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TABLE OF CONTENTS

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POINTS TO REMEMBER

Collection Action Respecting Outstanding Fines Imposed Under the Wagering Tax Laws Which is Affected by Marchetti-Grosso

The following views were expressed in reply to an inquiry concerning the effect of the decisions in Marchetti v. United States, 390 U.S. 39 (1968), and Grosso v. United States, 390 U.S. 62 (1968), upon outstanding fines imposed for violation of the wagering tax laws (26 U.S.C. 4401, et seq.):

> Marchetti-Grosso decided that the proper assertion of the privilege against self-incrimination provided a complete defense against criminal punishment for violation of the wagering tax laws. Later, in United States v. Coin and Currency, Etc., 401 U.S. 715, 91 s. Ct. 1041 (1971), a majority of the court viewed Marchetti and Grosso as holding that gamblers had the Fifth Amendment right to remain silent in the face of the statute's command that they submit reports which could incriminate them and, further, that in the absence of a waiver of that right, they could not properly be prosecuted at all. Coin and Currency also announced the retroactive application of Marchetti-Grosso to wagering tax law violations.

As to fines which were adjudged as punishment in criminal actions, Marchetti-Grosso, as ramified in Coin and Currency, would be applicable. Accordingly, we are of the view that collection action should not be taken with respect to uncollected fines in contested cases. Further, we perceive no general requirement to initiate any court process in relation to outstanding criminal judgments in cases of this nature. In this connection, it should be noted that the Department considers that fines which have been collected under subsisting judgments are not refundable.

(CRIMINAL DIVISION)

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ANTITRUST DIVISION

Assistant Attorney General Richard W. McLaren

DISTRICT COURT

CLAYTON ACT

CONSENT JUDGMENT ENTERED IN SECTION 7 OF CLAYTON ACT CASE.

United States v. Asiatic Petroleum Corporation, et al. (D. Mass.; Civ. 70-1807-M; October 4, 1971; DJ 60-57-037-7)

On October 4, 1971, Judge Frank J. Murray, United States District Court, District of Massachusetts, signed a consent Final Judgment terminating the captioned case.

The complaint filed on December 8, 1970, alleged that the acquisition by Asiatic Petroleum Corporation of the fuel oil business of C. H. Sprague & Son Company in 1969, violated Section 7 of the Clayton Act.

Asiatic and Sprague are engaged in the distribution and sale of fuel oil, primarily to wholesalers who operate deepwater terminals along the East Coast. The complaint charged that potential competition between Asiatic & Sprague in the sale of residual fuel oil may be eliminated; actual and potential suppliers of residual and distillate fuel oil to Sprague may be foreclosed from a substantial segment of the market; actual and potential purchasers of residual fuel oil may be foreclosed from a substantial source of supply; and that Sprague had been eliminated as a substantial independent competitive factor in the sale and distribution of residual and distillate fuel oil.

The Final Judgment orders Asiatic, within eighteen (18) months from the date of entry of the judgment, to either (a) divest all of the Sprague Stock, or (b) to cause Sprague to divest the Sprague Oil Business, on such a basis as will permit the Sprague Oil Business to be maintained as a viable operating business in competition with other distributors and marketers of fuel oil in the New England area.

Sprague is required by the judgment to offer, the purchaser of the divested assets a supply contract for not more than three years for all or a portion of its requirements for residual fuel oil.

Asiatic is enjoined, for a period of ten years from the date of entry of the judgment, from acquiring, directly or indirectly, the stock, assets, property or business, or any part thereof, or from merging with any person

engaged in the distribution or marketing of distillate or residual fuel oil in New England, unless it has obtained the prior written consent of the plaintiff.

Asiatic is further ordered and directed, should Sprague Stock be divested, that such stock shall not be reacquired by Asiatic, and should the Sprague Oil Business be divested, it shall not be reacquired by Sprague or acquired by Asiatic.

Staff: Charles D. Mahaffie, Jr., John H. Waters, Charles F. B. McAleer, Robert J. Ludwig, Arthur A. Feiveson, Julius Tolton (Economic Section) (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General L. Patrick Gray, III

COURTS OF APPEALS

ADMIRALTY

SIXTH CIRCUIT, BY 2-1, HOLDS THAT A SUIT FOR THE DESTRUCTION OF AN AIRCRAFT THAT HAD BECOME DISABLED OVER LAND BUT HAD CRASHED INTO LAKE ERIE IS NOT COGNIZABLE IN ADMIRALTY.

Executive Jet Aviation, Inc. v. City of Cleveland, Ohio (C. A. 6, No. 20706; decided August 24, 1971; D.J. 145-173-65)

Executive Jet's aircraft, immediately after becoming airborne from a Cleveland, Ohio lakeside airport but while still over the runway, struck a large number of seagulls flying over the runway in its flight path. The impact of the aircraft with the seagulls caused an almost immediate total loss of the aircraft's power and a substantial reduction in the aircraft's air speed. As a result, the aircraft lost altitude, struck the airport perimeter fence and the top of an adjacently-parked pickup truck, and finally came to rest in Lake Erie a short distance off shore.

Executive Jet, doing business principally out of Columbus, Ohio, brought suit in admiralty for the total destruction of its aircraft against the City of Cleveland, as the airport owner and operator, the airport manager, and an FAA air traffic controller on duty at the time of the crash. The district court, assuming Executive Jet's position that most of the aircraft damage occurred when it crashed and sank into the navigable waters of Lake Erie, nevertheless held that the case was not cognizable in admiralty. In reaching that conclusion, the court determined that it was bound by the legal standard incorporating the "locality alone" test and the "maritime nexus" test of admiralty jurisdiction announced in Chapman v. City of Grosse Pointe Farms, 385 F. 2d 962 (1967). By that standard, in order to exclude from admiralty jurisdiction those cases involving torts committed on land rather than on some navigable body of water, the Sixth Circuit declared that "reference should properly be made to the locality where 'the substance and consummation of the occurrence which gave rise to the cause of action took place'" or "to the place where the negligent act or omission becomes operative or effective upon the plaintiff" (385 F. 2d at 964, 966). But the Sixth Circuit went on to state that admiralty jurisdiction "may not be based solely on the locality criterion" and declared that, as a second part of the standard, "[a] relationship must exist between the wrong and some maritime

service, navigation or commerce on navigable waters" (385 F. 2d at 966). Applying the Chapman standard, the district court found that the locality of the tort was on land, that the eventual crash of the aircraft into Lake Erie was "at best fortuitous", and that "the operative facts of the claim * * * are concerned with the land-connected aspects of air commerce". The Court distinguished Weinstein v. Eastern Airlines, Inc., 316 F. 2d 758 (C. A. 3, 1963), and similar cases which sustained admiralty jurisdiction in similar circumstances, on the ground that in those cases, the courts have had difficulty in determining where the tort occurred because "it was impossible to prove whether or not something 'started to go wrong over land before the plane reached the sea'".

On appeal, two members of the Sixth Circuit (Phillips and McCree, J.J.), affirmed on the ground that the cause of action arose on land and not on navigable water. With regard to Weinstein, Judge Phillips found that it "produces the same result we have reached when applied to the facts of the present case", whereas Judge McCree read it as not "necessarily contradicting" their view.

Judge Edwards dissented. He believed "that the facts of this case require us to accept or reject Weinstein * * * and * * * to decide for this Circuit whether air ships, which are increasingly displacing water-borne ships in maritime commerce, are within the maritime jurisdiction when they crash on navigable waters." He concluded that the Court should adopt the Weinstein rule that "tort claims arising out of the crash on a land-based aircraft on navigable waters within the territorial jurisdiction of a state are cognizable in admiralty."

Staff: Robert V. Zener (formerly of the Civil Division) and James C. Hair (Civil Division)

MILITARY SELECTIVE SERVICE ACT

SECTION 10(b)(3) OF THE MILITARY SELECTIVE SERVICE ACT, 50 U. S. C. 460(b)(3), BARS REGISTRANTS' ATTACK ON THE MINISTERIAL EXEMPTION.

James Austin Imus, et al. v. United States (C. A. 10, No. 394-70 and 395-70, decided September 8, 1971; D.J. 25-77-420)

This appeal arose out of the granting of injunctive relief to two Utah registrants, Van Orden and Jensen, who had been permitted to intervene in an action commenced by James Imus challenging inter alia the classification of missionaries of the Church of Jesus Christ of Latter-Day Saints as ministers. Imus was subsequently classified IV-F.

Both Van Orden and Jensen alleged that they had been improperly classified by their local boards, and further asserted as the basis of their challenge to the ministerial exemption, that the classification of Mormon missionaries as ministers during the period of their service served to reduce the number of registrants eligible for service and thus made their induction more likely.

On appeal, the Tenth Circuit ordered the district court to vacate the injunctive relief as to both Van Orden and Jensen, and further ordered both appellees dismissed from the main action. With respect to appellees' allegations of improper individual classification, the court held that neither allegation came within the limited exception of Oestereich v. Selective Board, 393 U.S. 233 and accordingly such classifications were not entitled to pre-induction judicial review. The court further rejected appellees' constitutional challenge, holding: "In view of the affirmance by the Supreme Court in Boyd v. Clark [393 U.S. 316], we must hold that the exceptions to the prohibition in Section 10(b)(3) of the Selective Service Act at present are limited to those described in Oestereich and in Clark v. Gabriel [393 U.S. 256]."

Staff: Thomas J. Press (Civil Division)

TORT CLAIMS -- INDEMNITY

THIRD CIRCUIT HOLDS PENNSYLVANIA LAW BARS THE GOVERNMENT FROM RECOVERING INDEMNITY FROM A PENNSYLVANIA EMPLOYER WHOSE EMPLOYEE HAS SUCCESSFULLY SUED THE GOVERNMENT FOR INJURIES SUSTAINED WHILE WORKING IN A GOVERNMENT BUILDING.

O'Neill v. United States (C.A. 3, No. 19095, decided September 22, 1971; D.J. 157-62-446)

O'Neill was injured while working in a Post Office building, and brought an action under the Federal Tort Claims Act against the United States, which impleded O'Neill's employer, Ambrose-Augusterfer Corporation. The district court found both the United States and Ambrose negligent, and awarded judgment to O'Neill and to the Government on its indemnity claim.

On appeal, the Third Circuit affirmed the finding of the Government's liability to O'Neill, but reversed the award of indemnity against his employer. The court indicated that it was influenced by the fact that in the 56-year history of Pennsylvania Workmen's Compensation, no employer participating in the compensation plan has ever been required to

pay more than the amount of his statutory liability under the Act. In addition, the court noted that because of provisions in the Pennsylvania Constitution, a compulsory workmen's compensation act is impermissible, and therefore the Pennsylvania program is voluntary. From this the court reasoned:

> Not only would the result reached in Fisher (299 F. Supp. 1) and in the instant case be contrary to the spirit of the Act, it obviously would encourage employers to reject the Act. * * * *. We conclude that the necessity as a matter of public policy that Pennsylvania employers not be driven to reject its Workmen's Compensation Act requires a reversal of the judgment of indemnity recovered in this case by the Government. The overwhelming majority of decisions in workmen's compensation jurisdictions is in accord. Of course, nothing in our decision affects the Government's right to contribution from Ambrose as that right has been limited by Pennsylvania law.

Staff: Ronald R. Glancz (Civil Division)

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CRIMINAL DIVISION

Acting Assistant Attorney General Henry E. Petersen

COURT OF APPEALS

THEFT OF MAIL MATTER BY POSTAL EMPLOYEE (18 U.S.C. 1709)

CONSENSUAL SEARCHES UNDER THE FOURTH AMENDMENT

United States v. Bailey (C.A. 5, No. 71-1153, September 3, 1971; D.J. 48-017-3)

In United States v. Bailey, the Fifth Circuit Court of Appeals was faced with an unusual factual situation. The defendant letter carrier handled a test letter containing marked bills and failed to make proper disposition of this letter. Consequently, the defendant was approached by two postal inspectors outside the post office and was asked if he would accompany them to their office in the downtown post office. He was not told that he was under arrest and there was no physical contact between the defendant and the postal inspectors.

On arrival at the postal inspectors' office the defendant was given the full warnings and advice required by Miranda whereupon he executed a written waiver form. The inspectors informed him that a letter he had handled that day on his route had not been properly accounted for. He denied any knowledge of the letter and then stated: "Do you want to search me?" Contemporaneously with this statement, he took his wallet from his pocket and extended it toward one of the inspectors who declined to take it but acknowledged that he wanted to see its contents "if you don't mind." The defendant thereupon opened his wallet, extracted some bills, and tendered them to the inspector who examined them and discovered that the serial numbers matched those on the bills placed in the test letter.

The Court held that the defendant's voluntary act in accompanying the postal inspectors to the main downtown post office did not constitute a de facto arrest and further found it unnecessary to decide if these facts constituted a "search" in the accepted legal sense. The Court further commented that assuming arguendo this occurrence could be categorized as a search, the evidence indicated unequivocably that the defendant voluntarily consented for the inspectors to examine this currency.

Staff: United States Attorney Charles White-Spunner, Jr., Assistant United States Attorney Irwin Coleman, Jr. (S.D. Alabama)

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Shiro Kashiwa

COURTS OF APPEALS

CONDEMNATION

VALUATION OF LESSEE'S INTEREST LIMITED TO UNEXPIRED TERM OF LEASE AND MAY NOT INCLUDE IMPROVEMENTS' REMAINING-LIFE VALUE BEYOND LEASE TERM; RENEWAL EXPECTANCY IS NOT "PROPERTY" WITHIN MEANING OF FIFTH AMENDMENT.

United States v. 22.95 Acres in Whitman County, Wash. (Almota Farming and Elevator Co.) (C. A. 9, No. 24757, September 23, 1971; D. J. 33-49-777-124)

The issue in this condemnation case involved the valuation of a lessee's grain elevator when on the date of taking seven plus years only remained. The Government sought to limit the elevator's value to its use in place for the remaining term of its lease, $130,000. Arguing that it had been in possession since 1919 and had been assured by its lessor that it could expect to remain indefinitely, the elevator company sought to value its elevator based on the remainder of its useful life, 25 years, without regard to the term of its lease, namely $274,625, and the district court agreed.

The Court of Appeals reversed and remanded for entry of judgment at the Government's figure. The Court held that in condemnation the United States pays for legal interests taken only, not a condemnee's disappointed expectancy. Here, the elevator company's rights upon the expiration of its lease were limited to either removing its improvements or selling them to its lessor (or to a successor lessee) at a price dictated completely by the purchaser. Any additional value was, in the words of Justice Holmes, purely a "speculation or a chance"--which is not "property" within the meaning of the Fifth Amendment. The Court expressly disagreed with United States v. Certain Property, Borough of Manhattan (193 Realty Corp.), 388 F. 2d 596 (C. A. 2, 1968).

Staff: Jacques B. Gelin (Land and Natural Resources Division); Assistant United States Attorney Robert M. Sweeney (E. D. Wash.)

RIGHT TO TAKE; NECESSITY FOR TAKING PROPERTY NOT JUDICIALLY REVIEWABLE.

United States v. 80.5 Acres in Shasta County, Calif. (McGuire) (C. A. 9, No. 25093, September 29, 1971; D. J. 33-5-364-2322)

Section 3 of the Trinity River Project Act of 1955, 69 Stat. 720, enumerates five purposes for which the Secretary of the Interior may acquire land for minimum basic facilities: (1) access to project lands; (2) maintenance of public health and safety on project lands; (3) protection of project lands; (4) conservation of project lands; and (5) recreation facilities on project lands. The Act limits the Secretary by denying him the power to acquire lands solely for conservation and recreation unless he receives further congressional authorization. McGuire's tract did not directly border on the reservoir, but impeded access to project lands. The Government filed a declaration of taking of McGuire's tract, incorporating the exact language of the Act, namely, that the land was to be used for maintenance of minimum basic facilities, for access to and for maintenance of public health, and for the safety and protection of public property. McGuire moved for summary judgment dismissing the complaint on the ground that his land was to be used solely for recreation, contrary to the Act's express prohibition. The district court granted his motion for summary judgment and dismissed the declaration of taking, holding that the Government could only acquire access lands for the project's principal purpose, reclamation, not for recreation.

The Court of Appeals reversed, holding that the necessity for taking private property is not judicially reviewable; that courts cannot evade the rule of non-justiciability by characterizing the question as one of purpose rather than necessity; and that the district court erred by "second-guessing" the Secretary and concluding that, regardless of his stated reasons, he was seeking to acquire land for an impermissible purpose.

Staff: Jacques B. Gelin (Land and Natural Resources Division); Assistant United States Attorney Paul Locke (E. D. Calif.)

PUBLIC LANDS; SOVEREIGN IMMUNITY; ADMINISTRATIVE LAW

WILDERNESS ACT OF 1964; INJUNCTION AGAINST TIMBER SALE ON AREA CONTIGUOUS TO PRIMITIVE AREA; EXHAUSTION OF ADMINISTRATIVE REMEDIES.

Parker v. United States (C. A. 10, Nos. 404-70, 405-70, 406-70, October 1, 1971; D. J. 90-1-4-189)

A number of individuals, organizations and municipalities brought suit against the Secretary of Agriculture and certain subordinates and a lumber company, to enjoin a timber sale in an area, contiguous to an existing primitive area, which was found to be predominantly of wilderness value.

The plaintiffs argued that Section 3(b) of the Wilderness Act of 1964, 78 Stat. 890, 16 U.S.C. sec. 1132(b), requires the Secretary of Agriculture to refrain from conducting a timber sale in such an area until the President and Congress have decided whether to include such an area in the wilderness system.

The Government conceded that the Wilderness Act imposed a mandatory duty upon the Secretary to study and report on wilderness suitability of all existing wilderness areas, adding, however, that although the Secretary could recommend inclusion of lands outside of existing primitive areas in the wilderness system, these lands remained subject to his discretionary management authority. The Government added that the Act's legislative history revealed that Congress had represented to the timber industry that it did not intend to remove the Secretary's discretionary authority over contiguous lands. Accordingly, since under the doctrine of sovereign immunity, the Secretary's discretionary management of public lands was not subject to judicial review, the Government asserted that the Court lacked jurisdiction.

The district court agreed that, although the Secretary's discretionary management under multiple use was unreviewable, Section 3(b) of the Wilderness Act requires the Secretary to refrain from conducting a timber sale in such an area until the President and Congress have decided whether to include it in the wilderness system.

The Court of Appeals affirmed, holding that this suit against the United States was not unauthorized, nor the judgment an unjustified judicial interference with the management powers of the federal appellants. The Court rejected the lumber company's assertion of the doctrine of exhaustion of administrative remedies.

Staff: Jacques B. Gelin and Arthur D. Smith (Land and Natural Resources Division); and Nelson Grubbe (formerly of the Land and Natural Resources Division)

DISTRICT COURT

ENVIRONMENT

REFUSE ACT; 33 U.S.C. SEC. 407 HELD NOT LIMITED TO NAVIGATION IMPAIRMENT AND NOT TO REQUIRE SCIENTER; SUFFICIENCY OF INDICTMENT; WATER QUALITY IMPROVEMENT ACT.

United States v. United States Steel Corp., et al. (N. D. Ill., No. 70 Crim., July 28, 1971; D.J. 62-23-75)

The Government indicted the United States Steel Corporation and Charles Kay, an executive, for polluting the waters of Lake Michigan in violation of the Refuse Act, 33 U.S.C. sec. 407. The pollution charged was the corporation's discharges of blast furnace wastes into the lake. The individual defendant was charged with aiding and abetting the violation, by authorizing the discharge.

The court ruled that the Refuse Act reaches discharges which pollute but do not obstruct navigation, as well as discharges which obstruct navigation. The Water Quality Improvement Act, 33 U.S.C. sec. 1151 et seq., was held not to have superseded the Refuse Act by express provision.

The court sustained the sufficiency of the indictment, rejecting contentions that scienter must be alleged and that, since 33 U.S.C. sec. 421 prohibits discharges into Lake Michigan, the indictment should have rested on the more specific statute.

Staff: Bernard Rothbaum, Jr. (Land and Natural Resources Division); Assistant United States Attorney Howard M. Hoffman (N. D. Ill.)

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