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Abstention by Federal Courts Having Jurisdiction by Diversity of Citizenship

Ben R. Swank Jr.

Comments

ABSTENTION BY FEDERAL COURTS HAVING JURISDICTION BY DIVERSITY OF CITIZENSHIP

I. The Problem

Recent decisions by the United States Court of Appeals for the Fifth Circuit revive the problem of federal courts declining to exercise jurisdiction because of doubt about state substantive law. The federal jurisdictional requirement (diversity of citizenship and jurisdictional amount) was met in *Delaney v. United Services Life Ins. Co.*[1] Insurance Company insured Delaney but the policy did not cover death attributable to travel in an aircraft except death resulting from travel as a *passenger* on a United States Government plane or as a passenger on a scheduled passenger air service regularly offered between specified airports. The insured died in the crash of a United States Government aircraft in which he was the pilot and only occupant. Suit was filed in federal district court in Texas and judgment was rendered for the plaintiff.[2] The Insurance Company appealed to the Fifth Circuit Court of Appeals.[3] The court, following the mandate of *Erie v. Tompkins*,[4] initially determined that the Texas substantive law was expressed in *Continental Cas. Co. v. Warren*.[5] In the *Warren* case the Texas Supreme Court held that the designation "passenger" could reasonably be construed to include the pilot as the policy did not specifically exclude pilots.[6] Thus, the insured was deemed to be covered. A motion for rehearing of the *Delaney* case was granted.[7] This time the Fifth Circuit was not sure the *Warren* case[8] was controlling and said that "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.'"[9] Because of its uncertainty as to the Texas law, the Fifth Circuit stayed its hand. It advised the appellants to "initiate a proceeding in a Texas court seeking a declaratory judgment for the determining of the meaning of the pertinent clauses,

1. 201 F. Supp. 25 (W.D. Tex. 1961).
2. *Ibid.*
3. United Services Life Ins. Co. v. Delaney, 308 F.2d 484 (5th Cir. 1962).
4. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).
5. 152 Tex. 164, 254 S.W.2d 762 (1953).
6. *Id.* at 170, 254 S.W.2d at 765.
7. United Services Life Ins. Co. v. Delaney, 328 F.2d 483 (5th Cir. 1964). The *Paul Revere Life Ins. Co. v. First Nat'l Bank* case, presenting the same question, and the *Delaney* case were consolidated and referred to the United States Court of Appeals for the Firth Circuit, en banc.
8. Continental Cas. Co. v. Warren, *supra* note 5.
9. United Services Life Ins. Co. v. Delaney, *supra* note 7 at 484.

of the respective insurance contracts with a review of such judgment by a court of last resort of the State of Texas."[10] The Fifth Circuit Court of Appeals stayed further proceedings pending this determination, but retained "jurisdiction for the purpose of taking such further action as may be required."[11]

II. Statute and Decisions Leading to the Abstention Question

"Undoubtedly the greatest confusion and conflict over the choice of substantive law in the federal courts has arisen in those cases where jurisdiction is based on diversity of citizenship."[12] The origin of this confusion and of the abstention problem stems from section 34 of the original Judiciary Act of 1789, known as the Rules of Decision Act. Section 34 provides:

> The laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.[13]

There was much controversy as to the meaning of "the laws of the several states." The early case of *Swift v. Tyson*,[14] interpreted these controversial words to mean that state decisions were to be followed when construing state constitutions and statutes. They were also to be controlling for questions pertaining to rights and titles to real estate or other intraterritorial matters. But in the broad fields of commercial law and general jurisprudence, the state common law was not to be binding upon the federal courts.[15] Under this decision, the concept of federal common law grew. This idea was destroyed in 1938 when the United States Supreme Court handed down *Erie v. Tompkins*.[16] The new principle was that federal courts in diversity cases could not, as to non-federal matters, disregard state

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10. *Id.* at 485.
11. *Ibid.* Pursuant to the federal court's instruction, United Services and Paul Revere Life Insurance Companies petitioned Texas state district courts for declaratory judgments. The district court to hear the United Services case dismissed for want of jurisdiction giving as its reason that the courts of the State of Texas have no authority to render an advisory opinion. However, the district court of Dallas County hearing the *Paul Revere* case rendered an advisory opinion in favor of the insurance company; thus conflicting results in the Texas state district courts. The prospect is expensive and time consuming appeals to the state appellate courts and then a like procedure at the federal level.

The firm of Boyle, Wheeler, Gresham, Davis & Gregory, San Antonio, Texas, counsel for United Services Life Insurance Company provided the information as to the disposition of the state district court petitions.

A later case, St. Paul Mercury Ins. Co. v. Price, 329 F.2d 687 (5th Cir. 1964), also in the Fifth Circuit, suggested that the insurance company in that case bring a declaratory judgment proceeding in a state court for the determination of the meaning of exclusions. The court based its actions largely upon its previous ruling in the *Delaney* case.

12. 1A Moore's Federal Practice § 0.301 (2d ed. 1962).
13. 1 Stat. 92.
14. 41 U.S. (16 Pet.) 166 (1842).
15. 1A Moore's Federal Practice § 0.302 (2d ed. 1962).
16. Erie R. Co. v. Tompkins, *supra* note 4.

law in matters of substantive rights.[17] Justice Brandeis stated: "There is no federal general common law."[18] But this ruling left questions. How are the federal courts to act when there are no holdings by the state courts? What are the federal courts to do when the state decisions are ambiguous and when it is difficult to determine the applicability of a state law? Should these problems be avoided by directing the parties to a state court for determination? Hereby, the abstention problem was born. The Supreme Court answered these questions in *Meredith v. Winter Haven.*[19] That case was concerned with the extent of liability of a Florida municipality upon its refunding bonds. The Fifth Circuit held that the federal district court should decline jurisdiction because the Florida decisions were ambiguous. The Supreme Court recognized that public policy in exceptional cases calls for a federal court to decline to exercise its jurisdiction. But the Supreme Court went on to say that:

> The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts.[20]

The court goes on to say:

> When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act.[21]

Thus, *Delaney*[22] is in conflict with the rule set down by the Supreme Court unless "exceptional circumstances" are present.

III. Exceptional Circumstances When Federal Courts Should Decline to Exercise Their Jurisdiction

The Supreme Court has approved a number of circumstances which warrant refusal of federal courts to exercise their jurisdiction. The federal courts should not interfere (a) with state criminal prosecutions except where moved by urgent considerations;[23] (b) with collection of state taxes or with the fiscal affairs of a state;[24] (c) with the state administrative function of prescribing local utility rates;[25] (d) with liquidation of state banks by a state officer where there is

17. 1A Moore's Federal Practice § 0.304 (2d ed. 1962).
18. Erie R. Co. v. Tompkins, *supra* note 4 at 78.
19. 320 U.S. 228 (1943).
20. *Id.* at 234.
21. *Ibid.*
22. United Services Life Ins. Co. v. Delaney, *supra* note 7.
23. Beal v. Missouri Pacific Ry., 312 U.S. 45 (1940); Spielman Motor Co. v. Dodge, 295 U.S. 89 (1935).
24. Great Lakes Co. v. Huffman, 319 U.S. 293 (1943); Stratton v. St. Louis Southwestern Ry., 284 U.S. 530 (1932); Matthews v. Rodgers, 284 U.S. 521 (1932).
25. Central Kentucky Co. v. Railroad Comm'n of Kentucky, 290 U.S. 264 (1933).

no contention that shareholders and creditors will not be protected;[26] (e) with shaping the domestic policy of a state governing its administrative agencies;[27] (f) and a federal court may refrain from deciding constitutional questions and stay the proceedings before it to enable the parties to litigate questions of state law in the state court which may render unnecessary the decision of the constitutional questions presented.[28] The Supreme Court has provided a framework to enable the federal courts to know when to properly abstain:

> Reflected among the concerns which have traditionally counseled a federal court to stay its hand are the desirability of avoiding unseemly conflict between two sovereignties, the unnecessary impairment of state functions, and the premature determination of Constitutional questions.[29]

Clearly the framework and the recognized exceptions do not fit the *Delaney* case. The question in the *Delaney* case is merely would the Texas courts construe the word passenger as encompassing the pilot of a plane. Nevertheless, the Fifth Circuit stayed the proceedings in its court so that the parties could secure an answer from the Texas courts.

A number of recent Supreme Court cases involved abstention. In *Louisana P. & L. Co. v. Thibodaux*,[30] the question pertained to a city's power to condemn land. *Martin v. Creasy*[31] dealt with a premature constitutional issue and involved a state highway access dispute. *Harrison v. N.A.A.C.P.*[32] required abstention to prevent a premature constitutional interpretation. *Clay v. Sun Insurance Office*[33] required a stay of federal proceedings to avoid the preliminary decisions of

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26. Gordon v. Washington, 295 U.S. 30 (1935); Gordon v. Ominsky, 294 U.S. 186 (1935); Pennsylvania v. Williams, 294 U.S. 176 (1935).

27. Buford v. Sun Oil Co., 319 U.S. 315 (1943); Railroad Comm'n of Texas v. Rowan & Nichols Oil Co., 311 U.S. 570 (1941).

28. Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168 (1942); Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941).

29. Martin v. Creasy, 360 U.S. 219, 224 (1959).

30. Louisiana P. & L. Co. v. Thibodaux City, 360 U.S. 25 (1959). The City of Thibodaux, Louisiana petitioned for expropriation of land, buildings and equipment of Power & Light Company. Stating that eminent domain is a prerogative of the state, the federal district court abstained.

31. Martin v. Creasy, 360 U.S. 219 (1959). Respondents owned property abutting a section of highway in Pennsylvania which was about to be designated as a limited access highway under authority of a Pennsylvania statute which provides that the owners of property affected by the designation of a limited access highway shall be entitled only to damages arising from an actual taking of property and not for consequential damages when no property is taken. They sued in a federal district court for injunctive relief and a judgment declaring the statute unconstitutional.

32. Harrison v. N.A.A.C.P., 360 U.S. 167 (1959). Appellees sued in a federal district court for a declaratory judgment that five Virginia statutes enacted in 1956 and never construed by the Virginia courts were unconstitutional and to enjoin their enforcement.

33. Clay v. Sun Insurance Office, 363 U.S. 207 (1960). While a citizen and resident of Illinois, petitioner purchased an insurance policy covering all risks of loss or damage to certain personal property having no fixed situs. After moving to Florida, petitioner sustained losses on which Insurance Company denied liability. Suit was in Florida federal district court. A clause in the policy provided the

constitutional questions. These decisions are well within the abstention framework set out by the Supreme Court.

The *Delaney* case[34] is not the first attempt by a lower federal court to make an unwarranted extension of the abstention doctrine. It was the same circuit court of appeals that was reversed in the important *Meredith* decision.[35]

After the *Meredith* case, the Florida Legislature passed a statute authorizing the Supreme Court of Florida to receive and answer certificates pertaining to state law from federal appellate courts.[36] This statute did little to extend the doctrine of abstention.[37] It provides that the Supreme Court of Florida *may* receive certification; not must receive them.[38]

IV. The *Delaney* Case in Particular[39]

In *Delaney*, the Fifth Circuit relied on *Louisiana P. & L. Co. v. Thibodaux*[40] as its principal authority for abstention pending a state decision. The *Thibodaux* case dealt with eminent domain, an important state function, which is within the framework prescribed by the Supreme Court. However, it stretches the concept to argue that the determination whether the term "passenger" includes the pilot is also peculiarly suited to the state courts.[41]

The Fifth Circuit in the *Delaney* case directed the parties to seek "a declaratory judgment for the determination of the meaning of the pertinent clauses of

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claim must be made within 12 months after the loss which petitioner failed to do. Judgment was for petitioner. The court of appeals reversed on the ground that Florida could not, consistently with the requirements of due process, apply its statute, making this clause invalid, to the contract made in Illinois where such a clause is valid. The Supreme Court overruled the court of appeals stating it should not have passed on the constitutional question without the state court first passing on the issues of local law.

34. United Services Life Ins. Co. v. Delaney, *supra* note 7.

35. Meredith v. Winter Haven, *supra* note 20.

36. Fla. Stat. Ann. tit. 5, § 25.031 (1957).

37. In Clay v. Sun Insurance Office, *supra* note 33, Justice Black remarked that the Supreme Court of Florida had never promulgated any rules of court under the section and had never accepted any certified questions.

38. Fla. Stat. Ann. tit. 5, § 25.031 (1957). Only recently has the Supreme Court of Florida supplied the procedural rules needed by the federal appellate courts in order to insure the proper use of section 25.031. These rules are set forth in section 4.61 of the Florida Appellate Rules. Even with active use of the Florida statute, the abstention idea is not expanded past its present limits in that "this procedure can be used only in those cases which require the operation of abstention and not in all cases involving issues of uncertain state law." Kaplan, *Certification of Questions From Federal Appellate Courts to The Florida Supreme Court and Its Impact on The Abstention Doctrine*, 16 U. Miami L. Rev. 413, 433 (1962).

39. United Services Life Ins. Co. v. Delaney, *supra* note 7.

40. 360 U.S. 25 (1959), and *supra* note 30.

41. The *Delaney* decision likewise quotes from Railroad Commission v. Pullman Co., 312 U.S. 496 (1941), stating that any judgment the court might pronounce would be a forecast rather than a determination. The Fifth Circuit failed to mention that the *Pullman* case cites the *Meredith* case which says that "mere" difficulty of state law does not justify a federal court's relinquishment of jurisdiction in favor of state court action.

the respective insurance contracts. . . ."[42] There is some question as to whether a declaratory judgment is the appropriate device or remedy. The Supreme Court of Texas in *Calif. Prod. v. Puretex Lemon Juice, Inc.*[43] adopted language from a Pennsylvania case[44] saying "the Declaratory Judgments Act gives the court no power to grant advisory opinions, or to determine matters not essential to the decision of the actual controversy. . . ." There is some question whether the proceeding in the state court would be classed as an actual controversy.

> a "justiciable controversy" is one that is appropriate, distinct from a difference or dispute of hypothetical or abstract character, touching the legal relation of the parties in legal adverse interest, and must be a substantial controversy admitting of specific relief through a decree conclusive in character, distinct from advice of what the law would be, on a hypothetical state of facts.[45]

It seems the parties would be seeking an advisory opinion in the state courts while the federal court retained jurisdiction to later continue with the case. Texas courts, however, may decline to render advisory opinions. The parties in the *Delaney* case, pursuant to the Fifth Circuit's instruction petitioned a state district court for a determination of the meaning of exclusions in the insurance policy. The state district court dismissed the action claiming lack of jurisdiction to render an advisory opinion. The state court's dismissal is currently being appealed to the state appellate courts.[46] If the state district court is upheld, the parties find themselves denied final disposition of their case in the federal courts even though they met the federal diversity requirements. Thus, one of the oldest and most important bases of federal jurisdiction would be undermined.[47]

V. Problems of Certification

Certifying questions to state courts is not without its problems. Florida has a statute providing for the certification of issues to the state supreme court.[48] However, in other states where there are no comparable statutes, are the state courts required to receive and process these certificates or can they refuse to hear them? Asking a state court for an answer to a preliminary question pre-supposes that the state court has a device whereby this answer may be determined. Texas is one of the many states that has adopted the Uniform Declaratory Judgments Act.[49] But there is no assurance that the Texas courts will grant a declaratory judgment as "the entry of a declaratory judgment is discretionary with the trial court."[50]

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42. United Services Life Ins. Co. v. Delaney, 328 F.2d 483, 485 (1964).
43. 160 Tex. 586, 590, 334 S.W.2d 780, 782 (1960).
44. Ladner v. Siegel, 294 Pa. 368, 372, 144 Atl. 274, 275 (1928).
45. Parks v. Francis, 202 S.W.2d 683, 686 (1947).
46. The *Delaney* case was dismissed by a district court in Texas for want of jurisdiction to render an advisory opinion. *Supra* note 11.
47. 28 U.S.C.A. § 1332 (1964).
48. Fla. Stat. Ann. tit. 5, § 25.031 (1957).
49. Tex. Civ. St. tit. 46A, art. 2524-1 (1951).
50. Town of Santa Rosa v. Johnson, 184 S.W.2d 340 (1944).

Assuming that state courts accede to the federal courts' demands if the practice becomes prevalent another problem arises. State court dockets are already crowded; in some states, years behind. With the addition of these certifications, the problem is intensified. Congestion in the federal courts must also be recognized. But, increasing the burden on the state courts will only add to the problem at the state level.

Federal jurisdiction by virtue of diversity of citizenship was instituted to assure an out of state litigant a more impartial day in court. If issues must be certified to a state court before the federal court can continue with its proceedings, the same prejudice that the diversity jurisdiction was designed to eliminate can still prevail.

There may be merit in striving for consistency of decisions—more frequent use of certification to state courts would help promote this. However, if there is no state law on a point in 1965, there is little chance of an abundance of state cases on this point in the future. At any rate, weighing the inconvenience of a few inconsistencies against the mentioned problems of increased certification causes the consistency argument to lose its urgency.

The final problem of certification in general, and applied particularly to the *Delaney* case was aptly expressed by Chief Justice Stone in the *Meredith* decision:

> To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it.[51]

Conclusion

The United States Supreme Court has set down guidelines for the federal courts to follow in abstaining in diversity cases. The Fifth Circuit is making a broad encroachment on these guidelines. Success in this extension could thwart much of the purpose of diversity jurisdiction. If the doctrine is extended beyond the present framework, less cooperation from the state courts can be expected as congestion in state courts increases and as cases are directed to them dealing with matters other than those in which they have a peculiar interest. Uniformity is important if kept in perspective. But the problems and sacrifices caused by a further extension of the abstention doctrine are prices too high to pay for this objective.

Ben R. Swank, Jr.

51. Meredith v. Winter Haven, *supra* note 19 at 237.