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James L. Tapley

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"construction of the statute" view coverage in the light of public policy. Instead of viewing the third party strictly as a subrogee to the rights of the assured, and therefor disallowing his claim against the insurer,[25] they attribute to him rights independent of the assured, in effect treating him as a third-party-beneficiary.[26]

On the other hand, courts which follow the second approach, estoppel by judgment, rather than basing their decisions on the actual terms of the policy, are under no necessity of rationalizing their judgment for the third party in terms of third-party-beneficiary or analogous concepts, and in fact do reject any such theory. North Carolina[27] is one of this majority of courts[28] which utilizes the estoppel by judgment approach and rejects any suggestion that the third party has any greater rights than the assured.

Automobile liability insurance is coming to be thought of more as a social device for the reparation of injuries sustained than as a business contract to be strictly construed for the protection of the assured. It would appear that until liability insurance is required by law for all drivers, the judicial attitude will seek to find coverage of intentional injuries in the policy itself, or estoppel to deny that coverage.

CLYDE T. ROLLINS.

Labor Law—Fair Labor Standards Amendments of 1949—Suits for Unpaid Wages

A fundamental objective of the Fair Labor Standards Act[1] is to secure for workers the wages which they are required to be paid. In October, 1949, a new enforcement provision designed to further this objective was added to the Act. This is Section 16(c),[2] which gives to the Administrator of the Wage and Hour Division the authority to

[25] See 8 APPLEMAN, INSURANCE LAW AND PRACTICE 189-196 (1942).

[26] New Amsterdam Cas. Co. v. Jones, 135 F. 2d 191 (6th Cir. 1943); Franklin v. Georgia Cas. Co., 225 Ala. 58, 141 So. 702 (1932); Indemnity Co. v. Bollas, 223 Ala. 239, 135 So. 174 (1931); Antichi v. New York Indemnity Co., 126 Cal. App. 284, 14 P. 2d 598 (1932); Hartford Acc. & Indemnity Co. v. Wolbarst, 95 N. H. 40, 57 A. 2d 151 (1948). See 8 APPLEMAN, INSURANCE LAW AND PRACTICE 196 (1942).

[27] State Farm Mut. Automobile Ins. Co. v. James, 80 F. 2d 802 (4th Cir. 1936); MacClure v. Cas. Co., 229 N. C. 305, 49 S. E. 2d 742 (1948); Sears v. Maryland Cas. Co., 220 N. C. 9, 16 S. E. 2d 419 (1941); Peeler v. Cas. Co., 197 N. C. 286, 148 S. E. 261 (1929).

[28] Farm Bureau Mut. Automobile Ins. Co. v. Hammer, 177 F. 2d 793 (4th Cir. 1950); Summers v. Travelers' Ins. Co., 109 F. 2d 845 (8th Cir. 1940); Clements v. Preferred Acc. Ins. Co., 41 F. 2d 470 (8th Cir. 1930); Royal Indemnity Co. v. Morris, 37 F. 2d 90 (9th Cir. 1930); Guerin v. Indemnity Ins. Co., 107 Conn. 649, 142 Atl. 268 (1928); Coleman v. New Amsterdam Cas. Co., 247 N. Y. 271, 160 N. E. 367 (1928). See 8 APPLEMAN, INSURANCE LAW AND PRACTICE 189-191 (1942).

[1] 52 STAT. 1060 (1938), 29 U. S. C. §201 *et seq.* (1946), as amended, 63 STAT. 910, 29 U. S. C. §201 *et seq.* (Supp. 1949).

[2] 63 STAT. 919, 29 U. S. C. §216(c) (Supp. 1949).

supervise payment of employees' claims for unpaid minimum wages and unpaid overtime compensation. And, under this section, the Administrator, with the written consent of the employee-claimant, may bring suit to recover the amount of such claim, provided, "that this authority to sue shall not be used by the Administrator in any case involving an issue of law which has not been settled finally by the courts. . . ."

Prior to the enactment of this amendment there were three instruments of enforcement available for use against recalcitrant employers. (1) Section 16(b)[3] gives to the employee the right to sue for unpaid wages and an additional equal amount as liquidated damages, plus a reasonable attorney's fee. (2) Section 17[4] provides that the Administrator can get an injunction against employers found to be in violation of the Act. (3) Under Section 16(a)[5] the Administrator can obtain fines and jail sentences for willful violators on a second offense. Section 16(c) adds a fourth procedure to this already impressive array of sanctions.

As a matter of administrative practice the Wage and Hour Division had usually requested employers to make voluntary restitution of unpaid wages to employees. But this met with only partial compliance for two reasons: (A) even if the employer voluntarily paid the wages due, he was still subject to suit for the liquidated damages under 16(b); (B) some employers chose to gamble that they might not be sued at all—past experience had shown that many employees were reluctant to secure an attorney and bring suit, so the employer simply sat tight, gambling that employee inertia would persist long enough for the statute of limitations to run on the claim.[6]

Because employers were not making restitution voluntarily and because the Administrator was often powerless to require payment, the Department of Labor favored the adoption of 16(c), giving the Administrator authority to bring suit if requested by the employee to do so.[7]

In some situations, however, the Administrator *was* in position to require restitution. In 1948 the Supreme Court handed down its deci-

[3] 52 STAT. 1069 (1938), 29 U. S. C. §216(b) (1946).
[4] 52 STAT. 1069 (1938), 29 U. S. C. §217 (1946), as amended, 63 STAT. 919, 29 U. S. C. §217 (Supp. 1949).
[5] 52 STAT. 1069 (1938), 29 U. S. C. §216(a) (1946).
[6] At the hearings, Mr. William R. McComb, Administrator of the Wage and Hour Division, said: "The employer has found in many instances, I think, that his employees will not sue him, and he has refused to pay voluntarily. We have had a remarkable drop. We used to have voluntary payments from about 90 percent of those we found in violation. They are now down to 30 percent. The employer just does not pay. He knows the employee probably will not sue him." *Hearings before Committee on Education and Labor on H. R. 2033,* 81st Cong., 1st Sess. 115 (1949).
[7] *Hearings before Committee on Education and Labor on H. R. 2033,* 81st Cong., 1st Sess. 59 (1949). *Hearings before a Subcommittee of the Committee on Labor and Public Welfare on S. 653,* 81st Cong., 1st Sess. 72 (1949).

sion in *McComb v. Jacksonville Paper Co.*[8] In this case the Administrator instituted a civil contempt proceeding, alleging violations of a prior (1940) district court decree which enjoined the Paper Company from violating the minimum wage, overtime, and record-keeping provisions of the Act. In this proceeding the Administrator asked that the Company be required to make payment of unpaid statutory wages to employees affected. The Supreme Court held that the district court had the power to order the Company, *in order to purge their contempt,* to pay to the affected employees amounts of wages which were unpaid in violation of the Act.[9]

In the *Jacksonville* case the Court said, "We can lay to one side the question whether the Administrator, when suing to restrain violations of the Act, is entitled to a decree of restitution for unpaid wages."[10] The Court did not have that problem before it; it was dealing there with the power of the court to enforce compliance with its injunction. But the question which the Court "laid to one side" in the *Jacksonville* case was raised almost at once in *McComb v. Frank Scerbo & Sons.*[11] In this case the Administrator sought an injunction and, as ancillary relief, a contemporaneous order compelling the employer to pay unpaid overtime wages to employees affected. The court of appeals held that the order compelling payment was proper, citing the *Jacksonville* case as authority.[12]

The Administrator's victory was short-lived. Congress promptly negatived the effect of the *Scerbo* case by inserting the following proviso into Section 17: *no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.* This restricts the holding in the *Jacksonville* case to the precise situation there dealt with. That is, the Administrator can get an order requiring payment of wages only in contempt proceedings for enforcement of injunctions issued under section 17 for violations occurring subsequent to the issuance of such injunctions.[13]

Because existing wage collection machinery has proved ineffectual in many instances, Section 16(c), which gives the Administrator authority to bring suit for unpaid wages, was proposed. The Department of Labor and the unions supported its adoption, but many witnesses at

[8] 336 U. S. 187 (1948).
[9] McComb v. Crane, 174 F. 2d 646 (5th Cir. 1949).
[10] 336 U. S. 187, 193 (1948).
[11] 177 F. 2d 137 (2d Cir. 1949).
[12] The court said that the fact that the Supreme Court in the Jacksonville case had expressly left open the question whether the Administrator could obtain an order compelling restitution as ancillary to injunctive relief appeared to be "judicial caution, not the discovery of a vital difference." *Id.* at 139.
[13] H. R. REP. No. 1453, 81st Cong., 1st Sess. 32 (1949).

the hearings vigorously opposed it.[14] Without expressing the obvious objection that this power in the hands of the Administrator would be another club to hold over the head of the employer, many witnesses opposed the amendment as an improper enlargement of government action.[15] But, administrative authority to bring suit on behalf of a private claimant is no innovation in this country.[16] Many states have had similar provisions for a number of years,[17] and indeed in some states the mere existence of the authority to bring suit has been such an effective deterrent to violators that the power has seldom been resorted to.

But 16(c) as finally adopted was not in reality the amendment proposed by the Administrator, though both the House and the Senate Committees reported out the section substantially as he had proposed it.[18] In conference the section was saddled with a proviso which restricts the Administrator's authority to bring a suit for an employee to cases where the law has been settled finally by the courts.[19] The pro-

[14] The witnesses invariably represented the views of management. *Hearings on H. R. 2033, supra* note 7, at 226, 460, 582, 595, 954, 983, 1054, 1268, 1340, 1431, 1707.

[15] Mr. Peter T. Beardsley, Attorney, American Trucking Associations, had this to say: ". . . We fail to comprehend any legitimate reason why any government officer, no matter what his status, should be empowered to provide free legal services to a selected category of private litigants, at the expense of the general taxpayer." *Hearings on H. R. 2033, supra* note 7, at 595.

[16] Instances of such authority were not unknown in federal legislation. 49 STAT. 2037 (1936), 41 U. S. C. §36 (1946) (Walsh-Healey Public Contracts Act).

[17] Strongest of the state statutes is that of Rhode Island which makes it the "duty" of the director of the Dep't of Labor to institute actions for collection of wages. R. I. Pub. Laws, 1941, c. 1069, §6(a).

In Alaska, Connecticut, Hawaii, Massachusetts, Oregon, New York, and Utah, the appropriate administrative officer may, upon assignment of the wage claim to him, bring "any legal action necessary to collect such claim." Wisconsin limits this authority to claims of less than $100. ALASKA COMP. LAWS ANN. §43-1-5(4) (1949); CONN. GEN. STAT. §3796 (1949); HAWAII REV. LAWS §4363 (1945); MASS. ANN. LAWS c. 151, §20 (Supp. 1948); N. Y. LABOR LAW §199(2); ORE. COMP. LAWS ANN. §102-613(b) (1940); UTAH CODE ANN. §49-9-22 (1943); WIS. STAT. §101.10(14) (1947).

In California, Illinois, Kentucky, New Hampshire, New Jersey, Ohio, and Pennsylvania, the appropriate administrative officer may bring suit to collect unpaid wages owing to women and minors. CAL. LABOR CODE §1195.5 (1943); ILL. ANN. STAT. c. 48, §198.16 (Cum. Supp. 1948); KY. REV. STAT. §337.360 (1948); N. H. REV. LAWS c. 213, §23 (1942); N. J. STAT. ANN. §34:11-56 (1940); OHIO GEN. CODE ANN. §154-45s (1946); PA. STAT. ANN. tit. 43, §331(o) (1941).

In Arkansas, California, Nevada, and Washington, suit may be brought to collect wages of persons who are financially unable to employ counsel. ARK. STAT. §81-312 (1947); CAL. LABOR CODE §98 (1943); NEV. COMP. LAWS ANN. §2751 (Supp. 1941); WASH. REV. STAT. ANN. §7596-1 (Supp. 1940).

New Mexico's statute gives the labor commissioner authority to sue for collection of wage claims when, in his judgment, the claimant is "entitled to the services of the commissioner." N. M. STAT. ANN. §57-312 (1941).

And the South Carolina statute simply says that the labor commissioner shall "cooperate" with any employee in the enforcement of his wage claim. The statute does not seem broad enough to include authority to bring suit. S. C. CODE ANN. §7034-6(6) (1942).

[18] H. R. REP. No. 267, 81st Cong., 1st Sess. 10 (1949); SEN. REP. No. 640. 81st Cong., 1st Sess. 6 (1949).

[19] H. R. REP. No. 1453, 81st Cong., 1st Sess. 10 (1949).

viso was designed to prevent the Administrator from using his authority to bring test cases involving new or novel questions of law.[20] But the difficulties which the proviso injects are at once obvious. The phrasing of it supplies to ingenious defendants incentive to obscure the principal issue with a smoke screen of preliminary questions as to whether the case does, or does not, involve an issue of law which has been settled finally by the courts. Does the proviso mean that the Supreme Court must have ruled on the question? Or is it sufficient that certiorari has been denied? Or is it enough that one of the courts of appeals has ruled on the point? And what if there is disagreement among the circuits?[20a]

Employee suits will continue to be an important instrument for collection of wages,[21] and the *Jacksonville* case still provides a means for the Administrator to act as a collecting agent in a limited number of situations. Section 16(c), inasmuch as it provides that when an employee accepts payment under the Administrator's supervision or consents to an action on his behalf by the Administrator, he waives his right of action under 16(b) to sue for liquidated damages, should stimulate voluntary payments by fair-minded employers who formerly did not make payment voluntarily because they feared that a subsequent suit for liquidated damages might be brought. But 16(c) may prove not to be the panacea which the Administrator originally envisioned. The full efficacy of the section, in view of the proviso limiting the authority of the Administrator to bring suit to those cases in which the law has been settled with finality, will depend upon a determination of what the proviso really means. It is significant that though half the states have somewhat similar statutes none of these is similarly restricted.[22]

JAMES L. TAPLEY.

Negligence—Res Ipsa Loquitur—Application to Airplane Accidents

Decedent, who also held a pilot's license, was permitted by the pilot to ride in a dual control airplane which was to execute "precision spins" as part of a demonstration of airplane maneuvers. The pilot was in the instructor's seat when the plane took off, decedent being seated in the rear seat. The plane, once aloft, began the maneuver, but instead of pulling out of the spin and resuming level flight, it continued its downward movement until it crashed on the ground, killing both occupants. In a suit brought by decedent's administrator to recover for wrongful

[20] *Id.* at 32.
[20a] See note, 63 HARV. L. R. 1078 (1950), which appeared after this note was in proof.
[21] The Division can inspect each year less than 5% of the establishments now covered by the Act. *Hearings on S. 653, supra* note 7, at 74.
[22] See note 17 *supra*.