CIVIL RIGHTS—CIVIL RIGHTS ACT OF 1964—A bar containing various mechanical means of amusement held to be a "place of entertainment" and therefore a public accommodation within the meaning of the Act.—*United States v. Deetjen*, 356 F. Supp. 688 (S.D. Fla. 1973).

Ben and Mary Deetjen refused to provide service to Negroes in the cocktail lounge of the St. Lucie Inn. Such refusals had been regular occurrences and were based upon the defendants' policy to exclude Negroes from that portion of the Inn.[1] As if to emphasize their discrimination, defendants frequently directed Negroes to the drive-in package store portion of the establishment after service in the lounge had been refused.[2]

The United States[3] sought to enjoin the blatant discrimination pursuant to the Civil Rights Act of 1964.[4] The district court,[5] in *United States v. Deetjen*,[6] held that because the piano, juke box, and television set provided for the use of customers inside the St. Lucie Inn were manufactured outside Florida, operation of the bar "affected commerce" within the meaning of the statute. The court further held, on the plaintiff's motion for amendment of the judgment, that the bar was a "place of entertainment" within the meaning of the public accommodations section of the Civil Rights Act. The alleged racial discrimination could therefore be enjoined pursuant to the Act.[7] The district court relied exclusively upon

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[1]United States v. Deetjen, 356 F. Supp. 689 (S.D. Fla. 1973).

[2]*Id.* On occasion, employees had offered to serve a Negro a mixed drink in a paper cup through the drive-in window of the package store. Any service to Negroes inside the lounge had been isolated incidents and were in exception to defendant's normal policy and practice. *See* Brief for United States at 7-9. *See also* note 40 *infra*.

[3]The United States has standing to bring suit. *See* 42 U.S.C. § 2000a (5) (1970).

[4]*Id.* § 2000 *et. seq.*

[5]Section 2000a(6)(a) provides that,

> The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subchapter and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

[6]356 F. Supp. 689 (S.D. Fla. 1973).

[7]*Id.* at 691.

the Fifth Circuit's decision in *United States v. DeRosier*[8] for amendment of its judgment.

Establishments covered by the provisions of the public accommodations section of the Civil Rights Act of 1964 are grouped into four general categories: (1) establishments used for lodging, (2) establishments used for eating, (3) establishments used for entertainment, and (4) establishments located on the premises of other covered establishments or which have covered establishments on their premises.[9] Certain kinds of establishments are specified within each of the first three categories. Inns, hotels, motels, restaurants, cafeterias, lunch counters, theaters, and arenas are specifically enumerated by the Act. The significance of *Deetjen* is that an establishment with the characteristics and amenities of the St. Lucie Inn was held to be a "place of entertainment" within the meaning of 42 U.S.C. section 2000a(b)(3). This holding represents a definite turning point in the government's strategy since the "entertainment" provision[10] rather than the "restaurant" provision[11] was used to attack discrimination exhibited within a bar.

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[8]473 F.2d 749 (5th Cir. 1973), *rev'g* 332 F. Supp. 316 (S.D. Fla. 1971).

[9]The affected accommodations are set out at 42 U.S.C. § 2000a (1970), as follows:

> (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:
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> (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
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> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;
>
> (3) any motion picture house, theatre, concert hall, sports arena, stadium, or other place of exhibition or entertainment; and
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> (4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

[10]*Id.* § 2000a(b)(3). *See* note 9 *supra.*

[11]42 U.S.C. § 2000a(b)(2) (1970). *See* note 9 *supra.*

The early cases brought against bar owners were largely unsuccessful attempts to establish coverage under the "restaurant" provision of title II of the Civil Rights Act of 1964.[12] In *Cuevas v. Sdrales*,[13] the Tenth Circuit held that a bar which served only beer was not included within the "restaurant" provision coverage since the establishment could not be construed to be a "facility principally engaged in selling food for consumption on the premises . . . ."[14] According to the *Cuevas* court, therefore, a bar per se was not included under the "restaurant" provision.[15] Even though bars per se are not covered by this section,[16] it is clear that bars in which liquor is served in conjunction with food may be treated as restaurants.[17] It is also clear that bars may be subject to derivative coverage under section 2000a(b)(4).[18] However, these cases, as cited by the district court in support of its finding in the original *United States v. DeRosier*[19] opinion, are inapposite

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[12]*See* 356 F. Supp. at 689.

[13]344 F.2d 1020 (10th Cir. 1965), *cert. denied*, 382 U.S. 1044 (1966).

[14]42 U.S.C. § 2000a(b)(2) (1970). *See* note 9 *supra*.

[15]

> Beer, and similar drinks might in some instances be classed as food, as they supply some nutriment to the body, but generally beer is considered a drink, and although it may be served in eating places, a place serving only beer is not considered a restaurant . . . .

344 F.2d at 1021.

[16]Legislative history of the Act clearly lends support to the exclusion of bars from coverage under the "restaurant" section. Senator Magnuson, Chairman of the Senate Committee for Commerce, to which the Civil Rights Bill was referred for hearings, stated that establishments included within section 201(b)(2) of the Civil Rights Act of 1964 (42 U.S.C. § 2000a(b)(2) (1970)) were facilities engaged in selling food for consumption on the premises. *See* 110 CONG. REC. 7406 (1964). Throughout his remarks, the inference is clear that the section covered eating establishments and not those principally engaged in selling drinks. The Senator stated, "A bar, in the strict sense of that word, would not be governed by title II, since it is not 'principally engaged in selling food for consumption on the premises.'"

[17]*See* Fazzio Real Estate Co. v. Adams, 396 F.2d 150 (5th Cir. 1968).

[18]*See* United States v. Fraley, 282 F. Supp. 954 (M.D.N.C. 1968). When a kitchen and dining room of the establishment occupied a substantial portion of the premises and were devoted to food service, the establishment was held to be a "restaurant principally engaged in selling food for consumption on the premises." The bar, whose room was used also as a dining room, and which held itself out as serving patrons of the restaurant, was similarly a place of public accomodation under section 2000a(b)(4). *See* note 9 *supra*.

[19]332 F. Supp. 316 (S.D. Fla. 1971), *rev'd*, 473 F.2d 749 (5th Cir. 1973).

to the present problem because they deal with the "restaurant" provision and do not involve the issue of whether a tavern or bar that offers mechanical amusement devices falls within the perview of section 2000a(b)(3). Thus, finding little judicial sympathy for coverage of bars under the "restaurant" section, the United States has shifted its emphasis to the "entertainment" section as a means of including bars.

The problem with the government's most recent effort to include bars as "places of entertainment" is that examples of establishments covered by this provision are enumerated in the statute and a broad reading is needed to expand its scope. One early group of cases took the view that any determination of the scope of the general phrase "other places of exhibition or entertainment"[20] had to be guided by the interpretive principle of *ejusdem generis*.[21] This view was first proposed in *Robertson v. Johnston*[22] in which the court held that the rule must be applied to prevent the general words from extending the operation of the statute into a field not intended. Accordingly, the *Robertson* court held that the phrase "place of entertainment" could not be construed to mean "place of enjoyment." The term had to be confined to places in which performances were presented.[23] In a similar vein, the district court in *Miller v. Amusement Enterprises, Inc.*[24] held that the use of the word "other" before the words "place of exhibition or entertainment" made it clear that the establishments under that group must be similar to those specifically enumerated.

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[20]42 U.S.C. § 2000a(b)(3) (1970). In part, this subsection provides as follows: "any motion picture house, theatre, concert hall sports arena, stadium, or other place of exhibition or entertainment . . . ." *See* note 9 *supra*.

[21]BLACK'S LAW DICTIONARY 608 (4th ed. 1951).

> [W]here general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. . . .

[22]249 F. Supp. 618 (E.D. La. 1966), *rev'd on other grounds*, 376 F.2d 43 (5th Cir. 1967).

[23]*Id.* at 618, 622. Thus, a nightclub which provided a small band or singing group was a "place of entertainment" since performances were presented. Legislative history of the Act also recognized from the very beginning that a nightclub might also be covered under section 201(b)(3) if it customarily offered entertainment which moved in interstate commerce. *See* 110 CONG. REC. 7407 (1964) (remarks of Senator Magnuson).

[24]259 F. Supp. 527 (E.D. La. 1966), *rev'd* 394 F.2d 342 (5th Cir. 1968). The district court held an amusement park was not within the coverage

However, in its decision in *Miller v. Amusement Enterprises, Inc.*,[25] the Court of Appeals for the Fifth Circuit, emphasizing the general intent and overriding purpose of the Civil Rights Act to end discrimination in certain facilities, expressed disagreement with those who would have the Act narrowly construed. Even though the legislative history was admittedly inconclusive, the court announced that the "entertainment" provision includes not only establishments which present shows, performances, and exhibitions to a passive audience, but also those which provide recreational or other activities for the amusement or enjoyment of their patrons.[26] The court stated that *ejusdem generis* cannot prevail when the result would be to defeat the statute's obvious and dominant general purpose.[27]

Noting the division of opinion in the federal courts, the United States Supreme Court has considered the meaning of the phrase "place of entertainment." The Supreme Court held in *Daniel v. Paul*[28] that in light of the overriding purpose of the Civil Rights Act of 1964 to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public, the statutory language "places of entertainment" should be given full effect according to its generally accepted meaning.[29] However, notwithstanding the Supreme Court's man-

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of the statute since the establishments specifically enumerated by Congress in section 2000a(b)(3) were all of the kind that furnished entertainment to spectators and not to participants.

[25]394 F.2d 342 (5th Cir. 1968), *modifying* 391 F.2d 87 (5th Cir. 1967), *rev'g* 259 F. Supp. 523 (E.D. La. 1966).

[26]*Id.* at 349, 350. See Miller v. Amusement Enterprises, Inc., 391 F.2d 87, 89-96 (5th Cir. 1967), for an exhaustive discussion of the legislative history of the phrase "place of entertainment." This discussion indeed shows the inconclusive nature of the legislative history of the subsection.

[27]394 F.2d at 350 *relying on* United States v. Alpers, 338 U.S. 680 (1950); SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943).

[28]395 U.S. 298 (1969). The Supreme Court specifically agreed with the en banc decision of the Fifth Circuit in *Miller*.

[29]*Id.* at 307. Recognizing the respondent's argument that "place of entertainment" in the context of the statute referred only to establishments in which patrons were entertained as spectators or listeners rather than those in which entertainment took the form of direct participation, the Court said that it could find no support in the legislative history for such a reading of the statute. Although most of the discussion in Congress regarding the coverage of title II of the Civil Rights Bill admittedly focused on places of spectator entertainment rather than on recreational areas, the Court observed, "But it does not follow that the scope of section 201(b)(3)

date, the District Court for the Southern District of Florida continued to hold that a bar was not a "place of entertainment."[30] The lower court relied heavily on statements by Senator Magnuson that "a bar in the strict sense of the word would not be covered by title II . . . ."[31] However, the court failed to acknowledge that the Senator continued, with obvious reference to the restaurant provision only, "since it is not principally engaged in selling food for consumption on the premises. . . ."[32] The district court's interpretation was reversed by the Court of Appeals for the Fifth Circuit in *United States v. DeRosier*.[33]

In *DeRosier*, the appellate court followed its interpretation in *Miller* that sections 2000a(b)(3) and (c)(3) must be read with an open mind attuned to the clear purpose of the Act.[34] Thus the court read the statute, particularly the term "place of entertainment," as did the Supreme Court in *Daniel*, according to its generally accepted meaning.[35] The court of appeals refused to limit the statute by applying *ejusdem generis* and in fact held that the statute clearly specified than *any* place of entertainment is a place of public accommodation.[36] Once the phrase "place of entertain-

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should be restricted to the primary objects of Congress' concern when a natural reading of its language would call for a broader coverage. . . ." *Id.* at 307.

[30]United States v. DeRosier, 332 F. Supp. 316 (S.D. Fla. 1971), *rev'd*, 473 F.2d 749 (5th Cir. 1973). The thrust of the opinion is that "neighborhood" bars which earn an insubstantial part of their gross income through mechanical amusement means are not intended to be covered.

[31]*Id.* at 318.

[32]110 CONG. REC. 7406 (1964) (remarks of Senator Magnuson). Senator Magnuson at that time was discussing the reach of the portion of title II dealing with eating establishments and merely clarified the fact that bars which are not principally engaged in selling food would not be covered under that provision. The limitation of the Senator's comment is especially apparent when it is observed that subsequently, in the same speech, when discussing night clubs which may also be characterized as bars, Senator Magnuson stated that "a nightclub might also be covered under section 201(b)(3) if it customarily offers entertainment which moves in interstate commerce. . . ." *Id.* at 7407.

[33]473 F.2d 749 (5th Cir. 1973).

[34]*Id.* at 751.

[35]*Id.*

[36]

As opposed to this literal reading of the statute, defendants-appellees suggest that the phrase "other place of exhibition or entertainment" in Section 2000a(b)(3) refers to facilities similar in kind to those

ment" was interpreted widely enough to include an establishment such as the St. Lucie Inn, the district court adopted the appellate resolution as the single foundation for correcting its memorandum opinion in favor of the United States.[37]

Notwithstanding the generous interpretation of the phrase "place of entertainment," affirmative action in the *Deetjen* case hinged upon satisfaction of the other requirements of the Act.[38] The need for a discriminatory action required by section 2000a(a)[39] was satisfied when the Deetjens did not dispute the fact that racial discrimination had been practiced.[40] The remaining question was

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> enumerated in the statute. . . . We cannot, however, read those limitations into the statute because the words of the statute do not require that we do so and the expressed intent of the statute prohibits us from doing so. The statute does not require that the entertainment be of a certain variety or that a certain quantum of the establishment's business be derived from the entertainment of its customers. On the contrary, the statute clearly specifies that ". . . any . . . place of entertainment" is a place of public accommodations within its meaning if that establishment's operations affect commerce.

Id. at 752.

[37]356 F. Supp. at 691. The district court had entered a memorandum opinion on January 4, 1973, supporting their own ruling in the earlier *DeRosier* case that a local bar was not a "place of entertainment." When the Court of Appeals for the Fifth Circuit reversed the earlier *DeRosier* opinion, the District Court for the Southern District of Florida amended its January 4 memorandum opinion in order to follow what was in fact now the law of the Fifth Circuit.

[38]Generally, the requirements for action under title II of the Civil Rights Act of 1964 are the following: a discriminatory act to satisfy subsection (a), a place of public accommodation within subsection (b), and either state action supporting the discrimination within subsection (b) or the operations of the establishment affecting commerce within the meaning of subsection (c). *See* Note, *Public Accommodations*, 16 CASE W. RES. L. REV. 660 (1964). The first and last requirements were held satisfied in the memorandum opinion of Judge Atkins on January 4, 1973. It was not until after *DeRosier* that the second requirement was held satisfied in the amendment to the memorandum opinion on February 15, 1973.

[39]This subsection reads as follows:

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

[40]The United States was ready to prove through testimony of various witnesses that the defendants had maintained a long standing policy and

whether the operations of the St. Lucie Inn affected commerce within the meaning of section 2000a(c)(3).[41] The parties in *Deetjen* had stipulated that the juke box, piano, and television set provided at the St. Lucie Inn were sources of entertainment for the customers and had further stipulated that these sources of entertainment were manufactured outside the State of Florida. This type of stipulation taken together with the generally accepted meaning of the Act, enabled the court of appeals in *DeRosier* to find that the presence of foreign mechanical means of amusement would comport with a literal interpretation of the Act. The same mechanical devices which cause an establishment to be a "place of entertainment" when provided for the use and enjoyment of its patrons must certainly be considered "sources of entertainment." Additionally, the legislative history of section 2000a(c)(3) indicates that Congress specifically considered such mechanical and stationary machines as a juke box, pool table, and shuffle board to be "sources of entertainment" within the meaning of the section.[42] Indeed, the Senate rejected an amendment which would have ruled out most mechanical sources by requiring that the "source of entertainment" be one which has not come to rest within a State.[43]

The courts have long since established that a source of entertainment "moves in commerce" within the meaning of section

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practice of refusing to provide service to Negroes in the cocktail lounge portion of the St. Lucie Inn and that Negroes were allowed to purchase liquor only at a drive-in package store window. The evidence would allegedly show multiple incidents of the racially discriminatory policy and practice. The evidence would also allegedly show defendants' explicit admissions of such a policy and practice. *See* Brief for the United States at 8.

[41]This subsection reads as follows:

> The operations of an establishment affect commerce within the meaning of this subchapter if . . . (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce . . . . For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

[42]Daniel v. Paul, 395 U.S. 308 (1969).

[43]110 CONG. REC. 13915-21 (1964), *quoted in* Daniel v. Paul, 395 U.S. 307 (1969). *See also* 110 CONG. REC. 7402 (1964) (remarks of Senator Magnuson).

2000(c)(3) if it orginates in a state other than the one in which it is being presented.[44] When considering a question similar to that involved in *Deetjen,* the Supreme Court held that a club's customary sources of entertainment "moved in commerce" not only because the club leased fifteen boats from another state, but also because the club's juke box and records were manufactured outside the state.[45] Similarly, after finding a skating rink to be a place of entertainment, the court in *Evans v. Seaman*[46] concluded that the source of entertainment was the use of skates on the surface of the rink. Since the skates and parts came from outside the state, they constituted a source of entertainment which "moved in commerce." The same reasoning was followed in *United States v. L. C. Vizena,*[47] in which the court found that the juke box, records, and coin-operated pool table located in a bar were mechanical sources of entertainment which had "moved in interstate commerce." This finding made it clear that the bar's operations "affected commerce" within the meaning of section 2000a(c)(3). Since the "sources of entertainment" at the St. Lucie Inn were not only "customarily" presented but were permanently provided and had "moved in commerce" within the meaning of the statute, as interpreted by the cases, they were sufficient vehicles to furnish the interstate commerce connection required by the Act.

Deetjen demonstrates the extension of the phrase "place of entertainment" to reach a bar containing mechanical means of amusement. The next logical step, that of designating a bar itself a "place of entertainment" and the service of alcoholic beverages as a "source of entertainment" customarily presented, has apparently been taken in *United States v. Martin Eric, Inc.*[48] This

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[44]*See* Twitty v. Vogue Theatre Corp., 242 F. Supp. 281 (M.D. Fla. 1965).

[45]Daniel v. Paul, 395 U.S. 308 (1969).

[46]452 F.2d 749 (5th Cir. 1971).

> The remaining question, therefore, is whether the operations of Seaman's roller rink "affect commerce" within the meaning of § 2000a(c)(3). We conclude that they do. The rink is not entertaining by itself. Rather its source of entertainment is the use of the roller skates upon its surface. Those roller skates and the replacement parts for them were purchased from an Alabama company. The skates, therefore, constitute the "sources of entertainment" which "move in commerce."

Id. at 751.

[47]342 F. Supp. 555 (W.D. La. 1972).

[48]No. 72-C-142 (N.D. Ill., Apr. 14, 1972), *quoted in* Brief for the United States at 12, 19.

holding completes the coverage of the Civil Rights Act of 1964 to include all bars.

CRIMINAL PROCEDURE—DOUBLE JEOPARDY—Retrial on greater charge after guilty plea to lesser included offense vacated held violative of fifth amendment double jeopardy clause.—*Rivers v. Lucas*, 477 F.2d 199 (6th Cir. 1973).

On October 19, 1970, an information was filed in the Recorder's Court for the City of Detroit, Michigan, charging Senarfis Rivers with the offense of murder in the first degree in the perpetration of a larceny. Three months later, Rivers entered a plea of guilty to the lesser included offense of manslaughter. This plea was accepted by the trial court and Rivers was sentenced to a term of not less than fourteen nor more than fifteen years in the state prison.

On March 23, 1972, the Michigan Court of Appeals reversed Rivers' conviction and remanded the case to the recorder's court.[1] Another information charging Rivers with perpetration of felony-murder, or murder in the first degree, was subsequently filed with the recorder's court. Upon exhaustion of his state remedies,[2]

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[1]The sole authority cited by the court of appeals for the reversal was People v. Jaworski, 387 Mich. 21, 194 N.W.2d 868 (1972). This case held that prior to accepting the guilty plea of a defendant, the trial court must specifically inform the defendant of his constitutional rights against self-incrimination, to trial by jury, and to confront his accuser.

[2]The issue of exhaustion of state remedies was considered by the United States Court of Appeals, but is beyond the scope of this Recent Development. Prior to reaching the district court, Rivers filed a motion with the recorder's court to quash the information or to reduce the charge to manslaughter, and this motion was denied. He then filed four motions with the Michigan Court of Appeals: an emergency application for leave to appeal, a motion for immediate consideration of that motion, a motion for a stay of the order of the recorder's court, and a motion for immediate consideration of that motion. The court of appeals granted the motions for immediate consideration and denied the other motions. He then filed four motions with the Michigan Supreme Court: a motion for leave to appeal to the supreme court, a motion to by-pass the Michigan Court of Appeals, a motion for a stay, and a motion for immediate consideration. The