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POINTS TO REMEMBER

CONSUMER CREDIT PROTECTION ACT OF 1968
TRUTH IN LENDING ACT (15 U.S.C. 1601 et seq.)

Title I of the Consumer Credit Protection Act of 1968, known as the Truth in Lending Act, together with Regulation Z, promulgated thereunder by the Federal Reserve Board (12 CFR 226), became effective on July 1, 1969.

The Act is designed to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uniformed use of credit. In general terms, the Act and Regulation Z require that the lenders state explicitly and in uniform language what they are charging to lend money or extend credit in almost all consumer transactions involving less than $25,000, and in all real estate transactions, regardless of the amount. Business and government loans and loans to buy securities are exempt. The Act also sets forth the nature and form of credit information which must be disclosed in advertising material disseminated to the public.

Under the Act, a wronged consumer may sue a lender for twice the amount of finance charges not properly disclosed (up to $1000), plus court costs and attorney fees. Additionally, whoever wilfully and knowingly gives false or inaccurate credit information, or fails to make proper disclosure as required by the Act, is guilty of a misdemeanor, and punishable by a fine of not more than $5000, or imprisonment for not more than a year, or both. (15 U.S.C. 1611)

Administrative compliance responsibility under the Act has been assigned to the following agencies: Comptroller of the Currency, Federal Reserve System, Federal Deposit Insurance Corporation, Federal Home Loan Bank Board, Bureau of Federal Credit Unions, Interstate Commerce Commission, Civil Aeronautics Board, Secretary of Agriculture, and the Federal Trade Commission.

Investigative jurisdiction and referral procedures have been coordinated with the interested departments and agencies, as follows.

All complaints or requests for information concerning the Act received in the offices of the United States Attorneys should be referred directly to the agency responsible for administrative supervision of the creditor involved. It is anticipated that most complaints will involve creditors under the supervision of the Federal Trade Commission. The

Commission has requested that all complaints of this nature be forwarded to Truth In Lending, Federal Trade Commission, Washington, D.C. 20580. Any complaint in which the proper administrative agency is not readily ascertainable should also be referred to the Federal Trade Commission.

All possible criminal violations of the Act will be referred directly to the appropriate United States Attorney by the administrative agencies for consideration as to criminal prosecution. Because of the specialized areas involved, the Department of Agriculture, the Interstate Commerce Commission, the Civil Aeronautics Board, and the Federal Trade Commission will be responsible for criminal investigations in cases within their administrative jurisdiction. The Federal Bureau of Investigation is responsible for criminal investigations in cases referred to the United States Attorneys involving banking institutions, including savings and loan associations and Federal credit unions, and will conduct such investigations if so requested by the United States Attorney.

Any specific problems in this area should be referred to the Fraud Section, which has been assigned supervisory jurisdiction over the Truth in Lending Act.

ANTITRUST DIVISION

Assistant Attorney General Richard W. McLaren

DISTRICT COURT

SHERMAN ACT

VIOLATION OF SECTION 1 OF ACT CHARGED AGAINST DRUG COMPANIES.

United States v. Ciba Corp. (Civ. 791-69; July 9, 1969; D.J. 60-21-146)

United States v. Ciba Corp., et al. (Civ. 792-69; July 9, 1969; D.J. 60-21-145)

On July 9, 1969, two complaints were filed in the district court for the District of New Jersey, alleging that Ciba and CPC International, Inc. had restrained the sale of prescription drug products through restricting licensing arrangements.

The first complaint alleged that Ciba entered into various patent license agreements involving drugs known as benzothiadiazines, which are used as diuretics and antihypertensives. The two principal benzothiadiazines sold in the United States are hydrochlorothiazide and cyclothiazide. Ciba, its hydrochlorothiazide licensees, which are Abbott Labs., Carter-Wallace, Inc., McNeil Labs., Inc., Merck & Co., G.D. Searle & Co., Smith, Kline & French Labs. and Warner-Lambert Labs., and its cyclothiazide licensee, Eli Lilly and Co. have annual sales of these products of approximately $50,000,000.

Each agreement expressly prohibits the licensees from selling the licensed product in bulk. The complaint charges, as the Department charged in three complaints filed in 1968, that such agreements prevent competition in the sale of the drug in bulk between the defendant and its licensees, and among the licensees, control the manner in which the licensees market the drug, preventing third parties from preparing the drug in dosage form and reselling under their own trade name or generically.

The complaint further alleged that Ciba agreed with certain of its hydrochlorothiazide licensees that such licensees would sell hydrochlorothiazide only as a combination product containing other therapeutically active ingredients approved by Ciba. The complaint charges that such agreements prevent competition among Ciba's licensees in sales of hydrochlorothiazide in particular combinations and competition between Ciba, which sells hydrochlorothiazide alone and in particular combinations,

and its licensees. The complaint asks that Ciba be enjoined from entering into agreements in which licensees are prevented from selling drugs in bulk form or only in specified combinations and from challenging the validity of any patent.

The second complaint alleged that Ciba entered into an agreement with S. B. Penick & Co. in restraint of trade of a drug known as deserpidine, which is used as a tranquilizer and antihypertensive (Penick was subsequently acquired by CPC's predecessor, Corn Products Co.). Annual sales of products containing deserpidine are in excess of $3 million.

Ciba agreed to license Penick to make and sell deserpidine in bulk form only and to grant no additional deserpidine licenses, unless such licenses restricted sales of deserpidine-containing products to dosage form. Ciba subsequently authorized Penick to grant a license to Abbott Laboratories to make and sell deserpidine only in dosage form and only under Abbott's label. The complaint maintained that the bulk sales restriction has the same anticompetitive effect as alleged in previous complaints. The complaint further challenged the provision in the license whereby Abbott agreed not to contest the validity of the licensed patent.

The complaint asked that Ciba and CPC be enjoined from entering into any agreement prohibiting the sale of any pharmaceutical product in bulk or under any other than a specified trade name.

The Department further asked that the deserpidine patent be declared invalid because it covers only a purified product of nature extracted from the plant of the Rauwolfia species, which has long been used for antihypertensive and tranquilizing purposes.

Staff: James H. Wallace, Jr. and William B. Bohling
(Antitrust Division)

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CRIMINAL DIVISION
Assistant Attorney General Will Wilson

SUPREME COURT

MILITARY SELECTIVE SERVICE ACT

ALLEGED INVALIDITY OF CLASSIFICATION IS NO DEFENSE TO FAILURE TO SUBMIT TO PREINDUCTION PHYSICAL EXAMINATION, BUT IS DEFENSE TO FAILURE TO SUBMIT TO INDUCTION EVEN THOUGH ADMINISTRATIVE REMEDIES WERE NOT EXHAUSTED; SOLE SURVIVING SON IS EXEMPT BY STATUTE AND CANNOT BE RECLASSIFIED BECAUSE OF DELINQUENCY.

Jack Frederick McKart v. United States (Sup. Ct. May 26, 1969; D.J. 25-58-1328)

This decision marks a substantial departure from the established rules, rooted in Falbo v. United States, 320 U.S. 549 (1944), and Estep v. United States, 327 U.S. 114 (1946), that a selective service registrant may not assert the invalidity of his classification as a defense to a criminal prosecution under 50 U.S.C. App. 462 for non-compliance with an induction order unless he has exhausted his administrative remedies both by appeal within the Selective Service System and by reporting for and going to the "brink of induction".

McKart had been classified as a sole surviving son under 50 U.S.C. App. 456(o) because his father had been killed in action. His Board withdrew this classification when his mother died, acting on the opinion of the Director of Selective Service that the exemption was intended as a boon to the survivors (other than the registrant) of the dead veteran and terminated upon their death. He failed to appeal the change in classification, and, when issued an induction order, failed to report. As he had previously failed to report for armed forces physical examination he would have been entitled to a full examination on the induction date.

The trial court, because of his failure to exhaust administrative remedies by appeal of his classification and reporting for induction, refused to entertain his defense that the exemption was intended to preserve the male line, and that withdrawal of his exemption was contrary to law.

The Supreme Court, agreeing with his interpretation of the statute, reversed the affirmance of his conviction by the Court of Appeals for the Sixth Circuit and directed entry of judgment of acquittal.

The Court held that where the facts were undisputed and the sole issue was one of the proper construction of an exemption provision, no substantial interest required the exhaustion of administrative appeals as a prerequisite to judicial review of classification in a criminal prosecution for disobedience of an induction order.

The Court further held that the failure to report for induction also did not bar review of the classification, even though McKart would have been entitled to a full physical examination. The Court (Marshall, J.) stated:

> If the government deems it important enough to the smooth functioning of the system to have unfit registrants weeded out at the earliest possible moment, it can enforce the duty to report for preinduction examinations by criminal sanctions.

He goes on to say distinguishing Falbo v. United States, 320 U.S. 549, on the basis of changed procedures, that "an invalid classification, if allowed to be raised, would have been a complete defense to that prosecution; it would not be a defense today to a prosecution for failure to report for a preinduction examination".

The holding with respect to administrative appeals appears to have application to only a narrow spectrum of cases closely analogous to that of McKart. The ruling waiving the necessity for reporting for induction may well be interpreted as applicable in any case. It is therefore recommended that whenever a criminal prosecution is instituted for a selective service offense, the indictment should include a count for failure to comply with an order to report for and submit to an armed forces preinduction physical examination, where such a count is appropriate and can be sustained.

Staff: Assistant to Solicitor General Francis X. Beytagh, Jr.; Former Assistant Attorney General Fred M. Vinson; Beatrice Rosenberg and Leonard H. Dickstein (Criminal Division)

COURTS OF APPEALS

MILITARY SELECTIVE SERVICE ACT

DELINQUENCY REGULATION UPHELD.

United States v. David B. Troutman (C.A. 8, June 20, 1969; D.J. 25-25-854)

The Court of Appeals for the Eighth Circuit has again sustained the validity of the delinquency regulations, this time in a criminal prosecution under 50 App. U.S.C. 462 of a registrant over 26, for refusing to submit to induction.

Troutman, whose service liability had been extended to age 35 by virtue of an early II-S classification, was held properly reclassified from III-A to I-A when the post office returned a Current Information Questionnaire as undeliverable, and his mother, listed as the person who would always know his address, disclaimed knowledge of his whereabouts. The Court further held that he had been properly declared delinquent, which shifted him from group 5 (over age) to group 1, and ordered for induction, when he failed to report for the armed forces preinduction physical examination.

After Troutman failed to report for induction and was located by the FBI, the United States Attorney declined prosecution in favor of administrative action. The Board, however, refused to clear the delinquency and reopen his classification despite his claim that induction would cause extreme hardship to his children and mother, with whom they were living, and reordered him for induction. The Court sustained the Board's action, holding that he was not entitled to III-A classification under 32 C.F.R. 1622.30(a), which requires that the children reside with him, nor had he made out a prima facie case of "extreme hardship" under 1622.30(b).

Staff: Former United States Attorney James E. Reeves (E.D. Mo.).

PRIVILEGE

DISCLOSURE OF IDENTITY OF INFORMANT WITHIN COURT'S DISCRETION.

James Riley, Jr., et al. v. United States (C.A. 9, No. 22,511, May 28, 1969; D.J. 12-8-687)

On May 28, 1969, the United States Court of Appeals for the Ninth Circuit affirmed the convictions of James Riley, Jr., and Frank Marshall for conspiracy, and the receipt, concealment, and transportation of heroin in violation of Sections 173 and 174, Title 21, United States Code. They were caught in possession of heroin after crossing the Mexican border at Nogales, Arizona.

The Court ruled that:

(1) Disclosure of informer's identity remains within the sound discretion of the trial judge;

(2) Informer's information accompanied by suspicious activities constitutes probable cause for purposes of arrest.

/1/ The Court reviewed the "informer privilege" and the need of the Government to protect its informers, especially in the enforcement of narcotics laws. The Court emphasized that this is not an absolute privilege, but comes within the scope of discretion of the trial judge.

In distinguishing this case from Roviaro v. United States, 353 U.S. 53 (1957), the Court stated that,

> The informer had nothing to do with the offense as such. The only issue here is as to the reasonable cause to make the arrest not the ultimate issue of guilt or innocence.

The Court of Appeals for the Ninth Circuit was satisfied that it was not necessary to disclose the informer's identity in order to achieve a fair trial. There was a credible informer, whose information only went to the probable cause for an arrest, and not to the issue of guilt or innocence.

/2/ The Court found that there was probable cause for arrest since: the tips came from a reliable informer, one of the appellants associated with a known narcotics dealer, they carried unusual amounts of cash, they frequently changed cars, made unusual number of phone calls, and all suspicious activities took place adjacent to the Mexican border, where narcotics smuggling is prevalent.

Staff: Former United States Attorney Edward E. Davis (D. Arizona)

RIGHT TO COUNSEL

RETURN OF VERDICT CRITICAL STAGE AT WHICH COUNSEL MUST BE PRESENT.

United States v. Clarence W. Smith (C.A. 6, No. 18724, June 3, 1969; D.J. 48-57-764)

In the above case the Court reversed a conviction for embezzlement, damaging and stealing Government property, and falsifying application for Government employment on the ground that the defendant's attorney was involuntarily absent from court at the time the jury returned its verdict. The Court said the absence occurred at a critical stage of the proceedings, during which the Sixth Amendment requires that the accused be represented by counsel.

There is a split of authority among the circuits on the effect of absence of defense counsel at the time of verdict. The Fifth and Ninth Circuits have held that without more than the absence of counsel at time of verdict is harmless error. See, e.g., Martin v. United States, 182 F.2d 225 (5th Cir., 1950); Newagon v. Scope, 183 F.2d 340 (9th Cir., 1950), cert. denied, 340 U.S. 921. Contra, Thomas v. Hunter, 153 F.2d 834 (10th Cir., 1946).

As a matter of policy, the Department will not seek certiorari in Smith. United States Attorneys should protect the record whenever counsel is absent during trial by calling the absence to the attention of the court and obtaining waiver by the defendant, appointment of substitute counsel, or continuance until such time as counsel can be present.

Staff: United States Attorney Bernard Stuplinski
(N.D. Ohio)

DISTRICT COURTS

MILITARY SELECTIVE SERVICE ACT

HABEAS CORPUS PETITION DISMISSED WHERE REVIEW OF DENIAL OF C.O. DISCHARGE PENDING BEFORE ABCMR.

Lee Hildebrand v. Lt. Gen. S. Larsen, et al. (N.D. Cal., June 18, 1969; D.J. 25-11-4777)

Hildebrand, an enlisted man in the Army, filed a petition for habeas corpus to review the Army's refusal to discharge him as a conscientious objector under A.R. 635-20. Although he had an application for review by the Army Board for the Correction of Military Records pending, he asserted that such remedy was ineffective because of the delay involved in processing it, see, Craycroft v. Ferrall, 408 F.2d 587, 599 n. 18 (9th Cir., 1969). The Court (Peckham, J.), following the "rule of thumb" laid down in Kalmen v. Laird (N.D. Cal., 51214, June 10, 1969; D.J. 25-11-4839), and Speer v. Hedrick (N.D. Cal., 50933, May 20, 1969; D.J. 25-11-4819), determined that, as the application had been pending less than four months, the remedy would not be deemed ineffective and accordingly refused to review the merits of the petition. The Court further decided that the petitioner did not meet the standards set down in Craycroft for interim relief, e.g., restraint on the Army's transfer or re-assignment of petitioner, pending decision by the ABCMR, and dissolved its temporary restraining order and dismissed the petition.

Staff: United States Attorney Cecil F. Poole and
Assistant United States Attorney Jerry K. Cimmet
(N.D. Calif.)

PETITION FOR HABEAS CORPUS DISMISSED - NAVY'S DENIAL OF C.O. DISCHARGE SUSTAINED.

Richard Bradly Dalton v. Wells (N.D. Cal., June 17, 1969, D.J. 25-11-4663)

Dalton brought habeas corpus proceedings to review the Navy's refusal to discharge him as a conscientious objector. The court (Sweigert, J.) denied the petition on the merits. During pendency of his appeal from that decision, Dalton reapplied under new service regulations, was again refused discharge, and again petitioned for habeas corpus. The court (Zirpoli, J.) entertained the successive petition because it alleged new facts, but denied it upon finding that the Navy's decision had basis in fact. The court held in this connection that the Navy could properly consider the prior applications and their contents in determining both whether the second application was repetitious and whether it was sincere.

Dalton, who had, during the pendency of the applications, been reassigned from chaplain's assistant to hospitalman berthed on a ship destined for Southeast Asia, asked the court to prevent such assignment pending final determination of his application, asserting that such assignment to duties inconsistent with his claim was contrary to regulations. The court held that determination of consistency of duties was committed to naval discretion and was immune from judicial interference under the rule of Orloff v. Willoughby, 345 U.S. 83 (1953); Noyd v. McNamara, 267 F.Supp. 701 (Colo.) aff'd., 378 F.2d 538 (10th Cir.), cert. denied, 389 U.S. 1022 (1967); Luftig v. McNamara, 252 F.Supp. 819 (D.C. 1966), aff'd., 373 F.2d 664 (D.C. Cir.), cert. denied, 389 U.S. 934 (1967); Smith v. Ritchey (N.D. Cal. Civ. No. 49965, 1968), and Crane v. Hedrick, 284 F.Supp. 250, 252 (N.D. Cal. 1968), which preclude civil court interference with military assignments.

Staff: United States Attorney Cecil F. Poole and
Assistant United States Attorney Jerry K. Cimmet
(N.D. Calif.)

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Shiro Kashiwa

COURTS OF APPEALS

INDIANS; PUBLIC DOMAIN

GENERAL ALLOTMENT ACT DOES NOT CONFER ON INDIANS AN ABSOLUTE RIGHT TO ALLOTMENT OF LANDS SELECTED; LANDS SELECTED MUST BE AGRICULTURAL AND CAPABLE OF SUSTAINING INDIAN; DISCRETION OF SECY. OF INTERIOR TO CLASSIFY WITHDRAWN LANDS FOR ENTRY UNDER TAYLOR GRAZING ACT; JURISDICTION; SUMMARY JUDGMENT.

Amos A. Hopkins (Dukes), et al. v. United States & Udall (C.A. 9, No. 21456, May 19, 1969; D.J. 90-2-11-6837)

This action was instituted by the Indian appellants to compel allotment to them of public lands under the General Allotment Act. The lands involved had been withdrawn from entry by executive order and reserved for classification pursuant to the Taylor Grazing Act. Appellants' applications had been rejected because the lands selected would not support an Indian family, based on facts relating to location, topography, vegetation, land tenure pattern, and general economy of the area. Seven applications were rejected also because the public lands involved had previously been ordered into the market for sale at public auction. As to those seven, administrative remedies were not exhausted. The district court sustained the Secretary of the Interior's rejections.

The Ninth Circuit agreed with the recent opinion of the Tenth Circuit in Finch v. United States, 387 F.2d 13 (1967), cert. den. 390 U.S. 1012, and ruled (1) the district court had jurisdiction to review the Secretary's decision; (2) disposition by summary judgment was proper; (3) the allotment statutes, the legislative histories, and the decided Interior and judicial cases require that lands selected must be capable of supporting an Indian family engaged in agricultural pursuits; (4) the applicable rules of statutory construction--deference to administrative interpretation, presumption against repeal of legislation by implication, and interpretation favoring Indians--support the Secretary's decision; (5) the Taylor Grazing Act authorizes the Secretary to classify withdrawn lands "and to condition entry and settlement upon a prior classification of lands as suitable for allotment under the" General Allotment Act; and (6) on the merits and without regard to the failure to exhaust administrative remedies, seven applications were properly rejected also because they were filed after segregation of the lands involved

from all appropriations, by published notice, under reasonable regulations.

Staff: Raymond N. Zagone (Land and Natural Resources Division)

PUBLIC LANDS

JURISDICTION OF FED. CT. OF INJUNCTION SUIT BY U.S. PENDING ADMINISTRATIVE ADJUDICATION OF VALIDITY OF CLAIM.

United States v. Barrows, et al. (C.A. 9, 1968, 404 F.2d 749, cert. den. April 21, 1969; 37 L.W. 3399; D.J. 90-1-18-763)

The United States brought this action seeking damages for trespass and conversion and an injunction prohibiting further operation of a sand and gravel plant on Barrows' mining claim in the San Bernardino National Forest in California. At the time the suit was filed, administrative contest proceedings challenging the validity of the claim were pending in the Department of the Interior. The district court granted a temporary injunction to the United States conditionally restraining Barrows from removing no more than "such amounts of sand, gravel and surface materials from the subject area as are normally replenished seasonally". The decree was later modified to provide for removal of only so much material as was actually deposited each year. Procedures for yearly calculation of the allowable level of excavation were specified.

The Court of Appeals upheld the subject matter jurisdiction of the district court to grant the temporary relief requested by the United States. The Court expressly refrained from deciding whether the district court could adjudicate the validity of the claim in reaching its decision on the Government's requested relief while the validity issue was still pending before the Department of the Interior. The Court felt that the district court did not have to reach the validity issue in order to grant temporary relief if the lower court found, as here, that irreparable harm was being done to the public lands involved. The Court of Appeals upheld the temporary injunction even though the relief granted therein in effect disturbed the status quo by curtailing the sand and gravel operation on the claim.

Barrows' petition for certiorari in the Supreme Court was denied.

Staff: Robert S. Lynch (Land & Natural Resources Division)

ADMINISTRATIVE APPEAL; REGULATION REGARDING DISMISSAL OF APPEAL FOR LATE FILING OF STATEMENT OF REASONS IS DISCRETIONARY.

Udall v. Gorsuch, et al. (C.A. 9, No. 22833; May 28, 1969; D.J. 90-1-15-144)

Appellee's decedent brought a suit to overturn the Secretary's decision in a private contest of a homestead entry. The Secretary had dismissed the administrative appeal of the hearing examiner's decision because the statement of reasons for appeal had been filed one day late. The pertinent regulations, 43 C.F.R. Sec. 1840.0-7 and Sec. 1842.5-1, provide that an appeal "will be subject to summary dismissal" for such late filing. The district court held the dismissal to be an abuse of the discretion announced in the regulations and ordered the Director, Bureau of Land Management, to hold a hearing on the merits of the appeal.

The Court of Appeals modified the district court's order. The Court agreed with the lower court that the regulation was discretionary and that late filing of the statement of reasons could be waived in any appeal to the Director or the Secretary in spite of a longstanding administrative practice to the contrary. However, the Court found that the facts of this case did not require, as a matter of law, an exercise of that discretion in favor of the late filing. The Court remanded the case to the Director for an exercise of discretion on the question of waiver of the late filing.

Staff: Robert S. Lynch (Land & Natural Resources Division)

CONDEMNATION

ENHANCEMENT; SCOPE OF THE PROJECT A QUESTION UNDER RULE 71A(h).

United States v. 811.92 Acres in Edmonson & Hart Counties, Kentucky (W.G. Reynolds & Mary N. Reynolds) (C.A. 6, 1968, 404 F.2d 303; as modified on denial of rehearing January 23, 1969; cert. pending; D.J. 33-18-239-42)

During the course of a jury trial to determine the value of the portion of the Reynolds' land condemned for use in the Nolin Reservoir Project, the district court reversed its pretrial ruling and decided that the question of whether 78 acres of the land taken was "probably within the scope of the project from the time the government was committed to it" was a jury question. The jury found that the 78 acres were within the scope of the project and excluded enhancement in their valuation thereof.

The Court of Appeals upheld the submission of the scope of the project question to the jury as being an integral part of the jury's determination of "just compensation" under Rule 71A(h), F.R.Civ.P. However, the Court reversed the lower court's decision because it felt the lower

court's summation to the jury contained an improper reference to matter brought out by a witness in the jury's absence which bore on the scope of the project question. The Court of Appeals modified its opinion, in denying the Government's petition for rehearing, by adding a footnote which recognized that the Fifth Circuit has recently held scope of the project to be a legal question for the court, Wardy v. United States, 402 F.2d 962 (1968), but the Sixth Circuit did not feel compelled to adhere to the ruling in Wardy. Our petition for certiorari is pending for the fall term of the Supreme Court.

We feel the decision in Reynolds is wrong on two counts. First, as the Fifth Circuit pointed out in Wardy, it is the court's duty to decide all the issues in a condemnation case except "just compensation", which may be left to a jury or commission under Rule 71A(h). In allowing the jury to decide what elements are legally a part of "just compensation", the Sixth Circuit has usurped the power of the district court to exercise its proper function under the Rule. Second, the Sixth Circuit has, in effect, contradicted the holding in United States v. Miller, 317 U.S. 369 (1943). Miller excluded all enhancement due to the project from consideration in valuing the property taken for that project. In Reynolds, the Sixth Circuit is saying that there are times when enhancement can be paid and the jury may decide when those times occur. This misuse of Miller together with the conflict with the Fifth Circuit form the bases of our petition for certiorari.

Staff: Robert S. Lynch (Land & Natural Resources Division)

VALUATION EVIDENCE; REJECTION OF SALE AS NOT OPEN-MARKET TRANSACTION WAS PROPER EXERCISE OF TRIAL COURT'S DISCRETION; REPRODUCTION COST LESS DEPRECIATION METHOD OF VALUATION NOT PROPER IN THIS CASE.

United States v. Fox (C.A. 9, No. 22,368, May 21, 1969; D.J. 33-45-1017)

During a jury trial the landowners attempted to offer valuation evidence consisting of a transaction begun eight days before the taking by an earnest money receipt from a Mr. Floyd, an adjacent landowner and condemnee, to Mr. Fox. On cross examination and re-direct of Mr. Fox, it was revealed that no sales contract was executed until some 70 days after the taking and the time for payments called for in the contract had been subsequently orally waived by Floyd. The district court excluded the transaction as not being made on the open market and influenced by the project. The landowner also sought to offer testimony of reproduction cost less depreciation as direct evidence of value. The district court sustained the Government's objection because it felt the comparable sales evidence already admitted was sufficient.

The Court of Appeals upheld both evidentiary rulings. The Court concurred in the bases for rejecting the Floyd-to-Fox transaction and found no abuse of discretion in excluding it. The Court further agreed that this case was not one in which the reproduction cost approach could be used as direct evidence. The Court said that even under the "prevailing rule", requiring only that the landowner show that the buildings on the property were "well adapted" to the land, the landowner in this case had not laid a foundation for using the reproduction cost approach. The Court did not adopt the "prevailing rule" as such but indicated by its language that it might require somewhat more of a foundation when reproduction cost is offered as direct evidence of value.

Staff: Robert S. Lynch (Land & Natural Resources Division)

COMMISSION REPORT: POWER TO MODIFY REPORT ALLOWS DISTRICT COURT TO REDUCE AWARD TO CONFORM TO EVIDENCE IN RECORD.

United States v. Hilliard (C.A. 8, No. 19,317, June 16, 1969; D.J. 33-4-275-483)

After considering evidence of before and after values for a partial taking, the commission adopted an after value in its report below the range of testimony it had heard and accepted. In reviewing the report, the district court noted this error and decided that the court's power to "modify" under Rule 53(e)(2), as incorporated in Rule 71A(h), F.R.Civ.P., included the power to reduce the award to conform to the evidence in the record. Thus, the court reduced the award to the amount of the difference between the commission's before value and the lowest after value testified to by any witness.

The Government appealed on two grounds. First, we contended that the power to modify a report does not give the court the ability to directly alter the award to an amount the court feels is justified in the particular case. That kind of action amounts to a complete usurpation of the commission's function and renders meaningless the appointment of a commission at all. Second, the after value selected by the court was clearly shown by the report to be completely based on speculation, and therefore improper and inadmissible. The commission had itself rejected it on that basis.

Ignoring our second ground completely, the Court of Appeals held that the power to modify as exercised in this case did not constitute a "clearly erroneous" decision by the district court.

Staff: Robert S. Lynch (Land & Natural Resources Division)

GOVERNMENT LANDS

OTHER CLAIMANTS ARE INDISPENSABLE PARTIES: RULE 19, F.R.CIV.P.

McKenna v. Udall (C.A. D.C., No. 21,915; July 10, 1969; D.J. 90-1-18-797)

The land involved in this case was acquired by the United States for the Department of the Army in the 1940's. Thereafter, Army authorized the Department of the Interior to lease oil and gas deposits for the purpose of controlling drainage. Subsequently, Army, no longer having need for the area, reported it to the General Services Administration as excess property. GSA declared the area surplus and sold it to high bidders. McKenna learned of the availability of the land by an advertisement for bids by GSA. Believing that GSA's sale could not include the oil and gas estate--Interior had not issued a declaration of excess--McKenna applied for the issuance of oil and gas leases from the Department of the Interior under the Mineral Leasing Act for Acquired Lands, 30 U.S.C. 351-359. Following rejection of his applications and affirmation of the result in administrative appeals, McKenna's estate sought review in the district court. The district court affirmed the Secretary's rejection of McKenna's offers to lease. McKenna appealed.

The Government's position was that the property was not available under the Mineral Leasing Act for Acquired Lands because it had been declared surplus by GSA. In any event, we maintained, the Secretary had discretion not to lease the land to anyone. The Court of Appeals affirmed the district court's dismissal on the Government's alternative position that dismissal was warranted by the absence in this litigation of indispensable parties, namely the successful purchasers of the land from GSA. In so ruling, the Court observed:

> If only the first three factors contained in Rule 19(b) were balanced in attempting to decide whether the purchasers of the land are indispensable parties, this court would be inclined to rest upon its own precedent in Barash v. Seaton, 103 U.S.App.D.C. 159, 256 F.2d 714 (1958). As to these three factors, the court sees no significant distinction from Barash. The fact that in Barash the absent parties were leaseholders, whereas here they putatively have acquired title, has no bearing on the issue of indispensability.

> This, however, still leaves to be considered the fourth factor listed in Rule 19(b), i.e., "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder". Although Barash did not deal with the issue of indispensability in depth, it is obvious from the facts of that case that the court's determination was based primarily on its knowledge that, if plaintiff could not prevail in this jurisdiction, there was no other court to which he could turn. In the interim between the Barash case and this one, however, Congress has passed a statute, the Mandamus and Venue Act of 1962 /28 U.S.C. 1361, 1391(e) (1964)/, which has opened up to appellant other tribunals than those in the District of Columbia. /Fn. omitted./

The Court concluded that a federal district court in Kentucky, where the land was located, would have at least the same remedial powers in this controversy as the district court for the District of Columbia. The corporate purchasers of the property from GSA were doing business in Kentucky and amenable to service in that state. The Court in effect limited, if not overruled, its decision in Barash.

The venue provision, 28 U.S.C. 1391(e), provides that each defendant in such a civil action be "an officer or employee of the United States or any agency thereof". However, the Court pointed out that "it is not to be thought that Congress intended to preclude a Kentucky federal court from hearing this action with all parties present even though it would be a proper forum if only the Government officials, or the purchasers, were defendants". Venue can be waived and the Court noted that "it is clear in this case that neither the purchasers nor the Government would be able to raise venue objections if appellant now sues in Kentucky".

Staff: William M. Cohen (Land & Natural Resources Division)

DISTRICT COURT

INDIANS

JURISDICTION; AUTHORITY OF BUREAU OF INDIAN AFFAIRS TO EXPEND IRRIGATION PROJECT FUNDS FOR BENEFIT OF LANDS WITHIN INDIAN IRRIGATION PROJECT WHICH ARE OWNED BY NON-INDIAN.

Alex Scholder, et al. v. United States, et al. (S.D. Cal., No. 68-244-S, April 23, 1969; D.J. 90-2-2-148)

This was a class action brought by individual Indians and Indian bands to enjoin the Secretary of the Interior and the Bureau of Indian Affairs from spending Indian irrigation project funds for the benefit of a non-Indian owner of land which is situated within an Indian irrigation system. Upon filing their complaint, plaintiffs moved for a preliminary injunction and temporary restraining order enjoining the expenditure of funds for construction of a lateral pipeline to a non-Indian's land.

The defendants moved to dismiss and opposed the preliminary injunction on the basis of lack of jurisdiction. The court granted the preliminary injunction, having found jurisdiction over the claims of the Indian bands under 28 U.S.C. 1362. The motion to dismiss was granted as to individual Indians on the basis of lack of jurisdiction.

The defendants moved to dismiss a second time on the grounds that 28 U.S.C. 1362 did not provide jurisdiction and the complaint failed to state a claim on which relief can be granted. The court, concluding that the jurisdictional question went to the merits of the case, treated the motion as one for summary judgment. Plaintiffs cross-filed for summary judgment.

The issue presented was whether the Secretary of the Interior and the Bureau of Indian Affairs have authority to expend irrigation project funds for the sole, direct benefit of lands which are located within an irrigation project and which are owned by a non-Indian. After an examination of the legislative history of the appropriation acts (P.L. 88-356, 78 Stat. 275, and P.L. 89-52, 79 Stat. 176), the pertinent statutes (25 U.S.C. 348, 349, 381-392, 404 and 483), and long standing administrative practice, the court held that the defendants had the statutory authority to expend funds on lands within Indian irrigation projects, whether owned by Indians or non-Indians. The court granted defendants' motion for summary judgment.

Staff: Assistant United States Attorney Charles J. Fanning (S.D. Cal.); Myles E. Flint (Land & Natural Resources Division)

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TAX DIVISION

Assistant Attorney General Johnnie M. Walters

DISTRICT COURTS

BANKRUPTCY

COURT IS WITHOUT JURISDICTION TO ENTERTAIN ACTION WHICH SEEKS JUDGMENT DECLARING THAT PENALTY ASSESSED PURSUANT TO SECTION 6672 OF INTERNAL REVENUE CODE WAS DISCHARGED IN BANKRUPTCY BY SECTION 17 OF BANKRUPTCY ACT, AS AMENDED IN 1966.

James M. Butler v. Sheldon S. Cohen, Commissioner of Internal Revenue, et al. (N.D. N.Y., No. 67-CV-261; May 13, 1969; D.J. 5-50-2434)

On September 29, 1966, James M. Butler filed a petition in bankruptcy. Among his listed debts was a federal tax assessment pursuant to Section 6672 of the Code for unpaid trust fund portions of withholding taxes of a certain corporation for the years 1958 and 1959. The bankrupt was discharged on December 23, 1966.

The plaintiff instituted this action in the Federal District Court for a judgment declaring that the Section 6672 penalty assessment which became legally due and owing more than three years prior to the bankruptcy proceeding, was dischargeable by reason of Section 17 of the Bankruptcy Act, as amended in 1966, and applicable to the plaintiff's bankruptcy proceeding. The jurisdictional basis for the action was alleged to be Title 28, U.S.C., Section 2201.

The defendant moved to dismiss the complaint on jurisdictional grounds, asserting that the Section 6672 penalty assessment has been held to be in the nature of a tax, see Botta v. Scanlon, 314 F.2d 392 (C.A. 2), and that Section 2201 specifically precludes a declaratory judgment "with respect to federal taxes". The late Judge Steven W. Brennan denied the motion and granted the plaintiff leave to file an amended complaint. The Court's memorandum decision indicated that the "ultimate determination of this Court's jurisdiction should await further factual developments".

The plaintiff's amended complaint contained allegations of hardship and inadequacy of a remedy at law in an attempt to invoke equitable relief outside the restraint of Section 7421 of the Internal Revenue Code. The defendant then moved for summary judgment, reasserting the jurisdictional argument and briefing the dischargeability issue by contending that the Section 6672 penalty was intended to come within the provisions of Section

17a(1)(e) reserving certain taxes from the general three-year discharge provision in Section 17. The dischargeability question was one of first impression regarding the scope and effect of the newly added Section 17a(1)(e).

The court granted the defendant's motion for summary judgment and dismissed the action on the grounds that the relief sought was barred by 28 U.S.C., Sections 2201 and 7421 of the Internal Revenue Code of 1954. Having determined that the Federal District Court lacked the power to hear the case, the merits of the dischargeability issue were not considered.

Staff: Former United States Attorney Justin J. Mahoney; Assistant United States Attorney Samuel T. Betts, III (N.D. N.Y.); and John S. Kingdon (Tax Division)

GOVERNMENT'S PROOF OF CLAIM SATISFIES FORM REQUIREMENTS OF BANKRUPTCY ACT.

In the Matter of William Thomas Tyner (M.D. Ga., In Bankruptcy No. 15413, February 5, 1969; D.J. 5-19M-656) (69-1 U.S.T.C., par. 9235)

The Internal Revenue Service had filed its usual proof of claim in this bankruptcy action but the trustee objected to the form on the grounds that, since the tax assessments were the "consideration" for the claim and since the assessment certificates were not attached, the proof of claim was deficient. The Referee accepted this reasoning and ordered the Government to append certificates of assessment or have its claim disallowed.

The Government petitioned the district court to review the question whether the proof of claim was in proper form under Section 57 of the Bankruptcy Act (11 U.S.C. 93). "The clear answer to this question is yes", the court remarked as it reversed the Referee and ordered further consideration of the claim in the bankruptcy proceedings. The court noted that the Bankruptcy Act requirements as to proof of claim were not "stricti juris in the sense that slight deviation would be fatal" and concluded that the form presently used by the Internal Revenue Service does not deviate from those requirements. The court also determined that the "consideration" for any tax claim is apparent as a matter of law--the sovereign's right to collect taxes as due--and that, even if the certificates of assessment were attached to the proof of claim, they would shed no further light on the Government's claim.

Staff: George W. Shaffer, Jr. (Tax Division)

LIEN FOR TAXES

FED. TAX LIEN REQUIRED TO BE FILED IN COUNTY WHERE REAL PROPERTY LOCATED IN ORDER TO PERFECT LIEN FOR PURPOSES OF CLAIM UNDER ARTICLE 3-A OF NEW YORK LIEN LAW.

Harry R. Harman v. Fairview Associates, et al; Friederich & Sons v. Colorcraft of Syracuse, Inc. (N.Y. App. Div., Nos. 1 and 2; October 31, 1968; D.J. 5-53-2953)

This is an action under Article 3-A of the New York Lien Law brought by a general contractor (Friederich) for an accounting of the trust funds received in connection with a construction project in Tompkins County, New York. The Government was made a party defendant since its tax claims arose out of the project. The federal tax lien was filed in Onondaga County where the taxpayer corporation (Colorcraft) had its principal place of business and not in Tompkins County where the project was constructed.

Harry R. Harman, a mechanic's lienor and a defendant in the Article 3-A action, moved for summary judgment against the United States on the ground that the claim of the Government was barred by the statute of limitations in the Lien Law, Section 77(a), 32 McKinney's Consolidated Laws of New York. The trial court denied this motion. On appeal to the Appellate Division for the Fourth Department, the order of the trial court was "modified" on the theory that Harman's claim was entitled to priority since the Government failed to file its lien in Tompkins County. This "filing theory" was not urged by Harman in the trial court.

The holding of the Appellate Division in the instant case cannot be reconciled with the statute, the cases or the recent decision of the same court in Onondaga Wall Corp. v. 150 Clinton St., 28 App. Div. 2d 71. Section 71(4) of the Lien Law, provides that persons having claims for payment of amounts for which the trustee is authorized to use trust assets are beneficiaries of the trust whether or not they have filed a notice of lien. Aquilino v. United States, 10 N.Y. 2d 271, 277, 219 N.Y.S. 2d 254, 259.

An appeal has been taken to the Court of Appeals and the case argued on May 26, 1969.

Staff: Former United States Attorney John T. Curtin; Assistant United States Attorney Donald Statland (W.D. N.Y.); and Howard M. Koff (Tax Division)

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