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Case Notes

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Administrative Law—FCC—Constitutional Test of the Fairness Doctrine—*Red Lion Broadcasting Co. v. FCC*, 381F.2d 908, (D.C. Cir. 1967).

The instant case is the first direct constitutional test of the Fairness Doctrine as applied by the Federal Communications Commission in its regulation of the radio-television industry.[1] This decision culminates a long dispute over the validity of the Fairness Doctrine.

On November 27, 1964, petitioners[2] broadcasted a fifteen minute program by Reverend Billy James Hargis as part of a series entitled The Christian Crusade. The program included a discussion of the 1964 Presidential election and a book concerning the Republican campaign entitled *Goldwater—Extremist On The Right,* written by Mr. Fred J. Cook. During the course of the program, Reverend Hargis made several statements attacking the integrity, honesty, and character of Mr. Cook.[3] Upon learning of these statements, Mr. Cook wrote a letter to Station WGCB requesting time to reply without charge. After several letters were exchanged between the sta-

1. In United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966), the court assumed the validity of the Fairness Doctrine while designating a renewal application for hearing due to improper programming.

2. Red Lion Broadcasting Co., Inc. and the Reverend John M. Norris, the principal stockholder and president of Red Lion Broadcasting Co., Inc.

3. Red Lion Broadcasting Co. v. FCC, 381 F.2d 908, 910-11 (D.C. Cir. 1967), wherein the court partially quoted Reverend Hargis' attack as follows:

> Now who is Cook? Cook was fired from the New York World-Telegram after he made a false charge publicly on television against an unnamed official of the New York City government. New York publishers and Newsweek magazine for December 7, 1959, showed that Fred Cook and his pal Eugene Gleason had made up the whole story and this confession was made to the District Attorney, Frank Hogan. After losing his job, Cook went to work for the left-wing publication, *The Nation*. . . . Now among other things, [*sic*] Fred Cook wrote, for *The Nation* was an article absolving Alger Hiss of any wrong doing . . . there was a 208 page attack on the FBI and J. Edgar Hoover; another attack by Mr. Cook was on the Central Intelligence agency [*sic*] . . . now this is the man who wrote the book to smear and destroy Barry Goldwater called *Barry Goldwater—Extremist of the Right* [*sic*].

tion and Mr. Cook, he registered a complaint with the Commission alleging that Station WGCB had broadcasted a personal attack against him without notifying him of the attack and without sending him a transcript of the program. In addition, Mr. Cook alleged that the station was insisting upon his paying for any reply broadcast. The Commission rejected WGCB's contention[4] and stated that the Fairness Doctrine required that the station provide Mr. Cook with free time in which to answer the charges leveled against him by Reverend Hargis. On December 10, 1965, the Commission issued an order, in the form of a letter, to WGCB stating that it must comply with the Fairness Doctrine and afford Mr. Cook free time. Petitioners thereafter filed a petition in the Court of Appeals for the District of Columbia Circuit to review the Commissions action.[5] After the initial argument of the case, the three judge panel concluded that the declaratory rulings contained in the Commission's letters are not orders from which an appeal may be sought, and dismissed petitioners' action.[6] Thereafter, the Commission petitioned for an en banc rehearing, and a majority of the court voted to vacate the earlier judgment and directed the assigned panel to consider the petitioners' action on the merits.[7] The court then affirmed the validity of the Commission's Fairness Doctrine stating that: (1) Section 315 of the Communications Act[8] is not an unconstitutional delegation of Congress' legislative function; (2) the Fairness Doctrine is not unconstitutionally vague; (3) the Fairness Doctrine's requirement that a broadcaster may not insist on financial payment by a

4. WGCB contended that the Fairness Doctrine only required that they give Mr. Cook free time in the event that he was financially unable to pay for such a broadcast.

5. A licensee, who has been affected by an adverse ruling of the Commission is entitled to judicial review 80 Stat. 392-93 (1966), 5 U.S.C. §§ 702, 704, 706 (Supp. II, 1966).

6. Since many of the Commission's rulings are in the form of letters, this harsh decision would have effectively forced the licensee to risk loss of his license by ignoring the order to challenge the Commission's ruling.

7. *See* court order filed with the clerk of the Court of Appeals for the District of Columbia on March 13, 1967.

8. Communications Act of 1934 § 315, 48 Stat. 1088, *as amended*, 73 Stat. 557 (1959), 47 U.S.C. § 315 (1964).

Candidates for public office: facilities; rules.

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,
(2) bona fide news interview,
(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

party responding to a personal attack in no way violates the first[9] or fifth[10] amendments; and (4) the Fairness Doctrine does not violate the ninth[11] or tenth[12] amendments.

History of the Fairness Doctrine

The Fairness Doctrine, succinctly stated, is an affirmative obligation imposed upon all radio and television licensees to broadcast both sides of any controversial issue of public importance when they choose to present one side.[13] The inception of the Fairness Doctrine may be traced to the Radio Act of 1927[14] and the congressional debates which led to its enactment. These debates clearly show that the intent of Congress was that radio should be maintained as a medium of free speech for the general public rather than as an outlet for only a few.[15] Congress made it clear from the beginning that those who were granted a license to operate a radio station were thereby vested with a responsibility to operate for the benefit of the public.[16] The view that the public interest is paramount to the private interest of any one licensee was emphasized again on June 9, 1948, in a unanimous report of the Senate Committee on Interstate and Foreign Commerce,[17] and more recently on April 17, 1962, the latter with particular reference to the Fairness Doctrine.[18]

In 1929, the Federal Radio Commission (the predecessor of the FCC) extended its interpretation of the Radio Act[19] to apply not only to addresses by political candidates but to all discussions of issues of importance to the public.[20] The Radio Commission went on to set out the standard required in order to obtain a license; the station must operate "for the public interest, convenience, and necessity."[21] At an early date the Radio Commission implemented this policy by denying applications of stations which broadcasted or intended to broadcast only one point of view[22] and by refusing to grant a construction permit to an applicant who refused to allow the use of its facilities by persons or organizations wishing to present any viewpoint different from its own.[23] This policy was then adopted as the basic standard by the Federal Communications Commission.

9. U.S. CONST. amend. I.
10. U.S. CONST. amend. V.
11. U.S. CONST. amend. IX.
12. U.S. CONST. amend. X.
13. This should not be confused with the "equal opportunities" portion of § 315 which applies only when a candidate for a public office actually appears personally over a broadcast station. Then and only then must the licensee grant the other candidates equal time, Letter to Hon. Charles L. Murphy, 23 P & F RADIO REG. 953 (1962).
14. 44 Stat. 1162 (1927), *repealed*, 48 Stat. 1102 (1934).
15. 67 CONG. REC. 5479 (1926).
16. S. REP. No. 994 (Part 6), 87th Cong., 2d Sess. (1962).
17. S. 1333, S. REP. No. 1567, 80th Cong., 2d Sess. 14-15 (1948).
18. S. REP. No. 994 (Part 6), 87th Cong., 2d Sess. 1-4 (1962).
19. 44 Stat. 1162 (1927), *repealed*, 48 Stat. 1102 (1934).
20. Great Lakes Broadcasting Co. v. Federal Radio Comm'n, 3 FRC ANN. REP. 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. denied*, 281 U.S. 706 (1930).
21. 47 U.S.C. §§ 307 (a), 309 (1964), *formerly* 48 Stat. 1083, 1085 (1934).
22. Chicago Federation of Labor v. Federal Radio Comm'n, 3 FRC ANN. REP. 36, *aff'd*, 41 F.2d 422 (D.C. Cir. 1930); KFKB Broadcasting Ass'n v. Federal Radio Comm'n, 47 F.2d 670 (D.C. Cir. 1931).
23. Young People's Ass'n for the Propagation of the Gospel, 6 F.C.C. 178 (1938).

The Fairness Doctrine is set out in two FCC publications and in the 1959 amendment to Section 315 of the Communications Act.[24] These documents are commonly known as the *1949 Report*[25] and the *Fairness Primer*.[26] The *1949 Report* is the basic statement of the Fairness Doctrine. It was drafted by the Commission following public hearings. While the report confirmed the broadcasters' right to editorialize, that is, give their own opinion on any particular subject, it warned that the station should always seek to present both sides to any controversial issue of public importance.[27] The report went on to stress the fact that there were only a limited number of publicly owned broadcast frequencies and that therefore radio broadcasters must operate their facilities as "trustees" for the public.[28] The report clarifies the policy which should be strived for by broadcast licensees:

> The basis for any fair consideration of public issues, and particularly those of a controversial nature, is the presentation of the news and information concerning the basic facts of the controversy in as complete and impartial a manner as possible. A licensee would be abusing his position as public trustee of these important means of mass communication were he to withhold from expression over his facilities relevant news or facts concerning a controversy or to slant or distort the presentation of such news.[29]

In February of 1959 the Commission issued a controversial ruling which led to a congressional inquiry.[30] The result was the amending of Section 315 (a) of the Communications Act.[31] The importance of this amendment to the instant case is contained in the last sentence:

> Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this [Act] to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.[32]

The legislative history of this amendment, and of this last sentence in particular, indicates strongly that it was intended to codify and reinforce the Fairness Doctrine.[33]

24. Communications Act of 1934 § 315, 48 Stat. 1088, *as amended*, 73 Stat. 557 (1959), 47 U.S.C. § 315 (1964).

25. *Report of the Commission in the Matter of Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 25 P & F RADIO REG. 1901 (1949) [hereinafter cited as *1949 Report*].

26. Public Notice of July 25, 1964, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415 (1964) [hereinafter cited as *Fairness Primer*].

27. *1949 Report, supra* note 25, at 1253, 25 P & F RADIO REG. at 1908. This effectively overruled Mayflower Broadcasting Co., 8 F.C.C. 333 (1940). *See* Separate Views of Commissioner Jones, *1949 Report, supra* note 25, at 1259, 25 P & F RADIO REG. at 1914.

28. *1949 Report, supra* note 25, at 1247, 25 P & F RADIO REG. at 1903.

29. *1949 Report, supra* note 25, at 1254-55, 25 P & F RADIO REG. at 1910.

30. Lar Daly, 18 P & F RADIO REG. 238, *reaffirmed on reconsideration*, 18 P & F RADIO REG. 701 (1959).

31. Communications Act of 1934 § 315, 48 Stat. 1088, *as amended*, 73 Stat. 557 (1959), 47 U.S.C. § 315 (1964).

32. Communications Act of 1934 § 315, 48 Stat. 1088, *as amended*, 73 Stat. 557 (1959), 47 U.S.C. § 315 (1964).

33. S. REP. No. 562, 86th Cong., 1st Sess. (1959); H.R. REP. No. 1069, 86th Cong., 1st Sess. (1959); 105 CONG. REC. 16310, 16346-47, 17778, 17830-31 (1959).

This legislative history reveals that Senator Proxmire offered an amendment to the proposed bill which added this sentence to assure that all viewpoints in public controversies would be presented.[34] Senator Pastore's remarks accepting this last sentence clearly set forth both its significance and its purpose: "Mr. President, I understand the amendment to be a statement or codification of the standards of fairness. I understand that the Commission is now obliged by existing law and policy to abide by the standards of fairness."[35]

In the five years following passage of the 1959 amendment, the Commission continued to consider cases on an ad hoc basis. Following additional investigation and study, the Commission published an administrative pamphlet commonly known as the *Fairness Primer*. This publication contains a digest of the Commission's rulings on the Fairness Doctrine. The *Primer* essentially reinforces the *1949 Report* with exemplary rulings in differing fact situations. It emphasizes that radio must be maintained as a medium of free speech for the general public rather than for the individual licensees.

The Personal Attack

A section of the *Fairness Primer* was devoted to the personal attack, with which the principal case is primarily concerned. The Commission has defined a personal attack as "a speech which is an assault on the honesty, integrity or character of a person."[36] Thus, the personal attack may be viewed as a particular aspect of the Fairness Doctrine. Here, if the broadcast licensee allows its facilities to be used to impugn the character and honesty or to otherwise disparage named individuals, during the broadcast of a controversial issue, an obligation is imposed upon the station to allow the person attacked a reasonable opportunity to reply. This differs sharply from an ordinary Fairness Doctrine violation where the licensee may choose an appropriate spokesman for the side of the issue which was not presented. The *1949 Report* makes this difference clear by stating "[E]lementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist."[37]

There have been several different aspects of a licensee's obligation under the Fairness Doctrine which have been clarified by various Commission rulings. The procedure available to one who feels he has been the subject of a personal attack was described by the Commission as follows:

> [T]he complainant must show (1) what particular subject of a controversial nature was discussed over the air, (2) which particular station carried it, (3) the date it was shown, (4) the basis for the claim that the station presented only one side of the question, and (5) whether or not the station had afforded opportunity for the presentation of differing viewpoints.[38]

It was also determined that the Commission would hear complaints of violations of

34. 105 CONG. REC. 14457 (1959). Senator Proxmire's proposed amendment was modified but not essentially altered.
35. 105 CONG. REC. 14462 (1959).
36. *Fairness Primer, supra* note 26, at 10420.
37. *1949 Report, supra* note 25, at 1252, 25 P & F RADIO REG. at 1907.
38. Lar Daly, *supra* note 30.

the Fairness Doctrine at the time each violation occurred rather than waiting until time for renewal of the station's license.[39]

If the person attacked happens to be a political candidate, as is often the case, then the Commission has ruled that the attacked candidate must be given a "substantial voice" in the selection of the spokesman to respond to such an attack.[40] The Commission has also ruled that the station need not be personally involved in any way in order to violate the Fairness Doctrine; the crucial question must always be whether or not its facilities have been used to attack a person or group.[41] In *Clayton W. Maypoles*,[42] the Commission heard a petition to deny the renewal of Station WEBY because it had allegedly employed certain newscasters for the express purpose of leveling specific personal attacks against local public officials. Here the Commission warned WEBY that a licensee must not present one-sided news programming nor use its facilities for purely personal and private interests. In *Billings Broadcasting Co.*,[43] the Commission ruled that a twenty-four hour delay in supplying copies of the editorials to the persons attacked in them was such that the station had not fully complied with the Fairness Doctrine. In another facet of the personal attack, the Commission held that the requirements of the Fairness Doctrine may be met by a network rather than a local program, but only when the person appearing on the network program is allowed to respond specifically to the alleged attack.[44] In *Cullman Broadcasting Co., Inc.*,[45] the Commission was faced with a more difficult fact situation than the one in the instant case. Here, however, the Fairness Doctrine also survived its test. The Commission did stress that the licensee has considerable discretion in presenting local or national spokesmen, or a spokesman willing to pay for his broadcast time, or programming presented by the licensee's own staff. The *Cullman* decision makes it clear, however, that:

> [I]n short, where the licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, has not presented contrasting viewpoints in other programs, and has been unable to obtain paid sponsorship for the appropriate presentation of the contrasting viewpoint or viewpoints, he cannot reject a presentation otherwise suitable to the licensee—and thus leave the public uninformed—on the ground that he cannot obtain paid sponsorship for that presentation.[46]

In light of much criticism of the vagueness of the Fairness Doctrine the Commission recently amended part 73 of its Rules to provide definite procedures in the event of a personal attack or when a station editorializes with respect to political candidates.[47] The new Rules are designed to clarify the obligations of the broadcast licen-

39. Letter to Oren Harris, 3 P & F RADIO REG.2d 163 (1963).
40. Times-Mirror Broadcasting Co., 24 P & F RADIO REG. 404 (1962).
41. Letter to Douglas A. Anello, 25 P & F RADIO REG. 1900b (1963).
42. 23 P & F RADIO REG. 586 (1962).
43. 23 P & F RADIO REG. 951 (1962).
44. Capital Broadcasting, Inc., 2 P & F RADIO REG.2d 1104 (1964).
45. 25 P & F RADIO REG. 895 (1963).
46. *Id.* at 897.
47. 32 Fed. Reg. 10305-06 (1967) (to be enacted as 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679):

Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public im-

sees. Now clear violations of the Fairness Doctrine will warrant the appropriate forfeitures under Section 503 (b) of the Communications Act.[48] This is now the penalty provided when the offense(s) is not serious enough to merit loss of license. These Rules provide that when a personal attack occurs during the presentation of a controversial issue of public importance the licensee shall be required to transmit to the party attacked within a reasonable amount of time, and in no event later than one week after the attack, the text or an accurate summary of the statements made, together with an offer to reply free of charge. An illustration of the desirability of such a set of rules is *WSOC Broadcasting Co.*,[49] where the Commission agreed that WSOC-TV had violated the Fairness Doctrine but not to the extent that the Commission should impose any sanction.

These Rules, however, do not alleviate the problem of determining exactly what constitutes "a controversial issue of public importance." This problem was brought into focus when Madalyn Murray attempted to require thirteen Honolulu stations to afford her free time under the Fairness Doctrine due to their presentation of church services, devotionals, and prayers.[50] The Commission ruled that this was not the presentation of a controversial issue of public importance. This area has recently been extended, in an extremely unpopular ruling, to the commercial advertising of

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portance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall be inapplicable to attacks on foreign groups or foreign public figures or where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign.

Note: In a specific factual situation, the fairness doctrine may be applicable in this general area of political broadcasts. *See*, Section 315 (a) of the Act (47 U.S.C. 315 (a)); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed. Reg. 10415.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

48. 48 Stat. 1101 (1934), 47 U.S.C. § 503 (b) (1964), which reads in part:

(1) Any licensee . . . of a broadcast station who . . . (b) willfully or repeatedly fails to observe any of the provisions of this chapter or of *any rule* or regulation of the Commission . . . shall forfeit . . . a sum not to exceed $1000. . . . (Emphasis added).

49. 17 P & F RADIO REG. 548 (1958). *See also* Springfield Television Broadcasting Corp., 4 P & F RADIO REG.2d 681 (1965), Capital Broadcasting Inc., 2 P & F RADIO REG.2d 1104 (1964).

50. Letter to Madalyn Murray, FCC 65-476, June 2, 1965; *e.g.*, Letter to Dr. M. T. Mehdi, Public Notice FCC 65-74942, October 22, 1965.

cigarettes.[51] In such situations the licensee is required to make good faith judgments based on all the relevant facts and circumstances involved. But, it has been pointed out that an attack on a specific person or group does not in and of itself constitute a controversial issue of public importance.[52] The past rulings of the Commission in this particular area have not been revealing.

Constitutionality

Since *Red Lion* is the first direct constitutional test of the Fairness Doctrine, many arguments have been raised for and against its validity. It seems clear, as is stressed in the case, that the Fairness Doctrine is not an unconstitutional delegation of Congress' legislative authority to an administrative agency without "adequate standards or ascertainable criteria."[53] The conduct proscribed by the Fairness Doctrine is spelled out with reasonable clarity but is far from the punishment of unknowing conduct described in *Aptheker*. It is clear that article I, section 1 of the Constitution[54] does not prohibit a reasonable delegation of legislative power to a subordinate agency.[55] That radio is subject to regulation by Congress and the Commission is well established.[56] The Communications Act embodies the congressional guidelines used by the Commission in its regulation of the broadcasting industry. The purpose of the Communications Act is the regulation of interstate and foreign commerce in the area of communications, and it seems that its promulgation and enforcement is well within the ambit of legislative authority. The criterion which the Act sets out is that every station must operate in the "public interest, convenience, and necessity."[57] The validity of this public interest standard has also been sustained by the courts.[58]

The Fairness Doctrine has been further attacked as a violation of the free speech guarantee of the first amendment. Censorship is specifically precluded,[59] however, and editorializing is specifically allowed to broadcast licensees.[60] To the extent that radio and television is an industry which must be regulated, there is a "prior restraint" on speech. But, it seems certain that "the right of free speech does not include . . . the right to use the facilities of radio without a license."[61]

The Fairness Doctrine has also been condemned as a violation of the due process clause of the fifth amendment.[62] The argument boils down to a contention that the

51. Letter to WCBS-TV, FCC 67-641, June 2, 1967. This ruling was then reinforced by the Commission in a 43 page memorandum opinion and order, *In re* WCBS-TV, FCC 67-1029, September 13, 1967.

52. Letter to Pennsylvania Community Antenna Television Ass'n, Inc., 1 F.C.C.2d 1610a (1965).

53. Aptheker v. Secretary of State, 378 U.S. 500 (1964).

54. U.S. CONST. art. I, § 1 states that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States. . . ."

55. Yakus v. United States, 321 U.S. 414 (1944).

56. National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

57. U.S.C. §§ 307 (a), 309 (1964), *formerly* 48 Stat. 1083, 1085 (1934).

58. FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940); Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933).

59. 48 Stat. 1091 (1934), 47 U.S.C. § 326 (1964).

60. *E.g., 1949 Report, supra* note 25 and the *Fairness Primer, supra* note 26.

61. National Broadcasting Co. v. United States, *supra* note 56, at 227.

62. U.S. CONST. amend. V.

Fairness Doctrine is too vague and uncertain. The courts, however, have continually upheld it as a branch of the public interest standard. As far as the abuse of regulatory power is concerned, the licensees are protected by the procedural safeguards provided by Congress.[63] That the ninth[64] and tenth[65] amendments are not violated also seems certain. The Fairness Doctrine does not abridge the rights reserved to the people or the states since Congress' regulation of broadcasting is a proper exercise of its power over commerce.[66] In the principal case, Judge Tamm suggests the answer by quoting from *Griswold v. Connecticut,*[67] [b]ut to say that the Ninth Amendment has anything to do with this case is to turn somersaults with history."[68] It can also be argued that such regulation should not be extended to the programming of the station. Even that area, however, can be regulated to the extent that it must conform to the public interest. What degree of control may be exercised by the Commission in this unexplored area of program regulation has yet to be tested in the courts.

The sentence in the 1959 amendment that "[n]o obligation is imposed upon any licensee to allow the use of its station by any such candidate"[69] has given rise to the claim that a licensee may have the power to deny a candidate an opportunity to speak over its station. Such a practice, if engaged in regularly, could leave the impression that the station was no longer operating in the public interest, nor presenting all the salient facts of a controversial issue of public importance.

The equal protection clause of the fourteenth amendment[70] is also inapplicable in this area. A station may not censor a candidate's remarks even if libelous. This is not to say, however, that a non-candidate may libel another individual over a licensee's station. An ordinary citizen does not have, and cannot be reasonably expected to have, the same privileges as a legally qualified candidate for public office. Further, a candidate must forego certain privileges when he runs for public office.[71]

It has been urged that the libel laws are the panacea for this problem. Libel, however, is at best an inadequate remedy for the average citizen. Court costs are high and dockets are crowded. That libel suits should be the only remedy for one who is personally attacked in a broadcast places the burden and imposition on the wrong party. It was the broadcast licensee who permitted the attack, not the person attacked. Further, it is not and should not be the duty of the Commission to determine the truth or falsity of any given statement. This could well lead to governmental censorship, a result to be abhorred. In addition, the libel remedy serves only the private interest. It in no way informs the public of all the pertinent facts, which is the obligation every licensee undertakes when it agrees to operate in the public interest. Having the governmental authorities vested with the power to require only a full

63. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified in scattered sections of 47 U.S.C.); 80 Stat. 392-93 (1966), 5 U.S.C. §§ 702, 704, 706 (Supp. II, 1966).
64. U.S. CONST. amend. IX.
65. U.S. CONST. amend. X.
66. National Broadcasting Co. v. United States, *supra* note 56, at 227.
67. 381 U.S. 479 (1965).
68. Red Lion Broadcasting Co. v. FCC, *supra* note 3, at 927.
69. Communications Act of 1934 § 315, 48 Stat. 1088, *as amended*, 73 Stat. 557 (1959), 47 U.S.C. § 315 (1964).
70. U.S. CONST. amend. XIV, § 2.
71. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

presentation of all the facts does not seem to be a restraint which should be readily abolished or condemned.

The Fairness Doctrine has survived its constitutional test. But, the facts in *Red Lion* are extreme. A station's programming must be in the public interest. There is no right to use the public air waves as an instrument to disparage another's character. However, the Commission should not have the power to arbitrate the truth or falsity of adverse opinions. Nonetheless, protection must be afforded the private citizen, be he wealthy or poor. To this extent the Fairness Doctrine merits praise.

A less clear-cut fact situation might have, and still may, cast a shadow over the efficacy of the Doctrine. Note, though, *Red Lion* is a case of first impression with which the courts will have to reckon.

Insurance—Duty of Insurer to Settle—Damages for Refusal to Settle—*Crisci v. Security Insurance Co.*, 66 Cal. App. 2d 435, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

Mrs. June DiMare sustained physical injuries and a severe psychosis when she fell on a defective stairway in the apartment building owned by the plaintiff, Mrs. Rosina Crisci. The defendant, Security Insurance Company of New Haven, had issued a standard general liability policy to Mrs. Crisci, insuring her for a maximum of $10,000. Mrs. DiMare's suit far exceeded this sum, however, as she asked for $400,000 compensation for physical and mental injuries and medical expenses. After consulting competent psychiatrists whose opinions were divided as to whether the fall had caused the psychosis,[1] the defendant company declined a $9,000 settlement offer. Upon trial, a jury awarded Mrs. DiMare $100,000 and her husband $1,000. Mrs. Crisci, faced with a judgment $91,000 in excess of her coverage, became indigent and was forced to work as a baby sitter, and became dependent on her grandchildren for support. This change in her financial condition proved too much for the immigrant widow of 70 years, resulting in a decline in her physical health. Ultimately she attempted suicide. In her action against the insurance company, Mrs. Crisci was awarded $91,000 by the trial court, the amount of excess liability to which she was subjected, and was further awarded $25,000 for mental suffering. Upon appeal, Peters, J., speaking for the Supreme Court of California, *held:* the insured was entitled to recover the difference between the policy limits and the amount of the judgment; damages were also awarded for the mental suffering caused by the insurer's failure to settle.[2]

1. Both Mrs. DiMare and Mrs. Crisci found psychiatrists who would testify that the accident had caused Mrs. DiMare's mental illness. The defendant, who was aware of this testimony, relied upon the opinion of the doctors at the hospital who were under the impression that the psychosis was not related to the accident. All the psychiatrists did agree, however, that the accident could possibly cause such a psychosis.

2. 66 Cal. App. 2d 435, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

An insurance policy is essentially a contract embodying the mutual rights and obligations of the parties, and the general rules of contract law are applicable.[3] Accordingly, the earlier cases, following the "objective theory"[4] of contract law, refused to impose any duty upon the insurer for liability beyond policy limits—since the parties were bound by the terms of their contract, the insurer could in no way be liable for more than the face amount of the policy.[5] It is not true, however, that contract rules are to be mechanically applied to liability insurance policies. While recognizing that such policies are contracts, many decisions bearing on the responsibility of the insurer have treated the policy more as a commodity, and rules have evolved which are peculiar to insurance law.[6] The resulting liability imposed on the insurer is unique, as it sounds in both tort and contract. It is tortious because a duty is involved,[7] contractual because the duty arises from a relationship established by contract.[8]

Uncertainty clouds this area. Nebulous language recited by the courts and inconsistent attempts to formulate rules for the imposition of liability make this fact apparent. Nevertheless, two standards of conduct have emerged: some courts hold the insurer liable if negligent in refusing to settle,[9] while most favor the insurer by requiring that it be guilty of bad faith in order to incur liability beyond the face value of the policy.[10] The courts which follow the negligence rule require that the insurer, in handling all matters pertaining to settlement, use that degree of care and diligence which a reasonably prudent man would exercise in the management of his own business.[11] Dissatisfaction with this harsh and unwieldy rule has led a majority of the courts to adopt the good faith criterion. These jurisdictions, including California,[12] consider the relationship between insured and insurer to be fiduciary; consequently, each party owes the other the duty to exercise good faith and to act fairly.[13] The courts reason that since the reservation of power over settlement is for the insurer's protection, discretion in its use must remain unfettered by the restraints placed upon it by the negligence test.[14]

The line between the negligence and good faith tests is unclear. Indeed, as the New York court observed in *Best Building Co. v. Employers' Liability Assurance Corp.*:[15] "We may ask what would constitute negligence in the failure to settle a

3. Boyer v. United States Fidelity & Guar. Co., 206 Cal. 273, 274 P. 57 (1929).

4. For a thorough discussion of the objective theory of contract law, *see* 1 A. CORBIN, CONTRACTS §§ 105, 106 (1963); 3 A. CORBIN, CONTRACTS §§ 539, 599 (1960).

5. Haerens v. Commercial Cas. Ins. Co., 130 Cal. App. 2d 892, 279 P.2d 211 (1955).

6. Kavanaugh v. Franklin Fire Ins. Co., 185 Cal. 307, 197 P. 99 (1921).

7. Traders & Gen. Ins. Co. v. Rudco Oil & Gas Co., 129 F.2d 621 (10th Cir. 1942).

8. McCombs v. Fidelity & Cas. Co., 231 Mo. App. 1206, 89 S.W.2d 114 (1935).

9. Bennett v. Conrady, 180 Kan. 485, 305 P.2d 823 (1957); Douglas v. United States Fidelity & Guar. Co., 81 N.H. 371, 127 A. 708 (1924); G. A. Stowers Furniture Co. v. American Indem. Co., 15 S.W.2d 544 (Texas Comm'n App. 1929).

10. Georgia Cas. Co. v. Mann, 242 Ky. 447, 46 S.W.2d 777 (1932); Davis v. Maryland Cas. Co., 16 La. App. 253, 133 So. 769 (1931); Berk v. Milwaukee Auto. Ins. Co., 245 Wis. 597, 15 N.W.2d 834 (1944).

11. See cases cited in 71 A.L.R. 1488-89 (1931).

12. Palmer v. Financial Indem. Co., 215 Cal. App. 2d 419, 30 Cal. Rptr. 204 (1963); *see also* Critz v. Farmers Ins. Group, 230 Cal. App. 2d 788, 41 Cal. Rptr. 401 (1964).

13. Ohio Cas. Ins. Co. v. Gordon, 95 F.2d 605 (10th Cir. 1938).

14. Wakefield v. Globe Indem. Co., 246 Mich. 645, 225 N.W. 643 (1929).

15. 247 N.Y. 451, 160 N.E. 911 (1928).

case, as distinguished from bad faith."[16] However, in spite of the different reasons given by the courts—and the diverse rules enunciated by them—the results are identical.[17] The courts, confident that liability should be imposed, continue to rely on confused case law in their attempts to define guidelines for its imposition.

In the face of this uncertainty, the California courts have consistently sought to establish a clear standard. In *Brown v. Guaranty Insurance Co.*,[18] the Supreme Court of California recognized the recent trend toward the coalescence of the negligence and bad faith tests, but made its position clear:

> [W]e are convinced that only bad faith should be the basis of the insured's cause of action. Bad faith may involve negligence, or negligence may be indicative of bad faith, but negligence alone is insufficient to render the insurer liable.[19]

In order to aid courts in the future, *Brown* listed certain factors to be considered in determining the insurer's good faith. Among these were: the strength of the injured party's case, attempts by the insurer to induce settlement, and the sufficiency of the investigation by the insurer. This decision shows a lucid recognition of the problem, and the decision proposed by the court, while not flawless, provided a precedent for the more liberal decisions which followed.

A year after its decision in *Brown,* the Supreme Court of California handed down a major decision in the area of a liability insurer's duty to settle. Confronted with a factual situation strikingly similar to *Crisci,* the Court in *Comunale v. Traders & General Insurance Co.*,[20] went a step further and held that the insurer should be liable for its refusal to settle when such settlement was "reasonable." In awarding the plaintiff recovery for the amount of the excess judgment, the court held: "[A] consideration in good faith of the insured's interest requires the insurer to settle the claim. Its unwarranted refusal to do so constitutes a breach of the implied covenant of good faith and fair dealing."[21] The language of the court is clear—the "standard of reasonableness," "breach of duty," and "proximate causation" are indicative of the court's abandonment of strict contract law and its recognition of the *ex delicto* nature of the action. The importance of this decision cannot be overemphasized; the court freed itself from the inconsistencies of prior case law and established that this type of action is "sui generis."

Relying on *Comunale* and some recent California cases holding that evidence of actual dishonesty or bad faith is not fatal to the cause of action,[22] the court in *Crisci* has gone a step further and developed its own rule. The standard proposed by the court is uncomplicated and straight-forward—*absolute liability* on the insurer for its refusal to settle a claim within policy limits: "[W]here the insurer's and the insured's

16. *Id.* at 455, 160 N.E. at 912.
17. J. Spang Baking Co. v. Trinity Universal Ins. Co., 45 Ohio L. Abs. 577 (1946); Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches, Inc., 215 S.W.2d 904 (Texas Civ. App. 1948).
18. 155 Cal. App. 2d 679, 319 P.2d 69 (1957).
19. *Id.* at 689, 319 P.2d at 75.
20. 50 Cal. 2d 654, 328 P.2d 198 (1958).
21. *Id.* at 659, 328 P.2d at 201.
22. Davy v. Public Nat'l Ins. Co., 181 Cal. App. 2d 387, 5 Cal. Rptr. 488 (1960).

interests necessarily conflict, the insurer, which may reap the benefits of its determination not to settle, should also suffer the detriments of its decision."[23] In adopting this rule, the court is following the advice of law review commentaries and discussions[24] which have clamored for uniformity in this area of the law. Writers have sought adoption of such a rule for the "advantage of certainty and relative ease of application, even though it is an extreme position."[25] For the first time there is a definite statement of the law upon which the courts may rely in future litigation.

Having established the issue of liability, the court then had to assess the damages —in allowing Mrs. Crisci $25,000 for mental suffering, the court took a logical but unprecedented step. In the past, the usual recovery in such actions was the amount for which the insured became liable beyond the limits of his policy.[26] This measure was arrived at by a rote application of the general rule of damages for breach of contract actions, *i.e.,* liability for those damages which were reasonably foreseeable.[27] There were no instances of recovery for mental suffering, damages being strictly limited to liability beyond policy limits and, occasionally, the recovery of attorney's fees.[28] Since the court stated that the action sounded both in tort and contract, it was free not only to abandon the more rigid contract theory,[29] but also to develop its decision through more fluid tort concepts.

The court relied heavily upon its 1952 decision in *Eads v. Marks,*[30] which stated: "Where the cause of action arises from the breach of contractual duty, the action is delictual notwithstanding that it also involves a breach of contract."[31] In a tort action the injured party can recover *all damages* sustained, whether anticipated or not.[32] Thus, concluded the court, since the plaintiff had not undertaken any action which could prejudice the defendant, she need not elect her remedy,[33] and the case properly went to the trier of fact on both theories. From this premise as to the nature of the action, it was easy to find the necessary proximate causation[34] and award Mrs. Crisci $25,000 for mental suffering.

Yet, a final obstacle remained: according to the weight of authority, damages are not usually recoverable for mental suffering when there is no allegation of physical

23. *Supra* note 2, at 442, 426 P.2d at 177, 58 Cal. Rptr. at 17.

24. Note, 18 STAN. L. REV. 475, 483-85 (1966); Note, 60 YALE L.J. 1037, 1041-42 (1951); Note, 13 U. CHI. L. REV. 105, 109 (1945); Comment, 48 MICH. L. REV. 95 (1949).

25. Keeton, *Liability Insurance and Responsibility for Settlement,* 67 HARV. L. REV. 1136 (1954), presents a thorough and scholarly analysis of this subject.

26. Evans v. Continental Cas. Co., 40 Wash. 2d 614, 245 P.2d 470 (1952).

27. Automatic Poultry Feeder Co. v. Wedel, 213 Cal. App. 2d 509, 28 Cal. Rptr. 795 (1963); Grupe v. Glick, 26 Cal. 2d 680, 160 P.2d 832 (1945).

28. Maryland Cas. Co. v. Elmira Coal Co., 69 F.2d 616 (8th Cir. 1934). For a decision holding such damages *not* recoverable, *see* Christian v. Preferred Acc. Ins. Co., 89 F. Supp. 888 (N.D. Cal. 1950).

29. Hunt Bros. Co. v. San Lorenzo Water Co., 150 Cal. 51, 87 P. 1093 (1906).

30. 39 Cal. 2d 807, 249 P.2d 257 (1952).

31. *Id.* at 811, 249 P.2d at 260.

32. Collins v. Jones, 131 Cal. App. 747, 22 P.2d 39 (1933); Bartlett v. Federal Outfitting Co., 133 Cal. App. 747, 24 P.2d 877 (1933).

33. Weaver v. Bank of America Nat'l Trust & Savings Ass'n, 59 Cal. 2d 428, 380 P.2d 644, 30 Cal. Rptr. 4 (1963).

34. *Compare* CAL. CIV. CODE § 3333 (West Ann. 1954) which gives the measure of damages in tort, *with* § 3300 which gives the general measure of damages in contract actions.

injury.[35] The courts are reluctant to award such damages because they reason it would open the door to fictitious claims and lead to the litigation of trivialities.[36] It is the very nature of mental suffering which has put the courts on their guard. The uncertainty of medical evidence and the difficulty of proof make it extremely difficult to render a judgment on this issue. The California courts, however, have not subscribed completely to this theory and have established their own rules. In *Emden v. Vitz*,[37] the Supreme Court of California, when confronted with a similar argument, held: "Appellants' contention . . . is but an argument that the courts are incapable of performing their appointed tasks, a promise [*sic*] which has frequently been rejected."[38] Obviously influenced by this decision, the court in *Crisci* observed that the danger of fictitious claims had been reduced since "there were substantial damages apart from those due to mental distress" and that the conduct complained of was "tortious."[39]

In awarding damages for mental suffering which was not an aggravation of a physical injury, the court is following the modern trend.[40] Courts have allowed recovery for uncompounded mental suffering when the cause of action concerned an invasion of property rights,[41] or "intentional and outrageous conduct."[42] The California case of *Acadia, California Ltd. v. Herbert*[43] is illustrative of modern thinking—if the character of the contract is such that a breach would naturally cause mental anguish, a recovery may be had therefor. There can be no doubt that liability insurance policies come within this class of contract, for the essence of the agreement is the protection of the comfort, happiness, and personal well-being of the insured.

Finally, it is evident that the court was strongly influenced by policy considerations. Doubtless, it was striving to protect the insured from the inevitable conflict of interests which arise when an insurance company is offered a compromise within the terms of the policy. Inherent in the proposed rule is the recognition that most insurance policies are adhesion contracts in which the insured has little or no control over the terms. Thus, where there is a conflict of interests, the rights of the policyholder, who had no voice in the negotiations, should be protected. In enforcing the insured's contractual "expectations," the court joined the recent trend of decisions which have protected the "little man" in his fight against the limitations imposed by the stronger party in the adhesion contract setting. Underlying policy considerations are even more evident in the court's award of $25,000 for Mrs. Crisci's mental suffering. In the words of the court: "Fundamental in our jurisprudence is the principle that for every wrong there is a remedy and that an injured party should be compensated for all damage proximately caused by the wrongdoer."[44] Obviously the court felt

35. Mack v. Hugh W. Comstock Associates, Inc., 225 Cal. App. 2d 583, 37 Cal. Rptr. 466 (1964); Espinosa v. Beverly Hosp., 114 Cal. App. 2d 232, 249 P.2d 843 (1952).
36. W. PROSSER, TORTS § 11, at 43 (3d ed. 1964).
37. 88 Cal. App. 2d 313, 198 P.2d 696 (1948).
38. *Id.* at 319, 198 P.2d at 700.
39. *Supra* note 2, at 444, 426 P.2d at 179, 58 Cal. Rptr. at 19.
40. Stewart v. Rudner, 349 Mich. 459, 84 N.W.2d 816 (1957).
41. Kornoff v. Kingsburg Cotton Oil Co., 45 Cal. 2d 265, 288 P.2d 507 (1955); Herzog v. Grosso, 41 Cal. 2d 219, 259 P.2d 429 (1953).
42. Richardson v. Pridmore, 97 Cal. App. 2d 124, 217 P.2d 113 (1950).
43. 54 Cal. 2d 328, 353 P.2d 294, 5 Cal. Rptr. 686 (1960).
44. *Supra* note 2, at 443, 426 P.2d at 178, 58 Cal. Rptr. at 18.

that a judgment for an amount beyond that of the excess liability was both necessary and just. The determination that the insurer's liability—and the extent of that liability—should be fixed not by the form of the action but by the underlying equities of the case must be commended as a desirable result.

The *Crisci* decision attempts to clarify an area which has long plagued the courts. The proposed answer presents a logical, practical, and equitable solution to the problem. It remains to be seen whether the rule as announced by this court will be fully adopted, or whether each case will continue to be decided on an ad hoc basis.