United States Attorneys

Bulletin

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

VOL. 17 FEBRUARY 7, 1969 NO. 6

UNITED STATES DEPARTMENT OF JUSTICE

Vol. 17 February 7, 1969 No. 6

TABLE OF CONTENTS

NEWS NOTES

CONSUMER FRAUD UNIT IN SOUTHERN DISTRICT OF NEW YORK

Mr. Paul G. Bower, Consumer Counsel of the Department of Justice, recently reported on one important segment of the Department's effort to combat unlawful consumer practices. Robert M. Morgenthau, United States Attorney for the Southern District of New York, has established within his Criminal Division a special Consumer Fraud Unit to handle consumer fraud cases. Six attorneys have been assigned to or worked with the Unit, but none devotes his time solely to consumer fraud cases. As a result, a number of Assistant United States Attorneys have developed expertise in the consumer fraud area, but without disruption of the work assignments and caseloads of other attorneys in the Criminal Division.

In November, 1968, Assistant United States Attorney Richard A. Givens, Chief of the Consumer Fraud Unit, issued his report to Mr. Morgenthau on operations of the Unit (copies of the report are available from Mr. Givens), in which he noted that convictions had been obtained in each of the trials conducted. The convictions obtained included cases of auto fraud, "chain referral" swindles, mail fraud, and a health fraud scheme whereby consumers were induced to obligate themselves for a variety of worthless health treatments.

The report also noted that the Unit conducted numerous investigations, including a large scale investigation of the so-called "sewer" or "gutter" service of process which has resulted in indictments against several process servers under the Civil Rights Act. Other investigations involved used car repossessions, credit sales for future services, magazine sales methods, and food-freezer plans. In many instances, the mere fact of the institution of federal investigations resulted in voluntary actions to cease or change practices under inquiry, without any commitments as to prosecution.

The Department is becoming increasingly interested in prosecution of consumer fraud cases. Anyone desiring further information on establishment of consumer fraud units or related activities should contact Mr. Givens, Mr. Herb Edelhertz, Chief of the Fraud Section of the Criminal Division at the Department of Justice in Washington, or the Office of Consumer Counsel in the Attorney General's Office in Washington.

ORGANIZED CRIME STRIKE FORCE OBTAINS CONVICTIONS OF TOP MAFIA OFFICIALS IN DETROIT AREA

January 28, 1969: The perjury case of Jack Schwach, an associate of La Cosa Nostra members involved in the Giacalone loan sharking operation, was tried without a jury, resulting in a guilty verdict. The indictment arose

out of perjurious representations to the grand jury investigating loan sharking activities in the Detroit area. The trial was handled by Detroit Task Force attorney Jeremy Zimmermann.

January 29, 1969: Mike Rubino, an identified member of La Cosa Nostra, was found guilty in a jury trial of four counts of income tax evasion. Rubino, also known as "The Enforcer", was identified as a La Cosa Nostra "Administrator" and "Heir Apparent" by former police commissioner and now Sixth Circuit Court of Appeals Judge George Edwards during testimony before a Congressional Committee in 1963.

January 29, 1969: Anthony Cimini, who was identified by former police commissioner and now Judge Edwards as a La Cosa Nostra "Chief", was sentenced to two years imprisonment for interstate transportation of fraudulently prepared securities. Cimini has stated his intention to appeal the case.

FORMER ATTORNEY GENERAL OF ARKANSAS AND THREE OTHERS INDICTED FOR SECURITIES FRAUD

January 30, 1969: Four organizers and officers of Arkansas Loan and Thrift Corporation have been charged with violations of the registration and anti-fraud provisions of the Federal Securities laws, mail fraud, and wire fraud.

Attorney General John N. Mitchell announced that the indictment had been returned by a Federal Grand Jury in Ft. Smith, Arkansas, Thursday after an investigation of the issuance of more than $4 million of securities to the public by officials of Arkansas Loan and Thrift Corporation. The corporation was declared insolvent by U. S. District Court in Ft. Smith on September 23, 1968.

The defendants named in the indictment were Bruce Bennett, 51, El Dorado, Arkansas, formerly Attorney General for the State of Arkansas; Ernest A. Bartlett, Jr., 29, of Ft. Smith, Arkansas, former chairman of the board and chief executive officer of Arkansas Loan and Thrift Corporation; Afton A. Borum, 53, Booneville, Arkansas, president of Arkansas Loan and Thrift Corporation; Joyt Borum, 50, of Booneville, formerly president of Savings Guaranty Corporation, a subsidiary of Arkansas Loan and Thrift Corporation.

The indictment said that the defendants had caused common stock and bond certificates of Arkansas Loan and Thrift Corporation to be sold to the public by making and causing false and misleading statements to be made to prospective purchasers of such securities concerning the safety of their investment in Arkansas Loan and Thrift Corporation and the earnings and financial condition of that corporation.

The indictments culminated an investigation by the Justice Department. This case was developed with the assistance of the United States Securities and Exchange Commission, the U. S. Post Office Department, and the Intelligence Division of the Internal Revenue Service.

* * *

POINTS TO REMEMBER

GUN CONTROL ACT OF 1968

NEWLY OPERATIVE PROVISIONS

On October 22, 1968, the Gun Control Act of 1968 (P. L. 90-618) was signed into law by President Johnson. Title I of the Gun Control Act of 1968 sets forth comprehensive restrictions on commercial and private transactions involving firearms and ammunition and on the transportation, shipment and receipt of these articles in interstate or foreign commerce. The scope of these provisions extends to firearms and ammunition of every nature except antique weapons. 1/ Title I became effective on December 16, 1968 and is codified in Chapter 44, Sections 921-928 of Title 18, United States Code.

The Gun Control Act revises and expands the licensing requirement for firearms businesses first established in the Federal Firearms Act. 2/ Title I, Section 923(a) makes it incumbent on all persons 3/ "engaging in business as a firearms or ammunition importer, manufacturer or dealer" to secure a license from the Secretary of the Treasury. 4/ This provision differs significantly from the licensing requirements of the Federal Firearms Act which covered only those businesses which ship or receive firearms in interstate or foreign commerce. Because the scope of Section 923(a) extends to all who "engage in business", the new licensing provisions

---

1/ This is to be distinguished from the more limited scope of the National Firearms Act which extends only to so-called gangster-type weapons and destructive devices. See Vol. 17, No. 4, U. S. Attorneys' Bulletin, Jan. 24, 1969. In addition, see Vol. 16, U. S. Attorneys' Bulletin, No. 31, November 8, 1968, for an analysis of the restrictions on the importation of weapons established by Title I, Section 925(d).

2/ 15 U. S. C. 903.

3/ Section 921(a)(1) defines the term person to include "any individual, corporation, company, association, firm, partnership, society, or joint stock company".

4/ The Secretary of the Treasury has delegated enforcement responsibility for Title I to the Alcohol, Tobacco and Firearms Division, Internal Revenue Service.

apply with equal force to enterprises of an interstate and intrastate character. 5/ In addition, the Act creates a new license classification for collectors who acquire, hold or dispose of firearms or ammunition as curios or relics, thereby clarifying an ambiguity under the original act as to whether activities of this nature required hobbyists to become licensed dealers. 6/

Except in certain narrow circumstances, Title I enjoins all commercial transactions or shipments of firearms and ammunition in interstate or foreign commerce between persons who are not Federal licensees. This embargo results from a series of regulatory provisions set forth in Section 922 which prohibit licensed dealers, manufacturers, importers and

---

5/ Neither the Act nor the regulations promulgated by the Department of the Treasury define the phrase "engaged in business".

6/ Section 923(d)(1) provides that licenses shall be granted where:

> "(A) the applicant is twenty-one years of age or over;
> "(B) the applicant (including, in the case of a corporation, partnership, or association, any individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation, partnership, or association) is not prohibited from transporting, shipping, or receiving firearms or ammunition in interstate or foreign commerce under Section 922(g) and (h) of this chapter;
> "(C) the applicant has not willfully violated any of the provisions of this chapter or regulations issued thereunder;
> "(D) the applicant has not willfully failed to disclose any material information required, or has not made any false statement as to any material fact, in connection with his application; and
> "(E) the applicant has in a State (i) premises from which he conducts business subject to license under this chapter or from which he intends to conduct such business within a reasonable period of time, or (ii) in the case of a collector, premises from which he conducts his collecting subject to license under this chapter or from which he intends to conduct such collecting within a reasonable period of time."

Section 922(e) and (f) establishes procedures for the revocation of licenses and provides for an administrative hearing in review of such action.

collectors from selling, 7/ delivering or transporting 8/ a firearm to an unlicensed person who resides in a state other than the one in which he conducts his business. These provisions also make it unlawful for any person other than a licensee to transport into or receive in his state of residence a firearm purchased by him outside that state. 9/ or to transfer a firearm to a person who he knows or has reason to believe resides in another state. 10/

Nevertheless, the Act sets forth certain limited exceptions to these prohibitions. The most significant and controversial of these is the so-called "contiguous state" exception which authorized a licensee to sell a firearm to an unlicensed purchaser who is a resident of a state contiguous to the state in which the licensee's business is located. 11/ However, this provision takes effect only "if the purchaser's state of residence permits such sale or delivery by law." (Emphasis added.) This language has been interpreted by the Internal Revenue Service as requiring the enactment of specific enabling legislation by the purchaser's state of residence before such sales may lawfully be consummated. 12/ Other exemptions are afforded to "out of state" transfers where the firearm is acquired through bequest or intestate succession; 13/ where the firearm is loaned or rented temporarily for sporting purposes; 14/ or where a nonresident engaged in sport shooting purchases a firearm to replace a lost, stolen or inoperative weapon. 15/

7/ Section 922(b)(3).

8/ Section 922(a)(2) prohibits a licensee from shipping or transporting firearms and ammunition in interstate or foreign commerce to anyone other than a fellow licensee. The effect of this is to prohibit all interstate mail order shipments of these articles. The only exceptions to this provision arise where a licensee has repaired or replaced a damaged weapon or where a weapon is being sent to an individual who is authorized to receive a weapon sent through the mail pursuant to the "Mailability" of 18 U. S. C. 1715.

9/ Section 922(a)(3).

10/ Section 922(a)(5).

11/ Section 922(b)(3)(A).

12/ See 26 C. F. R. 178. 96.

13/ Section 922(a)(3)(A).

14/ Section 922(b)(3)(B).

15/ Section 922(b)(3)(C).

Title I sets additional regulatory controls concerning firearms transactions with certain purchasers. A Federal licensee is proscribed from selling or delivering any weapon or ammunition to an individual who he knows or has reasonable cause to believe is less than eighteen years of age. In addition, no weapon other than a rifle or a shotgun may be sold to a person under the age of twenty-one. 16/ An absolute prohibition is also placed on the sale of firearms and ammunition by a licensee when he knows or has reasonable cause to believe that the purchaser is a convicted felon or under indictment for a felony, a fugitive from justice, a narcotics addict or user, a person who has been adjudged mentally defective or who has been committed to a mental institution, 17/ and unless the licensee has reason to believe that the purchase or possession of the articles sold does not violate state or local laws at the place of sale or delivery. 18/

All licensees are subject to rigorous recordkeeping requirements concerning the importation, production, receipt, and disposition of weapons and ammunition in their inventory. Moreover, the Secretary or his delegate are given broad authority to enter a licensee's business premises during normal business hours in order to inspect or examine records or inventory. 19/ All information contained in a licensee's records concerning a purchaser's identity is available to local authorities on request to the Department of the Treasury. 20/ Further restrictions are imposed on sales

---

16/ Section 922(b)(1)

17/ Section 922(d).

18/ Section 922(b)(2).

19/ Section 923(g). See Section 922(m) which makes it unlawful for a licensee "knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder."

20/ This disclosure provision does not give rise to a valid claim of privilege by the purchaser where such information is used against him in a subsequent criminal proceeding. The Act does not place the purchaser under any compulsion to provide a dealer with such information. Pursuant to Section 923(g) and 26 C. F. R. 125, the only obligation in this regard is on the licensee who must obtain and record this information.

which are not consummated at the licensee's business premises 21/ and on "contiguous state" transactions. 22/ In such instances, Section 922(c) provides that a licensed business may transfer a weapon only if (1) the transferee has executed a sworn affidavit following a statutory form which states that he is not prohibited by Federal or state law from receiving or possessing a weapon; (2) the transferor has given notice of the contemplated sale to the chief law enforcement official at the purchaser's place of residence; and (3) the transferor has delayed shipment or delivery for at least seven days following the law enforcement official's receipt (or refusal) of this notice. The licensee is required to retain copies of these documents as part of his permanent records.

In addition to regulating commercial transactions, Title I of the Gun Control Act also establishes restrictions and controls on the transportation of firearms and ammunition in interstate or foreign commerce. Sections 922(g) and (h) make it unlawful for indicted or convicted felons, fugitives from justice, drug users or drug addicts, and persons who have been "adjudicated as mental defectives or who have been committed to a mental institution" to ship, transport or receive firearms and ammunition in interstate or foreign commerce. 23/ Section 922(i) and (j) make it unlawful for any person to transport or ship firearms or ammunition through these channels of commerce knowing or having reasonable cause to believe that they have been stolen or to receive, conceal or dispose of such articles which are moving in or as part of interstate or foreign commerce. The

21/ Pursuant to Section 922(c) this provision is directed toward intrastate mail order and freight sales which are not covered by Section 922(a)(1). See footnote 8.

22/ See Section 922(b)(3)(A).

23/ Subsections (g) and (h) reflect the prohibitions of Section 902(e) and (f) of the Federal Firearms Act and revise the category of persons subject to those provisions. Nevertheless, the case law arising under the original Act is controlling with respect to the scope of Sections 922(g) and (h). Particular note should be taken of Tot v. United States, 319 U. S. 463 (1943), which confined the unlawful receipt provisions in 902(f) to those circumstances where receipt is immediately proximate to interstate transportation. In the absence of such circumstances, prosecution should be considered under Title VII of the Omnibus Crime Control and Safe Streets Act (18 U. S. C. Appendix 1201-1203) which prohibits the receipt of a firearm by felons, etc. "in commerce or affecting commerce".

transportation, shipment or receipt of a weapon which has had its serial number removed, obliterated or altered is likewise prohibited. 24/

The new restrictions on transportation also encompass the shipment of firearms or ammunition in interstate or foreign commerce through a common or contract carrier. Section 922(e) requires the individual sending such a parcel to serve written notice on the carrier that firearms or ammunition are being shipped. Further procedures are established under which interstate passengers aboard a common carrier who wish to transport legally possessed firearms with them are required to deliver their weapons into the custody of the pilot, captain, conductor or operator for the duration of the trip. It is unlawful for a carrier to transport or deliver any firearm or ammunition with knowledge or cause to believe that the shipment, or receipt thereof, violates any other provisions of Chapter 44. 25/

Special restrictions are imposed with regard to National Firearms Act weapons. All sales or deliveries of these weapons, including transfers to licensees, must be specifically authorized by the Secretary. 26/ Such authorization must also be obtained in order for an unlicensed person to transport a weapon of this nature in interstate or foreign commerce. 27/

Section 925 affords limited exemptions from the provisions of Title I to firearms and ammunition delivered by the Secretary of the Army to certain persons and groups pursuant to Section 4308 of Title 10, U. S. C., and to weapons transactions by members of the armed forces outside the United States. 28/ In addition, the Secretary of the Treasury may, upon application, relieve an individual from all disabilities imposed under Federal weapons law as a result of his conviction for a crime punishable by

---

24/ See Section 922(k). In addition, Section 923(i) requires all licensed importers and manufacturers to identify each weapon imported or manufactured by means of a serial number engraved or cast into the receiver or frame.

25/ Section 922(f).

26/ Section 922(b)(4). See also 26 C. F. R. 178. 145.

27/ Section 922(a)(4). See also 26 C. F. R. 178. 98.

28/ See Section 925(2) (1-5).

imprisonment for more than one year 29/ where it is established that the applicant is "no longer likely to act in a manner dangerous to public safety". 30/

Section 924(a) imposes a maximum penalty of $5,000 fine and five years' imprisonment, or both, for any violation of the provisions of Chapter 44 or for making false statements or representations with respect to information required to be kept in the records of licensees or in connection with an application for any license or exemption. In addition, the Act creates new penalties where firearms are used in the commission of a crime. Pursuant to Section 924(b), anyone shipping, transporting or receiving a firearm or ammunition in interstate or foreign commerce with the intent to employ it in the commission of any offense punishable by imprisonment for a term exceeding one year 31/ or with knowledge or cause to believe that the weapon will be used in such a manner is subject to a maximum penalty of $10,000 fine and ten years' imprisonment. Moreover, Section 924(c) provides for a sentence of from one to ten years for a first offense, and a sentence of from five to twenty-five years for a subsequent offense, where a person uses a firearm to commit a felony which may be prosecuted in a Federal court, or who carries a firearm unlawfully during the perpetration of such an offense. In the case of a second conviction, the court is precluded from suspending sentence or giving a probationary sentence.

29/ Except where the crime involved "the use of a firearm or other weapon or a violation of this chapter or the National Firearms Act".

30/ Section 925(c).

31/ This includes Federal and state offenses.

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Director Harlington Wood, Jr.

APPOINTMENTS

ASSISTANT UNITED STATES ATTORNEYS

District of Columbia - JOHN E. STEIN: University of Pennsylvania; Georgetown Law Center, J. D. Formerly an associate with law firm.

Illinois, Eastern - JEFFREY F. ARBETMAN: University of Wisconsin, B. A.; Loyola University School of Law, J. D. Formerly in private practice.

Kansas - RICHARD J. ROME: Bethany College, B. A.; Kansas University, LL. B. Formerly Reno County Attorney; also, law librarian at Kansas University Law School.

New York, Northern - PAUL V. FRENCH: Siena College; Albany Law School, LL. B. Formerly in private practice.

Pennsylvania, Eastern - HAL F. DOIG: Hamilton College, B. A.; Duquesne Law School, LL. B. Formerly in private practice.

RESIGNATIONS

ASSISTANT UNITED STATES ATTORNEYS

Florida, Middle - RICHARD A. HIRSCH: To become Assistant County Solicitor, Hillsbrough County, Tampa.

Florida, Middle - ROBERT MACKENZIE: To become Assistant County Solicitor, Hillsbrough County, Tampa.

Wisconsin, Western - THOMAS C. ECKERLE: To become associated with Risser & Risser Law Firm, Madison.

Note: All the Assistant United States Attorneys listed above entered on duty before January 20th.

* * *

ANTITRUST DIVISION

Assistant Attorney General Richard W. McLaren

DISTRICT COURT

SHERMAN ACT

IBM CHARGED WITH VIOLATING SECTION 2 OF ACT.

United States v. International Business Machines Corp. (S. D. N. Y., 69 CIV 200; January 17, 1969; D. J. 60-235-38)

On January 17, 1969, a civil action was filed in the United States District Court for the Southern District of New York under Section 2 of the Sherman Act, charging IBM with monopolization of the general purpose digital computer industry.

IBM, which grossed $5.3 billion and netted $651.5 million in 1967, is the world's largest manufacturer of information handling systems. In 1967 IBM's share of the total industry revenues from the sale or lease of general purpose digital computers approximated 74% compared with 5% for its nearest competitor.

The complaint alleges that IBM has pursued a manufacturing and marketing policy that has denied other manufacturers an adequate opportunity to compete effectively. Pursuant to such policy, IBM has maintained a single price system under which it has discriminated among customers by providing certain customers with extensive software and related support in a manner that unreasonably inhibited the entry or growth of competitors and limited the development of computer programming and support industries.

IBM is also charged with introducing selected machines with unusually low profit expectations in market segments where competitors had or appeared likely to have unusual competitive success and announcing future production of new models for such markets although production of the machines was not likely within the announced time.

The complaint asserts that IBM dominated the educational market for general purpose digital computers, which was of unusual importance to the growth of competitors both by reason of this market's substantiality and by reason of its ultimate impact on the purchasing decisions in the commercial market by granting discriminatory allowances to universities and other educational insitutions.

The complaint asked that IBM be required to price, sell and lease separately its computer systems, programming knowhow and other customer support.

Also sought by the Government are provisions barring IBM from setting prices that fail to reflect reasonable returns and from granting special allowances that unreasonably inhibit the entry or growth of competitors.

In addition, the complaint asks the court to order any divorcement, divestiture or reorganization of IBM deemed necessary to dissipate the effects of the allegedly illegal activities and to restore competitive conditions to the general purpose digital computer industry.

Staff: Burton R. Thorman, Joseph H. Widmar, William B. Slowey, Harold J. Bressler, and W. Richard Gigax (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General William D. Ruckelshaus

COURTS OF APPEALS

JUDICIAL REVIEW OF VETERANS ADMINISTRATION DETERMINATIONS

SCOPE OF STATUTE PRECLUDING JUDICIAL REVIEW OF DETERMINATIONS BY VETERANS ADMINISTRATION LIMITED

Joseph W. DiSilvestro v. United States (C.A. 2, No. 32460; decided December 18, 1968; D.J. 146-55-3518)

DiSilvestro brought this action to recover dividends due him on his National Service Life Insurance policy. The Government admitted the dividends were due but claimed a right of set-off based upon two previous VA decisions. Those decisions had held first, that a prior award of disability benefits to DiSilvestro was erroneous because based upon VA records now known to be unauthentic, and second, that DiSilvestro had forfeited his rights to all other VA benefits because he himself had been responsible for the insertion of these unauthentic records in the VA files.

In defending the action, the Government contended that, by virtue of 38 U.S.C. 211(a), which precludes judicial review of VA decisions "on any question of law or fact concerning a claim for benefits or payments", the district court lacked jurisdiction to review the merits of either VA decision now claimed as a basis for the set-off. (DiSilvestro's direct attacks on that forfeiture determination previously had been rejected on the ground that judicial review of VA decisions was precluded by statute. DiSilvestro v. United States, 228 F.2d 516 (C.A. 2), certiorari denied, 350 U.S. 1009.)

The district court ruled, however, that the no-review clause was "inapplicable where the Government seeks a set-off or other relief". Then, taking the view that the claimed set-off was based solely on the VA's forfeiture determination, it held that determination invalid on the ground that the record did not establish that DiSilvestro had been mentally capable of fraudulent intent.

The Court of Appeals reversed. It agreed that 38 U.S.C. 211(a) did not preclude judicial review in this instance. Although the Court expressed the view that VA decisions, including those declaring forfeitures, were generally immune from review when challenged by the claimant, it concluded that Congress had not intended such non-reviewable determinations to remain

non-reviewable when, as here, the Government based a claim for affirmative relief thereon. The Court thus held that DiSilvestro was entitled to judicial review of the evidentiary basis for the Government's claimed set-off.

The Court of Appeals nevertheless concluded that the district court had erred in reviewing the forfeiture determination. It pointed out that the Government's right of set-off arose not from the forfeiture determination but rather from the VA's earlier decision that, absent the unauthentic evidence, benefits would not have been awarded to DiSilvestro. The matter was remanded to the district court for a determination of whether that first decision of the VA was supported by substantial evidence.

Staff: Michael C. Farrar (Civil Division)

NATIONAL TRAFFIC AND MOTOR VEHICLE ACT

MOTOR VEHICLE SAFETY STANDARDS MAY BE PROMULGATED PURSUANT TO INFORMAL RULE-MAKING PROCEDURES OF THE A. P. A.; VALIDITY OF HEAD RESTRAINT SAFETY STANDARD UPHELD.

Automotive Parts and Accessories Assn., et al. and Sterling Products Co. v. Alan S. Boyd (C. A. D. C., Nos. 21, 820 and 22, 015; December 27, 1968; D. J. 145-18-14)

In the first decision under the National Traffic and Motor Vehicle Safety Act of 1966, 15 U. S. C. 1381-1409 (Supp. III, 1968), involving direct review in the Court of Appeals of a motor vehicle safety standard of the Federal Highway Administration, the Court of Appeals for the District of Columbia Circuit sustained the Government's contention that certain head restraint safety standards may be issued pursuant to the informal rule-making procedures of the Administrative Procedure Act. These informal procedures require that notice of proposed safety standards be given interested persons and such persons be permitted to submit written comments with regard to the proposed standards. After consideration of these written comments, the safety standard, containing a concise general statement as to its basis and purpose, may be issued.

In accepting our contentions, the Court of Appeals in effect ruled that such a safety standard could be issued by the agency without complying with the formal rule-making procedures prescribed by the A. P. A. Such procedures would require, in part, the issuance of a rule or standard based upon a record after a hearing at which parties may introduce evidence and cross-examine witnesses.

Staff: Former Assistant Attorney General Edwin L. Weisl, Jr., Norman Knopf (Civil Division)

* * *

TAX DIVISION

Assistant Attorney General Johnnie McK. Walters

COURTS OF APPEALS

ENFORCEMENT OF INTERNAL REVENUE SUMMONS

SPECIAL AGENT MAY ISSUE SUMMONS IN CRIMINAL INVESTIGATION.

I

United States and William P. Breen, Special Agent v. Salten Rodenberg (C.A. 2d, No. 32,613; October 28, 1968; D.J. 5-53-3133)

The special agent served a summons (26 U.S.C. 7602) upon Rodenberg, who is an attorney, directing him to testify and produce records concerning legal fees received from a taxpayer whose returns were under investigation. Rodenberg refused on the grounds of (1) the attorney-client privilege, (2) the illegality of the use of a summons in a criminal investigation, and (3) the unconstitutionality of Section 7602 of the Internal Revenue Code if interpreted to authorize such use of a summons. On the Government's petition for enforcement the district court ordered compliance (26 U.S.C. 7604) and Rodenberg appealed.

The appeal was not promptly prosecuted and Rodenberg ultimately went to a hospital, allegedly with a heart attack. Since the Second Circuit has frequently stressed the need for speedy disposition of such appeals, and has expressed its concern with the frustration of legitimate investigations by dilatory appeals (see, e.g., Application of Magnus, 299 F. 2d 335, certiorari denied, 370 U.S. 918; In re Magnus, Mabee & Reynard, Inc., 311 F. 2d 12, 16, certiorari denied, 373 U.S. 902; United States v. McDonald, 313 F. 2d 832; Federal Maritime Commission v. New York Terminal Conference, 373 F. 2d 424), the Government filed a motion for summary affirmance on the merits on the ground that the record presented no question of substance. (1) The Second Circuit has held that the attorney-client privilege does not cover the existence of the relationship or the amount of the fees. Colton v. United States, 306 F. 2d 633, 637-638. (2) A summons may be issued by a special agent even though the information may ultimately lead to criminal prosecution. In re Magnus, Mabee & Reynard, Inc., 311 F. 2d 12, 16 (C.A. 2d), certiorari denied, 373 U.S. 902; Tillotson v. Boughner, 333 F. 2d 515 (C.A. 7th), certiorari denied 379 U.S. 913; Boren v. Tucker, 239 F. 2d 767 (C.A. 9th). (3) The Supreme Court has upheld the constitutionality of Section 7602. United

States v. First National Bank of Pikeville, 274 F. Supp. 283 (E. Ky.) affirmed for lack of substantial question, Justice v. United States, 390 U. S. 199.

The Second Circuit granted the motion to affirm. Rodenberg complied with the summons shortly thereafter.

Staff: Assistant U. S. Attorney Edgar C. Nemoyer (W. D. N. Y.) James H. Jeffries and Joseph M. Howard (Tax Division)

II

United States and Ader (Special Agent) v. DeGrosa (C. A. 3d, No. 17308; January 6, 1969; D. J. 5-48-7487)

United States and Dombrowski (Special Agent) v. Zudick (C. A. 3d, No. 17238; January 6, 1969; D. J. 5-48-7410)

In each of these cases the special agent served a summons on a corporate officer calling for production of corporate records. Both officers were represented by the same attorney who took the position that a summons can be used only for the purpose of determining civil tax liability. When the special agents refused to make a commitment that the summoned records would be used solely for civil purposes, the attorney instructed his clients to claim the privilege against self-incrimination. The District Court for the District of New Jersey granted the Government's petitions for enforcement.

In the Third Circuit the appellant officers argued (1) that Section 7602 of the Internal Revenue Code does not authorize the issuance of a summons in an investigation which is principally criminal in nature; and (2) that, if Section 7602 be so interpreted, (a) it would violate the Fourth Amendment by permitting unreasonable searches and seizures, and (b) it would violate the Fifth Amendment by permitting the government to substitute administrative summonses for grand jury subpoenas. Appellants conceded that they could not claim self-incrimination as a protection against production of corporate documents.

The Third Circuit affirmed the orders of enforcement. (1) The Court held that Section 7602 authorizes a special agent to issue a summons while investigating a possible criminal charge so long as the investigation has some bearing on the civil tax liability -- which was conceded here and which is always the case since the special agent must determine whether to recommend civil fraud penalties if he decides there is no criminal case. (2) The

Court upheld the constitutionality of Section 7602 as so interpreted, pointing to Justice v. United States, 390 U. S. 199, affirming United States v. First National Bank at Pikeville, 274 F. Supp. 283 (E. D. KY.), and to the fact that an Internal Revenue summons is not an unreasonable search because it can only be enforced after review by the district court. (3) The court brushed aside the Fifth Amendment argument as frivolous.

Staff: Assistant United States Attorneys Carolyn E. Arch and Thomas J. Alworth (D. N. J.)
John P. Burke and Joseph M. Howard (Tax Division)

WAGERING TAXES

LIABILITY FOR PAYMENT OF WAGERING TAXES IS NOT EXTINGUISHED BY SUPREME COURT DECISIONS IN MARCHETTI AND GROSSO.

United States v. Solon (C. A. 2d, No. 32,581; December 3, 1968; D. J. 5-52-7614)

In 1958 or 1959 Solon was convicted of violations of the federal wagering tax statutes on evidence seized from him during a raid by local police. Internal Revenue Service then made an assessment of wagering tax deficiencies based on gambling slips seized in the raid; a civil action was filed to reduce the assessment to judgment; and a default judgment in the amount of about $23,000 was entered on April 15, 1959. In 1962 Solon agreed to satisfy the judgment by payments of $7.50 a month. After the Supreme Court's decisions in Marchetti (390 U. S. 39) and Grosso (390 U. S. 62) Solon moved to vacate the civil judgment and for a return of all payments he had made on the ground that the wagering tax had been declared unconstitutional.

The District Court for the Eastern District of New York denied relief, pointing out that Marchetti and Grosso had expressly not invalidated the civil aspects of the wagering tax laws, and that the carefully circumscribed holding of those two cases is only that a defendant may not be convicted of a criminal violation of the wagering tax laws if he has properly claimed his privilege against self-incrimination. The Second Circuit, after hearing argument on December 3, 1968, affirmed from the bench in reliance on the opinion of the district court, which has not yet been reported.

For a similar interpretation of Marchetti and Grosso by the Fourth Circuit, see Washington v. United States, 402 F. 2d 3, noted in the Bulletin for October 25, 1968, Vol. 16, No. 29, p. 893. A petition for certiorari has

been filed in the Washington case.

Staff: United States Attorney Joseph P. Hoey and Assistant United States Attorney Stuart C. Goldberg (E. D. N. Y.).

STATE CIRCUIT COURT

FORFEITURE PROCEEDING

U. S. IS ENTITLED TO $35,000 FUND IN STATE STATUTORY FORFEITURE ACTION WHERE REQUISITES FOR VALID FORFEITURE NOT ESTABLISHED AT TRIAL AND GOVERNMENT'S PRESUMPTION OF OWNERSHIP IN FAVOR OF TAXPAYER-DEFENDANT NOT REBUTTED BY COMPETING CLAIMANTS.

County of Oakland v. John Doe, et al., United States, Intervenor, (Circuit Court, County of Oakland, September 26, 1968, D. J. 5-37-2447)

During the course of a one-man grand jury investigation, Michigan State Troopers assigned to the grand jury served a subpoena duces tecum upon Mr. and Mrs. Shoefard Bice pertaining to "all contents of safe; any moneys, records, belonging to one Roy Lee Clark or Anna Lois Clark." The Bices turned over $35,000 in cash to the troopers and received a receipt from them.

The Internal Revenue Service served notices of levy upon the Grand Juror and the County of Oakland claiming that the $35,000 was the property of Roy Clark who owed $39,000 in gambling excise taxes and penalties. The levies were not honored. Instead, the County of Oakland, choosing not to await the outcome of a criminal action for conspiracy to violate Michigan gambling laws against Roy Clark arising out of the grand jury investigation, instituted this action seeking title to the $35,000 pursuant to state forfeiture provisions governing material of gaming seized by local authorities. The taxpayers' in-laws, Mr. and Mrs. Bice, asserted a claim to the $35,000. The United States intervened claiming that the money was the property of Roy Clark and that the Government was entitled to the fund by virtue of the notices of levy.

At the trial, albeit a Wigmorian tragedy, the plaintiff, County of Oakland, was prevented from presenting any evidence whatsoever, since the Michigan State Troopers were precluded from testifying by the restrictive secrecy provisions of Michigan law governing grand jury investigations. Consequently, the County's claim was dismissed for failure to establish the

requisites of a valid statutory forfeiture. The troopers were also the only witnesses of the United States, and consequently the Government was forced to use the indirect evidence of the subpoena and the receipt to establish the rebuttable presumption of fact that the money turned over by the Bices was not theirs, but rather was the property of Roy Clark or Anna Clark.

The Bices presented no evidence on the issue of ownership, relying on the receipt to show that their possession of the $35,000 entitled them to the return of said money. Although the taxpayer and his wife were parties to the action, neither presented evidence to rebut the Government's presumption of fact. The court acknowledged the Government's presumption, and in view of Anna Clark's silence and the Bices' failure to rebut the presumption with contrary evidence of the rightful owner of the $35,000 the Government's claim was held to be superior. As authority the court cited the proposition that where a mere rebuttable presumption has arisen in support of a fact, and it is apparent that a more direct explanation is within the power of the parties to the action, it may be presumed that the better evidence, if given, would be unfavorable to said parties.

Staff: United States Attorney Lawrence Gubow (E. D. Mich.); John S. Kingdon (Tax Division)

* * *