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POINTS TO REMEMBER

Controlled Substances Act - Methaqualone Declared Controlled Substance; Recent Republication of Controlled Substance Schedule.

By order effective October 4, 1973, the Drug Enforcement Administration placed methaqualone in schedule II of the Controlled Substances Act (21 U.S.C. 812). See 38 Fed. Reg. 27516 (October 4, 1973).

Methaqualone is a non-barbiturate depressant drug which has been used clinically for the past 10 years (primarily in Europe) as a sleeping aid and daytime sedative. In the United States, methaqualone is marketed under such trade names as quaalude (William H. Rorer, Inc.), sopor (Arnar-Stone), parest (Parke-Davis), optimil (Wallace) and somnafac (Smith, Miller and Patch). When methaqualone was first introduced to the United States, it was considered a sedative hypnotic with no addiction potential and was prescribed freely for the relief of insomnia. In short order, however, serious overdose and addiction problems developed on college campuses in the Midwest and on high school and college campuses on the East and West Coasts. These problems were attributable to the drug's quiescent effects. Methaqualone makes users feel more relaxed, friendly, receptive, and uninhibited. As a result, methaqualone gradually developed a reputation, inter alia, as being a potent aphrodisiac or love drug. However, this reputation is not grounded in reality for, although methaqualone lowers inhibitions and increases sexual desires, it simultaneously lowers the ability to perform sexually.

At present, methaqualone is manufactured by reputable licensed pharmaceutical companies. The pills in circulation are top quality, legally manufactured pills which have been obtained from pharmacists by the use of legal or illegal prescriptions. However, it is anticipated that a "black market" in the drug will soon develop.

Placement of methaqualone in schedule II of the Controlled Substances Act resulted from findings by the Drug Enforcement Administration that the drug has become the subject of grave abuse and can lead to severe psychological and physical dependence.

Apart from methaqualone's placement in schedule II, it should be noted that the most recent publication of the controlled substance schedules, as updated by the Drug Enforcement Administration, appears at 38 Fed. Reg. 8254 (March 30, 1973). The revised schedules indicate, inter alia,

amphetamine's placement in schedule II of the Controlled Substances Act. Transfer of amphetamine from schedule III to schedule II of the Controlled Substances Act was effected on July 7, 1971, see 36 Fed. Reg. 12734 (July 7, 1971). The latest republication of the controlled substance schedules may also be found at 21 C.F.R. 308.01 et seq.

(Criminal Division)

Judgment Debtor Examinations

Several United States Attorneys are successfully conducting Judgment Debtor Examinations (oral depositions) before United States Magistrates, thereby obtaining financial information from uncooperative criminal and civil judgment debtors.

Title 18, United States Code, Section 3565 authorizes the use of the Federal Rules of Civil Procedure to enforce criminal impositions. Civil Rule 69(a) allows the United States Attorney, in aid of the judgment or execution, to obtain discovery from the judgment debtor in the manner provided in the Federal Rules of Civil Procedure. Rule 30 permits depositions upon oral questions.

Title 28, United States Code, Section 636(a)(2) includes Magistrates among those before whom oral depositions may be taken. Thus, the judgment debtor is subpoenaed before the Magistrate and the Assistant United States Attorney conducting the Judgment Debtor Examination asks all questions which he considers pertinent. The Assistant notes each response as it is given, thereby eliminating the cost of a transcript. Questions may be patterned after those found in the Financial Statement of Debtor (Form DJ-35). The debtor may also be requested to bring financial records and tax information to the examination.

Definite procedures for conducting Judgment Debtor Examinations should be established in cooperation with the United States Magistrate. A more detailed discussion of these procedures can be found on pages 39-42 of the criminal collection manual, Criminal Collections: Policy and Techniques.

(Criminal Division)

ANTITRUST DIVISION
Assistant Attorney General Thomas E. Kauper

COURT OF APPEALS

SHERMAN ACT

COURT OF APPEALS REVERSES AND REMANDS CIVIL AND CRIMINAL CONTEMPT PETITIONS FOR TRIAL IN SECTION I SHERMAN ACT CASES.

United States v. Martin Linen Supply Co., et al. (C.A. 5, Nos. 72-2796 and 72-2800; October 9, 1973; DJ 60-202-71)

On October 9, 1973 the Court of Appeals for the Fifth Circuit in an opinion by Judge Roney reversed an order of the District Court for the Western District of Texas dismissing before trial civil and criminal contempt petitions brought by the Government for violations of an antitrust consent decree.

In 1969, the Government filed a civil complaint alleging that Martin Linen Supply Co. and others restrained trade in violation of Section 1 of the Sherman Act with respect to the business of furnishing linen supplies in Texas. In June 1969, a consent decree was entered.

In December 1971, the Government filed separate civil and criminal contempt petitions alleging violations of Section V (A)(1) of the consent decree. That Section provides:

> Each corporate defendant is enjoined and restrained from, directly or indirectly:
> (A) threatening, coercing, inducing or attempting to induce:
> (1) Any linen rental supplier to refrain while in business, from furnishing linen supplies to any customer...

The activities which the Government allege violated the consent decree revolve around Martin's attempts to exact reciprocal agreements from other linen suppliers not to compete for Martin's customers, backed up by warnings of economic reprisals.

After full pre-trial discovery, Martin filed a petition in the original antitrust proceeding for construction of the above Section. The District Court determined that the allegations by the Government centered on Martin's activities aimed at recoupment of its own former customers and retaliations against competitors who solicited its customers. It concluded that Section V(A)(1) of the consent decree does not prevent Martin from threatening competitors with economic reprisals to persuade them to refrain from soliciting Martin's customers.

About three weeks after entry of the construction order and based thereon, the District Court dismissed the criminal and civil contempt petitions against Martin. The Government appealed.

The Construction Order

Upon appeal, Martin contended that the construction order interpreting a provision of the antitrust consent decree was a final judgment in a civil action and that, since the United States was the complainant, appeal lies only to the Supreme Court under the Expediting Act. The Court of Appeals rejected this contention, ruling that the construction order in the circumstances of this case was a ruling integral with the contempt proceedings, and not a final judgment within the meaning of the Expediting Act. Accordingly, it held that it had jurisdiction to review the construction order in connection with any review jurisdiction it has of the contempt proceedings.

Double Jeopardy

Martin conceded that the Court has jurisdiction under the Criminal Appeals Act, 18 U.S.C. 3731, to review the dismissal of the criminal contempt petition. It contended, however, that the dismissal was the equivalent of an acquittal, making review by the Court of Appeals inappropriate because the double jeopardy clause would prevent a trial even if the Court of Appeals disagreed with the district court's dismissal. Martin's contention that it was acquitted was based on the theory that the district court, when it dismissed, had before it the Government's entire case since the Government laid out the nature of its case in response to extensive pre-trial procedures ordered by the district judge.

The Court of Appeals held that Martin was never in jeopardy because the trial had not yet begun. The disclosure by the Government of the nature of its case on the extensive pre-trial discovery did not commence a "hearing" of the evidence and thus did not bring into play the constitutional policies underlying the double jeopardy clause.

Civil Contempt Jurisdiction

The court further held that it has jurisdiction to review the dismissal of the civil contempt petition in the circumstances of this case, even though under other circumstances the dismissal may be appealable only to the Supreme Court under the Expediting Act. The court reasoned that it has jurisdiction under the Criminal Appeals Act to review the dismissal of the criminal contempt petition and that, once the court's jurisdiction is properly invoked, there are three lines of cases supporting the court's jurisdiction to review dismissal of the civil contempt

petition. (1) Cases based on the rationale of judicial economy, similar to the policy underlying crossclaims, pendant and ancillary jurisdiction; (2) Cases arising under the former Criminal Appeals Act in which the Supreme Court required the Courts of Appeals to review both grounds if the district court's ruling was on alternative grounds, one appealable under that Act to the Supreme Court and other to a Court of Appeals; (3) Cases involving a single order for civil and criminal contempt in which the Supreme Court held that the criminal aspect of the order controls for purposes of determining the procedure on appeal.

Contempt Charge

Finally, the Court of Appeals interpreted Section V(A)(1) of the consent decree to mean that the defendants are prohibited from using threats, coercion and inducements to persuade their competitors to refrain from doing business with any customer. In its view, although Martin's attempt to recoup business may not, without more, violate Section V (A)(1), such activity would be a violation if its purpose is to cause Martin's competitors to refrain from competing. Accordingly, the allegations in the contempt petitions, if established, make out a violation. The court therefore reversed and remanded for trial.

Staff: Irwin A. Seibel and Carl D. Lawson
(Antitrust Division)

CIVIL DIVISION
Acting Assistant Attorney General Irving Jaffe

COURT OF APPEALS

AGRICULTURAL MARKETING AGREEMENT ACT

FIFTH CIRCUIT UPHOLDS CELERY MARKETING ORDER AND COMPOSITION OF CELERY MARKETING COMMITTEE.

Chiglades Farm, Ltd., et al. v. Butz, (C.A. 5, No. 72-3451, October 10, 1973, D.J. 145-8-881)

Under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 et seq., the Secretary of Agriculture issued a Marketing Order to regulate the celery grown in Florida by limiting the total quantity of celery which may be handled by a first handler during a marketing season. The total quantity to be handled is apportioned among producers by issuing base quantities to each eligible producer. These base quantities are computed on the basis of their past production history. If these producers produce their full allotment, additional allotments may be granted to new producers if the marketing situation justifies additional production. The terms and provisions of the Order are administered by a Florida Celery Committee which is composed of producers, employees of producers, handlers, or employees of handlers. Ultimate authority lies with the Secretary.

Chiglades Farms, Ltd. brought suit to compel the Secretary of Agriculture to issue it a permanent base quantity. Alternatively, Chiglades alleged inter alia (1) that the Marketing Order is an unlawful violation of the Act, 7 U.S.C. 608c(13)(B) which prohibits the Secretary from issuing any order applicable to a producer "in his capacity as a producer"; (2) the composition and role of the Florida Celery Committee violates due process because it vests control in a committee with "obvious self-interest"; and (3) marketing quotas may not be based solely on past production history.

The Fifth Circuit rejected each of these contentions. The Court held that the Order does not regulate producers in their capacity as producers since they may grow any amount of celery; they are simply limited in the amount of celery which may be marketed. Relying on Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604, the Court upheld production quotas based on historical base periods, noting also that the Marketing Order provides for entry of new producers under certain circumstances. Finally, the Court upheld the composition of the Florida Celery Committee on the grounds that the Secretary has ultimate control with the committee acting only in an advisory capacity. Moreover, Congress has approved the use of such producer-controlle

committees on the theory that those with the greatest knowledge of the industry are in the best position to make recommendations to the Secretary.

Staff: Judith S. Feigin
(Civil Division)

F.A.A. EMERGENCY REVOCATION OF PILOT'S LICENSE

NINTH CIRCUIT DISMISSES PETITION FOR REVIEW AND MOTION TO STAY F.A.A. ADMINISTRATOR'S EMERGENCY REVOCATION ORDER FOR LACK OF JURISDICTION.

Stetson v. F.A.A., (C.A. 9, No. 73-2645, October 1, 1973, D.J. 88-190)

Petitioner, an airman, sought to review and enjoin an order of the F.A.A. Administrator revoking, on an emergency basis, the airman's medical certificate. The revocation was based upon the airman's disregard of the Administrator's lawful request for medical records. The Government argued that petitioner had not exhausted his administrative remedies before the National Transportation Safety Board and, moreover, that a determination by the Administrator that an emergency exists endangering the public safety is not subject to judicial review. The Ninth Circuit accepted the Government's argument and dismissed for lack of jurisdiction.

Staff: Karen K. Siegel (Civil Division)

FREEDOM OF INFORMATION ACT: INVESTIGATORY FILE EXEMPTION

ON REHEARING EN BANC C.A.D.C. HOLDS MATERIAL EXEMPT FROM DISCLOSURE UNDER EXEMPTION OF THE INFORMATION ACT ONCE IT IS SHOWN THAT THE MATERIAL IS PART OF AN INVESTIGATORY FILE COMPILED FOR LAW ENFORCEMENT PURPOSES.

Weisberg v. Department of Justice (C.A.D.C., No. 71-1539, October 24, 1973, D.J. 145-12-1449)

Plaintiff, a writer, sought access to FBI spectrographic analyses of bullet fragments recovered from the body of President John F. Kennedy and the car in which he was riding at the time of the assassination. The Department of Justice denied his request on the ground that the information sought was part of an investigatory file compiled for law enforcement purposes and thus was exempt from disclosure under exemption 7 of the Information Act, 5 U.S.C. 552(b)(7). This denial was upheld by the district court against plaintiff's claim that the file was

not an investigatory file compiled for law enforcement purposes because the FBI had no jurisdiction to investigate the assassination, which was not then a federal crime. On appeal, a panel of the C.A.D.C. vacated the district court's ruling and held that the agency must show that harm will result from disclosure of each particular item sought to qualify for exemption under 552(b)(7).

On rehearing en banc the Court of Appeals vacated the judgment of the panel, and affirmed the district court, holding that all that must be shown to qualify under exemption 7 is that the material sought is part of an investigatory file compiled for law enforcement purposes. That classification is subject to judicial review to determine its propriety, but no showing of harm need be made. The court accepted the government's argument that closed investigatory files are entitled to the same protection as active files.

Staff: Walter H. Fleischer, Michael H. Stein, Barbara L. Herwig (Civil Division)

LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Wallace H. Johnson

COURTS OF APPEAL

SOVEREIGN IMMUNITY; MOOTNESS.

Association of Northwest Steelheaders, etc., et al. v. United States Army Corps of Engineers, et al. (C.A. 9, Nos. 72-1428 and 72-1430, Sept. 21, 1973; D.J. 90-1-4-209)

Suit was instituted by various public interests and joined in by the State of Washington to enjoin the Corps of Engineers from further dam construction on the Lower Snake River and to compel compliance with certain federal laws. The district court dismissed the proceeding as an unconsented suit against the United States. The Court of Appeals reversed, holding that the court has jurisdiction to determine whether the federal defendants have exceeded their statutory authority or exercised in a void manner. The Court remanded to the district court to determine whether there has now been compliance with NEPA and the Fish and Wildlife Coordination Act and the action in that respect moot. After a trial on the merits, if one is required, the court is to then determine whether the relief sought would constitute such an intolerable burden to governmental functions when weighed against private harm that the suit should be dismissed.

Staff: United States Attorney Dean Smith (E.D. Wash.)

CONDEMNATION; JURY INSTRUCTIONS.

United States v. 145.31 Acres in Huntingdon County, Penna. (C.A. 3, No. 72-1617, October 3, 1973; D.J. 33-39-943-229)

The landowners appealed from a condemnation judgment, contending that the district court erred in failing to make appropriate references to the facts of the case in its jury charge. The Third Circuit affirmed and held that the instructions, read as a whole, fairly and adequately submitted the case to the jury.

Staff: Henry J. Bourguignon (Land and Natural Resources); Assistant United States Attorney Harry A. Nagle (E.D. Pa.)

FEDERAL LAND GRANT; ENFORCEABLE CONTRACT; STATE OBLIGATION TO EDUCATE INDIANS ON TUITION-FREE BASIS.

Cornell Tahdooahnippah v. John W. Thimmig; United States of America v. Colorado (C.A. 10, No. 72-1811, July 10, 1973; D.J. 90-24-204)

The Government brought this action to enforce the terms of a 1910 Act of Congress (33 Stat. 269) which granted 6,300 Acres of Land to Colorado on the condition that the State expressly agree to: (1) hold and maintain the lands and buildings as an institution of learning; (2) admit, tuition-free, all qualified Indian students. The State expressly agreed to the terms of the grant in 1911 by both legislative and executive action. The school was operated and maintained at its original site until it was relocated in 1956. Thereafter, the old site was used as an agricultural experiment station. Regardless, the State continued to provide tuition-free education at the new site for Indian students until 1971 when the State legislature limited the right of tuition-free education to only Colorado Indians who could prove financial need.

On motions for summary judgment, the trial court held: (1) subsequent federal legislation had no effect on this particular grant; (2) Colorado could not unilaterally modify the enforceable contract created by operation and acceptance of the federal grant. The Court of Appeals affirmed the lower court's conclusion that Colorado was contractually bound. It rejected Colorado's claim that, assuming a breach, the proper remedy should be suit to reenter the land pursuant to its claim that the grant constituted the transfer of a fee subject to a reversionary interest. The court based its affirmance on the existence of the requirement for an express agreement to the conditions of the grant and the lack of a clearly expressed reverter or right of reentry.

Staff: Peter R. Steenland (Land and Natural Resources Division); Dennis R. Whittlesey (formerly with the Land and Natural Resources Division)

NEPA; DECISION NOT TO FILE EIS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Morningside Renewal Council v. A.E.C. (C.A. 2, No. 72-2093, decided July 5, 1973, D.J. 90-1-4-575)

Petitioners brought suit seeking a review of an A.E.C. order which authorized the issuance of a license to the Trustees of Columbia University to operate research nuclear reactor in New York City. They claimed the A.E.C. had violated

N.E.P.A., 42 U.S.C. sec. 4321 et. seq., by issuing a license without first filing an environmental impact statement. Pursuant to the conclusion of the Commission's Regulatory Staff that the reactor could be safely operated, the agency had published its initial intention to grant the license. After a hearing, at which the petitioners had intervened, the Licensing Board concluded it could not authorize the issuance of the license due to a lack of: (1) applicable substantive criteria from the Commission; (2) convincing objective standards to deal with hypothetical safety problems. The Atomic Safety and Licensing Appeal Board reviewed the decision and, subsequent to oral arguments, ordered the issuance of the license, subject to additional security requirements.

By a 2 to 1 majority, the court found substantial evidence in the record to support the commission's decisions that: (1) the operation of the reactor would not be inimical to public health; (2) the issuance of the license was not a sufficiently major federal action significantly affecting the quality of the human environment to require the preparation of an environmental impact statement.

The dissent contended that the threat of danger had not been disproven, and that, until it was, the potential for environmental impact was substantial enough to require the preparation of an environmental impact statement. Additionally, the dissent suggested that the proper administrative procedure would have been rule-making rather than adjudicatory in light of the recognized lack of standards governing the issuance of licenses for this type of reactor.

A motion for rehearing en banc was denied by a vote of 4 to 3 on October 4, 1973.

Staff: John Cho (Atomic Energy Commission); Peter R. Steenland (Land and Natural Resources Division)

ENVIRONMENT, CLEAN AIR ACT; ATTORNEYS' FEES AWARDED.

Natural Resources Defense Council v. Environmental Protection Agency (C.A. 1, Nos. 72-1219 and 72-1224, Oct. 1973; D.J. 90-5-2-3-20 and 90-5-2-3-38)

Petitioners, a "public interest law firm" headquartered in Washington, D.C., and a few local organizations and individuals, instituted a proceeding in the Court of Appeals for the First Circuit to review the approvals by the Environmental Protection Agency of the plans of the States of Rhode Island and Massachusetts for implementing the requirements of the Clean Air Act, 42 U.S.C. sec. 1857c-5, and upon approval by EPA, became integral parts of the Federal Clean Air regulatory

program and were federally enforceable regulations.

The petitioners challenged EPA's approvals of the state plans on the grounds that, in several respects, they did not conform to the prerequisites for EPA approval of such plans, as listed in Section 110, and in other respects, were inconsistent with and in derogation of certain requirements of the Act. The Court of Appeals, in its opinion of May 2, 1973, 478 F.2d 875, held for the petitioners on several of their contentions, against them on others, and remanded the case to EPA for remedial rulemaking.

After the court's primary decision, and while EPA was in the process of amending the state implementation plans, petitioners moved the Court of Appeals to award them their attorneys' fees and expenses. EPA opposed the award, primarily on the grounds that 28 U.S.C. sec. 2412 bars the awards of attorneys' fees against the Government unless such award is specifically authorized by another statute. EPA contended that, although Section 304(d) of the Clean Air Act provides for the award of attorneys' fees in proceedings brought under that Section, 42 U.S.C. sec. 1857h-2, these review proceedings were brought under, and were authorized by, Section 307 of the Act, 42 U.S.C. sec. 1857h-5, which makes no such provision for award of attorneys' fees. The argument was that these original Court of Appeals reviews agency rulemaking are essentially different from the "citizen suits" provided for in Section 304, which are to be brought in the district courts and can be brought, as against EPA or other federal agencies, only to enforce the duties and limitations imposed upon them by the Act.

The Court of Appeals disagreed, and, in its opinion of October 1, 1973, ruled that petitioners were "entitled to recover reasonable attorneys' fees and costs." The opinion flatly rejects the basic argument of EPA as to the difference between Section 304 and Section 307 proceedings. The court holds, "To award attorneys' fees against a governmental agency, we must find that Congress has given specific statutory sanction. Here, we find such sanction in the language of the Clean Air Amendments themselves" (Slip opinion, p. 8, emphasis added). The Court of Appeals proceeds to interpret Section 304 to be the authorization for all proceedings brought by private parties under the Clean Air Act. The Court so rules, not without recognition of the apparent inconsistencies it presents. "The difficulty is that Section 304 on its face deals only with litigation in the District Court" (Slip opinion, p. 8), and "the statutory language is confusing," (Id., p. 9) but the court still finds that "[s]ection 307 designates the forum; it goes no further. The authorization for, and conditions of, suit are contained in Section 304(a). The legislative history reveals that Section 307

does no more than direct that some proceedings must be brought in the circuit courts" (Ibid., citation omitted).

The court also disposed, in footnotes, of subsidiary arguments by the Environmental Protection Agency that Section 304(d) does not authorize recovery of attorneys' fees against the Government at all (Slip opinion, p. 8 n. 5) and that, even if petitioners' retained counsel were entitled to his attorneys' fees, a "public interest law firm" formed for the purpose of litigating issues against the Government should not be entitled to recovery against the Government of the salary of its house counsel in furthering such private organization's purposes (Slip opinion, p.13, n. 7). The court found these arguments of no merit.

Staff: Thomas C. Lee (Land and Natural Resources Division)

COURT OF CLAIMS

INVERSE CONDEMNATION; NECESSITY OF PERMANENCE TO ESTABLISH AN AERIAL TRESPASS AS A TAKING UNDER THE FIFTH AMENDMENT.

Jay R. Wilfong, d/b/a Wilfong Poultry Farms v. United States, 480 F.2d 1326 (C. Cls., July 13, 1973; D.J. 90-1-23-1658)

In an action in the Court of Claims the plaintiff complained that his property rights in the air superadjacent his farm, but below the 500-foot level above which lies the public's free and navigable air space, had been taken as a result of military aircraft overflights for a period of approximately 14 months from October 1969 to December 10, 1970.

In dismissing plaintiff's petition the court stated that it is not enough to constitute a taking that aerial trespasses are sufficiently low and frequent as to interfere with the enjoyment of private property; they must also subject such enjoyment to a liability of intermittent and permanent interference. Drawing from cases relating to the taking of riparian property rights by periodic flooding occasioned by federal dam projects and the necessity there of a permanent interference the court stated the permanence factor establishing a Fifth Amendment taking is equally applicable to aerial invasions of private property by federal action. Thus, where the trespass is terminable quickly and at will and the policy of prompt abatement is firm and followed in actual practice even though there may be some damage, it is consequential in nature and tortious in origin rather than a compensable taking under the Fifth Amendment.

Staff: Hank Meshorer (Land and Natural Resources Division)