Published by Executive Office for United States Attorneys,
Department of Justice, Washington, D. C.

July 8, 1966

United States

DEPARTMENT OF JUSTICE

Vol. 14 No. 14

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 14 July 8, 1966 No. 14

APPOINTMENTS - UNITED STATES ATTORNEYS

The nomination of the following new appointee as United States Attorney has been submitted to the Senate for confirmation:

Maine - Lloyd P. LaFountain

The nominations of the following incumbent United States Attorneys to new four-year appointments have been confirmed by the Senate:

Louisiana, Eastern - Louis C. LaCour
Texas, Eastern - W. Wayne Justice
Texas, Western - Ernest Morgan
Virgin Islands - Almeric L. Christian

The nomination of the following United States Attorney as United States district judge has been confirmed by the Senate:

Rhode Island - Raymond J. Pettine

The nominations of the following United States Attorneys as United States district judges have been submitted to the Senate for confirmation:

Ohio, Southern - Joseph P. Kenneary
Texas, Southern - Woodrow B. Seals

Since January, 1961, the following United States Attorneys have been appointed United States district judges:

Arizona - Carl A. Muecke
California, Southern - Francis C. Whelan
Connecticut - Robert C. Zampano
Kentucky, Eastern - Bernard T. Moynahan, Jr.
Massachusetts - W. Arthur Garrity, Jr.
Minnesota - Miles W. Lord
Oklahoma, Eastern - Edwin Langley
Pennsylvania, Eastern - Joseph S. Lord III
Rhode Island - Raymond J. Pettine
Washington, Western - William N. Goodwin
West Virginia, Northern - Robert E. Maxwell

* * *

ADMINISTRATIVE DIVISION

Assistant Attorney General Ernest C. Friesen, Jr.

The following Memoranda applicable to United States Attorneys Offices have been issued since the list published in Bulletin No. 11, Vol. 14, dated May 27, 1966:

MEMOS	DATED	DISTRIBUTION	SUBJECT
376-S1	5/20/66	U.S. Attorneys	PROCEDURE FOR ENFORCEMENT OF CIVIL PENALTIES AND FORFEITURES IN CASES OF VIOLATION OF NAVIGATION AND SHIPPING LAWS.
464	5/17/66	U.S. Attorneys	SERIES OF ARTICLES PREPARED BY FBI ON SEARCH OF THE PERSON.
466	5/23/66	U.S. Attorneys	ACTIONS BY GOVERNMENT FOR INDEMNITY AND CONTRIBUTION.
467	6/1/66	U.S. Attorneys & Marshals	REPORT OF OUTSTANDING OBLIGATIONS.
469	6/3/66	U.S. Attorneys & Marshals	REDUCED AIR FARES
470	6/15/66	U.S. Marshals	PLACING DEPUTY, SENIOR DEPUTY SUPERVISORY, AND CHIEF DEPUTY U.S. MARSHAL POSITIONS IN COMPETITIVE CIVIL SERVICE.
472	6/16/66	U.S. Attorneys	NEW FORM FOR REPORTING APPOINTMENTS AND ESTIMATED EXPENSES OF CONDEMNATION COMMISSIONERS.
473	6/21/66	U.S. Attorneys	UNITED STATES ATTORNEY'S LISTINGS
474	6/28/66	U.S. Attorneys & Marshals	RULE 46(h) FEDERAL RULES OF CRIMINAL PROCEDURE (EFF, 7/1/66).

* * *

ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Supreme Court Reverses District Court in Beer Case. United States v. Pabst Brewing Company, et al., (Sup. Ct. No. 404 - O.T. 1965) D.J. File 60-0-37-217. On June 13, 1966, the Supreme Court unanimously reversed a district court decision which, at the close of the Government's case-in-chief, had dismissed its suit under Section 7 of the Clayton Act against the Pabst-Blatz Breweries merger for failure to prove a relevant market.

Immediately prior to their merger in 1958, Pabst was the nation's tenth largest brewery and Blatz ranked eighteenth. The merger made Pabst the fifth largest in an industry which is tending toward serious concentration. The record showed that the number of United States breweries slipped from 714 to 219 in the 27 year period ending in 1961. In the tri-state area of Wisconsin, Illinois and Michigan, where Pabst distributed a substantial part of its product, the number of breweries fell from 104 to 86.

Writing for the Court, Justice Black rejected the district court's holding that a "relevant geographic market" must be proved by detailed evidence to show a Section 7 violation. Instead, the Government need prove only that "the merger has a substantial anti-competitive effect somewhere in the United States -- 'in any section' of the United States."

The Court ruled that the Government established a prima facie case when it proved the continuing trend toward concentration and the fact that the combined market shares of the two former competitors was 23.95% in Wisconsin, 11.32% in the tri-state area and 4.49% in the nation as a whole. As the Court reads previously decided cases, this is sufficient in a horizontal merger to constitute a substantial lessening of competition.

The Court rejected Pabst's contention that the trend toward concentration should not be considered because the Government had not proved that it resulted from mergers. The Act is concerned with the arresting concentration in its incipiency without regard to causation. The Court noted that Section 7 was enacted on the premise that mergers do tend to accelerate concentration.

Mr. Justice Fortas, concurring in the reversal, did not join in the opinion because he believes the Government must carefully prove the "market" or "section" of the country in Section 7 violations. He felt that here it had done so "in well defined sections of the country."

Mr. Justice White concurred and joined in the Court's opinion to the extent that it held the merger substantially lessens competition in the national market.

Justices Harlan and Stewart concurred in the result to the extent that the Court held the Government's evidence supported Section 7 violations in Wisconsin and the tri-state area.

Staff: Edwin A. Zimmerman, Robert B. Hummel, Irwin A. Seibel, Bertram M. Long and John Cusack (Antitrust Division)

Bank Merger Challenged Under Section 7 of Clayton Act. United States v. First National Bank of State College, et al., (M.D. Pa.) D.J. File 60-111-1024. On June 17, 1966, a complaint was filed in Harrisburg, Pennsylvania to enjoin the merger of First National Bank of State College and Peoples National Bank of State College, as a violation of Section 7 of the Clayton Act.

First National is the largest commercial bank headquartered in Centre County, Pennsylvania, and has approximately $23 million in assets, $21 million in deposits and $10 million in loans. Peoples Bank, whose main office is about one block from that of First National, is the third largest bank headquartered in this county, and has approximately $18 million in assets, $16 million in deposits and $10 million in loans. Each bank operates a branch in State College, which is the population and trade center of the county. Peoples Bank also has a branch in Bellefonte, the county seat, 10 miles northeast of State College.

There are ten banks operating offices in Centre County, nine of which are headquartered in the county. The three largest banks control approximately 68% of the total IPC deposits and 65% of the total loans held by all Centre County commercial banking offices. First National alone controls about 25% and 19% of such deposits and loans, respectively.

If the merger of defendants were effected, First National would control about 42% of the IPC deposits and 38% of the loans held by all Centre County commercial banking offices. The three largest banks would then control about 85% and 84% of such deposits and loans, respectively.

The area in and around State College is also alleged as a relevant market. Defendants and one other bank, Mid-State Bank & Trust Company, operate offices in this area. Mid-State Bank is headquartered outside Centre County, but operates four offices therein, which it recently acquired through merger. In terms of total deposits and loans, Mid-State Bank is larger than First National, but most of Mid-State Bank's business is conducted outside Centre County.

First National controls about 38% of the IPC deposits and 29% of the loans held by all commercial banking offices located in the State College area. After its merger with Peoples Bank, First National would have controlled about 65% and 58% of such deposits and loans, respectively.

The complaint alleges that the merger of defendants would substantially increase the already high degree of concentration existing both in the State College area and in Centre County generally. It also alleges that the extensive competition between defendants would be eliminated and that a significant competitive factor would be removed from commercial banking in State College and Centre County generally.

Staff: Donald A. Kinkaid (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General John W. Douglas

COURT OF APPEALS

ADMINISTRATIVE LAW

Adjudicatory Hearing Not Required in Rule-making Proceeding; CAB Regulation Which Limits Passenger Charter Operations of All-Cargo and Combination Carriers Is Valid. Flying Tiger Line, Inc. v. Charles S. Murphy, et al. (C.A.D.C., No. 19,896, June 2, 1966). D.J. File 88-16-238. Flying Tiger Lines, an all-cargo carrier, instituted this action to obtain injunctive relief and a declaratory judgment as to the validity of various regulations promulgated by the CAB which limit the passenger charter operations to all-cargo carriers and combination carriers. The district court, in granting the Board's motion to dismiss, held that the Board had not exceeded its statutory authority in promulgating the challenged regulations, that the regulations were not unreasonable, and that no adjudicatory-type hearing was required by the Administrative Procedure Act prior to adopting these regulations.

Upon Flying Tiger's appeal, the Court of Appeals affirmed by judgment order the decision below, noting that it was "in general agreement with the opinion . . . /of/ the District Court," which is reported at 244 F. Supp. 889. The Court also cited in its judgment order its recent en banc decision in American Airlines, et al. v. CAB (Nos. 18,833, 18,834, and 18,840, decided March 2, 1966), which similarly was concerned with the question of the right to an adjudicatory-type hearing in a rule-making proceeding.

Staff: Lawrence R. Schneider (Civil Division)

CIVIL SERVICE DISCHARGE

Probationary Federal Civil Service Employee has No Right to Appeal or Hearing on His Discharge Unless Allowed by Rules of Agency Which Employed Him or in Regulations of Civil Service Commission; Executive Orders 10987 and 10988 Did Not Change That Rule. Medoff v. Freeman (C.A. 1, No. 6661, June 22, 1966). D.J. File 145-8-592. Medoff was discharged from his position with the Department of Agriculture before the expiration of his probationary period for submitting travel vouchers under false pretenses. He appealed to the courts following the Department and Civil Service rulings that, as a probationary employee, he was not entitled to an appeal from, or hearing on, his discharge except on allegations of discrimination for political, marital or physical reasons (not involved in this case). The district court dismissed the complinat and the Court of Appeals affirmed.

The First Circuit accepted the Government's contention that neither Congress, the Agriculture Department, nor the Civil Service Commission provided appeals for dismissed probationary employees in the circumstances presented. The Court of Appeals also ruled that Presidential Executive Orders 109877 and 10988 did not change that rule. Following the decision of the Court of Appeals for the District of Columbia in Manhattan-Bronx Postal Union v. Gronouski, 350

F.2d 451, certiorari denied, 382 U. S. 978, the Court held that those Executive Orders represented only broad guidelines from the President to subordinate officials and neither abolished the long-standing distinction between probationary and permanent employees nor created judicially enforceable rights.

Finally, the Court rejected Medoff's contention that he was entitled to a hearing because he had been "charged with a crime." The Court ruled that the specification--"submitting travel vouchers under false pretensions"--was equally consistent with an unknowing or careless act. The Court observed that any dismissal is likely to reflect unfavorably to some degree on the employee, but that this is not enough to entitle the employee to an appeal where Congress and the agencies concerned have not provided one.

Staff: J. William Doolittle, First Assistant, and
Richard S. Salzman (Civil Division)

FALSE CLAIMS ACT

False Claims Act Applies Where Payments Were Made by Government Contractor Who Was Reimbursed by Government Under Cost-Plus-Fixed-Fee Contract. United States v. Lagerbusch (C.A. 3, No. 15642, June 7, 1966). D.J. File 46-83-19. By falsely representing himself to be a graduate engineer living together with his family in Seattle, Lagerbusch induced the Hercules Powder Company to hire him as an engineer and to reimburse him for fictitious expenses of: transporting himself, his family and his household goods from Seattle to Cumberland, Maryland; relocation subsistence expenses; and returning to Seattle to conclude a personal business transaction. Since Hercules was engaged in operating a wholly-owned Navy facility under a cost-plus-fixed-fee contract, all payments made by Hercules to Lagerbusch ultimately were borne by the United States.

In this False Claims Act suit, the district court entered judgment (on a jury verdict) awarding the United States $15,402.16--double its damages, plus $2,000 for each of the four false claims. On appeal, Lagerbusch argued: (1) that the court should have charged the jury not only on the False Claims Act but also under the Government's alternative theories, unjust enrichment and money had and received, and (2) that the False Claims Act did not apply where the claims were made to, and paid by, a private company. In a brief opinion per curiam, the Court of Appeals affirmed, holding that the charge to the jury had not prejudiced Lagerbusch and that "the False Claims Act covers such an indirect mulcting of the government."

Staff: Florence Wagman Roisman (Civil Division)

SOCIAL SECURITY ACT

Eighth Circuit Applies Bolas Test to Facts Before It and Affirms Lower Court's Judgment Upholding Secretary's Denial of Benefits to 59-year-old Claimant. Fletcher H. Nichols v. Gardner (No. 18,173, C.A. 8, June 9, 1966). D.J. File 137-28-43. In this Social Security disability case, the Secretary denied claimant, a 59-year-old, self-employed truck driver, benefits on the ground that he was still capable, despite his back and knee impairments, of engaging in many kinds of light or sedentary work. The district court, finding

substanital evidence to support the Secretary's decision, affirmed. Upon the claimant's appeal, the Court of Appeals upheld the judgment of the district court and, pursuant to our suggestion, remanded the cause to the district court with instructions to remand to the Secretary "for consideration of claimant's application in light of the recent amendments to the disability provisions of the Social Security Act."

In its opinion, the Court reiterated "the legal standards applicable to appeals of this kind," which it had set forth in Celebrezze v. Bolas, 316 F.2d 498, and then applied these standards to the particular facts of this case. The Court then concluded "that there is substantial basis in the evidence for the Secretary's decision." The Court pointed out that the Secretary, having the claimant's records, both medical and personal before him, "was in a position to judge, in his professional capacity, the education, training, capacity, capabilities, as well as the physical condition of the claimant." The Court also indicated its approval of the Secretary's use of the Dictionary of Occupational Titles.

Staff: Lawrence R. Schneider (Civil Division)

DISTRICT COURT

FEDERAL TORT CLAIMS ACT

Claim Based Upon Misrepresentation of Plaintiff's Physical Condition Excluded From Coverage of Federal Tort Claims Act. Sharon L. DeLange v. United States (S.D. Calif., Civil No. 3130-SD-K, June 7, 1966). D.J. File 157-12-1318. Plaintiff, a waitress at a Chief Petty Officers' Club, as a condition of employment was required to take periodic physical examinations. A routine blood test was recorded as being "weakly reactive" and "doubtful positive." Plaintiff was advised that because of the possibility that she had syphilis she could not return to work. Further tests proved that plaintiff did not in fact have syphilis, and she filed suit for physical and mental suffering caused by having been told that she had syphilis. Trial resulted in a judgment for the Government based upon the defense that the claim was barred by 28 U.S.C. 2680(h) excluding any claim arising out of misrepresentation. The court distinguished this case from Hungerford v. United States, 307 F.2d 99 (C.A. 9, 1962), on the basis that no damage flowed from a lack of treatment of plaintiff, pointing out that in this case the entire damage resulted from the original communication or representation to her.

Staff: United States Attorney Manuel L. Real; Assistant U.S. Attorney Dzintra I. Janavs, (S.D. Calif.)

Insurance Policy Endorsement Purporting to Exclude United States Held Invalid. Hobart H. Kimball v. United States by Substitution for Harold B. Pratt v. National Insurance Underwriters (Case No. 2230, W.D. Missouri, June 9, 1966). D.J. File 145-5-3017. Plaintiff filed suit against a Government postal carrier as a result of a motor vehicle accident while the federal employee was acting within the scope of his employment. The suit was removed to federal court and the Government substituted as the party defendant pursuant to 28 U.S.C. 2679 (b-e). The Government then filed a third-party claim against the insurance company which had issued an insurance policy to the federal driver. The basis

for the third-party claim was that the United States was an "insured" under the policy issued to the federal employee. The insurance company denied coverage upon the basis that it had sent an exclusion to the federal employee purporting to exclude coverage to the United States. The Court adopted the Government's position that the endorsement was invalid for lack of consideration because the endorsement was sent to the insured during the middle of the policy year and no part of the premium was refunded, and therefore there was no consideration for the endorsement.

Staff: Assistant U.S. Attorney John L. Kapnistos;
United States Attorney F. Russell Millin (W.D. Mo.);
J. Charles Kruse (Civil Division)

DISCOVERY

Immunity of FBI Records From Discovery. United States v. Z. Alpert & Sons, et al. (S.D.N.Y., Civil No. 62 Civ. 1144, June 1, 1966). D.J. File 52-62-243. A lengthy criminal prosecution for thefts of Government property was followed by a complex suit for conversion against numerous wholesalers who had received the stolen goods. Defendants in the civil action pleaded, among other defenses, that they had been prejudiced by delay of the Government in publicizing discovery of the theft and in warning the trade to beware of the stolen goods. Defendants demanded production of 95 FBI reports and the appearance of 27 FBI agents at a deposition. The United States moved to quash the notices of depositions on the grounds that the FBI agents were not "officers, directors or managing agents" of the United States within the meaning of Rule 26(d)(2), F.R. Civ. P., that nine of the agents were no longer in Government service, and that production of more than one agent (the one in charge of the case) would be unnecessary and oppressive. The Court was asked to limit the questioning, in any event, to exclude the identity of confidential informants, the substance of information given by them, and investigative techniques. Production of the investigative reports was resisted on the ground that they contained information given on a confidential basis. Also, one report had been specifically prepared at the request of the United States Attorney's office to organize the evidence needed at the trial, and immunity for that report was claimed as "attorney work product."

The district court (Sugarman, J.) sustained all the Government's objections. The deposition was confined to the one agent whose testimony had been tendered by the Government. Defendants were given leave to serve him with a subpoena duces tecum to bring all the investigative reports, "not for the purpose of discovering same to the defendants' counsel but for the purpose of refreshing [his] recollection, if necessary."

Staff: United States Attorney Robert M. Morgenthau;
Assistant United States Attorney Martin Paul Solomon (S.D. N.Y.);
Robert Mandel (Civil Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

AMENDMENTS OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The amendments and additions to the Federal Rules of Criminal Procedure became effective on July 1, 1966. These changes govern all criminal procedures commenced after that date and "so far as just and practicable all proceedings then pending".

The revised rules are the first extensive changes made in the Rules since they were first promulgated in 1946. Important changes have been made particularly in the discovery area. In order that the Department may establish a consistent policy it is requested that the Department be notified, attention Criminal Division, of any rulings made by the courts. The Department then will notify United States Attorneys of these rulings through the medium of the United States Attorneys' Bulletin.

POLLUTION OF NAVIGABLE WATERS

Commercially Valuable Aviation Gasoline Discharged Into Navigable Waters of United States Is "refuse matter" Within Title 33 U.S.C. United States v. Standard Oil Company (S. Ct., No. 291, May 23, 1966). D.J. File 61-17M-17. Defendant was charged in a single count with allowing to be discharged into the St. Johns River "refuse matter" consisting of 100-octane aviation gasoline. For the purposes of defendant's motion to dismiss, the parties entered into a stipulation which stated that the gasoline was commercially valuable and was discharged into the river only because a shut-off valve at dockside had been "accidentally" left open.

The district court dismissed the information because it was of the view that the statutory phrase "refuse matter" in 33 U.S.C. 407 does not include commercially valuable oil.

The Supreme Court, on direct appeal, held the full statutory phrase "any refuse matter of any kind or description" includes valuable oil and stated that "whether useable or not by industrial standards it [oil] has the same deleterious effect on waterways" and reversed.

Staff: District Court - William J. Hamilton, Jr. (M.D. Fla.).
Supreme Court - Nathan Lewin (Solicitor General's Office); Beatrice Rosenberg, Paul C. Summitt, on the brief (Criminal Division).

MAIL FRAUD

Debt Consolidation Scheme. United States v. Bertin, et al. (D. Md., oral decision February 23, 1966, filed June 6, 1966). D.J. File 36-35-148. Four defendants were charged with violations of the mail fraud statute for operating a debt consolidation and tie-in insurance business. They solicited

homeowners, offering to consolidate all debts into one monthly payment without the use of liens against their properties. Defendants also induced the homeowners to purchase life insurance policies which allegedly would strengthen the prospects of obtaining loans from available sources. The case was tried before the court without a jury. One defendant entered a plea of nolo contendere, and the other three were found guilty on each of the fifteen counts of the indictment.

The homeowners went to the offices of the defendants after receiving the letter offering to consolidate their debts. At the initial interview, they were persuaded to apply for insurance, and sign a judgment note for $240, representing twelve monthly premiums. A fee of $20 was also collected for credit reports. They were told that the insurance could not be canceled during the year. The Court found the letter of solicitation to be misleading in stating that the consolidation of debts could be achieved without the use of liens and referred to payments on a fifteen-year loan, since the plan agreed upon by defendants contemplated five-year mortgages on which the monthly payments would be about four times as large as those indicated in the letter. The Court also found that defendants knew from the beginning that they could not render the services offered to many of the applicants. With respect to the insurance, it was found that the sales were part of the scheme, that the purchase of insurance did not strengthen the loan applications, and that defendants knew the situations of some applicants to be hopeless and that no effort would be made to process the applications. The insurance policies could be canceled, but defendants were interested only in the first year's premiums, out of which they received 90 or 95% of the amount paid.

In a few instances where loans were obtained, defendants increased the face amounts, disbursed to the homeowners substantially less than the face amounts of the loans which were secured by notes and second mortgages, and retained the difference in order to discount the notes and mortgages at favorable rates to third parties.

Each of the defendants was placed on probation for five years and fines ranging from $6,000 to $12,000 were imposed.

Staff: United States Attorney Thomas J. Kenney;
Assistant United States Attorney Thomas P. Curran
(D. Md.).

* * *

TAX DIVISION

Assistant Attorney General Mitchell Rogovin

CRIMINAL TAX MATTERS
Appellate Decision

Admissibility of Evidence Claimed to Have Been Obtained in Derogation of Right to Counsel Under Escobedo Case. Kohatsu v. United States (C.A. 9), 351 F. 2d 898, certiorari denied June 20, 1966. Special mention is made of the denial of certiorari in the Kohatsu case, which was the subject of an item in the November 12, 1965 issue of the Bulletin, Vol. 13, No. 23, p. 489. As there noted, appellant sought to apply the ruling of Escobedo v. Illinois, 378 U.S. 478, to the stage of a Revenue Service investigation at which the special agent assumes direction of the investigation. Appellant had contended that at that stage the inquiry had "begun to focus on a particular suspect" and the agent, therefore, had the duty to advise appellant of his Sixth Amendment right to the assistance of counsel. The Court of Appeals for the Ninth Circuit, pointing out that appellant had not been indicted or arrested, found that there was no constitutional requirement that the agents advise appellant of his right to counsel. The Court held Kohatsu's decision to cooperate with the agents to have been voluntary and affirmed his conviction.

In opposing Kohatsu's resulting petition for certiorari, the Government emphasized that petitioner was under no compulsory influences and that he was not in custody when he was interrogated by the special agent of the Internal Revenue Service. The Government's brief moreover suggested that in light of the fact that Miranda v. Arizona, Vignera v. New York, Westover v. United States and California v. Stewart were under submission to the Court on the Sixth Amendment issue "The Court may, of course, deem it appropriate to defer decision on this petition until the decision of cases now under advisement involving related issues." The Supreme Court in fact did not act on Kohatsu until the week following its Miranda decision.

It follows that the Kohatsu decision of the Ninth Circuit was before the Supreme Court when it handed down its June 13 decision in Miranda, etc. The opinion in Miranda seems to take unusual pains to limit the Court's holding to the necessity to give advice on Sixth Amendment rights when the accused is in custody as a prerequisite to custodial interrogation. The phrase "custodial interrogation" or its counterpart "in-custody interrogation" is repeated no less than twenty-seven times in the sixty-one pages of the slip opinion. The Court, moreover, defined what it meant:

> By "custodial interrogation" we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

A footnote dropped at this point says that this is what the Court meant in Escobedo when it spoke of an investigation which had "focused on an accused."

Since custodial interrogation does not occur in the usual income, estate, or excise tax investigation, the Department views the denial of certiorari in the Kohatsu case as lending strength to its conclusion that the Escobedo principle has no application to Revenue Service interviews in the course of audits and fraud investigations.

Staff: John P. Burke and Joseph M. Howard (Tax Division)

CIVIL TAX MATTERS
Appellate Decisions

Federal Tax Liens: Interpleader Funds, Under Jurisdiction of District Court, and Subject to Federal Tax Liens May Not Be Partially Released to Pay Attorneys' and Accountants' Fees for Services Rendered and to Be Rendered in Behalf of Taxpayers in Contesting Tax Liability in Tax Court. Illinois Redi-Mix Corp. v. Eugene C. Coyle, Jr. et al., (C.A. 7, Nos. 15320, 15321, May 19, 1966). (CCH 66-1 U.S.T.C. Par. 9435). D.J. File 5-23-4118. Redi-Mix contracted to purchase all of the assets of the three taxpayer-corporations for approximately $350,000. Thereafter, jeopardy assessments were made against taxpayers for taxes totalling some $900,000 notices of tax liens were filed, and notices of levy were served. Redi-Mix instituted an interpleader action, depositing the unpaid purchase price of taxpayers' assets (over $300,000) with the district court. Following the jeopardy assessments, taxpayers commenced proceedings in the Tax Court for a redetermination of the deficiencies and then petitioned the district court for immediate release of $30,000 to pay attorneys' and accountants' fees for present and future services in connection with the Tax Court suit. Taxpayers urged that, if the money were not released, they would be unable to obtain legal and lay assistance and would thus be deprived of due process of law. Over the objections of the Government and other creditors, the district court granted the petition.

The Seventh Circuit reversed, relying on the doctrine that constitutional questions should not be anticipated (Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 71-72). Since a trial had not yet been had in the Tax Court, taxpayers' due process claim was, in substance, no more than an allegation that in the future they might be denied a fair hearing. At present, the Court of Appeals concluded, it is "impossible to determine whether any constitutional violations will occur; that can be decided only after the trial." United States v. Brodson, 241 F. 2d 107 (C.A. 7), certiorari denied, 354 U.S. 911; Lloyd v. Patterson, 242 F. 2d 742 (C.A. 5). The Seventh Circuit did not reach the Government's additional argument to the effect that neither taxpayers nor their shareholders had made a sufficient showing of their indigency, and of the merit to the Tax Court suit, to warrant the release of funds.

Staff: Joseph Kovner and Martin T. Goldblum (Tax Division)

Enforcement of Internal Revenue Summons; Use of Summons Power by Special Agent Authorized in Investigation Which Could Terminate With Recommendation For Criminal Prosecution; Government's Opening Pleading Denominated "Petition" Properly Treated as Complaint. Albert J. Wild, et al. v. United States, et al. (C.A. 9), June 2, 1966. In an action to enforce an Internal Revenue summons

served on a bank by a special agent, taxpayer intervened and alleged that the summons was issued for the improper purpose of obtaining evidence for use against him in a criminal prosecution. The Ninth Circuit upheld the summons, pointing out that the asserted purpose for its issuance was to ascertain the correctness of taxpayer's returns. Inasmuch as this would aid in the determination of civil liability, the mere fact that the information might also be used in a criminal prosecution does not effect the validity of the summons. The Court reaffirmed its earlier decision in Boren v. Tucker, 239 F. 2d 767, and its opinion is in line with those of the Second Circuit (In re Magnus, Mabee & Reynard, 311 F. 2d 12, certiorari denied, 373 U.S. 902), the Third Circuit (Wright v. Detwiler, 345 F. 2d 1012), the Fifth Circuit (Sanford v. United States, decided March 28, 1966, A.F.T.R. 2d 720) and the Seventh Circuit (Tillotson v. Boughner, 333 F. 2d 515, certiorari denied, 379 U.S. 913).

Taxpayer also alleged that the Government had proceeded improperly by initiating the action with a pleading denominated a "Petition" in view of the dictum in United States v. Powell, 379 U.S. 48, 58 (fn. 18) that "The proceedings are instituted by filing a complaint, followed by answer and hearing." The Ninth Circuit rejected this argument, for the District Judge had expressly held that the disputed pleading would be treated as a complaint. Moreover, taxpayer had all of the procedural rights to which he was entitled under the Federal Rules of Civil Procedure, including an opportunity to answer and a hearing, and had failed to show any prejudice.

Staff: Burton Berkley and Joseph M. Howard (Tax Division)

District Court Decisions

Insolvent Estate: Priority of Federal Tax Claims: State Law.--Government Not Being Bound by State Statutes of Limitations, Is Free to Seek Judgment Against Insolvent Estate in Federal Court for Unpaid Taxes Owed by Decedent Even Though Government Had Not Filed Timely Claims Against Estate Under State Law and Had Not Appealed State Court Action Denying It Right to File Late Claims.

Interest on Deficiency: Decedent: Insolvent Estate.--Since Proceeding for Settlement of Insolvent Estate Is Similar to Proceeding in Bankruptcy, Interest on Decedent's Income Tax Obligations Ceases to Accrue at Beginning of Estate Proceeding. United States v. Eugene J. Sullivan, Jr., and James A. Higgins, Co-Administrator c.t.a. of the Estate of Robert G. Holt. (D. R.I., April 15, 1966). (CCH 66-1 U.S.T.C. Par. 9403). The United States sought to obtain a judgment against defendants as co-administrators c.t.a. of the estate of Robert G. Holt, deceased, in the amount of $9,719.18 for tax liabilities incurred by decedent during his lifetime together with interest thereon as provided by law.

In a state court proceeding the Government, after the state statute of limitations for filing claims against said estate had run, filed a petition in the Probate Court for leave to file its claim for all of said taxes. The petition was denied by the Court and the United States did not appeal the decision. In the present case, defendants contended that the Government was barred from maintaining the action because it failed to take an appeal from the decree of the Probate Court. In overruling this contention the Court held that whether the United States sues in its own courts or in state courts, it is not subject to or bound by local statutes of limitations.

An alternative contention of defendants was that the Government is not entitled to recover interest on its claim after March 9, 1960, the date of decedent's death. They based this contention on the fact that his estate was at the time of his death and is still insolvent and under Rhode Island law interest is only allowed until the death of the testator. The Court held, however, that the priority of the Government's tax claims cannot be limited by local law, thus denying taxpayer's contention in this regard. The Court went on, however, to equate an insolvent decedent's estate with bankruptcies and receiverships, stating, as a general rule, that interest on claims in such proceedings ceases to accrue on the debtor's obligations at the beginning of the proceedings. In holding this, the Court distinguished Bruning v. United States, 376 U.S. 358 (1964). As a result, the Government was awarded a sum which included interest as provided by law on the claims allowed from the date of assessment to the date of the qualification of the defendants as co-administrators c.t.a. of the estate of the decedent.

Staff: United States Attorney Raymond J. Pettine; Assistant United States Attorney Frederick W. Faerber, Jr., (D. R.I.); and Thomas R. Manning, (Tax Division).

Suit to Enforce Tax Lien; Lien Can Attach to Taxpayer-Beneficiary's Interest in Trust for Support; "Forfeiture" Clause Providing for Termination of Taxpayer-Beneficiary's Interest in Trust if Government Attempted to Enforce Its Lien Against Taxpayer-Beneficiary's Interest in Trust Held Invalid Against Federal Tax Lien on Grounds of Public Policy. United States v. Walter E. Taylor, et al. (N.D. Calif., Civil No. 43286, June 9, 1966). Decedent in his will attempted to provide for his son and at the same time prevent the use of any of his money to satisfy his son's known tax liability by establishing a trust which, inter alia provided: (1) for the payment of the net income to his son; (2) for the payment of principal up to $15,000 per year if the trustees in their absolute discretion deemed this necessary for his proper care, maintenance, and support; (3) for the termination or "forfeiture" of his son's interest in the trust if the Government attempted to satisfy the taxpayer-son's liability from trust income or principal; and (4) notwithstanding the termination or "forfeiture", for the application of the forfeited income by the trustees in their uncontrolled discretion, and without any obligation to do so, to the use of the taxpayer-son. Other provisions in the trust provided for the payment of trust income over to the son's wife and children in the event that the son's interest in the trust was "forfeited". The trust also contained a spendthrift clause. In this suit the Government sought a declaration that the taxpayer-son has a property right in the trust to which the tax lien attached and an order compelling the trustees to pay to the Government all amounts otherwise payable to the taxpayer-son. The Court in its Memorandum Opinion held that the taxpayer had "property" or "rights to property" under California law to which the tax lien attached, citing Sec. 2269, California Civil Code; Estate of Lackman, 156 C.A. 2d 674, 320 P.2d 186, Canfield v. Security-First Nat'l Bank, 13 C.2d 1; Problems of Discretion in Discretionary Trusts, 61 Colum. L. Rev. 1425, 1430-33 (1961). "The fact that the property right under consideration has a variable value cannot be advanced as a valid reason against concluding that the tax lien has attached to the taxpayer's substantial, vested property right in the trust." The Court noted that, while there was a clause containing an absolute forfeiture provision, a later clause provided for the application of payments for the benefit of the "forfeiting beneficiary" by the device of the trustees' "uncontrolled discretion" and concluded

that "this is not a case of an absolute forfeiture, with a gift over upon the happening of a condition" but was designed "to insulate the interest of the spendthrift son from an admittedly valid Government lien", and that it represented "an exercise in circumlocution in attempting to draft around the well-settled law in the Ninth Circuit on spendthrift trusts." (See Leuschner v. First Western Bank & Trust Co., 261 F.2d 705).

Staff: United States Attorney Cecil F. Poole; Assistant United States Attorney John M. Youngquist, (N.D. Calif); and Clarence J. Grogan, (Tax Division).

* * *

I N D E X

Subject	Case	Vol.	Page
A			
ADMINISTRATIVE LAW Adjudicatory Hearing Not Required in Rule-making Proceeding; CAB Regulation Which Limits Passenger Charter Operations of All-Cargo and Combination Carriers Is Valid	Flying Tiger Line, Inc. v. Murphy, et al.	14	273
ANTITRUST MATTERS Bank Merger Challenged Under Section 7 of Clayton Act	U.S. v. First Nat'l Bank of State College, et al.	14	272
Supreme Court Reverses District Court in Beer Case	U.S. v. Pabst Brewing Co., et al.	14	271
C			
CIVIL SERVICE DISCHARGE Probationary Federal Civil Service Employee Has No Right to Appeal or Hearing on His Discharge Unless Allowed by Rules of Agency Which Employed Him or in Regulations of Civil Service Commission; Executive Orders 10987 and 10988 Did Not Change That Rule.	Medoff v. Freeman	14	273
CRIMINAL PROCEDURE - AMENDMENTS TO THE FEDERAL RULES OF		14	277
D			
DISCOVERY Immunity of FBI Records From Discovery	U.S. v. Z. Alpert & Sons, et al.	14	276

Subject	Case	Vol.	Page
F			
FALSE CLAIMS ACT			
False Claims Act Applies Where Payments Were Made by Government Contractor Who Was Reimbursed by Government Under Cost-Plus-Fixed-Fee Contract	U.S. v. Lagerbusch	14	274
FEDERAL TORT CLAIMS ACT			
Claim Based Upon Misrepresentation of Plaintiff's Physical Condition Excluded From Coverage of Federal Tort Claims Act	DeLange v. U.S.	14	275
Insurance Policy Endorsement Purporting to Exclude U.S. Held Invalid	Kimball v. United States by Substitution for Pratt v. National Insurance Underwriters	14	275
M			
MAIL FRAUD			
Debt Consolidation Scheme	U.S. v. Bertin, et al.	14	277
MEMOS & ORDERS			
Applicable to U.S. Attorneys Offices		14	270
P			
POLLUTION OF NAVIGABLE WATERS			
Commercially Valuable Aviation Gasoline Discharged Into Navigable Waters of U.S. Is "refuse matter" Within Title 33 U.S.C.	U.S. v. Standard Oil Co.	14	277
S			
SOCIAL SECURITY ACT			
Eighth Circuit Applies Bolas Test to Facts Before It and Affirms Lower Court's Judgment Upholding Secretary's Denial of Benefits to 59-year-old Claimant	Nichols v. Gardner	14	274

Subject	Case	Vol.	Page
T			
TAX MATTERS			
Counsel, Right to; Admissibility of Evidence Claimed to Have Been Obtained in Derogation of Right to Counsel Under Escobedo Case	Kohatsu v. U.S.	14	279
Insolvent Estate; Priority of Federal Tax Claims; State Law	U.S. v. Sullivan and Higgins, Co-Administrator c.t.a. of Estate of Robert G. Holt	14	281
Liens; "Forfeiture" Clause Providing for Termination of Taxpayer-Beneficiary's Interest in Trust if Government Attempted to Enforce Its Lien Held Invalid on Grounds of Public Policy	U.S. v. Taylor, et al.	14	282
Liens; Funds Under Jurisdiction of District Court, Subject to Tax Liens May Not Be Released to Pay Attorneys' and Accountants' Fees in Contesting Tax Liability in Tax Court	Illinois Redi-Mix Corp. v. Coyle, et al.	14	280
Summons; Power by Special Agent Authorized in Investigation which Could Terminate With Recommendation for Criminal Prosecution	Wild, et al. v. U.S., et al.	14	280