

Administrative Law - National Service Life Insurance - Doctrine of Sovereign Immunity in the Field of Government Commercial Enterprises

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COMMENTS

ADMINISTRATIVE LAW—NATIONAL SERVICE LIFE INSURANCE—DOCTRINE OF SOVEREIGN IMMUNITY IN THE FIELD OF GOVERNMENTAL COMMERCIAL ENTERPRISE

I

The rule of law enunciating the principle that the United States may not be estopped by the unauthorized acts of its agents and that such agents may not waive the rights of the United States has recently been invoked in the case of *United States v. Fitch*.¹ The basis of this principle is founded on the broader concept that the sovereign may not be sued without its consent² and where consent is given, the statute will be strictly construed³ so as not to broaden the field of government liability beyond the express consent of the legislature. Many of the District Courts have shown a tendency to apply the doctrine of waiver and estoppel against the government, but in most cases have been reversed upon the application of this ancient doctrine of sovereign immunity.⁴ In this contemporary era of paternalism in which the government has extended the scope of its activities so as to include business ventures heretofore reserved to private enterprise, an important issue is squarely placed before the courts. Where the United States, through agencies and government corporations, enters the field of commercial transactions, should the laws and decisions governing private enterprises be applicable to the government?

II

While there is no constitutional provision which forbids a suit against the United States⁵ without its consent, the principle that "the

¹ 185 F. (2d) 471 (10th Cir., 1950). The insured under a national service life insurance policy, allowed the policy to lapse for non-payment of premiums. He mailed a letter to the Veterans Administrator enclosing premiums for two months but failed to send a statement as to the condition of his health. The Administrator stated that it would be applied to the account of the insured *in accordance with the law and regulations pertaining thereto*. No question was raised as to the health statement required by the regulations in effect. 38 CODE FED. REGS. §§10.3422, 10.3423, 10.3424 (Cum. Supp. 1946). The lower court found that the insured was in better health when the premiums were received than he was when the insurance lapsed for non-payment of premiums. The Circuit Court of Appeals denied recovery on the policy alleged to be in force, holding that no policy was in effect at the date of the death of the insured and the Veterans Administration rightfully denied reinstatement.

² *Kansas v. United States*, 204 U. S. 331, 27 S. Ct. 388, 51 L. Ed. 510 (1907). See also 54 Am. Jur. 634 and cases collected therein.

³ *Wilson v. United States*, 70 F. (2d) 176, 179 (10th cir., 1934).

⁴ *Infra*, note 20.

⁵ The Eleventh Amendment of the U. S. Constitution is limited to an action against a state brought by a citizen of another state or by citizens or subjects of a foreign state.

courts have no jurisdiction over such action"⁶ forecloses the possibility of such suits.⁷ Various reasons have been assigned for the doctrine of sovereign immunity, many of them being of historical importance only. The idea that a government should not be made to suffer the inconveniences and indignities of a suit by one of its citizens⁸ seems to be insubstantial in view of the express consent to sue the government granted by congress in many instances.⁹ The reasoning of Justice Holmes, apparently influenced by the political writings of Thomas Hobbes, led to this conclusion:

"A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."¹⁰

This reasoning appears to lack force in view of the prevalent political philosophy of this country that sovereignty resides most completely in the people and not in any government. Holmes' argumentation is probably a corollary of the maxim that "the King can do no wrong" which was a popular theory in, and a consequence of, English Jurisprudence.¹¹ Sovereignty was said to reside in the King by reason of his dignity, and since the laws were dependent on his prerogative, he was not subject to them. However, it is difficult to ascertain exactly where sovereignty resides, under the United States government of limited, delegated powers. Certainly all three branches of the government are limited by the U.S. Constitution, and each state has surrendered some portion of sovereignty as a member of the union.¹² The only alternative appears to be that sovereignty reposes in the people.¹³ If this be the case, the conclusion of Holmes appears unsatisfactory.

⁶ *Kansas v. United States*, *supra*, note 2.

⁷ Art. III Sec. 2 Cl. 1 of the U. S. Constitution extends the judicial power to "Controversies to which the United States shall be a party." This article would be sufficient to support a court holding that a suit may be maintained against the United States. However, by reason of the established doctrine of sovereign immunity, this clause is limited to suits in which the United States is the party plaintiff. *Williams v. United States*, 289 U. S. 553, 573, 53 S. Ct. 751, 77 L. Ed. 1372 (1933).

⁸ *In Re Ayers*, 123 U. S. 443, 505, 8 S. Ct. 164, 31 L. Ed. 216 (1887).

⁹ E.g., Federal Tort Claims Act, 28 U.S.C.A. sec. 1346 (b). ". . . the district courts . . . shall have jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable . . .".

¹⁰ *Kawananokoa v. Polybank*, 205 U. S. 349, 353, 27 S. Ct. 526, 51 L. Ed. 834 (1907).

¹¹ I BLACKSTONE COMMENTARIES 239.

¹² *United States v. Texas*, 143 U. S. 621, 12 S. Ct. 488, 36 L. Ed. 285 (1892).

¹³ *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886). "In our system, while sovereign powers are delegated to the agencies of govern-

Perhaps the only meritorious argument lies not in theory but rather in practical considerations, entailing the interference with the functioning of government.¹⁴ But this is an insufficient premise for applying the immunity doctrine indiscriminately. That doctrine ought to be limited in this wise: A government should not be subject to suits without its consent where such suits or the threat of such suits would unduly interfere with the primary functioning of government. Such a rule cannot be applied without first determining the extent of the primary functions of government. The question might well be asked, "Does a government agency or corporation engaged in the business of insurance fall within the scope of primary governmental functions?" The answer to this, if any existing injustices are to be remedied, should not be dependent upon the subjective norm of the prevalent political theory existing at the time. If it were, the further problem of determining what this theory is at a certain period of time would serve as a valid objection to its adoption. A more realistic approach to the problem necessitates the adoption of a more objective standard. A government agency or corporation engaged in a business which *by its nature* involves commercial transactions is not within the primary function of government. The adoption of this standard would indicate that the doctrine of sovereign immunity would apply only to cases in which first, there was an interference with the functioning of the government and second, this function was of a non commercial nature. This rule would remove cases involving national service life insurance from the purview of the immunity doctrine and these cases would be decided according to the laws and decisions applicable to private insurance companies. As a result, the rules of waiver and estoppel would apply to the United States. Similarly, those corporations discharging government functions which are commercial in nature and which the legislature has authorized to sue and be sued would be subject to the rules of waiver and estoppel.¹⁵

ment, sovereignty itself remains with the people by whom and for whom all government exists and acts."

¹⁴ 23 So. CAL. L. REV. 258, 260.

¹⁵ Reconstruction Finance Corporation, Tennessee Valley Authority, Federal Savings and Loan Insurance Corporation, Federal Crop Insurance Corporation. Under the rule advocated here these corporations listed would not have recourse to the immunity doctrine because *by their nature* they are involved in commercial transactions. Although it may appear to be a moot question as to whether government corporations and agencies would be included in the rule contended for, particularly in situations in which congress has consented to their suing and being sued, the fact remains that the government, under the present rule, may withdraw its consent at any time. *White v. United States*, 270 U. S. 175, 46 S. Ct. 274, 70 L. Ed. 530 (1926). A more important reason for their inclusion is the fact that the doctrine of waiver and estoppel applicable to private companies is not applicable to the government corporations listed. Cf. *infra*, note 29.

While the doctrine of sovereign immunity could be narrowed or restricted without the aid of a statute,¹⁶ the courts seem to be intrigued by the antiquity of it and have uniformly held that the "sovereign"¹⁷ may not be sued without its consent. From this the courts concluded that when congress authorizes suits against the government, this consent will be strictly construed in favor of the government¹⁸ and the doctrine of waiver or estoppel will not be applied.¹⁹ The adherence to the rigid rule of sovereign immunity and the consequential injustices resulting therefrom have led some federal district courts to apply essentially the rule advocated here, but have met with little success.²⁰ Some circuit courts have expressed an implied disfavor with the results attained under the rule but thus far have failed to grant relief. Various reasons have been assigned. In *Birmingham v. United States*²¹ the court held that "no officer or employer of the government can . . . bind the government to any waivers, express or implied." This court also laid down the rule that where the government did not enter the field of business in the accepted sense for commercial purposes and pecuniary gain, it does not stand in the same position as ordinary insurance companies.²² While the rule may be the basis for distinction in this field, the test applied seems wholly inadequate, being based upon the motives of the government for entering a particular business field. It may be unprejudicially stated that at no time is pecuniary gain the prime factor in the government's entering a commercial field. Other reasons, for example, re-development, or promotion of commerce among the states,²³ are greater motivating factors. In *United States v.*

¹⁶ *Supra*, note 6.

¹⁷ The idea that the United States is a sovereign in the sense that the word sovereign was used to support the English rule concerning the non-suability of the king is open to question. Cf. *supra*, note 12.

¹⁸ *Wilson v. United States*, *supra*, note 3; *Bryan v. United States*, 99 F. (2d) 549, 552 (10th cir., 1938).

¹⁹ *Wilbur National Bank v. United States*, 294 U. S. 120, 55 S. Ct. 362, 79 L. Ed. 798 (1934).

²⁰ The district court in *Wilbur National Bank v. United States*, *supra*, note 19, said: "If the defendant (United States) was a private insurance company, I would have no hesitancy in declaring it estopped from claiming the policy had lapsed for non-payment of premium. . . . The same principle should be applied against the defendant (United States) in this case." See also, *United States v. Fitch*, *supra*, note 1.

²¹ 4 F. (2d) 508 (8th cir., 1925). Insured's war risk insurance policy lapsed on March 31, 1919. On July 2, 1919 the insured died and the due notice of death was given by the beneficiary. After the notice, the beneficiary was notified of an arrearage which was forwarded and was received by the Veteran's Bureau. The beneficiary pleaded that the United States waived the prompt payment of the premiums.

²² To the same effect is *White v. United States*, *supra*, note 15. "The insurance was a contract, for which a premium was paid, but it was not one entered into by the United States for gain."

²³ *Luxton v. North River Bridge Co.*, 153 U. S. 525, 529, 14 S. Ct. 891, 38 L. Ed. 808 (1894).

*Tyke*²⁴ the court stated that a war risk insurance contract is not a business contract. It is a "relation of benevolence, established by the government at considerable cost to itself, for the soldier's good." If motive is to remain the test in determining the extent of government liability, it is respectfully submitted that no business undertaking by the government can be immune from the nonsuability doctrine. This was evidenced in the case of *United States v. Loveland*²⁵ where the court categorically stated:

"When the government broadened its field of operation to new fields, it did not thereby broaden the power of those it employed in such new fields to the extent of allowing them, by acts of neglect or omission, to commit the government to liabilities in such fields which they had no power to do in other spheres of government activity."

This statement appears to be contrary to the test laid down by Justice Holmes in *Standard Oil Co. of New Jersey v. United States*.²⁶

"When the United States went into the insurance business, issued policies in familiar form and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business."

However, this case has not been followed as an authority governing war risk insurance.²⁷ The decision in *Keifer & Keifer v. R.F.C.*²⁸ was a recent step toward a liberal construction of a statute creating government corporations. The R.F.C. was authorized to charter a Regional Agricultural Credit Corp. Neither the statute authorizing this nor the charter explicitly rendered the Credit Corporation amenable to suit. Among the corporate powers granted to the R.F.C. was the power to sue and be sued. The court held that the Credit Corporation's liability to suit was to be inferred from the numerous instances in which congress has authorized suits against government corporations. The court also remarked, "Congress may, of course, endow a governmental corporation with the government's immunity. But always the question is: has it done so?" The question as to whether a government cor-

²⁴ 19 F. (2d) 876 (9th cir., 1927). The facts were concerned with the payment of interest by the United States. The court stated, "It is a settled rule that, in the absence of a stipulation to pay interest, or a statute allowing it, none can be recovered against the United States upon unpaid accounts or claims." citing *United States v. Rogers*, 255 U. S. 163, 169, 41 St. Ct. 281, 65 L. Ed. 566 (1921).

²⁵ 25 F. (2d) 447 (3d cir., 1927).

²⁶ 267 U. S. 76, 45 S. Ct. 211, 69 L. Ed. 519 (1925). The insured held two policies issued by the government insuring a ship and its freight against war risks. The Supreme Court affirmed a district court decree awarded *against* the United States. The statement of the court was made in reference to the lower court's decree awarding interest against the United States.

²⁷ *Sternfield v. United States*, 32 F. (2d) 789 (D.C., N.Y.) (1929), citing *Birmingham v. United States*, *supra*, note 21, *United States v. Lyke*, *supra*, note 24.

²⁸ 306 U. S. 381, 59 S. Ct. 516, 83 L. Ed. 784 (1939).

poration partakes of government immunity, unless congress consents to its being sued appears to be decided in the negative. The problem, however, still remains: does the doctrine of waiver or estoppel apply in cases involving governmental agencies and corporations? The answer to this was stated in *Federal Crop Insurance Corporation v. Merrill et al.*²⁹ The government empowered a corporation to insure wheat farmers against crop losses. Regulations specifying the conditions on which it would insure wheat crops were published in the Federal Register, and included was a provision making spring wheat which had been reseeded on winter wheat acreage ineligible for insurance. The plaintiff farmer applied for insurance, informing the local agent that his wheat was being reseeded in winter wheat acreage and the local agent advised him that the crop was insurable. The corporation accepted the application subject to the terms of its regulations. In this suit to recover on the policy for loss of the crop, the court held that the plaintiff was not entitled to recover. Here the court assumed that recovery could be had against a private insurance company.

"It is too late in the day to urge that the government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business heretofore conducted by private enterprise or engages in competition with private ventures."³⁰

It would appear that fair dealing concerning the interrelation of the United States and its citizens should be essential. If this were true, the government in the crop insurance case would be bound by the contract, i.e., the written application and the policy issued. But the court sustains its position by superimposing the regulations upon the relationship of the parties. In order to sustain their position, the court, impliedly at least, held that after the local agent advised the farmer that the crop was insurable the farmer was bound—1. to know that regulations of the corporation existed; 2. to read these voluminous regulations; 3. to understand them and their technical applications. It goes without saying that this is undoubtedly requiring too much of the citizenry. To fulfill these requirements, it is doubted that a farmer would have any unconsumed time in which to plant crops.

In a recent case³¹ the Court of Claims held that the plaintiff could not rely on an expression of opinion by the Chairman of the Board of

²⁹ 332 U. S. 380, 68 Sup. Ct. 1, 92 L. Ed. 10 (1947).

³⁰ *Ibid.*

³¹ *Kelley v. United States*, 91 F. Supp. 305 (1950). The plaintiff bid to supply milk to a government hospital. The standard form for the bid contained a clause that "If any sales tax, . . . *adjustment charge*, . . . or other taxes or charges are imposed or changed by Congress, . . . the prices named in this bid will be increased accordingly. . . .". The chairman of the Board of Awards said that in his opinion the *adjustment charge* phrase included adjustment of prices by the OPA. Ceiling prices were later increased. Plaintiff's increased costs were disallowed by the Comptroller General of the United States and the Court of Claims affirmed the denial.

Awards concerning the meaning of a provision on a standard government form for bids. Under the present rule, the employment of a lawyer is essential in determining whether the layman is actually receiving a binding contract when he deals with his government, even though a government agent assures the citizen that he has.

III

In a majority of the cases involving the doctrines of waiver and estoppel against the United States, the courts have admitted that recovery could be maintained against private companies. There remains no equitable or logical basis for a distinction. The doctrine of sovereign immunity, which lies, innately, at the base of these decisions need not be disregarded entirely but merely contained within a specific sphere. A government, when carrying out its proper functions, should not be molested by suits or threats of suits. This much is conceded. But the broad contention maintained by the court in the Federal Crop Insurance Corporation case,³² based only on the antiquity of a rule rather than reason should not be allowed to endure. Rather, the courts should adopt the standard that a government agency or corporation engaging in a business which by its nature involves commercial transactions is subject to the same laws and decisions governing private enterprise in that field. A second solution would be legislation on a national level similar to that exercised in the tort field.³⁴ While it is well to say that anyone doing business with the government must turn square corners,³³ there appears to be no valid reason why such action should constitute a one way street.

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³² *Supra*, note 30.

³³ *Supra*, note 29, the dissenting opinion of Justice Jackson.

³⁴ Federal Tort Claims Act, *supra*, note 9.