United States Attorneys

Bulletin

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

VOL. 16 SEPTEMBER 20, 1968 NO. 24

UNITED STATES DEPARTMENT OF JUSTICE

Vol. 16 September 20, 1968 No. 24

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NEWS NOTES

New Appointments in BNDD

September 9, 1968: Attorney General Ramsey Clark announced the appointment of 30 key personnel and the creation of 17 regional offices by the Bureau of Narcotics and Dangerous Drugs. Mr. Clark said the actions complete a major governmental reorganization ordered by President Johnson to strengthen federal efforts against the illegal sale and use of drugs. Heading the list of appointments were those of John Finlator, former Director of the Bureau of Drug Abuse Control, and Henry L. Giordano, former Commissioner of Narcotics, as Associate Directors. Mr. Giordano will head enforcement while Mr. Finlator will supervise other bureau functions.

Other headquarters personnel named by Mr. Clark were: Edward J. Anderson, Assistant Director for Intelligence and Foreign Operations; Nelson B. Coon, Assistant Director for Administration; John R. Enright, Assistant Director for Criminal Investigations; Patrick W. Fuller, Assistant Director for Compliance; Frederick M. Garfield, Assistant Director for Science and Education; Donald E. Miller, Chief Counsel; Patrick P. O'Carroll, Assistant Director for Training; Walter Panich, Assistant Director for Investigative Services; Andrew C. Tartaglino, Chief Inspector; Perry Rivkind, Executive Assistant to the Director; and George H. Gaffney, Special Assistant to the Director.

Attorney General Sends Firearms Message to Senate

September 10, 1968: Attorney General Ramsey Clark, in a letter to each member of the Senate, said that gun control legislation is the most important anti-crime issue before the Senate and must be promptly enacted if Congress really wants to do something to control crime. "Those who stridently call for law and order, yet oppose or ignore gun control, fail to face the issues, fail to protect the public, and raise questions as to their own purposes", the Attorney General said. Mr. Clark said that the purpose of the Administration's comprehensive registration and licensing bill is simply to keep guns out of the hands of common criminals, assassins, snipers, the mentally disturbed, narcotics addicts, and others who may be dangerous. "This is your chance to help America take a major step toward the control of crime", Mr. Clark told the members of the Senate. "I urge you to take full advantage of it."

Firearms Facts

The Criminal Division of the Department of Justice recently published a document entitled "Firearms Facts", a compilation of statistics on the ownership and misuse of firearms in the United States, with comparisons of the homicide rates among states with strong gun laws and those with weak controls.

The article shows by means of comparison tables that states with strong firearms laws tend to have fewer murders with guns than states with weak firearms laws and tend to have lower overall murder rates. It points out that during the four year period, 1964-1967, armed robberies with a gun increased 58% and assaults with a gun increased 77% and in 1967 a total of 134,000 homicides, assaults and robberies were committed with firearms. A total of 767,000 people have been killed by firearms misuse between 1900-1966; this is 150,000 more than the total number of fatalities in all our wars.

The United States Attorney might find this document extremely helpful, expecially at a time when the question of firearms control is being debated in the United States Congress, and at the state and local levels. A copy of this 23 page fact sheet may be obtained by sending a request to the Executive Office for United States Attorneys.

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ANTITRUST DIVISION

Assistant Attorney General Edwin M. Zimmerman

DISTRICT COURT

SHERMAN ACT

DISTRICT COURT DENIES MOTIONS OF CORPORATE DEFENDANTS TO ENTER NOLO PLEAS AND TO SUPPRESS CERTAIN TAPE RECORDED EVIDENCE.

United States v. American Radiator & Standard Sanitary Corp., et al. (W. D. Pa., Cr. 66-295; August 16, 1968; D. J. 60-3-154)

On August 16, 1968, Judge Louis Rosenberg issued orders and opinions denying motions by three of the corporate defendants to plead nolo contendere, and a motion by all of the defendants to suppress certain tape recorded evidence on the grounds that its disclosure or use in evidence would violate the recently enacted Omnibus Crime Control and Safe Streets Act of 1968, Title III, Chapter 119 (18 U.S.C. §§ 2510 - 2520).

Denial of Nolo Contendere Pleas

The Government opposed the nolo pleas arguing the seriousness of the offense (a price-fixing conspiracy spanning four years), its impact on the economy, the prior history of antitrust crimes by these and the other defendants and the plumbing fixtures industry, and the congressional policy of aiding injured private claimants made this an inappropriate case in which to grant the discretional plea. We also urged that a conviction based upon a nolo plea in these circumstances would fail to be a sufficient deterrent and that accepting nolos by these three defendants would prejudice the prosecution of the case against the remaining defendants.

In his opinion, Judge Rosenberg discussed the arguments raised, focusing mainly on the impact of the plea on the treble damage cases now pending in several jurisdictions. The court stated that §5(a) of the Clayton Act, giving prima facie effect to a judgment in favor of the Government, was intended to aid those who needed support against strong corporate combinations violating the antitrust laws. However, the court observed that the plaintiffs and intervenors in the collateral damage suits could not easily be classified as "small men" dependent upon the prima facie effect of a Government judgment. The court stated that §5(a) had an additional purpose; namely, to deter would-be law violators.

Judge Rosenberg noted that in one private suit "a vast amount of discovery machinery" has gone forward which itself will probably prove to be a more effective and speedier remedy than the result of the Government's suit. This, he noted, was because of delays arising out of anticipated appeals from any conviction.

In response to a Government contention that the public interest would be best served either by an open disclosure at trial of the antitrust violations, or by an unequivocal plea of guilty, the court stated that the Government could, upon acceptance of a nolo plea, present evidence in open court to establish the facts germane to imposing sentences. Additionally, the companion civil suit filed by the Government can "provide the adequate vehicle for informing the public regarding antitrust violations as the Government believes."

With respect to our claim that the case as to the remaining defendants would be prejudiced if the pleas were accepted, the court stated that this may be so but as yet the record did not establish the premise.

The court summarized all of the factors that must be considered, drawing upon Judge Weinfeld's opinion in the Standard Ultramarine case. They are the nature and duration of the claimed violation, the size and power of the defendants in the particular industry, and the effect of the violation upon the economy. Judge Rosenberg believed it necessary to add a further factor; i. e., the measure of success private plaintiffs were meeting with in their damage actions.

The court concluded that insufficient information had been provided by the parties for it to properly weigh all of the factors. It, therefore, ordered that the motions be denied without prejudice.

Denial of Motion to Suppress Evidence

The tape recordings which the defendants sought to suppress under the Omnibus Crime Control Act of 1968 were made by William E. Kramer, former Executive Secretary of the Plumbing Fixture Manufacturers Association during a two-year period prior to August, 1963. The tapes consist primarily of telephone conversations which Kramer had with various members of the Association who were officials of the defendant corporations, some of whom are individual defendants.

In a prior motion the defendants sought to have the tape recordings suppressed on the grounds they constituted illegal interceptions under the then existing law and had been illegally obtained by the Government. This

motion was denied on October 23, 1967. 278 F. Supp. 24 (E.D. Pa. 1967). [See Antitrust Bulletin, October 30 and November 6, 1967, p. 4].

In the instant motion the defendants' claim centered around Title III dealing with Wire Tapping and Electronic Surveillance. Section 2511 makes it a felony for anyone to intercept or knowingly to disclose intercepted wire and oral communications. Besides prohibiting secret interceptions by third persons not parties to communications (illegal under prior law), the section makes it unlawful for a party to the communication to intercept or record the conversation if his purpose is to commit any criminal, tortious, or "any other injurious act."

Section 2515 of the Act makes inadmissible as evidence in any proceeding, the contents of any intercepted communication "if the disclosure of that information would be in violation of this chapter."

In arguing that §2515 makes the Kramer tapes inadmissible at the forthcoming trial in this case, the defendants sought to characterize the section as remedial and §2511 as punitive. Although the tapes in question were made long before the passage of the Act, the defendants contended the remedial aspect of the legislation was intended by Congress to have a retroactive effect and control admissibility of all evidence of wire interceptions, no matter when the interception may have occurred. The defendants contended further that even if the language of §2515 does not clearly indicate it is to be applied retroactively, then the section is ambiguous and a general rule of statutory construction providing for the retroactivity of procedural matters, should be applied.

The court refused to construe the language of the Act as urged by the defendants. To do so, the court felt, would require the taking of one section out of context with the Act as a whole and would also ignore the concluding phrase of §2515, "if the disclosure . . . would be in violation of this chapter." The court viewed the Act as an attempt by Congress to provide a formula for the supervised use of electronic devices. Section 2515 plainly indicates that evidence not obtained in accordance with the formula would be inadmissible in a subsequent criminal proceeding. One can learn what is prohibited as evidence under §2515 only by learning what constitutes a disclosure in violation of the Act. Since the tape recordings could not be interceptions in violation of the Act, their disclosure or use in evidence could not violate §2515.

Defendants also argued that even if not excluded by the Act, Congress did manifest a strong public policy to cleanse legal proceedings from evidence so tainted and that therefore, in the exercise of its inherent supervisory powers, the court should reject the tape recordings. This argument was ignored in Judge Rosenberg's opinion.

In closing, the court noted that Congress could have drafted legislation so as to make the provision on the inadmissibility of evidence retroactive, but it simply did not do so. The court thus concluded the Act speaks prospectively only and, therefore, denied the motion to suppress.

Staff: John C. Fricano, Rodney O. Thorson, Joel Davidow, J. N. Raines, and S. Robert Mitchell (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

COURTS OF APPEALS

FEDERAL TORT CLAIMS ACT - INJURIES TO SERVICEMEN

FERES V. UNITED STATES, 340 U.S. 135, BARS SUIT BY SERVICEMEN WHERE INJURIES OCCURRED "INCIDENT TO SERVICE", REGARDLESS OF WHETHER THE NEGLIGENCE IS COMMITTED BY MILITARY OR CIVILIAN PERSONNEL.

United States v. Ardell Lee, et al. (C.A. 9, No. 21,706; August 30, 1968; D.J. 157-12-1546)

The representatives of two servicemen brought this action under the Federal Tort Claims Act, alleging that their decedents, while on active duty, had been killed in the crash of a military aircraft caused by the negligence of the F.A.A. control tower operators. The Government moved to dismiss on the ground that Feres v. United States, 340 U.S. 135, bars suits under the Act for injuries to servicemen which occur incident to military service. The district court denied the motion, holding that Feres was "no longer authoritative" and, in any event, did not apply where the injuries were caused by a civilian employee of the Government.

On an interlocutory appeal, the Ninth Circuit reversed. The Court noted that the Feres rule had been adhered to by the Supreme Court, consistently followed by the Courts of Appeals, and acquiesced in by Congress. Reviewing the rational of Feres, the Court concluded that it was fully applicable to the instant case, even though the tortfeasors were civilian and not military.

Staff: Leonard Schaitman (Civil Division)

FEDERAL TORT CLAIMS ACT - STATUTE OF LIMITATIONS

NINTH CIRCUIT HOLDS THAT TWO-YEAR STATUTE OF LIMITATIONS OF FEDERAL TORT CLAIMS ACT IS NOT TOLLED OR RENDERED INAPPLICABLE BECAUSE PLAINTIFF IS AN AMERICAN INDIAN AND WAS A MINOR WHEN INJURED.

Keith Yazzie Mann v. United States (C.A. 9, No. 21,896; August 29, 1968; D.J. 157-8-240)

In this case the plaintiff was an American Indian of the Navajo tribe.

He was injured at age 16 while attending a school administered by the Bureau of Indian Affairs. Approximately six years later plaintiff brought suit against the United States under the Tort Claims Act. The district court dismissed the suit on the ground that the action was barred by the two-year statute of limitations period prescribed in 28 U.S.C. 2401(b).

On appeal, the Ninth Circuit affirmed the dismissal of the action. The Court rejected the contention that plaintiff's status, as a minor and an Indian who was "a ward of the Government," prevented the Government from taking advantage of the limitations defense and brought the case within the rule of Osbourne v. United States, 164 F. 2d 767 (C.A. 2), where a period of wartime internment by the enemy was not counted in computing the limitations period in an admiralty case. Quoting from F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99, 116, the court said: "[I]t is well settled * * * that a general statute in terms applying to all persons includes Indians and their property interests."

Staff: William Kanter (Civil Division)

RESERVISTS

FOURTH CIRCUIT AFFIRMS DISTRICT COURT'S DENIAL OF RELIEF TO RESERVISTS SEEKING RELEASE FROM ACTIVE DUTY.

SP 4 Bradish G. Morse, et al. v. Boswell, et al. (C.A. 4, No. 12,738; August 26, 1968; D.J. 145-4-1683)

In SP 4 Bradish G. Morse, et al. v. Boswell, et al. (D. Md., Civil No. 19734, decided August 6, 1968), reported in the United States Attorneys Bulletin of August 30, 1968, at page 676, the district court held that 113 members of an Army Reserve Unit had been properly activated pursuant to P.L. 89-67. The Court of Appeals for the Fourth Circuit has affirmed per curiam for the reasons stated by the district court. On September 6, 1968, Justice Warren denied an application for a stay pending certiorari.

Staff: United States Attorney Stephen H. Sachs and
Assistant United States Attorney Alan I. Baron (D. Md.)

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Acting Director John K. Van de Kamp

AUSA APPOINTMENTS

Arkansas, Eastern - JAMES R. RHODES, III; University of Arkansas Law School, LL. B., and formerly in private practice.

Illinois, Northern - DAVID R. MACKENZIE; DePaul University College of Law, J. D.

Minnesota - NEAL J. SHAPIRO; University of Minnesota Law School, J. D.

Montana - DONALD C. ROBINSON; George Washington University Law School, LL. B.; and formerly staff attorney with Legal Aid Society of D. C.

South Carolina - CHARLES W. GAMBRELL; University of South Carolina Law School, LL. B., and formerly with South Carolina Insurance Department and in private practice.

South Carolina - JACK H. LYNN; University of South Carolina Law School, LL. B., and formerly in private practice.

Texas, Eastern - CLARENCE H. ABEL; University of Texas Law School, LL. B., and formerly in private practice.

TAX DIVISION

Assistant Attorney General Mitchell Rogovin

STATE COURT - CIVIL CASE

FEDERAL TAX LIENS - PRIORITY

FEDERAL TAX LIEN HELD PRIOR TO SECURITY INTEREST UPON ACCOUNTS RECEIVABLE DUE THE TAXPAYER WHERE ACCOUNTS RECEIVABLE AROSE FROM INVOICES DATED MORE THAN 45 DAYS AFTER FILING OF NOTICE OF FEDERAL TAX LIEN, EVEN THOUGH SECURITY INTEREST WAS PERFECTED PRIOR TO DATE FEDERAL TAX LIEN AROSE.

Continental Finance, Inc. v. Cambridge Lee Metal Co., Inc., & U.S. (Superior Court of New Jersey, Law. Div., Union County, No. L-1023-64; April 5, 1968; D. J. 5-48-6108) (68-1 USTC, Par. 9334)

This action was brought by plaintiff, Continental Finance, for a judgment upon indebtedness allegedly due from the taxpayer, Centre Trucking Co., and for a determination of the relative priority of its lien and federal tax liens encumbering certain accounts receivable owed to the taxpayer by defendant, Cambridge Lee Metal. Although the United States was dismissed as a party defendant for want of jurisdiction, it intervened to assert the tax liens.

Plaintiff's lien arose from a financing agreement with the taxpayer covering "accounts receivable, * * * together with all personal property, then owned or thereafter acquired." The financing statement was duly filed in accordance with state law more than a year prior to the date the first assessment for federal taxes herein was made. Notice of the federal tax lien was duly filed. The dispute herein involved money due the taxpayer pursuant to a contract by which the taxpayer agreed to truck and store materials for defendant Cambridge Lee Metal for a fixed rate per ton. Although this contract was entered into before either the plaintiff's security agreement was entered into or the federal tax liens arose, the specific accounts receivable involved were earned by the taxpayer after the date notice of the first federal tax lien was filed, and were evidenced by invoices dated more than 45 days after that date.

Plaintiff argued that its security interest was prior to the tax liens because the taxpayer had no interest in the accounts receivable to which the tax liens could attach, to the extent they were encumbered by its security interest, and, further, that the security interest was a choate lien against the "contract rights," which eventually were coverted into the subject proceeds, long before the federal tax lien arose. The court, however, decided the issue of priority in favor of the Government.

The court held that, inasmuch as the obligation of Cambridge Lee Metal to pay for the services went to the taxpayer, rather than to the plaintiff as the taxpayer's creditor, the right to payment constituted property to which the federal tax liens attached, and that the question of the relative priority of tax liens is exclusively one of federal law. The court further held that, even if plaintiff's lien encumbered "contract rights," in contradistinction to the accounts receivable, the plaintiff's lien could not be choate, according to federal requirements, until the potential and contingent character of such "rights" to payment were converted by performance into an existing right to payment, i.e., an account receivable. The court noted that "The Federal Tax Lien Act of 1966 reaffirm[ed] the [f]ederal [c]hoate [t]est as regards the requirement that the identity of the property must be ascertained * * *," citing Section 6232(H)(1) of the Internal Revenue code of 1954, which defines the term, "security interest." The court concluded that since plaintiff's lien could be choate only as to the accounts receivable, and since such a security interest is valid as against a notice of federal tax lien only to the extent the property thus made the subject of the security interest is "acquired by the taxpayer before the 46th day after the date of such lien filing" (Section 6323(c)(2)(B), of the Internal Revenue Code of 1954), the federal tax lien must be adjudged prior in this case, where the accounts receivable were acquired by the taxpayer after the 46th day.

Plaintiff has filed a notice of appeal of the decision to the Appellate Division of the Superior Court.

Staff: United States Attorney David M. Satz, Jr.; Assistant United States Attorney Don Allen Resnikoff; and Robert E. Ferguson (Tax Division)

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