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THE PRIVATE CLUB EXEMPTION TO THE CIVIL RIGHTS ACT OF 1964

Wheaton-Haven Recreation Association operated a nonprofit swimming pool for its members and their guests. The Association's bylaws provided that membership would be open to bona fide residents of the area within a three-quarter mile radius of the pool. Applicants had to be approved by a majority of those present at a meeting of either the membership or the board of directors. A black couple bought a home located within the three-quarter mile radius. In 1968 they applied for membership in the Association, but the board of directors refused their application. Previously, two white members of Wheaton-Haven had brought a black guest to the club pool. Thereafter, Wheaton-Haven adopted a new rule limiting guests to relatives of members. The black couple, white members, and the black guest joined as plaintiffs and sought to enjoin Wheaton-Haven from denying membership on the basis of race. Plaintiffs contended that Wheaton-Haven was an entertainment establishment within the scope of the public accommodations section of the Civil Rights Act of 1964¹ and not a private club, which is expressly exempted under the Act.² A federal district court granted defendant's motion for summary judgment,³ the Fourth Circuit affirmed,⁴ and plaintiffs appealed.

1. 42 U.S.C. § 2000a (1970) provides in part:

(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

...
(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment

2. 42 U.S.C. § 2000a(e) (1970) provides: "The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section."

3. *Tillman v. Wheaton-Haven Recreation Ass'n*, 451 F.2d 1211 (4th Cir. 1971).

4. *Id.* at 1220.

In *Tillman v. Wheaton-Haven Recreation Association*⁵ the Supreme Court held that Wheaton-Haven was not a private club within the meaning of section 2000a (e) of the Civil Rights Act of 1964. The Court based its holding on an earlier decision in *Sullivan v. Little Hunting Park, Inc.*,⁶ as well as on a finding that membership in Wheaton-Haven was open to every white person in the geographic area. The Court noted that the only restrictions were "the stated maximum number of memberships and, as in *Sullivan*, . . . the requirement of formal board or membership approval."⁷

Generally, courts have failed to employ uniform criteria in deciding what constitutes a private club under the 1964 Act.⁸ This tendency is exemplified by the opposing opinions of the Fourth Circuit and the Supreme Court in *Tillman*. The Fourth Circuit found that because of its structure, membership requirements, social function, and degree of exclusiveness, Wheaton-Haven qualified as a private club.⁹ Yet the Supreme Court, applying identical criteria, reached the opposite conclusion.¹⁰ The different results reached by the Fourth Circuit

5. 410 U.S. 431 (1973).

6. 396 U.S. 229 (1969). This case involved a non-stock corporation, organized for recreational purposes in a residential subdivision, in which a homeowner could assign his membership to any person renting the home. When the corporation's board refused to approve a membership that had been assigned to a black because of his race, suit was instituted for both injunctive relief and damages under 42 U.S.C. § 1982 (1970). The Supreme Court granted relief, holding that the assignment of the membership after renting a member's home fell under the right to "lease" protected by the Civil Rights Act of 1866. 396 U.S. at 237. The community recreation association could not claim immunity from the 1866 Act on the ground that it was a private club because "there was no plan or purpose of exclusiveness." *Id.* at 236.

7. 410 U.S. at 438.

8. The period directly following the passage of the Civil Rights Act of 1964 witnessed countless attempts to take advantage of the exemption by means of reclassifying facilities as private clubs. Virtually all of the establishments challenged under this Act had initially been operated as public accommodations and were subsequently reorganized as private clubs. *See Daniel v. Paul*, 395 U.S. 298 (1969); *United States v. Richberg*, 398 F.2d 523 (5th Cir. 1968). For this reason it has been a relatively easy matter for the judiciary to employ a "shot-gun" approach in this area of litigation by enumerating all conceivably relevant facts and denying the claim for exemptions without formulating a uniform test. *See, e.g., United States v. Jack Sabin's Private Club*, 265 F. Supp. 90 (E.D. La. 1967).

9. 451 F.2d at 1220.

10. 410 U.S. at 438.

and the Supreme Court in applying these criteria to *Tillman* illustrate the difficulty of establishing the parameters of the private club exemption.

I. STRUCTURE

The Fourth Circuit emphasized the fact that Wheaton-Haven was "owned, operated and controlled entirely by its members."¹¹ Most courts considering private club claims under Title II have investigated the internal structure of the club. When a profit motive and a lack of member-ownership and governance were absent the structure was deemed inconsistent with the nature of a private club.¹² The Supreme Court, however, looked beyond the form of organization to the actual operations of the club, noting that Wheaton-Haven did not exhibit any selectivity in its qualifications for admission.¹³ This approach is consistent with the Court's decision in *Sullivan* in which the requirement of formal board or membership approval of new members was not automatically determinative of private club status. Rather, the issue was whether the organization claiming the exemption could show a "plan or purpose of exclusiveness."¹⁴ The fact that the club was governed by its members was in itself insufficient to establish private club status.¹⁵

II. OPEN TO GENERAL PUBLIC

Another requirement for private club status is that the club be closed to the general public.¹⁶ The Fourth Circuit found that Whea-

11. 451 F.2d at 1220.

12. *See, e.g.*, *Daniel v. Paul*, 395 U.S. 298, 301 (1969). In *Daniel* Justice Brennan defined the resort in question as "simply a business operated for a profit with none of the attributes of self-government and member-ownership traditionally associated with private clubs." *Id.* It therefore failed to qualify as a private club because it was blemished by the existence of a profit-making motive and the absence of member-ownership or member-control. *Id.* *See also* *Nesmith v. Y.M.C.A.*, 397 F.2d 96, 101-02 (4th Cir. 1968); *United States v. Jack Sabin's Private Club*, 265 F. Supp. 90, 91 (E.D. La. 1967); Note, *The Private Club Exemption to the Civil Rights Act of 1964: A Study in Judicial Confusion*, 44 N.Y.U.L. Rev. 1111, 1129-30 (1969).

13. 410 U.S. at 438; *see* text at notes 6-7 *supra*.

14. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1969).

15. *Id.* at 234.

16. *See* note 2 *supra*. *See also* *Nesmith v. Y.M.C.A.*, 397 F.2d 96 (4th Cir. 1968).

ton-Haven's membership was not open to, nor did the Association purport to serve, all of the general public in any recognizable community.¹⁷ The majority noted that a nearby suburb of Washington, D.C., a residential area of almost two square miles, would have a population substantially greater than the population Wheaton-Haven was designed to serve.¹⁸ The majority concluded that although Wheaton-Haven's bylaws specified that membership would be open to bona fide residents within a three-quarter mile radius of the pool, the residents of this area could not be regarded as the "general public." The Fourth Circuit found that by limiting its membership to 325 families, Wheaton-Haven had deliberately avoided any attempt to serve the community as a whole.¹⁹

The Supreme Court, however, found that Wheaton-Haven was open to the white community in the geographic area, despite the fact that the club's total membership was limited to 325 families.²⁰ This finding was in line with other cases holding that a limit on the number of memberships is not determinative of exclusiveness.²¹ In *Castle Hill Beach Club, Inc. v. Arbury*²² the formal membership ceiling was based only on the facility's physical capacity for growth. In *Clover Hill Swimming Club, Inc. v. Goldsboro*²³ the mere existence of a membership limit, determined by the number of persons who could effectively be served, did not change an otherwise public accommodation into a private one.

A club may be viewed as holding itself out to the general public if it either creates an expectation of admission, directly or indirectly, through advertising²⁴ or makes its membership incidental to a public sale or lease of housing.²⁵ The Fourth Circuit noted that

17. 451 F.2d at 1220.

18. *Id.*

19. *Id.*

20. 410 U.S. at 433.

21. *Clover Hill Swimming Club, Inc. v. Goldsboro*, 47 N.J. 25, 219 A.2d 161 (1966); *Castle Hill Beach Club, Inc. v. Arbury*, 2 N.Y.2d 596, 142 N.E.2d 186, 162 N.Y.S.2d 1 (1957).

22. 2 N.Y.2d 596, 142 N.E.2d 186, 162 N.Y.S.2d 1 (1957).

23. 47 N.J. 25, 219 A.2d 161 (1966).

24. *See, e.g.*, *Clover Hill Swimming Club, Inc. v. Goldsboro*, 47 N.J. 25, 219 A.2d 161 (1966).

25. In order to decide if Wheaton-Haven qualified as a private club under the 1964 Act, the Fourth Circuit asked whether membership in the club was "so intimately related to an establishment or transaction in which non-discrimination is

Wheaton-Haven did not publicly solicit members through advertising.²⁶ The court also concluded that, unlike membership in Little Hunting Park,²⁷ membership in Wheaton-Haven was not incidental to the purchase of a home from a member²⁸ or of a home within the geographic area from which Wheaton-Haven drew most of its members.²⁹ The Supreme Court agreed that Wheaton-Haven did not advertise its facilities to the general public.³⁰ The Court decided, however, that certain membership preferences granted only to property owners within the three-quarter mile radius area³¹ were

required that it can be said to be part of, or . . . incident to, the larger, basically commercial, establishment or transaction." 451 F.2d at 1215. In applying this test, the court concluded that membership in Wheaton-Haven was not incidental to the purchase of a home from a member or a home within the geographic area from which Wheaton-Haven drew most of its members. This standard was derived from the Fourth Circuit's reading of *Sullivan*.

26. 451 F.2d at 1220.

27. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1969).

28. Under the Wheaton-Haven system, a within-the-area member selling his home may either retain his membership or seek to sell it back to the Association. If Wheaton-Haven is willing to purchase, it pays 80% of the initial cost if the membership is not full, and 90% if the membership is full. The purchaser of the member's home then has a first option on the membership so released by the seller.

410 U.S. at 436 n.5. The Fourth Circuit pointed out that when a member's home was purchased, the purchaser got only a first option to be *considered* for membership in the club, not automatic membership. This option, in the court's view, meant only that a purchaser would be considered for membership before other persons if there was a waiting list to join the club. Since club membership was not full and there was no waiting list, the court viewed the option as entitling a new homeowner to virtually nothing. 451 F.2d at 1217.

29. Plaintiffs had contended that purchase of a home within a three-quarter mile radius of Wheaton-Haven implicitly carried with it the right to membership in the club. Distinguishing Wheaton-Haven from Little Hunting Park, the club in *Sullivan*, the Fourth Circuit found it "inferable from Little Hunting Park's organization and membership provision that it was built by the same real estate developers who built the four subdivisions from which members were drawn, as an aid to the sale of their homes." 451 F.2d at 1215 n.8. The Supreme Court noted that this inference might be erroneous, and that "*Sullivan* did not rest on any relationship between the club and real estate developers." 410 U.S. at 438 n.9.

30. 410 U.S. at 433.

31. The Supreme Court noted that under Wheaton-Haven's bylaws a resident of the area within a three-quarter mile radius of the pool received three preferences over other persons not residing within the three-quarter mile radius: (1) he is allowed to apply for membership without seeking a recommendation from a current member; (2) he receives preference over others, except those with first options, when applying for a membership vacancy; and (3) if he is an owner-member, he is able to pass to his successor-in-title a first option to acquire the

sufficiently incidental to the purchase of the property to be covered by section 1982 of the Civil Rights Act.³² Specifically, the Supreme Court found that access to the community swimming pool added to the value of the homes in the neighborhood that it served,³³ and that the homeowner, who became a pool member, obtained a specific asset (*i.e.*, a first option) that he could convey to the purchaser of his home.³⁴ The Supreme Court concluded, therefore, that Wheaton-Haven did in fact hold itself out to the general public:

When an organization links membership benefits to residency in a narrow geographical area, that decision infuses those benefits into the bundle of rights for which an individual pays when buying or leasing within the area. The mandate of 42 U.S.C. § 1982 then operates to guarantee a nonwhite resident, who purchases, leases or holds this property, the same rights as are enjoyed by a white resident.³⁵

The Supreme Court's finding that membership in Wheaton-Haven is covered by section 1982 of the Civil Rights Act because the club held itself out to the general public is consistent with its decision in *Sullivan*.³⁶ The Court in *Sullivan* stated that the fundamental purpose of section 1982, protecting the right to "purchase and hold property," should not be defeated by giving it a narrow construction.³⁷ The Supreme Court's broad construction of property rights to include "membership preferences" in Wheaton-Haven is also in harmony with the public policy behind the Civil Rights Act of 1968,³⁸ since

membership Wheaton-Haven purchases from him. If the membership is full, the preference area resident is placed on the waiting list; other applicants are required to reapply after those on the waiting list obtain memberships. *Id.* at 436.

32. 42 U.S.C. § 1982 (1970) provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

33. The Supreme Court noted that the automatic waiting list preference given to residents of the favored area may have affected the price paid by the black couple who bought their home within the three-quarter mile radius. 410 U.S. at 437.

34. The Supreme Court gave weight to the fact that the sale of a home in several years might bring a higher price because of the first option to membership in Wheaton-Haven. *Id.*

35. *Id.*

36. 396 U.S. 229 (1969).

37. *Id.* at 237.

38. *See* 42 U.S.C. § 1982 (1970); Civil Rights Act of 1968, Title VIII, 42 U.S.C. § 3601 (1970).

the routine exclusion of blacks from neighborhood recreational facilities would discourage them from buying in that neighborhood. To permit club membership to serve as a means of indirectly excluding members of certain groups from a community would violate the Act.

III. SELECTION CRITERIA

Closely connected to the requirement that the club not be open to the general public is the requirement of selection criteria. A club must have some definite criteria on which to base its selection of members. It cannot employ an arbitrary policy of excluding all blacks and admitting all whites.³⁹ Although the Fourth Circuit in *Tillman* noted that race was employed by the Association as a selection criterion for membership, it found that qualifications of social and financial standing were paramount in determining the size of fees and yearly dues and were an important element of selectivity.⁴⁰ It is not surprising, however, that the Supreme Court did not view the payment of yearly fees and dues as an element of selectivity.⁴¹ Facilities similar to Wheaton-Haven that require substantial fees and dues have been held to be "public facilities."⁴² For the residents of the Wheaton-Haven area, a \$375 initiation fee and annual dues of \$50-60 are not a substantial investment.⁴³

39. Traditionally, the determination of whether a club is private, although involving numerous other factors such as whether the members actually control the club, the amount of publicity or advertising used to solicit potential members, and the purpose for which the club is formed, hinges on whether the club selects its members on some other criteria besides race. *United States v. Jordan*, 302 F. Supp. 370 (E.D. La. 1969). In *Jordan*, members were selected entirely by the one person who had been proprietor of the restaurant when it had been previously operated as a public accommodation, and this precluded the club from being classified as private. "A private club must have some basis for its selectivity and must have machinery whereby applications for membership are screened by members." *Wright v. Cork Club*, 315 F. Supp. 1143, 1151 (S.D. Tex. 1970).

40. 451 F.2d at 1221.

41. 410 U.S. at 438.

42. In *Bell v. Kenwood Golf & Country Club, Inc.*, 312 F. Supp. 753 (D. Md. 1970), initiation fees were \$600 to \$1,500 and annual dues were \$123 to \$138. In *Clover Hill Swimming Club, Inc. v. Goldsboro*, 47 N.J. 25, 219 A.2d 161 (1966), new members were required to buy a \$350 debenture bond and pay a yearly fee of \$150.

43. Montgomery County, where the Wheaton-Haven pool is located, is one of the most affluent areas of the country.

A club's past record of rejections and acceptances is frequently regarded as direct evidence of selectivity.⁴⁴ The Fourth Circuit discerned an element of selectivity in Wheaton-Haven's rejection of one white family in the club's eleven-year history.⁴⁵ The Supreme Court disagreed and compared Wheaton-Haven's one rejection in eleven years with Little Hunting Park's one rejection in twelve years. The Court concluded in both cases that this record could not be considered as evidence of selectivity.⁴⁶ The Supreme Court's interpretation of this fact is supported by other cases, in which low rejection ratios by allegedly private clubs were fatal to the claim of private club exemption.⁴⁷

IV. SOCIAL FUNCTION

Holding that the statutory exemption for distinctly private organizations is designed to protect the personal associational preferences of their members, courts demand that the organization claiming exemption demonstrate a social purpose or function.⁴⁸ The Fourth Circuit found that, although Wheaton-Haven's membership was racially identifiable, its make-up exhibited a "discernible basis of commonality other than a common desire to exclude persons of other races."⁴⁹ The Supreme Court, however, found no "commonality of interest," but concluded that Wheaton-Haven's sole membership criterion was residence in a defined geographic area.⁵⁰ The Supreme Court's failure to find that Wheaton-Haven had a social function is in accord with other cases. In *Nesmith v. Y.M.C.A.*⁵¹ the club was not private because membership eligibility was determined solely on the basis of geography. In contrast, the fraternal organization in *Moose Lodge*

44. *Stout v. Y.M.C.A.*, 404 F.2d 687 (5th Cir. 1968); *Nesmith v. Y.M.C.A.*, 397 F.2d 96 (4th Cir. 1968); *United States v. Jordan*, 302 F. Supp. 370 (E.D. La. 1969).

45. 451 F.2d at 1221.

46. 410 U.S. at 438 n.9.

47. In *Nesmith v. Y.M.C.A.*, 397 F.2d 96 (4th Cir. 1968), only five out of 1,300 applicants were rejected in one year. In *Stout v. Y.M.C.A.*, 404 F.2d 687 (5th Cir. 1968), of 3,070 membership applications in one year, only four were rejected. In *United States v. Jordan*, 302 F. Supp. 370 (E.D. La. 1969), not one of 2,400 applications for membership was rejected.

48. *Clover Hill Swimming Club, Inc. v. Goldsboro*, 47 N.J. 25, 219 A.2d 161 (1966).

49. 451 F.2d at 1221.

50. 410 U.S. at 438.

51. 397 F.2d 96 (4th Cir. 1968).

*No. 107 v. Irviss*⁵² was held to be a private club because it had well-defined membership criteria, evidencing a clear social function as set forth in its constitution.

CONCLUSION

Senator Humphrey, floor manager of the 1964 civil rights legislation, saw the private club exemption as protecting only "the genuine privacy of private clubs or other establishments whose membership is genuinely selective on some reasonable basis."⁵³ Both Senator Humphrey's statement and the Supreme Court's emphasis in *Tillman* mandate a judicial probing of the actual operations of the club, rather than mere deference to the form of the organization, in order to determine whether the club is actually private. Attributes such as government by members, a stated maximum number of memberships, a record of past rejections, and the existence of club fees and dues are not necessarily conclusive of private club status for the purpose of the section 2000a (e) exemption. Moreover, after the Supreme Court's decisions in *Sullivan* and *Tillman*, not only will a club's advertising be seen as a waiver of the private club exemption, but also an association that makes its membership incidental to the purchase of a home or residence in a defined geographic area will be viewed as being public, quite apart from the issue of admissions qualifications.

Joan Garden

52. 407 U.S. 163 (1972).

53. 110 CONG. REC. 13697 (1964).

