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Glen B. Smith

uting effect be deemed proximate. The holding in *Miles* has not adopted the narrow view of the *Penn* case which excludes recovery where the ailment is found to be but a "necessary condition" to the ultimate consequences. Neither does the majority purport to bar recovery upon the mere presence of an incurable disease when there is no causal relationship between its agencies and the death of the insured.[53]

Fourth, the dissent failed to realize that it was not the mere presence of an ailment which defeats recovery, but the causal effect it has on the ultimate loss is the factor which will extend the situation beyond the risks in the policy.[54]

Fifth, where the insurable risk is expressly confined to accidental injury or death resulting "directly and independently of all other causes," it requires the most imaginative interpretation to imply coverage to situations where an injury, incapable of itself to render a fatal effect, merely accelerated an inevitable, and predetermined result.

Finally, the bare statement by the dissent that there is an insurable value in the continuation of life is indisputable. It is another matter, however, to find such a value within the meaning of these insuring clauses in situations where an accidental injury has accelerated the fatal effect of an otherwise incurable disease. The adoption of such a view would tend to lead to further judicial distortion and abrogation of the protective language of these contracts, and in essence would relegate their coverage to areas and risks presently insured by the general life insurance contracts.[55]

ALBERT NEIL STIEGLITZ

Labor Law—Consumer Picketing—"Threat, Coercion or Restraint."—*Burr v. NLRB.*[1]—The Wholesale and Warehouse Employees Union called a strike against Perfection Mattress & Spring Co. in support of their contract demands. In furtherance of its dispute with Perfection, the Union picketed retail stores that sold Perfection's products, at entrances commonly used by customers and employees. Employees of the stores could see the picket line from inside the stores and had to cross the picket line on their way into and out of the stores during the course of the day. There had been no work stoppages nor were there any refusals to handle Perfection's products at any time by employees of the retail stores.[2] Perfection filed charges with

[53] Klinke v. Great Northern Life Ins. Co., supra note 21.

[54] Justice Cardozo in Silverstein v. Metropolitan Life Ins. Co., supra note 18, at 84, 171 N.E. at 915, illustrated this point when he coined the celebrated phrase "the common speech of men" in the following passage:

> Something more, however, must be shown to exclude the effects of accident from coverage of a policy. The disease or infirmity must be so considerable or significant that it would be characterized as a disease or infirmity in the *common speech of men.* (Emphasis supplied.)

[55] See Hancock and Grahame, Are the Courts Destroying the Double Indemnity and Accidental Death Benefit?, 1951 Ins. L.J. 440.

[1] 321 F.2d 612 (5th Cir. 1963).

[2] There were facts indicating more than just peaceful picketing. At one store,

the NLRB and the Board issued a complaint against the Union charging violations of sections 8(b)(4)(i) and (ii)(B).[3] The Board in a supplemental decision found the Union guilty of violating 8(b)(4)(ii), but no violation of 8(b)(4)(i). In affirming the Board's decision as to the 8(b)(4)(ii) violation, the Court of Appeals for the Fifth Circuit HELD: Consumer picketing at the premises of a neutral secondary employer is condemned per se by 8(b)(4)(ii).

The court based its result upon both the legislative history of the Landrum-Griffin amendment to the Taft-Hartley Act, and the literal wording of the amendment itself. The court emphasized the numerous legislative exchanges in the legislative history to show that Congress was concerned with the secondary boycott problem and intended to remedy it by prohibiting all consumer picketing in 8(b)(4)(ii)(B).[4] In the wording of the amendment, the court emphasized the so-called publicity proviso, and reasoned that the proviso allowing publicity, *other than picketing*, clearly indicated that Congress had picketing in mind and intended to forbid it when they drafted this amendment.[5]

This construction of 8(b)(4)(ii) was in direct opposition to that of the Court of Appeals for the District of Columbia.[6] In the *Fruit Packers* case, the Union called an economic strike against the employers of the bargaining association. The Union organized a consumer boycott of the struck employer's product at retail stores, to urge customers not to buy only the primary employer's product, but taking care that the stores' employees continued to work and that the pickups and deliveries at the stores would not be halted. The District of Columbia court construed the statute

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pickets loudly shouted about "junk in the window" made by "scab labor" and when the manager remonstrated about this, the picket became harsh and impudent. On another occasion there were repeated requests as to the home address of an employee of this same store as she crossed and recrossed the picket line. Pickets at another store became loud and boisterous shouting that they would never cross a picket line.

[3] 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4)(ii) (Supp. IV, 1963). Section 8(b)(4)(ii) now reads:

> (b) It shall be an unfair labor practice for a labor organization or its agents . . . .
>
> (4)(ii) to *threaten, coerce, or restrain* any person engaged in commerce or in an industry affecting commerce, . . .
>
> *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit *publicity, other than picketing*, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer . . . . (Emphasis added.)

[4] Supra note 1, at 618.

[5] Ibid. The court quoted in support of this interpretation the report of the then Senator Kennedy that the Senate conferees were not able to convince the House conferees to permit picketing in front of the secondary shop, but that the House conferees agreed that the union be free to conduct informational activity short of picketing.

[6] Fruit & Vegetable Packers & Warehousemen v. NLRB, 308 F.2d 311 (D.C. Cir. 1962), aff'd, — U.S. —, 32 U.S.L. Week 4350 (Apr. 20, 1964).

as condemning not picketing per se, but the use of threats, coercion, and restraint to achieve specified proscribed objectives.

This result was reached through an interpretation of the language of the statute in the light of federal labor policy. It found the most plausible reading to be that the amendment outlaws only such conduct as *in fact* threatens, coerces, or restrains the secondary employers. The publicity proviso was intended to exempt from regulation "publicity other than picketing" even though it threatens, coerces, or restrains an employer,[7] which indicates a difference in meaning between 8(b)(4)(ii) and the proviso.

The legislative history of the Landrum-Griffin amendment was circumvented in the *Fruit Packers* case in order to construe 8(b)(4)(ii) narrowly and thereby avoid the possible constitutional question of whether this amendment interfered with the First Amendment's protection of free speech. Picketing is not merely speech, however. Also inherent in this conduct is the "signal effect," an economic aspect which is subject to a sovereign's regulation through valid exercise of the police power.[8] The D.C. Circuit discussed this duality of picketing and pointed out that the union had sought to *prevent* its picketing from having the customary signal effect upon the retail employees.[9]

While admitting the possibility that there might be some circumstances in which the literal enforcement of 8(b)(4)(ii) would constitute an infringement of the First Amendment, the court in the *Burr* case found that the dual aspect of picketing sustained the constitutional validity of its interpretation of the Landrum-Griffin amendment:[10] first, the 8(b)(4) proviso effectively leaves open the means that can be employed in communicating the union's message to members of the public, including actual or potential customers of any secondary employer; second, the law recognizes that picketing is more than mere communication—that it may also provide a "signal" to action.[11] The court, as to the first point, indicates that a certain type of speech may be prohibited if alternative means are available to the union to communicate its message. The second point indicates that picketing goes beyond mere speech to a more active inducement and as it goes beyond speech, it goes beyond the protection of the First Amendment. It is difficult to tell whether the court is making a finding that the section is constitutional, or is denying that any constitutional problem is presented for the reasons stated.

The distinction between the *Burr* view and that of the District of Columbia court is that the *Burr* court found that it was not necessary that there be a likelihood that the particular picketing will be a signal to action to the employees of the secondary employer before it can be regulated, since

[7] Id. at 315.
[8] Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).
[9] Supra note 6, at 316.
[10] Supra note 1, at 621.
[11] Giboney v. Empire Storage & Ice Co., supra note 8.

the signal effect is presumed.[12] The District of Columbia court held that without this factual likelihood of "signal" effect, picketing would be constitutionally protected.

The United States Supreme Court, while recognizing that picketing is a form of speech protected by the First Amendment,[13] has also stated that picketing is more than and different from speech in that it is more likely than speech to induce action.[14] Picketing, not being the equivalent of speech as a matter of fact, is not held to be its inevitable legal equivalent.[15] It was for these reasons that the Supreme Court has allowed a state to prohibit peaceful picketing if the purpose of the picketing contravenes a valid public policy of the state. Thus, the Supreme Court has upheld state prohibitions of picketing based on the state's policy to encourage small businesses,[16] and to enforce a state's policy against picketing in the absence of a labor dispute.[17] By the same token the Supreme Court has seen no reason why Congress may not also proscribe picketing based on an established national policy.[18]

It would appear that the court in the *Burr* case was correct in its conclusion that the First Amendment protection does not depend upon the likelihood that the picketing may be a signal for action,[19] but that Congress may prohibit the picketing if it contravenes a strong national policy. The pivotal question then is whether Congress actually prohibited all secondary consumer picketing.

The legislative history of the amendments, which was cited in the *Burr* case would seem to indicate that Congress did intend to prohibit consumer picketing per se. This also was the interpretation given to the amendments by the NLRB.[20] However, the Senate Labor Committee understood the amendment to prohibit a union from "threatening, coercing, or restraining" a secondary employer, and nowhere in its analysis of the provisions of the amendment is mention made of consumer picketing or of any intention or meaning to prohibit any such picketing per se.[21]

The words "threaten, coerce, or restrain" have been interpreted by the

12 Supra note 1, at 621.

13 Thornhill v. Alabama, 310 U.S. 88 (1940).

14 Hughes v. Superior Court, 339 U.S. 460 (1950).

15 Id. at 465.

16 International Bhd. of Teamsters v. Hanke, 339 U.S. 470 (1950).

17 Teamster's Union v. Vogt, Inc., 354 U.S. 284 (1957). See discussion on the subject of the Supreme Court's application of free speech protection to the regulation of peaceful picketing discussed in a casenote, supra page 768, treating Schwartz-Torrance Inv. Corp. v. Bakery & Confectionary Workers, 222 Cal. App. 2d 378, 35 Cal. Rptr. 179 (1963).

18 International Bhd. of Elec. Workers v. NLRB, 341 U.S. 694, 705 (1951).

19 Supra note 1, at 621.

20 Desmond, Consumer Picketing: The Limited Restrictions of the Labor Management Relations Act, 4 B.C. Ind. & Com. L. Rev. 79, 81 (1962).

21 1 Legislative History of the Labor-Management Reporting & Disclosure Act of 1959 965 (G.P.O. 1959).

Supreme Court as restrictive and narrow in scope. In interpreting the former section 8(b)(4), the Court stated that the words "induce or encourage," are broader in scope and effectively prohibited peaceful picketing, while it intimated that the words "restrain or coerce" would not have manifested such intent.[22] It must be assumed that Congress knew of the legal effect of these words when it chose to use them. The wording of 8(b)(4)(ii) as finally passed is the same as was analyzed by the Senate Committee, prohibiting only "threatening, coercing, or restraining" a secondary employer engaged in commerce. As pointing out in the *Fruit Packers* case, when Congress wanted to prohibit picketing per se, it knew how to do so.[23] This is evidenced by section 8(b)(7) which forbids a union from picketing or causing to be picketed, any employer, for a proscribed object.[24] For these reasons it is submitted that the correct interpretation of 8(b)(4)(ii) is that of the *Fruit Packers* case.

Because of the decision in the *Burr* case, the intent of Congress in enacting 8(b)(4) has been cast very much in doubt. It is a doubt that can be removed only by a pronouncement of the Supreme Court, or by a clarification by Congress.

GLEN B. SMITH

Labor Law—Labor-Management Reporting and Disclosure Act of 1959—Challenging the Denial of an Equal Right to Nominate Under § 101.—*Harvey v. Calhoon.*[1]—Plaintiff, a member of the National Marine Engineers' Beneficial Association, AFL-CIO, brought suit against the defendant in his capacity as president of District No. 1 to enjoin the holding of a union election. He alleged that the union had violated the rights guaranteed to him and others similarly situated, as union members, by Section 101(a)(1) of the Labor-Management Reporting and Disclosure Act of 1959[2] (hereafter referred to as the LMRDA). This method of enforcing

[22] International Bhd. of Elec. Workers v. NLRB, supra note 18, at 703. The former section 8(b)(4) has been retained by the Landrum-Griffin Act as 8(b)(4)(i). 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4)(i) (Supp. IV, 1963).

Section 8(b)(4)(i) makes it an unfair labor practice "to engage in, or to induce or encourage any individual. . . ."

[23] Supra note 6, at 317.

[24] 73 Stat. 544 (1959), 29 U.S.C. § 158(b)(7) (Supp. IV, 1963). Section 8(b)(7) reads:

> (b) It shall be an unfair labor practice for a labor organization or its agents . . . .
>
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer. . . .

[1] 324 F.2d 486 (2d Cir. 1963), cert. granted, 84 Sup. Ct. 633 (1964).

[2] 73 Stat. 520 (1959), 29 U.S.C. § 411(a)(1) (Supp. IV, 1963). This section is part of Title I, popularly referred to as "The Bill of Rights" section, and provides that:

> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to