



6-1-1965

Recent Decisions

Kevin W. Carey

Michael C. Farrar

Stephen A. Seall

Thomas D. Ready

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Kevin W. Carey, Michael C. Farrar, Stephen A. Seall & Thomas D. Ready, *Recent Decisions*, 40 Notre Dame L. Rev. 468 (1965).

Available at: <http://scholarship.law.nd.edu/ndlr/vol40/iss4/6>

This Commentary is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

RECENT DECISIONS

TRADE REGULATION — ROBINSON-PATMAN ACT — PRICE DISCRIMINATION — “PREMIUM” AND NON-“PREMIUM” PRODUCTS ARE OF UNLIKE “GRADE” UNDER SECTION 2(a). — Since about 1938, the Borden Company has been selling chemically identical quantities of evaporated milk under its own brand name and under private labels. The Borden brand, like the brands of its major national competitors, has been sold nationwide on a uniform delivered-price basis. The private-label milk has been sold on an f.o.b. plant basis, at a price determined by a cost-plus formula by which Borden adds a margin of profit to the actual cost of production at the particular plants from which the milk is shipped. This price has varied from plant to plant, and from month to month at each plant, but it has always been substantially lower than the price for the Borden brand.

Prior to 1956, only four of the nine Borden plants were engaged in packing the evaporated milk under private labels. In 1956 and 1957, Borden expanded its private-label operations in a number of its plants which had previously packed only the Borden brand, including those located in Lewisburg, Tennessee and Chester, South Carolina. This expansion was motivated by the requests of customers of another packer who had gone out of business. The private-label milk was sold thereafter to these customers and to others who requested it; Borden made no general offers, and solicited no orders.

As a result of its new operations in Tennessee and South Carolina, various wholesalers and retailers who formerly purchased private-label milk from other packers began to shift their business to Borden. There is some evidence that this milk may not have been available to all customers on equal terms, and that sales of Borden's private-label milk at the retail level tended to interfere with the retailers' efforts to market the Borden brand. The Federal Trade Commission claimed that the price differentials maintained between the Borden brand and private-label brands constituted a “price discrimination” among products of “like grade and quality” under the Robinson-Patman Act, and issued a complaint alleging primary- and secondary-line injury to competition.¹

In the proceedings before the Commission, Borden denied the substantial likelihood of injury to either line of competition,² and also offered a cost justification for its pricing differentials. The Hearing Examiner agreed with its contentions on these points, but the Commission's rulings were adverse.³ Petitioning the Fifth Circuit to set aside the Commission's order, Borden renewed these contentions, and pressed urgently the *jurisdictional* contention that the quantities of milk sold under different labels were not of like grade and quality. The Borden brand milk was a “premium” product, consistently commanding a higher price from the consuming public than less well-known brands. It was consequently of a “grade” unlike that of the private-label milk. The Commission countered with various authorities, purportedly to the effect that brand-name distinctions may play no part in the determination of a commodity's statutory “grade.” The Court granted the petition,

1 It shall be unlawful . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . . 15 U.S.C. § 13(a) (1958).

2 Actual injury to competition need not be proven. *Mid-South Distrib. v. FTC*, 287 F.2d 512, 517 (5th Cir. 1961), *cert. denied*, 368 U.S. 838 (1961). See also Judge Whitaker's discussion in *Moog Indus., Inc., v. FTC*, 238 F.2d 43, 51 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958).

3 *The Borden Co.*, 3 Trade Reg. Rep. (1962 Trade Cas.) ¶ 16191 (FTC, Nov. 28, 1962).

and unanimously held that the Borden and private brands were not of "like grade and quality" within the meaning of the act. *Borden Co. v. FTC*, 339 F.2d 133 (5th Cir. 1964).

The issue presented by the *Borden* case is whether the statutory "grade" of a commodity may be altered solely by the public demand for it under a particular label or brand name.

That brand names alone, irrespective of their commercial significance, will not distinguish commodities in grade, is settled beyond dispute. A proposal during the debates over the Robinson-Patman amendments to limit the price discrimination provisions to "commodities of like grade and quality and brands" was vigorously denounced and finally rejected.⁴

On the question involved here, however, the law is less clear. The Commission has repeatedly held, on facts similar to those of the *Borden* case, that goods, which are physically the same in all respects except for their labels, are goods of like grade and quality. Some of these cases have involved distributions of "name"-brand and private label goods, such as tires⁵ and footwear,⁶ to wholesalers and retailers. *Page Dairy Co.*⁷ involved a price discrimination at the retail level, where one cent more per quart was charged for "Vitamin D Homogenized" milk than for the same milk without the label. The *Borden* Court distinguishes these precedents, however, as not involving the express contention that Borden raises, stating:

In none of those cases was there any showing that the purchasers paying the higher prices had received brand-name products which readily commanded a premium price in the market, while the purchasers paying the lower prices did not. The brand names were not shown to have any effect on the ultimate price the products could command. Here the Borden label was clearly of commercial significance.⁸

It might well be that "Goodyear" and "U.S. Royal" tires, "U.S. Rubber" footwear and "Vitamin D Homogenized" milk all commanded higher prices from the public than they would have if sold under other labels. Still, no evidence had been adduced to show that fact at the jurisdictional level to support an argument that these were products to which section 2(a) could not apply. Thus the Court regards the Commission's precedents as merely illustrative of the basic proposition that brand names alone cannot make a difference of grade.⁹

4 Mr. Teegarden, draftsman of the statute, called the proposal a "specious suggestion that would destroy entirely the efficacy of the bill against large buyers." Hearings Before the Subcommittee of the House Committee on the Judiciary on Bills to Amend the Clayton Act, 74th Cong., 2d Sess., ser. 10, pt. 2, at 469 (1936).

On the question here, the legislative history is uncertain. Mr. Teegarden's criticism of the "and brands" proposal was that "[s]o amended, the bill would impose no limitations whatever upon price differentials, except as between purchasers of the same brand." *Ibid.* (Emphasis added.) While he did not address himself to the question of "demonstrably preferred" brands, he did say that the bill left manufacturers "free to put up their products under private brands," mentioning only the caveat that these brands must be available to all comers on equal terms. *Ibid.*

On the other hand, Representative Patman stated that manufacturers could not make certain brands of goods available to particular chain stores unless independents could buy goods of the same quality at the same price, regardless of the brand names. 80 CONG. REC. 8115 (1936) (remarks of Representatives Patman and Taylor).

5 *Goodyear Tire & Rubber Co.*, 22 F.T.C. 232 (1936), was a pre-Robinson-Patman case under the essentially similar language of the Clayton Act; there, Goodyear sold tires to Sears, Roebuck & Co., for resale under the Sears brands, at prices lower than it charged to independent dealers for resale under the Goodyear brand. The facts were substantially the same in *United States Rubber Co.*, 28 F.T.C. 1489 (1939).

6 In *United States Rubber Co.*, 46 F.T.C. 998 (1950), the company had given varying quantity discounts on its rubber and canvas shoes and other footwear, which was sold under a variety of the company's own brand names, and under private brands. *Accord*, *Hood Rubber Co.*, 46 F.T.C. 1015 (1949).

7 50 F.T.C. 395 (1953).

8 339 F.2d at 137.

9 The Commission precedent would be of some weight if we were here holding that the mere affixing of different labels to physically identical

There is a division of opinion among the commentators who have dealt with this question. A majority of the Attorney General's National Committee to Study the Antitrust Laws recommended the "promotional" factors inherent in brand names not be considered in the jurisdictional inquiry.¹⁰ The minority urged that "significant consumer preferences" for one product over another should be evaluated as a measure of its "grade."¹¹ Rowe supports the minority's view:

Considerations of "quality" aside, the requirement of "like grade," whose real import was never legislatively clarified, appears sufficiently plastic to take account of any other commercially significant distinctions — whether physical or promotional differentiations affecting market value. "Like grade" is thus readily equated with "commercial fungibility."

So construed, the statutory condition of "like grade" would exempt those non-"fungible" goods differentiated significantly in physical components or promotional appeal.¹²

It is said that the purpose of the "like grade and quality" jurisdictional test is to foreclose the "emasculatation" of section 2(a) by the making of "artificial distinctions" among products which are otherwise commercially comparable.¹³ It is noteworthy that the test is "like" grade; *identity* of grade is not required. The question is whether the goods are "sufficiently comparable for price regulation."¹⁴

Even if the public preference for Borden brand milk over the same milk under another label may be largely a matter of promotional artifice, the distinction is nonetheless of competitive significance. This has been repeatedly recognized by the Commission and the courts in cases involving defenses of price differentials under section 2(b),¹⁵ as good faith efforts to meet competition. The representative case of *Anheuser-Busch, Inc.*¹⁶ involved the lowering of Budweiser beer prices in the St. Louis area to equal those of its local competitors. Because the company maintained a "premium" price level for Budweiser in more than 80% of its markets, with an established consumer demand for it at those prices, the Commission rejected the defense, reasoning that for Budweiser to "meet" the prices of local, "nonpremium" beers was in effect to "beat" the competition. Similar analyses have prevailed in cases involving yeast,¹⁷ gasoline,¹⁸ automatic controls,¹⁹ cigarettes²⁰

products is sufficient to make them different in grade, but we do not so hold. It is only when those labels are proven to have demonstrable commercial significance that they can change the grade of a product. *Id.* at 137-38.

10 REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTI-TRUST LAWS 158 (1955). See also PATMAN, COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT 23, 35 (1963). The Court cites Austin as supporting the views of the majority of the Attorney General's Committee. 339 F.2d at 136, n. 5. However, he seems merely to reiterate the principle that brand names alone do not alter a commodity's grade or quality: "Where goods sold under private brands are of the same grade and quality as those sold by the manufacturer under his own brands, Section 2(a) applies." AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 39 (1959).

11 REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTI-TRUST LAWS 158-59 (1955).

12 ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 76 (1962).

13 *Atalanta Trading Corp. v. FTC*, 258 F.2d 365, 371 (2d Cir. 1958).

14 This language has been used in cases involving prices on entire lines of goods, to relieve the Commission of the obligation to compare prices on each individual item. *Moog Indus., Inc. v. FTC*, 238 F.2d 43 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958). More generally, Austin notes that "slight differences in grade and quality will not be of importance if the goods sold are competitive and if injury to competition may result from price differences. . . ." AUSTIN, *op. cit.* *supra* note 10, at 38.

15 . . . nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent a seller rebutting the prima-facie case . . . by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor. . . . 15 U.S.C. § 13(b) (1958).

16 54 F.T.C. 277 (1957), *rev'd on other grounds*, 265 F.2d 677 (7th Cir. 1959), *rev'd*, 363 U.S. 536 (1960), *again rev'd on other grounds*, 289 F.2d 835 (7th Cir. 1961).

17 *Standard Brands, Inc.*, 46 F.T.C. 1485 (1950), *aff'd as modified*, 189 F.2d 510 (2d Cir. 1951). Because for nine years Standard's yeast had been priced higher than that of its competitors, a "competitive situation" had been established such that it was "unnecessary for [Standard] to meet or match exactly a lower price of a competitor in order to retain business or to get new business." 46 F.T.C. at 1495.

and baby food.²¹ The state of the law was recently summarized by the Commission in *Callaway Mills Co.*:²²

Both the courts and the Commission have consistently denied the shelter of the [meeting competition] defense to sellers whose product, because of intrinsic superior quality or intense public demand, normally commands a price higher than that usually received by sellers of competitive goods.²³

In reviewing this line of cases, the *Borden* Court was disturbed at an apparent inconsistency in the Commission's position. If the Borden company had sensed a threat to its Borden brand sales in a particular area, it could adjust its prices only within bounds that would maintain the "premium" differential. Yet, in pricing its own private-label product, a similar differential was held to be price discrimination. Since the only effective defenses for price differentials which injure competition are meeting-of-competition and cost justification, and since here there was no claim of the former, the consequence of the Commission's holding is that Borden must price its private label only so much lower than the Borden brand as may be accounted for by lower costs of "manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are . . . sold or delivered. . . ."²⁴ No analysis of the complexities of cost justification is necessary to demonstrate that the resulting price might not be low enough to compete on the private-label market.²⁵ The Commission's view therefore means that a company, by establishing and exploiting a valuable name, could preclude its own entry into private-label markets. To that extent, competitive success could become self-limiting.

The Court's reaction is simple and direct:

*If [weighing the public demand for a product] is appropriate in considering the grade and quality of products for purposes of Section 2(b), it is equally applicable to that determination under Section 2(a). We cannot approve of the Commission's construing the Act inconsistently from one case to the next, as appears most advantageous to its position in a particular case.*²⁶

It is submitted that the Court was in error. Arguably, this is a case of first impression.²⁷ Since the FTC precedents did not involve explicit attempts to

18 *Standard Oil Co.*, 49 F.T.C. 923 (1953), *rev'd on other grounds*, 233 F.2d 649 (7th Cir. 1956), *aff'd*, 355 U.S. 396 (1958).

19 *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351 (1948), *rev'd on other grounds*, 191 F.2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952).

20 *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F.2d 234, 237 (2d Cir. 1929), *cert. denied*, 279 U.S. 858 (1929).

21 *Gerber Prods. Co. v. Beech-Nut Life Savers, Inc.*, 160 F. Supp. 916 (S.D.N.Y. 1958).

22 3 Trade Reg. Rep. (1964 Trade Cas.) ¶ 16800 (FTC, Feb. 10, 1964).

23 *Id.* at 21755.

24 . . . nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . . 15 U.S.C. § 13(a) (1958).

Cost-justification and meeting-of-competition are the only available defenses to a charge of price discrimination, absent "changing conditions affecting the market for or the marketability of the goods concerned. . . ." *Ibid.*

25 Testimony was adduced indicating a definite ceiling price for private label milk, \$1.50 to \$2.00 less per case than the Borden brand could command. 339 F.2d at 136, n.3.

26 *Id.* at 139. (Emphasis added.)

27 In *Atalanta Trading Corp. v. FTC*, 258 F.2d 365 (2d Cir. 1958), advertising allowances had been granted on certain pork products to certain purchasers. The Court rejected the finding that all of the products were of like grade and quality, and one of its grounds, mentioned in a footnote, was that the Commission had failed to take account of the prices at which the products sold. 258 F.2d at 371, n.5. The remark was dictum, and the question of "premium" labelling was not raised.

Closer to the point was the Fifth Circuit's own opinion in *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F.2d 916 (5th Cir. 1962). Florida Beverage sold nationally-

demonstrate variations in the marketability of the products found to be of like grade and quality, they do not directly dispose of the issue here. Nonetheless, it would seem inappropriate to limit these precedents, as the Court does, to situations in which brand names have no proven significance. Higher prices are charged for "Goodyear" and "U.S. Royal" tires and for "Vitamin D Homogenized" milk only because the prices *will* be paid. The Commission cannot have been unaware these many years that brand names markedly affect the public demand for certain products; yet the *jurisdictional* insignificance of that fact has been readily and consistently presumed.

Likewise, the Court seems to have read too much into the Commission precedents dealing with the meeting-competition defense under section 2(b). Its key argument seems to be that the Commission includes the public demand for products in determinations of "grade" in the 2(b) cases, while refusing to do so under section 2(a). It is true that the Commission does require maintenance of established and exploited "premium" price differentials over *all* competing "nonpremium" goods, in order to prevent the use of an established trade name to overwhelm local competition on a geographically selective basis. They do *not* say that "premium" and "nonpremium" items are of unlike grade, but merely that they are of unequal competitive strength, and that their prices cannot be said to "meet," for purposes of price regulation, unless allowance is made for that inequality. In 2(b) cases, the "grade" of the competing products is irrelevant.²³

The Commission precedents under both sections 2(a) and 2(b) are consistent, moreover, in serving the same basic objective of competition among relatively equal contestants. The 2(b) cases recognize that public preferences for particular commodities, imparting to them a "premium" status, are often largely an accidental function of time, place and public relations. Accordingly, their thrust is to minimize

known liquors both under their own labels and under obscure names, at varying prices. The *Borden* Court distinguishes its finding of price discrimination there from the present case on the ground that Florida's purchasers, retailers and wholesalers, were told the true character of the private-label liquor, so that the significance of the different trade names was nullified, while *Borden* strictly forbade the use of its name in marketing the private-label milk. 339 F.2d at 137. The distinction may not be sound. The opinion in *Hartley & Parker* does not indicate whether or not these disclosures were made to the *public*, and certainly does not rest upon any *explicit* assumption that they were. From the facts as reported in the Court's opinion, it is not clear that the significance of the trade names was nullified effectively by the disclosures.

Finally, the Seventh Circuit has suggested that in some cases the "promotional" appeal of certain "commodities" may be determinative of their likeness in grade and quality. The case itself is distinguishable as involving television programs, for which there is perhaps *no* other appropriate standard than "drawing power." *Columbia Broadcasting Co. Inc. v. Amana Refrigeration Inc.*, 295 F.2d 375, 378 (7th Cir. 1961).

28 The Court was particularly concerned over language in *Callaway Mills Co.*, 3 Trade Reg. Rep. (1964 Trade Cas.) ¶ 16800 (FTC, Feb. 10, 1964) which seems to use the words "grade" and "saleability" interchangeably:

The *quality* and *saleability* of carpeting depend upon many variables and it offends our common sense to . . . hold, sans affirmative evidence . . . that carpeting made by Callaway to sell at a certain price level is similar in *grade* and *quality* to all carpeting made by Callaway's competitors to sell at approximately the same level. . . . Respondents should have introduced proof as to the comparative *quality* and *saleability* of their goods and the competitive goods allegedly defended against. 3 Trade Reg. Rep. ¶ 16800, at 21755.

The Commission clearly indicated, however, that it meant to reiterate the principle developed by previous meeting-competition cases. See text accompanying note 24 *supra*. None of these cases suggest a theoretical equation of "grade" with "saleability." They merely recognize the fact that "premium" products not only meet but undercut "nonpremium" competition when a customary price differential is suddenly eliminated. Cases cited notes 17-22 *supra*. It appears, therefore, that the Court read too much into what was most probably a careless choice of language in the *Callaway* case.

See also *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956), which affirms that section 2(b) allows a seller to meet the price of "competing" products, whether of like grade and quality or not.

the effect of that factor upon competitive opportunities for the many. The operation of these cases is rather like a system of handicapping under which, because of its past successes, a race horse is required to carry a heavier burden. Similarly, just as fighters competing in a certain weight division can only move *upwards* to meet the heavier contestants, the 2(a) jurisdictional standards tend to require heavyweights like Borden to remain in their own price division. They may branch out under private labels only at cost-justified prices which do not tend to injure competition. "Premium" competitors, like Borden, presumably have the superior resources for research and refinement of production techniques. Theirs are the incalculable advantages, in a wholesaler-retailer market, of names established "in the trade" as well as in the public eye. Benefiting from "premium" earnings which are not entirely accounted for by higher costs of "premium" marketing, their products and their prices could be expected to define the private-label competition, establishing or tending to establish the price levels at which the contest will be waged.

Ultimately, the issue seems to resolve itself into a choice between alternative views of the "competition" which the act is designed to protect. The meaning of "like grade" has not been legislatively clarified, and is no more logically to be divined by reference to "promotional" features than by examination only of physical properties. Its meaning, in short, cannot be discovered, but must be *constructed* to suit the broad objectives of the act.

The Court saw in its conclusion an adherence to the Supreme Court's counsel that the act be applied consistently with "broader antitrust policies that have been laid down by Congress," to avoid a "price uniformity and rigidity in open conflict with the purposes of other antitrust legislation."²⁹ It is thus arguable that Borden should be free to price its milk at the levels sustained by any market Borden is willing and able to exploit. This argument assumes that it is Borden's competitive flexibility with which the act is primarily concerned. Currently, however, there are two distinct spheres of competition: one occupied by Borden, and other "national" brands, and the other by smaller, less prestigious companies who produce comparable goods for lower stakes.³⁰ The Commission's finding that these commodities are of like grade, sufficiently comparable for price regulation purposes, reflects the view that this competitive *situation* — in which many can compete because there *are* both "premium" and "nonpremium" markets — is the proper object of its concern.

To write either view into the law is certainly to perform a legislative function of great consequences. Given the necessity of a choice, however, the Commission's view seems preferable. Its inquiries are thereby directed to the issue which is critical in all price discrimination cases: to what extent do price differentials adversely affect the competition among those who deal with the commodities? Aside from questions of cost justification, Borden's private-label operations are not prejudiced by the jurisdictional holding if they do not tend "substantially to lessen competition." An essential element³¹ of the Commission's burden was to show that Borden's expansion attracted enough business from other packers appreciably to tend to narrow the field, and that certain private-label customers were favored over others. The Commission faced these questions, addressing itself to the jurisdictional standard as a device by which Congress meant to preserve and expand competitive opportunity for the many. The Court, although it saw "considerable merit" in Borden's

29 *Automatic Canteen Co., v. FTC*, 346 U.S. 61, 74, 63 (1953).

30 See note 25 *supra*.

31 . . . the Commission has always construed the Act to require it as a part of its affirmative case to present evidence that a discrimination may lessen or tend to injure competition. *General Foods Corp.*, 50 F.T.C. 885, 890 (1954).

Where that burden has not been sustained, the cases have been dismissed. See, *e.g.*, *Champion Spark Plug Co.*, 50 F.T.C. 30 (1953). The Commission and the courts generally have not followed the view suggested by the Second Circuit, that where a discrimination alone was shown, the burden would be on anyone making such discrimination to show that no injury to competition would occur. *Moss, Inc. v. FTC*, 148 F.2d 378 (2d Cir. 1945); *FTC v. Standard Brands*, 189 F.2d 510 (2d Cir. 1951).

arguments as well as in its cost justification,³² foreclosed them, and placed a potential threat to that policy beyond inquiry.

Kevin W. Carey

DIVORCE — ALIMONY — SURVIVAL OF PAYMENTS FOLLOWING DEATH OF HUSBAND. — A divorce decree entered in May, 1951, confirming a property settlement, provided that "the plaintiff . . . is awarded alimony to be paid by the defendant in the sum of one hundred fifty dollars per month so long as she shall live, or until her re-marriage." The husband paid the designated amount monthly until his death in July, 1961, but his executor rejected the ex-wife's claim for \$150 per month afterwards. The trial court directed continuation of the alimony payments from the estate. On appeal the Supreme Court of Washington, reversing this judgment, *held*: the payments abate on the death of the husband. "So long as she shall live" is not an expression of sufficient clarity to enable a finding of judicial intent that the payments survive death of the husband. *Bird v. Henke*, 395 P.2d 751 (Wash. 1964).

A divorce decree entered in April, 1943, awarded the plaintiff "a property division and an award of alimony and support money for her care, support and maintenance" and provided for \$200 per month "for the care, support and maintenance of the plaintiff and her minor children," to be reduced when the children became of age or self-supporting "to One Hundred Dollars a month to continue during the lifetime of the plaintiff and while she remains unmarried." The husband paid the designated sum monthly until his death in March, 1962, but, his executor rejected the ex-wife's claim for \$100 per month afterwards. The trial court directed payment for as long as claimant lived. On appeal the Supreme Court of Iowa, affirming this judgment, *held*: the husband's estate is bound to make the payments. The expression in the court's decree as to when the payments were to terminate was sufficiently clear to indicate this finding. *In Re Roberts' Estate*, 131 N.W.2d 458 (Iowa 1964).

These two decisions illustrate a recurring problem in the interpretation of a divorce decree which has granted alimony or support payments to the ex-wife for a period defined by language to the effect of "until she dies or remarries." The problem arises from the common law rule that the obligation to pay alimony, derived from the obligation to support, is a personal one and terminates upon the death of the husband or wife.¹ It has been held that the power of a court does not extend to the granting of decrees binding the husband's estate to make alimony payments after his death.² That argument can be mooted, however, by either of two developments: (1) statutes which give the court such power, or (2) settlement agreements adopted or incorporated into a divorce decree, which contain the consent of the husband to be so bound.³

Given this power in the court, the derivative issue is: did the court exercise, or intend to exercise, the power?⁴ This question is complicated by the notion, surviving from the common law rule, that the payments are presumed to terminate upon the husband's death and that a clear intention to the contrary is necessary to overcome the presumption.⁵

32 339 F.2d at 139.

1 *E.g.*, *In re Yoss' Estate*, 237 Iowa 1092, 24 N.W.2d 399, 400 (1946); *Wilson v. Hinman*, 182 N.Y. 408, 75 N.E. 236, 237 (1905). See 17 AM. JUR. *Divorce and Separation* §§ 694, 699 (1957); 27A C.J.S. *Divorce* § 240b (1959).

2 *Aldrich v. Aldrich*, 163 So. 2d 276 (Fla. 1964); See generally Annot., 39 A.L.R. 2d 1406 (1955).

3 See, *e.g.*, *Murphy v. Shelton*, 183 Wash. 180, 48 P.2d 247, 248 (1935); *In re Traver's Estate*, 2 Wis. 2d 509, 87 N.W. 2d 269, 274 (1958).

4 Where the decree incorporates a settlement agreement, the issue, more technically, is: did the husband give, or intend to give, his consent; if so, then the textual issue is reached.

5 *Bird v. Henke*, 395 P.2d 751, 752, 753 (Wash. 1964).

That what is unmistakable language to one court can be unclear to another is well illustrated by the principal cases. A review of the recent cases⁶ dealing with this problem of interpretation suggests that a completely satisfactory resolution of the problem is unlikely. The practicing lawyer can be alerted to the need for ultra-specific language in settlements and decrees arising in the future, but the problem remains with decrees previously made. Unless the parties to a decree, having agreed on the proper construction, petition the court to amend it to clearly reflect such construction, the difficulty remains. No analysis of the interpretation of decretal language can clear up the many ambiguous decrees which will be fodder for future suits if the husband predeceases the wife.

The courts will look to a variety of factors to determine the import of decretal language. The least satisfactory method is to simply read the words and supply intent out of the air, saying, for example, that since the decree has in mind the life of the wife, the judge also must have had in mind the life of the husband, and, since no mention of his life was made, the life of the husband was not to control.⁷ The countervailing argument to this is that the husband's life was not mentioned because the judge knew that under the law the husband's death would automatically terminate the payments unless he provided otherwise.⁸ Justifications more satisfactory than these must be sought.

One such justification can be found where the decree expressly relates payments to the husband's income. Where the decree was "pay to the plaintiff from his income the sum of \$15 per week during her life, as alimony for the plaintiff and support for the child," it was stated that

the express terms of the award clearly manifest an intention that it should cease upon the death of the divorced husband, because that even would terminate the receipt of any income by him. . . . The provision . . . that the periodic payments of alimony should be made during the plaintiff's life must, if possible, be construed in harmony with the language as to the making of such payments from income.⁹

This reasonable conclusion can be extended to decrees that do not contain the magic words "from income" by reason of the rule that any alimony payments may be modified upon a showing of a change in circumstances, *i.e.*, reduction in the husband's income. The argument is, of course, that if a reduction in income may be grounds for reduction of alimony, then a complete elimination of income should be grounds for the complete elimination of the alimony.¹⁰ This conclusion seems to beg the question.

Where the decree purports to bind heirs, executors, administrators and assigns, it might be expected that this offers clear justification to continue the payments after the husband's death, but the decisions do not regard presence of such a phrase as controlling, but rather as "some indication"¹¹ or binding "so far as appropriate."¹² Absence of such a clause will not necessitate abatement of the payments.¹³ But, where it was agreed that the wife would not file any claim in the husband's estate unless the "[husband] failed and neglected to carry out the covenants, provisions, and conditions of this agreement on his part to be performed," and the executrix claimed that this meant "husband in his lifetime failed," whereas the ex-wife argued it meant "husband or his estate failed," the Court said that since the agreement elsewhere bound the administrators, this was enough to make

6 Cases prior to 1960 are covered in the periodicals reviewing *Stoutland v. Stoutland*, 103 N.W.2d 286 (N.D. 1960); the case note at 10 DE PAUL L. REV. 194 (1960) gave an excellent pre-1960 treatment of this same problem.

7 Brief for Respondent, p. 6, *Bird v. Henke*, 395 P.2d 751 (Wash. 1964).

8 *In re Roberts' Estate*, 131 N.W.2d 458, 464 (Iowa 1964) (dissent).

9 *Harrison v. Union and New Haven Trust Co.*, 147 Conn. 435, 162 A.2d 182, 184 (1960); *accord*, *In re Breznell's Estate*, 35 Misc.2d 256, 228 N.Y.S.2d 921 (Surr. Ct. 1962).

10 See *Scudder v. Scudder*, 55 Wash.2d 454, 348 P.2d 225, 227 (1960).

11 *In re Breznell's Estate*, 35 Misc.2d 256, 228 N.Y.S.2d 921, 923 (Surr. Ct. 1962).

12 *In re Kettering's Estate*, 151 Colo. 202, 376 P.2d 983, 987 (1962).

13 *In re Fredenthal's Estate*, 25 Misc.2d 1068, 206 N.Y.S.2d 194, 198 (Surr. Ct. 1960).

unclear the construction of the release clause, and thus that clause could not limit the express provision that the payments would continue "so long as she lives and is unmarried."¹⁴ These cases illustrate that a mere statement that one's heirs and executors will be bound by the decree or agreement is not of sufficient clarity to insure uniform interpretation.

Interpretation that the payments will survive is indicated when the decree makes express provision for securing the payments after the husband's death through an insurance policy, as where the husband, "to secure the payment to the wife of said \$325 monthly payments in the event the husband predeceased the wife, had agreed to name the wife the irrevocable beneficiary . . ." and the policies provided that at the death of the insured, the wife is to be paid the sum of \$325 monthly.¹⁵ But where one clause of an agreement provided for payments of \$250 per month "so long as the wife shall live or until she remarries," and another clause provided only that the husband would maintain and keep in force a \$10,000 insurance policy of which the wife would be beneficiary, the Court concluded that the latter provision strongly implied that the policy was to *replace* the monthly payments to the plaintiff when the husband's earning power came to an end by death.¹⁶

Indication of other supplementary or substitutional arrangements thus can make interpretation relatively simple. But outside circumstances, to insure justice, can require that interpretation violating express language be made. Where the payments of \$250 per month were to continue until the death of either party, but if the wife remarried were to be cut to \$125 per month for the care of a minor child, and the husband died, it seems clear that the provisions require that the payments cease. However, the husband left a will in which he made no provision for the minor child, "for the reason that I deem that adequate provision has already been made for her in the property settlement agreement." The Court struggled to conclude that the estate must pay \$125 per month to the wife for the support of the child, using the interpretation that the parties gave to the agreement as the best indication of what the intention was at the time the contract was made.¹⁷

These recent decisions point up the problems inherent in determining the effect of the husband's death on continuation of alimony awards. The lesson to be learned is clear: the lawyer drafting a separation agreement should specify what is to be the effect of the husband's death; this specification must not be by way of implication, since the courts do not give literal effect to "until the wife's death," but rather must be in express language. If the payments are to continue, the lawyer is well advised to use language such as "in the event of the death of the husband before the wife, the husband charges his estate and his heirs, executors, administrators and assigns with the payment to her of . . ." after the provision for payment "until the wife dies or remarries." If the payments are to abate, then they should be stated "to end upon the death of either husband or wife or the remarriage of the wife."

The likely contingency of the husband's predecease *must be mentioned* in order that there be no argument about the effect of its omission. The problems and costs in money and human feelings involved in divorce and separation contests are too plentiful not to have as nearly complete a settlement as possible in the one action, rather than a renaissance of bitterness up to fifty years later¹⁸ when the husband predeceases the wife.

14 *Hawkins v. McLaughlin*, 196 Cal.App.2d 318, 16 Cal.Rptr. 572, 576 (Dist. Ct. App. 1961).

15 *In re Oswald's Estate*, 20 Misc.2d 1001, 189 N.Y.S.2d 472, 481 (Surr. Ct. 1959).

16 *Desjardins v. Desjardins*, 193 F.Supp. 210 (E.D. Ky. 1961), *modified on other grounds*, 308 F.2d 111 (6th Cir. 1962).

17 *Reinhardt v. Reinhardt*, 131 So. 2d 509 (Fla. Dist. Ct. App. 1961), *petition dismissed*, 139 So. 2d 697 (Fla. 1962).

18 *In Harrison v. Union and New Haven Trust Co.*, 147 Conn. 435, 162 A.2d 182 (1960), discussed in text accompanying note 9 *supra*, the divorce decree was granted in 1916.

Of course, the admonition to draft with specificity is easily made and, doubtlessly, easily ignored. Perhaps, then, it is appropriate for the courts to reconsider the presumption to be given ambiguous language in these cases. Currently, the presumption is against an intent to continue payments after the husband's death. If this is based upon probability, there is no evidence available to substantiate the assertion that the average husband so intends. The sounder basis for creating a presumption has to be public policy, rather than assumed probability. The factors involved include: (1) the social desirability of providing the wife with an income for life; and (2) the undesirable burden placed upon an estate when the Executor is required to continue such payments to the detriment of the testator's plan of disposition.¹⁹ When one considers that the average small estate would be consumed in an attempt to fulfill an obligation to continue payments, a proper regard for the expectations and needs of the deceased husband's natural objects of affection requires continuance of the existing presumption.

Michael C. Farrar

LEGAL ETHICS — SOLICITATION OF LEGAL BUSINESS — CONSTITUTIONAL RIGHT OF UNION MEMBERS TO ADVISE INJURED WORKERS TO OBTAIN LEGAL ADVICE AND TO RECOMMEND SPECIFIC LAWYERS DOES NOT LICENSE THE SOLICITING OF LEGAL EMPLOYMENT. — The Virginia State Bar brought a suit to enjoin the Brotherhood of Railroad Trainmen from carrying on activities which were alleged to constitute the solicitation of legal business and the unauthorized practice of law in Virginia. The Brotherhood admitted that in order to assist the prosecution of claims by injured railroad workers or by the families of workers killed on the job it maintains in Virginia, as well as throughout the country, a Department of Legal Counsel. The Department's function is to recommend to injured Brotherhood members or their families the names of lawyers believed to be honest and competent. Upon finding that the Brotherhood's plan resulted in the channeling of substantially all the workers' claims to lawyers recommended by the Department of Legal Counsel, the Chancery Court of the City of Richmond, Virginia, enjoined the Brotherhood from carrying out its plan in Virginia. On appeal, the Supreme Court of Appeals of Virginia affirmed summarily over objections that the injunction abridged the Brotherhood's rights under the first and fourteenth amendments, which guarantee freedom of speech, petition and assembly. Granting certiorari "to consider this constitutional question in the light of our recent decision in *NAACP v. Button*, 371 U.S. 415 [1963]."²¹ The United States Supreme Court held: "that the First and Fourteenth Amendments protect the right of the members through their Brotherhood to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for recommending specific lawyers." *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 8 (1964). The Supreme Court then vacated the judgment and decree and remanded the case for proceedings not inconsistent with its opinion.

On remand, the Chancery Court of the City of Richmond, Virginia, issued a new injunction limiting "the constitutional rights of the defendant, its officers, agents, servants, employees or members, to advise the defendant's members or their families or others, to obtain legal advice before making settlement of their claims for injury or death, and to recommend a specific lawyer or lawyers to give such advice or handle such claims" to instances where "the circumstances of such advice

¹⁹ See *In re Bernstein's Estate*, 25 Misc.2d 717, 203 N.Y.S.2d 191, 195 (Surr. Ct. 1960).

¹ *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 2 (1964).

and recommendation shall not constitute or amount to, the solicitation of legal employment for or on behalf of any lawyer or lawyers." *Virginia ex rel. Virginia State Bar v. Brotherhood of R.R. Trainmen*, Final Order p. 4, Ch. Ct. Richmond, Va., January 15, 1965.

The basic issue in this case is the extent to which an organization may translate into action its legitimate interest in seeing that its members are able to procure competent legal counsel without running afoul of the prohibitions against the unauthorized practice of law and the solicitation of legal business.

The impact of the Supreme Court decision on this area of the law is viewed by some commentators as being extremely significant.² Others consider it of little importance in making the practical determination of what constitutes solicitation in a given instance.³ The Supreme Court decision itself is vague enough to be open to either interpretation.⁴ Such vagueness, however, does not characterize the Chancery Court's opinion and decree. It gives the Supreme Court decision its narrowest possible interpretation, forcing a determination of whether the Chancery Court's decree has correctly supplied the guidelines within which the Supreme Court implied that the Brotherhood was to operate its plan⁵ or, as the Brotherhood contends, has evaded the Supreme Court's mandate.⁶

The Brotherhood's plan was originated in 1930 to protect injured members, or the families of fatally injured members, from being pressured into inadequate settlements by unscrupulous railroad claims agents, or from being victimized by incompetent or unethical attorneys, many of whom solicited the cases and demanded a 50% contingent fee.⁷ The Brotherhood divided the United States into sixteen regions and chose one regional counsel in each who was recommended to Brotherhood members injured within the region. The Legal Aid Department of the Brotherhood

2 Bodle, *Group Legal Services: The Case for BRT*, 12 U.C.L.A.L. REV. 306 (1965); Markus, *Group Representation by Attorneys as Misconduct*, 14 CLEV.-MAR. L. REV. 1 (1965); Comment, 16 S.C.L. REV. 528 (1964); 16 SYRACUSE L. REV. 141 (1964); 43 TEX. L. REV. 254 (1964); 26 U. PITT. L. REV. 142 (1964).

3 Simpson, *Group Legal Services: The Case for Caution*, 12 U.C.L.A.L. REV. 327, 335 (1965). It is argued that the original decree of the Chancery Court did not prohibit the Brotherhood from recommending specific lawyers, but only from soliciting for the recommended lawyers. By merely affirming this uncontested right to recommend specific lawyers, the Supreme Court decision does not disturb the existing doctrine of solicitation. *Virginia ex rel. Virginia State Bar v. Brotherhood of R.R. Trainmen*, Opinion pp. 12-13, Ch. Ct. Richmond, Va., Jan. 15, 1965; Petition for Rehearing for Respondent, pp. 3-5, 8-10, Brotherhood of R.R. Trainmen v. *Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964). It is interesting to note, however, that the American Bar Association originally disagreed with the Virginia State Bar on this point, equating recommendation with solicitation. It contended that the original decree of the Chancery Court, by enjoining solicitation, did bar the Brotherhood from recommending specific attorneys. Brief for the American Bar Association as Amicus Curiae, p. 11, Brotherhood of R.R. Trainmen v. *Virginia ex rel. Virginia State Bar*, *supra*.

4 At various stages of this litigation the American Bar Association has adopted both interpretations. Immediately after the Supreme Court decided the case, the American Bar Association urged a rehearing on the grounds that the opinion, by appearing "to state that the Brotherhood can solicit cases for specific Attorneys," "damages the Canons of Professional Ethics, and the Rules of Law prohibiting the Unauthorized Practice of Law, so severely as to make future enforcement of the Canons and Rules of Law almost impossible." Brief for the American Bar Association as Amicus Curiae for Rehearing, pp. 4-5, Brotherhood of R.R. Trainmen v. *Virginia ex rel. Virginia State Bar*, *supra* note 3. However, when the Chancery Court issued its decree narrowly interpreting the Supreme Court decision, the American Bar Association announced that "the revised order upholds the position taken by the ABA in advising lawyers that the Supreme Court's Brotherhood decision was not a 'license to solicit.'" News from the American Bar Association, Jan. 26, 1965, p. 2.

5 This is the contention of the American Bar Association. News from the American Bar Association, *supra* note 4.

6 The Brotherhood directed this objection to the proposed decree offered by the Virginia State Bar, which was adopted by the Chancery Court with very little change. Memorandum of Argument of the Brotherhood of R.R. Trainmen on the Decree Offered by the Bar, p. 6, *Virginia ex rel. Virginia State Bar v. Brotherhood of R.R. Trainmen*, Ch. Ct. Richmond, Va., Jan. 15, 1965.

7 *In re Brotherhood of R.R. Trainmen*, 13 Ill.2d 391, 150 N.E.2d 163, 165 (1958).

employed several full-time investigators for each region whose duties were to investigate all accidents involving members within the region, make these accident reports available to the injured member's attorney and, most importantly, urge the injured member or his family to employ the regional counsel. Investigators often carried photographs of large settlement checks to impress the injured member with the regional counsel's past success and also carried contracts of retainer. The regional counsel gave free legal advice and, if retained, handled these suits for a contingent fee set by the Brotherhood at considerably less than the prevailing rate. In addition, the expenses of the litigation were borne by the regional counsel and the costs of operating the Brotherhood's Legal Aid Department, including the salaries of the investigators, were divided among the regional counsel.⁸

From its inception, the plan was under heavy attack by the courts, almost without exception.⁹ Consequently, it has been modified to eliminate its most objectionable features. At the present time, the Brotherhood contends¹⁰ that its plan is operated in accordance with the guidelines established by the Illinois Supreme Court in 1958.¹¹ This latest plan differs from the older ones in several important respects. The Brotherhood still designates a single attorney or firm as the regional counsel and the investigators still recommend that injured members or their families employ him, but there is no financial tie between the Brotherhood and the regional counsel. Investigators no longer carry photographs of settlement checks or contracts of retainer. The regional counsel sets his own fees after consultation with the client and makes no payments, either direct or indirect, to the Brotherhood. The costs of operating the Department of Legal Counsel (as it has since been renamed), including the salaries of the investigators, are borne by the Brotherhood. As has always been the case, the injured member or his family is free to choose an attorney other than the recommended regional counsel and, if the regional counsel is chosen, the injured member or his family, not the Brotherhood, controls the course of the litigation.¹²

For the purposes of deciding the case, the Supreme Court assumed that the Brotherhood's plan was operating in accordance with these guidelines established by the Illinois Supreme Court.¹³ The Supreme Court primarily considered only those parts of the original decree to which the Brotherhood objected¹⁴ — those which enjoined it

from holding out lawyers selected by it as the only approved lawyers to aid the members or their families; . . . or in any other manner soliciting or encouraging such legal employment of the selected lawyers; . . . and from doing any act or combination of acts, and from formulating and

8 These facts are set out in *Hulse v. Brotherhood of R.R. Trainmen*, 340 S.W.2d 404 (Mo. 1960), and *In re Brotherhood of R.R. Trainmen*, 13 Ill.2d 391, 150 N.E.2d 163 (1958).

9 See *Hulse v. Brotherhood of R.R. Trainmen*, 340 S.W.2d 404 (Mo. 1960); *State v. Lush*, 170 Neb. 376, 103 N.W.2d 136 (1960); *Doughty v. Grills*, 37 Tenn.App. 63, 260 S.W.2d 379 (1952); *Hildebrand v. State Bar*, 36 Cal.2d 504, 225 P.2d 508 (1950); *Re O'Neill*, 5 F.Supp. 465 (D.C.N.Y. 1933); *Re Committee on Rule 28 of the Cleveland Bar Ass'n*, 15 Ohio L. Abs. 106 (App. 1933). *But see Dombey, Tyler, Richards & Grieser v. Detroit, T. & I. R.R.*, 226 F.Supp. 345 (1964); *Atchison, T & S.F. Ry. v. Jackson*, 235 F.2d 390 (10th Cir. 1956); *Ryan v. Pennsylvania R.R.*, 268 Ill.App. 364 (1932). *Hildebrand v. State Bar*, 36 Cal.2d 504, 225 P.2d 508, 514, 518 (1950) (Carter, J., dissenting) (Traynor, J., dissenting).

10 Memorandum of Argument of the Brotherhood of R.R. Trainmen on the Decree Ordered by the Bar, *supra* note 6, at 17; Brief for Petitioner, pp. 17-19, *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964).

11 *In re Brotherhood of R.R. Trainmen*, 13 Ill. 2d 391, 150 N.E.2d 163 (1958).

12 These facts are contained in the Brief for Petitioner, pp. 17-19, *supra* note 10.

13 See 377 U.S. at 5 n. 9.

14 *Ibid.* The other parts of the decree were passed on by the Court only to the extent necessary to prevent their being construed at a later date to bar the Brotherhood from advising injured members not to settle without a lawyer and from recommending lawyers selected by the Brotherhood. *Ibid.*

putting into practice any plan, pattern or design, the result of which is to channel legal employment to any particular lawyer or group of lawyers.
 . . .¹⁵

In holding that the first and fourteenth amendments protect the associational rights of the members of the union "personally or through a special department of their Brotherhood to advise concerning the need for legal assistance — and, most importantly, what lawyer a member could confidently rely on,"¹⁶ the Court extended the principle of *NAACP v. Button*¹⁷ even though personal injury litigation, rather than litigation as a form of political expression, was involved. While affirming the broad powers of a state to regulate the practice of law within its borders, the Court reiterated that "a State cannot foreclose the exercise of constitutional rights by mere labels."¹⁸ It noted that Virginia was seeking to halt neither conduct which constituted "a commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice," nor "ambulance chasing," nor the unauthorized "practice of law," nor "any soliciting of business."¹⁹ The Supreme Court then said that "since the part of the decree to which the Brotherhood objects infringes those rights, it cannot stand; and to the extent any other part of the decree forbids these activities it too must fall."²⁰

Upon receiving the case on remand, the Chancery Court issued a decree enjoining the Brotherhood, its officers, agents, servants, employees, members and anyone acting on its behalf

. . . from soliciting for, or on behalf of, its Regional or Legal Counsel or any other lawyer, any of its members, their families or any other person to employ such Regional or Legal Counsel or other lawyer to represent him, her or them in court or otherwise, in respect to any claim for personal injury, death or in relation to property; from informing any lawyer or lawyers or any person whomsoever that an accident has been suffered by a member or non-member of the said Brotherhood and furnishing the name and address of such injured or deceased person for the purpose of obtaining legal employment for any lawyer; from stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such injured persons or their families pending settlement of their claims; . . . from doing any act or combination of acts that constitutes or amounts to the solicitation of legal employment for or on behalf of any lawyer, or conspiring to do so. . . .

But nothing herein contained shall be construed to infringe upon or restrict the constitutional rights of the defendant, its officers, agents, servants, employees or members, to advise the defendant's members or their families or others, to obtain legal advice before making settlement of their claims for injury or death, and to recommend a specific lawyer or lawyers to give such advice or handle such claims; *provided*, however, that the circumstances of such advice and recommendation shall not constitute or amount to, the solicitation of legal employment for or on behalf of any lawyer or lawyers. The term "solicit" and its derivatives, as herein employed, shall refer to the same terms as employed or intended by the common law, the statutes of this state, and Canons of Legal Ethics of the American Bar Association, adopted in this state.²¹

The Chancery Court justified this decree by referring to a section of the Supreme Court opinion in which it thought it perceived a distinction drawn between advice and recommendation on the one hand, and channeling of legal employment, on the other.²² At best, this distinction is largely illusory. If the protected activity — the

15 *Id.* at 4-5.

16 *Id.* at 6.

17 371 U.S. 415 (1963).

18 377 U.S. at 6.

19 *Id.* at 6-7.

20 *Id.* at 8.

21 *Virginia ex rel. Virginia State Bar v. Brotherhood of R.R. Trainmen*, Final Order pp. 3-4, Ch. Ct. Richmond, Va., Jan. 15, 1965.

22 Mr. Justice Black distinguishes (p. 1116) [377 U.S. at 5] between the advice, on the one hand, to injured members to obtain legal services and to recommend particular attorneys and, on the other hand, the resulting chan-

advice and recommendation — has the natural and probable result of channeling the Brotherhood's personal injury litigation to the recommended attorneys, and this channeling is solely the result of such advice and recommendation, not of any other unprotected activity such as fee-splitting, is not this "channeling" also protected? Yet, the Chancery Court took the position that if the protected activity resulted in channeling, it constituted solicitation per se.

In considering these two cases as a unit, there is a manifest difficulty in ascertaining with precision the applicable law. The Supreme Court holds that the Brotherhood can advise injured members to obtain legal advice and recommend specific lawyers, emphasizing that this activity does not constitute solicitation or ambulance chasing.²³ In previous cases, the contrary result has been reached.²⁴ The Supreme Court does not indicate where advice and recommendation ends and solicitation begins.

The Chancery Court agreed that such advice and recommendation does not constitute solicitation.²⁵ However, the decree is so narrowly drawn that any advice and recommendation which results in the channeling of legal business to the recommended attorney would constitute solicitation²⁶ — a result clearly incongruous with the Supreme Court decision. Like the Supreme Court, the Chancery Court offered no explicit definition of solicitation. Instead, it subscribed to that definition "employed or intended by the common law, the statutes of this state, and Canons of Legal Ethics of the American Bar Association, adopted in this state."²⁷

An attempt at ascertaining the definition of solicitation employed by the common law²⁸ is fruitless as the courts have been extremely reluctant to offer a comprehensive definition of solicitation, preferring the dichotomy of permissible solici-

nelling of legal employment. He then states that the injunction against "this particular practice" denies the members their constitutional rights. Obviously, "practice" does not refer to the result, because a result is not a practice and a practice is a repeated act or a series of acts. If Mr. Justice Black had wished to state that the injunction against the channelling of legal employment deprived the members of constitutional rights, he could have substituted "plan" for "practice." As he did not, his intention is plain — he referred to and approved only advice and recommendation.

Virginia ex rel. Virginia State Bar v. Brotherhood of R.R. Trainmen, Opinion pp. 10-11, Ch. Ct. Richmond, Va., Jan. 15, 1965.

²³ 377 U.S. at 6-7.

²⁴ See *Hulse v. Brotherhood of R.R. Trainmen*, 340 S.W.2d 404 (Mo. 1960); *Doughty v. Grills*, 37 Tenn.App. 63, 260 S.W.2d 379 (1952); Association of the Bar of the City of New York Committee on Professional Ethics, Opinions No. 799 (1955) & 377 (formerly 509) (1936); New York County Lawyers' Association Committee on Professional Ethics, Opinion No. 147 (1918). *But see* NAACP v. Button, 371 U.S. 415 (1963); *In re Brotherhood of R.R. Trainmen*, 13 Ill.2d 391, 150 N.E.2d 163 (1958); *In re Thibodeau*, 295 Mass. 374, 3 N.E.2d 749 (1936).

²⁵ *Virginia ex rel. Virginia State Bar v. Brotherhood of R.R. Trainmen*, Opinion p. 12, Ch. Ct. Richmond, Va., Jan. 15, 1965.

²⁶ *Virginia ex rel. Virginia State Bar v. Brotherhood of R.R. Trainmen*, *supra* note 25, at 10-11.

²⁷ *Virginia ex rel. Virginia State Bar v. Brotherhood of R.R. Trainmen*, Final Order p. 4, Ch. Ct. Richmond, Va., Jan. 15, 1965.

²⁸ At common law, mere solicitation, as opposed to the stirring up of litigation, was not condemned. *Chreste v. Louisville Ry.*, 167 Ky. 75, 180 S.W. 49, 53 (1915). The prohibitions against the stirring up of litigation were phrased in terms of barratry, champerty and maintenance. Barratry is the criminal offense of exciting and stirring up suits with the malicious motive of oppressing or harassing another, no matter how well-founded the suit may be. *State v. Chitty*, 17 S.C.L. (1 Bailey) 379 (1830). Champerty is an agreement by a stranger with a party to a suit to bear the expenses of the suit in return for a share in what may be recovered; the gravamen of the offense is the "officious intermeddling in the affairs of others for purposes of speculation or other unworthy motives. . . ." *Curry v. Dahlberg*, 341 Mo. 897, 110 S.W.2d 742, 748 (1937). Maintenance exists "where a man, improperly and for the purpose of stirring up litigation and strife, encourages others, either to bring actions of [sic] to make defenses, which they have no right to make." *Schaferman v. O'Brien*, 28 Md. 565, 574 (1868).

It is clear that the exercise by the Brotherhood of its right to advise and recommend

tion and improper solicitation.²⁹ In all cases, the literal meaning of the word "solicit," in the sense of asking, urging or enticing, is present in the defendants' conduct in seeking legal employment.

Solicitation has been deemed permissible on the grounds that the personal relations between the solicitor and the one solicited justify the former's conduct,³⁰ or the solicitor is not soliciting in consideration of any remuneration,³¹ or the solicitor's motive is not to stir up litigation for the sake of the fees which he will earn, but to see that justice is secured for the one solicited.³² Solicitation which does not contain these extenuating factors is deemed improper. Yet, some courts hold that solicitation is improper although the solicitor receives no monetary remuneration for his solicitation.³³ Other courts require an overt act, designed to effectuate the solicited legal employment, to be carried out before improper solicitation is constituted.³⁴ The nature of the overt act required would, of course, vary according to the court.

The statutes of Virginia contain a precise, albeit stringent, definition of "solicitation of professional employment":

[T]he obtaining or attempting to obtain for an attorney at law representation of some other person to render legal services for such other person and whereby such attorney at law will or may receive compensation; provided that neither conduct limited to mere statements of opinion respecting the ability of a lawyer, nor conduct pursuant to a uniform legal aid or lawyer referral plan approved by the Virginia State Bar, shall be deemed the solicitation of professional employment.³⁵

The Canons of Professional Ethics do not define solicitation. The distinction between permissible and improper solicitation embodied in case law is present, but the category of "permissible solicitation" is much narrower, as Canon 27 states that "it is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews *not warranted by personal relations.*" (Emphasis added.) Canon 28 issues an even more absolute prohibition:

[I]t is disreputable . . . to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office. . . .

The Virginia Court's decree effectively evades the mandate of the Supreme Court. Case law has indicated that advice and recommendation, even in the absence of any monetary compensation, can be held to constitute solicitation.³⁶ Even where the performance of an overt act designed to effectuate the legal employment solicited is required, a court so disposed might have little difficulty in finding that the formal organization through which the Brotherhood exercises its right to advise and recommend satisfies this requirement.

It is also questionable whether the exercise of the Brotherhood's right to advise

through the plan suggested by the Illinois Supreme Court does not fall within the scope of these prohibitions. Thus, when the Chancery Court spoke of the "common law" definition of "solicitation" it probably had in mind fairly recent cases which attempt to set limits upon activities which, though objectionable, could not be categorized as barratry, champetry or maintenance. For a discussion of these cases see text accompanying notes 29-34 *infra*.

29 *In re Mitgang*, 385 Ill. 311, 52 N.E.2d 807, 816 (1944).

30 A.B.A. Canons of Professional Ethics No. 27; Association of the Bar of the City of New York Committee on Professional Ethics, Opinions No. 231 (formerly 300) (1932) & 487 (formerly 642) (1939); New York County Lawyers' Committee on Professional Ethics, Opinion No. 126 (1917).

31 See *In re Mitgang*, 385 Ill. 311, 52 N.E.2d 807, 817 (1944); *In re Dunn*, 370 Ill. 413, 19 N.E.2d 186 (1938).

32 *People v. Edelson*, 313 Ill. 448, 145 N.E. 246, 249 (1924).

33 *Hildebrand v. State Bar*, 36 Cal.2d 504, 225 P.2d 508, 512 (1950). See *Doughty v. Grills*, 37 Tenn.App. 63, 260 S.W.2d 379, 390 (1952).

34 *E.g.*, *People v. Levy*, 8 Cal.App.2d 763, 50 P.2d 509 (Super. Ct. 1935).

35 VA. CODE ANN. § 54-78(c) (Supp. 1964).

36 Cases cited note 33 *supra*.

and recommend would avoid the Virginia statute's prohibition against attempting to obtain legal employment for an attorney.

Canons 27 and 28 of the Canons of Professional Ethics have been interpreted to permit the recommendation of a particular attorney where such recommendations are neither compensated for nor made with any great frequency.³⁷ However, where chronic recommendations to see a particular attorney were made by officials of a labor union as an incident of a formal plan similar to that of the Brotherhood's, the Committee on Professional Ethics of the Association of the Bar of the City of New York held that this was a clear violation of Canons 27 and 28.³⁸ There is little reason to doubt that the Brotherhood's plan would not be similarly labelled.

It is arguable that the Supreme Court tacitly adopted the guidelines established by the Illinois Supreme Court in 1958.³⁹ This would appear to be the proper inference since the Supreme Court rendered its decision upon the assumption that the Brotherhood's plan was functioning in accordance with the standards adopted by the Illinois Supreme Court.⁴⁰ Thus, the more correct interpretation of the Supreme Court decision would permit the Brotherhood to exercise its right to advise and recommend *within the framework of that plan*.

The principal difficulty in the Supreme Court decision is that it allows "solicitation" activity previously prohibited⁴¹ without offering a new definition of solicitation. It simply said that this activity does not constitute solicitation without revealing the standard against which the Court measured the activity in making this determination. However, it would have been better to admit that this activity did indeed constitute solicitation, but was a form of solicitation which would be permitted under certain detailed circumstances.

Much of the uncertainty stems from the inappropriateness of the arguments against solicitation when they are applied to the activities of an organization.⁴² The standard arguments are that solicitation results in stirring up litigation, fraudulent claims, corruption of public officials, detriment to the legal profession and harm to the client.⁴³ The Brotherhood's plan is not aimed at lining the pockets of the particular attorney recommended, but rather at protecting the rights of the individual member in an area of vital concern to the entire organization.⁴⁴ Under such circumstances solicitation does not result in detriment to the legal profession because the popular image of the lawyer as "a disinterested champion of justice" is not tainted by the "aggressive pursuit of financial gain."⁴⁵ Furthermore, rather than resulting in harm to the client, such solicitation is actually beneficial to him.⁴⁶ The lawyer selected and recommended by the Brotherhood is apt to be more competent in handling personal injury suits than an attorney selected at random by one totally unaccustomed to dealing with attorneys.⁴⁷ The client will also probably have the bene-

37 *In re Seidman*, 228 App.Div. 515, 240 N.Y.S. 592 (1930); Association of the Bar of the City of New York Committee on Professional Ethics, Opinion No. 176 (formerly 209) (1931).

38 Association of the Bar of the City of New York Committee on Professional Ethics, Opinion No. 799 (1955).

39 *In re Brotherhood of R.R. Trainmen*, 13 Ill.2d 391, 150 N.E.2d 163 (1958).

40 See 377 U.S. at 5 n. 9. Allegations that the Court approved the old Brotherhood plan, or that the Court approved only the Brotherhood's right to advise and recommend without approving its natural and probable result — the channeling of substantially all the workers' personal injury claims to the recommended attorneys — appear equally untenable.

41 Authorities cite note 24 *supra*.

42 *Cf.*, Note, 72 YALE L.J. 1613, 1629 (1963).

43 Comment, 25 U. CHI. L. REV. 674, 675 (1958).

44 *Hildebrand v. State Bar*, 36 Cal.2d 504, 225 P.2d 508, 518-22 (1950) (Traynor, J., dissenting).

45 While agreeing that this objection to solicitation is groundless, the existence of this popular image of the lawyer is challenged by Comment, 25 U. CHI. L. REV. 674, 681 (1958).

46 *Id.* at 684.

47 See *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 4 (1964).

fit of a somewhat lower contingent fee, even though the actual setting of the fee scale by the organization is not allowed by the courts,⁴⁸ since the recommended attorney is assured of a comfortable income because of the volume of cases referred to him and will make such an unbargained-for concession in order to retain his advantageous position as the recommended attorney.⁴⁹ For this same reason, there is little likelihood that the recommended attorney would settle the claims for inadequate amounts.

The potency of the arguments that solicitation corrupts public officials and encourages fraudulent claims is also greatly impaired when examined in the context of solicitation by a nonprofit organization. The attorneys recommended by an organization like the Brotherhood are chosen on the advice of local lawyers and federal and state judges, upon the basis of their reputation for honesty and professional skill.⁵⁰ The solicitation on behalf of the recommended attorney is not done by individuals working on a flat fee or commission basis who would be in a position to manufacture evidence and benefit financially from the bringing of fraudulent claims. In private solicitation schemes, the soliciting individuals are often doctors, hospital personnel, policemen and others engaged in public service.⁵¹ Since the solicitation by organizations like the Brotherhood is carried on by special investigators or simply by organization members, this solicitation is not open to the charge of corrupting public officials.

The objection that solicitation results in the stirring up of litigation is applicable to solicitation by organizations. However, the validity of this objection as a grounds for proscribing some forms of solicitation is being increasingly questioned in terms of desirable public policy.⁵² The prohibitions against stirring up litigation arose centuries ago when the courts were easily corrupted.⁵³ At present, the courts play such an important role in righting injustices that access to the courts has been held to be a constitutionally protected form of political expression even though the claims involved have been solicited.⁵⁴ Thus, rather than being an evil to be avoided if at all possible, litigation is often viewed as a definite good.⁵⁵ For example, the courts have allowed the solicitation of actions to enforce certain laws.⁵⁶

It is in the public interest to allow solicitation by an organization of the personal injury claims of its members to prevent them from being forced into inadequate settlements by unscrupulous claims agents or from being victimized by incompetent or overreaching attorneys. If solicitation by an organization prevents tortfeasors from escaping their just liabilities, while permitting the injured to avoid becoming public charges, public policy should be in favor of this solicitation absent undesirable results.

Among the objections that are specifically directed at solicitation by organizations, the most important are that it commercializes the practice of law, enables

48 *In re Brotherhood of R.R. Trainmen*, 13 Ill.2d 391, 150 N.E.2d 163 (1958).

49 See Markus, *Group Representation by Attorneys as Misconduct*, 14 CLEV.-MAR. L. REV. 1, 3 (1965).

50 *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 4 (1964).

51 Comment, 25 U. CHI. L. REV. 674, 680 (1958).

52 *Id.*; Bodle, *Group Legal Services: The Case for BRT*, 12 U.C.L.A.L. REV. 306 (1965); Markus, *supra* note 49, at 18; Note, 72 YALE L.J. 1613, 1630 (1963).

53 Note, 72 YALE L.J. 1613, 1632 n. 79 (1963).

54 See *NAACP v. Button*, 371 U.S. 415 (1963).

55 Note, 72 YALE L.J. 1613, 1632 n. 79 (1963). See *Azzarello v. Legal Aid Society*, 117 Ohio App. 471, 185 N.E.2d 566, 569 (1962).

56 *Gunnels v. Atlanta Bar Ass'n*, 191 Ga. 366, 12 S.E.2d 602 (1940). Even the American Bar Association once endorsed the solicitation of a certain class of actions. The A.B.A. Committee on Professional Ethics approved a plan whereby a committee of lawyers belonging to the American Liberty League publicly offered legal assistance to persons who felt that their constitutional rights were being infringed upon by New Deal legislation. A.B.A. Committee on Professional Ethics and Grievances, Opinion No. 148 (1935).

unscrupulous lawyers to solicit business through such organizations and impairs the attorney-client relationship.⁵⁷ However, where the organization has no control over the fees charged by the recommended attorney nor the course of the litigation, it cannot be convincingly contended that the profession is being commercialized nor that the attorney-client relationship is being infringed upon. The charge that unscrupulous lawyers solicit business through such organizations is relevant only to the extent that it raises the problem of advertisements in the organizations' publications naming the recommended attorney. This has been condemned by most courts confronted with this practice.⁵⁸ The Supreme Court was silent on this aspect of the Brotherhood's plan, as was the Illinois Supreme Court.⁵⁹ Whether the Supreme Court's approval of the right to advise and recommend encompasses listing the recommended counsel by name in organization publications is questionable. One commentator suggests that "the organization publish only the availability of competent counsel without identifying that attorney in mass mailings or other mass communication media."⁶⁰ Presumably, the name of the specific attorney would be divulged to the members by more informal means or only when they are in need of an attorney. In view of the fact that insurance companies are allowed to name a specific attorney in an insurance policy as the one to be notified in the event of an accident,⁶¹ the solution suggested above might be thought overly conservative. Nevertheless, it may be prudent in view of the prevailing judicial attitude.

The Supreme Court decision only gave a nonprofit organization, a labor union, the right to advise its members to see an attorney before settling claims arising under a federal statute and to recommend a specific lawyer. Yet, the tenor of the Supreme Court's opinion indicated that in future cases the Court will continue to be sympathetic to the efforts organizations make to aid their members in obtaining the services of competent attorneys in bringing actions in areas of interest to the entire organization.⁶² It is extremely doubtful that the right of an organization to advise and recommend will be limited to instances in which the rights to be enforced arise under federal law.⁶³ The nature of the organizations to which this right will be extended is in doubt although it is contended that the grounds on which the Supreme Court decision is based will readily support an extension of this right even to profit-making organizations.⁶⁴ In any event, the Supreme Court will be called upon again in the near future to establish guidelines as to what type of organization possesses the right to advise and recommend and as to the specific modes of exercising this right without engaging in the "solicitation of legal business." The only meaningful decision will be one which resists the traditional impulse to speak of "solicitation" only in generalities and instead pares away the outdated features of this doctrine. The profession must be presented with a new doctrine of solicitation which speaks in terms of specific activities and

57 Markus, *supra* note 49, at 3.

58 *In re Maclub*, 295 Mass. 45, 3 N.E.2d 272 (1936). See *People ex rel. Chicago Bar Ass'n v. Chicago Motor Club*, 362 Ill. 50, 199 N.E. 1 (1935); *Re Committee on Rule 28 of the Cleveland Bar Ass'n*, 15 Ohio L. Abs. 106, 108 (App. 1933); *Association of the Bar of the City of New York Committee on Professional Ethics*, Opinions No. 763 (formerly B163) (1951) & 799 (1955). *But see In re Thibodeau*, 295 Mass. 374, 3 N.E.2d 749 (1936).

59 *In re Brotherhood of R.R. Trainmen*, 13 Ill.2d 391, 150 N.E.2d 163 (1958).

60 Markus, *supra* note 49, at 22.

61 A.B.A. Committee on Professional Ethics and Grievances, Opinion No. 174 (1937).

62 See 377 U.S. at 7, where the Court states that "it is interesting to note that in Great Britain unions do not simply recommend lawyers to members in need of advice; they retain counsel, paid by the union, to represent members in personal lawsuits, a practice similar to that which we upheld in *NAACP v. Button*." Perhaps the Court is hinting that it may allow American unions to go this far in the future.

63 See Markus, *supra* note 49, at 21.

64 *Ibid.*

is designed to meet the special problems and needs of the bar and of the public in the latter half of the twentieth century.

Stephen A. Seall

CIVIL RIGHTS — DISCRIMINATION IN EMPLOYMENT — ORDER TO HIRE WITHIN DISCRETION OF STATE BOARD AGAINST DISCRIMINATION. — Geraldine Arnett, a 23 year old Negro high school graduate, sought employment as a tray girl in the dietary department of the Seattle General Hospital. Having been advised in a telephone conversation with the department that applications were being taken for that position, Mrs. Arnett appeared at the hospital and asked to apply. There she was told that applications were not being taken and she was turned away. That same afternoon, at Mrs. Arnett's request, a friend called the dietary department to ask whether there were any openings for a tray girl. She was told that there may be and that applications were being taken. The Washington State Board Against Discrimination discovered that although Negroes were hired in other departments, the dietary department had not hired a Negro during the twelve year tenure of the present supervisor. Therefore, it found that the hospital had discriminated against Mrs. Arnett in violation of the Washington Fair Employment Practices Act,¹ and, as part of its order, required the hospital to offer Mrs. Arnett employment at the first opening provided she met "standard qualifications."² On appeal by the hospital, the Superior Court for King County modified the order so that the hospital had only to give Mrs. Arnett "full consideration" without regard to race, creed, color or national origin and then to hire the "best qualified person."³ The Board appealed from this modification of its order to the Supreme Court of Washington, which *held*, in a split decision, that the Board was within its discretion in issuing the original order to hire and that the King County Court erred in substituting its judgment for that of the Board. *Arnett v. Seattle General Hospital*, 395 P.2d 503 (Wash. 1964).

Administrative agencies generally have broad discretion in issuing remedial orders within the scope of their enabling statutes, and their decisions are upheld unless it is found that they exceeded their powers or that they acted arbitrarily and capriciously.⁴ The majority in *Arnett* rested its opinion on this principle of wide administrative discretion,⁵ while the dissent arguing that the Board's original order was illegal in that it was "in itself discriminatory" stated: "The purpose of the law against discrimination is to eliminate racial prejudice and establish equality among all persons seeking the same employment, to the end that the *most qualified* person will be employed, whether Caucasian or non-Caucasian."⁶ *Arnett*, then, presents the separable problems of the constitutionality and the advisability of the order to hire.

1 WASH. REV. CODE 49.60.030 (1962).

2 *Arnett v. Seattle Gen. Hosp.*, 395 P.2d 503, 504 (Wash. 1964) quoting the order of the Washington State Board Against Discrimination:

IT IS FURTHER ORDERED that the Seattle General Hospital will accept a written application for employment from Complainant and will offer her employment in the Dietary Department in the first vacancy of a job for which she has applied, provided she meets the standard qualifications of other applicants for employment, but without regard to race, color, creed or national origin.

3 *Id.* at 505 quoting the order as modified by the King County Court:

IT IS FURTHER ORDERED that Mrs. Arnett will be sent an application, and if it is completed and furnished to the hospital, she, when a vacancy occurs in the position sought, will be given full consideration for the vacant position and the appointment will be made to the best qualified person without any consideration to race, creed, color or national origin.

4 4 DAVIS, ADMINISTRATIVE LAW § 30.10. *E.g.*, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Holland v. Edwards*, 307 N.Y. 38, 119 N.E.2d 58 (1954).

5 395 P.2d 503, 507 (Wash. 1964).

6 *Id.* at 508.

Twenty-five states have laws forbidding discrimination in employment.⁷ At least fourteen⁸ of these have provisions specifically including the word "hiring" in the arsenal of remedies delegated to the Fair Employment Practices agencies in their discretion in carrying out the letter and policy of the Fair Employment Practices statutes. Washington's statute is typical in providing that the agency (Washington State Board Against Discrimination), upon its finding of an unfair practice, issue an order:

requiring such respondent to cease and desist from such unfair practice and to take such affirmative action, including, (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, an admission or restoration to full membership rights in any respondent organization, to take such other action as, in the judgment of the tribunal, will effectuate the purposes of this chapter. . . .⁹

The order to hire has had, and does have, its practical difficulties in the states with Fair Employment Practices laws. The order is probably more appropriate where discrimination is unmistakable and an available applicant is qualified for an available position than where discrimination is not clearly found, where the applicant has found other employment or is not qualified, or where the position has been filled.¹⁰ The New York Commission for Human Rights, the agency which enforces the nation's oldest Fair Employment Practices law (enacted in 1945),¹¹ is probably most familiar with these remedial difficulties. The General Counsel for that Commission, Henry Spitz, has written that the Commission often limits its order to one requiring the discriminating employer to "consider" the applicant without regard to race, color, creed, religion, or national origin, an order very similar to the modified order made by the King County Court in *Arnett*. The reason given for the Commission's self-imposed restraint is to ensure that persons of inferior efficiency are not forced upon employers.¹²

That strong and positive measures¹³ are needed to eliminate the sometimes striking adverse effects¹⁴ of discrimination cannot be denied. The order to hire is

7 Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin. For citations see: Woll, *Labor Looks at Equal Rights in Employment*, 24 FED. B.J. 93, 94 n. 8 (1964).

8 CAL. LAB. CODE § 1426, COLO. REV. STAT. ANN. § 80-24-7 (Supp. 1960); CONN. GEN. STAT. REV. § 31-127 (1958); HAWAII REV. LAWS § 90A-6 (Supp. 1963); KAN. GEN. STAT. ANN. § 44-1005 (Supp. 1961); MASS. ANN. LAWS ch. 151B, § 5 (1957); MICH. COMP. LAWS § 423.307 (Supp. 1961); N.J. STAT. ANN. § 18:25-17 (Supp. 1964); N.M. STAT. ANN. § 59-4-10 (1953); N.Y. EXECUTIVE LAWS § 297; OHIO REV. CODE ANN. § 4112.05 (Page 1965); PA. STAT. ANN. tit. 43 § 959 (1964); R.I. GEN. LAWS ANN. § 28-5-24 (1956); WASH. REV. CODE § 49.60.250 (1962).

9 WASH. REV. CODE § 49.60.250 (1962). (Emphasis added.)

10 Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 HARV. L. REV. 526, 553-54 (1961).

11 Minsky, *FEPG Comes to Illinois*, 50 ILL. B.J. 42 (1961).

12 Spitz, *Tailoring the Techniques to Eliminate and Prevent Employment Discrimination*, 14 BUFF. L.J. 79, 84 (1964):

An employer is always entitled to consider an applicant's qualifications and competency. Thus the temporary State Commission Against Discrimination, which drafted the Law, stated in its report:

"Often employers fear that they may be compelled to employ, or retain in employment, persons of inferior efficiency. The administrative body contemplated by the Commission will have no charter to protect the inefficient or unfitted in jobs they are incapable of handling." Therefore the Commission often limits its requirement of the respondent to a consideration of the complainant for training, union membership or employment without regard to race, color, creed, religion or national origin.

13 See Pollit, *Racial Discrimination in Employment; Proposals for Corrective Action*, 13 BUFF. L.J. 59 (1963).

14 See, e.g., Donahue, *Equal Employment Opportunity*, 24 FED. B.J. 76, 77 (1964): "And most striking of all, the non-white college graduate will earn less than a white who has completed elementary school."

probably among the strongest of the corrective measures aimed against discrimination in employment since it involves a coerced employer-employee relationship. Some writers believe that the order to hire, among other measures, tips and scales too much against the employer and that an infringement on the traditional right to freedom of choice¹⁵ and "discrimination in reverse"¹⁶ are the results; others stress that liberal use of the order to hire is essential in eliminating employment discrimination.¹⁷

A consideration of the recent Illinois case, *In the Matter of Myart and Motorola*,¹⁸ may serve to clarify and emphasize some of the difficulties involved in the use of the order to hire. In that case, the Fair Employment Practices Commission found that a Negro applicant was deliberately and discriminatorily given a failing score on an objective test, which the company had destroyed prior to hearing. It was found, from evidence showing that the applicant had passed the same test both before and after taking it for Motorola, that the applicant had passed Motorola's test. The hearing examiner ordered Motorola to hire the applicant; however, the full Commission on review, upon hearing evidence developed *after* the complaint proceeding had been initiated that the applicant had an unfavorable background of arrests, vacated the order to hire in favor of an award to the applicant of \$1,000 "as compensatory damages" for Motorola's "act of discrimination."¹⁹ The Commission stated that its reason for vacating the examiner's order to hire in favor of the \$1,000 award was that, having no way of judging the merit and qualifications of the applicant, the Commission could not "apply its general remedial policy of placing the Complainant in the same position in regard to the Respondent as if no act of discrimination had been committed."²⁰ The \$1,000 award has since been set aside by an Illinois Circuit Court as beyond the authority of the Commission.²¹ It is probable that the case will be appealed to the Illinois Supreme Court.

The *Motorola* decision, as it stands at this writing, has found an employer guilty of a discriminatory practice but has left the applicant, against whom the discrimination was aimed and who is perhaps not a "fit" person to be hired because of his background of arrests, without redress. The case demonstrates the questionable usefulness of the order to hire since any one of innumerable factors in an applicant's background may make him "unfit" for employment or at least an "unfit" subject of an order to hire.

The 1964 Federal Civil Rights Law deals with Equal Employment Opportunities in Subchapter VI.²² This law provides that an Equal Employment Opportunity Commission is to be created which only has the power to make investigations and recommendations. However, it can "refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party. . . ."²³ If a proscribed unfair employment practice occurs in a state with a Fair Employment Practices Act, the state is first given the opportunity to resolve the matter before the federal machinery goes into operation.²⁴ If there is no state Fair Employment Practices law or if the state machinery fails to resolve the dispute successfully, then the federal Commission may exercise its powers.²⁵

Though the Commission may not issue orders, an aggrieved party may bring

15 Avins, *Anti-Discrimination Legislation as an Infringement on Freedom of Choice*, 6 N.Y.L.F. 13 (1960).

16 Tower, *F.E.P.C.—Some Practical Considerations*, 24 FED. B.J. 87, 91 (1964).

17 E.g., RUCHAMES, *RACE, JOBS AND POLITICS* 174 (1963).

18 Illinois Fair Employment Practices Commission, Charge No. 63C-127 (Nov. 18, 1964).

19 *Id.* at 7 (as modified by order, Jan. 12, 1965).

20 *Id.* at 6.

21 Chicago Sun-Times, March 6, 1965, p. 5, col. 1.

22 42 U.S.C.A. § 2000 e-15 (1964).

23 42 U.S.C.A. § 2000 e-4 (1964).

24 42 U.S.C.A. § 2000 e-5(b, c) (1964).

25 42 U.S.C.A. § 2000 e-5 (d) (1964).

an action in a federal district court which, if it finds that a respondent has committed an act of discrimination proscribed by the Act, "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate which may include reinstatement or hiring of employees, with or without back pay." There is a limiting proviso: "No order of the court shall require . . . the hiring . . . of an individual as an employee . . . if such individual . . . was refused employment . . . for any reason other than discrimination on account of race, color, religion, sex or national origin."²⁶ The legislative history of this law makes it clear that an employer is to have the right to hire the best man.²⁷ A memorandum of the Justice Department stated:

No employer is required to hire an individual because that individual is a Negro. No employer is required to maintain any ratio of Negroes to whites, Jews to gentiles, Italians to English, or women to men. . . . On the contrary, any deliberate attempt to maintain a given balance would almost certainly run afoul of title VII [Subchapter VI] because it would involve a failure or refusal to hire some individual because of his race, color, religion, sex, or national origin.²⁸

The federal law, while giving the courts the power to order an employer to hire an individual found to have been the subject of discrimination, is very careful not to infringe on an employer's right to refuse employment for any other reason. The difficulty lies in the ascertainment and evaluation of these reasons. Another difficulty might be found where, as in *Motorola*, after the employer has "discriminated," facts unknown to the employer are discovered in the complaint proceedings which indicate the applicant's unfitness for employment. The federal law does not state that the order to hire is inappropriate in such a situation, although clearly it is; its appropriateness is left to the tribunal's discretion. Abuse of this discretion could meet with constitutional objections.

It is well settled that freedom of contract is not an absolute right; it is the subject of regulation and restriction by the state under its valid police powers.²⁹ The Justice Department, in an opinion written for Senator Clark, stated: "It is now clear that appropriate regulation of the hire and discharge of employees is not an unconstitutional abridgement of the contract right."³⁰ The Justice Department cited a United States Supreme Court decision to illustrate that it was within the power of the National Labor Relations Board to order an employer, found to have discriminated against two applicants because of union activities, to hire those applicants.³¹ Further, the Department cited another decision in which the Supreme Court used this strong language: "Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation."³² It would seem, from an examination of the reasoning in these decisions, that an order to hire made pursuant to the enforcement of legislation aimed at prevention of discrimination based on race, religion, color, creed, or national origin is constitutionally sound. Other United States Supreme Court cases involving reinstatement orders³³ and orders of unions to admit specific applicants to membership³⁴ could be recited to establish the constitutionality of the order to hire.

26 42 U.S.C.A. § 2000 e-5 (g) (1964). (Emphasis added.)

27 See, e.g., 110 CONG. REC. 6982-7006 (daily ed. April 8, 1964).

28 110 CONG. REC. 6986 (daily ed. April 8, 1964).

29 *Nebbia v. New York*, 291 U.S. 502 (1934).

30 110 CONG. REC. 6989 (daily ed. April 8, 1964) citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

31 *Phelps Dodge Corp. v. NLRB*, *supra* note 30.

32 *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 561 (1938).

33 E.g., *Associated Press v. NLRB*, 301 U.S. 103 (1937); *Texas & New Orleans R. Co. v. Railway Clerks*, 281 U.S. 548 (1930).

34 *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1945):

We have here a prohibition of discrimination in membership or union services on account of race, creed or color. A judicial determination that

In *Associated Press v. NLRB*³⁵ the constitutional limits of such an order were discussed by the Supreme Court in considering an order to reinstate. The Court stated that the order does not at all infringe upon an employer's right to discharge for any proper reason. Moreover, any law that would impose a certain percentage or number of employees of any race on an employer would violate the equal protection clause.³⁶ It is not likely that, where a position is available and an applicant is available and qualified, an order to hire based upon a clear finding of an employer's discrimination will reach or exceed these constitutional limits. The purpose of Fair Employment Practices laws is not to force unfit employees on employers, but rather to promote unbiased employer judgment of applicants based upon qualifications alone.³⁷

Arnett v. Seattle General Hospital presents a good example of the difficulties involved in the order to hire. Used properly, it is a constitutionally sound administrative and judicial remedy against employment discrimination. However, the employer's right to freedom of choice must be balanced against the applicant's right not to be discriminated against for reasons of race, creed, color, or national origin. The order to hire seems to be an appropriate remedy only when certain variables exist in combination, that is where the employer's discrimination is clearly found, where discrimination is the *only* reason for refusal to hire, where the position is available, where the applicant remains available for the position, and where the applicant is fit for the position sought. In *Arnett*, the Washington Board clearly found discrimination on the part of the hospital. It was not clear, however, that the hospital's discrimination was the only reason for the refusal to hire, or, in this case, for refusal to accept Mrs. Arnett's application, since it appears that there was no immediate opening for the position of tray girl. The Board's order reflects this fact in requiring the hospital to offer Mrs. Arnett employment at *the first opening*. If there was no immediate opening for the position of tray girl, then it is possible that a long period of time could pass without an opening appearing. This would leave Mrs. Arnett without a job or income for all of that period unless she found another job. If she did, then she would become unavailable, thereby making the order to hire inappropriate for that reason. The Board's order to hire was qualified by the requirement that Mrs. Arnett meet "standard qualifications of other applicants." Though, admittedly, standards of fitness for a tray girl are not stringent, the Board's order would have the hospital hire Mrs. Arnett even though an exceptional and experienced tray girl may have applied prior to or subsequent to Mrs. Arnett's attempted application. It is suggested, in light of the foregoing, that the order to hire in *Arnett v. Seattle General Hospital* was neither an appropriate nor an effective remedy for the hospital's discrimination.

The order to hire, generally, it is submitted, is rarely appropriate and effective. The probability of all of the necessary variables being present in a given situation is not great. A notable instance of the inappropriateness of the order to hire was the *Motorola* case, discussed above, where all of the necessary variables coincided but one, the fitness of the applicant. Even where the order is deemed appropriate it may not be effective because of the relationship forced upon an unwilling employer with an unwanted employee. Such an employer could conceivably, without *clearly* discriminating, make working conditions unpleasant or even unbearable for his new employee and could, again without *clearly* discriminating, enforce working rules strictly so as to discharge such employee for any

such legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race and color.

35 301 U.S. 103, 132 (1937).

36 See *Truax v. Raich*, 239 U.S. 33 (1915).

37 KONVITZ AND LESKER, *A CENTURY OF CIVIL RIGHTS* 219-20 (1961).

minor infraction. These considerations, taken together with the necessarily inexpert non-employer determination of fitness for employment involved in the order to hire, lead this writer to the conclusion that the order to hire should be a remedy sparingly used by the courts and the state boards.

To the degree this evaluation of the remedy's utility is based upon a repugnance for the forced employer-employee relationship, it may be countered that the argument proves too much. To be sure, the compelled employment may result in inefficiency or harassment because of the unavoidable fact of compulsion, but the remedial legislation presupposes and is in fact designed to operate upon the *unwilling* employer. If the legislation is to achieve its purpose necessarily there will be involuntary hiring to some degree. Since the discrimination is undifferentiated, the employer will be just as *unwilling* to hire the next Negro applicant for the tray girl position as she was reluctant to hire Mrs. Arnett. Moreover, since racial discrimination is based upon erroneous presuppositions about Negroes as a class, the order to hire Mrs. Arnett compels an encounter with individual reality that tends to erode those presuppositions.

The difficulty with this defense of the order to hire lies in the fact that there is a difference between the employer's unwillingness to hire a Mrs. Arnett, who has been a complaining witness, and his unwillingness to hire the next qualified Negro applicant. Mrs. Arnett would begin work with two strikes against her instead of one. Anticipating this result, it would be more effective to award significant money damages to Mrs. Arnett and thus allow other Negro applicants to reap the benefit of her protest. Assuming the award does have the deterrent effect intended, the employer will thereafter hire qualified Negro applicants without an acrimonious initial confrontation. Thus, considering both the appropriateness and the effectiveness of the remedy, the order to hire should infrequently be used.

Thomas D. Ready