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

January 20, 1967

United States

DEPARTMENT OF JUSTICE

Vol. 15 No. 2

UNITED STATES ATTORNEYS

BULLETIN

UNITED STATES ATTORNEYS BULLETIN

Vol. 15 January 20, 1967 No. 2

ADMINISTRATIVE DIVISION

Assistant Attorney General Ernest C. Friesen, Jr.

The following Memoranda and Orders applicable to United States Attorneys Offices have been issued since the list published in Bulletin #26, Vol. 14 dated December 23, 1966:

MEMOS	DATED	DISTRIBUTION	SUBJECT
497	11/15/66	U.S. Attys. and Marshals	Position Management; Job Redesign.
470-S2	11/16/66	U.S. Marshals	Conversion of appointments of Deputies, Senior Deputies, Supervisory and Chief Deputies.
498	11/21/66	U.S. Attys. and Marshals	Personnel Security.
488-S2	12/ 1/66	U.S. Attorneys	Disposal of records.
499	12/ 2/66	U.S. Attorneys	Survey of forms used in Lands Div. cases.
488-S1	12/ 5/66	U.S. Attys. and Marshals	Cleanout Campaign.
477-S2	12/ 6/66	U.S. Attys. and Marshals	Revised table for computing and paying salaries of U.S. Attys. and Asst. U.S. Attys.
500	12/ 8/66	U.S. Attys. and Marshals	Civil Service Retirement - Annuity increase due to cost of living rise.
183-S1	12/14/66	U.S. Marshals	Employment of stationary guards.
428-S2	12/19/66	U.S. Attys. and Marshals	Amendments to travel regulations.

MEMOS	DATED	DISTRIBUTION	SUBJECT
489-S1	12/29/66	U.S. Attorneys	Standards governing administrative collection, compromise, closing and referral of government claims for money or property.
502	1/ 5/67	U.S. Attorneys	Bail reform act form No. 2.

ORDERS	DATED	DISTRIBUTION	SUBJECT
371-66	12/22/66	U.S. Attys. and Marshals	Prescribing regulations pursuant to public law 89-506 relating to agency consideration of claims presented under federal tort claims act.

* * *

ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

Laches Held Insufficient Defense to Suit by Government to Vindicate Public Right. United States v. Pennsalt Chemicals Corporation, et al. (E.D. Pa.) D.J. File 60-0-37-731. On January 4, 1966, Judge John P. Fullam granted the Government's motion, made under Rule 12(f), Fed. R. Civ. P., to strike defendants' affirmative defense of laches.

This action is one of three cases which were filed on September 30, 1966, charging violations of Section 7 of the Clayton Act by the three largest manufacturers of dental equipment and supplies. It challenges four separate acquisitions by S. S. White, one of which was made in 1961, and the three others, in 1965.

In their answer which was filed on November 30, 1966, defendants included a "Second Defense" which read in its entirety as follows: "Plaintiff's claims for relief are barred or limited by laches."

On December 14, 1966, the Government filed its motion under Rule 12 (f) to strike the defendants' "Second Defense" on the ground that the defense pleaded was insufficient. On the same day the court set the motion for hearing on December 21, 1966.

In his opinion, Judge Fullam upheld the Government's contention that laches is an insufficient defense to a suit brought by the Government to vindicate a public right, citing U.S. v. New Orleans Chapter Associated General Contractors of America, Inc., 382 U.S. 17 (1965). Defendants had conceded in their brief that laches was not a defense to the action, but argued that laches could constitute a bar to or limitation of certain forms of relief. Here again, the Court held that the authorities were contrary, citing U.S. v. American Tobacco Co., 221 U.S. 106, 185 (1911); U.S. v. E.I. DuPont deNemours & Co., 366 U.S. 316, 327 (1961); U.S. v. Grinnell Corp., 384 U.S. 563 (1966).

As to the question of defendants' discovery rights on any issue of alleged delay, the Court held that "striking the defense of laches from the pleadings does not determine the limits of permissible discovery."

Staff: John F. Graybeal and Roy E. Green (Antitrust Division)

Damage Settlement. United States v. Aluminum Company of America, et al. (E.D. Pa.) D.J. File 60-9-163. On December 29, 1966, the Government's damage claims, based on purchases of aluminum conductor cable from the defendants, pleaded in counts two and three of this action, were

dismissed without prejudice by the Court after payment by the defendants, Alcoa, Anaconda Wire and Cable, General Cable, Kaiser Aluminum & Chemical Sales, Olin Mathieson and Reynolds Metals, of $562,935. Concurrent with the payment and dismissal, the Government gave the defendants a covenant not to sue.

This three-count action was filed on March 19, 1964. Count one sought injunctive relief; count two sought damages under the False Claims Act; and count three, as an alternative claim to count two, sought damages under Section 4A of the Clayton Act. The damages sought in counts two and three were not specified.

Count one was previously disposed of by the entry of a consent decree on November 9, 1964. The six defendants had earlier, on October 5, 1964, pleaded nolo contendere to a companion indictment and were fined a total of $300,000.

The complaint alleged a conspiracy among the defendants, beginning in or about June 1958, and continuing thereafter until at least March 1961, to fix, stabilize, and maintain uniform prices, terms, and conditions for the sale of aluminum conductor cable, and to quote such prices to various public agencies and electric utilities. The complaint also alleged a conspiracy among the defendants to defraud the United States in the sale of aluminum conductor cable to the Government. The earlier indictment alleged a conspiracy from in or about June 1958 through at least August 1960.

Among other provisions, the consent decree enjoined price fixing, bid rigging, and restricting third persons in purchasing or selling aluminum conductor cable. The consent decree also required the defendants for five years to submit affidavits of non-collusion with each public bid and for a like period of time to have an officer certify that each price change was independently made.

Staff: Donald G. Balthis, John J. Hughes, Richard M. Walker, Stewart J. Miller and Floyd C. Holmes (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General Barefoot Sanders

SPECIAL NOTICES

FEDERAL TORT CLAIMS ACT AMENDMENTS

The recent amendments to the Federal Tort Claims Act (Public Law 89-506) became effective on January 18, 1967. These amendments effect substantial modification in the procedures to be followed in asserting tort claims accruing on and after January 18, 1967. We foresee various problem areas which may arise as a result of the amendments and in anticipation of questions we shall, in the near future, forward guidelines to the United States Attorneys' offices for the future handling of tort litigation to which the amendments apply. In the meantime, it would perhaps help to minimize problems if through the bar association or other media in the area the United States Attorneys were to bring the amendments to the attention of the local bar. The most notable procedural change and the change of immediate importance is the requirement that claims in any amount accruing after January 18, 1967, must be asserted administratively before suit may be commenced under 28 U.S.C. 1346(b).

SCREENING OF CLAIMS REFERRALS

The Federal Claims Collection Act of 1966, Public Law 89-508, 80 Stat. 308, and the joint regulations issued pursuant thereto, 31 F.R. 13381, became effective on January 15, 1967. This legislation gives most client agencies the authority to compromise and close claims up to $20,000 for the first time. The joint regulations establish standards for agency compromise and closing of claims and require vigorous agency collection efforts. Claims which are not processed and documented as required by the regulations may be returned to the client agency when referrals are made after January 15, 1967. Please be sure that all direct reference claims are systematically screened for compliance with the joint regulations and that referrals which do not comply with the requirements of the regulations are returned with an appropriate explanation.

SUPREME COURT

GOVERNMENT CONTRACTS

Violation of Anti-Kickback Act by Responsible Officials of Prime Contractor Is Sufficient Cause for Government's Cancellation of Prime Contract.

United States v. Acme Process Equipment Co. (Supreme Court, October Term, 1966, No. 86, December 5, 1966) D. J. File 154-349-57. In January, 1953, Acme Process Equipment Co. entered into a contract with the Department of the Army to manufacture 75mm. recoilless rifles. Since Acme was new in this field, it had hired two men -- Harry Tucker, Jr. and James Norris -- with previous experience in Government contract work to negotiate the contract and to establish and manage a new division of the company to handle Government contracts. Tucker and Norris had arrangements with other companies whereby they would receive payments in return for sales to Acme. After the prime contract for rifles was awarded, subcontracts were awarded to these companies, and Tucker and Norris received kickbacks on account of these subcontracts. In addition, Tucker, Norris and Jack Epstein (son of the president and principal stockholder of Acme, and superintendent of an Acme plant) extorted a payment from the principal subcontractor, under a threat of cancelling the subcontract. When these activities came to light, the Army cancelled the prime contract, and Acme fired Tucker, Norris and Epstein.

Criminal indictments under the Anti-Kickback Act, 60 Stat. 37 (originally passed in 1946), against Tucker, Norris and Epstein were subsequently dismissed on the ground that the Act only applied to cost-reimbursable prime contracts. The prime contract here was a fixed price contract, with a provision for price redetermination on the basis of cost, up to a ceiling price. As a result of this dismissal, the Comptroller General recommended, and Congress in 1960 passed, an amendment to the Anti-Kickback Act, extending its application to all "negotiated contracts." The amendment was made retroactive, so as to permit civil recovery of kickbacks under all pre-1960 negotiated contracts.

Acme sued in the Court of Claims, alleging that the cancellation was a breach of contract. The Court of Claims agreed. It distinguished United States v. Mississippi Valley Co., 364 U.S. 520 (the Dixon-Yates case) -- where violation of a conflict of interest statute was held to justify cancellation -- on the ground that the Anti-Kickback Act, unlike the statute in Dixon-Yates, provides for a civil remedy (recovery of the kickbacks), which it conceived to be impliedly exclusive. The Court of Claims also doubted whether the Anti-Kickback Act, as it existed before the 1960 amendment, had been violated. And finally, the Court of Claims found that none of the officers of Acme -- other than Tucker, Norris and Epstein -- was aware of the kickback conspiracy.

The Supreme Court reversed. It held that the sanction of nonenforcement is necessary to enforce the policy of the statute. It pointed out that the statutory remedy of recovering the kickbacks is not adequate: kickbacks are often difficult to detect; they may result in increased cost to the Government over and above the amount of the kickback, by causing the award of subcontracts on the basis of bribes rather than efficiency; and they cause the subcontractor to inflate his bid (since he knows his bribe has insured the award).

The Court also deemed irrelevant the fact that the conspirators had escaped criminal prosecution, "for whether the kickbacks here contravened the narrow letter of the criminal law, strictly construed, they clearly were violative of the public policy against kickbacks" expressed in the 1946 Anti-Kickback Act. Finally, the Court rejected the argument that Acme should not be penalized, since the officers who were not in the conspiracy did not know about it. The guilty employees were in the "upper echelon" and were "the kind of company officers for whose conduct a corporation is generally held responsible."

Staff: Argued by the Solicitor General; David L. Rose and Robert V. Zener (Civil Division) on the brief.

COURTS OF APPEALS

AGRICULTURE - MILK MARKETING

"Nearby Differential" Payable to Milk Producers in New York Area Held Invalid. Lorton Blair v. Freeman, (C.A.D.C., No. 19801, November 18, 1966) D.J. File 106-16-59. The Milk Marketing Order promulgated by the Secretary of Agriculture for the area including New York City and northern New Jersey imposed a so-called "nearby differential," paid to producers whose farms are situated within a specified distance of Columbus Circle in New York City. In this suit brought by producers covered by the marketing order, but not entitled to the nearby differential, the Court of Appeals, reversing the district court, ruled that the nearby differential was invalid because it was contrary to the applicable provisions of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 et seq. The Secretary had issued the regulation establishing the nearby differential pursuant to Section 8c(5) of the Act, which allows him to make adjustments from the blend price received by each producer for, inter alia, "the locations at which delivery of such milk is made."

The Court of Appeals ruled that the nearby differential could not be justified by that statutory authorization, for it was based upon the location of the farm rather than the location at which the milk was delivered. Moreover, the Court ruled that in no event could a differential be based upon the reason given by the Secretary in promulgating this differential, i.e., that nearby producers should be compensated "for reduction in [their] share of the fluid milk market resulting from [their] participation in a market-wide pool." The Court ruled that the Act was designed to eliminate such disparities between producers resulting from the use made of their milk.

Staff: Edward Berlin (Civil Division)

BANKRUPTCY

Trustee's Motion in Chapter X Proceedings to Deny Priority to Government's Non-tax Claim After Plan of Reorganization Had Been Substantially Consummated Held Untimely. In the Matter of North Atlantic and Gulf Steamship Company, Inc., (C.A. 2, Nos. 239, 240, December 15, 1966) D.J. Files 61-51-2501, and 61-51-2469. In Chapter X reorganization proceedings, the trustee moved to deny priority to a non-tax claim of the United States on the ground that such a claim was not entitled to priority. A plan of reorganization had been substantially consummated in December 1962, granting the Government priority for non-tax claims based upon 31 U.S.C. §191. In March 1965, the trustee moved for the first time to deny the Government priority, asserting that § 191 was not applicable in Chapter X proceedings. In denying the trustee's motion, the district court held (1) that the denial of priority was barred by § 229(c) of the Bankruptcy Act since the Government's right to priority was vested by a plan of reorganization declared substantially consummated; (2) that the trustee was estopped to claim denial of priority due to his prior representations accepting priority; (3) that the trustee's motion was denied as untimely in the exercise of the court's discretion. The district court therefore found it unnecessary to reach the issue of the applicability of § 191 priorities to Chapter X proceedings. On appeal by the trustee the Court of Appeals has affirmed on the opinion of the district court.

Staff: Frederick B. Abramson (Civil Division)

COURTS

Court Has No Authority, Under Declaratory Judgment Act, 28 U.S.C. 2201, to Declare Criminal Conviction Void. Gajewski v. United States, (C.A. 8, No. 18,410, November 14, 1966). D.J. File 106-56-92. Appellants, who had previously been convicted (see Gajewski v. United States, 321 F. 2d 261 (C.A. 8)), served their time, and been released, brought this action under 28 U.S.C. 2201 to obtain a judicial declaration that their conviction had been void. The district court granted the Government's motion for summary judgment on the ground that 28 U.S.C. 2201 was not available for use as a post conviction remedy. The Court of Appeals affirmed. It agreed that 28 U.S.C. 2201 could not be invoked for this purpose, but, as appellants appeared pro se, went on to treat the proceeding as being in the nature of a writ of error coram nobis. Even under that procedure, however, it held that the cause should have been dismissed.

Staff: United States Attorney John O. Garaas (D.N.D.)

FEDERAL RULES OF CIVIL PROCEDURE

Conclusion as to Negligence is Essentially Question of Law Freely Reviewable on Appeal Without Protection Afforded Other Findings of Fact by Rule 52(a). Hicks v. United States (C.A. 4, No. 10,432, October 27, 1966) D.J. File 157-79-712. This Tort Claims action was brought by the administrator of decedent's estate. When decedent had been brought to a Navy Dispensary at 4:00 a.m. one morning suffering from intense abdominal pain and vomiting, the Naval doctor had diagnosed the trouble as gastroenteritis, given her medicine for that malady, and told her to return in eight hours. In fact, as an autopsy showed, decedent had suffered from a high intestinal obstruction resulting from herniation of the small intestine into a congenital defect in her peritoneum. This was an extremely serious, but quite rare condition, and decedent died before she could return to the dispensary. The only issues were actionable negligence and causation.

In reversing the district court's holding for the Government, the Fourth Circuit joined the Second Circuit (see Mamiye Bros. v. Barber Steamship Line, 360 F. 2d 774) in holding that the ultimate conclusion as to negligence, when the basic facts are uncontested, is essentially a question of law, freely reviewable on appeal without the protection afforded other findings of fact by Rule 52(a). It then proceeded to review the record, including the testimony of a Government expert that the Navy doctor had exercised "average judgment," and concluded that the doctor had not conformed to the local standard of care, and was negligent, and remanded for a determination of damages.

Staff: United States Attorney C. V. Spratley, Jr., and Assistant United States Attorney Roger T. Williams (E.D. Va.)

Civil Service Commissioners Indispensable Parties to Action for Review of Their Decision, and Failure to Serve Complaint on Them Naming Them as Parties Is Fatal. Bell v. Groak, et al. (C.A. 7, No. 25,625, December 8, 1966). D.J. File 35-23-22. Plaintiff sought a declaratory judgment that the Civil Service Commission must overturn its previous refusal to consider his appeal timely, and hear the merits of his claim that his resignation from the postal service was unlawfully coerced. The appeal to the Commission was filed some nineteen months after the resignation. The district court dismissed the complaint "for lack of jurisdiction to grant the relief sought."

The Court of Appeals affirmed without reaching the question of whether the Commission's refusal to accept plaintiff's tardy appeal was an abuse of discretion. It pointed out that while the individual members of the Commission had been named in an amended complaint as parties, they had not been served; accordingly, under the rule of Blackmar v. Guerre, 342 U.S. 512, the

indispensable parties to an action to review a Civil Service Commission decision were not before the district court, and suit was properly dismissed.

Staff: Martin Jacobs (Civil Division)

FEDERAL TORT CLAIMS ACT - INDEPENDENT CONTRACTOR

Hirer of Independent Contractor Not Liable Under New York Law to Contractor's Employees for Negligence in Selecting Incompetent Contractor. Lipka, et al. v. United States (C.A. 2, Nos. 30328-30330, December 2, 1966). D.J. Files 157-50-321, 157-50-330, 157-50-331. These actions arose from the collapse of a temporary dewatering cofferdam built by Vaughn Construction Company to enable it to pour a concrete guide wall for the Army Corps of Engineers at the Troy, New York, Lock and Dam. Plaintiffs are two employees of Vaughn who were injured, and the representatives of two who were killed, in the collapse of the cofferdam. The district court found that Vaughn was an independent contractor with the Corps of Engineers, not its employee, and therefore the United States was not liable for its negligence. The court rejected plaintiffs' claim that various provisions of the New York Labor Law statute (§§ 200, 240, 241) imposed liability on the United States as a property owner, reasoning that it could not be held liable since it had not assumed control of the details of the contractor's operations. The district court then held that it did not have to decide whether the Government had negligently hired an incompetent contractor since the "discretionary function" exception to the Tort Claims Act protects the Government from liability for such conduct.

The Court of Appeals, in an opinion by Chief Judge Lumbard, agreed that the evidence established that Vaughn was an independent contractor, and that the New York Labor Law did not impose liability on the Government in these circumstances. The Second Circuit then adopted our suggestion that there was no need to reach the question of whether the negligent selection by the Government of an incompetent contractor may fall within the discretionary function exception to the Tort Claims Act, 28 U.S.C. 2680. In this connection the Second Circuit held that, while no New York court had yet considered an employee's claim that his employer was negligently selected, in its view an employee of the contractor, unlike members of the general public, should not be entitled to recover on that theory. It pointed out that:

> "The principal justification for denying recovery to employees of an independent contractor on either of these theories is that they are coverd by workmen's compensation, and that 'it is to be expected that the cost of the workmen's compensation insurance will be included by the contractor in his contract price

for the work.' Special Note, Restatement (Second), Torts 17-18 (Tent Draft No. 7, 1962)."

Staff: Martin Jacobs (Civil Division)

FEDERAL TORT CLAIMS ACT - MALPRACTICE

Action Based on Failure of Air Force Doctor to Detect Aspirin Poisoning, Which Subsequently Caused Death of 15-Month-Old Child, Remanded by Reason of Insufficient or Incorrect Findings and Conclusions of Trial Court. Rewis v. United States (C.A. 5, No. 23301, December 5, 1966). D.J. File 157-20-140. The examination of a 15-month-old child by a medical officer at an Air Force Hospital at about 9:45 p.m. failed to disclose aspirin poisoning which caused the death of the child by about 7:20 p.m. of the next evening. The district court entered judgment in favor of the United States in the parents' action based on malpractice, but the Court of Appeals remanded for a new trial by reason of a number of aspects of the trial court's findings and conclusions, although accepting the trial court's factual finding that the father of the child had failed to disclose the child's access to aspirin during the afternoon.

The Court of Appeals first ruled that the district court had employed an improper standard by requiring affirmative testimony that the child could have been saved by earlier treatment.

The Court of Appeals went on to analyze the reasoning the district court had apparently utilized in reaching its ultimate conclusion, closely examining the relevant findings of fact. Certain of the findings of fact were found not to be supported by the evidence of record, and the Court considered that this vitiated the district court's conclusions, when, according to some of the testimony, the difference might have been critical, and the district court had not indicated which of the experts it had credited.

In addition the Court of Appeals suggested the need of expert testimony to show whether it was possible for the infant already to be beyond saving at the time of the examination and yet disclose no symptoms at such time. It considered this aspect of the Government's position to be sufficiently unlikely to call for testimony.

Lastly, the Court of Appeals, while not gainsaying the specific statutory permission to take the deposition of a witness who was over 100 miles distant -- here, an Air Force doctor other than the examining doctor -- nevertheless stated that on remand "the trial court should give serious consideration to the contention of the appellant that the government should not be permitted to use the deposition of [that doctor] if he is still available as an Air Force medical officer."

This decision is important as a demonstration of the need -- especially in a case where the sympathies lie with the other side -- for precision in the trial court's findings and in statements of the law being applied.

Staff: J. F. Bishop (Civil Division)

SOCIAL SECURITY ACT - ATTORNEYS FEES

Fourth Circuit Reaffirms Its Holding That Attorneys' Fees Awarded in Social Security Proceedings May Include Percentage of Past-Due Benefits Payable to Claimant's Dependents But Directs That In All Cases Courts Avoid Routine Approval of Maximum Allowable Fee. Lambert v. Celebrezze (C. A. 4, No. 10,160, rehearing denied, December 8, 1966); Redden v. Celebrezze, (C. A. 4, No. 10,156, rehearing denied, December 8, 1966). D. J. Files 137-84-216; 137-84-162. In its original decisions in Lambert v. Celebrezze (361 F. 2d 677), and Redden v. Celebrezze, (361 F. 2d 815,) the Fourth Circuit held that Section 206(b)(1) of the Social Security Act overrode pre-existing contingent fee agreements providing for fees higher than those allowable under the Statute. It further held, however, that the statute permitted the award of a fee not to exceed twenty five percent of the past-due benefits paid to a wage-earner claimant and his dependents.

Petitions for rehearing en banc were filed by the Secretary on the question of whether the base for the award of attorneys' fees could include past-due benefits paid to a claimant's dependents. The Court, in a seven-page opinion, denied rehearing. It determined that benefits paid under the Social Security Act inured to the benefit of the family unit, and that under the statute all benefits paid to the family as a result of the award to the wage earner were within the meaning of the statutory language "past due benefits to which the claimant is entitled by reason of such judgment."

The Court went on to say however "[R]outine approval of the statutory maximum allowable fee should be avoided in all cases. In a great majority of the cases, perhaps, a reasonable fee will be much less than the statutory maximum." The Court pointed out that Social Security benefits are provided for the claimant and his family and are "not for the enrichment of members of the bar." With respect to the Redden case, in which the district court had been directed to enter judgment for the claimant, the Court expressed the view that although past-due benefits payable to Redden and his dependents amounted to approximately $16,000, a reasonable fee for claimant's lawyer "would probably lie well within the $1750 which the Government contends is the maximum." Thus the Court of Appeals has held that dependents' benefits may be charged with attorneys' fees in Social Security cases, but the clear import of its opinion is that the amount of the fee awarded must be reasonable, and that an award of

25% of all past-due benefits (including dependent's benefits) should be reserved for a highly extraordinary case.

To effectuate this decision, therefore, we think it clear that the attorneys representing the Secretary in these cases, particularly those in the Fourth Circuit, should not approve or acquiesce in allowance of the maximum statutory fee, except in the unusual situation where the attorney has shown his entitlement to such a fee.

Staff: Jack H. Weiner (Civil Division)

SOCIAL SECURITY ACT - DISABILITY

Sixth Circuit Reverses District Court's Award of Benefits, Despite Absence of Finding That Work Is Available in Claimant's Geographic Area. Jennie B. Pilcher v. Gardner (C.A. 6, No. 16342, December 9, 1966). D.J. File 137-30-239. This claimant, now 57 years old, lost the thumb and index finger of her right hand (which was her dominant hand) in an industrial accident. The Court of Appeals reversed the district court's award of benefits, despite the facts that claimant apparently could not return to her former work and that the jobs allegedly available to her were not shown to be available "in the area in which the appellee lives." The Court found "substantial evidence to support the Secretary's findings," noting that although "appellee had suffered a severe and crippling injury, yet it is not clear from the evidence that such injury permanently precludes her from substantial gainful activity." At our suggestion, the case was remanded for consideration of the effect of the 1965 amendments.

Staff: Florence Wagman Roisman (Civil Division)

Fifth Circuit Holds That Test For Disability Under Social Security Act Is Whether Claimant's Impairment Prevents Him From Having Reasonable Opportunity to Compete For Job Within His Determined Capabilities in His Geographic Area. Harrison v. Gardner, (C.A. 5, No. 22655, November 30, 1966). D.J. File 137-73-116. Claimant, a sixty-three year old Negro with a seventh grade education, applied for Social Security disability benefits, alleging that he became disabled in 1962 when he injured his back lifting a heavy tray of coffee cups while serving as a bus boy in a hotel in Wichita Falls, Texas. At the hearing, a vocational expert testified that claimant could still perform light work, such as a porter, elevator operator, or checkroom attendant, and that such jobs were available in the economy of the area where claimant resided. On the basis of such testimony, and evidence that claimant could walk, sit, stand, manipulate, think and remember, the Secretary denied the application. The district court affirmed on the ground that substantial evidence supported the Secretary's findings.

The Fifth Circuit, however, reversed the district court, and ordered the case remanded to the Secretary for the taking of further evidence. The court held that the medical evidence did not support the Secretary's finding that claimant could perform substantial gainful activity. The Court further held that the Secretary failed to apply the legal standards established by Gardner v. Smith, C.A. 5, No. 22392, decided October 11, 1966 and Bridges v. Gardner, C.A. 5, No. 23076, decided November 3, 1966, which require the Secretary to find that if a claimant can perform only light work, there must be a reasonable opportunity for him to compete, in the manner normally pursued by persons genuinely seeking work, for a job within his determined capabilities. The Court thus remanded the case for the hearing examiner to resolve the issue of "whether or not claimant's impairment would prevent him from being hired to fill jobs or whether he would have a reasonable opportunity to compete for a job within his determined capabilities in his geographic area."

Staff: United States Attorney Melvin Diggs; Assistant United States Attorney Martha Joe Stroud. (N.D. Tex.)

Fourth Circuit Rejects Finding of Availability of Job Opportunities Within 150 Mile Radius of Claimant's Home - Sets Forth Criteria for Determining Availability of Job Opportunities. Marion A. Cooke v. Gardner (365 F. 2d 425, (C.A. 4)). D.J. File 137-84-246. Claimant, at age 37, applied for social security disability benefits. The Secretary denied his application on the ground that he was able to perform various jobs which, according to the testimony of a professional guidance counselor, existed both in the national economy and within the general area of his home in Inman, West Virginia. Claimant sought judicial review of that denial, and the district court agreed with the Secretary's finding that the claimant was physically able to perform certain types of work, but remanded the case to the Secretary for the taking of additional evidence as to whether there were any such jobs available in "the locale of plaintiff's residence, or within a reasonable proximity thereof."

On the Secretary's appeal, the Fourth Circuit modified and remanded for entry of final judgment for the claimant. The Court deemed it "wholly impractical" to require a man such as the claimant "to range 150 miles from his home in search of a job which at best would hardly pay enough to justify the major expense of moving his home, his wife, and his five children."

Claimant in this case died shortly after the decision of the Court of Appeals, rendering impractical any serious consideration of seeking certiorari.

Staff: Richard S. Salzman and Martin Jacobs (Civil Division)

SOCIAL SECURITY ACT - PRESUMPTION OF DEATH

Ninth Circuit Places Broad Interpretation on Social Security Regulation Relating to Presumption of Death. Secretary of Health, Education and Welfare v. Meza (C.A. 9, No. 20,0377 August 31, 1966, rehearing denied November 16, 1966). D.J. File 137-12-316. This action was brought to review the Secretary's determination that claimant was not entitled to Social Security survivor's benefits. Claimant had no proof of her husband's death, but relied on his 7-year absence to establish his death. The only question was whether Mr. Meza's absence was sufficient under a regulation (20 C.F.R. 404.705) which provided that, in the absence of any evidence to the contrary, if an individual has been unexplainedly absent and unheard of for seven years, he shall be presumed dead.

Mr. Meza had deserted claimant, her two children by an earlier marriage, and their child, shortly before the birth of their second child. This desertion had occurred after three years of marriage, in 1948, in Los Angeles. In 1954 or 1955, after claimant had inquired as to possible Social Security benefits, it was discovered that Mr. Meza had reported earnings covered by Social Security in Texas until 1954, at which time the record of earnings ceased. In 1962, a California court, on claimant's petition, determined that Mr. Meza was dead, and appointed her administratrix. Shortly thereafter, she made application for the survivor's insurance benefits here involved.

The Secretary found that the circumstances shown of record explained Mr. Meza's disappearance. The district court reversed, and the Ninth Circuit affirmed. The Court of Appeals held that the regulation could not reasonably be interpreted to mean that a claimant must show that there is no explanation of the absence. Rather, it determined, it is sufficient if a claimant shows the fact of absence, and that she has no explanation. The presumption of death which then arises can be dissipated, it held, either by evidence that the wage-earner is still alive, or by proof of facts that rationally explain the anomaly of disappearance in a manner consistent with continued life. No such facts, it found, had been shown in connection with the 1954 disappearance.

The Secretary's petition for rehearing pointed out that new evidence - the wage earner's 1966 inquiry as to old age benefits - had just come to light which indicated that his original decision had been correct. The Court of Appeals, however, declined to grant the petition, construing its decision to allow the Secretary to take this new evidence into account on remand.

In an opinion subsequent to this one, the Ninth Circuit, while reiterating its reasoning, decided that the Secretary had shown that the absence there involved had been explained. See Gardner v. Wilcox, 14 U.S. Att. Bull. 432.

Staff: J.F. Bishop and Alan S. Rosenthal (Civil Division)

DISTRICT COURT

GOVERNMENT CONTRACTS - MISTAKE IN BID

Low Bidder on Government Contract May Not Withdraw Bid Before Award Unless Government Knew or Should Have Known From Face of Bid That Mistake Had Been Made. United States v. Burtz-Durham Construction Co. (N. D. Ga., Dec. 1, 1966). D.J. File 77-19-422. In 1962 defendant, Burtz-Durham Construction Company, submitted a bid on a contract to build a bridge for the Corps of Engineers. After the opening of bids the company allegedly discovered omissions in its bid totalling $38,000. It attempted to show these errors to the contracting officer, but could not produce evidence clearly indicating that a mistake had been made. The company then attempted to withdraw its bid, but the Government refused to accept the withdrawal and awarded the contract to Burtz-Durham. The company refused to execute the contract documents and begin performance. The Government terminated the contract for default and awarded a new contract to the highest bidder. Suit was brought for the excess costs involved.

The Government contended: (1) A bidder on a Government contract may not withdraw his bid after the opening of bids unless the Government knew or had reason to know from the face of the bid that a mistake had been made, and in this case the Government neither knew nor had reason to know of a mistake; (2) failure of the defendant to pursue its administrative remedy precluded raising the same issues in the courts; (3) the company, in any event, failed to prove its mistake, especially since clear and convincing evidence was required; and, (4) a waiver of mistake clause in the invitation for bids, now discontinued by the Corps of Engineers, precluded the assertion of a certain amount of any mistake made, which amount was above the amount of any mistake proved by the company.

The bidder argued that, as in ordinary contract law, bids are unilateral offers without consideration and should not be binding until accepted. The Government argued that its contracting procedures, which require numerous administrative acts before acceptance, and generally acceptance of the low bid, would be frustrated if bids were not firm. Great opportunities for fraud would be presented in that a bidder could purposely make a mistake in one part of the bid, make a balancing error in another part (so the total bid would seem regular), and then wait until he sees all the bids before deciding whether to withdraw his bid on the claim of error.

The court entered Findings of Fact and Conclusions of Law adopting as conclusions all the contentions of the Government numbered above.

Staff: Stephen R. Felson (Civil Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

CONSPIRACY

Scheme to Steal Goods Wherever Found Held Broad Enough to Violate 18 U. S. C. 371.

Rudolf J. Nassif v. United States (C. A. 8, No. 18, 290, December 6, 1966). Defendant's conviction of conspiring to steal with intent to convert goods out of interstate commerce (18 U. S. C. 371) was affirmed.

Defendant, the owner of a bar, agreed to pay Schmadebeck, his partner in a construction firm, $3, 000 for a load of liquor to be hi-jacked by two persons employed by Schmadebeck in a third business; apparently defendant made no inquiry as to the source of the goods. The employees stole from a trucking yard in Minneapolis a trailer of goods that had been transported from Chicago, and delivered it to a salvage dealer whose name had been supplied by Nassif. Evidence of defendant's involvement in the scheme was that rental on the truck used in the actual theft and the three vans into which the goods were transferred was charged to the construction firm, and payment for the goods was made by the salvage dealer to that firm. In addition, one of the two employees testified as to various statements made by Nassif, such as "police know every time we turn. . ." Defendant argued that he had no knowledge of the plans to steal goods from interstate commerce, and was therefore not liable as a conspirator.

Although Federal courts have ruled that knowledge that stolen goods were taken while being transported interstate is not an element of the offense under Section 2314, they have required a showing of such knowledge for conviction of a conspiracy to violate the statute. (See, e. g., Linde v. United States, 13 F. 2d 59 (C. A. 8, 1926)). In United States v. Crimmins, 123 F. 2d 271, 273 (C. A. 2, 1941), however, the Second Circuit Court of Appeals in dictum suggested that an agreement in which one party was indifferent to the source of the stolen property would bring all parties to it within the statute, "for such an agreement would have dealt with the place of the theft, even though it did no more than provide that the place made no difference . . ." Under that view, proof of the apparent broad scope of the agreement, without any other tangible evidence, would render all parties liable to prosecution for conspiracy to violate a Federal statute.

The instant case was seen as a clear situation for applying the Crimmins rationale, because the defendant, Nassif, not only furnished a market for the stolen goods, but knew in advance of the planned theft. In affirming his conviction for conspiracy, the Court ruled:

> Clearly, if the plan was to steal merchandise only from a known defined local source Nassif might have been guilty of conspiracy to steal or conceal, which only a state may punish. But if the scheme is to steal goods, wherever they may be found, and in fact, goods are stolen from interstate commerce, then we feel the scope of the conspiracy can be broad enough to imply intent to commit a federal crime.....
>
> We hold there was sufficient evidence to implicate Nassif with the overall conspiracy to steal from interstate commerce.

Staff: United States Attorney Patrick J. Foley (D. Minn.).

UNIVERSAL MILITARY TRAINING AND SERVICE ACT

Whether There Is No Basis for Classification Is Question of Law and Only Issue for Jury Is Whether Registrant was Ordered to Report for Induction and Knowingly Failed to Comply With Order.

In United States v. Charles Alton Jackson (C. A. 4, Dec. 6, 1966) the Court of Appeals followed the great weight of authority in affirming the conviction of the defendant, a Jehovah's Witness classified as a conscientious objector, who failed to comply with his selective service board's order to perform civilian work in the national interest in lieu of induction into the Armed Forces. The Court held that in a criminal prosecution for a refusal to obey a selective service board order, the scope of judicial inquiry into the administrative proceedings leading to the defendant's classification is very limited in that the courts are not to weigh the evidence to determine whether the classification by the board was justified since the board's decision, made in conformity with the regulations, is final even though it may be erroneous. Such a classification may be questioned only if there was no factual basis for it, and since that is a question of law for the court to determine from the registrant's "cover sheet," the only issue for a jury to decide is whether the defendant was ordered by his board to report and if so, whether he knowingly failed to comply with the order.

Staff: United States Attorney John H. Kamlowsky;
Assistant United States Attorneys John Marshall, III, and George R. Triplett (N. D. W. Va.).

NEW LEGISLATION

There were enacted during the 89th Congress, 1st and 2d Sessions, 55 statutes containing provisions of particular interest to the Criminal Division. The list of such statutes is set forth below. Legislative histories of some of these statutes have already been compiled and are on file in the Legislation and Special Projects Section of the Division; the others are in process of being compiled.

Public Law No.	
89-4	Appalachian Regional Development Act of 1965
89-24	District of Columbia - Parolees Under Supervision - Discharge
89-64	Aircraft and Motor Vehicles - Destruction - False Bomb Information
89-68	Anti-Racketeering - Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises - to Include Arson
89-74	Drug Abuse Control Amendments of 1965
89-81	Coinage Act of 1965
89-92	Cigarette, Federal, Labeling and Advertising Act
89-95	Explosives - Regulation of Pipelines
89-136	Public Works and Economic Development Act of 1965
89-141	Presidential Assassination - Penalties
89-152	Universal Military Training and Service Act of 1951, As Amended - Draft Cards - Destruction
89-163	Courts - Court Reporters - Recording of Proceedings
89-167	Courts - Court Reporters - Transcript Fees
89-176	Prisons - Rehabilitation of Federal Prisoners

Public Law No.	
89-184	Firearms Act, Federal, As Amended - Relief from Provisions of the Act
89-186	Presidents - Protection of Former Presidents and Their Wives or Widows
89-197	Law Enforcement Assistance Act of 1965
89-216	Labor-Management Reporting and Disclosure Act of 1959, As Amended - Bonding Provisions
89-218	Arrests - Authority of Secret Service Agents
89-236	Immigration and Nationality Act, As Amended
89-242	Courts - Judicial Districts - South Carolina - Consolidation
89-267	Prisons - Transfer of Certain Canal Zone Prisoners
89-272	Clean Air Act, As Amended
89-277	District of Columbia Correctional Officers - Assault Penalty
89-318	President - John F. Kennedy Assassination - Preservation of Evidence
89-347	District of Columbia - Amending and Clarifying Certain Criminal Laws
89-372	Judges - Additional Circuit and District Judges
89-402	District of Columbia - Superintendent of Insurance - Domestic Stock Insurance Company - Rules and Regulations
89-465	Bail Reform Act of 1966
89-487	Administrative Procedure Act, As Amended - Public Information - Availability
89-519	District of Columbia Bail Agency Act

Public Law No.	
89-544	Animals - Transportation of Dogs, Cats, etc., for Research Purposes
89-551	Oil Pollution Act, As Amended
89-554	Government Organization and Employees - Enactment of Title 5, United States Code
89-577	Federal Metal and Nonmetallic Mine Safety Act
89-578	District of Columbia Certified Public Accountancy Act of 1966
89-590	Habeas Corpus - Jurisdiction and Venue
89-654	Thefts from Pipelines
89-669	Fish and Wildlife - Conservation and Protection
89-684	District of Columbia Minimum Wage Amendments Act of 1966
89-689	Public Works Appropriation Act, 1967
89-695	Financial Institutions Supervisory Act of 1966
89-702	Fur Seal Act of 1966
89-707	Indians - Offenses Committed in Indian Country
89-711	Habeas Corpus - State Custody
89-732	Immigration and Nationality Act, As Amended - Cuban Refugees - Adjustment of Status
89-753	Clean Water Restoration Act of 1966
89-775	District of Columbia - Child Abuse - Reporting Requirement
89-776	District of Columbia - Reporting of Injuries Caused by Firearms

Public Law No.	
89-793	Narcotic Addict Rehabilitation Act of 1966
89-798	Law Enforcement Assistance Act of 1965, As Amended
89-801	National Commission on Reform of Federal Criminal Laws
89-803	District of Columbia Work Release Act
89-807	Seal, Arms, Flag and Other Insignia - Great Seal of United States - Use of likenesses Prohibited
89-809	Foreign Investors Tax Act of 1966 and Presidential Election Campaign Fund Act of 1966

* * *

INTERNAL SECURITY DIVISION

Assistant Attorney General J. Walter Yeagley

Coast Guard Merchant Marine Screening Program: Long-time "Knowing" Member of Communist Party May Be Denied Specially Validated Merchant Mariner's Document on Grounds That His Presence Aboard U.S. Vessels "Would Be Inimical to the Security of the United States" Without Showing That He Has "Specific Intent" to Further Illegal Objectives of Party. Joseph Clinton McBride v. E. J. Roland, Commandant, U.S. Coast Guard (C.A. 2, No. 30331) D. J. File 146-1-51-6382. McBride, desiring employment on American merchant vessels of 100 gross tons or over, applied for special validation of his mariner's papers pursuant to the Magnuson Act, 50 U.S.C. 191 and Coast Guard regulations, 33 C.F.R. §121.01 et seq. The Commandant, after receiving McBride's answers to interrogatories and after considering the recommendations of a Hearing Board and an Appeal Board, denied his application on the grounds that he was not satisfied that McBride's "character and habits of life are such as to warrant the belief that his presence on board a merchant vessel of the United States would not be inimical to the security of the United States." 33 C.F.R. §121.03.

There was evidence of record that McBride had been a long-time Communist Party member and employee who knew of the Party's aims of overthrow of the Government. The record also established that McBride had not only performed the regularly assigned Party membership tasks of picketing, distributing literature, taking part in rallies, parades, and demonstrations, but had among other things also attended Communist schools, summer camps, and state and national conventions.

McBride sued in the U.S. District Court for the Southern District of New York for a judgment declaring the Commandant's acts unconstitutional and a court order directing validation of his application. The Court, Ryan, C. J., found the evidence and procedures sufficient, denied McBride's motion for summary judgment and dismissed the action. 248 F. Supp. 459. McBride appealed from this order.

The Court of Appeals, Smith, Hays and Feiberg, Circuit Judges, on November 23, 1966, affirmed the decision of the District Court rejecting McBride's contention that a "specific intent" to further the illegal objectives of the Communist Party and participation in the Party's illegal activities were required elements of proof (as to which there was no evidence of record). The Court distinguished the cases of Elfbrandt v. Russell, 384 U.S. 11 (1966); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Scales v. United States, 367 U.S. 203 (1961) and Noto v. United States, 367 U.S. 290 (1961), on the grounds that they involved the interpretation of criminal statutes where

"specific intent" was necessary for a constitutionally based conviction while McBride's case involved only the "reasonableness of regulation of employment in a peculiarily sensitive area of those who are knowing members [of organizations] and the nature of whose membership activities makes it likely that their presence would be inimical to the United States." The Court found the evidence and procedures in this setting to be sufficient and the regulations as interpreted and applied to be reasonable.

Staff: United States Attorney Robert M. Morgenthau and Assistant United States Attorney Robert E. Kushner (S.D.N.Y.); Assistant United States Attorney David E. Montgomery on the brief.

* * *

TAX DIVISION

Assistant Attorney General Mitchell Rogovin

SPECIAL NOTICE

Procedure for Handling Disputes in Concluding Refund Suits

Due to the frequency with which we are confronted with the problem discussed herein, we are reissuing the following announcement which first appeared in Bulletin No. 21, Vol. 6, dated October 10, 1958 and in Bulletin No. 23, Vol. 8, dated November 4, 1960.

In the payment of judgments and compromise settlements in tax cases, there will arise a certain number of situations in which the computation of the taxpayer or his counsel will not agree with the Government's computation. In order to expedite the handling of such disputes, the Tax Division and the Internal Revenue Service are inaugurating a new "shortcut" procedure.

The United States Attorney will customarily be furnished with a copy of the Revenue Service's recomputation. This recomputation should be furnished to the taxpayer's attorney. If taxpayer's attorney is not satisifed with the Service's computation, he should then be advised to reconcile the difference with the office of the District Director from which the refund was authorized. If the differences cannot be reconciled in this manner, the matter will then be referred by the District Director to the appropriate official of the Revenue Service in Washington, without reference back to the United States Attorney or the Department of Justice. The District Director will receive his instructions as to his authority and method of handling such cases directly from the appropriate official of the Revenue Service in Washington.

CIVIL TAX MATTERS

Appellate Decision

Recovery by United States of City Sales Taxes Illegally Exacted From Government Cost-Plus Contractor; Collateral Estoppel. City of New Orleans v. United States and Chrysler Corp. (C.A. 5) D.J. File 236517-19-3. Chrysler Corp. sued in the Louisiana courts to recover New Orleans use taxes assessed against it in connection with its use of property in performance of a Government contract. It contended that no use tax was payable since the Government, not Chrysler, owned the property which was used, and the New Orleans ordinance taxed only use by the owner. The Government intervened in support of Chrysler's claim because it had reimbursed Chrysler and would, under the contract between them, receive the benefit of any recovery. The Louisiana

Supreme Court found that the Government, not Chrysler, was the owner of the property, but dismissed Chrysler's complaint on the ground that it had no standing to sue, since it had been reimbursed by the Government. It also held that the Government's complaint as intervenor fell with Chrysler's complaint. The Government and Chrysler then sued in the United States District Court for refund of the taxes to the Government. In affirming the District Court's summary judgment for the Government, the Fifth Circuit held that the City was estopped by the Louisiana Supreme Court's finding that the Government, not Chrysler, owned the property with respect to the use of which the taxes were assessed. It rejected the City's contention that the Government could not recover the admittedly illegal taxes because they were paid by Chrysler, which had no standing to recover them under Louisiana law. Rather, it held that "there is ample power in the United States District Court to protect the sovereign against such unjust enrichment on familiar principles of money had and received."

Staff: Harold C. Wilkenfeld, Edward J. Shillingburg and William Massar (Tax Division)

District Court Decision

Lien for Taxes; Unrecorded and Unwritten Contract of Sale Under Which Title to Car Was Retained by Seller Was Mortgage Within Meaning of Section 6323 and Was Prior to Tax Liens Which Had Not Been Recorded With Division of Motor Vehicles as Required by State Law. K-R-K Investment Co. v. United States (D. Ariz. No. 4516-Phx, June 20, 1966. CCH 66-2, para. 9668). The Service seized a Cadillac in taxpayer's possession to satisfy tax liens recorded in the county of his residence. Registered title was not in taxpayer's name but in the name of one Levin who had endorsed the title certificate over to K-R-K in blank. After seizure K-R-K was prevailed upon to turn the title certificate over to the Service but later brought suit to enjoin the sale of the car and obtain the return of the title certificate. By agreement the levy sale was completed and the competing claims transferred to the sale proceeds in the sum of $1,800. While the Government is of the opinion that the decision is erroneous in holding that the Government was required to file a notice of tax lien with the Arizona Division of Motor Vehicles (Desert Air Conditioning, Inc. v. Wood, D.C. Ariz., 66-2 U.S.T.C., para. 9632) and in holding that plaintiff's unrecorded security interest is valid against the federal tax lien (United States v. Creamer Industries, Inc., 349 F. 2d 349; Allen v. Diamond T. Motor Car Co., 291 F. 2d 115) an appeal was not taken from this adverse decision because record title to the Cadillac was not in the name of the taxpayer, which deprives us of reliance upon the record title, the main foundation for our case. United States v. Fulford, 65-2, U.S.T.C., para. 9710. Also at the time that the decision not to appeal was made, it was expected that the Federal Tax Lien Act of 1966 would shortly be signed into law and that that Act would finally resolve the issues in this case so that this adverse decision

would not materially harm the Government. This Act amends Section 6323, I. R. C. of 1954, to provide that the tax lien will not be valid against the holder of a security interest until notice thereof has been filed, in the case of personal property, "in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated". Personal property shall be deemed to be situated at the residence of the taxpayer at the time notice is filed. Section 6232(f) (2) (B), I. R. C. of 1954, as amended. With respect to a security holder's compliance with state recording laws Section 6323(c) (1) (B), I. R. C. of 1954, as amended by the Federal Tax Lien Act of 1966, provides that the tax lien is invalid against a security interest that is protected under local law against a judgment lien arising as of the time of the filing of a tax lien notice. Thus, if recording of a security interest is necessary to protect the holder thereof from the lien of a judgment creditor under local law, such recording is then a prerequisite for obtaining priority over a federal tax lien. It was so held in United States v. Strollo, et al., (D. Ct. of Appeals of Fla., 2nd Dist., decided Dec. 21, 1966), discussed in 15 United States Attorney's Bulletin 9, the first case decided under the Federal Tax Lien Act of 1966.

Staff: United States Attorney William P. Copple and Former Asst. U. S. Attorney Richard C. Gormley (D. Ariz.); Clarence J. Grogan (Tax Division)

* * *

Vol. 15 January 20, 1967 No. 2

INDEX

INDEX

INDEX

INDEX

INDEX