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COMMENTS

CONSTITUTIONAL LAW—PROPOSED SOUTH CAROLINA INDIGENT DEFENDANT ACT*

Since Gideon v. Wainwright1 the states have been faced with the problem of determining the nature and extent of the constitutionally imposed requirement of appointment of counsel for indigent defendants.2 The Proposed South Carolina Indigent Defendant Act, introduced this year before the general assembly, is an effort to resolve this problem.3 This comment proposes to examine that bill in light of the constitutional requirements delineated by cases before and after Gideon4 and to make brief footnote references to other legislative reaction to the problem.

A. What Criminal Prosecutions Require Appointed Counsel?

Prior to Gideon the accused had the right to appointed counsel in state courts in capital cases5 but not, in the absence of special circumstances, in non capital cases.6 Although Gideon erased

* A BILL—PROVIDING FOR THE APPOINTMENT OF COUNSEL TO REPRESENT INDIGENT DEFENDANTS (S.C. 1965).

2. See the study made in 1963 by Clack D. Hopkins, Jr., Esq., reporter for the South Carolina Bar Association, on the present practices of appointment of counsel in South Carolina. The study includes the results of discussions with attorneys, solicitors and judges and their reactions to the problems presented. This study, together with other state practices over the United States, is discussed in Silverstein, Defense of the Poor in Criminal Cases in American State Courts (1965) (hereafter referred to as Silverstein, Defense of the Poor).
4. See Kamisar & Choper, The Right to Counsel In Minnesota: Some Field Findings and Legal-Policy Observations, 48 Minn. L. Rev. 1 (1963) for an exhaustive treatment on many of the questions raised by Gideon.
6. Betts v. Brady, 316 U.S. 455 (1942). Prior to Gideon, in South Carolina the accused was guaranteed the right to counsel by the South Carolina Const. art. I, § 18, and appointed counsel was guaranteed by S.C. Code Ann. § 17-507 (1962). In accord with Betts v. Brady, supra, these provisions only applied to capital cases, absent special circumstances. See Shelton v. State, 239 S.C. 535, 123 S.E.2d 867 (1962). Shelton was later overruled by Pitt v. MacDougall, 245 S.C. 98, 138 S.E.2d 840 (1964) where the court recognized that there was no distinction between capital and non capital cases.

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this capital-non capital distinction by applying the sixth amendment guaranteed right to counsel in "criminal prosecutions" to state courts,\(^7\) it failed to define what criminal prosecutions required appointed counsel,\(^8\) and this failure has led to inconsistency in state decisions.\(^9\) Despite this inconsistency, it may be argued that the nature of the offense is determinative of the need for counsel.\(^10\) Consequently, the fact that the charge is serious\(^11\) or that a substantial prison sentence is involved\(^12\) may alone provide sufficient constitutional basis for a required appointment. The traditional felony-misdemeanor breakdown of the nature of the offense would not appear to meet these standards.\(^13\)

If the seriousness of the offense charged does become the test for appointment of counsel, the South Carolina bill appears to conform to this test by its emphasis on the length of the possible prison sentence. It requires the appointment of counsel where the crime is one for which a sentence of six months or more may be imposed.\(^14\)

8. "Whether the rule should extend to all criminal cases need not now be decided." Gideon v. Wainwright, supra note 7, at 351 (concurring opinion).
9. Compare People v. Witenksi, 15 N.Y.2d 392, 207 N.E.2d 358, 259 N.Y.S. 2d 413 (1965) (right of accused to appointed counsel where charged with stealing a half bushel of apples valued at two dollars and sentenced to thirty days or twenty five dollars) with State v. Lee, 143 S.E.2d 604 (S.C. 1965) (no right to appointed counsel in a prosecution for driving while intoxicated, an offense which under S.C. Code Ann. § 46-345 (1962) carries a fifty dollar fine and not more than thirty days).
10. "It is 'The nature of the charge . . . ' that underlines the need for counsel." Chewning v. Cunningham, 368 U.S. 443, 446 (1962).
11. Some members of the Court think that where serious offenses are charged, failure of a court to offer counsel in state criminal trials deprives an accused of rights under the Fourteenth Amendment. . . . Others of us think that when a crime subject to capital punishment is not involved, each case depends on its own facts. See Betts v. Brady [citation omitted]. . . . The philosophy behind both of these views is that the due process clause of the Fourteenth Amendment requires counsel for all persons charged with serious crimes.

13. Compare S.C. Code Ann. § 16-56 (1962) (felony to administer poison—sentence not more than ten years nor less than two years) with S.C. Code Ann. § 16-359.1 (1962) (shoplifting—sentence for third offense not less than one nor more than five years). Although not specified as a misdemeanor the latter section bears such an interpretation under S.C. Code Ann. § 16-12 (1962) (All offenses not specified as felonies are considered to be misdemeanors). This comparison indicates that there is no logical breakdown between felonies and misdemeanors as to the possible length of the prison sentence and the seriousness of the crime.
14. Proposed Bill § 1. In cases where the charge could carry a sentence of less than six months, the judge can appoint counsel at his discretion. The federal enactment provides for appointed counsel in every criminal case where
B. When Does Right to Counsel Begin?

The South Carolina bill provides for appointment of counsel after a determination of indigency and before the defendant is required to plead 15 and therefore satisfies the Gideon requirement that counsel be appointed at least by the time of trial. The constitutional question left unanswered by Gideon, however, is at what time prior to trial counsel must be appointed. The Supreme Court has said only that counsel must be appointed at the "critical stage" of the proceedings 16 and has held that an Alabama arraignment was such a stage. 17 The South Carolina Supreme Court has also declared that arraignment requires appointed counsel. 18 More recently, in White v. Maryland, 19 the Court held a preliminary hearing in Maryland to be a critical stage in the criminal prosecution. However, in South Carolina, our court has decided that a preliminary hearing was not a critical stage, 20 distinguishing White on the ground that the rights of the accused would not be prejudiced. In this state the only purpose of the preliminary hearing is to allow the state to show probable cause for binding the defendant over for grand jury action. 21 The defendant is not permitted to plead, and any state-

a defendant is charged with a "felony or a misdemeanor other than a petty offense." CRIMINAL JUSTICE ACT OF 1964, 18 U.S.C. § 3006A (b) (Supp. 1964) (hereafter referred to as CRIMINAL JUSTICE ACT). A crime is defined as a petty offense where the penalty does not exceed imprisonment for six months or the fine of not more than $500, or both. 62 Stat. 684 (1948), 18 U.S.C. § 1(3) (1950).

15. Proposed Bill § 1. Presumably the time set in this bill is before the accused is arraigned in general sessions court. The defendant is not required to plead and, in fact, cannot plead in the magistrate's court during a preliminary examination or a proceeding to have the defendant bound over for grand jury action. State v. White, 243 S.C. 238, 133 S.E.2d 320 (1963); S.C. Code Ann. § 43-232 (1962). The CRIMINAL JUSTICE ACT § 3006A (b) provides for appointment when the defendant appears before the United States Commissioner.


17. Hamilton v. Alabama, supra note 16 (defenses could be lost at this time).

18. Moorer v. State, 244 S.C. 102, 135 S.E.2d 713 (1964). Where the defendant was arraigned without counsel but rearraigned two days later with counsel, the defendant's constitutional right to counsel was not violated.

19. 373 U.S. 59 (1963). In both White and Hamilton the defendant was charged with a capital offense. See note 16 supra and accompanying text. However, the rationale of these cases will probably apply to non capital cases since Gideon erased this distinction at the trial level.


ment made by him cannot later be used at the trial. There is one factor that could possibly lead to the requirement of counsel at preliminary hearings in South Carolina. Although it may be merely a nominal right in light of its questionable effectiveness, the accused may cross-examine the state’s witnesses in an attempt to show lack of probable cause for binding the defendant over for grand jury action. As Mr. Justice Sutherland said in Powell v. Alabama:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of the law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Although Powell concerned the right to appointed counsel at the trial level, it is arguable that the Supreme Court could apply this reasoning and declare a preliminary hearing “critical” where the defendant has the right of cross-examination.

The sixth amendment guarantee of right to counsel can also apply prior to the preliminary hearing. In Escobedo v. Illinois it was held that the accused must be permitted to consult with his lawyer during police interrogation when the process shifts from the investigatory to the accusatory stage. The problems

22. State v. White, 243 S.C. 238, 133 S.E.2d 320 (1963). See Pointer v. Texas, 380 U.S. 400 (1965) (decided on grounds other than the right to counsel) where the validity of a Texas preliminary hearing was discussed. However, the question was reserved as to whether other circumstances made this proceeding a critical stage.

23. Another consideration is that this hearing is the defendant’s only opportunity to find out anything about the state’s case before trial. See Dancy v. United States, 34 U.S.L. Week 2212-13 (D.C. Cir. 1965). But see Application of Hoff, 393 F.2d 619, 620 (Nev. 1964).

24. 287 U.S. 45 (1932).

25. Id. at 68, 69. (Emphasis added.)


27. The Court held inadmissible a confession where the accused had been denied the right to consult with retained counsel and had not been advised of his right to remain silent. This case did not discuss the problem of appointment of counsel, but if such a case were presented, the Court would seem to have precedent in Escobedo to require appointment of counsel during interrogation. See Massiah v. United States, 377 U.S. 201 (1964) (right to counsel after an indictment but prior to trial in a federal prosecution). See also An Historical
of appointing counsel for the indigent during police interrogation are not covered by the bill, and it is possible that these problems would better be resolved by the police than by an assigned counsel system. They, at least, could inform the person of his right to remain silent and of his right to counsel and thus meet the chief objections of the Court in Escobedo. Moreover, if appointment were required at this level, it would present major difficulties; among them would be the problem of having some official determine indigency before any interrogation and the increased workload for appointed attorneys.

6. When Does the Right to Counsel End?

The indigent criminal defendant is constitutionally entitled to counsel on appeal.28 Accordingly, the South Carolina bill provides that "a defendant who has been convicted and has been sentenced for six months or more may apply to the trial judge or to the resident judge for the appointment for appeal."29 Other post-conviction remedies, however, are less clear. Habeas corpus, for example, is considered to be essentially a civil proceeding and the right to counsel does not attach.30 On the other hand, an argument can be made that such a right does exist. Under the Douglas v. California31 rationale the poor are denied equal protection because the rich can afford to retain counsel on appeal. This reasoning would also apply to habeas corpus or other post-conviction proceedings.32


29. Proposed Bill § 1. It appears that the attorney appointed at the trial remains with the case through the appeal. There are provisions, however, for withdrawal of counsel for good cause shown during the trial (§ 19) or during pendency of an appeal (§ 20). The procedure under the CRIMINAL JUSTICE ACT § 3006A(c) is similar.

30. See, e.g., Dorsey v. Gill, 148 F.2d 857, 877 (D.C. Cir. 1945). See also The District Court of South Carolina Plan for Implementation of the Criminal Justice Act, which provides that the act has no application to habeas corpus or other proceedings, collateral to the original case. However, some states have passed legislation for appointment of counsel in these proceedings. See, e.g., N.C. GEN. STAT. § 15-219 (1965) (Supp. 1963).


D. Waiver of the Right

The bill provides for waiver of the right to counsel in all but capital cases.33 The trial judge must make reasonable inquiry of the defendant prior to the trial to determine if the defendant has understandingly waived his right.34 Once this has been decided a waiver form is executed35 and becomes part of the record of the case.36 There is no absolute rule as to what constitutes a waiver.37 Generally, it must be understandingly, competently and intelligently made38 without the elements of pressure or coercion.39 The waiver form in the bill appears to meet these qualifications.40

E. Determination of Indigency

The constitutional, factual determination of indigency has received little clarification in cases concerning the rights of the accused.41 Mr. Justice Goldberg may have indicated a standard in a recent case.

"Indigence must be conceived as a relative concept. An impoverished accused is not necessarily one totally devoid of means. . . ." An accused must be deemed indigent when "at any stage of the proceeding [his] lack of means . . . substantially inhibits or prevents the proper assertion of a

33. Proposed Bill § 1. Waiver is also provided for in the Criminal Justice Act § 3006A (b).
34. Proposed Bill § 10.
36. Proposed Bill § 11. This is an important provision because no waiver will be presumed from a silent record. See Carnley v. Cochran, 369 U.S. 506 (1962); accord, Pitt v. MacDougall, 245 S.C. 98, 138 S.E.2d 840 (1964).
37. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case including the background and conduct of the accused.
40. The undersigned represents to the Court that he has been informed of the charges against him, the nature thereof, the statutory punishment therefor and the right to appointment of counsel upon his representation to the Court that he is unable to employ counsel and the reasons therefor, all of which he fully understands. The undersigned now states to the Court that he does not desire the appointment of counsel, expressly waives it and desires to appear in all respects in his own behalf, which he understands he has the right to do.
41. This may be the reason the Criminal Justice Act § 3006A (b) specifies defendants who are "financially unable to obtain counsel." The statute defines no standard for the determination of indigency.
[particular] right or a claim of right. . . ." Indigence must be defined with reference to the particular right asserted. Thus, the fact that a defendant may be able to muster enough resources, of his own or of a friend or relative, to obtain bail does not in itself establish his non-indigence for the purposes of purchasing a complete trial transcript or retaining a lawyer.42

Whether this will become the test of indigency is an open question. The affidavit form contained in the bill43 covers the factual question of the defendant's personal financial ability to employ a lawyer and, therefore, will apparently conform to Mr. Justice Goldberg's standard if that standard is adopted. On the basis of the affidavit form and any other information brought to the attention of the court, the trial judge determines indigency under the proposed South Carolina act.44

F. Compensation of Appointed Counsel

Due to the prohibitive cost to the state, the bill does not provide for state payment of fees.45 It does, however, provide for a judgment to be entered against the defendant in favor of the attorney in an amount equal to the usual compensation for such

42. Hardy v. United States, 375 U.S. 277, 289 n.7 (1964) (indigent's right to a free transcript). Mr. Justice Goldberg's authority for this assertion was the ATT'Y. GEN. COMM. ON POVERTY & THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE REP. (1963) indicated by quotation marks in the text above.

43. 1. By whom are you employed? __________
   2. What is your present income? $________ Weekly, $________ Monthly, $________ Other.
   3. Are you married? __________
   4. How many children under age 18 do you have? __________
   5. What kind of car do you own? __________
   6. Is it paid for? _______ If not, what are the payments? _______
   7. State specifically all property which you own and give location and value. _______
   8. How much do you owe? _______

I hereby declare under the penalties of perjury that the foregoing answers are true, correct and complete and that I am financially unable to employ counsel to represent me in this action. I hereby request the Court to appoint counsel to represent me in this action.

PROPOSED BILL, FORM No. 1

44. PROPOSED BILL § 8-A.

45. PROPOSED BILL § 1. See SOUTH CAROLINA LEGISLATIVE COMM. REP. 1, 2 (Comm. Print 1964). The cost of such a system was estimated to be $169,847.00 on the basis of North Carolina's cost during a six month period. Compare the SOUTH CAROLINA PROPOSED BILL WITH N.C. GEN. STAT. § 15-5 (Supp. 1963) which provides for attorneys fees to be paid by the state, and the CRIMINAL JUSTICE ACT § 3006A(d) (Maximum fees allowed—fifteen dollars per hour for time expended in court, ten dollars for time expended out of court—$300 maximum in a case of one or more felonies and $300 for misdemeanor cases.)
cases and for garnishment of defendant's wages to satisfy the judgment.46 Presumably, however, out of pocket expenses will be paid by the state treasury.47

Compensation of appointed counsel is a controversial subject. Some have argued that the indigent's rights will be better protected under a system that provides compensation;48 others contend that the defense of the indigent has always been the duty of the attorney as an officer of the court.49 At least one attorney feels that appointment without compensation violates constitutional rights.50 The right of the indigent accused to an adequate defense is the prime concern under either system and the legislature must decide between placing the burden on the bar under an uncompensated system or on the public with payment out of state funds.

G. Choice of a Plan

The bill provides for county bar associations to adopt a plan for the designation of attorneys to serve as assigned counsel.51 An attorney will be appointed generally only in the county where he resides52 and the indigent will not be able to select an attorney to represent him.53

46. Proposed Bill § 3. The purpose of this section is not so much to collect a fee as it is to protect the attorney from defendants who are actually not indigent. The perjury provision for a false affidavit (§ 5) will not practically stop this problem. It is thought by many that if the defendant knows a judgment will be entered against him, he will be more likely to inform the court of his true financial status because if he later is found not to be indigent the attorney will be able to collect his fee.

47. Proposed Bill § 1. "Upon application to the court by the indigent defendant, or his appointed attorney, reasonable expenses to insure his defense or appeal may be allowed by the court and payment shall be made by the State Treasurer."


50. See Dillon v. United States, 230 F. Supp. 487 (D. Ore. 1964) which held that counsel must be awarded just compensation under the fifth amendment for his services. This case was later overruled by the United States Court of Appeals for the Ninth Circuit. See 33 U.S.L. Week 2673 (1965).

51. Proposed Bill § 12. The bar will provide the county clerk of court with a list of attorneys in that particular county, and the assignments will be made from this list. See South Carolina Legislative Comm. Rep. 4 (Comm. Print 1964). The Criminal Justice Act § 3006A(a) provides for representation by private attorney and/or attorneys furnished by a bar association or legal aid society. There is no provision for a public defender system.

52. Proposed Bill § 14.

53. Proposed Bill § 15.
There is no provision for a public defender system, apparently because of its probable unworkability in sparsely populated areas and the prohibitive cost to the state. But whatever the motive, it seems that the assigned counsel plan is better suited to this state at the present time.

H. Services Other Than Counsel

There is no specific provision for investigative or expert services. It is provided, however, that "upon application to the court by the indigent defendant, or his appointed attorney, reasonable expenses to insure his defense . . . may be allowed by the court and payment shall be made by the State Treasurer," and this provision could be considered broad enough to allow such services. It has been argued that the right to assistance other than counsel is required on the basis of the rationale of the Supreme Court in Douglas v. California. Douglas held that to deny an indigent the right of an appeal which the rich enjoy violates the equal protection clause of the fourteenth amendment. To deprive an indigent of expert and investigative services which the rich can afford could therefore be a similar denial.

I. Conclusion

The problems arising from the constitutional requirements of counsel for the indigent accused will only be settled by future court decisions. The Proposed South Carolina Indigent Defendant Act is not intended to be a panacea, but whatever the shortcomings of the act, it will provide a uniform system for the appointment of counsel in this state. Whether or not one agrees with Gideon, some action must be taken to meet the requirement of providing an adequate defense for the indigent, and this proposed legislation seems to be a step toward meeting this challenge.

JOHN U. BELL, III

55. See for a discussion of public defenders, David, Institutional or Private Counsel: A Judges View of the Public Defender System, 45 Minn. L. Rev. 753 (1961). For a comparison of the assigned counsel plan with the public defender system, see 1 Silverstein, Defense of the Poor 63 (1965).
56. Compare the Criminal Justice Act § 3006A(e) which specifically provides for "investigative, expert or other services necessary to an adequate defense."
57. Proposed Bill § 1.
59. See Note, Right to Aid in Addition to Counsel for Indigent Criminal Defendants, 47 Minn. L. Rev. 1054, 1058 (1963).
FEDERAL CIVIL PROCEDURE—DISCOVERY OF
EXISTENCE AND AMOUNT OF DEFENDANT'S
INSURANCE POLICY*

A controversial question which has divided the courts on numerous occasions is whether the existence and amount of a defendant's liability insurance coverage is discoverable under the Federal Rules of Civil Procedure. Much has been written about this question, but no definite answer has yet been reached.¹

Insurance is unique in that it is virtually the only fact bearing on the collectibility of the judgment which the plaintiff must ascertain from the defendant, or not at all.² The general rule,³ and the one followed by the trial courts in South Carolina,⁴ is that the existence of insurance may not be proved at the trial of a case. This rule is subject to an exception where the plaintiff is attempting to show ownership or control of a vehicle.⁵ An entirely different problem arises, however, when the plaintiff seeks to discover the existence and amount of the defendant's insurance where control or ownership is not in issue, and although this information, if obtained, would not be admissible into evidence.

The Federal Rules, by virtue of their express provisions and as a result of their construction and application by the courts, afford simple and effective means for narrowing the issues and obtaining evidence for use at trial. The discovery remedies they set forth embody a far-reaching step toward achieving their principal goal—elimination of the sporting theory of justice⁶ by making "a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to fullest practicable extent."⁷ The basic philosophy of the Federal Rules is that


2. S.C. Code Ann. § 46-333 (1962). If either a motorist's name or license tag number is known, the name of the insurance company with whom an individual motorist is insured may be obtained by requesting this information from the S. C. Highway Department.


4. There have been however, no reported South Carolina cases expressly upholding this proposition which have been brought to the attention of the author.


prior to trial every party to a civil action is entitled to the disclosure of all relevant information in the possession of any person, unless such information is privileged. Certainly the requirement of relevancy should be given a liberal common sense construction rather than in terms of narrow legalisms, but it is arguable that it should not be expanded to allow the discovery of all information that might possibly be relevant to the subject matter of the action. In either event, however, relevancy will furnish the plumbline for testing the asserted right of discovery. 8

Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. 9

Rule 26(b), stated above, permits discovery of all matters which are relevant and not privileged. Since no question of privilege has been raised as to insurance policies, their relevance to the subject matter becomes the sole question.

A recent Idaho case has focused attention upon this problem. 10 The plaintiff, whose wife was killed in an automobile accident, served written interrogatories calculated to elicit information as to “the coverage and limits of defendant’s liability insurance policy, if one existed.” 11 The court ordered the defendant to answer the interrogatories and he refused. The question was appealed to the Supreme Court of Idaho which held that the defendant’s insurance coverage was not subject to pre-trial discovery in an accident case. Rule 26(b) of the Idaho Rules of Civil Procedure 12 is identical to Rule 26(b) of the Federal Rules.

9. Ibid.
11. Id. at 591.
The courts which permit discovery in this area do so primarily on the basis that this information is relevant and that a disclosure of the insurance coverage would greatly facilitate settlements between the opposing parties. A leading case, Johaneck v. Aberle, held that the test was not whether the information sought would be admissible in evidence or relevant to the precise issues in the case but whether it was relevant to the subject matter involved. Maddox v. Grauman concluded that since the question of insurance was relevant to the subject matter after the plaintiff prevailed, it was relevant to the subject matter while the action was pending. In Maddox it was said that "an insurance contract is no longer a secret, private, confidential arrangement between the insurance carrier and the individual but it is an agreement that embraces those whose person or property may be injured by the negligent act of the insured."

The large number of vehicles in use today and the tendency for fast driving has enormously increased the number of highway motor accidents. These conditions have resulted in more stringent regulations designed for the protection and benefit of the public and have furthered the legislative trend toward requiring owners of motor vehicles not only to maintain liability insurance but also to establish minimum requirements for limits of liability as well. Obviously, this legislation is designed primarily to protect the public from the negligent operation of motor vehicles.

Brackett v. Woodall Food Prods. acknowledged the importance of this legislation in considering the problem of relevancy by saying that "from the tenor and purposes of this legislation it is obvious that such insurance policies are definitely relevant to the subject matter of pending actions growing out of accidents covered by such policies." A leading Colorado case held that the procedure which allows depositions to elicit information concerning the existence and policy limits of liability insurance is the best rule "and the one which is more in accord with the object, purpose and philosophy of the Rules of Civil Procedure." The court felt that justice would be promoted by removing secrets and mysteries through discovery. In addition, the argument is made in those jurisdictions which have financial

14. 265 S.W.2d 939 (Ky. 1961).
15. Id. at 942.
17. Id. at 6.
responsible laws that this statute gives injured persons a direct interest in the insurance coverage, thus entitling them to discovery of the amount. 19

There is one final consideration to which the courts allowing discovery have given weight. Rule 1 of the Federal Rules declares that the rules shall be construed "to secure the just, speedy, and inexpensive determination of every action." Knowledge of the defendant's insurance would permit a more realistic appraisal of a case and undoubtedly lead to the settlement of cases which otherwise would go to trial. Since Rule 26(b) is not in itself decisive, those courts believe that the mandate of Rule 1 requires that construction of Rule 26(b) which will lead to the speedy determination of actions by settlement. 20

Before presenting the arguments against the discovery of insurance coverage, the arguments set forth above should be briefly examined. The first sentence of Rule 26(b) says that the defendant may be examined regarding any matter "relevant to the subject matter involved." If this phrase is liberally construed, as it is in many instances, almost anything the examiner would like to know becomes relevant to the subject matter; otherwise he would not attempt to discover it. To say that a thing may be generally relevant implies with equal weight that it may be generally irrelevant. Another argument is that settlement negotiations would be greatly aided by the disclosure of the defendant's insurance coverage. This is not to say, however, that settlement itself will necessarily be promoted. This argument is not entirely without merit, for one of the objects of the law is to promote out of court settlements, and undoubtedly a plaintiff's counsel would not refuse a settlement in anticipation of a hundred thousand dollar verdict in a case which has a ten thousand dollar ceiling. On the other hand, settlement negotiations might be hindered because one party knows of the high insurance coverage and holds out for more, when under the circumstances he would have ordinarily have settled for less if this information had not been made available to him.

Courts which do not permit discovery of insurance base their reasoning on one of two grounds, or both. The first is the individual's right to be free from unreasonable invasions of


privacy. To permit discovery would disclose the confidential affairs of a defendant which were neither relevant nor necessary to determine any issue in the litigation. The second is that the information sought is not discoverable because it would not ordinarily lead to the production of admissible evidence. It was said in Langlois v. Allen that even though the insurance coverage is relevant and important in one sense of the word, unless it is relevant to the subject matter of the particular case, it is not discoverable.

Rules of discovery adopted by our courts are designed to serve the just, speedy and inexpensive determination of every action. . . . [T]hat does not mean that information should be discoverable which is desired only for the purpose of placing one party in a more strategic position than he otherwise would be by acquiring information that has nothing to do with the merits of the action; there must be some connection between the information sought and the action itself before it becomes discoverable.

Insurance coverage has been held exempt from discovery not only because the information would be irrelevant and could not be introduced at the trial, but also because the information disclosed would have nothing to do with the presentation of the case nor come within one of the objectives of discovery procedure.

Dictum in Hickman v. Taylor gives an insight into what the Supreme Court believes to be the purposes of pre-trial procedure. These three objectives are to narrow the issues, to provide relevant information and to produce testimony reasonably calculated to lead to discovery of admissible evidence. If a broad interpretation is to be given to the requirement of relevancy, it cannot be denied that insurance coverage is relevant. On the other hand, the wording of Rule 26(b) is clear and requires that testimony obtained must appear "reasonably calculated to lead

to the discovery of admissible evidence.” What admissible evidence can possibly result from knowledge of the defendant’s insurance coverage?

A basic concept of tort law insures the right of entry into our courts to any person for the purpose of (1) proving liability for an injury and (2) proving damages which resulted from the injury. The existence and the amount of the defendant’s insurance, however, is in no way related to this concept. Civil procedure rules were formed to promote the inexpensive, speedy and just determination of every action. Determination of an action, as used by the Federal Rules, should be construed to mean the disposition of a case by some means over which the court has control and not by disposition of a case through settlement. Although the law favors compromise through settlement, it does not do so at the expense of giving one party an advantage over the other in order to bring about settlement.

A majority, although not an overwhelming one, of state courts which have squarely encountered this problem appear to have barred discovery of insurance coverage when no independent basis of relevancy existed to make the question of insurance bear directly upon the issues in the case. At present, the federal courts are moving toward allowing discovery of liability policy limits. Although this trend was recently supported in Ash v. Farwell, it could be reversed by a strong opinion from another federal court of appeals.

WILLIAM W. WILKINS, JR.


TRADE REGULATIONS—ROBINSON-PATMAN ACT—SELLING AT UNREASONABLY LOW PRICES MEANS SELLING AT PRICES LESS THAN FULLY DISTRIBUTED COST WITH PREDATORY INTENT*

National Dairy Products Corp. is engaged in the business of purchasing, processing, distributing and selling milk and other dairy products throughout the United States under its national labels of Sealtest and Kraft. Through its processing plant in Kansas City, Missouri, National Dairy has for the past several years been in competition with national and local dairies in greater Kansas City. In this area it distributes its products directly, while other markets are served by independent distributors who purchase milk from National Dairy and resell on their own account.

National Dairy was charged with violations of both the Sherman Act and the Robinson-Patman Act. The Robinson-Patman counts charged National Dairy and Wise, a vice president and director, with selling milk in those markets at “unreasonably low prices for the purpose of destroying competition.” The indictment specifically alleged that National sold milk below cost.

National Dairy and Wise moved to dismiss the Robinson-Patman counts on the grounds that the statutory provision “unreasonably low prices” is so vague and indefinite as to violate the due process requirement of the fifth amendment and that an indictment based on this provision is violative of the sixth amendment in that it does not adequately apprise a defendant of the charges. The district court, after rendering an oral opinion holding that section three of the Robinson-Patman Act was unconstitutionally vague and indefinite, granted the motion and ordered dismissal of the section three counts. The order was appealed and the Supreme Court reversed, holding that section three was not unconstitutionally vague as applied to sales made below cost with specific intent to destroy competition and that sales below cost were “unreasonably low.”

In proscribing sales at ‘unreasonably low prices for the purpose of destroying competition’, we believe that Congress condemned sales made below cost for such purpose. Whether

below cost refers to "direct cost" or "fully distributed" cost or some other level of cost computation cannot be decided in the abstract, and we do not reach that issue here.²

On remand it was held that even though National made no sales below "direct cost", i.e., raw material (milk), processing and container cost, it violated section three by selling below "fully distributed cost" which includes the cost of production plus the additional allocated delivery, selling and administrative costs, including national advertising costs.

The Supreme Court cautioned that its opinion was not to be construed as holding that every sale below cost constitutes a violation of section three. They held that a necessary element to such a violation was predatory intent and that such below cost sales were not condemned when made in furtherance of a legitimate commercial objective.³ An earlier case along this same line held that "one who reduces his prices in defense of his economic life cannot be guilty of eliminating competition or his competitors."⁴ It is apparent, however, that this "legitimate commercial objective" test leaves many questions unanswered. Suppose sales are made below cost where both legitimate business aims and predatory intent exist. This situation is not unusual where a business or manufacturer may find it profitable to sell or manufacture below cost to absorb a portion of its overhead while realizing that a competitor as a result may be eliminated.⁵ Or suppose sales are made below cost to increase volume of sales and therefore decrease unit production cost while realizing that a competitor near bankruptcy will be financially ruined. These questions are as yet unsolved and can only be answered by future litigation.

The primary question left unanswered by the earlier Supreme Court Case is, what is cost? The Court made it clear that it did not reach the issue of whether below cost refers to "direct" or "fully distributed" cost or some other level of cost computation.⁶ In resolving the issue in the instant case, the court of appeals

said that below cost referred to "fully distributed" cost. However, questions still remain. Why was cost used as a standard in the determination of "unreasonably low price?" How will cases in the future construe below cost? Will below cost even be used, be it "direct" or "fully distributed," as a standard in determining the reasonableness or unreasonableness of a price?

In order to more fully understand this decision and to determine whether it sets a standard upon which the vendor or producer can judge his activity and thus prevent conviction under the "unreasonably low price" provision, one must consider several factors. It has been held that section three was intended to carry only criminal sanctions. However, price discriminations, to the extent that they were common to both section three of Robinson-Patman and section two of the Clayton Act, were also understood to carry private remedies under the Clayton Act. This means that although price discriminations are both criminally punishable under section three of the Robinson-Patman Act and subject to civil redress under section two of the Clayton Act, selling at "unreasonably low prices" is subject only to criminal penalties provided in section three of the Robinson-Patman Act.9 Due to the criminal provisions of section three, its constitutionality has been repeatedly questioned.10 Indeed, the Report of the Attorney General's National Committee to Study the Antitrust Laws urged repeal of that section.11 In spite of, or as a result of, the fears of the criminal provisions of section three, there have been few cases concerning the criminal prohibitions of that section, and in each of these instances the Robinson-Patman charge was joined with a Sherman Act count which alone might have achieved the same enforcement success.12 "The paucity of litigation under section three has given it the status

11. ATTY. GEN.'S NAT'L. COMMITTEE ON ANTITRUST REP. 201 (1955).
of the proverbial 'sleeping dog' whose ferocity heretofore has been untested.\textsuperscript{13}

In determining whether below cost generally and below "fully distributed cost" particularly will be the standard used in future cases to determine what is meant by "unreasonably low," a number of observations appear relevant. Even before the Robinson-Patman amendment was passed in 1936, below cost was used as a factor in determining whether certain activity came within the proscriptions of the Sherman Act.\textsuperscript{14} In 1958, after the Robinson-Patman Amendment, the court also used the fact that there was no evidence of selling below cost or at unreasonably low prices to determine if there was a violation of the anti-trust laws.\textsuperscript{15} It would seem, therefore, that in view of the fact that below cost has been used as a standard in determining violations of the antitrust laws in the past, it was not improbable that it would be used with reference to the "unreasonably low prices" clause of the Robinson-Patman Act. This opinion was strengthened by the fact that there have been few reported cases brought under the state statutes, which explicitly prohibit sales below cost, wherein the cost of selling an item was determined. It seems clear that references to cost are camouflage used to shelter the statutes from attacks of unconstitutionality.\textsuperscript{16} In view of the many questions concerning the constitutionality of the Robinson-Patman Act, perhaps the court used below cost in order to set a standard for determining "unreasonably low prices" to assure its constitutionality and increase the frequency of its use. Since the state statutes prohibiting sales below cost have been repeatedly held constitutional, it is unlikely that the "unreasonably low price" clause based on any standard of below cost will be seriously challenged. Now, with the uncertainty of section three at least reduced, will there be more criminal prosecutions under it?

\textsuperscript{13} 32 Geo. Wash. L. Rev. 126, 128 (1963).

\textsuperscript{14} In Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931), the Court used the fact of selling below cost as a factor in a conviction for violations of the Sherman Act. In United States v. International Harvester Co., 274 U.S. 693 (1927), a factor supporting a finding that the Sherman Act had not been violated was that there had been no sales below cost. In Standard Oil Co. v. United States, 221 U.S. 1 (1911), the Court said that sales below cost without a justifying business reason may come within the proscriptions of the Sherman Act.


Assuming finally that "unreasonably low prices" means prices below cost, the question, what is below cost, remains. As already noted, the court held below cost to mean below "fully distributed cost" as opposed to below "direct cost" as urged by the appellant. Although the problems of defining "cost" are manifold, cost accounting has reached the exactness of a science and the courts have recognized the elements which go into establishing cost. The holding that below cost means below "fully distributed cost" is consistent with prior interpretations of "cost" and the meaning of "cost" as established in the state statutes. The state statutes that apply to producers usually define costs separately for production and distribution. Production costs include raw materials, labor, and overhead, while distribution costs include the lower of invoice or replacement cost plus the "cost of doing business." "Cost of doing business" and "overhead" are defined as including labor, rent, depreciation, selling expense, maintenance, interest on borrowed capital, delivery expense, credit losses, licenses, taxes, insurance and advertising. On the basis of common sense and the foregoing authority, it is evident that the holding that below cost meant below "fully distributed cost" was clearly correct and the only reasonable conclusion under the circumstances.

It is immediately realized that many questions remain unanswered concerning the ramifications of section three. Is "unreasonably low price" always synonomous with below cost after this decision? What would be the result if sales were one cent below cost or one cent above cost? Over how long a period does an alleged violator have to sell at an "unreasonably low price?" Notwithstanding the many unanswerables, it is evident from this decision that a vendor or producer now has notice that if, intending to destroy competition, he sells his products at a price which is below the "fully distributed cost" of the product, he is subject to the criminal sanctions of the Robinson-Patman Act.

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17. See 57 YALE L.J. 391 (1948).