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POINTS TO REMEMBER

POST OFFICE

POSTAGE STAMPS MAY NOW BE ILLUSTRATED IN COLOR

H. R. 15972, an act amending paragraph (1) of Section 504 of Title 18, United States Code, was signed June 20, 1968 (P. L. 90-353). The principal change in the paragraph, which permits illustrations of United States and foreign obligations and securities under certain circumstances, is that color as well as black and white reproductions of postage stamps are now permitted.

POSTAL OFFENSES

POSTAL EMPLOYEES WHO FAIL TO REMIT POSTAGE DUE RECEIPTS TO BE PROSECUTED UNDER 18 USC 1711.

H. R. 17024, an act to repeal Section 1727 of Title 18, United States Code, was signed July 5, 1968 (P. L. 90-384). Prior to this legislation a number of unreported district court decisions held that prosecution for embezzlement of postage due receipts must proceed under Section 1727, with a mild penalty provision, to the exclusion of prosecution under the postal embezzlement statute, Section 1711 of Title 18, United States Code. This act eliminated the ambiguity as to which statute should be applied, and permits more effective prosecution of postal employees for failure to remit postage due collections.

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NEWS NOTES

Grants for Riot Control Made Under New Crime Bill

September 3, 1968: Attorney General Ramsey Clark announced the award of almost $4,000,000 in federal funds to 40 states, the District of Columbia and Puerto Rico for the prevention, detection and control of violent civil disorders. The awards, which were made under a special grant program authorized by the Omnibus Crime Control and Safe Streets Act of 1968, would pay up to three-fourths the cost of a wide range of projects proposed by the recipients, including police-community relations programs, communications equipment, training programs, small arms and ammunition, photo and video equipment, chemical agent supplies and protective equipment for personnel.

Department Brings Record Number of Organized Crime Cases in FY1968; Increased Activity in Other Areas

September 4, 1968: Attorney General Ramsey Clark released figures on certain Department of Justice activity during fiscal 1968.

Organized Crime

Mr. Clark reported that the Department of Justice brought a record number of organized crime cases in fiscal 1968.

Mr. Clark said indictments were obtained against 1,166 individuals in cases handled by the Organized Crime and Racketeering Section of the Criminal Division.

The record total compared with 19 in 1960, the year before the current drive against organized crime was begun. Indictments have increased each year since. They totaled 1,107 in fiscal 1967.

Defendants convicted in such cases during fiscal 1968 numbered 520, up 30 percent from 400 the previous year.

Convictions of racketeering and gambling figures resulting from FBI investigation reached a record high of 281, up 43 percent from 197 in fiscal 1967, and nearly 700 others were awaiting trial at the year's end.

Of 210 known or suspected members of La Cosa Nostra indicted or convicted during the past 13 years, 48 were indicted or convicted during fiscal 1968.

The number of attorneys in the Organized Crime and Racketeering Section was increased to 70, an all-time high, during fiscal 1968.

The Section in fiscal 1968 established three additional "Strike Forces"--teams of attorneys and investigators from key federal agencies who move comprehensively against organized crime in metropolitan areas.

Mr. Clark said the concept, introduced with one Strike Force in fiscal 1967, had proven highly successful.

Thirty individuals have been indicted as the result of the work by the original Strike Force, in Buffalo.

Within the past six months, Strike Forces have moved into Detroit, Brooklyn and most recently Philadelphia. Indictments of 16 persons have already been obtained in Brooklyn while 8 have already been indicted in Detroit.

The Attorney General said Strike Forces are planned for four more cities during the 1969 fiscal year.

"This was the most effective year in the history of federal law enforcement's effort to eliminate organized crime", Mr. Clark said.

"Heavy and increasing pressure from coordinated law enforcement action, plus the telling blows of the Strike Forces, have weakened organized crime's hold in many parts of the nation.

"A vigorous follow-through can achieve virtual elimination of major organized crime that has corrupted American life for decades."

The record highs in prosecutions were obtained despite a court decision limiting the Government's power to prosecute gamblers for failure to follow federal registration requirements. As a result of the decision, the Department dismissed cases against 351 defendants and withheld action on hundreds of other potential cases.

"The clear lesson is that law enforcement can be effective within this Constitutional limitation", Mr. Clark said. "The redirection of enforcement effort to protect important Constitutional rights will better protect the public in both the short and the long run."

In view of the decision and since gambling is the chief source of income for organized crime, the Department introduced legislation to make it a federal crime to engage in a substantial gambling enterprise.

Narcotics

More than 1,700 defendants were convicted of federal drug violations in fiscal 1968, Mr. Clark reported.

Federal narcotics seizures totaled 327,750 grams, up 154 percent from 128,953 grams the year before. There were 69 clandestine drug laboratories seized, compared with 14 the year before.

Selective Service

There were 1,698 prosecutions commenced under the Universal Military Training and Service Act of 1948, up from 1,388 in fiscal 1967. Convictions numbered 747, down from 786. The decrease was due primarily to the record number of 342 dismissals--the overwhelming majority resulting from defendants choosing to enter military service rather than face trial.

Bureau of Prisons

The number of inmates in federal prisons rose for the first time in five years. The inmate population on June 30 was 20,247, up from 19,543 the previous year. Factors in the increase included longer sentences, a substantial rise in commitments for bank robberies and selective service violations, and an 18 percent decline in paroles.

FBI Activity

A project inaugurated in January, 1967--the National Crime Information Center--was expanded in fiscal 1968 to serve 61 law enforcement agencies in 42 states, the District of Columbia and Canada on its teletype network. The Center, operated by the FBI, is a computerized index of information on crime and criminals.

The FBI extended training assistance in some 6,000 schools to nearly 185,000 local and state officers during the fiscal year. The FBI National Academy graduated 199 officers.

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ANTITRUST DIVISION

Assistant Attorney General Edwin M. Zimmerman

DISTRICT COURTS

CLAYTON ACT

BANK CHARGED WITH VIOLATION OF SECTION 7 OF ACT.

United States v. The First National Bank of Maryland, et al. (D. Md., Civ. 19801; August 16, 1968; D. J. 60-111-1317)

On August 16, 1968, a civil action was filed in the United States District Court in Baltimore, Maryland, challenging the proposed acquisition of First National Bank of Harford County, Bel Air, Maryland, by The First National Bank of Maryland, Baltimore, Maryland.

First National of Maryland, the State's second largest bank, agreed to merge with First National of Harford on October 11, 1967. A hearing on the proposed merger was held by the Comptroller's Office on February 28, 1968, and the Comptroller approved the merger on July 19, 1968.

First National of Maryland is headquartered in Baltimore and twenty-eight of its forty-one offices are located in Baltimore City and Baltimore County. Its other offices are located in Wicomico County (Eastern Shore area), Washington County (Hagerstown area), and Montgomery County. Since 1960, it has established nine de novo branch offices in various parts of the State. Currently, it has permission to open eight additional branch offices in various communities, including two counties, Prince George and Howard, not previously served by it. As of September 30, 1967, it had total deposits of $534 million. It accounts for approximately fourteen percent of the total deposits held by all Maryland commercial banks.

First National of Harford is the largest commercial bank headquartered in Harford County and the third largest commercial bank operating in the county. It currently has about thirty-one percent of the total commercial bank deposits located in the county, the largest share held by any bank operating in the county. It operates five banking offices in the county, three of which were opened since 1962. As of September 30, 1967, First National of Harford had total deposits of $29.8 million.

The headquarters of the two merging banks are twenty-five miles apart. Their nearest branch offices are sixteen miles apart.

Harford County is located northeast of the Baltimore area, adjacent to Baltimore County. Like neighboring counties, Harford County is undergoing rapid economic growth. Commercial banking in Harford County is highly concentrated with the two largest banks accounting for about fifty-three percent of county commercial bank deposits, and the five largest eighty-five percent. A total of eight commercial banks, operating twenty offices, currently serve the county. Two large Baltimore-based banks, Equitable Trust Co. and Union Trust Co., have in recent years begun operating in the county, the former by merger and the latter by opening a de novo branch office.

Under the banking laws of Maryland, which permit statewide branching First National of Maryland could be permitted to establish de novo branch offices in Harford County. It is one of the two most likely potential entrants into that area, the other being the State's largest bank, Maryland National Bank. Aside from the question of de novo entry, however, there remains the possibility of entry by First National of Maryland by the less anticompetitive method of acquiring a smaller Harford County bank, of which there currently are five.

The complaint alleges that the merger would have the following illegal anticompetitive effects:

(a) Potential competition between the merging banks will be permanently eliminated;

(b) First National of Maryland will be eliminated as a potential entrant into Harford County;

(c) First National of Harford County will be eliminated as a substantial independent competition factor in commercial banking in Harford County;

(d) Potential competition would be reduced by a continuation of a trend of acquisitions by Maryland's largest banks of banks with substantial positions in markets throughout many parts of the State; and

(e) Substantial barriers will be created to independent entry by remaining potential entrants into commercial banking in Harford County.

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CLAYTON ACT

COURT GRANTS GOVERNMENT MOTION FOR PRELIMINARY INJUNCTION AND DEFENDANTS ABANDON MERGER.

United States v. Wilson Sporting Goods Co., et al. (N.D. Ill., Civ. 68 C 549; July 2, 1968; D. J. 60-277-037-1)

On July 2, 1968 Judge Abraham L. Marovitz, in a 100-page opinion, granted the Government's motion for preliminary injunction to enjoin the proposed merger of Nissen into Wilson. Previously on March 28, 1968 a temporary restraining order had been issued preventing consummation. In essence the court enjoined the number one sporting goods company from merging with the number one gymnastic equipment manufacturer.

The Government contended that the proposed merger would probably engender three anti-competitive consequences:

(1) Entrenching and increasing Nissen's already dominant market position in gymnastic apparatus and trampolines, while at the same time discouraging smaller competitors from aggressively competing with Nissen, and deterring other companies from entering this market.

(2) Eliminating Wilson as one of the most important companies that might have entered the gymnastic apparatus business as a new competitor or remained on the fringe of the market as a restraining influence on price and profit margins.

(3) Entrenching and increasing Wilson's dominance of the sporting goods market and eliminating the actual and potential competition that an independent or otherwise-merged Nissen might have mounted against Wilson.

The defendants opposed the motion on the following grounds:

(1) There was no reasonable probability that the Government would prevail on the merits.

(2) A preliminary injunction would, in effect end the proposed transaction, thereby giving the Government a victory in fact though not on the record; and

(3) The public interest would be fully safeguarded if the merger was allowed to be consummated subject to an order requiring the Nissen business to be maintained and operated as a separate business entity that could be divested if the Government prevailed on the merits and such relief were decreed.

The Government opposed the entry of a hold-separate order for two reasons. First, the transfer of ownership pending trial would harm competition. Second, it left in doubt whether competition could be fully restored upon divestiture.

Judge Marovitz classified the proposed acquisition as a "product extension" merger because Nissen manufactured a different product from Wilson, but one which was closely related to the sporting goods produced by Wilson, and because the merger might enable significant integration in the production, distribution, or marketing activities of the merging firms. The relevant geographic market was held to be the entire nation, and the relevant product market that of gymnastic equipment. It was found that Nissen had 32% of the gymnastic equipment market, the top four companies accounted for over 60% of the total industry sales, and the top nine companies comprised over 90% of the market.

It was held despite the Government's contention to the contrary, that any effect of Wilson's massive advertising budget upon market structure and competition, as was found in Clorox and General Foods, was missing here, and that the market structure and the conditions of entry into the gymnastic equipment industry would not be affected by advertising.

Judge Marovitz found the following probably anticompetitive effects of the proposed merger upon existing competition:

(1) that Nissen's competitive positions will likely improve from the merger but certainly will not decline with Wilson's backing, and this is due in part, at least, to the marketing advantage Nissen's products will likely receive when marketed by Wilson dealers;

(2) that the smaller rivals of Nissen may or may not compete as aggressively as before, but psychologically will fear the Wilson-Nissen combine, with the probable result in the long run that the industry would be transformed into a tighter oligopoly featuring large diversified companies with no serious threat from potential competitors; and

(3) that small potential entrants will be deterred from entering as a result of the merger.

In regard to the elimination of Wilson as a potential entrant into the gymnastic equipment market, Judge Marovitz concluded there was no evidence in writing or otherwise that Wilson would have entered the market independently of the instant merger, but this fact was not entitled to great weight. There were a number of economic factors which tended to support the conclusion that Wilson would have entered this market via internal expansion if this merger were prohibited. These factors were:

> First, the sale of gymnastic equipment is extremely closely related to the sale of other team equipment to schools and institutions. It would be logical for a broad line sporting goods house such as Wilson to enter the gymnastic apparatus market and add a natural complement to its line. Second, the market is rapidly expanding and offers attractive opportunities for profitable operations. Third, there was testimony from certain of Nissen's competitors that they regarded Wilson and other full line sporting goods houses as the most likely potential entrants. Fourth, by its own admission, Wilson is physically capable of entering the business at any time. It already has facilities for metal working and chrome-plating, and whatever other facilities are necessary are within its financial reach. There are no technological barriers to its independent entry. Fifth, Wilson already has a large marketing staff which deals with many of the same persons and dealers who would be likely purchasers of gymnastic equipment. If it needs to add a few former gymnasts to its sales force, it could easily do so. Sixth, Wilson's respected name in athletic equipment would certainly inure to the benefit of any new product which it produced. Finally, and perhaps most important, Wilson has indicated by this proposed merger its interest in the market.

The court concluded that even if Wilson lacked the subjective intent to enter the gymnastic market, there would still be a lessening of competition, since the firms already in the market could not know Wilson's intent and did regard Wilson as a potential competitor. Despite the relative ease with which firms with minimal capital could enter the gymnastic equipment market, the elimination of even one of the larger potential entrants by merger with a leading firm in the gymnastic equipment market might be significantly anticompetitive for the following reasons:

> [1] It could easily be the trigger to a round of mergers which would transform the nature of the industry. [2] Although the

> other large firms would still be on the fringe following the first merger, it is less likely that they would consider entering by internal expansion and the remaining existing competitors would probably encourage that trend by expressing interest in merger themselves. [3] Loss through merger of one of a recognized small group of significant potential entrants, lessens the likelihood of future deconcentration for it removes a company which could have been expected to furnish significant competition to the leading firms in the industry had it entered. [4] That tiny firms can still enter is insignificant in this context because they do not constitute a significant competitive force due to their inability to produce Olympic equipment. [5] We have already found, supra, that an immediate effect of the instant merger will probably be to raise the entry barriers to small firms which had previously considered coming in. The future of the tiny firms' survival, let alone their prospects of entry, is problematical, if the industry's market structure becomes more concentrated.

In regard to the issue of eliminating competition in the sporting goods industry, Judge Marovitz held that the merger would have three adverse effects:

> First, it would entrench Wilson's position in the sporting goods industry by allowing it to add a respected brand of gymnastic equipment to its family, and under the Nissen trademark. Second, it would eliminate in the future any competition that now exists between Wilson and Nissen in the products which both presently produce. And thirdly, it would eliminate all future competition which might develop between Wilson and an independent or otherwise merged Nissen.

Nissen had developed a series of new products in the last few years, and intended to introduce a complete line of track and field equipment. There was no reason to believe that a merged Nissen would continue to develop products in direct competition to those of Wilson. Yet that was its history in its premerger days. If Nissen were to remain independent or merge with a smaller sporting goods company than Wilson, it could continue to diversify its product line, and ultimately could pose a competitive challenge to the broad line sporting goods companies, four of which controlled close to half of the sporting goods sales. According to the court this was the kind of development of a broad line competitor that Section 7 was designed to preserve. The Nissen owners would have no difficulty in

selling their company to others; it would be more pro-competitive for Nissen to merge with a smaller company than with Wilson; and Nissen could become a diversified threat to Wilson and its major competitors.

It was further held that any course of action that Wilson could follow was more pro-competitive than the path it had chosen. It could enter through internal expansion by buying a small company in the market at the expense of a leading company, or it could simply wait on the sidelines as an interested bystander. Hence, by disallowing the merger a benefit to competition was insured in the gymnastic equipment market. The court concluded it was therefore apparent that the proposed merger would pro have the effect of lessening competition in the gymnastic equipment industry in violation of Section 7.

Finally the court stated a hold separate order would not be sufficient protection pending trial because a hold separate order was inconsistent with Section 7 aims to prevent the creation of long run market power by acquisition. Pending a ruling on the merits, small gymnastic firms might sell out, large sporting goods companies might enter the gymnastic industry by acquisition rather than by internal expansion, small companies might be frightened to enter the gymnastic field and, most important, the management of Nissen might lose incentive to promote Nissen products at the expense of Wilson. Divestiture later left in doubt whether there could be a full restoration of competiton, even though Nissen was a salable company.

No countervailing economies had been offered by the defendants which might be weighed against the adverse effects of the merger. It was accordingly held that the anticompetitive effects of the instant merger stood unrebutted by any positive advantages it might serve.

On August 1, 1968, the parties abandoned the merger.

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

COURT OF APPEALS

LIEN FOR TAXES

MATERIALMAN WHO FAILS TO EXERCISE SELF-HELP REMEDY PROVIDED UNDER NEW YORK LAW BEFORE FEDERAL TAX LIEN ATTACHED TO PROPERTY NOT ENTITLED TO PROCEEDS FROM SALE OF UNINSTALLED STEEL CONSTRUCTION MATERIALS.

Bethlehem Steel Corp. v. John E. Foley, District Director of Internal Revenue (C.A. 2, No. 32,012; July 26, 1968; D.J. 5-53-2615)

Section 39-c of the New York Lien Law provides that an unpaid materialman may repossess his goods delivered to a job site which have not been incorporated into the project at a time when the project either is abandoned or completed by the contractor and that such right to repossess shall not be affected by a good faith sale, encumbrance or attachment of the materials so long as they remain at the job site. Here the materialman, Bethlehem Steel Corporation, attempted to apply this statute to recover its unpaid-for and uninstalled heavy construction materials under the following chronological set of circumstances:

(1) Fall of 1964 -	Delivery of the materials to a contractor building an arterial highway for the State of New York.
(2) February 16, 1965 -	Notice of tax lien filed against the contractor for delinquent withholding and other federal taxes in excess of $200,000.
(3) End of February, 1965 -	Contractor abandons the project.
(4) March 5, 1965 -	District Director levys upon and seizes all of contractor's equipment at the project, including the materials delivered by Bethlehem.

(5) March 24, 1965 - The State of New York terminates the contractor's right to proceed with the project.

(6) June 5, 1965 - Bethlehem notifies District Director of its rights to the uninstalled materials pursuant to Section 39-c.

The District Director's refusal to release the materials led to Bethlehem's suit for their recovery. The parties subsequently agreed to cause the materials to be sold and left with the court pending the outcome of the litigation. On a motion and cross-motion for summary judgment the sole question for the district court was whether Section 39-c gave the materialman a continuing property interest in the uninstalled and unpaid for materials such that it could defeat a federal tax lien against all the property of the contractor recorded prior to both the contractor's abandonment of the project and its own attempt to repossess. From an adverse decision Bethlehem appealed to the Second Circuit.

HELD, in the absence of clearer legislative intent to retain something akin to ownership in the materialman, the contractor's "rights to property" were sufficient for the attachment of the federal tax lien. The Court reasoned from the language of the statute and its meager legislative history that the provision was designed to remedy a specific problem of materialmen--how to repossess uninstalled materials left lying around the job site without obtaining the consent of the hopelessly insolvent contractor--by legitimatizing self-help conduct in limited circumstances. There is, however, no indication that the New York legislature intended to alter its general property law (which in this case provides that the property in the goods passes to the contractor upon delivery) by permitting the materialman to retain a property interest in each item until it is installed on the project.

The purpose of the enactment--to prevent senseless and unfair waste (e.g., the rusting of the materials awaiting the time-consuming resolution of their ownership in a lawsuit)--is not subverted by rendering the materialman's after-accruing right inferior to the Service's earlier perfected tax lien, since the Service presumably, as occurred here, can and will take immediate measures to seize and dispose of the uninstalled materials. The Court concluded by observing that materialmen can protect themselves from federal tax liens by retaining a security interest in the uninstalled materials and timely recording it under state law, a procedure which would ensure their priority under 28 U.S.C. 6323.

Staff: Joseph Kovner and Robert J. Campbell (Tax Division)

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