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Construction of Texas Insurance Contract - Erie Misapplied

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that the Court of Criminal Appeals has held that the blood test does violate our state constitution. In spite of the Attorney General's statement, there is reason to assume that the present Texas law will be challenged. Taking into consideration the fact that Texas is among the leading states with regard to the death toll on its highways, due in large measure to drunken driving, perhaps the *Trammel* decision should be overruled.

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Construction of Texas Insurance Contract — Erie Misapplied

Loy Thomas Brown was killed when the private airplane that he was piloting crashed. Brown was insured by policies issued by Paul Revere Life Insurance Company. The policies contained exclusionary clauses excepting liability for "death or disability resulting from flight in aircraft except as a passenger on a civilian plane."[1] Paul Revere denied liability under the policies, contending that Brown, as pilot of the plane, was clearly excluded. The First National Bank in Dallas, administrator of Brown's estate, brought a diversity suit in the United States district court and obtained a summary judgment, the district judge being of the opinion that Texas law was settled in favor of recovery. Paul Revere appealed to the Court of Appeals for the Fifth Circuit, but that court abstained from deciding this and two companion cases.[2] In its abstention opinion the court stated, "The guidance of the dim light of the Texas decisions leaves the meaning of the questioned clauses obscure. Without further enlightenment any judgment we might pronounce would be a 'forecast rather than a determination.' "[3] The court suggested that the parties seek declaratory judgments in the Texas courts. The Texas Supreme Court refused jurisdiction for declaratory judgment in *United Services Life Ins. Co. v. Delaney,* companion case to *Paul Revere,* on the ground that any ruling would be an advisory opinion.[4] As a result, the Fifth Circuit

[1] Paul Revere Life Ins. Co. v. First Nat'l Bank, 359 F.2d 641, 642 (5th Cir. 1966).

[2] United Services Life Ins. Co. v. Delaney, 328 F.2d 483 (5th Cir. 1964), *cert. denied,* 377 U.S. 935 (1964); St. Paul Mercury Ins. Co. v. Price, 329 F.2d 687 (5th Cir. 1964). The *United Services* and *Paul Revere* cases were decided together. Both of these cases, as well as the *St. Paul Mercury* case, involved the construction of exclusionary clauses in Texas insurance contracts and the applicability of Continental Cas. Co. v. Warren, 152 Tex. 164, 254 S.W.2d 762 (1953).

[3] United Services Life Ins. Co. v. Delaney, *supra* note 2, at 484, quoting in part Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 499 (1941).

[4] United Services Life Ins. Co. v. Delaney, 396 S.W.2d 855 (Tex. 1965). In *Delaney* the Texas Supreme Court said:

> If the state court is to entertain a suit for declaratory relief, it must have the

was forced to rule upon the merits. *Held, reversed and remanded:* The term "passenger" as used in exclusionary clauses of insurance policies excepting liability for death or disability resulting from flight in aircraft except as a passenger, is not ambiguous and does not include the pilot. *Paul Revere Life Ins. Co. v. First Nat'l Bank,* 359 F.2d 641 (5th Cir. 1966).

According to the doctrine of *Erie v. Tompkins,*[5] stringent restrictions are placed upon the federal judiciary in diversity cases. Federal courts may not determine questions of state law independently or subjectively but must follow state court decisions, even though they are in conflict with the weight of authority on the point in question and though they are contrary to the views of the federal court.[6] Where there is no direct expression of what the state law is on a given point, the federal court must look to indirect indications of how the state courts will ultimately decide the question.[7] The Fifth Circuit itself has stated:

> [T]he obligation to accept local interpretations extends not merely to definitive decisions, but to considered dicta as well. . . . Indeed, under the implication of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, . . . it is the duty of the federal court, in dealing with matters of either

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> power and jurisdiction to settle the controversy by entry of a final judgment. This is not a case in which a federal suit has been stayed in order that some other and different lawsuit pending in the state courts may be determined. Here, in effect, the same suit is pending in both the state and federal courts by reason of a directive which contemplates that the final judgment will be rendered by a federal court. The Circuit Court's reservation of jurisdiction to render final judgment renders these proceedings advisory in nature. . . . [T]he rendition of advisory opinions by courts is unauthorized by our constitution. . . .

Following the *Delaney* decision, proceedings in Texas courts toward declaratory relief in the *Paul Revere* and *St. Paul Mercury* cases were dismissed for want of jurisdiction.

For a discussion of the application of the abstention doctrine by the Fifth Circuit and the subsequent refusal of the Texas courts to assume jurisdiction for declaratory relief in *Delaney,* see Note, *Refusal of State Court To Assume Jurisdiction After Federal Abstention,* 20 Sw. L.J. 402 (1966).

[5] Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[6] West v. American Tel. & Tel. Co., 311 U.S. 223 (1940); Johnson v. New York Life Ins. Co., 212 F.2d 256 (7th Cir. 1954); Krauss v. Greenburg, 137 F.2d 569 (3d Cir. 1943).

[7] The Fifth Circuit has in the past been one of the foremost proponents of the principle that under the *Erie* doctrine federal courts must have regard for any persuasive data available, *including dicta,* when there is no direct expression of state law. New York Life Ins. Co. v. Schlatter, 203 F.2d 184 (5th Cir. 1953), citing Yoder v. Nu-Enamel Corp., 117 F.2d 488 (8th Cir. 1941); Polk County, Ga. v. Lincoln Nat'l Life Ins. Co., 262 F.2d 486 (5th Cir. 1959). In Polk County, Ga. v. Lincoln Nat'l Life Ins. Co., *supra* at 490-91, the court, in reference to its decision in New York Life Ins. Co. v. Schlatter, stated:

> [T]his court justified following a state court pronouncement which was asserted to be a dictum by this quotation from the Supreme Court. 'At least it is a considered dictum, and not merely obiter. It has capacity, though less than a decision, to tilt the balanced mind toward submission and agreement. . . . In controversies so purely local, little gain is to be derived from drawing nice distinctions between dicta and decisions. Disagreement with either, even though permissible, is at best a last resort, to be embraced with caution and reluc-

> common law or statute, to have regard for any persuasive data that is available, such as compelling inferences or logical implications from other related adjudications and considered pronouncements. The responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it. Any convincing manifestation of local law, having a clear root in judicial conscience and responsibility, whether resting in direct expression or obvious implication and inference, should accordingly be given heed.[8]

Continental Cas. Co. v. Warren[9] is the only Texas case on the question posed by *Paul Revere*—whether a pilot of an airplane is covered by an insurance contract which excepts death resulting from flight in aircraft except as a passenger on a civilian plane. The insurance contract involved in *Warren* was an accident policy issued to the firm employing Warren as a pilot. The policy covered injury to employees, officers, or guests of the policyholder, "provided such injury is sustained by the insured person in consequence of riding as a passenger in, boarding, alighting from, making a parachute jump from (for the purpose of saving his life) or being struck by"[10] the named aircraft. Warren was killed while piloting the airplane. Continental Casualty denied liability for Warren's death on the ground that since Warren was piloting the plane when killed, he could not qualify as a person riding as a passenger in the aircraft. The Texas Supreme Court held that Warren, though the pilot of the plane, was within the coverage of the Continental Casualty policy. In arriving at its determination, the court stated, "the mere word 'passenger' cannot be said to exclude the pilot"[11] and "common parlance undoubtedly uses it (the word 'passenger') at times in the sense of occupant. . . ."[12] The court followed the established Texas rule that where wording in an insurance contract is susceptible to more than one interpretation the construction favoring the insured should be adopted.[13] The court noted that "the insurer may not escape liability merely because his or its interpretation should appear to us a more

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> tance. The stranger from afar, unacquainted with the local ways, permits himself to be guided by the best evidence available, the directions and counsel of those who dwell upon the spot.'

See also West v. American Tel. & Tel. Co., 311 U.S. 223 (1940); Cold Metal Process Co. v. McLouth Steel Corp., 126 F.2d 185 (6th Cir. 1942); Mattson v. Central Elec. & Gas Co., 174 F.2d 215 (8th Cir. 1949).

[8] Polk County, Ga. v. Lincoln Nat'l Life Ins. Co., 262 F.2d 486, 490 (5th Cir. 1959), quoting Yoder v. Nu-Enamel Corp., 117 F.2d 488, 489 (8th Cir. 1941).

[9] 152 Tex. 164, 254 S.W.2d 762 (1953).

[10] 254 S.W.2d at 763.

[11] *Id.* at 764.

[12] *Ibid.*

[13] See note 15 *infra.*

likely reflection of the intention of the parties than that urged by the insured. The latter has to be no more than one which is not itself unreasonable."[14]

Warren v. Continental Cas. Co. has bearing on *Paul Revere,* not only because it follows the rules of construction of insurance policies in favor of the insured,[15] but also because it seems to establish that under Texas law the word "passenger" is ambiguous and is a proper subject for construction. In *Paul Revere,* the Fifth Circuit directed its major efforts, not at determining what Texas law is, but at distinguishing the facts of the *Warren* case from those of *Paul Revere.* Reasoning that *Warren* did not directly hold that a pilot is a passenger and that the *Warren* court considered other policy language relevant,[16]

[14] 254 S.W.2d at 763.

[15] It is a settled principle of insurance law that ambiguities in insurance contracts are to be strictly construed against the insurer. Trahan v. Southland Life Ins. Co., 155 Tex. 548, 289 S.W.2d 753 (1956); Providence Washington Ins. Co. v. Proffitt, 150 Tex. 207, 239 S.W.2d 379 (1951); Davis v. Nat'l Cas. Co., 142 Tex. 29, 175 S.W.2d 957 (1943); McCaleb v. Cont. Cas. Co., 132 Tex. 65, 116 S.W.2d 679 (1938); Roth v. Traveler's Protective Ass'n, 102 Tex. 241, 115 S.W. 31 (1909); Goddard v. East Tex. Fire Ins. Co., 67 Tex. 69, 1 S.W. 906 (1886); Mid-Continent Life Ins. Co. v. Hubbard, 32 S.W.2d 701 (Tex. Civ. App. 1930) *error ref.;* Home Ben. Ass'n v. Brown, 16 S.W.2d 834 (Tex. Civ. App. 1929) *error ref.;* Jefferson Standard Life Ins. Co. v. Baker, 260 S.W. 223 (Tex. Civ. App .1924) *error ref.;* Missouri State Life Ins. Co. v. Hearne, 226 S.W. 789 (Tex. Civ. App. 1920) *error dism.*

In Kelly v. American Ins. Co., 316 S.W.2d 452 (Tex. Civ. App. 1958), *aff'd,* 325 S.W.2d 370 (1959), the court said:

> [I]t is necessary to apply certain elementary rules of construction (all rooted in the same basic concept) including these: (1) an insurance policy will be construed strictly against the insurer; (2) when the terms of an insurance contract are capable of two or more constructions and under one a recovery is allowable and under the other it is denied, the construction which permits recovery will be given the policy; (3) forfeitures of insurance coverage is not favored; and (4) if a fair and reasonable construction of an insurance contract will permit, a meaning will be given to its language that effectuates a contract of insurance rather than defeats it.

For examples of the application of these rules of construction, see Standard Life & Accident Ins. Co. v. Hardee, 330 S.W.2d 544 (Tex. Civ. App. 1959) *error ref. n.r.e.,* where the word "within," as used in an accident policy providing coverage for loss due to injuries sustained while riding "within" a vehicle was held not to exclude recovery for a person injured while standing on a truck bed; United Am. Ins. Co. v. Gravett, 339 S.W.2d 682 (Tex. Civ. App. 1960) *error ref. n.r.e.,* where a policy excluding "dental treatment" was held not to exclude an operation on the neck of the insured necessitated by the extraction of wisdom teeth; American Nat'l Ins. Co. v. Fox, 184 S.W.2d 937 (Tex. Civ. App. 1944) *error ref. w.o.m.,* where sunstroke suffered by insured was held to be within the protection of an accident policy insuring against bodily injury sustained through external, violent, and accidental means; National Life & Accident Ins. Co. v. Hanna, 195 S.W.2d 733 (Tex. Civ. App. 1946) *error ref. n.r.e.,* where death of insured by toxic agranulocytosis, or absence of white blood cells due to drug sensitivity, brought about by taking drugs in accordance with a doctor's orders, was held to be "death by accidental means."

[16] "It must be conceded that the full phrase 'riding as a passenger in,' does suggest a meaning of 'passenger' as a non-operative of the plane. However, we obviously are not limited to considering this one phrase, if other provisions of the policy have logical bearing on the intended coverage, as they do." 254 S.W.2d at 765.

Though only liability under the "riding" risk was in dispute in Continental Cas. Co. v. Warren the *Warren* court considered the complete enumeration of the risks in the policy—"riding as a passenger in, boarding, alighting from, making a parachute jump from . . . or

the Fifth Circuit concluded that the word "passenger" was not found to be ambiguous by the Texas court but that the policy as a whole was considered ambiguous. Since no other policy language was relevant in *Paul Revere*—the case turned solely upon the construction of "passenger"—the Fifth Circuit felt that it was free from the restraints of Texas law to make an independent decision. Therefore, it concluded, "the term 'passenger' is not inherently ambiguous when used in its common or popular meaning."[17]

The Fifth Circuit seems to have reversed its self-established approach to *Erie* questions in areas where state law is unclear. In the past the court has proceeded toward decisions from cases which, though not directly in point, it found to "afford a lantern as we make our *Erie* way."[18] Through this method, in *Ford Motor Co. v. Mathis*[19] and in *Putman v. Erie City Mfg. Co.*,[20] the court utilized distinguishable yet parallel Texas cases as a starting point in determining that Texas would now accept strict liability for manufacturers of eminently dangerous defective non-food products, though Texas courts had previously extended strict liability only to manufacturers of food products.[21] In *Ford Motor Co.* and *Putman* the Fifth Circuit found related Texas cases and, using those decisions as vehicles, followed them to logical conclusions in determining the point in controversy, keeping in mind its responsibility to decide the matters as a state court would.

In *Paul Revere* the court seems to view the most nearly related case, *Continental Cas. Co.*, as an obstacle to be avoided instead of as a starting point to utilize in proceeding toward a proper *Erie* conclusion. Statements made in *Continental Cas. Co.*, which concededly may be dicta, are in direct conflict with the *Paul Revere* holding that

being struck by" the plane, to determine the effects of the construction urged by the insurer on the policy. The court found that "grammatically speaking, any requirement of the insured person being a passenger in the sense of non-operator applies only to the 'riding' risk and to none of the other four." The court felt that it was not likely that the parties intended the pilot to be covered by the policy while "boarding, alighting from, making a parachute jump from . . . or being struck by" the plane, yet to be excluded while riding in it. Thus, "passenger" was construed to mean occupant and the pilot was held covered under the "riding" risk.

It should be noted that elsewhere in the *Warren* opinion the court had stated that "the mere word passenger cannot exclude the pilot" and "common parlance undoubtedly uses it in the sense of occupant." These statements seem to be to the effect that "passenger" standing alone is ambiguous.

[17] 359 F.2d at 644.

[18] Ford Motor Co. v. Mathis, 322 F.2d 267 (5th Cir. 1963), Note, 18 Sw. L.J. 128 (1964).

[19] *Ibid.*

[20] 338 F.2d 911 (5th Cir. 1964). See Recent Decision, 19 Sw. L.J. 198 (1965).

[21] For a complete analysis of the problem of applying strict tort liability to manufacturers, see Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5 (1965).

"passenger" is not ambiguous.[22] Speculation as to whether these statements constitute a direct holding by the Texas Supreme Court that "passenger" is ambiguous or whether the statements are dicta is unimportant. The court is duty-bound to follow the statements if they constitute a direct holding or to consider them indicative of what Texas law is or ultimately will be if the statements are dicta.

The *Paul Revere* decision cites no Texas cases in support of its holding that "passenger" excludes "pilot" but instead cites one United States Supreme Court case giving a definition of "passenger" as used in connection with travel on a train.[23] Aside from the fact that a Supreme Court holding is of doubtful import in an attempt at a determination of Texas law,[24] the Fifth Circuit brings itself into direct conflict with *Continental Cas. Co.* once again by choosing to cite the carrier definition of "passenger." In *Continental Cas. Co.* the Texas Supreme Court stated, "the significance of 'passenger' as applied to common carriers has little relevance to a situation where no carriage for hire, public or private is involved."[25] Since no carriage for hire was involved in *Paul Revere,* it is evident that this statement from *Warren* is an applicable indication by the Texas court of Texas law. The fact that the Fifth Circuit chose to use as authority a United States Supreme Court case giving a definition clearly inapplicable under Texas law is evidence that the court was proceeding toward an independent pronouncement.[26]

As pointed out by Judge Gewin in his dissent, the propriety of the Fifth Circuit's action in overruling the decision of the district judge is questionable. The Fifth Circuit abstained from deciding *Paul Revere* originally because the "dim light of the Texas decisions leaves the questioned clauses obscure."[27] Judge Gewin argues that in a situation where state law is unclear the local federal judge should not be lightly overruled. Judge Gewin cites two United States Supreme Court cases in which that court decided to defer to the decisions of the federal district judges because existing state law was unclear. In *MacGregor v. State Mut. Life Assur. Co.*[28] the Supreme Court said, "No decision of the [state supreme court], or any other court of that State construing the relevant [state] law has been brought to our

[22] See text accompanying notes 11 and 12, *supra.*

[23] 359 F.2d at 644, citing Aschenbrenner v. United States Fid. & Guar. Co., 292 U.S. 80 (1934).

[24] MOORE, FEDERAL PRACTICE ¶ 0.309(2) (2d ed. 1965).

[25] 254 S.W.2d at 764.

[26] It is interesting to note that seventy pages are devoted to defining the term "passenger" in different situations and jurisdictions. 31A WORDS & PHRASES 15 (perm. ed.).

[27] United Services Life Ins. Co. v. Delaney, 328 F.2d 483 (5th Cir. 1964), *cert. denied,* 377 U.S. 935 (1964).

[28] 315 U.S. 280 (1942).