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Recent Cases

INSURANCE—MISSOURI—APPLICATION OF TORT PRINCIPLES OF CAUSATION TO DETERMINE LIABILITY UNDER AN INSURANCE POLICY

*Smith v. M.F.A. Mut. Ins. Co.*¹

This action was brought on an insurance policy covering a truck propelled by propane gas and used by plaintiff's bottled gas and heating company to carry propane gas. The comprehensive coverage insured plaintiff from "loss caused by . . . fire."² A "Bottle Gas Endorsement" was attached which provided:

"In consideration of the premium charged,³ it is agreed that the insurance provided in this policy *does not cover nor include any loss, damages, injuries, or death caused by bottled or compressed gas*, whether known as Butane or Propane gas or by any other name, while the same is in or upon or being transported or conveyed in or by the insured vehicle or while same is being loaded or unloaded therein or therefrom."⁴ (Emphasis added.)

On August 14, 1958, gas leaked from and enveloped the truck in a cloud of white vapor. Shortly thereafter the vaporized gas ignited by some unknown means and the truck was destroyed by fire. The circuit court rendered a directed verdict for the plaintiff. On appeal, *held*, affirmed. The Kansas City Court of Appeals found that the exclusionary provision did not apply since "fire" destroyed the truck; and the loss was "caused by" fire rather than by bottled or propane gas.⁵

In reaching its decision the court pointed out that defendant-insurer clearly would be liable were it not for the "Bottle Gas Endorsement." The court found that "flames *arose* from the vaporized propane gas," but reasoned that since the gas must first come in contact with fire in order to burn, the loss could not have

1. 337 S.W.2d 537 (K.C. Ct. App. 1960).

2. *Id.* at 538. (Emphasis deleted.)

3. A six month premium of \$98.45 was charged for the policy with \$19.85 being the allocable portion charged to the comprehensive coverage. The inclusion of the "Bottle Gas Endorsement" resulted in a total premium reduction of \$11.70. This information was obtained from the claims office of M.F.A. Insurance.

4. 337 S.W.2d at 538.

5. The court apparently relied on the rule applied in *Cova v. Bankers & Shippers Ins. Co.*, 100 S.W.2d 23, 29 (St. L. Ct. App. 1937), that: "[W]here the peril specifically insured against sets other causes in motion which . . . produce the final result for which the insured seeks to recover under his policy, then the peril insured against will be regarded as the proximate cause of the entire loss"

been "caused" by bottled or compressed gas.⁶ No independent spark or flame was observed at any time prior to the destruction of the truck. The day before the loss the truck's tank had been checked for leaks and none was found. On the day of the loss 841 gallons of propane gas were loaded on the truck. As it was being driven the solenoid valve "burned out" and a new one was installed.⁷ Under these facts, in order to impose liability on the insurer the court had to find some "cause" other than "burning propane gas."

In determining that a covered peril, fire, "caused" the loss the court applied a "tort" test of causation. That is, the court looked beyond the burning gas to the agent which ignited the gas. The cause of loss was found to be fire because "the gas was ignited by fire, and fire consumed the truck."⁸ Had the court looked to the parties' intent the primary inquiry would have been to determine if the loss would have occurred in the absence of bottled gas. Clearly the bottled gas was a major factor in the loss and also the subject of the exclusionary clause. This language should have been given effect even though contained in a restrictive provision of the policy.⁹ Did the parties intend coverage against a loss sustained as a result of burning propane gas? It would seem dissenting Judge Hunter accurately stated the issue as follows:

[F]ire damage if caused by propane gas ignited by an incidental spark which in and of itself would not have damaged the truck is excluded from coverage for under such circumstances propane gas is the efficient cause of the damage.¹⁰

This appears to be in accord with the manifested intent of the parties. The assignment of "cause" would thus be limited to the bounds of the policy.

The difference between the "contract" and "tort" approaches to resolving questions of causation is well illustrated by the decision of the New York Court of Appeals in *Bird v. St. Paul Fire & Marine Ins. Co.*¹¹ A test specifically rejecting the "tort" approach was applied to determine coverage under an insurance policy. Justice Cardozo stated:

General definitions of a proximate cause give little aid. Our guide is the reasonable expectation and purpose of the ordinary business man when making an ordinary business contract. It is his intention, expressed or fairly to be inferred, that counts. There are times when the law permits us to go far back in tracing events to causes. The inquiry for us is how far the parties to this contract *intended* us to go. The causes within their contemplation are the only causes that concern us.¹²

6. 337 S.W.2d at 540.

7. The solenoid valve constituted part of the electrical system of the truck's engine. Malfunction of the solenoid valve indicated a strong possibility that a spark, incapable by itself of damaging the truck, actually "touched off" the propane gas.

8. 337 S.W.2d at 541. (Emphasis deleted.)

9. *State ex rel. Prudential Ins. Co. of America v. Shain*, 344 Mo. 623, 629, 127 S.W.2d 675, 678 (1939) (en banc).

10. 337 S.W.2d at 542 (dissenting opinion).

11. 224 N.Y. 47, 120 N.E. 86 (1918); see Annot., 13 A.L.R. 875, 877 (1921).

12. *Id.* at 51, 120 N.E. at 87. *Accord*, *Lunn v. Indiana Lumbermens Mut. Ins. Co.*, 184 Tenn. 584, 588, 201 S.W.2d 978, 980 (1947).

Of course some insurance contracts will lend themselves to the application of "tort" principles of causation because they embody such an approach within the provisions of the policy. However, the parties' manifested intention to incorporate such a test in the policy is the governing consideration. For instance, the case of *Pan American Life Ins. Co. v. Andrews*¹³ involved a claim for double indemnity benefits under a life insurance policy. The insurer was liable for double indemnity only if the death of the insured occurred as a result of bodily injuries "effected solely through external, violent and accidental means . . ." The insured died thirty-four days after observing his office being consumed by fire. The plaintiff-beneficiary contended that the insured's death resulted from a psychic trauma induced by the shock of witnessing the fire. The Supreme Court of Texas first found for the plaintiff-beneficiary¹⁴ but on rehearing reversed itself. The policy incorporated a "tort" approach to the causation issue which required the court to look behind the immediate cause of death to determine whether death had been "effected" through "accidental means." On rehearing the court did not find a sufficient causal connection between the shock of witnessing the fire and the death of the insured. The manifested intent of the parties was to require a causal relationship between the accident (fire) and the death. This is essentially a tort question and was so treated by the court.¹⁵

The instant policy, however, through an application of basic contract principles, unlike that construed in *Pan American*, did not encompass an intent to retrace the chain of causation to its first link, but was designed only to exclude protection if "bottled or propane gas" constituted one of the links of the causal chain. Under the reasoning of the court in the instant case, the exclusionary endorsement was written out of the policy entirely. It should be noted that propane gas is neither combustible nor inflammable in its liquid state, and is inflammable in a gaseous state only if it comes in contact with a spark or flame. Under these circumstances how could propane gas ever "cause" a loss, as defined by this court? This question was raised on oral argument and the answer given by the court was that heat from the sun's rays might cause an explosion which would be excluded from coverage.¹⁶ It is hard to distinguish this hypothetical from the instant case, if the court intended to attribute the loss to expanding gas. However, if the court meant the sun's rays "caused" the loss, protection would be denied because sun rays are not a peril insured against under the policy, and not because of an "exclusion" due to the "Bottle Gas Endorsement."¹⁷

In dealing with the *Smith* case the court experienced considerable difficulty

13. 340 S.W.2d 787, 789 (Tex. 1960).

14. 28 U.S.L. WEEK 2512 (April 19, 1960).

15. *Accord*, *Britton v. Prudential Ins. Co. of America*, 320 S.W.2d 326, 328 (Tenn. 1959).

16. Majority opinion, K.C. Ct. App., Oct. Session 1959, unreported because of rehearing.

17. See generally Brewer, *Concurrent Causation in Insurance Contracts*, 59 MICH. L. REV. 1141 (1961). Concurrent cause situations in insurance cases can be divided into those in which the excluded cause plays a part and those in which it does not. The modern decisions hold defendant insurer is not liable in the first type case, while it is liable in the second.

with the case of *Insurance Co. v. Express Co.*¹⁸ There a policy insured goods while being transported on a train by the Express Company. An exclusionary clause denied coverage for any loss "arising from petroleum or other explosive oils." A loss was suffered when the goods were consumed by a fire occasioned by a collision with another train mainly composed of oil cars loaded with petroleum. The court denied recovery as a result of the exclusionary clause and held that the parties must have intended that:

[A] loss by fire might arise or be caused by petroleum. That would be impossible, unless the petroleum were ignited in some way. It must, therefore, have been understood that burning petroleum, distinguished from the match, coals, or collision that ignited it, might originate a fire, and that a loss might arise from it.¹⁹

This holding compelled the court in the *Smith* case to draw a distinction between the words "arising from" as used in the exclusion in the *Insurance Co.* case and the words "caused by" as used in the "Bottle Gas Endorsement" involved in *Smith*,²⁰ an exercise in semantics which appears unnecessary to the issue in question, *i.e.*, the intent of the parties as manifested in the policy.

In an attempt to conform to this distinction M.F.A. Mutual Insurance Company has rewritten its "Bottle Gas Endorsement."²¹ But it is questionable whether any change of wording will adequately protect the insurer. For the endorsement, as rewritten, to have any practical effect as a limitation on liability the courts must use an approach which gives effect to the limitations of the coverage as manifested in the policy and in accordance with the intent of the parties. In the final analysis the insured will be the party who suffers from a judicial disregard of the parties' intent because insurance companies may refuse to provide coverage for any vehicles used for "hazardous" purposes.²²

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18. 95 U.S. 227 (1877).

19. *Id.* at 230.

20. A distinction previously made in *Schmidt v. Utilities Ins. Co.*, 353 Mo. 213, 218-19, 182 S.W.2d 181, 183 (1944), where the words "arising out of" were said to be much broader than the words "caused by."

21. "It is expressly understood and agreed that this policy would not have been issued by MFA Mutual without this endorsement forming a part thereof; therefore, in consideration of the issuance of this policy, it is agreed that such insurance as is afforded by the policy does not apply with respect to any loss, damage, injury or death arising from, caused or occasioned, either directly or indirectly, or contributed to, by bottled or compressed gas (whether known as butane or propane gas, or by any other name), whether ignited by any means or cause, or whether not ignited, (1) while such gas is in or upon or being transported or conveyed in, upon, or by the insured vehicle, or (2) while such gas is being loaded or unloaded therein or therefrom, nor (3) during or subsequent to any release or escape of such gas from the insured vehicle.

It is agreed the provisions of this endorsement apply regardless of whether or not the insured vehicle is itself propelled by such gas or other fuel."

22. Similar "liberal" construction, which ignored the parties' intent, resulted in abandonment by many life insurance companies of the issuance of disability policies. See KEETON, BASIC INSURANCE LAW 288 (1960).

THE SPECIAL LAW

*Petitt v. Field*¹

The plaintiffs, retail merchants from the larger cities and counties of Missouri, brought a declaratory judgment action seeking to have House Bill 238² enacted by the 1959 General Assembly declared unconstitutional and void, and to enjoin its enforcement. The plaintiffs argued that the bill was a special law prohibited by the Missouri Constitution.³

The bill, in part, provided that all persons who wished to "sell or issue checks in this state as a service for a fee" had to obtain a license to do so;⁴ the bill also provided that no license should issue to any person "engaged in any business the major portion of which involves the processing, manufacture or purchase and sale of commodities or articles of tangible personal property."⁵

The Circuit Court of Jackson County declared the law void on its face and issued a permanent injunction against its enforcement. On appeal, *held*, affirmed on the basis that it was within the constitutional prohibition against passage of special laws.

In determining whether House Bill 238 was constitutionally prohibited, an understanding of what constitutes special laws and how and why they are distinguished from general laws is necessary.

Many opinions begin the analysis with the premise that "a statute which relates to persons or things as a class is a general law while a statute which relates to particular persons or things of a class, is a special one."⁶ The courts, through

1. 341 S.W.2d 106 (Mo. 1960).

2. The section of act which is challenged is Mo. Laws 1959, H.B. 238, § 3: "A. No person shall sell or issue checks in this state as a service for a fee or other consideration without first obtaining a license from the commissioner pursuant to the provisions of this Act, provided, however, that this Act shall not apply to the receipt of money by an incorporated telegraph company at any office or agency of such company for immediate transmission by telegraph.

"B. No license shall be issued or renewed to any person who is engaged in any business the major portion of which involves the processing, manufacture or purchase and sale of commodities or articles of tangible personal property."

3. Mo. Const. art. 3, § 40(28), (30). "Section 40. The general assembly shall not pass any local or special law . . . (28) granting to any corporation, association, or individual any special or exclusive right, privilege or immunity, or to any corporation, association or individual the right to lay down a railroad track; . . . (30) where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject." The first twenty-nine clauses of art. 3, § 40 deal with specific areas that received special legislative attention before the enactment of this section. Clause thirty is general intending to cover those areas not specifically mentioned in the first twenty-nine clauses.

4. Mo. Laws 1959, H.B. 238, § 3(A).

5. Mo. Laws 1959, H.B. 238, § 3(B).

6. *Walters v. City of St. Louis*, 364 Mo. 56, 259 S.W.2d 377 (1953) (en banc), *Aff'd* 347 U.S. 231 (1954); *Reals v. Courson*, 349 Mo. 1193, 164 S.W.2d 306 (1942); *Ewing v. Hoblitzelle*, 85 Mo. 64 (1884).

decisions to be discussed in this note, have applied this premise to particular legislation and have thus formulated more enlightening distinctions.

One area in which there has been close scrutiny of the problem is in legislation where classification is by districts and population. In *Reals v. Courson*,⁷ the question arose over a grant of extra funds for certain school districts. The legislation allowed funds only to school districts which were formed from municipalities in counties having more than 200,000 but less than 450,000 inhabitants.⁸ The court stated that although it was permissible to classify legislation of political subdivisions by population, this legislation, though general on its face, was special in effect.

Even though the law may purport to be general if the classification by population is unreasonable, unnatural or arbitrary so that it does not apply to all persons or things similarly situated, it is then, in fact, special despite its apparent purpose.⁹

The test of a special law, in the light of the court's analysis, appears to be the appropriateness of its provisions to the objects that it excludes. It seems it is not what the law includes that makes it special, but what it excludes. In the *Reals* case, the court stated that the distinction between school districts in counties having a population of between 200,000 and 450,000 was arbitrary and unnatural. All State school districts were faced with the same economic problems and to allot funds in the manner provided amounted to special legislation.

In *Walters v. City of St. Louis*,¹⁰ the General Assembly passed legislation under which only the constitutional charter city of St. Louis could qualify.¹¹ This act allowed St. Louis to place, by ordinance, an earnings tax upon people working within the city. The Supreme Court held that the "earnings tax" was not a special law, the justification being that the size and financial responsibilities of St. Louis made its financial problems unique as to all other cities in the State of Missouri.

In both the *Reals* and *Walters* cases the classification of the area covered was accomplished by specifying population requirements; yet in the *Reals* case the bill was special and in *Walters*, general. The conflict is easily solved when one looks to the areas involved. The *Walters*' legislation *included* all who were similarly situated, while the *Reals*' legislation *excluded* school districts which were similarly situated. In the *Reals* case there were school districts all over the State in need of financial aid; in the *Walters* case the financial problems of St. Louis were unique. One of the reasons for Missouri's prohibition against special laws is their discrimi-

7. *Supra* note 6.

8. Mo. Laws 1941, H.B. 445.

9. *Reals v. Courson*, *supra* note 6, at 1198, 164 S.W.2d at 308.

10. *Supra* note 6.

11. Section 92.010, RSMo 1949, provides: "Any constitutional charter city in this state which now has or may hereafter acquire a population in excess of seven hundred thousand inhabitants, according to the last federal decennial census, is hereby authorized to levy and collect, by ordinance for general revenue purposes, an earnings tax on the salaries, wages, commissions and other compensation earned by its residents . . ."

natory effect, but to strike down the legislation because no other area could qualify in a class with St. Louis would be just as unreasonable and discriminatory.

As seen, the reasonableness of classification and the exclusions involved have great bearing as to whether legislation is general or special. City ordinances are subject to the same analysis¹² and in *McKaig v. Kansas City*,¹³ an ordinance was enacted which forbade auto dealers to be open on Sunday and six national holidays.¹⁴ The city defended its action on the basis of its police power contending that it was sound public policy to recognize a weekly day of rest. The plaintiffs did not challenge the city's authority, but argued that the ordinance was arbitrary and special. The court struck down the ordinance on the basis that there were no reasonable grounds for distinguishing auto dealers from others engaged in the sale of merchandise. The unreasonable classification made the ordinance special.

The *McKaig* case should be contrasted with *ABC Liquidators, Inc. v. Kansas City*.¹⁵ In the latter, Kansas City passed an ordinance prohibiting public auctions on Sunday.¹⁶ Not unlike the *McKaig* ordinance, a special group had been legislated against. However, the court upheld the ordinance against a charge that it was special. The distinction is found in the nature of auctions as a means of selling merchandise. The noise, crowds, and excitement of an auction make a sharp contrast from most other types of sales. The means utilized by the auctioneer through the public auction would seem to serve as the distinguishing feature justifying the ordinance in question. No such feature can be found to justify the *McKaig* ordinance.

Returning to the principal case, *Petitt v. Field*, and taking the cases above as background, the distinctions which the court drew in striking down the statute become clear. The parties stipulated that the act was:

[I]ntended to exercise the police power of the state with reference to licensing and regulation of sale and issuance of checks, drafts, and money orders as a service for a fee and that the field is a proper one for the exercise of the police power and there is a need therefor.¹⁷

Even so, since the act was special, it failed.

The law refused licenses to businessmen who dealt in tangible personal property. If a businessman dealt in a service rather than the sale of goods, he was eligible for a license to sell and issue checks. The bill distinguished, without reason, persons dealing in services and persons dealing in tangible goods. A proprietor of a bowling alley or barber shop could issue and sell checks, but a proprietor of a dry

12. *Laclede Power & Light Co. v. City of St. Louis*, 353 Mo. 67, 182 S.W.2d 70 (1944) (en banc); *City of Springfield v. Smith*, 322 Mo. 1129, 19 S.W.2d 1 (1929) (en banc).

13. 363 Mo. 1033, 256 S.W.2d 815 (1953) (en banc).

14. *Kansas City, Mo., Ordinance 15794*, August 22, 1952.

15. 322 S.W.2d 876 (Mo. 1959).

16. *Kansas City, Mo., Ordinance 19978*, May 23, 1956.

17. *Petitt v. Field*, *supra* note 1, at 108.

goods or drug store could not. There seems to be little reason to base such a classification either on regulatory power or public policy or on both.

The statute made a further distinction: if "49% of the person's business was buying and selling goods, he could be licensed, but if it was 51% he could not be."¹⁸

The above mentioned classifications were not based upon reasonable distinctions and the court was compelled to strike the act down.

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18. *Petitt v. Field*, *supra* note 1, at 109.