured — an argument not available under the modern policy of a frankly liability kind. The court also held that the joinder statute had to be regarded as more than remedial, if it was to affect an insurer's substantive rights under a foreign contract.

During the next few years, the federal courts for the Eastern and Western Districts of Louisiana sharply differed on whether the Louisiana joinder statute should be regarded as only remedial in character. *Wheat v. White*<sup>28</sup> very explicitly held, as to an automobile liability policy issued in Mississippi by a Missouri reciprocal licensed in Louisiana:

A Louisiana statute cannot be engrafted [on a Mississippi contract] so as to make it substantively a different and more onerous one. The general rule is that a contract valid under the governing law of a state is valid everywhere, unless such contract violates the fixed public policy of the state in which an action is brought on the contract. . . . The contract violates no fixed public policy of [Louisiana] and this court cannot, therefore, refuse to give full effect to its provisions.<sup>29</sup>

<sup>27</sup> (1934), 157 So. 826 (La. Ct. A.).

<sup>28</sup> (1941), 38 F.S. 796 (E.D. La.).

<sup>29</sup> Accord, *Belanger v. Great Amer. Ind. Co. of N.Y.* (1950), 89 F.S. 736, (E.D. La.).

*Rogers v. Amer. Employers' Ins. Co.*<sup>30</sup> is an authority to the contrary, holding as it did the Louisiana joinder statute to be remedial by nature and thus applicable to a Louisiana suit and accident arising under an automobile liability policy issued in the District of Columbia by an insurer licensed in Louisiana. *Duncan v. Ashwander*<sup>31</sup> had previously suggested the same thing in holding that an automobile liability policy issued in Alabama was subject to the Louisiana joinder statute as to a Louisiana accident, on the further ground:

It seems to have been the intention of the parties to make a contract to have effect anywhere . . . and which was not made or intended to be with reference to or governed exclusively by the laws of Alabama. . . . This is quite different from a contract made and to be performed solely within a given state, and it was evidently intended that accidents might happen and suits be brought outside of Alabama.<sup>32</sup>

That the Louisiana legislature *does* intend its joinder statute to apply to Louisiana accidents, irrespective of where the policy is issued, provided the defendant insurer is licensed in Louisiana, is clear from Senate Concurrent Resolution 13, adopted in June 1950, and from amendments at the 1950 regular legislative session (S.B. 199 and 201) to the joinder statute and to the insurers' licensing provisions. It is a little mystifying to this outlander how such a declaratory resolution can be expected conclusively to overcome constitutional objections which are present when the joinder legislation is regarded as more than remedial in nature.<sup>33</sup>

If the outcome of litigation normally would be affected by direct action against or joinder of the liability insurer, it is hard to see how such "procedure" can fail to escape a substantive character, as some courts have pointed out. One court, *Wells v. Irwin*,<sup>34</sup> went so far as to take judicial notice that a jury's probable reaction would be adverse to the insurer.<sup>35</sup>

Rhode Island evidently regards her direct action statute to be substantive in operation, since its highest court has disaffirmed the power to apply the statute to insurance policies issued abroad, whether or not by insurers licensed in the state.<sup>36</sup>

<sup>30</sup> (1945), 61 F.S. 142 (W. D. La.).

<sup>31</sup> (1936), 16 F.S. 829 (W.D. La.).

<sup>32</sup> See, in further accord, *Bouis v. Aetna Casualty & S. Co.* (1950), 91 F.S. 954 (W.D. La.).

<sup>33</sup> Cf. *Hartford Acc. & Ind. Co. v. Delta & Pine Land Co.* (1934), 292 U.S. 143, 54 S.C. 634, 92 A.L.R. 928.

<sup>34</sup> (1942), 43 F.S. 212 (N.D. Texas).

<sup>35</sup> Cf. *John Hancock Mut. Life Ins. Co. v. Yates* (1936), 299 U.S. 178, 57 S.C. 129, on the vast practical difference between a jury's findings on the materiality of a misrepresentation and the same thing being held to be material as a matter of law.

In *Martin v. Zurich General Acc. & Liab. Ins. Co.*<sup>37</sup> the federal courts for Rhode Island refused to permit direct action against an insurer which had issued a general liability policy in Illinois to an Indiana insured covering a single tank erection job in Rhode Island. During the work an accident occurred. The plaintiff tried to distinguish the state court's past refusals to allow the direct action procedure as to foreign insurance policies, arguing unsuccessfully that the policy in suit contemplated its performance exclusively in Rhode Island and therefore properly should be governed by Rhode Island law.

The attitude of the Wisconsin court is closely in accord with that of the Rhode Island court as demonstrated by the recent *Ritterbusch* case discussed earlier in this paper. Previously, the Michigan and Minnesota courts had in the same year (1946) taken interestingly different approaches in dealing with an attempted direct suit against the liability insurer under a Wisconsin policy, following a Wisconsin accident, such direct suit not being allowed by the law of either forum.

The Michigan court<sup>38</sup> appeared to assume that the Wisconsin statute was only remedial in nature, and thus not to be given extra-territorial force; it further indicated that, if regarded as substantive, there would have been such a clash of the public policies of the Wisconsin locus and the Michigan forum that comity could not have availed the former.

The Minnesota court,<sup>39</sup> on the other hand, seemed disposed to allow the direct suit, provided it was pursuant to Wisconsin substantive law; and was willing to accept the views of the Wisconsin court as determinative of the true characterization. The direct suit was refused because it seemed to the Minnesota court that the Wisconsin cases regarded the local statute as remedial.<sup>40</sup>

### Conclusion

The case precedents to date appear to indicate, with great uniformity, that the law of the place of contracting will govern the substantive construction of a casualty insurance policy, even though elements of the insured risk are located in different states. There remains the potentiality of some future case holding that

<sup>36</sup> *Riding v. Travelers Ins. Co.* (1927), 138 Atl. 186 (R.I.):

<sup>37</sup> (1936), 84 Fed. 2d 6 (1st C.C.A.).

<sup>38</sup> *Lieberthal v. Glens Falls Ind. Co.* (1946), 24 N.W. (2) 547.

<sup>39</sup> *Anderson v. State Farm Mut. Auto. Ins. Co.* (1946), 24 N.W. (2) 836.

<sup>40</sup> *McArthur v. Maryland Cas. Co.* (1939), 186 So. 305, 120 A.L.R. 846 (Miss.), applied similar reasoning in rejecting joinder based on the Louisiana statute.

the fact of countersignature of the policy in various states, pursuant to resident agency laws, has the legal effect of transforming the policy into the equivalent of a package of intrastate contracts — and thus require a negative answer to be given as to the second case described at the outset of this paper.

If ever the judicial answer should be that the law of the place of occurrence or performance did so govern the substantive construction, casualty insurers generally would benefit in having the coverage correspond with the premium charged for local elements of the risk, but a further element of complication and uncertainty would have been introduced into the administration of casualty insurance contracts.

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### A Glimpse at the Lawyer's Function

What is distinctive about the role of the lawyer in a democratic society? The law of such a society is a kind of self-rule, where the subjects are also the rulers, where, whether we speak of our government as a republican or as a democratic one, the officials are responsible to the people. In such a society, the lawyer is a natural leader unless he abdicates in favor of less-informed persons or otherwise defaults in the face of insistent obligation. Lawyers have been called ministers of justice and that underlines the fact that their service transcends their personal importance or advantage. It emphasizes the lawyer's function as an expert in lawmaking and law-administration. Not least does it cast the lawyer in the role of teacher to his fellow men in the best Socratic sense of helping them to discover the "right answers", the better, sounder answers to difficult legal and political problems. These, at least, are the ways in which the great lawyers of the formative era in American history, the founding fathers, looked upon their profession. It also recalls the broader context of political science within which the ancient Greeks debated the nature and functions of law. (Jerome Hall: *The Challenge of Jurisprudence* (1951), 37 A.B.A.J. 23)