Marquette Law Review

Volume 41
Issue 2 *Fall 1957*

Article 12

1957

Joinder of Parties: Effect of No-Action Clause Valid in State Where Insurance Contract Made Upon Joinder of Insurer Under Section 260.11(1)

Donald Gancer

"The Church most severely forbids everywhere marriages between two baptised persons, one of whom is a Catholic, the other a member of a heretical or schismatical sect; and if there is a danger of perversion for the Catholic party or the offspring the marriage is forbidden also by Divine law."

Canon 1060.

DAVID A. SCHUENKE

Joinder of Parties: Effect of No-Action Clause Valid in State Where Insurance Contract Made Upon Joinder of Insurer Under Section 260.11(1)—A direct action was brought against defendant non-resident insurer, who had issued an automobile liability policy in Kansas to a Wisconsin taxicab company, for injuries sustained in Wisconsin as a result of the negligence of the taxicab company. This policy contained a "no-action" clause[1] which is recognized as valid in Kansas. Upon motion of insurer to dismiss the complaint against him on the ground that insurer is not a proper party. *Held:* that an insurer is not subject to direct action in Wisconsin by the injured party in view of the *construction* of Wis. Stats. Sec. 260.11 (1)[2] as not permitting direct action in such case before the amount for which the insurer may be liable has first been determined either by agreement or by final judgment against the insured. *Klabacka v. Midwestern Automobile Insurance Co.,* 146 F. Supp. 243 (W.D. Wis. 1956).

The principal case again raises the question of what effect, if any, *Watson v. Emplyoers Liability Assurance Corp.*[3] has had on the Wisconsin decision of *Ritterbusch v. Sexsmith.*[4] In the *Ritterbusch* case the no-action clause was contained in a policy issued in Massachusetts where such clause is valid but the party insured resided in Wisconsin. Our Court held that the no-action clause was effective to postpone di-

---

[1] The standard form of such clause reads: "No action shall lie against the company until the amount for which the assured is liable by reason of any casualty covered by this policy is determined by final judgement against the insured or by agreement between the insured and the plaintiff with the written consent of the company."

[2] WIS. STATS. §260.11(1) (1955), the pertinent provision being: ". . . . In any action for damages caused by the negligent operation, management, or control of a motor vehicle, any insurer of motor vehicles, which had an interest in the outcome of such controversy adverse to the plaintiff or to any of the parties to such controversy, or which by its policy of insurance assumes or receives the right to control the prosecution, defense or settlement of the claim or action of the plaintiff or any of the parties to such claim or action, or which by its policy agrees to prosecute or defend such action brought by the plaintiff or any of the parties to such action or agrees to engage counsel to prosecute or defend such action, or agrees to pay costs of such litigation is by this section made a proper party defendent in any action brought by the plaintiff on account of any claim against the insured."

[3] Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954).

[4] Ritterbusch v. Sexsmith, 256 Wis. 507, 41 N.W. 2d 611 (1950).

rect action against the insurer until after adjudication of liability against the insured notwithstanding Sec. 260.11 (1) which provides that the insurer is a proper party in an action against the insured.

The *Watson* case involved a policy of insurance issued in Massachusetts and Illinois containing a no-action clause. The suit was brought in Louisiana where the statute[5] provided that a no-action clause in an insurance policy shall be no bar to a direct action against an insurance company regardless of whether such policy is issued in Louisiana or in any other state.[6] The United States Supreme Court held that this statute is not violative of the Full Faith & Credit, Due Process or Impairment of Contracts provisions of the Federal Constitution.

Does this decision change the law in Wisconsin as stated in the *Ritterbusch* case? The principal case answers this question in the negative. The federal court there adopts the view that the *Ritterbusch* case had *construed* Sec. 260.11(1) as being inapplicable to policies written in states recognizing such clauses as valid. And since the Louisiana statute[7] involved in the *Watson* decision was different from ours in that it specifically referred to policies written in other states, that case was not a controlling precedent.

The court said:

> "In short, the court simply held in the *Watson* case that the Louisiana statute which completely abrogated the 'no-action' clause of insurance policies, was valid. Wisconsin has no such statute. It could pass a statute similar to the Louisiana statute but has not elected to do so, and until it does the rule in the *Ritterbusch* case, and the others cited herein, remains the law of this state which this court must adopt."[8]

Some state circuit courts have held a contrary view.[9] But upon viewing the decisions of the Wisconsin Supreme Court prior to *Ritterbusch* it seems that the principal case has arrived at the proper conclusion.

In *Morgan v. Hunt*[10] the Court held that a no-action clause did not offend the provision of Sec. 85.93[11] (then Sec. 85.25) imposing a

---

[5] LA. REV. STATS. §22.655 (1950); as amended by Act 541 of the Louisiana Legislature of 1950.

[6] *Ibid.* ". . . . This right of direct action shall exist whether the policy sued upon was written or delivered in the state of Louisiana or not and whether or not such policy contains a provision forbidding such action, provided the accident or injury occurred within the state of Louisiana . . . ."

[7] *Ibid.*

[8] Klabacka v. Midwestern Mutual Automobile Insurance Co., 146 F. Supp. 243, at 245 (W.D. Wis. 1956).

[9] Arnold & Gaines, *Does the Decision in the Watson Case Overrule Ritterbusch v. Sexsmith,* Milwaukee Bar Association Gavel, Spring & Summer (1956).

[10] Morgan v. Hunt, 196 Wis. 298, 220 N.W. 224 (1928).

[11] WIS. STATS. §85.93 (1955): "Any bond or policy of insurance covering lia-

direct liability upon insurers to the injured party. Such a clause only postponed the time when such liability could be asserted. The no-action clause was given effect and suit dismissed as to the insurer.

The question of joining an insurer as a party defendant under Sec. 85.93 was raised again in *Bergstein v. Popkin*[12] and the Court reaffirmed its decision of the *Morgan* case but clearly outlined what kind of statute the Legislature would have to adopt before such joinder would be permitted. Following this suggested method, the Legislature in 1931 amended Sec. 260.11(1) to read as it now does.[13] The amendment clearly provided for joinder of an insurer as a defendant in cases involving automobile liability policies.

In *Lang v. Baumann*[14] the Wisconsin Court held that this joinder provision evidenced a legislative intent to make the no-action clause ineffective to postpone direct action. In that case the Court referring to the amendment suggested in *Bergstein* said:

> "The court plainly indicated the sort of amendment that it considered necessary to render ineffective clauses postponing actions against the insurer until judgment had been taken against the insured. The legislature has followed the precise method suggested by the court and the amendment immediately followed the decision in this case. We entertain no doubt that the legislative intent was to change the doctrine of the *Morgan* and *Bergstein* cases."[15]

Oertel v. Williams[16] involved a no-action clause in a policy issued in Wisconsin but after issuance the insured moved to Pennsylvania and was a resident of that State when the collision occurred in Indiana. Indiana has no provision for joining an insurer as a party defendant. The court held that:

> "Whether under the law of Indiana the insurer can or cannot, as a matter of procedure, be joined, against its objection, as defendant in such action is immaterial. That is purely a question of procedural law, as to which, under the rule that the law of the forum governs all matters relating to the remedy, the conduct of the trial, and the evidence, (citations omitted) the procedural law of this state is controlling."[17]

---

bility to others by reason of the operation of a motor vehicle shall be deemed and construed to contain the following conditions: That the insurer shall be liable to persons entitled to recover for the death of any person, or for the injury to any person or property, irrespective of whether such liability be in praesenti or contingent and to become fixed or certain by final judgement against the insured, when caused by the negligent operation, maintenance, use or defective construction of the vehicle described threin, such liability not to exceed the amount named in said bond or policy."

[12] Bergstein v. Popkin, 202 Wis. 625, 233 N.W. 572 (1930).

[13] See note 2 *supra.*

[14] Lang v. Baumann, 213 Wis. 258, 251 N.W. 461 (1933).

[15] *Id.* at 464.

[16] Oertel v. Williams, 214 Wis. 68, 251 N.W. 465 (1934).

[17] *Id.* at 466.

In *Beverly v. Thorpe*[18] the Court held that a no-action clause in a state recognizing such clauses as valid retained its vitality in a suit in Wisconsin. Joinder of the insurer as a party defendant was not allowed because Sec. 260.11(1), although merely procedural,[19] also takes away a valuable right and to apply it to a contract good in the state where written would be unconstitutional as an impairment of a valid contract.

Ritterbusch v. Sexsmith made passing reference to the constitutional ground applied in *Byerly*. The decision was in fact, though, made to rest upon the conflict of laws doctrine that the law of the state where a policy is issued determines the efficacy of the no-action clause.

> "No case has been cited to us from the decisions of this court or any other court which holds that the obligation 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 by acknowledging the principle that the law of the state where the contract is made determines the obligation of the contract, not the law of the place of performance."[20]

The Wisconsin Supreme Court has steadfastly refused to give extra-territorial effect to Sec. 260.11(1) in every case where the issue was raised. Whether these decisions have in fact construed Sec. 260.11(1) as being inapplicable to the policies under consideration or whether instead the conflict of laws rule of *Ritterbusch* controls; the result would appear to be the same, viz., Sec. 260.11(1) does not apply to policies of insurance containing a no-action clause recognzied as valid in the state where the policy was issued.

DONALD GANCER

Errors in Framing Special Verdict and Instructions: Necessity of Motion for New Trial Grounded Thereon as Prerequisite to Availability on Appeal—On trial of an auto negligence action, counsel for the defendant objected to the form of a special verdict proposed for submission to the jury, pointing out to the court that the special verdict was duplicitous in that it permitted finding defendant's deceased driver negligent not only as to lookout, but also as to management and control. The jury returned a special verdict under which the driver was found causally negligent as to speed, lookout, and management and control. After verdict, the defendant moved for a new trial. The motion for new trial specified five grounds in support thereof, none of which specifically

[18] Byerly v. Thorpe, 221 Wis. 28, 265 N.W. 76 (1936); Followed in Kilcoyne v Trausch, 222 Wis. 528, 269 N.W. 276 (1936).
[19] See notes 16 & 17 *supra*.
[20] See note 4 *supra*, 256 Wis. at 515, 41 N.W. 2d at 615. Two justices dissenting to this statement of the conflict of laws rule.