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ANTITRUST DIVISION

Assistant Attorney General William H. Orrick, Jr.

Court refuses to accept Nolo Plea: United States v. H. P. Hood & Sons, Inc. and The Great Atlantic & Pacific Tea Co., Inc. (D. Mass.). On September 21, 1964 Judge Andrew A. Caffrey denied the application of defendant Hood to plead nolo contendere to all six counts of the indictment. The indictment charged Hood with an attempt to monopolize, conspiracy to restrain trade, conspiracy to monopolize and three counts of price discrimination in violation of Section 3 of the Robinson Patman Act. A & P, a defendant in the two conspiracy counts only, and Hood had pleaded not guilty to all charges of the indictment in March 1963.

Judge Caffrey denied Hood's motion to plead nolo contendere from the bench after lengthy oral arguments. The Government had submitted a brief in opposition to Hood's motion and an eighteen page supporting affidavit. The affidavit detailed evidence of Hood's predatory conduct upon which the Government will rely at trial. The principal arguments made by the Government were that Hood's conduct demonstrated a calculated and deliberate defiance of the antitrust laws which disqualified it from the privilege of pleading nolo contendere, and that acceptance of nolo contendere pleas would deny injured parties of the benefit of Section 5 of the Clayton Act. The Government informed the Court of the existence of 12 treble damage plaintiffs who have already filed suits against Hood and tendered to the Court a letter from Cumberland Farms, the only victim of the conspiracy named in the indictment, which stated that Cumberland intended to sue Hood but because of the financial burdens of protracted litigation would not unless and until it had the benefit of a prima facie judgment.

Judge Caffrey also denied A & P's motion for a severance and A & P's motion for an order requiring the Government to prove the existence of a conspiracy between A & P and Hood before offering evidence of acts and declarations of co-conspirators.

Trial is set for October 26, 1964.

Staff: John J. Galgay, Charles Donelan, Bertram M. Kantor, Nicholas L. Coch. (Antitrust Division)

Complaint Under Sections 1 & 2 of Sherman Act. United States v. Johnson & Johnson. (D. N.J.) DJ File No. 60-21-104. On September 16, 1964, a civil complaint alleging violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act was filed in the District of New Jersey against Johnson & Johnson (J&J) a manufacturer of first aid products and baby toiletries.

The complaint alleges that J&J, which is the oldest and largest manufacturer of first aid products (adhesive tape, adhesive bandages, gauze bandages and pads, sterile cotton and first aid kits) and of baby toiletries (baby powder and baby oil), has monopolized the sale and distribution of these products in food stores.

The complaint also charges that defendant, a New Jersey corporation, located in New Brunswick, New Jersey, has entered into agreements and understandings with wholesale purchasers in the food field which are in unreasonable restraint of trade and which prohibit such purchasers from dealing in products manufactured by defendant's competitors.

Manufacturers of first aid products and baby toiletries sell them for resale in food stores (principally supermarkets), to rack operators, wholesale grocers and directly to food chains. Rack operators and food chains control the racks or shelves from which these products are sold in that they select the items, allocate space for display and replenish items as they are sold. Wholesale grocers to a lesser degree also perform these services. Presently about $58 million or 35% of all retail sales of first aid products and approximately $12 million or 40% of all retail sales of baby toiletries are made in food stores.

The complaint alleges that J&J in effectuating and carrying out the monopolization has required rack operators, self-service supermarkets and wholesale grocers to agree to and to purchase and display J&J products to the complete or substantial exclusion of competitive products and to purchase the full line of J&J products.

The complaint also charges that J&J granted special discounts to wholesale purchasers who complied with its requirements relating to purchase and display. On the other hand it threatened to and refused to sell to purchasers in this market who refused to agree to or did not comply with its requirements.

J&J it is charged, has succeeded in obtaining a monopolistic position in the food field to the extent that sales of its first aid products and baby oil amount to over 90% of the total retail food store sales and its sales of baby powder in these stores is over 70%.

Injunctive relief is sought to dissipate the monopoly and to restore free and open competition.

Staff: John J. Galgay, John D. Swartz, William J. Elkins and Edward F. Corcoran (Antitrust Division)

Court Holds For Defendant in Section 7 Clayton Act Case. United States v. Von's Grocery Company, et al. (S.D. Calif.) DJ Files No. 60-0-37-342. On September 14, 1964, Judge Carr entered an opinion directing the dismissal of the Government's complaint in the Von's Grocery case.

The Von's case was filed on March 25, 1960, to test the applicability of amended Section 7 to a straight horizontal merger between two leading retail chains in an economically significant section of the country.

In the course of pre-trial the parties entered into a pre-trial conference order. Judge Carr's opinion incorporates and repeats much of the pre-trial order including provisions which established that the Los Angeles metropolitan area was the relevant section of the country; that groceries and related products were the relevant line of commerce; that the defendants were leading chains of supermarkets in the area; that the twenty leading chains of supermarkets, including the two defendants, were all part of the retail grocery competition in the area and, as such, each of the chains competed with each other.

The Court's opinion also incorporated the Government's statistical tables which showed that the combined Von's and Shopping Bag chains had total sales of $177 million and accounted for 8.9% of all grocery sales, making them in combination the leading chain in the area in terms of total dollar sales and percentages.

The opinion also accepted the Government's statistics showing that in the period between January 1, 1950, and January 1, 1963, the total number of single store outlets decreased from 5,365 outlets to 3,590 while the total outlets operated by chains increased from 856 to 958. The Court also noted that between 1948 and 1958 the market share of the twenty largest chains increased from 43.8% to 56.9%.

In ordering dismissal of the Government's case the Court placed its reliance upon the remaining vigor of competition and stressed the fact that there have been some "new entrants" into the field. The opinion also stated that testimony by Government industry witnesses that the merger would lessen competition was of little assistance since such testimony was merely conclusionary. However, the Court seems to have placed some reliance upon the testimony by the defendants' industry witnesses that the merger would increase competition rather than decrease it.

In general, the Von's opinion resembles the lower court opinions in the Lexington and Philadelphia Bank cases which were overruled by the Supreme Court. The opinion in the Von's Grocery case may provide a desirable vehicle for further testing the Supreme Court's opinion in the two bank cases in the context of activity other than banking and in a market setting where the percentages are smaller than those involved in Philadelphia and Lexington.

The opinion required the defendants to prepare proposed findings of fact and conclusions of law to be served within thirty days and granted the Government fifteen days thereafter to serve and file objections thereto.

Staff: James J. Coyle, John F. Hughes and Malcolm F. Knight
(Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURTS OF APPEALS

FALSE CLAIMS ACT - DEFINITION OF CLAIM

Application For Surplus Grain Under Emergency Feed Program Held to Be Claim Within Coverage of False Claims Act. Aaron Sell v. United States (C.A. 10, No. 7468, September 3, 1964). DJ No. 120-29-185. Aaron Sell owned large amounts of farm lands in Colorado and Western Kansas, and a herd of pedigreed cattle. In 1955 as a result of a severe drought, Western Kansas was declared a disaster area and farmers and ranchers in the area became entitled to share in the Emergency Feed Program. The program provided a mechanism under which federally owned grain would be furnished to farmers or ranchers in order to preserve their basic herd of livestock. On January 1, 1956, Sell prepared and filed with the local Farmers' Home Administration county committee an application for surplus grain under the program. In the application he stated that he had practically no feed, and certified that "he did not have a supply of feed on hand sufficient to maintain his basic herd" and that he "would be unable to maintain his basic foundation herd" without the assistance he requested. These statements were false, as Sell knew, because he in fact owned substantial quantities of grain, which were kept in a grain elevator owned by a corporation which he substantially owned and dominated. The county committee approved his application and Sell was issued Farmers Purchase Orders having a value of $1,564. He then caused some of the grain from his elevator to be shipped and sold to another grain elevator. Under the terms of the arrangement he repurchased the same grain with his Farmers Purchase Orders, plus a balance in cash. The result of the transaction was therefore to convert his Farmers Purchase Orders into their cash equivalent, while leaving him with the same amount of grain which he had previously owned. The other grain elevator received the Farmers Purchase Orders, through which it was able to obtain equivalent amounts of Government-owned grain from the Commodity Credit Corporation.

Sell was indicted and found guilty of violating 15 U.S.C. 714m(a). The criminal trial was to the court, which found that Sell had intentionally made false representations, thereby causing the Government to pay out substantial quantities of grain to the Government's damage. A civil action under the False Claims Act was brought while the criminal indictment was pending. After the criminal conviction, the Government moved for summary judgment on the basis of the findings made in the criminal proceeding. The district court granted the motion for summary judgment, and entered judgment in favor of the United States.

On appeal, plaintiff relied primarily upon United States v. Robbins, 207 F. Supp. 799 (D. Kan.), in which the court held that an application under the Emergency Feed Program was not a "claim within the meaning of the Federal Claims Act," because no federal money or property was paid directly to the applicant. In the instant case, the Court of Appeals affirmed the district court's judgment, holding that the application was a claim because its purpose was to obtain property, and because the Purchase Orders caused the Government to suffer immediate financial detriment, in that it was liable to redeem them in grain. The Court of Appeals also agreed that there were no material issues of fact to be tried in the civil proceedings in the district court, because defendant was collaterally estopped by the judgment in the prior criminal proceeding to deny the factual findings made therein.

Staff: David L. Rose (Civil Division)

FALSE CLAIMS ACT

Government Does Not Have to Prove All Elements Ordinarily Required in Action For Damages For Fraud in Order to Recover For False Claim Under False Claims Act. Don Fleming, d/b/a Green Valley Feed Mill v. United States (C.A. 10, No. 7591, September 3, 1964). DJ No. 120-49-21. In 1956, Don Fleming, who operated a feed mill in the state of New Mexico, was a certified dealer in the Government's Emergency Feed Program. Under the program, a farmer eligible for assistance was given Farmers Purchase Orders which could be used for the purchase of certain designated surplus feed grain. The farmer had to present the orders to a certified dealer, such as Fleming was. In exchange for the orders, the dealer would deliver the designated grain to the farmer. The dealer then had to certify to Agriculture officials that he had made such delivery in exchange for the purchase orders, after which the dealer would be given a Dealer's Certificate in the face value equal to the value of the purchase orders. The Dealer's Certificate could then be used to purchase other designated surplus feed grain owned by the Commodity Credit Corporation.

The evidence showed that, on 15 occasions during 1956, Fleming had accepted purchase orders from farmers; had given them a credit on his books for the value thereof but had not actually delivered the grain for which the orders were redeemed; had caused the required certification to be executed; had presented such certification together with the purchase orders for payment; had received Dealer's Certificates therefor; and had negotiated the certificates. Fleming testified that many of the farmers who came to him did not like the feed mixtures which could be purchased with the purchase orders, and so requested him to provide them with different mixtures. To accommodate these requests, Fleming and his manager devised the feed credit arrangement, so that the farmers could be given a general cash credit for the value of their purchase orders, but were not then charged for any grain. At a later time, when the farmers took delivery of a quantity of feed of their specified mixture, the value thereof was debited to their accounts.

Upon the claim of the CCC, the United States brought this action against Fleming to recover damages and forfeitures for a "false, fictitious and fraudulent claim" under the False Claims Act, 31 U.S.C. 231. The district court found that Fleming knowingly and with intent to defraud had made and presented the false claims to CCC. Judgment was accordingly entered for the Government. Fleming appealed, alleging that, to establish its case under the False Claims Act, the Government had to prove all of the elements ordinarily required in an action for damages for fraud, and that the Government had failed to do this.

The Tenth Circuit rejected the contention and affirmed. It ruled that, under 31 U.S.C. 231, it is necessary to show only that the claimant made a claim upon or against the Government knowing it to be either false, fictitious, or fraudulent. The evidence was uncontroverted, and even appellant did not contend otherwise, that he caused 15 purchase orders to be filed knowing that the statement contained therein that the feed had been actually delivered to the purchaser was false. Thus, felt the Court, the Government had proved all of the facts necessary to establish Fleming's liability under the Act. The Court also held that, where a person files a claim which he knows is false for the purpose of obtaining approval or payment of the claim, there is a reasonable inference, almost a necessary implication, that he intends to deceive.

Staff: United States Attorney John Quinn, Assistant United States Attorney John A. Babington (D. N.M.)

FEDERAL TORT CLAIMS ACT

Where Action Is Based on Government Contract, Party May Not Waive Breach And Sue in Tort to Vest District Court With Jurisdiction. Herder Truck Lines, etc. v. United States of America (C.A. 5, No. 20958, July 29, 1964). DJ No. 78-18-42. At the direction of the Air Force, a Government contractor shipped certain Government-owned supplies from Florida to Texas. The shipments were made pursuant to Government bills of lading via several connecting interstate motor carriers. Upon delivery, the shipments were determined to be short. Accordingly, the Government withheld the value of the missing cargo, some $18,000, from freight charges due the delivering carrier, Herder Truck Lines.

Herder sued the shipper, an intermediate carrier, and the United States to recover the sums withheld. The complaint against the Government was framed under the Tort Claims Act, and alleged that as a result of the negligence of the United States or its agent, the shipper, the missing items were never shipped in the first instance.

The district court dismissed the suit against the Government on the ground that it was really one in the nature of a contract action and since it exceeded the $10,000 jurisdictional limitation under the Tucker Act, the court was without jurisdiction. On appeal, the Fifth Circuit affirmed, relying on its earlier decision in United States v. Smith, 324 F. 2d 622. The Court noted that many breaches of contract can also be treated as torts, but that in cases such as this, where the tort complained of was based entirely upon breach by the Government of a promise made by it in a contract, so that the claim was in substance a breach of contract claim, and only incidentally and conceptually also a tort claim, the common law or local state law right to waive the breach and sue in tort cannot be used to bring the case within the Federal Tort Claims Act. The Court further remarked that the motion of such waiver of breach and suit in tort, a product of the history of English forms of action, should not be used to defeat the long established policy that Government contracts are to be given a uniform interpretation and application under federal law, rather than being given different interpretations and applications depending upon the vagaries of the laws of fifty different states.

Staff: Richard S. Salzman (Civil Division)

DISTRICT COURTS

ADMIRALTY

Drifting Barge Liable For Bridge Damage And Salvage Award. United States v. Barge CBC 603 and Joseph M. Jones (E.D. La., Admiralty No. 3418, Div. 13, August 25, 1964). DJ No. 61-19M-2. Respondent Barge broke her moorings as a result of flood conditions caused by a hurricane and drifted downstream colliding with an Army pontoon bridge. Respondent claimed inevitable accident or "force majeure." The Court found that there was a failure to tend the barge properly under the prevailing weather conditions and held respondent liable for the bridge damage. Additionally, the Court held the Government entitled to a salvage award for pulling the barge to the bank and preventing her from further damage and liability downstream.

Staff: Alan Raywid (Civil Division) and Assistant United States Attorney Louis Lucas (E.D. La.)

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CRIMINAL DIVISION

Assistant Attorney General Herbert J. Miller, Jr.

SEARCH AND SEIZURE

Where Search and Seizure on Military Reservation Is Valid as Matter of Military Law When Made, Evidence Secured May Be Used in Subsequent Prosecution in District Court. United States v. Gene A. Grisby (C.A. 4, August 14, 1964). D. J. File 52-67-271. Defendant, a corporal in the Marine Corps, was assigned duties as a military policeman at Parris Island Marine Recruit Depot. With his family, he occupied Government-owned quarters on the base in an area where low-cost housing was provided for married enlisted personnel, who paid nominal rent. In the early morning hours of February 2, 1963, someone broke into the Enlisted Men's Club on the base and removed ten cases of beer. On February 4, 1963, one of Grisby's neighbors, having heard of the theft from the Club, called investigators in the Office of the Provost Marshal and reported that she had seen Grisby and another drive up to Grisby's house in an M.P. truck between 4:30 and 5:00 o'clock on the morning of February 2, 1963, and carry a number of boxes from the truck into Grisby's house. The investigators located a private who was on duty with Grisby on the early morning of February 2nd and he confirmed the neighbor's story.

The Provost Marshal consulted the Chief of Staff, informed him of what the investigators had learned and requested permission to search Grisby's quarters. The Chief of Staff, on behalf of the Commanding General, ordered the search. Grisby was summoned to the office of the Provost Marshal and accompanied the investigators to his quarters. He inquired whether the investigators had a search warrant and protested their entry into his quarters without one. He was advised that they did not have a warrant but were acting under the authority of the Chief of Staff. During the subsequent search the investigators found no beer but did find quantities of other articles belonging to the United States. These articles were seized and led to an indictment in the United States District Court for the Eastern District of South Carolina charging Grisby with theft on the property, its receipt, or both. After pretrial hearing on Grisby's motion to suppress, the District Court denied the motion as it affected the articles seized during the search of Grisby's quarters. At the conclusion of a trial without a jury Grisby was convicted on one count.

On appeal, Grisby's sole contention was that a District Court may not recognize as lawful any search of living quarters unless authorized by a valid search warrant or incident to a lawful arrest. He did not question the existence of probable cause to procure a warrant or procedural compliance with military law.

In its opinion the Court of Appeals discussed the right of a commanding officer to authorize a search of property located within a military reservation. Citing United States v. Murray, 12 USCMA 434 31 CMR 20, the Court stated that the United States Court of Military Appeals "has held by implication, at least, that the commanding officer's authorization of the search is dependent upon his determination that probable cause exists." In the instant case, the Court concluded that there was justification for the determination that probable cause for the search existed. Having concluded that the search was clearly authorized by military law, the Court held that it was valid for all purposes and "the District Court properly recognized it as being not constitutionally unreasonable or invalid and properly refused to suppress as evidence the fruits of the search." So far as we are aware, the precise question presented here had not previously been ruled upon in a reported case.

Staff: United States Attorney Terrell L. Glenn (E.D. S.C.).

CURRENCY BOOKLETS AND SIMILAR NOVELTIES

Policy of Department Regarding Prosecutions of Manufacturers of Currency Booklets and Similar Novelties. There have been several occasions in which various manufacturers prepared special personalized booklets containing currency of the United States. Generally the booklets are prepared by applying a soft glue or similar substance to a heavy cambric material which is attached to the edge of one end or side of currency. The booklets may contain from five to as many as one hundred pieces of currency. When individual notes are removed the glue remains on the material and none adheres to the certificates. No cases have been received in which the currency had been mutilated or damaged. The covers of the booklets contain legends such as "United States Currency made expressly for John Doe." The booklets were either distributed as a gift by an individual purchaser or offered for sale to the general public. As these matters came to the attention of various United States Attorneys, questions arose as to prosecutive policy.

A careful review of Sections 333 and 475 of Title 18, United States Code leads to the conclusion that there is no violation of Federal law so long as any advertisements or legends appear on the booklet itself as distinguished from the currency, and so long as the currency is attached in such manner as not to mutilate or disfigure the currency either by the attachment or by extraction of the currency. Should situations arise which do not clearly fall within this general description the Department will undertake to recommend disposition in individual cases.

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TAX DIVISION

Assistant Attorney General Louis F. Oberdorfer

CIVIL TAX MATTERS
District Court Decisions

Suit for Damages Against Revenue Officer; A Taxpayer Alleging that an Internal Revenue Service Agent Had Settled a Disputed Tax Claim Has No Cause of Action Against the Agent When the Agent's Superiors Repudiate the Settlement. Babylon Milk & Cream Co., Inc. v. Monroe Rosenbush. (E.D. N.Y., August 13, 1964). (CCH 64-2 U.S.T.C. ¶9719). The taxpayer instituted this suit against a Revenue Officer seeking damages allegedly sustained when the Revenue Officer's superiors repudiated a tax settlement which the Revenue Officer had allegedly made with the taxpayer and which the Revenue Officer had allegedly represented he had authority to make. The disputed tax was collected by distraint after the settlement was repudiated as unauthorized. The taxpayer claimed that it had relied upon the Revenue Officer's warranty of authority and, by so doing, lost its remedy against the Government.

In granting a motion to dismiss, the Court held that a federal officer could not be called upon to defend against assertions that, in the performance of his discretionary acts on behalf of the Government, he tortiously invaded the private interests of another and that this principle is one which halts at the threshold any judicial inquiry into the existence of private injury. The Court reasoned that if discretionary acts of public servants could be made the subject of judicial inquiry on bare assertion of damage, such public servants might often shrink from taking the action their duties required of them. Thus, the Court concluded that the immunity of federal officers in discretionary activities is from inquiry as well as liability.

The Court also noted that the taxpayer had not lost any remedy against the Government because it could file a claim for refund of the tax collected within the applicable time limitation, and, if it were rejected or not acted upon for six months, file a suit for refund. The Court specifically rejected any claim for "loss of bargain" damages based on the repudiation of the supposed "settlement."

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney William N. McKee, Jr. (E.D. N.Y.); and Robert L. Handros (Tax Div.)

Offer In Compromise; Defaulted Offer in Compromise Permits Action for Liability Sought to be Compromised Without Right of Contest by Taxpayers. United States v. Sara Saladoff. (E.D. Pa., June 26, 1964). (CCH 64-2 U.S.T.C. ¶9698). In this suit to reduce tax assessments to judgment, the Government introduced proof of the taxpayer's default on an accepted offer in compromise. The terms of the offer permitted the United States to bring this action without the right of the proponent of the offer to contest the liability which was sought to be compromised. The Court found the requisite default in the meeting of the scheduled payments under the accepted offer and reinstated the tax liabilities. The defendant had contended that the period of five years of untimely payments without a declaration of default constituted estoppel against the Government. The Court rejected this contention holding that, by the declaration of default and subsequent suit, the defendants incurred no detriment beyond that contracted for, and further that the doctrine of estoppel is rarely applicable against the Government.

Staff: United States Attorney Drew J. T. O'Keefe; Assistant United States Attorney Sidney Salkin (E.D. Pa.); and Arnold Miller (Tax Div.).

Offer in Compromise; District Court Cannot Compel the Government to Accept An Offer In Compromise and It Cannot Enjoin the Government From Taking Action to Collect the Unpaid Tax Liability. Robert J. Carroll, et ux. v. Scanlon, et al. (E.D. N.Y., July 28, 1964). (CCH 64-2 U.S.T.C. ¶9687). Taxpayers, husband and wife, sought to compel the Internal Revenue Service, a District Director of Internal Revenue and a Revenue Officer to accept a $500 offer in compromise of a $23,998.46 tax liability and to have a prior rejection of the offer "deemed as a matter of law to have no force and effect." In a second count, alleging that the defendants had levied on the wages of the wife, they sought an injunction prohibiting such levies and prohibiting other collection activities.

In granting the Government's motion and dismissing the complaint, the Court concluded: "The decision to accept or reject a compromise offer by its nature involves the discretion of administrative authority and cannot be compelled by any action for a mandatory injunction." The Court rejected the suggestion that, by retention of the $500 sum tendered with the offer in compromise, the Government had accepted the offer, noting that the strict administrative safeguards surrounding the compromise power would not be avoided by retention of the check in that amount.

Further, the Court stated that Enochs v. Williams Packing and Navigation Co., 1962, 370 U.S. 1, makes it clear that in almost no circumstances can the collection of a tax admittedly due be enjoined in the teeth of Section 7421 of the Internal Revenue Code of 1954 which expressly forbids actions to enjoin the assessment or collection of taxes. The Court concluded that only Congress, not the Courts, can establish exemptions for wage payments.

Staff: United States Attorney Joseph P. Hoey; Assistant United States Attorney Bernard Rothman (E.D. N.Y.); Charles A. Simmons and Arnold Miller (Tax Div.).

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