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It may be that a county court has no business overruling established law under the Interstate Commerce Act. However, *Chris* does point out a very real problem. The public is not aware of the law of carrier liability, and there is no satisfactory means of discovering it until one suffers the loss of a piece of baggage at the hands of a carrier. Judge Finz has pointed out that the carriers have been protected by law long enough, and that some of this protection should be removed to promote a greater sense of responsibility and care upon the "giants who can conquer speed at 35,000 feet but appear to drag their feet at sea level."³⁴ Whether higher courts will also impose this greater burden on common carriers remains to be seen.³⁵

ROBERT H. DUCKWALL

"IN TIME OF WAR" AND VETERANS' PREFERENCE

"In time of war" is a phrase often used in the legal field to distinguish between a time of peace and a period of hostilities between nations. Both declared and undeclared wars have been included within the phrase,¹ but a major problem is presented whenever a court must determine whether or not a period of hostilities constitutes a "time of war" when Congress has not officially declared war.

The Supreme Court of Colorado recently faced this problem in *Freed v. Baldi*² in the context of veterans' preference in public employment. A Colorado constitutional clause³ gives preference points to civil service applicants who have served in the armed forces "in

³⁴*Chris v. Greyhound Bus Lines*, 57 Misc. 2d 129, 291 N.Y.S.2d 964, 967 (Civ. Ct. 1968).

³⁵At the time of this writing, no notice of an appeal has been made.

¹See *New York Life Ins. Co. v. Bennion*, 158 F.2d 260 (10th Cir. 1946); *Savage v. Sun Life Assur. Co.*, 57 F. Supp. 620 (W.D. La. 1944).

²— *Colo.* —, 43 P.2d 716 (1968).

³ In each and every examination held or conducted by the state civil service commission . . . for appointment and employment in and promotions to offices and places of trust and employment in the classified civil service . . . the passing grade for each candidate shall be the same. Five points shall be added to the grades of candidates receiving a passing grade who served in the armed forces of the United States in times of war and who were honorably discharged therefrom . . . Ten points shall be added to the grades of candidates receiving a passing grade who incurred disability in the line of duty while so serving and who were so discharged.

COLO. CONST. art. 12, § 14.

times of war."⁴ Freed's position on the promotion list of the City and County of Denver Civil Service Commission was challenged on the ground that the ten veterans' preference points awarded to him as a result of his military service during the Korean conflict were illegally awarded since the Korean conflict was not a time of war. The court, relying heavily on the earlier Colorado case of *Pyramid Life Insurance Company v. Masch*,⁵ concluded that the hostilities in Korea were not encompassed by the phraseology "in times of war" because of the absence of an official declaration of war by Congress. The court further supported its position by noting that the Philippine Insurrection, an undeclared war, was specifically mentioned by name in the constitution. The court reasoned that the legislature enumerated this particular conflict because it meant that undeclared wars should otherwise not be included within the phrase. Accordingly, Freed lost his preference points.

Justice Kelley dissented⁶ and indicated that "in times of war" was intended to be used in a generic sense and not the technical sense employed by the *Pyramid* case. He asserted that *Pyramid* was inapplicable because the considerations presented in interpreting "in time of war" in insurance contracts are different from those in the present case. Justice Kelley further stated that the majority failed to carry out the intent of the people of Colorado in interpreting the constitutional provision.⁷

"In time of war" is not confined in use solely to veterans' preference legislation, but is a prominent and decisive factor in other areas of government and law. For example, in the field of insurance law there has been a split of authority in construing "in time of war." The phrase is used frequently in double indemnity provisions for accidental death to limit the insurance company's liability if the

⁴ The times of war above referred to are the period of the Spanish-American War; the period of the Philippine Insurrection; the period from April 6, 1917, to November 11, 1918, both dates inclusive; the period from December 7, 1941, to the date proclaimed by the congress or president of the United States as the end of the war declared by the United States on December 8, 1941, both dates inclusive; and the period of any war in which the United States may hereafter engage. (Emphasis added).

COLO. CONST. art. 12, § 14.

The Colorado Constitution stands alone in its use of "in times of war." Throughout this comment "in time of war" will be used except when specific reference to *Freed* is made. The phrases are interpreted synonymously.

⁵134 Colo. 70, 299 P.2d 117 (1956).

⁶Chief Justice Moore and Justice Kelley both delivered dissenting opinions.

⁷443 P.2d at 722.

insured dies "in time of war."⁸ Some courts have reasoned that a "time of war" can only evolve from an official declaration by Congress.⁹ The leading case using this "constitutional" criterion¹⁰ is *West v. Palmetto State Life Insurance Company*,¹¹ in which the insured was killed at Pearl Harbor on December 7, 1941, while a member of the United States Navy. His life insurance policies contained clauses which stated that the insurer would not be liable for double indemnity for accidental death if the insured was killed while serving in the Armed Forces "in time of war." Because Congress did not declare war on Japan until December 8, 1941,¹² the court reasoned that the attack on Pearl Harbor was not encompassed by the term "in time of war." Accordingly, the insurance company was held liable for double indemnity. Another factor in cases using the "constitutional" criterion is the canon of insurance law which construes the contract against the insurer and most favorably for the insured.¹³

A different interpretation of "in time of war" in insurance cases was conceived during World War II,¹⁴ but it was not until litigation

⁸Typical exclusionary clauses used by insurance companies are:

The Society agrees, subject to the provisions hereinafter stated, to increase the amount payable under this policy by a sum equal to the face amount thereof upon receipt of due proof, as herein required, that . . .

(4) such death was not the result of or caused by . . . (e) war, or service in any military, naval or air forces of any country at war.

E. PATTERSON AND W. YOUNG, CASES AND MATERIALS ON INSURANCE, App. L(I) at 729 (4th ed. 1961).

Risks Not Assumed:—The Company shall not be liable for the additional Accidental Death Benefit specified above if said death shall result by reason of any of the following: . . . (d) Military, air or naval service in time of war.

Beley v. Pennsylvania Mut. Life Ins. Co., 373 Pa. 231, 95 A.2d 202, 204, *cert. denied*, 346 U.S. 820 (1953).

⁹*Savage v. Sun Life Assur. Co.*, 57 F. Supp. 620 (W.D. La. 1944); *Rosenau v. Idaho Mut. Benefit Ass'n*, 65 Idaho 408, 145 P.2d 227 (1944); *Harding v. Pennsylvania Mut. Life Ins. Co.*, 373 Pa. 270, 95 A.2d 221, *cert. denied*, 346 U.S. 812 (1953); *Beley v. Pennsylvania Mut. Life Ins. Co.*, 373 Pa. 231, 95 A.2d 202, *cert. denied*, 346 U.S. 820 (1953); *West v. Palmetto State Life Ins. Co.*, 202 S.C. 422, 25 S.E.2d 475 (1943); *Ching Pang v. Sun Life Assur. Co.*, 37 Hawaii 208 (1945).

¹⁰It is so called because "in time of war" is held to be a war in the constitutional sense only when it is officially declared by Congress. See *Beley v. Pennsylvania Mut. Life Ins. Co.*, 373 Pa. 231, 95 A.2d 202, *cert. denied*, 346 U.S. 820 (1953).

¹¹202 S.C. 422, 25 S.E.2d 475 (1943).

¹²U.S. CODE CONG. SERVICE, at 843 (1941).

¹³*Rosenau v. Idaho Mut. Benefit Ass'n*, 65 Idaho 408, 145 P.2d 227 (1944); *Beley v. Pennsylvania Mut. Life Ins. Co.*, 373 Pa. 231, 95 A.2d 202, 205, *cert. denied*, 346 U.S. 820 (1953).

¹⁴See *Stinson v. New York Life Ins. Co.*, 167 F.2d 233 (D.C. Cir. 1948); *New York Life Ins. Co. v. Bennion*, 158 F.2d 260 (10th Cir. 1946); *Stankus v. New York Life Ins. Co.*, 312 Mass. 366, 44 N.E.2d 687 (1942).

arising from the Korean conflict that it became widely accepted. Many courts¹⁵ began interpreting "in time of war" to include both declared and undeclared wars and thereby found no liability on the insurer in either case. The reasoning of the courts in adopting this approach was that the risks contemplated by the contracting parties were identical in both declared and undeclared wars.¹⁶ To enforce the liability of the insurer on the ground that Congress had not officially declared war was thought to place an unnecessarily strict interpretation upon the words of the insurance contract¹⁷ perhaps placing an unnecessarily harsh burden on the insurer. Furthermore, some of these courts reasoned that if legislative action is a necessary antecedent to war, such action could be found in other kinds of legislation enacted by Congress designed to further a war-time effort.¹⁸

Military law is another area where "in time of war" has been subject to interpretation. The Uniform Code of Military Justice¹⁹ makes frequent use of the phrase.²⁰ The Military Court of Appeals has con-

¹⁵*Gagliormella v. Metropolitan Life Ins. Co.*, 122 F. Supp. 246 (D. Mass. 1954); *Weissman v. Metropolitan Life Ins. Co.*, 112 F. Supp. 420 (S.D. Cal. 1953); *Zaccardo v. John Hancock Mut. Life Ins. Co.*, 20 Conn. Supp. 76, 124 A.2d 926 (Super. Ct. 1956); *Stucker v. College Life Ins. Co. of America*, — Ind. App. —, 208 N.E.2d 731 (1965); *Langlas v. Iowa Life Ins. Co.*, 245 Iowa 713, 63 N.W.2d 885 (1954); *Standbery v. Aetna Life Ins. Co.*, 26 N.J. Super. 498, 98 A.2d 134 (Super. Ct. 1953); *Goodrich v. John Hancock Mut. Life Ins. Co.*, 17 App. Div. 2d 271, 234 N.Y.S.2d 587 (1962); *Shneiderman v. Metropolitan Cas. Co.*, 14 App. Div. 2d 284, 220 N.Y.S.2d 947 (1961); *Thomas v. Metropolitan Life Ins. Co.*, 388 Pa. 499, 131 A.2d 600 (1957); *Western Reserve Life Ins. Co. v. Meadows*, 152 Tex. 559, 261 S.W.2d 554 (1953), *cert. denied*, 347 U.S. 928 (1954); *Christensen v. Sterling Ins. Co.*, 46 Wash. 2d 713, 284 P.2d 287 (1955); *Lynch v. National Life & Acc. Ins. Co.*, 278 S.W.2d 32 (St. Louis Ct. App. 1955).

¹⁶*E.g.*, *Langlas v. Iowa Life Ins. Co.*, 245 Iowa 713, 63 N.W.2d 885, 888 (1954); *Christensen v. Sterling Ins. Co.*, 46 Wash. 2d 713, 284 P.2d 287 (1955).

¹⁷*See* *Western Reserve Life Ins. Co. v. Meadows*, 152 Tex. 559, 261 S.W.2d 554 (1953), *cert. denied*, 347 U.S. 928 (1954).

¹⁸*Weissman v. Metropolitan Life Ins. Co.*, 112 F. Supp. 420 (S.D. Cal. 1953); *Zaccardo v. John Hancock Mut. Life Ins. Co.*, 20 Conn. Supp. 76, 124 A.2d 926 (Super. Ct. 1956); *Langlas v. Iowa Life Ins. Co.*, 245 Iowa 713, 63 N.W.2d 885 (1954); *Western Reserve Life Ins. Co. v. Meadows*, 152 Tex. 559, 261 S.W.2d 554 (1953), *cert. denied*, 347 U.S. 938 (1954).

¹⁹10 U.S.C. §§ 801-940 (1964).

²⁰Article 2(10) of the U.C.M.J. makes all persons (civilians) serving with or accompanying an armed force in the field subject to the Code "in time of war." Article 43(a) suspends the statute of limitations for the offenses of desertion or absence without leave if committed "in time of war," and Article 43(f)(1) suspends the statute of limitations for all frauds against the government when the United States is at war until three years after termination of the hostilities. Certain offenses not punishable as capital are made capital offenses "in time of war": desertion (art. 85(c)); assaulting or wilfully disobeying a superior commissioned officer (art.

sistently included both declared and undeclared wars in defining "in time of war."²¹ The leading case in this area is *United States v. Bancroft*²² where the defendant was charged with sleeping on his post during the Korean hostilities. A special court-martial, which normally has jurisdiction only over non-capital offenses,²³ convicted Bancroft of the offense. Bancroft argued that only a general court-martial had jurisdiction because the offense was punishable as capital "in time of war." The court concluded that reasonableness and practicality were the most prevailing reasons for determining that the Korean conflict was a "time of war." Accordingly, the special court-martial was held to lack jurisdiction. The court considered eight factors in determining that there was a "time of war": (1) the manner in which the conflict was being carried out; (2) the movement to, and large numbers of American men and women on, the battlefields of Korea; (3) the casualties involved; (4) the sacrifices required; (5) the drafting of recruits to maintain the large number of persons in military service; (6) the national emergency legislation enacted and being enacted; (7) the executive order promulgated; and (8) the tremendous sums expended for the purpose of keeping the Army, Navy, and Air Force in the Korean theatre of operations.²⁴ These reasons have most recently been followed in applying "in time of war" to the hostilities in Viet Nam for purposes of the Uniform Code of Military Justice in *United States v. Anderson*.²⁵ Anderson, who had been convicted of an unauthorized absence, argued that this determination was barred by the statute of limitations, but the court found that the statute of limitations was suspended because the United States was "in time of war."²⁶

90); improper use of countersign (art. 101); spying (art. 106); and misbehavior of sentinel (art. 113). For an excellent, in depth study of "in time of war" as applied to the U.C.M.J., see Stevens, *Time of War and Viet Nam*, 8 JAG L. REV. 23 (May-June, 1966).

²¹*United States v. Anderson*, 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968) (desertion); *United States v. Swain*, 10 U.S.C.M.A. 37, 27 C.M.R. 111 (1958) (fraud); *United States v. Shell*, 7 U.S.C.M.A. 646, 23 C.M.R. 110 (1957) (absence without leave); *United States v. Gann*, 3 U.S.C.M.A. 12, 11 C.M.R. 12 (1953) (desertion); *United States v. Bancroft*, 3 U.S.C.M.A. 3, 11 C.M.R. 3 (1953) (sleeping on post).

²²3 U.S.C.M.A. 3, 11 C.M.R. 3 (1953).

²³"[S]pecial courts-martial have jurisdiction to try persons subject to this chapter for any *non-capital* offense made punishable by this chapter . . ." U.C.M.J. art. 19 (Emphasis added).

²⁴3 U.S.C.M.A. 3, 5, 11 C.M.R. 3 (1953).

²⁵17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968).

²⁶Chief Judge Quinn concluded that the Gulf of Tonkin Resolution, passed by a joint session of Congress on August 10, 1964, was a declaration of war by Congress. He reached this conclusion by looking to the language of the Resolution as well

No distinction has been drawn between declared and undeclared wars for the purpose of the Uniform Code of Military Justice because it appears that discipline and proper control of military affairs is as much a necessity in an undeclared war as in a declared war.²⁷

Basically, there are three purposes generally said to underlie the passage of veterans' preference statutes. The federal government, in passing the Veterans' Preference Act of 1944,²⁸ intended to aid veterans in rehabilitation and relocation because military service had disrupted their normal modes of life and employment.²⁹ In passing this statute, Congress hoped that the states would similarly follow with

as the interpretation of it by the Executive Department, as revealed by the testimony of the Under Secretary of State, Nicholas deB. Katzenbach, before the Senate Foreign Relations Committee in 1967. Katzenbach testified that the Administration regarded the resolution as participation by Congress "in the functional way... contemplated by the Founding Fathers" to "invoke the...war powers." *United States v. Anderson*, 17 U.S.C.M.A. 588, 590, 38 C.M.R. 386 (1968). Judges Kilday and Ferguson each concurred in the result, but neither regarded the Gulf of Tonkin Resolution as a declaration of war.

The Resolution reads in part as follows:

Sec. 1....*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.

Sec. 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in south-east Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

Sec. 3. This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, except that it may be terminated earlier by concurrent resolution of Congress.

78 Stat. 384 (1964).

²⁷See generally *United States v. Anderson*, 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968); *United States v. Ayers*, 4 U.S.C.M.A. 220, 15 C.M.R. 220 (1954); *United States v. Bancroft*, 3 U.S.C.M.A. 3, 11 C.M.R. 3 (1953).

²⁸58 Stat. 387 (1944). Sec. 2.

In certification for appointment... permanent or temporary, and in either (a) the classified civil service; (b) the unclassified civil service... preference shall be given to... (4) those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, or in any campaign or expedition (for which a campaign badge has been authorized), and have been separated therefrom under honorable conditions.

This act was revised by 80 Stat. 401 (1966).

²⁹*Mitchell v. Cohen*, 333 U.S. 411 (1948).

their own preference provisions.³⁰ A second purpose for preference legislation has been to utilize, in public employment, the valuable qualities and experiences which are possessed by those men and women who have had military training. Courts have reasoned that, because of military training and discipline, veterans tend to make superior public servants.³¹ The last purpose expressed for the passage of preference statutes is founded on the belief that the public owes a measure of gratitude to those who served in the Armed Forces, and the passage of preference legislation is an excellent means of fostering patriotism.³²

Cases interpreting "in time of war" in the context of preference statutes are rare.³³ The New Jersey Superior Court was called upon to interpret the New Jersey veterans' preferences statute specifically in relation to the Korean hostilities in the case of *Miele v. McGuire*.³⁴ It was unsuccessfully argued that because various other state preference statutes had been amended to include the Korean hostilities, the omission of Korea in the New Jersey statute could only mean that it was not intended to be included within the scope of "in time of war." The court, however, stated that it was just as reasonable to infer that the legislature believed the wording of the statute broad enough to encompass veterans of the Korean conflict without the necessity of amendment. The court further stated that scholastic strictness of definition could not be adopted if it prevented a reasonable construction of the statute. Strict construction could not be allowed to defeat apparent legislative design.³⁵ Thus, one court, when called upon to interpret "in time of war" in relation to veterans' preference statutes, rejected a restrictive reading of the statute and founded its result in an effort to effectuate the purposes and de-

³⁰"Private employers and corporations, as well as State, county, and municipal governments, have been urged through the selective-service law and otherwise to afford reemployment to veterans when they leave the armed forces." U.S. CODE CONG. SERVICE at 1154 (1944).

³¹*Yates v. Rezeau*, 62 So. 2d 726 (Fla. 1952); *Commonwealth ex rel. Maurer v. O'Neill*, 368 Pa. 269, 83 A.2d 382 (1951), in which the court stated: "We do not doubt but that the military training received by veterans during the course of their service renders them superior candidates for public offices of the nature now under consideration." 83 A.2d at 383 (office of fire department).

³²*See State ex rel. Higgins v. Civil Service Comm'n*, 139 Conn. 102, 90 A.2d 862 (1952); *Valentine v. McDonald*, 371 Mich. 138, 123 N.W.2d 227 (1963); *Bateman v. Marsh*, 188 Misc. 189, 64 N.Y.S.2d 678 (Sup. Ct. 1946).

³³Research has revealed only two: *Freed v. Baldi*, — Colo. —, 443 P.2d 716 (1968) (which is the subject of this comment) and *Miele v. McGuire*, 53 N.J. Super. 506, 147 A.2d 827 (Super. Ct. 1959), *modified*, 31 N.J. 339, 157 A.2d 306 (1960).

³⁴53 N.J. Super. 506, 147 A.2d 827 (Super. Ct. 1959), *modified*, 31 N.J. 339, 157 A.2d 306 (1960).

³⁵*Id.* at 831.

signs of the statute—to reward military personnel who had risked their lives in a military conflict.

The majority in *Freed*, by relying on *Pyramid Life Insurance Company v. Masch*,³⁶ relied on a result which was reached in light of the purposes underlying contracts for life insurance. As Justice Kelley indicated in his dissent, *Pyramid* was inapplicable to the present controversy because a result based upon insurance principles is not necessarily a proper result in relation to veterans' preference statutes.³⁷ In each of the areas affected by the phrase "in time of war," judicial interpretation has achieved a result consonant with the purpose underlying the use of the phrase. In the area of veterans' preference statutes, then, courts should, as the New Jersey court has done, endeavor to achieve a result which is harmonious with the *purposes* of the passage of such legislation, rather than one based upon judicial interpretation of the legislation. If it is determined that the purposes behind veterans' preference statutes will be served better by limiting their application to declared wars only, then cases like *Freed* will be supportable. But, in relying on an insurance case, *Freed* showed a total disregard for the purpose of the legislation with which it was dealing. Hopefully, this approach will not be followed in the eighteen other states with preference statutes similar to or identical with the Colorado constitution.³⁸

MICHAEL S. COLO

³⁶134 Colo. 70, 299 P.2d 117 (1956).

³⁷*Freed v. Baldi*, — Colo. —, 443 P.2d 716, 721 (1968).

The same guidelines, in my opinion, should not be applied in interpreting a covenant between *all* of the people of the state and the relatively small portion of the people who serve the country in times of military conflict by whatever name it may be called, as those which are applied to an insurance contract. The contract is between private citizens; it is unilaterally prepared, though bilaterally executed. Courts, in general, construe the terms of contracts of insurance against the company whenever an ambiguity exists.

³⁸ARIZ. REV. STAT. ANN. § 38-491 (1956); ARK. STAT. ANN. § 12-2319 (Repl. Vol. 1956); CONN. GEN. STAT. ANN. § 5-224 (Supp. 1968); DEL. CODE ANN. tit. 29, § 5933 (Supp. 1967); ILL. ANN. STAT. ch. 127, § 63b108b.7 (Smith-Hurd 1967); KY. REV. STAT. ANN. § 90.320 (1963); LA. REV. STAT. ANN. § 33-2416 (1966); MASS. ANN. LAWS ch. 31, § 23 (1966); MICH. STAT. ANN. § 5.1191(13) (1968); MO. ANN. STAT. § 36.220 (1952); NEV. REV. STAT. § 284.260 (1967); N.H. REV. STAT. ANN. § 283.4 (1966); N.D. CENT. CODE § 37-19-01 (1960); OKLA. STAT. ANN. tit. 74, § 817 (1963); UTAH CODE ANN. § 27-11-25 (1963); VA. CODE ANN. § 2.1-112 (Repl. Vol. 1966); WIS. STAT. ANN. § 16.18 (1957); WYO. STAT. ANN. § 15.1-288 (Repl. Vol. 1965).