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EXECUTIVE OFFICE FOR U. S. ATTORNEYS
William P. Tyson, Director

POINTS TO REMEMBER

Changes To The Obstruction Of Justice And Bail Statutes

Effective October 12, 1982, sections 4 and 8 of the "Victim and Witness Protection Act of 1982" (P.L. 97-291, 96 Stat. 1248) made several changes to the Federal obstruction of justice statutes contained in chapter 73 of title 18, United States Code and the bail statute contained in section 3146(a) of chapter 207 of title 18, United States Code.

Section 4 of the Act modified current sections 18 U.S.C. 1503, 1505, and 1510(a), and it created four new sections, 18 U.S.C. 1512-1515. At the conclusion of this item is the complete text of these seven statutes, which in the case of sections 1503, 1505, and 1510(a) indicates the portions which were deleted. A short summary of the changes follows:

(1) Section 1503 - All references to witnesses and parties were deleted. These individuals will be covered under the new sections 1512 and 1513. The broad final clause of section 1503, however, remains intact. Nevertheless, obstruction efforts performed on or after October 12, 1982 against witnesses and parties should be prosecuted under new sections 1512 or 1513.

(2) Section 1505 - The first two paragraphs dealing with witnesses or parties involved in proceedings before departments, agencies, and Congressional Committees were deleted. Such witnesses and parties are now covered by sections 1512 and 1513.

(3) Section 1510(a) - The existing offense was limited to endeavors to obstruct a criminal investigation by means of bribery. The other conduct is intended to be prohibited by new sections 1512 and 1513.

(4) Section 1512 - This new section is entitled "Tampering with a witness, victim, or an informant." Subsection (a) makes it a serious felony (up to $250,000 and/or 10 years) to knowingly use intimidation or physical force, threaten another person, or attempt to do so, or to engage in misleading

conduct toward another person with intent to do certain specified acts which amount to an obstruction of justice. Subsection (b) creates a misdemeanor (up to $25,000 and/or 1 year) to intentionally harass another person, or attempt to do so, and thereby hinder, delay, prevent, or dissuade any person from performing a "witness-type" act which is crucial in the initiating or functioning of the justice system. Both of these subsections deal with the situation where the witness has not yet completed his testimony.

(5) Section 1513 - This new section is entitled "Retaliating against a witness, victim, or an informant." It makes it a serious felony (up to $250,000 and/or 10 years) to knowingly engage, threaten to engage, or attempt to engage in any conduct which causes bodily injury to another person or damages the tangible property of another person with intent to retaliate against any person for his "witness-like" involvement in the justice system. This section applies to the situation where the witness has already testified.

(6) Section 1514 - This new section creates a cause of action and establishes the procedures by which the Federal prosecutor can seek from a United States District Court a restraining order against any individual where there are reasonable grounds to believe that harassment of an identified victim or witness exists or that such an order is necessary to prevent and restrain an offense under sections 1512 (other than misleading conduct) and/or 1513. Harassment is defined as a course of conduct directed at a specific person that causes substantial emotional distress in such person and which conduct serves no legitimate purpose.

It should also be noted that section 8 of the Act modified the bail procedures in section 3146(a) of chapter 207 of title 18, United States Code. This change makes all bail subject to the condition that the defendant not commit an offense under section

1503, 1512, or 1513 to title 18, United States Code. The full amended text of 18 U.S.C. 3146(a) is also set forth at the conclusion of this item.

(7) Section 1515 - This new section provides the definitions for the terms "official proceeding," "physical force," "misleading conduct," "law enforcement officer," and "bodily injury."

Both sections 1512 and 1513 are intended to have extraterritorial effect. In both sentences, the intended receiver of the harm does not have to be the witness himself (e.g., the threat can be against his wife, a minor child, etc.). For purposes of section 1512 the "official proceeding" need not be actually underway. And only in regard to a Congressional proceeding would there be a need in a prosecution under section 1512 to prove a state of mind by the defendant (i.e., he knew of the existence or possible existence of the Congressional proceeding). (Proof of state of mind would be necessary for all prosecutions under section 1513 however.) Moreover, the amendments also clearly expand the scope of the obstruction statutes to parole and probation proceedings as well as any other proceeding in a Federal forum.

The Criminal Division is in the process of preparing a more definitive explanation of these new changes which will be incorporated as part of a chapter on "Obstruction of Justice" in the U.S. Attorneys' Manual. If you have any questions about these changes to the Federal obstruction of justice statutes, please contact the General Litigation and Legal Advice Section in the Criminal Division at FTS 724-7144.

A central bank of pleadings filed under this statute is being established in the Office of Legal Support Services. Copies of all pleadings should be sent to the Office of Legal Support Services, Room 303, Federal Triangle Building, 315 9th Street, N.W., Washington, D.C. 20530 (FTS 724-7184).

(Criminal Division)

Actual Text of New and Revised Sections

§ 1503. Influencing or injuring officer [~~,juror-or-witness~~] or juror generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any [~~witness,-in-any-court-of-the-United States-or-before-any-United-States-commissioner-or-other committing-magistrate,-or-any~~] grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or [~~injures-any-party-or-witness-in-his person-or-property-on-account-of-his-attending-or-having attended-such-court-or-examination-before-such-officer, commissioner,-or-other-committing-magistrate,-or-on-account-of his-testifying-or-having-testified-to-any-matter-pending therein,-or~~] injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. (Deletions as indicated; insertions underlined.)

§ 1505. Obstruction of proceedings before departments, agencies, and committees

[~~Whoever-corruptly,-or-by-threats-or-force,-or-by-any threatening-letter-or-communication,-endeavors-to-influence, intimidate,-or-impede-any-witness-in-any-proceeding-pending before-any-department-or-agency-of-the-United-States,-or-in connection-with-any-inquiry-or-investigation-being-had-by-either House,-or-any-committee-of-either-House,-or-any-joint-committee of-the-Congress,-or~~

~~Whoever-injures-any-party-or-witness-in-his-person-or property-on-account-of-his-attending-or-having-attended-such proceeding,-inquiry,-or-investigation,-or-on-account-of-his testifying-or-having-testified-to-any-matter-pending-therein, or~~]

Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which [~~such~~] any pending proceeding is being had before [~~such~~] any department or agency of the United States, or the due and proper exercise of the power of inquiry under which [~~such~~] any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress --

Shall be fined not more than $5,000 or imprisoned not more than five years, or both. (Deletions as indicated; insertions underlined.)

§ 1510. Obstruction of criminal investigations

(a) Whoever willfully endeavors by means of bribery [~~, misrepresentation, intimidation, or force or threats thereof~~] to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator [~~, or~~

~~Whoever injures any person in his person or property on account of the giving by such person or by any other person of any such information to any criminal investigator~~

~~Shall~~] shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(b) As used in this section, the term "criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations of or prosecutions for violations of the criminal laws of the United States. (Deletions as indicated; insertions underlined.)

§ 1512. Tampering with a witness, victim, or an informant

(a) Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to --

(1) influence the testimony of any person in an official proceeding;

(2) cause or induce any person to --

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined not more than $250,000 or imprisoned not more than ten years or both.

(b) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from --

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined not more than $25,000 or imprisoned not more than one year, or both.

(c) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(d) For the purposes of this section--

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(e) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance--

(1) that the official proceeding before a judge, court, magistrate, grand jury, or government agency is before a judge or court of the United States, a United States magistrate, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(f) There is extraterritorial Federal jurisdiction over an offense under this section.

§ 1513. Retaliating against a witness, victim, or an informant.

(a) Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for--

(1) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

(2) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings given by a person to a law enforcement officer;

or attempts to do so, shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

(b) There is extraterritorial Federal jurisdiction over an offense under this section.

§ 1514. Civil action to restrain harassment of a victim or witness

(a)(1) A United States district court, upon application of the attorney for the Government, shall issue a temporary restraining order prohibiting harassment of a victim or witness in a Federal criminal case if the court finds, from specific facts shown by affidavit or by verified complaint, that there are reasonable grounds to believe that harassment of an identified victim or witness in a Federal criminal case exists or that such order is necessary to prevent and restrain an offense under section 1512 of this title, other than an offense consisting of misleading conduct, or under section 1513 of this title.

(2)(A) A temporary restraining order may be issued under this section without written or oral notice to the adverse party or such party's attorney in a civil action under this section if the court finds, upon written certification of facts by the attorney for the Government, that such notice should not be required and that there is a reasonable probability that the Government will prevail on the merits.

(B) A temporary restraining order issued without notice under this section shall be endorsed with the date and hour of issuance and be filed forthwith in the office of the clerk of the court issuing the order.

(C) A temporary restraining order issued under this section shall expire at such time, not to exceed 10 days from issuance, as the court directs; the court, for good cause shown before expiration of such order, may extend the expiration date of the order for up to 10 days or for such longer period agreed to by the adverse party.

(D) When a temporary restraining order is issued without notice, the motion for a protective order shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character, and when such motion comes on for hearing, if the attorney for the Government does not proceed with the application for a protective order, the court shall dissolve the temporary restraining order.

(E) If on two days notice to the attorney for the Government or on such shorter notice as the court may prescribe, the adverse party appears and moves to dissolve or modify the temporary restraining order, the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(F) A temporary restraining order shall set forth the reasons for the issuance of such order, be specific in terms, and describe in reasonable detail (and not by reference to the complaint or other document) the act or acts being restrained.

(b)(1) A United States district court, upon motion of the attorney for the Government, shall issue a protective order prohibiting harassment of a victim or witness in a Federal criminal case if the court, after a hearing, finds by a preponderance of the evidence that harassment of an identified victim or witness in a Federal criminal case exists or that such order is necessary to prevent and restrain an offense under section 1512 of this title, other than an offense consisting of misleading conduct, or under section 1513 of this title.

(2) At the hearing referred to in paragraph (1) of this subsection, any adverse party named in the complaint shall have the right to present evidence and cross-examine witnesses.

(3) A protective order shall set forth the reasons for the issuance of such order, be specific in terms, describe in reasonable detail (and not by reference to the complaint or other document) the act or acts being restrained.

(4) The court shall set the duration of effect of the protective order for such period as the court determines necessary to prevent harassment of the victim or witness but in no case for a period in excess of three years from the date of such order's issuance. The attorney for the Government may, at any time within ninety days before the expiration of such order, apply for a new protective order under this section.

(c) As used in this section--

(1) the term "harassment" means a course of conduct directed at a specific person that--

(A) causes substantial emotional distress in such person; and

(B) serves no legitimate purpose; and

(2) the term "course of conduct" means a series of acts over a period of time, however short, indicating a continuity of purpose.

§ 1515. Definitions for certain provisions

As used in sections 1512 and 1513 of this title and in this section --

(1) the term "official proceeding" means--
(A) a proceeding before a judge or court of the United States, a United States magistrate, a bankruptcy judge, or a Federal grand jury;
(B) a proceeding before the Congress; or
(C) a proceeding before a Federal Government agency which is authorized by law;
(2) the term "physical force" means physical action against another, and includes confinement;
(3) the term "misleading conduct" means--
(A) knowingly making a false statement;
(B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;
(C) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;
(D) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or
(E) knowingly using a trick, scheme, or device with intent to mislead;
(4) the term "law enforcement officer" means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant--
(A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or
(B) serving as a probation or pretrial services officer under this title; and
(5) the term "bodily injury" means--
(A) a cut, abrasion, bruise, burn, or disfigurement;

(B) physical pain;
(C) illness;
(D) impairment of the function of a bodily member, organ, or mental faculty; or
(E) any other injury to the body, no matter how temporary.

§ 3146. Release in noncapital cases prior to trial

(a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, subject to the condition that such person not commit an offense under section 1503, 1512, or 1513 of this title, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose a condition of release that such person not commit an offense under section 1503, 1512, or 1513 of this title and impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:

(1) place the person in the custody of a designated person or organization agreeing to supervise him;
(2) place restrictions on the travel, association, or place of abode of the person during the period of release;
(3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;
(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or
(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours. (Insertions underlined)

Anti-Arson Act of 1982

On October 12, 1982, section two of the Anti-Arson Act of 1982 (P.L. 97-298, 96 Stat. 1319) amended subsections 844(e), (f), (h)(1), and (i) of Title 18, United States Code, by adding the word "fire" to these subsections. The principal purpose of this change was to clearly allow the continued use of subsection 844(i) in arson fires started by gasoline that result in the destruction or damage of a building used in or affecting interstate commerce. Since this change is intended primarily to facilitate the prosecution of that type of Federal case already being brought, the change does not represent any significant expansion of Federal prosecutive efforts in the arson area. Local and state authorities will still be expected to prosecute most arson fires as they have been doing. If you have not already done so, this recent Act may allow you the opportunity to discuss the respective roles of local, state, and Federal agencies on arson matters in your district with the membership of your Law Enforcement Coordinating Committee.

In addition to the amendments to 18 U.S.C. 844, section three of the Act directs the Director of the FBI to permanently classify arson as a Part I crime in the Uniform Crime Reports (UCR). The Director is also authorized and directed to prepare a special statistical report in cooperation with the National Fire Data Center for the crime of arson. The UCR Program of the FBI sponsored an Arson Conference at the FBI Academy in Quantico, Virginia, from November 30-December 2, 1982, aimed at helping the FBI to implement its statistical responsibilities under section three of the Act.

If you have any questions about the changes to 18 U.S.C. 844, please contact the General Litigation and Legal Advice Section in the Criminal Division at FTS 724-6971.

(Criminal Division)

H.R. 6976. P.L. 97-292, "The Missing Children Act," signed October 12, 1982.

The chief purpose of this bill, which became effective when signed, is to enable the FBI to maintain a more accurate and complete file on missing persons, especially missing children. Another aspect of the bill is to enable the FBI to create a national file of unidentified dead persons to help state and local authorities in their identification.

Since 1975 the FBI has maintained a missing person file as part of the NCIC to assist state and local police in identifying missing persons. Proponents of H.R. 6976 argued that the NCIC file was not very helpful in locating missing children because the FBI would only accept entries from law enforcement agencies, some of which were allegedly uninterested in receiving information about missing persons, even children. Moreover, identifying data required for entry into the system -- such as a social security number -- are often not available for children. H.R. 6976 amends 28 U.S.C. 6976 to provide that the Attorney General or a designee such as the head of the FBI shall "acquire, collect, classify, and preserve any information which would assist in the location of any missing person (including an unemancipated person as defined by the laws of the place of residence of such person) and provide confirmation as to any entry for such a person to the parent, legal guardian, or next of kin of that person (and the Attorney General may acquire, collect, classify, and preserve such information from such parent, guardian, or next of kin)." Pursuant to this provision, the FBI will begin providing confirmation as to whether a child has been entered into the NCIC to a parent, legal guardian, or next of kin of the child. Instructions are being sent to all FBI field offices as to the procedure to be followed. Basically, the FBI will try to establish with certainty whether the requester of the information really is the parent, legal guardian, or next of kin of the child.

The FBI will also have the discretionary authority to enter data on a missing child in the NCIC if it is received directly from a parent, guardian, or next of kin, rather than from a law enforcement agency. The FBI prefers to enter data from law enforcement agencies, but the Director has indicated and Congress relied on the fact that there may be a rare case in which direct entry from a parent will be accepted. The FBI

is also sending instructions to its field offices to deal with this situation. In general, field offices will be told that the information should be given to local authorities if they will accept it and that parents cannot automatically by-pass local authorities and have the information entered in the NCIC.

Inquiries regarding "The Missing Children Act" should be directed to the Office of Legislation, Criminal Division, FTS 633-3949.

(Criminal Division)

The Model Rule Of The Judicial Conference For Continuing Bankruptcy Jurisdictions

On December 27, 1982, J. Paul McGrath, Assistant Attorney General, Civil Division, issued a memorandum to all U. S. Attorneys concerning the model rule providing for the continued operation of bankruptcy courts which was proposed by the Judicial Conference on December 3, 1982. A copy of this memorandum has been added as an appendix to this issue of the United States Attorneys' Bulletin.

(Civil Division)

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CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

AFGE v. Pierce, No. 82-2372 (Dec. 8, 1982). D.J. # 145-17-3496.

HUD Appropriations Act of 1982 -- Requirement of Committee Approval Prior To Personnel Action: D.C. Circuit Holds Committee Approval Section Of HUD Appropriations Statute Unconstitutional, And Severs It From Remainder Of Statute In Such A Way As To Allow HUD To Carry Out A Long-Planned Personnel Action.

Following a lengthy hiring freeze, HUD found that varying attrition rates in its different offices created a skills and work imbalance within the agency headquarters. Consequently, HUD studied its personnel situation and found that it also had a number of unnecessary positions. To remedy these problems, HUD decided to carry out a reduction-in-force in November 1982. However, when Congress passed the HUD Appropriations Act of 1982, it included a proviso that HUD could not carry out any reorganizations before January 1, 1983, unless the Appropriations Committee approved. On advice of OLC that this proviso was unconstitutional, HUD decided to go forward with the RIF. The employees' union and Congressman Sabo filed suit to enjoin the RIF, and the district court granted an injunction. We appealed. In an expedited appeal, we argued that Congressman Sabo lacked standing, and that the district court lacked jurisdiction over the employees' claims because their sole remedy lay with the MSPB. If the court reached the merits, we argued that the Committee's approval mechanism was an unconstitutional legislative veto device, and that it was inseverable from the prohibition on HUD reorganizations; therefore, the entire proviso had to be struck down, leaving HUD free to carry out its planned personnel action. The D.C. Circuit overturned the district court's injunction. While it found that Mr. Sabo had standing, the court accepted our argument that the Committee's approval device was invalid and that it was linked to the ban on reorganizations. The court ordered its mandate issued immediately, and HUD was able to carry out its personnel action within several days.

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CIVIL DIVISION
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Metropolitan Medical Center v. Harris, Nos. 81-2401 and 82-1014 (Nov. 22, 1982). D.J. # 137-39-347.

HHS -- Medicare Reimbursement For Hill-Burton Free Care: Eighth Circuit Reverses District Court Decision Allowing Medicare Reimbursement For Hill-Burton Free Care.

The Hill-Burton Act provides construction aid to hospitals on the condition that they perform certain levels of free care for indigents. The hospitals characterize this mandatory free care as a "financing expense," akin to interest or depreciation, and seek medicare reimbursement for medicare patients' proportionate share of the free care costs. The district court, following a Fifth Circuit decision, agreed with the hospital's view, and ordered reimbursement for free care costs. On our appeal, the Eighth Circuit reversed, expressly disagreeing with the Fifth Circuit's view. The Eighth Circuit's comprehensive opinion endorsed our arguments that medicare reimbursement for the free care costs is contrary to the Medicare Act and regulations and indeed, would vitiate the worth of the hospitals' free care commitment under the Hill-Burton Act. The court did not rely on recent legislation passed by Congress expressly declaring that the free care costs are not reimbursable; it thus avoided any question about the retroactive application of that legislation. The court of appeals also ordered a remand on a subsidiary reimbursement issue so that the Secretary could consider arguments not previously advanced by the hospital.

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CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

In re Estus: United States v. Estus, No. 82-1121 (Dec. 15, 1982). D.J. # 77-9-324.

Bankruptcy Code -- Good Faith Provision of Chapter 13: Eighth Circuit Reverses District Court Determination That Debtor's Chapter 13 Repayment Plan Under The Bankruptcy Code Was Proposed in Good Faith.

Under the Bankruptcy Code, a debtor with regular income may propose a repayment plan under Chapter 13, rather than liquidation under Chapter 7, to obtain a discharge of debts. The Code requires the repayment plan to be approved by the bankruptcy court (or higher court, if challenged) and, inter alia, that the plan be proposed in good faith (§1325(a)(3)) and that the plan not propose to pay unsecured creditors less than what those creditors would have received under a Chapter 7 liquidation (§1325(a)(4).

In this case, the Veterans Administration (VA), which had made an unsecured educational loan to the debtor, objected to the debtor's plan on the ground that the plan did not meet the good faith requirement of the Code. Under the plan, the debtor proposed a repayment period of 15 months in which all secured creditors would receive full payment but under which unsecured creditors (including the VA) would receive nothing. The plan was approved by both the bankruptcy court and the district court. Both courts noted that under Chapter 7 liquidation, the VA would have received nothing. Therefore, the debtor's plan met the §1325(a)(4) requirement. Since this was the only minimum payment requirement found in Chapter 13 and since neither Chapter 13 nor the Code defines good faith, the courts determined that the good faith requirement (§1325(a)(3)) had been met because the §1325(a)(4) requirement had been met.

We appealed the district court's decision, arguing that the good faith requirement in §1325(a)(3) must be read to have its own substantive content separate and apart from §1325(a)(4). Although the bankruptcy courts have split on whether good faith requires a substantial payment or no more payment than §1325(a)(4) requires, we chose a middle ground. Accordingly, we argued that good faith must be determined on a case-by-case basis after examination of numerous factors which we identified. In our brief, we focused on just three of these factors: the length of the debtor's plan (15 months versus the 36-month norm); the debtor's likely increases in salary since he was a Federal employee; and the fact that the debt for which he sought discharge -- an educational loan -- was not dischargeable under Chapter 7 liquidation though it was dischargeable under Chapter

13. The Eighth Circuit reversed and remanded the district court decision, adopting our argument. The court noted approximately 11 factors (which we had cited in our brief) which ought to be considered in determining good faith in each case. In our case, the court addressed the three factors which we had focused on and ruled that the plan "reveals an apparent lack of good faith." However, because the lower courts did not make specific findings concerning the total circumstances of the case, the Eighth Circuit remanded the case to the lower courts for a good faith determination consistent with the court's opinion.

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Beck Park Apartments v. HUD, No. 81-4270 (Dec. 23, 1982). D.J. # 145-17-2657.

HUD--Adjustment of Rent Schedules: Ninth Circuit Affirms District Court Decision And Holds That HUD's Regulatory Agreements With Project Owners Did Not Prohibit HUD From Reevaluating And Adjusting Rents In California In §221(d)(3) And §236 Housing In Light Of The Lowering Of Real Estate Taxes Caused By The Adoption Of Proposition 13.

The project owners in this case are owners of §221(d)(3) or §236 housing in California. Pursuant to the National Housing Act, HUD drafted and entered into a Regulatory Agreement with each project owner. The agreement establishes certain rights and obligations of the parties with respect to each project.

Following the passage of Proposition 13, which lowered real property taxes in California, HUD reevaluated rent schedules in §221(d)(3) and §236 projects in California. The purpose of the reevaluation was to insure that the rents reflected expenses necessary to operate the projects. The reevaluation, based on owner-submitted data concerning all operating expenses, resulted in decreasing rents for some projects.

After HUD ordered Beck Park and other owners to reduce rents charged, they instituted this action, alleging that HUD's actions breached the agreement and violated the notice and comment provisions of the APA. The district court granted partial summary judgment for HUD on the breach claims and directed entry of judgment under Rule 54(b), F.R.Civ.P. On appeal, Beck Park contended that the agreement precluded HUD from initiating decreases in rents.

The Ninth Circuit has just affirmed the district court's decision. The court rejected Beck Park's principal argument

that, because the Regulatory Agreements grant owners the right to request rent increases, the agreements must be read to permit only the owners to initiate the rent adjustment process. The court noted first that the agreements only addressed rent increases, not decreases. But even as to rent increases, the court ruled, the language of the agreements does not compel the conclusion that owners have sole power to initiate adjustments. The court emphasized that this was not a case of a private contract. Here, where a public interest is involved, the court must render an interpretation which favors the public. Thus, consideration of the contract against the backdrop of the National Housing Act is appropriate. In this regard, the court stated that the Secretary could not effectively discharge the congressionally mandated duty to maintain reasonable rentals and to allow owners a reasonable return on investment without the power to adjust rents. Thus, the court concluded, HUD may not contract in a way to impair the exercise of that power, and nothing in the regulatory agreement suggests that it did.

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LAND AND NATURAL RESOURCES DIVISION
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Northwest Commercial Fishermen's Federal Recovery Assn. v United States, No. 81-3490 (9th Cir. Nov. 24, 1982). D.J. # 90-6-0-88.

Jurisdiction: Exclusive Jurisdiction Over Suit Against United States Claiming Interference With Fishing Rights Lies In United States Claims Court.

The Association, made up of non-Indian fishermen, sued the United States for money damages, claiming interference with their fishing rights as the result of the United States v. Washington fishing rights litigation. They alleged, inter alia, that (1) the Government's conduct in connection with that litigation effected an unconstitutional "taking" of their fishing rights, and (2) the Government's legal representation in that litigation constituted tortious misconduct. The district court granted summary judgment for the United States. The court of appeals affirmed the district court's holding that the tort claim was barred because the Association had failed to seek an administrative remedy, as required by the Federal Tort Claims Act, 28 U.S.C. 2675(a). The court of appeals stated that the district court's grounds for rejecting the taking claim were "compelling." Those grounds were that (1) the fishermen had no private property right to take fish, and (2) the taking claim is collaterally estopped by the United States v. Washington decision. However, the court of appeals noted that the Association's money damages claim (as well as the individual claim of each member) exceeded $10,000, so that jurisdiction of the taking claim lies only in the Court of Claims (now the United States Claims Court). Therefore, the court of appeals concluded, the district court lacked jurisdiction to dispose of this claim. Accordingly, the Ninth Circuit "reluctantly" vacated that portion of the district court's judgment rejecting the taking claim and remanded the taking matter to the district court for disposition under 28 U.S.C. 1406(c) (which provides that the district court shall transfer a case to the Court of Claims if the latter court has exclusive jurisdiction and if such transfer is "in the interest of justice").

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Rocky Mountain Oil and Gas Assoc. (RMOGA) v. Watt, Nos. 81-1040, 81-1041 (10th Cir. Nov. 30, 1982). D.J. # 90-1-18-1368.

FLPMA: Under Section 603(c) Mineral Leasing Is Subject To Nonimpairment Standard, Except To "Grandfathered" Activities.

RMOGA challenged the Interior Department's interpretation of Section 603(c) of FLPMA which, according to that interpretation, provides that oil and gas activities on BLM's wilderness study areas (WSA's) may not be conducted if they impair wilderness values, unless such activities were actually being conducted on October 21, 1976 (the date of FLPMA's enactment), in which case they are subject to a less strict standard of no unnecessary or undue degradation. The district court in Wyoming granted summary judgment for RMOGA, holding that Section 603(c) excepts mineral leasing in general, and not just activities occurring when FLPMA was enacted, from the "nonimpairment standard" for WSAs. The Government and intervenors Sierra Club, et al. appealed. The Government requested reversal of the district court's decision only as to "post-FLPMA" leases (i.e., leases issued after October 21, 1976), because of Interior's position that "valid existing rights" granted by "pre-FLPMA" leases were expressly protected by FLPMA itself. Intervenors requested that the decision below be reversed as to all leases.

The Tenth Circuit, in a 37-page opinion, reversed as to all leases. The court held that the doctrines of ripeness, exhaustion and primary jurisdiction did not bar review on the merits. The court then determined that the language and legislative history of Section 603(c) indicated that mineral leasing in general is subject to the "nonimpairment standard," with an exception for "grandfathered" activities. The court did not decide the issue of whether Interior's "valid existing rights" position was justified, since this position was formulated after the district court's decision and the court of appeals was reviewing only the narrow question of the interpretation of Section 603(c), which was the basis of the district court's decision.

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Sierra Club v. Hennessy (Westway), No. 82-6175 (2nd Cir. Dec. 6, 1982). D.J. # 90-5-1-4-139.

Federal Highway Administration Ministerial Acts Of Reimbursement Of Federal Lands To State Sustained Even While Study Of Environmental Impacts Of Westway Continue.

The court of appeals reversed the permanent injunction entered by the district court preventing Federal reimbursement of the State of New York for its earlier acquisition of the right-of-way for the Westway project. Plaintiffs were unsuccessful in obtaining injunctive relief until after the State had acquired land needed for the highway. The district court enjoined the Federal Highway Administration from reimbursing the State for its purchase, on the theory that such a commitment of funds would prejudice the Federal Government's ongoing reconsideration of the environmental impacts of Westway. The court of appeals disagreed, finding that since the State's obligation to pay for the right-of-way had already become fixed, FHWA's "merely ministerial" act of reimbursement would pose no significant threat to the objectivity of FHWA's or the State's reconsideration of Westway. The court of appeals also found that the district court had abused its discretion in failing to consider the financial disruption to the State caused by non-receipt of $90 million of Federal funds to pay for its already-acquired right-of-way.

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City and County of Denver v. Bergland, No. 81-1852 (10th Cir. Dec. 9, 1982). D.J. # 90-1-4-2057.

City Not Authorized To Vary Alignment Of Original Right-Of-Way Grant From Forest Service.

In 1924, the Department of the Interior, acting pursuant to Section 4 of the Act of February 1, 1905, 33 Stat. 628, partially repealed, Section 706(a), Federal Land Policy and Management Act of 1976 ("FLPMA"), 90 Stat. 2743, 2793, issued Denver a right-of-way for the construction of a transbasin water diversion facility on national forest lands. As

required by the applicable regulations, Denver's right-of-way application consisted of a survey map, which Denver officials swore to be accurate, and the application described the project as one consisting, among other things, of "canals and ditches."

In the late 1930's and early 1940's, Denver constructed, and placed in operation, a portion of its project. In constructing this portion of the project, however, Denver utilized conduit rather than "canals and ditches" and it constructed along an alignment different than the precise route depicted in its right-of-way application. In 1978, Denver resumed construction of its project, again using conduit and following along an alignment dictated by its previous construction, which varied from its approved right-of-way application. The Forest Service then issued a stop order directing Denver to cease construction. The Forest Service ruled that Denver could continue its construction as planned only by applying for and obtaining a right-of-way authorization pursuant to Section 501(a) of FLPMA, 43 U.S.C. 1761, by which Congress, among other things, transferred the authority "to grant, issue, or renew rights-of-way" concerning national forest lands from the Secretary of the Interior to the Secretary of Agriculture. The grant of any such right-of-way would be subject to the requirements of NEPA. Denver sought judicial review, contending, among other things, that it had broad general authority to construct its project; that it was not constrained to follow the precise route and methods of construction described in its application; and, that the Government was estopped from attempting to restrain Denver from completing the project. The district court, however, upheld the Forest Service and Denver appealed.

The court of appeals affirmed in part and reversed in part. The court ruled that Denver's 1924 right-of-way did not authorize Denver to vary the alignment of the project, although it also found that the use of conduit was consistent with the original right-of-way grant. As Denver had no authorization to deviate from the approved route, the Forest Service, the court found, had properly directed Denver to cease construction on national forest lands other than those described in the 1924 approved application. The court went on, however, to rule that Denver's appropriate remedy was to file an application with the Department of the Interior for an amended right-of-way under the 1905 Act, rather than a new or renewed right-of-way from the Secretary of Agriculture under FLPMA. The court further held that such an amended application would be subject to the

requirements of NEPA. The court rejected Denver's estoppel argument and several other contentions.

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OFFICE OF LEGISLATIVE AFFAIRS
Assistant Attorney General Robert A. McConnell

SELECTED CONGRESSIONAL AND LEGISLATIVE ACTIVITIES

DECEMBER 22, 1982 - JANUARY 5, 1983

98th Congress. The 98th Congress convened on January 3, 1983. Full legislation activity will not commence until January 25, 1983.

VOL. 31 January 21, 1983 NO. 1

Federal Rules of Evidence

Rule 612. Writing Used to Refresh Memory.

Rule 106 Remainder of or Related Writings or Recorded Statements.

In order to refresh his memory during his testimony, defendant's witness consulted a portion of a report he had previously written relating to defendant's activities. At the close of his testimony the defense moved to have that portion of the report admitted into evidence. The prosecution then sought to have the entire report admitted. Over defendant's objections, the trial judge permitted the entire document, much of which was damaging to the defendant, to be shown to the jury, finding that since the defense had introduced a part of the report, the prosecution could compel the admission of the entire document. Defendant appealed.

The court of appeals held that the trial judge had an obligation pursuant to Rule 612 to examine the writing in camera and excise any irrelevant matter; the prosecution did not have the right to see, much less to introduce into evidence, any portion of the document not related to the subject matter of the testimony. The common law "rule of completeness", relied upon by the trial judge, has been codified in Rule 106 and is intended only to eliminate misleading impressions caused by taking a statement out of context; it covers an order of proof problem, and is not designed to make admissible evidence that should be excluded under Rule 612.

(Reversed and remanded for new trial.)

United States v. Paul K. Costner, 684 F.2d 370 (6th Cir. July 30, 1982).

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CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

(as provided for in the amendment to the Federal postjudgment interest statute, 28 U.S.C. §1961, effective October 1, 1982)

Effective Date	Annual Rate
10-01-82	10.41%
10-29-82	9.29%
11-25-82	9.07%
12-24-82	8.75%

NOTE: When computing interest at the daily rate, round (5/4) the product (i.e., the amount of interest computed) to the nearest whole cent.

U.S. Department of Justice

Civil Division

VOL. 31 JANUARY 21, 1983 NO. 1 35

Office of the Assistant Attorney General *Washington, D.C. 20530*

27 DEC 1982

MEMORANDUM

TO: All U. S. Attorneys

FROM: J. Paul McGrath
Assistant Attorney General
Civil Division

SUBJECT: The Model Rule of the Judicial Conference for Continuing Bankruptcy Jurisdiction

In Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 50 U.S.L.W. 4892 (U.S. June 28, 1982), the Supreme Court declared unconstitutional the broad grant of jurisdiction to bankruptcy courts contained in § 241(a) of the Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549. The Supreme Court stayed its decision to enable Congress to act. However, the stay expired on December 24, 1982, and Congress did not cure the constitutional infirmities.

On December 3, 1982, the Judicial Conference circulated a proposed model rule providing for the continued operation of the bankruptcy courts. We expect that the model rule will be adopted by the district courts of each Federal circuit. Please confirm the adoption of the model rule in your jurisdiction. Local variations from the model are possible but not expected.

The premise of the model rule is that the Supreme Court in Northern Pipeline did not invalidate all bankruptcy jurisdictional grants in the Bankruptcy Reform Act and that bankruptcy jurisdiction reverts to the district courts. The model rule refers all bankruptcy cases and proceedings to bankruptcy judges; however, the district court may withdraw the reference at any time. Unless withdrawn, the bankruptcy judge will adjudicate most disputes in the traditional manner. The principal exceptions are jury trials, which are forbidden to bankruptcy courts, and "related" proceedings. "Related" proceedings are those not uniquely arising in bankruptcy brought against parties who have not filed claims against the estate. "Related" proceedings may be adjudicated by the bankruptcy court unless the district court withdraws the reference. In a "related" proceeding, the bankruptcy court may issue only

proposed judgments which require execution by the district court to be effective except where the parties consent otherwise. Review of any bankruptcy court adjudication is by the district court. The scope of review is left to the district court's discretion, including power to relitigate any issue de novo.

The Department of Justice supports the constitutionality and efficacy of the model rule. In cases you are litigating in bankruptcy courts in behalf of the United States, you should not contest proceeding before the bankruptcy court on grounds that bankruptcy jurisdiction has lapsed or that the model rule is defective. Of course, any right granted by the rule may be claimed in behalf of the United States, including moving to withdraw the reference in the proper case.

Questions with regard to this and related issues should be directed to Tracy Whitaker of the Commercial Litigation Branch (FTS 724-7154). Thank you.