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ANTITRUST DIVISION
Assistant Attorney General Thomas E. Kauper

SUPREME COURT

SHERMAN ACT

SUPREME COURT REVERSES DISTRICT COURT ON QUESTION OF PATENT VALIDITY.

United States v. Glaxo Group Limited (No. 71-666; January 22, 1973; DJ 60-21-142)

On March 4, 1968, the United States filed a civil antitrust suit against Glaxo Group Ltd. ("Glaxo" and Imperial Chemical Industries Ltd. ("ICI"), charging that restrictions relating to the sale of bulk griseofulvin, contained in a series of agreements between ICI and Glaxo, ICI and American Home Products Corp., and Glaxo and Johnson & Johnson, Inc., were unreasonable restraints of trade. In addition, the government challenged the validity of ICI's dosage form patent.

The case was decided in the district court without receiving testimony, on a series of motions. In a June 4, 1969 opinion (reported at 302 F. Supp. 1), the United States District Court for the District of Columbia held that the ICI-AMHO agreement, barring AMHO from selling bulk from the griseofulvin it purchased from ICI, was a per se violation of the Sherman Act. Because ICI disclaimed any reliance on its patent in defense of the antitrust claims, the district court also held that the government lacked standing to challenge the validity of the ICI patent, and struck from the complaint the allegations that the patent was invalid. The court also refused to permit the government to amend its complaint to allege, inter alia, that Glaxo's patent on micro-size (finely ground up) griseofulvin was invalid. In decisions of the District Court on November 20, 1969, and April 30, 1970, the Glaxo agreements with Schering and Johnson & Johnson, prohibiting bulk sales of both patented and unpatented griseofulvin sold to the licensees by Glaxo, and the ICI-Glaxo pooling agreement provision that ICI would endeavor to prevent its licensees from selling griseofulvin in bulk, respectively, were held to be per se violations of the Sherman Act.

The government sought a decree prohibiting further bulk sales restrictions on all drugs marketed by Glaxo and ICI, requiring Glaxo and ICI to grant reasonable royalty licenses under their griseofulvin patents, and requiring them to sell griseofulvin in bulk on reasonable and nondiscriminatory terms. The District Court's final Judgment of June 17, 1971, granted the prohibitory injunction, but refused to order any type of mandatory sales or licensing relief.

The United States then appealed directly to the Supreme Court, under § 2 of the Expediting Act. The questions presented involved (1) standing of the government in an antitrust suit to challenge the validity of patents involved in illegal restraints of trade, where the defendants do not rely on the patents to justify their conduct, and (2) the refusal of the district court to grant compulsory licensing and sales relief.

The Supreme Court, in an opinion written by Mr. Justice White, held that the district court "erred in striking the allegations of the government's complaint dealing with the patent validity issue and in refusing to permit the government to amend its complaint with respect to this issue." In reaching its decision, the Court agreed with the government that the district court had taken "an unduly narrow view of the controlling cases." The Court re-examined such prior decisions as United States v. Bell Telephone Co., 167 U.S. 224 (1897), which permitted the United States to sue to set aside a patent for fraud or deceit associated with its issuance: United States v. United States Gypsum Co., 333 U.S. 364 (1948) which declared that, to vindicate the public interest in enjoining violations of the Sherman Act, the United States could attack the validity of patents relied upon to justify conduct otherwise in violation of the antitrust laws; Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942); Edward Katzinger Co. v. Chicago Metallic Mfg. Co., 329 U.S. 394 (1947); and MacGregor v. Westinghouse Electric & Mfg. Co., 329 U.S. 402 (1947). The Court stated that "the essence" of the preceding three cases is that a patent licensee is free to challenge the validity of the patent under which he licensed "when he alleges conduct by the patentee which would be invalid [illegal] under the antitrust laws, absent the patent." The Court went on to say that Katzinger and Gypsum were in the tradition of Pope Mfg. Co. v. Gormully, 144 U.S. 224, 234 (1892); and Lear v. Adkins, 395 U.S. 653, 670 (1969) -- which seek to keep competition from being repressed by worthless, invalid patents. In conclusion, the Court stated: "We think that the principle of these cases is sufficient authority for permitting the government to raise and litigate the validity of the ICI-Glaxo patents in this antitrust case." The Court cautioned, however, that nonfraudulently enforcing a patent that turns out to be invalid is not an antitrust violation in itself --"we do not recognize unlimited authority in the government to attack a patent by basing an antitrust claim on the simple assertion that the patent is invalid."

It also ruled "Nor do we invest the Attorney General with a roving commission to question the validity of any patent lurking in the background of an antitrust case." ". . . . [T]he district courts have jurisdiction to entertain and decide antitrust suits brought by the government and where a violation is found to fashion appropriate relief. This often involves a substantial

question as to whether it is necessary to limit the bundle of rights normally vested in the owner of a patent ..."This usually assumes a valid patent, but if this basic assumption is itself challenged, there is no good reason of patent policy or judicial administration why the antitrust court should not resolve the challenge.

With respect to compulsory sales and licensing relief, the Supreme Court stated: "Here, we think not only that the United States presented a substantial case for additional relief, but we are of the view that it was sufficiently convincing that the District Court, wholly aside from the question of patent validity, should have ruled favorably on the demand for mandatory sales and compulsory licensing."

In arriving at its decision on the relief issue, the Court stated that "it is clear from the evidence that the ICI dosage form patent, along with other ICI and Glaxo patents gave the appellees the economic leverage with which to insist upon and enforce the bulk sales restrictions imposed on the licensees.... There can be little question that the patents involved here were intimately associated with and contributed to effectuating the conduct that the District Court held to be a per se restraint of trade in griseofulvin." The Court noted that the appellee's licensees were the only suppliers of griseofulvin in the United States and that they sold it in dosage form at virtually identical prices. The Court also recognized, "There is little or no reason to think that the appellees or their licensees, now that the bulk sales restrictions have been declared illegal, will begin selling in bulk. It is in their economic self-interest to maintain control of the bulk form of the drug in order to keep the dosage-form, wholesale market competition market competition-free. Bulk sales would create new competition ... and would presumably lead to price reductions as the result of normal competitive forces." Therefore, ICI and Glaxo should have been required to sell bulk form griseofulvin on reasonable and nondiscriminatory terms and to grant patent licenses at reasonable royalty rates to all bona fide applicants in order to "'pry open to competition' the griseofulvin market which 'has been closed by defendants' illegal restraints.' International Salt Co., 332 U.S., at 401."

Mr. Justice Rehnquist, with the concurrency of Mr. Justice Stewart and Mr. Justice Blackmun, dissented on the ground that: "There is neither statutory nor case authority for the existence of a general right of either private individuals or the government to collaterally challenge the validity of the issued patents." and that the majority was granting a "sort of roving commission" to the governement to challenge the validity of any patent owned by a antitrust defendant which is in any way related to the factual background of the claimed antitrust violation.

Staff: Howard B. Shapiro, Richard H. Stern and Thomas A. Schulz (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Harlington Wood, Jr.

COURTS OF APPEAL

ADMIRALTY

FIFTH CIRCUIT HOLDS THAT GOVERNMENT SUITS FOR BREACH OF CERTIFICATION AGREEMENTS ARE GOVERNED BY GENERAL 6-YEAR LIMITATION RATHER THAN 1-YEAR BILL OF LADING LIMITATION.

United States v. Waterman Steamship Corporation (C.A. 5, No. 71-3424, decided January 4, 1973; D.J. #61-18385

The United States through the Agency for International Development (AID) reimburses volunteer relief organizations for the cost of shipping goods to "less-developed" countries by paying shipping costs to the carrier upon the carrier's certification that it has charged the volunteer organization no more than the prevailing freight rates. The procedures for reimbursement of ocean shipment costs are set out in 22 C.F.R. §202.1 - 202.8. On October 12, 1965, the defendant carrier shipped a cargo of wheat to Turkey for CARE, a volunteer relief organization. In due course, the carrier applied to AID for shipping cost reimbursement, and presented with its application a certification that (1) the sum charged CARE did not exceed the prevailing rate, and (2) that in the event of a breach of any terms of the certification it would make refund to AID. AID thereupon paid the carrier. Later AID determined that the costs paid by it exceeded the prevailing rates and this suit for a refund was filed in 1971, just under 6 years from the dates of shipment. The carrier moved to dismiss, asserting that the government's claim was barred by the 1-year limitation on suits for overcharges contained in the standard bill of lading under which the goods were shipped by CARE. A standard bill of lading provides that"The carrier . . . shall be discharged from all liability in respect of claim for overcharge . . . unless suit is brought . . . within 1 year from the date the goods are delivered". The District Court granted the motion, citing its decision in U.S.v. S.S. Claiborne, 252 F. Supp. 897 (S.D. Ala. 1966), wherein it held that the government as a shipper was governed by the 1 year bill of lading limitation.

The Court of Appeals reversed. The Court found that the government was not bound by the limitation of the bill of lading because: (1) the government was neither party nor privy to the bill of lading, but that there was privity between the carrier and the government on the certification contract; (2) the

certification contract did not set any time limitations for suit for breach of its provisions and hence such suits are governed by the 6-year limitation pursuant to 28 U.S.C. 2415; (3) the certification contract gives the government a cause of action for overcharges independent of causes of action arising under the bill of lading. The Court distinguished Claiborne observing that the fact "that the government was a party to the bill of lading in S.S. Claiborne supports by implication the government's contention in this case that it was not bound by a bill of lading to which it was not a party."

Staff: Harry R. Sachse (Office of the Solicitor General)

APPELLATE RULE 38 - "DAMAGES FOR DELAY"

FIRST CIRCUIT AWARDS DOUBLE COSTS TO GOVERNMENT FOR APPELLANT'S FRIVOLOUS APPEAL.

United States v. Vincent J. Marino (C.A. 1, No. 72-1238, decided January 30, 1973; D.J. #105-78-18

The United States sought recovery against the guarantor of a loan made by the Small Business Administration. The District Court granted the government's motion for summary judgment and the guarantor appealed, alleging that there were genuine issues of material fact to be tried. The Court of Appeals found that this contention was totally without merit, since defendant's affidavits on their face showed no material issues of fact which would preclude a grant of summary judgment. The Court affirmed the judgment of the District Court with double costs to the United States under Rule 38, Federal Rules of Appellate Procedure, which provides: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." Although the rule speaks in terms of "damages for delay" courts of appeal allow damages and costs -- including double costs -- to an appellee if an appeal is frivolous without requiring a showing that the appeal resulted in delay. (See Notes of Advisory Committee on Appellate Rule 38, U.S.C.A. and cases cited therein.)

Staff: United States Attorney Joseph L. Tauro; Assistant United States Attorney Mary M. Brennan.

SOCIAL SECURITY ACT

SIXTH CIRCUIT CLAMPS DOWN ON EXCESSIVE CLAIMANTS' ATTORNEYS' FEES.

Glendal B. Webb v. Richardson (C.A. 6, No 71-2010, decided December 20, 1972; D.J. #137-30-607)

The Secretary appealed from the allowance of attorney's fees by the District Court to claimant's attorney in the amount of 25 percent of accrued benefits awarded in January 1971 retroactive to January 1964. The Court of Appeals remanded.

In a lengthy opinion the Court reviewed the legislative history of 42 U.S.C. 406(b) which limits the amount of attorneys' fees which district courts may award to 25 percent of the accured benefits, and the problems that have arisen in applying the statute. Noting, among other things, that courts have been undecided as to whether the court's award may take into consideration services performed before the agency, and whether the Secretary may award fees based in part upon court representations, the Court of Appeals laid down the following rule for its circuit: "We hold that the tribunal that ultimately upholds the claim for benefits is the only tribunal that can approve and certify payment of an attorney fee, and that the fee cannot exceed 25 percent of the past due benefits awarded by the tribunal. The tribunal making this award can consider all services performed by the attorney from the time the claim was filed by the Social Security Administration." The Court further held that the 25 percent maximum fee should not include the accrual of benefits resulting from unreasonable delays and that fees should not be awarded without an itemization of all legal services rendered. Thus "routine approval of the statutory maximum allowable fee should be avoided in all cases".

Staff: James L. Kelley (Office of Legal Counsel)

Chester Clem v. Richardson (C.A. 6, No. 72-1390, decided February 1, 1973; D.J. #137-30-648)

The government challenged as excessive the allowance by the district court to the claimant's attorneys of a fee of $5,324 for representing him in connection with his claim for Social Security benefits. Citing Webb v. Richardson, supra, the Sixth Circuit found the fee excessive on the basis of the record and reduced the award to $2,800 as recommended by the Department.

Staff: Robert M. Feinson (Civil Division)

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Criminal Division
Assistant Attorney General Henry E. Petersen

COURTS OF APPEAL

DEFENDANT'S RIGHT TO A TRANSCRIPT OF PRIOR PROCEEDINGS

IN REVERSING CONVICTION AND REMANDING CASE COURT HELD THAT, UNDER FACTS AND CIRCUMSTANCES OF CASE, APPELLANT'S MOTION IN HIS SECOND TRIAL FOR A TRANSCRIPT OF THE TESTIMONY OFFERED ON THE FIRST TRIAL SHOULD HAVE BEEN GRANTED.

United States v. Marvin Martin Young (C.A. 6, November 29, 1972, No. 72-1373; D. J. 26-70-415)

In the Eastern District of Tennessee the defendant was charged with receiving and concealing a motor vehicle moving in interstate commerce with knowledge that the vehicle had been stolen, in violation of 18 USC 2313. Defendant's first trial ended with a hung jury. Defendant then moved for a transcript of the testimony offered on the first trial.

At the opening of the second trial the trial judge denied defendant's request in view of the following factors: the two trials were conducted just two weeks apart, the defendant was represented by the same counsel at all times, and there were only three witnesses who testified in both trials. In addition, the trial judge indicated that a reporter was available to read back at any time any portion of the first trial deemed relevant; and, furthermore, there was no material variance in the testimony of the three witnesses who testified in both trials.

The second trial resulted in conviction. Appealing, the defendant alleged that the denial of his request for a transcript was contrary to the principle laid down in Griffin v. Illinois, 351 U.S. 12 (1056) that, as a matter of equal protection, indigent prisoners must be provided with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners.

The Court of Appeals agreed that the transcript should have been provided. The Court indicated that although Britt v. North Carolina, 404 U.S. 226 (1971) provided for a narrow exception to the rule laid down by Griffin v. Illinois, the instant case was not within that exception. In Britt the court held that a defendant is not entitled to a free transcript if it appears that he had an "informal alternative" which was the equivalent of a transcript. However, the Court of Appeals in the instant case was not satisfied that the defendant had the "informal alternative"

referred to in the Britt case. Specifically, the Court of Appeals questioned the trial court's assertions that the defendant had unlimited access to the court reporter during the second trial and that there were no material variances in the testimony of the three witnesses who testified at both trials.

This Court of Appeals decision should not be read as establishing a per se rule that retrial must be delayed for the preparation of a transcript. Rather, the decision should be taken as a warning to prosecutors that in order to avoid delay when any defendant requests a transcript, a good record must be made indicating the lack of need for such transcript.

Staff: United States Attorney John L. Bowers, Jr.
Assistant U. S. Attorney Edward E. Wilson
(Eastern District of Tennessee)

FIREARMS

COURT UPHOLDS CONVICTION FOR MAKING FALSE STATEMENT TO A PAWNBROKER IN THE REDEMPTION OF A FIREARM.

United States v. Huddleston (C.A. 9, No. 72-2779, January 8, 1973; D.J. 80-12c-93

The ninth Circuit Court of Appeals has upheld the conviction of a convicted felon who made false statements to a pawnbroker regarding his status as a convicted felon, during the redemption of a firearm from the pawnbroker.

The Court rejected the appellant's claim that the statutory term "acquisition" was not meant to reach redemption of firearms from a pawnbroker and that its plain meaning is not broad enough to do so. In so holding, the Court concurred with the Tenth Circuit holding in United States v. Beebe, C. A. 10, 1972, 467 F. 2d 222, and refused to follow the holding of the Fifth Circuit in United States v. Laisure, C.A. 5, 1971, 460 F2d 709, 711-712.

The Criminal Division believes that the Laisure case was decided incorrectly and that the Huddleston and Beebe opinions correctly interpret the congressional intention to cover firearms transcactions with pawnbrokers, as part of a regulatory scheme over the sale and acquisition of firearms. This position should be urged in other Circuits if the issue is presented.

Staff: United States Attorney William D. Keller
Assistant U. S. Attorneys Eric A. Nobles and
Laurence W. Campbell
(C.D. CaLif.)

SALE OF FIREARMS TO PERSON TRANSFEROR HAD REASON TO BELIEVE OUT-OF-STATE RESIDENT ILLEGAL UNDER 18 U.S.C. 922(a)(5) EVEN THOUGH TRANSFEREE WAS IN FACT A RESIDENT.

United States v. Colicchio (C.A. 4, No. 71-1882, December 14, 1972; D.J. 80-35-77)

Section 922(a)(5) of Title 18 prohibits any person from selling firearms to any person, other than a licensed dealer, who the transferor knows or has reasonable cause to believe resides out of state. The Court of Appeals for the Fourth Circuit has held that a conviction may be obtained under this section when the purchase is made by a government agent investigating selling firearms without a license, who portrays himself to be an out-of-state resident even though he is in fact a resident of the state where the investigation took place.

The case involved the conviction of Vincent Colicchio, Jr., for a violation of 18 U.S.C. 922(a)(5), selling firearms to an out-of-state resident. Colicchio sold several weapons, including a M-1 rifle, a 12 gauge shotgun, and a .22 weapon, to Robert M. Griffith, an undercover agent of the Bureau of Alcohol, Tobacco and Firearms. Both Colicchio and Griffith were Maryland residents and the sales took place in Maryland. During the course of their negotiations Griffith has told Colicchio that he was a resident of Virginia and the car that Griffith drove to their meetings bore Virginia license plates.

The Court found first that there was no constitutional impediment to the enforcement of the statute, since Congress may enact criminal statutes regulating intrastate commerce. Perez v. United States, 402 U.S. 146 (1971) The Court found that Congress has specifically legislated against intrastate activities of this nature as a part of the federal regulatory scheme to control the interstate commerce in firearms.

The Court also found that Colicchio was guilty of a violation notwithstanding that the BATF agent was a resident of the same state, based upon an interpretation of the statute. The language of the section states in pertinent part that:

> (a) It shall be unlawful -- (5) for any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) to transfer, sell, trade, give, transport, or deliver any firearm to any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) who the transferor knows or has reasonable cause to believe resides in any State other than that in which the transferor resides.
> * * *

Since Colicchio has reasonable cause to believe that the BATF agent was not resident of Maryland, even though he in fact was a resident, the provision of 922(a)(5) covered the sales.

The effect of this holding in the Fourth Circuit is that the violations of this statute can be investigated if an agent in the course of his normal investigations happens upon an individual who is apparently fencing firearms or selling them to out-of-state residents.

Staff: United States Attorney George Beall
Assistant U. S. Attorney Herbert Better
(District of Maryland)

FRAUD - CONSPIRACY

DISCOVERY OF CLASSIFIED PORTIONS OF AF CONTRACT DENIED AS IRRELEVANT; EFFECT OF PRIOR ACQUITTAL OF CONSPIRATOR IN PROVING OVERT ACT.

United States v. Harry C. Bass, Jr., et al. (C.A. 8, Nos. 71-1733, 71-1734, January 11, 1973; D.J. 46-9-193)

The Eighth Circuit recently affirmed the conviction under 18 U.S.C. 371 and 1001 of Harry C. Bass, Jr. and Selb Manufacturing Company (wholly owned by Bass) for fraudulently passing off unacceptable component parts of the F-11 aircraft to General Dynamics who was prime contractor for the Air Force. The Court's decision involved two noteworthy points of law.

The trial court refused to grant the defense access to certain documents--classified portions of General Dynamics' contract with the Air Force and investigative reports by General Dynamics and by the Air Force--on the grounds that these documents were irrelevant to the defense's case. The trial court inspected the documents in camera prior to reaching its decision. The Eighth Circuit, likewise, examined the documents prior to upholding the trial court's decision.

The trial court also allowed the Government to introduce evidence for the purpose of proving that Bass had committed an overt act in furtherance of the conspiracy, even though the other person involved in the act, Townley, had been acquitted of conspiracy charges in an earlier trial. The Eight Circuit, in upholding the trial court's decision, pointed out that Townley's acquittal did not absolve Bass of conspiracy charges, since six other alleged co-conspirators were also involved. Nor, said the Court, was the Government barred from proving that the overt act took place, since that act need not be criminal and need not involve more than one of the conspirators.

Staff: United States Attorney Wilbur H. Dillahunty
Former Assistant U. S. Attorney Sidney McCollum
(E.D. Ark.)

JURISDICTION OF THE PERSON

FOURTH AMENDMENT--SEIZURE OF PERSON; EXTRATERRITORIAL APPLICATION OF 18 U.S.C. 641, THEFT OF GOVERNMENT PROPERTY.

United States v. Cotten and Roberts (C.A. 9, No. 72-1242, Jan. 2, 1973; D.J. 46-1221)

The Ninth Circuit recently affirmed the conviction of James Milton Cotten and William Lowell Roberts under 18 U.S.C. 371 and 641 for knowingly converting property of United States Military Exchanges in Japan for the defendants' own use.

The Court, citing Ker v. Illinois, 119 U.S. 436 (1888), held that the forcible abduction of the defendants from Vietnam to Hawaii via Air Force plane did not deprive the district court in Hawaii of jurisdiction to try the case. The defense had argued that the use of the Air Force plane was a violation of 18 U.S.C. 1385. The Court, citing Frisbie v. Collins, 342 U.S. 519 (1952), stated that the purported violation was not a bar to jurisdiction.

The Ninth Circuit also held that 18 U.S.C. 641 was properly given extraterritorial effect. The Court asserted that extraterritorial application of the statute was permissible in terms of international and constitutional law and that the legislature could not conceivably have enacted such a statute without intending that it be given such application. The Court had previously held that extraterritorial application of 18 U.S.C. 371 was proper in Brulay v. United States, 383 F 2d 345, cert. denied, 389 U.S. 986 (1967).

See also Volume 20, No. 2, January 21, 1972, issue of the United States Attorneys Bulletin, pp. 30-31

Staff: United States Attorney Robert K. Fukuda
Former Assistant U. S. Attorney Joseph M. Gedan
Gary D. Jackson (Special Attorney, Criminal Division)
(District of Hawaii)

* * *

INTERNAL SECURITY DIVISION

ASSISTANT ATTORNEY GENERAL A. WILLIAM OLSON

FOREIGN AGENTS REGISTRATION ACT

OF 1938, AS AMENDED

The Registration Section of the Internal Security Division administers the Foreign Agents Registration Act of 1938, as amended, (22 USC 611) which requires registration with the Attorney General by certain persons who engage within the United States in defined categories of activity on behalf of foreign principals.

FEBRUARY 1973

During the first half of this month the following new registrations were filed with the Attorney General pursuant to the provisions of the Act:

Wilkinson, Cragun & Barker of Washington, D. C. registered as agent of the Dakota Association of Canada. Registrant's agreement was for a 2-year period beginning December 1970 and called for fees and expenses in the amount of $24,364.05. Registrant lobbied in the House and Senate to attempt to have the Dakota Indians of Canada included in H.R. 796, a bill to distribute a judgment to the Mississippi Sioux. Francis L. Horn filed a short-form registration as an attorney.

Activities of persons or organizations already registered under the Act:

The Danish National Tourist Office of New York City filed exhibits on behalf of its foreign principal, the Danish Tourist Board, Cohenhagen. Registrant is a branch of its parent in Copenhagen with a separate budget allotted by the Danish Government and paid quarterly. Registrant engages in public relations activities through service to prospective travelers and informational activities.

Lynch, Wilde & Company, Inc., of Washington, D. C. filed exhibits in connection with its representation of Companhia Hidro Eletricia do Sao Francisco, Rio de Janeiro, Brazil. Registrant's agreement began on January 20, 1972, for a duration of 3 years and calls for a fee of $700 per month plus expenses. Registrant will engage in general administrative services, emergency purchasing and shipping, will maintain liaison with lending agencies, will develop and supervise educational and training programs and pro-

vide technical consultation, and will advise the foreign principal on electric power developments in the United States.

Maurice Feldman of New York City filed exhibits in connection with his representation of the City of Graz, Austria. Registrant's agreement is for a 1-year period ending March 31, 1973, and calls for an annual fee of $5,000 including expenses. Registrant is to furnish public relations services by distributing news releases containing information about the City of Graz to the news media.

Shearman & Sterling of New York City filed exhibits in connection with its representation of Schlumberger Limited, a Netherlands Antilles Corporation. Registrant is to act as legal counsel for the principal and will represent its interests in proposing amendments to the U.S. Internal Revenue Code. Such representation will involve communications and other contacts with representatives of the Treasury Department and members of Congress. Paul M. Butler, Jr. filed a short-form registration statement as the attorney working directly on this foreign account. Fees to be paid directly to Shearman & Sterling.

Young and Rubicam, Inc., of New York City, filed a copy of its current agreement with the City of West Berlin. Registrant's agreement is for a 1-year period and calls for public relations services by the registrant in the form of conception and dissemination of 12 news films on Berlin, production and dissemination of 12 radio programs on Berlin events and the writing and distribution of 12 press releases.

Europican Marketing, Inc., of New York City filed exhibits in connection with its representation of Malev-Hungarian Airlines. Registrant's agreement is oral and calls for advertising and public relations. Registrant places $3,000 worth of advertising in airline and travel magazines and writes three or four stories a month for a fee of $250.00.

The following persons filed short-form registration statements in support of registrations already on file pursuant to the terms of the Act:

On behalf of the Government of the Province of Alberta, Canada, Los Angeles: Ralph James Hamlett as Administrator reporting a salary of $11,988 per year. Mr. Hamlett will engage in informational activities for the promotion of tourism to Alberta distributing literature, film, fulfulling speaking engagements and maintaining contact with the travel media. Mr. Hamlett also provides economic and industrial information to American companies to encourage the distribution or manufacture of their products in Canada and the establishment of branch offices or plants in Canada. In addition, Mr. Hamlett engages in trade promotion activities to encourage the sale of Alberta-made products in the California area.

On behalf of the Bahama Islands Tourist Office, Miami, the following sales representatives: William E. Garrett with a salary of $541.66 per month, Bernadette Pini with a salary of $625 per month and Bruce J. Dyke with a salary of $7,500 per year. Their activities include the servicing of travel agents and commercial accounts, presentations to various civic organizations, and promotional activities to increase tourist traffic to the Bahamas.

On behalf of Stitt, Hemmindinger & Kennedy of Washington, D.C. whose foreign principals are the Embassy of Japan and eight other Japanese manufacturing interests: William C. Lieblich with a salary of $22,000 per year and R. Christian Berg with a salary of $16,000. Both render general legal services.

On behalf of the Information Service of South Africa, New York City: Ghemus Jan Johannes Geldenhuys as Information Controller. Mr Geldenhuys will engage in publicity and public relations activities with a view to disseminating information concerning South Africa. He is a regular salaried employee of registrant.

On behalf of the Israel Government Tourist Office of New York: Yoram Golan as Director of the Boston Office reporting a salary of $1,083.65 per month, Rafael Daon as Assistant Director of the Chicago Office reporting a salary of $961.43 per month and Reuven Harly as Assistant Director, Southern States, located in Atlanta, Georgia, and reporting a salary of $964.00 per month. Each engages in information activities, lecturing, advertising and the general promotion of tourism to Israel.

On behalf of the United States-Japan Trade Council of Washington, D. C.: Allen Taylor as Executive Secretary reporting a salary of $28,600 per year and Jean Choate as Office Manager reporting a salary of $12,700 per year. Mr. Taylor is in charge of the activities of the Council which are the distribution of printed materials, public relations, appearances before Congressional Committees and executive agencies, and speaking engagements.

On behalf of the United States Office of the British Broadcasting Corporation, New York City: Weiner Lichman as Office Manager reporting a salary of $14,352 per year, Lillian Lang as Radio Producer reporting a salary of $18,000 per year. Christopher Hallam Mylverton-Drake as New York Correspondent reporting a salary of $28,473.00 and John D. Humphrys as Correspondent reporting a salary of $31,150 per year.

On behalf of Japan National Tourist Organization of Chicago: Tetsuya Sato as officer engaged in tourist promotion and reporting a salary of $9,960 per year.

On behalf of Kenyon & Eckhardt, Inc. of New York City whose foreign principal is the French West Indies Tourist Board: Edward J. Murphy as Financial Officer. Mr. Murphy is a regular salaried empoyee of registrant.

On behalf of Arnold & Palmer & Noble, Inc., of San Francisco whose foreign principal is the Japan Trade Center: John L. Motroni as account executive doing public relations and publicity work and reporting a salary of $100 per month.

On behalf of United States-Japan Trade Council of Washington, D. C.: Noel Hemmendinger as Deputy Director and as Counsel rendering advice and drafting literature for public distribution. Mr. Hemmendinger also makes appearances before public bodies on behalf of the foreign principal and reports a salary of $18,400.

On behalf of South Africian Tourist Office of Los Angeles: Cathleen P. Schoeman as employee functioning as tourist promotion officer and reporting a salary of $800 per month.

On behalf of China Books and Periodicals, San Francisco whose foreign principals are Guozi Shudian, Peking, China and Xunhasaba, Hanoi, Vietnam: Henry H. Noyes as Owner. Mr. Noyes engages in the importation and wholesale and retail distribution of books and periodicals and reports an income of approximately $175 per week.

On behalf of the Irish Northern Aid Committee of Pittsburgh: M. Donald McNamara as Secretary and Public Relations Officer. Mr. McNamara sends news releases and stories to local media and Irish-American newspapers in New York City and reports no compensation.

On behalf of Sobel Overseas Corporation of New York City whose foreign principals are National Savings Bank of Hungary and Ibusz, Hungarian Tourism and Travel Agency: Peter Zerkowitz as vice-president and manager reporting a salary of $220 per week.

On behalf of the Tourist Organization of Thailand, New York: Patpong Abhijatapong as Assistant Chief, engaging in public relations, publicity and advertising for the promotion of tourism to Thailand and reporting a salary of $710 per month.

On behalf of the Information Service of South Africa, New York: Albert Johan van der Wal as Information Officer disseminating information in the form of publications, press releases, photographs, film, radio and television programs, lectures and exhibits. Mr. van der Wal is a regular salaried employee of the registrant.

On behalf of the Hong Kong Tourist Association,

San Francisco: Robert A. Kertz as representative promoting tourism to Hong Kong through the distribution of information and literature, presentations and lectures, joint promotions with carriers, and contacts with the press. Mr. Kertz renders these services on a part-time basis and reports no compensation.

On behalf of Utsch & Associates, Inc., of New York City whose foreign principal is Tuzex Foreign Trade Corp., Prague, Czechoslovakia: Hans Utsch as officer soliciting and collecting orders in the United States for the sale and delivery of food parcels, gift certificates and other remittances to recipients in Czechoslovakia. Mr. Utsch reports a salary of $40,000 per year.

On behalf of Harry W. Graff International Corporation of New York City whose foreign principal is the Surinam Tourist Bureau: Evelyn Graff and Harry Graff as officers engaged in the placement of tourism advertisements and reporting receipt of a commission of 15 percent of gross billing.

On behalf of Woody Kepner Associates, Inc., of Miami, Florida whose foreign principal is the Island Government of Curacao: Sigrid E. Murray as District Manager engaging in the promotion of tourism to Curacao and reporting a salary of $8,900 per year.

On behalf of the Partido Institucional Democratico de la Republica Dominicana of New York City whose foreign principal is Dr. Jaime Manuel Fernandez: Ivonne A. Objio, Merlin A. Perez, Dario A. Perez as officers engaging in political activities. Services are rendered on a special basis and no compensation is reported.

* * *

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Kent Frizzell

COURTS OF APPEAL

ENVIRONMENT

CLEAN AIR ACT: JURISDICTION TO REVIEW TO EXTENSIONS GRANTED STATES FOR ATTAINMENT OF AIR STANDARDS.

Natural Resources Defense Council, Inc., et al. v. Environmental Protection Agency (C.A. D.C. Nos. 72-1522, 72-1598, 72-1810, 72-1941, 72-1982, 72-1985, 72-2028, and 72-2159, January 31, 1973; D.J. 90-5-2-4-7, 90-5-2-3-28, 90-5-2-3-19, 90-5-2-3-26, 90-5-2-3-29, 90-5-2-3-86, 90-2-3-27, 90-5-2-3-30)

These actions were brought by Natural Resources Defense Council and others against the Environmental Protection Agency in the Court of Appeals for the District of Columbia Circuit charging that the Administrator had violated Section 110(3) of the Clean Air Act of 1970, 42 U.S.C. sec. 1857c-5(e) (1970), in permitting several states to delay submission of transportation control portions of their implementation plans until February 15, 1973, and in granting extensions until mid-1977 for the attainment of national primary ambient air standards to these states. The Government challenged the court's jurisdiction, urging that, since these cases involved implementation plans, they should be adjudicated in the circuits wherein the various states are located.

The court found that, since there were no facts or laws peculiar to any state, it had jurisdiction under Section 307(b)(1) of the Act, 42 U.S.C. sec. 1857h-5(b)(1)(1970). The court reasoned that Congress intended a "flexible" approach when it authorized review under this section "in the United States Court of Appeals for the appropriate circuit." The court supported its conclusion by contrasting this language with the more specific language of Section 110(f)(2)(B) of the Act, 42 U.S.C. sec. 1857c-5(f)(2)(B)(1970). There Congress provided for review in the "Courts of Appeal by the circuit which includes such state." The court also indicated that anomalous results could be produced in metropolitan areas covering jurisdictions in several circuits, if an "inflexible" approach was to be adopted requiring review in a circuit where the control area might be located.

On the merits the court found the Administrator, although acting in good faith, had violated Section 110(3) of the Act. Accordingly, it ordered the Administrator to rescind the delays and extension, to notify the states involved to submit implemention plans in conformity within the Act. The court ordered that no extension of time for attainment of primary standards should be granted unless there was compliance with Section 110(e)

of the Act.

Staff: Edmund B. Clark (Land and Natural Resources Division)

CONDEMNATION

OIL AND GAS PAYING QUANTITIES, 90-DAY CLAUSE, RECONDITION OF PRIOR WELL.

United States v. 431.39 Acres of Land, More or Less, Situated in Barren County, Kentucky, and Lena Stovall, et al., and Gene D. Manno, et al., (C.A. 6, No. 72-1625, Jan. 26, 1973; D.J. 33-18-242-419)

This appeal arose from the Government's motion to determine the ownership of the mineral interest (for which it had filed a declaration of taking) in certain tracts of land as between the fee owner and the lessee of oil and gas drilling rights. The district court ruled that the lease terminated under its own terms at the end of 90 days because of the lessee's failure to commence drilling or pay delayed rental. The Sixth Circuit found that drilling had commenced prior to 90 days but that the lease terminated at the end of one year because of the lessee's failure to produce oil "in such quantities as to be susceptible of division, so as to pay the landowner a royalty even though small." The court analogized this standard to the "paying quantities" test. Resolving all doubts in favor of the lessee, 115 barrels, resulting in royalty payments of $21.71, was the total production over a period of several years. This the court found insufficient. The court (fn. 2) in dicta, states that it does not believe that Durbin v. Osborn, 166 S.W. 2d 841 (Ky. 1942), supports the statement that the reconditioning of a prior well is insufficient to satisfy the drilling requirements of this lease.

Staff: Larry G. Gutterridge (Land and Natural Resources Division); Thomas L. Adams (formerly of Land and Natural Resources Division); United States Attorney George J. Long and Assistant U. S. Attorney A. Duane Schwartz (W.D. Ky.)

INDIANS; STATE TAXATION

INDIAN IMMUNITIES FROM STATE TAXATION; INDIAN SELF-GOVERNMENT; STATE INCOME TAX AND GROSS-RECEIPTS TAX HELD INVALID ON EARNING WITHIN INDIAN COUNTRY.

Hunt v. O'Cheskey (Court of Appeals, State of New Mexico, No. 931, Feb. 12, 1973, D.D. 90-2-5-392)

Here a New Mexico state court reversed a decision of the state revenue commissioner and held that an Indian was immune from state taxation of his salary and business receipts arising from work he performed exclusively within the confines of a self-governing Indian reservation.

The Indian taxpayer was a member and resident of the Indian Pueblo of Laguna. The Pueblo was organized, pursuant to Section 16 of the Indian Reorganization Act of 1934, as a self-governing Indian community with powers under its own constitution to tax its members and regulate trade. The Indian taxpayer's salary was for his employment in a federally-assisted anti-poverty program conducted within the Pueblo. His gross business receipts were from trucking services within the Pueblo.

The state court unanimously held that the State could not levy a gross-receipts tax on the Indian's trucking business. State legislation characterizes gross-receipts taxation as a levy on the "privilege of engaging in business." If the tax were collected on businesses within the Pueblo, the court reasoned, it would mean that the State was interfering with the Pueblo's self-governing powers to regulate trade in its territory.

A majority of the state court, over one dissent, also held that the Indian's salary was immune from state income tax, because New Mexico never obtained state civil and criminal jurisdiction over the Laguna Pueblo. Between August 15, 1953, and April 11, 1968, Congress did give New Mexico and certain other states opportunity to make appropriate changes in their constitutions and statutes so as to acquire civil and criminal jurisdiction over Indian country within state boundaries (Sections 6 and 7, Public Law 280, Act of August 15, 1953, 67 Stat. 590). New Mexico never exercised this option, and since April 11, 1968, the consent of the Laguna Pueblo Indians is required before New Mexico can obtain such jurisdiction over their reservation (Title IV, Civil Rights Act of 1968, 83 Stat. 78-80, 25 U.S.C. secs. 1321-1326). No consent has been given. Thus, the absence of state juridiction precluded its power to tax income of Laguna Indians.

The United States filed a brief, amicus curiae, in favor of the tax immunities claimed by the Indian.

Staff: Dirk D. Snel (Land and Natural Resources Division); Assistant United States Attorney James B. Grant (D. N. Mex.)

DISTRICT COURTS

OCS LANDS ACT: SECRETARY'S AUTHORITY

JUDICAL REVIEW; AUTHORITY OF SECRETARY OF THE INTERIOR TO SUSPEND OPERATIONS ON OFF-SHORE OIL LEASES IN THE SANTA BARBARA CHANNEL, BY DENYING A PLATFORM PERMIT BECAUSE OF "OVERRIDING ENVIRONMENTAL CONSIDERATIONS," SUSTAINED.

Union Oil Company of California, et al. v. Morton, (Civil No. 71-2287-RCM, C.D. Cal., D.J. 90-1-18-948)

Pursuant to the terms of the Outer Continental Shelf Lands Act, the plaintiff oil companies acquired the subject lease in the Santa Barbara Channel, drilled for and discovered substantial oil reserves, and erected drilling platforms "A" and "B" from which presently producing oil wells were drilled. The oil companies had requested and had been granted permission to erect a third platform, construction of which had been completed when events in the Santa Barbara Channel provided a catalyst for the present high level of concern for the environment.

On January 28, 1969, one of the wells being drilled from platform "A" by Union "blew out," causing large amounts of oil to flow to the ocean surface and pollute the Santa Barbara Channel and adjoining beaches. Operations were suspended pending technical studies by several governmental and nongovernmental scientific groups. Public Hearings were held and environmental statements prepared by the Department of the Interior concerning the impact on the environment of an additional platform, Platform "C" on the environment. All of these studies and reports of the hearings, as well as the preliminary and final environmental statements were before the Secretary when he made his final decision.

On September 20, 1971, the Department of the Interior issued a press release which stated that Secretary Morton would not grant a permit for oil production platform "C" because of "overriding environmental consideration." This was followed by a letter to the operator, Union Oil Company, which cited the Outer Continental Shelf Lands Act, as interpreted in accordance with the National Environmental Policy Act, as authority for the act of the Secretary. The letter concluded that this was final action by the Department and that all administrative remedies had been exhausted.

The oil companies brought this action to compel Secretary Morton to rescind and set aside the final decision and to enjoin governmental officials from interfering with the erection and installation of Platform "C" and the exercise of the plaintiffs' rights under the lease.

The court accepted the Government's characterization of this case as a judicial review of final administrative action and stated that the administrative record, plus additional items of evidence and depositions, reflected conflicting facts, opinions and conclusions but that the Secretary's decision was based upon substantial evidence. Then, without citing the OCS Act or NEPA, both of which had been extensively discussed in briefs and oral argument by both sides, the court stated that "under the controlling statutes, pertinent regulations and the terms of the lease, the Secretary had the power and the authority to exercise discretion relative to curtailing the activities under the leases." The court found that the decision arrived at was neither unlawful nor in excess of authority, nor arbitrary, capricious or an abuse of discretion granted under the statutes. The court concluded that no property or property rights of the plaintiffs had been taken in deprivation of any right of due process and dismissed their complaint with prejudice.

Subsequently, plaintiffs have filed a motion for a new trial or, alternatively, to amend or alter the findings of the trial court, which has been denied.

Staff: Myles E. Flint and Andrew F. Walch (Land and Natural Resources Division)

REFUSE ACT CASES: SAVED

REFUSE ACT REMAINS IN EFFECT; FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 DO NOT ABATE PENDING LITIGATION UNDER REFUSE ACT; APPLICABILITY TO INDUSTRIAL WASTE INJUNCTIVE RELIEF APPROPRIATE.

United States v. Consolidation Coal Co. (N.D. W.Va., Civil No. 72-31-F, Jan. 11, 1973, D.J. 90-5-1-1-286)

The United States had filed an action for a permanent injunction against defendant's continued discharge of effluent wastes into a navigable water of the United States in violation of Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. sec. 407 (commonly known as the "Refuse Act")

The defendant moved for a dismissal on the grounds (1) that the Refuse Act is a navigation statute and not a pollution statute and is not intended to apply to industrial wastes; (2) that injunctive relief is not the proper remedy; and (3) that Section 402(K) of the Federal Water Pollution Control Act Amendments of 1972 renders the case moot until final administrative action has been taken on the defendant's pending permit application.

In denying the motion, the court held, in light of both the legislative history of the 1972 Amendments and the fact that the Refuse Act was not explicitly repealed, that the provisions of the Refuse Act will "remain in effect as part of * * * [the Congress] overall water pollution control scheme." The court stated that it was the intent of Congress that § 402(k) should have a prospective effect only and was not intended to apply to pending litigation." Thus, there was no need to dismiss all pending Refuse Act prosecutions until there was a final administrative action taken by the Environmental Protection Agency on any permit application.

In rejecting the remaining contentions, the court relied on established authority, citing United States v. Republic Steel Corp., 362 U.S. 482 (1960), and United States v. Standard Oil Co., 394 U.S. 244 (1966), and held that the Refuse Act is a pollution control statute and held that injunctive relief is appropriate.

Staff: Bradford Whitman (Land and Natural Resources Division
United States Attorney
James F. Companion (N.D. W.Va.)

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TAX DIVISION
Assistant Attorney General Scott P. Crampton

COURTS OF APPEAL

Failure to File Fiduciary Income Tax Returns

United States v. Jenning (C.A. 9, No. 72-2809; decided January 10, 1973. Executors, corporation presidents, and other representative parties sometimes contend that, because they are not "persons" within the meaning of 26 U.S.C. 7203, which makes it a misdemeanor for any "person" to fail to file a required tax return. The Ninth Circuit recently held that an executor can be prosecuted as a "person" within the meaning of Section 7203.

Staff: United States Attorney Sidney L. Lezak
Assistant U. S. Attorney Jack C. Wong

Failure to File Corporate Return
President's Plea of Nolo Contendere

United States v. Chandler (C.A. 6, No. 72-1538; decided December 20, 1972). The Sixth Circuit recently held that the question whether a corporation president is the person required to file the corporation return is a question of fact which cannot be reviewed on appeal from a plea of nolo contendere.

Staff: United States Attorney George J. Long
Assistant U. S. Attorney James H. Barr

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UNITED STATES BOARD OF PAROLE
Maurice H. Sigler, Chairman

ORDER DENYING PAROLE WITH CONTINUANCE TO EXPIRATION OF SENTENCE HELD NOT A DENIAL OF DUE PROCESS UNDER INDETERMINATE SENTENCE PROVIDING FOR CONTINOUS PAROLE ELIGIBILITY.

William J. L. Lee v. U. S. Board of Parole (D.C. Dist. of Kans.) No. L-2300, November 9, 1972

Recently federal prisoners have filed suits in numerous district courts throughout the country challenging decisions of the Board of Parole in sentences imposed under 18 U.S.C. §4208(a)(2) under which the prisoner becomes eligible for parole at such time as the Board of Parole may determine. Specifically, these suits challenge the Board's action in denying parole with reviews set for a future date, as well as cases where parole is denied with directions that incarceration be continued until expiration of sentence. The opinion of Ditrict Court Judge Theis, in the above captioned action, contains a succinct exposition of the Board's reasoning underlying such Board decisions. The Court found this rationale justified; and this reasoning should be useful in framing motions to dismiss in response to similar suits.

Petitioner Lee was in custody under an 8 year sentence imposed under 18U.S.C. §4208(a)(2). On October 8, 1968, he was advised that the Board of Parole had continued his case and had scheduled an institutional review hearing for January 1972. Upon review by a Member of the Board in January 1972, Lee was notified in February that the Board had decided to continue his case until expiration of sentence. Lee sought a a writ of mandamus, asserting that the Board's action in continuing him to expiration was arbitrary and capricious and in violation of 18 U.S.C. §4208(a)(2), which provides for "continous parole eligibility". The Court held that mandamus was not available to order the Board to grant him parole; that the Board's power in this area is clearly discretionary. The Court further held that a prisoner sentenced under the cited statute becomes eligible immediately for parole and remains eligible until either paroled or otherwise released; and that any action by the Board which would preclude a possibility of parole during the sentence term would be an arbitrary and capricious act, subject to mandamus to order the Board to consider him for parole. The Court, however, found a Board order for continuance to expiration does not deny further consideration for parole, since under its own regulation the case is subject to continuous review, even though another formal hearing at the prison may not be conducted, quoting the Board's rule, 28 C.F.R. § 2.21:

> The Board shall, on the basis of special progress reports or otherwise, periodically review cases in which parole has previously been denied. It shall also periodically review cases of prisoners whose parole or mandatory release has been revoked. Any case may also be specially reviewed at other times upon the receipt of any new information of substantial significance bearing upon the possibility of parole.

The Court held that the above regulation assures consideration for parole at reasonable intervals and that, therefore, the Board's order did not foreclose parole before expiration of sentence and accordingly could not be deemed arbitrary or capricious nor a denial of due process.