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CASES NOTED

CONSTITUTIONAL LAW

ELECTIONS — REQUIREMENT OF A FILING FEE — *Wetherington v. Adams*, 309 F. Supp. 318 (N.D. Fla. 1970).— Plaintiff sought a declaratory judgment that a Florida statute, requiring a candidate for state office to pay a $300 filing fee before his name could be placed on the primary ballot violated the due process and equal protection clauses of the 14th amendment. The district court relied upon *Snowden v. Hughes*, 321 U.S. 1, 7 (1943), for the rule that "an unlawful denial by state action of the right to hold a state political office" does not violate the due process clause. The court also rejected the equal protection challenge, holding that a state has a valid interest in limiting the number of candidates for state offices in order to avoid overburdening its election machinery, and in promoting the growth of political parties which receive the bulk of the collected fees.

This decision is questionable in light of *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), which added wealth to the list of criteria which are suspect when used by states to make statutory classifications. After *Harper*, wealth may only be used as a basis for such classification if the state can show a "compelling interest" and meet the strict scrutiny established in *Skinner v. Oklahoma*, 316 U.S. 535 (1942). In light of alternative means available to Florida for protection of its election process, such as signature collection, it is doubtful that the statute can meet the stricter standard.

EQUAL PROTECTION OF LAWS — ONE MAN, ONE VOTE PRINCIPLE — *Hadley v. Junior College District*, 397 U.S. 50 (1970).— Appellants, residents of a school district which had voted to consolidate with several others to form a junior college district, challenged the constitutionality of the statutory apportionment formula governing the election of the college district's trustees. The appellants' local district, containing 60 percent of the total school-age population of the college district, was entitled to elect only three trustees, or 50 percent of the six-member board. In rejecting the appellees' contentions that the "one man, one vote" principle should not apply to "less important" elections, nor to the election of administrative officials, the Supreme Court held that the election of trustees of a junior college district must be apportioned such that the appellants' votes are given the same weight as that of any other voter.

Although this extension of the rule may allow less flexibility in structuring local governmental units which perform specialized functions, the principle of one man, one vote is not without limitation. Whether a single-purpose agency falls outside this mandate will depend upon how far it is "removed from normal governmental activities" and whether it disproportionately affects different groups within electoral boundaries.

FIRST AMENDMENT — FREEDOM OF SPEECH — *Tanner v. Lloyd Corp.*, 308 F. Supp. 128 (D. Ore. 1970).— Several orderly war protesters were barred from distributing handbills on a privately owned shopping mall open to the general public. Defendant contended that the exclusion was constitutionally permissible since the distribution did not relate to a business purpose of the center. The court held that the first amendment requires

that when one invites the general public on his property for business purposes, he gives up the right to prohibit the distribution of literature or to decide what kinds of literature may be distributed thereon.

Although the Supreme Court, in *Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), extended the freedom of speech protection to privately owned shopping centers, it left unanswered the question whether an owner could bar picketing which was not directly related to the use of the center. In a case of first impression the federal district court of Oregon replied in the negative, and thus extended *Logan Valley* by denying *any* censorship rights to the private shopping center owner where the distribution is peaceful. This decision firmly establishes the supremacy of the first amendment freedom of expression over the concept of private property.

FIRST AND FIFTH AMENDMENTS — CONSCIENTIOUS OBJECTORS — *U.S. v. Bower*, 307 F. Supp. 1094 (N.D. Cal. 1969).— Defendant believed that Roman Catholic doctrine required him to distinguish between just and unjust wars. In accordance with that belief, he determined that the Vietnam war was unjust and refused induction. His refusal questioned the constitutionality of section 6(j) of the Military Selective Service Act of 1967, 50 U.S.C. § 456(j) (Supp. III, 1967), which, in according conscientious objector status, distinguishes between persons who object to war in *any* form and those who *selectively* object. The court found that since there was no compelling governmental interest for the distinction, the denial of conscientious objector status to a registrant solely on the ground that he failed to oppose *all* wars was in violation of both the establishment clause of the first amendment and the due process clause of the fifth amendment.

In addition to concluding that the first amendment insures to an individual with religious reservations against certain wars the opportunity to qualify for conscientious objector status, this decision takes the further step — logical but perhaps unnecessary — of declaring freedom of religion to be a fundamental right. While no one has seriously contended that the enumerated rights contained in the first amendment are not fundamental, most courts have relied directly on that amendment to strike down any statutory classification infringing upon the specified rights, rather than adopt the fundamental rights doctrine which has traditionally been utilized to safeguard *unenumerated* or penumbral rights derived from the Bill of Rights.

VOTING RESIDENCY REQUIREMENTS — STANDING TO SUE — *Hall v. Beals*, 396 U.S. 45 (1969).— The plaintiffs, ineligible by 1 month to vote in the November 1968 presidential election, brought a class action challenging the constitutionality of Colorado's 6-month residency requirement for voting. The three-judge federal district court denied relief, and during the intervening time while the case was on appeal the election date passed and Colorado reduced its residence requirement to 2 months. The Supreme Court reasoned that because the plaintiffs now met the new residency requirement the case was moot. Mr. Justice Marshall, dissenting, chose to discuss the merits of the case. In *Drueding v. Devlin*, 380 U.S. 125 (1965), *aff'g* 234 F. Supp. 712 (D.C. Md. 1964), the Court had affirmed a decision sustaining a 1-year residency requirement. Mr. Justice Marshall thought that *Drueding* was no longer good law because the district court had applied a "rational relationship" test, and since *Harper v.*

Virginia Bd. of Elections, 383 U.S. 633 (1966), a state must show a "compelling interest" before it can restrict the right to vote. Reviewing Colorado's justifications for the residency requirements, he found no compelling interest and concluded that the state's 2-month requirement violated the 14th amendment.

If the Supreme Court decides to face such an issue in the future, it is likely that Mr. Justice Marshall's conclusion may be adopted by the majority in light of the Court's reasoning in *Shapiro v. Thompson*, 394 U.S. 618 (1969), and the fact that voting residency requirements may also impede the fundamental right to travel. *See* 21 CASE W. RES. L. REV. 571 (1970).

FEDERAL CIVIL PROCEDURE

DEPOSITIONS AND DISCOVERY — IN GENERAL — *Thayer v. Liggett & Myers Tobacco Co.*, 38 U.S.L.W. 2453 (W.D. Mich. Feb. 10, 1970).— Plaintiff sought damages from a cigarette manufacturer, alleging that her husband's death from lung cancer was caused by the defendant's product. Knowing of defendant's intent to rely on expert testimony concerning scientific and medical data, plaintiff attempted to utilize discovery techniques to gather information about payments made by defendant and other members of the Tobacco Institute to various experts. Recognizing the policy of broad discovery under the Federal Rules of Civil Procedure and the value that establishing pecuniary relationships between defendant and the experts based on payments for past services would have on plaintiff's ability to attack the experts' credibility, the court allowed plaintiff to pursue the desired information.

By permitting the use of discovery machinery to include prior industry-expert witness relationships, the court substantially increased the scope of permissible discovery. This may be particularly significant in actions involving large corporate parties whose vast economic resources permit them to subtly nurture loyalty from experts through a pecuniary interest.

LIMITED PARTNERSHIP

MISMANAGEMENT — LIMITED PARTNER'S RIGHT TO SUE — *Blattberg v. Weiss*, 61 Misc. 2d 564, 306 N.Y.S. 2d 88 (Sup. Ct. 1969).— Plaintiffs, several limited partners of a syndicated real estate partnership, sought to recover damages on their own behalf for loss suffered by the partnership entity resulting from wrongful acts of defendant general partners. The court held, as a matter of law, that although a limited partner does have a right to bring a class or derivative action involving partnership affairs, the common law rule that partners cannot sue one another over the concerns of the partnership effectively barred a suit brought by a partner in his individual capacity.

This decision comports with the principle articulated in *Riviera Congress Ass'n v. Yassky*, 18 N.Y.2d 540, 223 N.E.2d 876, 277 N.Y.S.2d 386 (1966), that for the purpose of determining the rights of parties, the relationship between general and limited partners is to be considered similar to that which exists between corporate directors and their shareholders.

MUNICIPAL CORPORATIONS

ZONING — VALIDITY OF RESOLUTIONS — RESTRICTIONS ON MULTIPLE DWELLINGS — *In re Girsh*, 38 U.S.L.W. 2465 (Pa. Sup. Ct. Feb. 13, 1970).— A Pennsylvania township refused to provide for apartment de-

velopment in its zoning scheme. In response to a challenge that such a land-use restriction was unreasonable, the township argued that a variance could be obtained upon a showing that the property was subject to a unique hardship. The Pennsylvania Supreme Court reaffirmed *National Land & Inv. Co. v. Easttown Twp. Bd. of Adjustment*, 419 Pa. 504, 215 A.2d 597 (1965), noting that "a zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise" on the township is invalid.

Municipalities have used a number of zoning devices, such as minimum lot size requirements and prohibitions of multiple-family dwellings, to keep their communities homogeneous. This decision echoes the refusal of a number of courts to accept the specious argument that a municipality promotes the "public welfare" by keeping its expenses at a minimum, at the cost of depriving our growing population of adequate housing.

NEGLIGENCE

ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE — NEGLIGENT MISREPRESENTATION — *Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 820, 81 Cal. Rptr. 519 (1969).— In an action by a shoe purchaser for personal injuries sustained when she slipped and fell while wearing the new shoes, the plaintiff sought to hold the defendant, publisher of *Good Housekeeping Magazine*, liable for negligent misrepresentation through its advertisement endorsing the product. In reversing the lower court and finding a valid cause of action, the court of appeals concluded that a person who publically endorses products as "good ones" has a duty of ordinary care to insure that such a commendation is accurate. The action was remanded for determination of whether the shoes in question were, in fact, inferior to representations made by the defendant.

Although recovery under products liability was formerly confined to the manufacturer or retailer, this decision suggests that unless a person or institution exercises reasonable care to determine whether the goods they endorse or advertise are of the quality represented, they may be fully liable for any resulting injuries. This precedent should have a significant impact on the many institutions and individuals that publicly endorse products.

DAMAGES — IMPACT RULE — *Niederman v. Brodsky*, --- Pa. ---, 261 A.2d 84 (1970).— While walking with his son, appellant witnessed an accident wherein his son was injured when defendant's vehicle skidded onto the sidewalk and struck the boy. Although defendant's car made no actual impact with appellant, the father was hospitalized for 5 weeks with diagnosed heart ailments, which he attributed to the fright and shock attendant at the accident. The lower court, following the impact rule, denied recovery for negligence. The Supreme Court of Pennsylvania reversed, holding that damages could be recovered even though defendant's vehicle did not make physical contact with the appellant. The court reasoned that the arguments supporting the impact rule were no longer persuasive because of medical advances in locating the source of traumatic injury, the incongruity of using medical proof to establish a causal connection between emotional trauma and bodily injuries in cases of minor impact but not in cases of no impact, and because the judicial process offered adequate protections against exaggerated and fraudulent claims.

Although eliminating the impact rule, the Pennsylvania decision appears to limit recovery of damages for injury through fright to those in-

stances where a negligent force is directed *at* a person, placing him in personal danger of physical impact and where he actually did fear the force.

REAL PROPERTY

BUILDER'S LIABILITY — IMPLIED WARRANTY — *Rothberg v. Olenik*, 38 U.S.L.W. 2479 (Vt. Sup. Ct. Feb. 3, 1970).— Plaintiff had signed a house sale contract before the structure was complete and before title had passed. Many latent structural defects appeared after occupancy resulting in severe damage to the property. The plaintiff asserted that a builder-vendor impliedly warrants the structural fitness of the house in the contract of sale. Relying upon precedents from other jurisdictions and recognizing the inability of the purchaser to detect such defects, the Supreme Court of Vermont applied the doctrine of implied warranty to the sales of houses and found the defendants liable.

The decision continues the departure from the harsh doctrine of caveat emptor in the sale of new homes. This court plus six others have found implied warranties with respect to the builder-vendors of houses, theorizing that since the builders and purchasers are not on equal footing the purchaser tends to rely upon the builder's expertise. It is likely that these decisions will persuade other jurisdictions to adopt the implied warranty approach, and may signal the demise of caveat emptor in the real property context.

SECURITIES REGULATION

ALLEGED FEDERAL CAUSE OF ACTION UNDER RULE 10b-5 — STATUTE OF LIMITATIONS — *Vanderboom v. Sexton*, 422 F.2d 1233 (8th Cir. 1970).— Plaintiffs asserted an implied private right of action for violations of fraud Rule 10b-5 promulgated pursuant to the Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) (1964). Although they had complied with the 3-year statute of limitations for common law fraud, they had failed to come within the 2-year limit contained in Arkansas' blue sky law. While remanding for a decision as to precisely when the plaintiffs discovered, or should have discovered the alleged fraud, the court held that the state's blue sky law statute of limitations should control. Acknowledging that the Arkansas blue sky law and the federal statute are not identical, the court found them to be similar in that both were specifically directed at security fraud, and both were intended to cover negligent actions.

In holding that the statute of limitations contained in state blue sky laws controls a private right of action brought under the Securities Exchange Act, the Eighth Circuit has agreed with a growing number of jurisdictions that controvert the majority rule of *Charney v. Thomas*, 372 F.2d 97 (6th Cir. 1967), that the state's statute of limitations for common law fraud is applicable.

ANTIFRAUD VIOLATIONS — MISLEADING PRESS RELEASE AND USE OF INSIDE INFORMATION — *SEC v. Texas Gulf Sulphur Co.*, [Current Binder] CCH FED. SEC. L. REP. ¶ 92,572, at 98,584 (S.D.N.Y. Feb. 6, 1970).— On remand from the Court of Appeals for the Second Circuit, the district court was required to determine: (1) Whether a press release issued by the defendant would mislead the reasonable investor; (2) whether the defendant exercised due diligence in issuing the press release; and (3) what penalty should be imposed upon the individual defendants who had pur-

chased TGS stock or accepted stock options in reliance on undisclosed information. After finding that a reasonable investor exercising ordinary care would have been misled and that the corporate insiders failed to exercise due diligence in disclosing material information, the court ordered the individual defendants to pay into escrow the profits they realized by buying or receiving TGS stock while in possession of the undisclosed information.

This decision marks the first application of the due diligence test to information disclosures, looking to the facts held by corporate officials at the time public representation was made. In requiring the disgorgment of profits realized on the basis of inside information, the court applied the remedy it had recently established under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (1964), in *SEC v. Golconda Mining Co.*, [Current Binder] CCH FED. SEC. L. REP. ¶ 92,504 at 98,357 (S.D.N.Y. 1969).

BROKERS AND DEALERS — CHURNING — *Pierce v. Richard Ellis & Co.*, 38 U.S.L.W. 2433 (N.Y. Civ. Ct. Jan. 20, 1970).— By churning plaintiff's $3000 discretionary account, including the trading of the same security 15 times within 8 days, one of defendant's brokers generated $1000 in commissions and reduced the value of the account to $110. Additionally, evidence was introduced indicating that the defendant delayed covering a short sale and deceptively reported the transactions to the customer. In a common law constructive fraud action for breach of fiduciary duty, the court found for the plaintiff and awarded damages in the amount of his original investment, interest, and commissions paid.

In granting this measure of damage, the court relied on the rule enunciated in *Stevens v. Abbott, Proctor & Paine*, 288 F. Supp. 836 (E.D. Va. 1968), that in a fraud action the court may choose the character of the damages to be awarded. The court noted that to limit damages to a restoration of commissions where the capital of the account was dissipated would "encourage this conduct as low risk larceny."

TENDER OFFER — DISCLOSURE OF MERGER PLAN OR PROPOSAL — *Susquehanna Corp. v. Pan American Sulfur Co.*, [Current Binder] CCH FED. SEC. L. REP. ¶ 92, 610, at 98, 749 (5th Cir Mar. 13, 1970).— Susquehanna, when attempting by tender offer to take over the appellee, had continuously represented in its original and amended schedule 13D, filed pursuant to section 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78m(d) (Supp. IV, 1969), that it did not "plan or propose to merge the target corporation." A day after the last schedule was filed, Susquehanna proposed to a third corporation that it merge into Pan American. This offer was never replied to by the third corporation and was soundly denounced by the target. The district court, finding that the appellant had failed to disclose material information in violation of section 13(d), enjoined the offeror from voting shares acquired in the tender offer. Vacating the injunction and dismissing the suit, the court of appeals concluded that since the merger was only a "unilateral offer to negotiate," to include it as a plan or proposal of merger would have been more misleading to the target's shareholders.

This decision, coupled with *Electronic Speciality Co. v. International Controls Corp.*, 409 F.2d 937 (2d Cir. 1969), evidences a tendency by appellate courts to liberally interpret the disclosure requirement in the new tender offer legislation. Still to be decided is whether a tender offeror's

intention of using the target's cash assets for some future merger or acquisition is within the reach of section 13(d).

TENDER OFFER — STANDING TO SUE — *Kahan v. Rosenstiel*, 38 U.S.L.W. 2466 (3d Cir. Feb. 20, 1970).— Plaintiff, a nontendering minority shareholder, brought a class action for an injunction and attorney's fees, alleging that the controlling shareholder and tender offeror had materially misrepresented and failed to disclose the true nature of the offering price in violation of section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1964), and Rule 10b-5, 17 C.F.R. § 240.10b-5 (1969). The district court dismissed the petition for attorney's fees because plaintiff was not a purchaser or seller of securities and, therefore lacked the requisite standing to show that he relied upon the misrepresentation. The Court of Appeals for the Third Circuit reversed, holding that the strict purchaser-seller rule of *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952), applied to actions for damages but *not* to claims for *equitable* relief. The court rationalized its expansion of standing by an analogy to *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), which held that proof of reliance is not an independent element which must be established in addition to a showing of materiality. Further, the court followed another aspect of the *Mills* holding when it ruled that although the instant litigation would not produce a fund from which to award counsel fees, the target corporation (a nominal defendant) itself derived sufficient benefit from the plaintiff's activities to warrant directing it to reimburse plaintiff for those fees.

The court has broken new ground in the area of implied rights under section 10(b) and Rule 10b-5 by according standing to nontendering shareholders, a group embraced by neither the statute nor the rule. By so holding, the court demonstrated its agreement with the Second Circuit's ruling in *Mutual Shares Corp. v. Genesco, Inc.*, 384 F.2d 540 (2d Cir. 1967), wherein the court emphasized the important policing function accomplished by *injunctive* actions brought by "interested" individuals.

SOCIAL SECURITY

FAMILY ASSISTANCE — VALIDITY OF STATE LIMITATIONS ON WELFARE ALLOWANCES — *Dandridge v. Williams*, 38 U.S.L.W. 4277 (U.S. April 6, 1970).— Welfare disbursements under Maryland's Aid to Families with Dependent Children (AFDC) statute are determined by need, based on number of children and family living conditions, and are limited by a maximum disbursement. Petitioners challenged this statutory formula on the grounds that it was violative of the equal protection clause of the 14th amendment. Passing on this issue, the Supreme Court, noting that federal law grants each state great latitude in the administration of its AFDC payments [42 U.S.C. § 601 (1964)], reasoned that this, nevertheless, did not permit the state to impose a system of invidious discrimination. However, finding that none of the petitioners' fundamental rights were at stake, the Court held that Maryland need only show a *rational* basis for its statutory classification. The Court found that Maryland had made such a showing.

Although the Court gave express recognition to the fiscal probems facing the states, the standard applied in determining whether the state action was constitutionally permissible seems to retreat from the Court's prior position in *Shapiro v. Thompson*, 394 U.S. 618 (1969), wherein it

held that state classifications based on wealth could only be sustained by showing a *compelling* state interest.

THREE-JUDGE COURTS

28 U.S.C. § 2281 — ADMINISTRATIVE ORDERS — *Gold v. Lomenzo,* 38 U.S.L.W. 2430 (2d Cir. Jan. 22, 1970).— Appellant, a real estate broker, applied for a hearing before a three-judge federal district court, alleging that the New York Secretary of State's administrative order limiting brokers' commissions was confiscatory in nature. Upon finding that appellant's contention raised a substantial constitutional question to warrant the invocation of a three-judge court pursuant to 28 U.S.C. § 2281 (1964), the Second Circuit Court of Appeals ruled that the district judge was without power to deny the preliminary injunction, and reversed and remanded the denial of such hearing.

By assuming jurisdiction itself to reverse the lower court, the court of appeals adheres to the current trend away from the stringent rule of *Stratton v. St. Louis S.W. Ry.,* 282 U.S. 10 (1930), which had indicated that the only remedy for the improper denial of a three-judge court was a writ mandamus to the Supreme Court. Additionally, the court reaffirmed the long-established rule that section 2281 was intended to scrutinize both allegedly unconstitutional state statutes and questionable administrative orders issued under patently constitutional statutes.

TRUSTS

STOCK OF ISSUER HELD IN FIDUCIARY CAPACITY — RIGHT TO VOTE FOR DIRECTORS — *Cleveland Trust Co. v. Eaton,* 21 Ohio St. 2d 129, 256 N.E.2d 198 (1970).— Cleveland Trust sought a declaratory judgment to enable it to vote its own shares held by it as trustee in a trust created prior to January 1, 1968. The Ohio Supreme Court held that a recently enacted statute permitted the vote. The statute, OHIO REV. CODE ANN. § 1109.10 (Page 1968), allows banks to vote their shares held in trust under certain circumstances, notwithstanding a general statutory prohibition against corporations voting their shares. Those circumstances, for shares held by trusts created after January 1, 1968, include authorization by the beneficiaries. For trusts created prior to January 1, 1968, the vote must be conducted according to "any provisions of law applicable." Finding no statute preventing such a vote, the court held that neither the common law of trusts nor that of corporations supplied a prohibition.

While the court's reasoning with respect to corporate law has merit, it fails to grasp the potential for trustee conflict of interest between loyalty to the beneficiaries and allegiance to its own management. This potential is minimized by section 1109.10's requirement that beneficiaries of post-January 1, 1968 trusts must authorize the vote. However, for pre-January 1, 1968 trusts there is no such protection. In fact, the corporate trustee by acquiring its own shares could easily serve management's wishes under the guise of discharging its fiduciary function.

WATER AND WATER COURSES

SURTERRANEAN WATERS — POLLUTION — *Nelson v. C. & C. Plywood Corp.,* 38 U.S.L.W. 2464 (Mont. Sup. Ct. Feb. 13, 1970).— The well water in plaintiff's area was naturally high in iron and magnesium, but not unpalat-

able unless there were sufficient phenols in the water to form a precipitate. Expert testimony demonstrated that the glue dumped by neighboring defendant into sumps and wells on his property released phenols which percolated through the soil into plaintiff's water supply, thus rendering it unsuitable for drinking. Defendant relied upon the common law rule, which provided that the proprietor of soil on which percolating water is found has the right to use and control the soil as he pleases, even though such use may injure adjoining property. Holding for the plaintiff, the Montana Supreme Court found the common law rule was based on outmoded scientific understanding since modern hydrological innovations have made possible the accurate tracing of underground water.

By its action, the court has brought an end to the common law rule of percolating water in Montana and established an important precedent in the fight against pollution.