UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 45 | Number 2 Article 11

2-1-1967

Civil Rights Act of 1964 -- Public Accommodations -- Private Club Exemption

Robert L. Thompson

In addition to these arguments, a few courts have held that relevation of defendant's insurance at discovery violates his fifth amendment constitutional rights.[34] The argument is that insurance is an asset of defendant and that if discovery is allowed, there is no rational basis to deny discovery as to all of defendant's assets before liability is established.[35] Thus, *Hillman v. Penny*,[36] a Tennessee federal case, expressed the fear that a groundless claim might become the vehicle for making full inquiry into all the confidential affairs of any defendant involved in an automobile accident.[37]

The arguments for relevancy of insurance as illustrated by *Welty* thus seem to be answered both by the purpose of discovery, *i.e.*, to get to the merits, and the limitations on discovery, *i.e.*, to matters of evidence or matters that may lead to evidence. Nevertheless, the courts are almost evenly divided on this question. As a number of courts seem to disregard the purpose and language of Rule 26(b), an amendment or a definitive decision by the United States Supreme Court would seem desirable in order to have uniformity throughout the federal system. When the North Carolina General Assembly considers Rule 26(b), it specifically should either include or exclude liability insurance from discovery.

EUGENE W. PURDOM

Civil Rights Act of 1964—Public Accommodations—Private Club Exemption

In *United States v. Northwest La. Restaurant Club*[1] a three-judge federal court held that the acts and practices of the members of defendant club constituted an unlawful deprivation of rights secured to Negro citizens for the free and equal use and enjoyment of public accommodations guaranteed by Title II of the Civil Rights

[34] Gallimore v. Dye, 21 F.R.D. 283, 287 (E.D. Ill. 1958). For a thorough discussion of the constitutional problem see Note, 34 NOTRE DAME LAW. 78 (1958).

[35] See, Hillman v. Penny, 29 F.R.D. 159 (E.D. Tenn. 1962); Gallimore v. Dye, 21 F.R.D. 283 (E.D. Ill. 1958); McClure v. Boeger, 105 F. Supp. 612 (E.D. Pa. 1952). *Contra*, Brackett v. Woodall Food Prods., Inc., 12 F.R.D. 4 (E.D. Tenn. 1951), which holds that a liability policy is not an asset but purchase protection for both compensatory and punitive damages.

[36] 29 F.R.D. 159 (E.D. Tenn. 1962).

[37] *Id.* at 161.

[1] 256 F. Supp. 151 (1966).

Act of 1964.[2] In an attempt to avail themselves of the exemption of "a private club or other establishment not in fact open to the public,"[3] the members, some one hundred restaurants, had formed a non-profit corporation named the Northwest Louisiana Restaurant Club. An action, seeking a permanent injunction against further discrimination, was brought by the Attorney General of the United States under 42 U.S.C. § 2000a-5.[4] The court held that the plaintiff was entitled to a permanent injunction as a matter of law.[5]

The Civil Rights Act of 1964 was the first federal government effort at prohibition of discrimination as to race since the Civil Rights Act of 1875.[6] The earlier act had been declared unconstitutional in *The Civil Rights Cases*[7] because it attempted to base on the fourteenth amendment its power to restrict discrimination by *individuals*. The new act has survived the test of constitutionality. Its provision for relief against *state action*[8] is supported by the long line of cases holding that Congress possesses such power under section five of the fourteenth amendment.[9] Its source of authority

[2] 78 Stat. 243, 42 U.S.C. §§ 2000a-2000a-6 (1964).

[3] 78 Stat. 243, 42 U.S.C. § 2000a(e) (1964).

[4] 78 Stat. 245, 42 U.S.C. § 2000a-5(a) (1964) provides that

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court. . . .

78 Stat. 245, 42 U.S.C. § 2000a-5(b) (1964) requires the Attorney General to certify that he feels that the case is of general public importance.

[5] 256 F. Supp. at 151.

[6] 18 Stat. 335 (1875).

[7] 109 U.S. 3 (1883). The public accommodations section of the act of 1875 was applicable to individual offenders and was not dependent upon state action, which led to its destruction. The Slaughter-House Cases, 83 U.S. (16 Wall) 36 (1873), had held that the purpose of the equal protection clause of the fourteenth amendment was to protect individuals from discrimination by state, not individual, action. Mr. Justice Harlan wrote a strong dissent in *The Civil Rights Cases*.

[8] 78 Stat. 243, 42 U.S.C. § 2000a(b) (1964) provides that each of the named establishments which serves the public is a place of public accommodation if it is "supported by state action."

[9] *E.g.*, The Civil Rights Cases, 109 U.S. 3 (1883). The scope of the authority within the prohibition of discrimination supported by state action is wide. Peripheral types of state activity have been brought within the sphere of state action. See Shelley v. Kraemer, 334 U.S. 1 (1948) (enforcement by state court of a covenant banning sale of real property to Negroes is state action); see Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (lessee of state-owned property is bound by the fourteenth

for the provision against discrimination by *individuals* is the commerce clause of the constitution.[10] Two cases[11] have supported its constitutionality on this theory.

The private establishment exemption provides that "the provisions of . . . [the act] shall not apply to a private club or other establishment not in fact open to the public. . . ."[12] The act does not articulate the reason for this exemption, but most certainly it must rest upon traditional notions of the rights of association and privacy.[13] Predictably, restaurants and other establishments, whose prior activities would constitute illegal discrimination under the new law, seized upon the exemption and attempted to create "private" clubs in order to avoid the necessity of compliance.[14] According

amendment in the conduct of a restaurant on that property); see Evans v. Newton, 382 U.S. 296 (1966) (city's control and maintenance of park devised to city for use of white people only subjects it to restraints of fourteenth amendment); see United States v. Guest, 383 U.S. 745 (1966) (arrest of Negroes by police after false reports that such Negroes had committed criminal acts would be sufficient state action.)

[10] U.S. CONST. art. I, § 8. 78 Stat. 243, 42 U.S.C. § 2000a(b) (1964) provides that each of the named establishments which serves the public is a place of public accommodation if its operations "affect commerce."

For arguments that this is an unconstitutional broadening of the commerce powers see Rice, *Federal Public-Accommodations Law: A Dissent*, 17 MERCER L. REV. 338 (1966); Note, 16 S.C.L. REV. 646 (1964).

[11] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (inn, seventy-five per cent of whose customers traveled in interstate commerce); Katzenbach v. McClung, 379 U.S. 294 (1964) (restaurant, "Ollie's Barbeque," purchased forty-six per cent of its meat from local supplier who had procured it from outside the state).

[12] 78 Stat. 243, 42 U.S.C. § 2000a(e) (1964). The section concludes with the statement that the club's facilities may not be restricted if they are available to patrons of "places of public accommodation" as defined in earlier subsections.

[13] In N.A.A.C.P. v. Alabama, 357 U.S. 449, 462 (1957), the Court stated, "This Court has recognized the vital relationship between freedom to associate and privacy in one's associations." And in Griswold v. Connecticut, 381 U.S. 479, 483 (1965), "The first amendment has a penumbra where privacy is protected from governmental intrusion. . . . [W]e have protected forms of 'association' that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members."

[14] The Wall Street Journal, July 22, 1964, p. 1, col. 4:

> Many Dixie businessmen, particularly in the big cities, are complying with the bill. But some are concerned about competition from the growing number of other establishments shifting to private operation in a last ditch effort to preserve racial barriers. Besides restaurant owners, others who have gone 'private' include proprietors of amusement parks, bowling alleys and at least one major hotel.

The Washington Post, Aug. 16, 1964, § A, p. 6, col. 4, related that the new Civil Rights Act brought a "sudden spate" of private clubs. Both of these newspaper articles refer to events within Mississippi.

to the court's decision, this is what was attempted by the members of the Northwest Louisiana Restaurant Club.

The test provided by the language of the statute for determination of the status of the alleged club is simply that it is "not in fact open to the public."[15] No detailed or sophisticated standards appear with which to attack the problem of just what is "in fact" open to the public.[16] Because of the short time since passage of the act and the resulting small amount of litigation under it, there has not yet been a great amount of judicial formulation of the tests that are to be applied.

Thus, as an aid in determination of the aspects to which the federal courts are likely to turn in forthcoming litigation, examination may be made of the following: the legislative history of the exemption, state court decisions rendered under state public accommodation laws, and the factors deemed significant in the principal case.

The legislative history of the private club exemption is limited almost entirely to the Senate discussion surrounding an amendment to the language in the proposed House of Representatives bill. The House version read, "bona fide private club."[17] The amendment changed this language to the way it now appears, *viz.* "not in fact open to the public."[18] The debate made it clear that this change was made so as to more accurately reflect the intent of Congress that the *motivation* for the establishment of the club is *not* to be the test; rather, the question is to be one of *fact* alone.[19] Thus it seems clear

[15] 78 Stat. 243, 42 U.S.C. 2000a(e) (1964).

[16] The Act lists in § 2000a(b) establishments which are "places of public accommodation." But as Professor Van Alstyne, writing on the Ohio law, points out, "[I]t is impossible to determine the scope of the private club exemption by listing *types* of facilities, for the legitimate exclusiveness of such clubs is more a function of their internal order than of the activity which they sponsor." Van Alstyne, *Civil Rights: A New Public Accommodations Law for Ohio*, 22 OHIO ST. L.J. 683, 688 (1961).

[17] H.R. 7152, 88th Cong., 1st Sess. § 201(c) (1963).

[18] 78 Stat. 243, 42 U.S.C. 2000a(e) (1964).

[19] Senator Long, speaking for the amendment:

> Its purpose is to make clear that the test of whether a private club . . . is exempt from Title II relates to whether it is, in fact, a private club, or whether it is, in fact, an establishment not open to the public. It does not relate to whatever purpose or animus the organizers may have had in mind when they originally brought the organization or establishment into existence.

110 CONG. REC. 13697 (1964).

that according to the manifested intent of the legislators, a club could be formed primarily so as to exclude Negroes; yet if it is in fact private, it would not be covered by the act. Regardless of how one may or may not feel about this as a worthwhile attribute for an association, such would appear to be in keeping with the court-protected notions of privacy and right of association.[20]

Many states have passed their own public accommodations laws.[21] However, it has been the feeling of many that these laws have proven to be generally ineffective.[22] This ineffectiveness, plus the absence of such laws in some states, led to the belief that federal legislation was needed. Despite this ineffectiveness, state decisions rendered under these laws are valuable. They provide various factors that appear to have been significant in determining whether a particular establishment should be exempted as private:

(1) *Procedure for obtaining membership.* If the evidence is that white persons are admitted as members with very little formality, *e.g.*, by simply paying a small fee and "signing up," while Negroes have to present applications (which are seldom if ever approved), doubt is cast upon the contention that the club is in fact private.[23] Lack of genuine qualifications for membership, so that in practical effect, the only requisite is being white, together with little limitation as to number, has been deemed significant.[24]

(2) *Use of the club by persons other than members.* If on occasion persons (white) are admitted without any semblance of becom-

[20] See note 13 *supra.*

[21] Alabama, Arkansas, Florida, Georgia, Hawaii, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia are apparently the only states that do not have any type of public accommodations law. For a list of the statutes, see Comment, *Public Accommodations Laws and the Private Club,* 54 GEO. L.J. 915 n.9 (1966).

[22] For the most part, this ineffectiveness rests upon two circumstances: strict construction and non-use of the state laws. See Comment, 19 U. MIAMI L. REV. 456, 465 (1965). See also District of Columbia v. John R. Thompson Co., 346 U.S. 100 (1953), where the Supreme Court had to decide whether or not the statute had been repealed by non-use. (Held that it had not been.)

For a general discussion of state public accommodation laws and the litigation surrounding their constitutionality see Caldwell, *State Public Accommodation Laws, Fundamental Liberties and Enforcement Programs,* 40 WASH. L. REV. 841 (1965).

[23] See Lackey v. Sacoolas, 411 Pa. 235, 191 A.2d 395 (1963).

[24] See Castle Hill Beach Club v. Arbury, 208 Misc. 35, 142 N.Y.S.2d 432 (Sup. Ct. 1955), *modified,* 1 App. Div. 2d 943, 950, 150 N.Y.S.2d 367 (1956), *aff'd,* 2 N.Y.2d 596, 142 N.E.2d 186, 162 N.Y.S.2d 1 (1957).

ing members, it would appear unlikely that the club is private.[25] Of course, a genuine club permits its members to allow guests to use the facilities. But the "guest list" will hardly be permitted to become so great that the club is, in effect, open to the public.

(3) *Control arrangement; the existence or non-existence of a profit motive; character of the relationship among the members.* One writer[26] suggests the following types of questions: Are any of the policy decisions made by the members, or do they merely agree to decisions made by an independent manager, owner, or nucleus of members?[27] Is the club a nonprofit organization, perhaps collecting dues, or is it in practical essence a commercial enterprise, with profits going to the manager or owner personally? Do short-term membership cards functionally resemble tickets?[28] Is the principal sustaining element in the club the members' interest in and association with one another, or does the club exist primarily because of the common interest in the activity of its sponsors?[29] To what extent are those who use the facilities actually acquainted with one another?

In most of these state cases several of the above factors are discussed. One factor may seem to predominate, but the decisions are usually based upon a combination of two or more. Seldom is a broad or general rule stated. In at least one of the cited cases the reason for formation of the club was examined.[30] However, if legislative intent is to be given weight, motivation should be of no significance under the federal law.[31]

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[25] See Gillespie v. Lake Shore Golf Club, Inc., 91 N.E.2d 290 (Ohio Ct. App. 1950).

[26] Van Alstyne, *Civil Rights: A New Public Accommodations Law for Ohio*, 22 OHIO ST. L.J. 683, 689 (1961). The questions are posed in a discussion of the then new Ohio public accommodations law.

[27] See Gillespie v. Lake Shore Golf Club, Inc., 91 N.E.2d 290 (Ohio Ct. App. 1950).

[28] See Evans v. Ross, 55 N.J. Super. 266, 150 A.2d 512, 4 RACE REL. L. REP. 355 (Camden County Ct. 1959), *aff'd*, 57 N.J. Super. 223, 154 A.2d 441, 4 RACE REL. L. REP. 1012 (Super. Ct. 1959), *cert. denied*, 31 N.J. 292, 157 A.2d 362, 5 RACE REL. L. REP. 209 (1959).

[29] See Castle Hill Beach Club v. Arbury, 208 Misc. 35, 142 N.Y.S.2d 432 (Sup. Ct. 1955), *modified*, 1 App. Div. 2d 943, 950, 150 N.Y.S.2d 367 (1956), *aff'd*, 2 N.Y.2d 596, 142 N.E.2d 186, 162 N.Y.S.2d 1 (1957); Norman v. City Island Beach Co., 126 Misc. 335, 213 N.Y. Supp. 379 (1926).

[30] See Castle Hill Beach Club v. Arbury, 208 Misc. 35, 142 N.Y.S.2d 432 (Sup. Ct. 1955), *modified*, 1 App. Div. 2d 943, 950, 150 N.Y.S.2d 367 (1956), *aff'd*, 2 N.Y.2d 596, 142 N.E.2d 186, 162 N.Y.S.2d 1 (1957).

[31] See note 19 *supra*.

Turning to the principal case, examination of the court's findings of fact reveals a reflection only of express dealing with some of the factors considered in state cases and apparently no dealing with legislative intent. Indeed, the court seems to have disregarded the intent of the legislators that motivation is not to be significant, as it found that the club "was organized and . . . exists for the purpose of avoiding the provisions of the Civil Rights Act of 1964."[32] It is easily understandable that a court would find it difficult to refrain from attaching significance to motivation. This is especially true where such a purpose is expressly manifested, as in this case where the organizers solicited members by representing that the club would provide a means for circumventing the act.[33] However, this should be avoided as a test of the "public" or "private" character of the club.

Procedure for obtaining membership, an important factor in the state cases, was evidently significant here. This is reflected in the court's finding that the members "offered and issued membership cards as a matter of course to any white customer without any requirements or conditions whatsoever. . . ."[34] A consideration of the use of the club by persons other than members was made when the court found that the members "served white customers without regard to whether they were members of the Northwest Louisiana Restaurant Club. . . ."[35] The nature of the interests of the members is not mentioned. However, it was found that prior to formation of the club,[36] the restaurants were businesses open to the public and that "the character of its trade and nature of its solicitation to the general public [of each member restaurant] had not changed by reason of its membership in the club."[37] Implicit in this finding is the fact that the only interest binding the members was avoidance of having to serve Negroes. Clearly, this is not the associational interest in one another that the act would seem to contemplate. Relevant here is the finding that the club conducted no general meetings

[32] 256 F. Supp. at 152.
[33] *Id.* at 153.
[34] *Id.* at 153.
[35] *Id.* at 153.
[36] The club was found to have been chartered as a corporation on June 30, 1964, only two days before the effective date of the act. *Id.* at 152.
[37] *Id.* at 153

after July, 1964.[38] Hardly can a club be a private association where the members do not meet together.

It seems apparent that *Northwest La. Restaurant Club* is a relatively "easy" case, and that the court had little trouble concluding that the members were not in such a relation that the private club exemption should be invoked to protect rights of private association. Such a protectable association did not exist. Because of the ease in deciding that this was indeed a "sham organization,"[39] the court here simply was not called upon for extensive articulation of the precise factors that led to the decision.

However, hard cases will come, and more judicial refinement of the factors considered will be necessary and welcomed. For example, what will be the decision in regard to the genuinely private club that grows larger and larger? Will the greater number of members, many of whom perhaps do not know one another, render the club so "open to the public" that it will cease to be exempted? How would a court hold on a facility, such as a golf course, which ordinarily constitutes a place of public accommodation, but operates as a "private" club, with associational interests existing among the members?[40]

ROBERT L. THOMPSON

Conflict of Laws—Departure from Lex Loci

In *Clark v. Clark*[1] the New Hampshire court applied its own law and allowed a guest passenger to sue her host for ordinary negligence rather than applying the stricter Vermont guest statute. The parties were both from New Hampshire; the automobile accident occurred in Vermont. The decision was a logical extension of that court's recent holdings in the area of conflicts law. Earlier in *Thompson v. Thompson*[2] the court abandoned its adherence to strict *lex loci delicti* which requires application of the law of the place of the wrong, overruled a long line of cases, and applied the

[38] *Id.* at 153.
[39] *Id.* at 153.
[40] Professor Van Alstyne suggests this problem. Van Alstyne, *Civil Rights: A New Public Accommodations Law for Ohio*, 22 OHIO ST. L.J. 683, 688 (1961).

[1] ——N.H.——, 222 A.2d 205 (1966).
[2] 105 N.H. 86, 193 A.2d 439 (1963).