ML

# United States Attorneys

# Bulletin

*Published by Executive Office for United States Attorneys*
*Department of Justice, Washington, D.C.*

Vol. 23 October 31, 1975 No. 22

UNITED STATES DEPARTMENT OF JUSTICE

Vol. 23 October 31, 1975 No. 22

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

Vol. 23 October 31, 1975 No. 22

## POINTS TO REMEMBER

### FEDERAL RULES OF EVIDENCE: RULE 801(d)(1)(C): IDENTIFICATION OF DEFENDANT

When the Federal Rules of Evidence were enacted last year, Congress omitted proposed Rule 801(d)(1)(C), which would have permitted the introduction as substantive evidence of a witness's prior statements of identification of a defendant, such as those made during a lineup, photographic display, or on-the-scene confrontation. The rule as proposed codified existing Federal law. See e.g., Clemons v. United States, 408 F.2d 1230 (D.C. Cir. 1968), Cert. denied, 394 U.S. 964 (1969); United States V. Anderson, 406 F.2d 719 (4th Cir.), Cert. denied, 395 U.S. 968 (1969).

On October 16, 1975, President Ford signed S. 1549, a bill to restore Rule 801(d)(1)(C) to the Rules of Evidence. The bill takes effect fifteen days after its approval, i.e., on October 31, 1975.

The restoration of the rule should be of substantial benefit in situations in which a witness who was once certain of his identification is unable at trial to positively identify a defendant because of the passage of time, the changed appearance of the defendant, intimidation, or other reason.

(Criminal Division TWX dtd 10/17/75)

* * * *

ANTITRUST DIVISION
Assistant Attorney General Thomas E. Kauper

DISTRICT COURT

SHERMAN ACT

JURY FINDS DEFENDANTS GUILTY OF PRICE FIXING OF GYPSUM BOARD.

United States v. United States Gypsum Company, et al., (Cr. 73-347; July 15, 1975, DJ 60-12-138)

On March 3, 1975, trial commenced in the above-styled case against the following defendants: United States Gypsum Company; National Gypsum Company; Georgia-Pacific Corporation; The Celotex Corporation; Andrew J. Watt, Executive Vice President of U.S. Gypsum; Colon Brown, Chairman of the Board and Chief Executive Officer of National Gypsum; and J.P. Nicely, a divisional Vice President of Sales of National Gypsum. Two other corporate defendants and seven additional individual defendants previously had pleaded nolo contendere.

Jury selection was completed in one day with six men and six women empanelled to hear the case which Judge Hubert I. Teitelbaum said, at the time of jury selection, could last three or four months. Opening statements were made by counsel for each of the defendants immediately after the opening by government counsel and before the prosecution's case-in-chief. The court had given them the option of either opening then or waiting until the prosecution rested.

The indictment charged that the defendants and others had, from sometime prior to 1960 until at least 1973, engaged in a conspiracy to raise, fix, maintain and stabilize the prices and terms and conditions of sale of gypsum wallboard throughout the United States in violation of §1 of the Sherman Act. Sales of gypsum wallboard by the corporate defendants exceeded $4 billion during the conspiratorial period.

During its case-in-chief which covered 9-1/2 weeks, the government called 36 witnesses and introduced approximately 3500 exhibits. Most of the witnesses were present or former employees of the defendant companies and were hostile to our position. Nevertheless, the government was able to establish the four main parts of the conspiracy: the establishment and maintenance of uniform published prices and terms and conditions of sale; the exchange of competitive information concerning reported departures from list prices and terms; the suppression and restraint of the competition from small "single-plant" producers; and the adoption of uniform methods of packaging and handling gypsum board.

The evidence establishing the agreement concerning list prices and terms and conditions of sale was largely circumstantial, consisting of meetings and communications among the defendants at times and in such circumstances as to make it probable that a number of the important price and credit changes were the result of prior communications. The most significant of these changes were the price increases and adoption of stricter credit terms during 1965 and 1966, when the industry was experiencing decreasing sales and increasing over-capacity. At the time of one major price increase (December, 1965) the corporate defendants simultaneously adopted identical "internal" policies of selling only at list price, ignoring the competitive prices offered by the independent, single-plant gypsum board producers and centralizing authority to deviate from list prices in the hands of the chief executive officer of each company.

The proof in this regard was bolstered by the defendants' continuing practice of exchanging competitive information regarding prices, credit terms, job price protection, delivery practices, and methods of packaging and handling. This was a key feature of the case and constituted a common thread running through all of the defendants' activities. These exchanges occurred during the entire conspiratorial period, mostly by telephone but also in face-to-face situations at meetings of the Gypsum Association, the trade group for the industry.

The government claimed that through the exchange of

competitive information the defendants were in fact policing an agreement to adhere to list prices and standard terms, ratifying prior changes in list price, and that the exchanges had a stabilizing effect on prices. The defendants conceded that they exchanged competitive information, but denied that there was any agreement to do so. They contended that they engaged in this practice on the advice of counsel, and that it was necessary to exchange competitive information to protect themselves against the fraudulent claims of buyers and to establish a good faith meeting of competition defense under Section 2(b) of the Robinson-Patman Act. The defendants claimed that the phone calls, which they termed "verification", were made to ascertain whether a competitor was offering a certain price or credit term to a customer. If verified, the defendants claimed, this process enabled the inquiring company to lower its price and to offer the same price or terms to the customer without risking a price discrimination violation of the Robinson-Patman Act. The government showed that this claimed defense was a "sham" by developing the following facts:

(a) Defendants, while keeping elaborate and detailed forms for recording information and evidence of competitive offers, had no space provided for a systematic record showing that the offer was "verified" by a competitor.

(b) Rather than keeping detailed and accurate accounts of these alleged "lawful" contacts with competitors, defendants' employees either kept no notes, or only made scratch notations, often in cryptic language or in a "code," where numbers were used in place of the name of a competitor.

(c) These so-called "verifications" ranged far beyond a limited inquiry seeking a yes or no answer about a specific competitive offer, and included discussions on prices of new products not yet marketed, prices being offered throughout an entire marketing zone, whether any defendant was deviating from standard credit terms, and warnings to smaller competitors about trucking in "rail only" zones. In addition, "verification" continued during a period when the defendant corporations all had a policy of not

meeting lower prices. Thus, these so-called "verification" calls were in reality a method of policing the conspiracy.

The testimony also showed that these phone calls increased when prices were falling, and a few witnesses stated that prices would have fallen even more in the absence of "verification."

The third aspect of the conspiracy was to curb the competitive activities of single-plant producers--newcomers to the industry. Having failed in efforts to get these smaller firms to conform to standard industry pricing and delivery practices, the defendants from time to time engaged in selective predatory pricing activity against two independent producers, Texas Gypsum Company and Republic Gypsum Company. These actions were taken against these two companies in retaliation for their practice of delivering wallboard to dealers by truck, at a time when wallboard was delivered by rail. The "majors" knew that the demand for truck delivery would allow these companies to expand their operations and cause "disruptive" competitive conditions all over the country. Their object was to drive them out of business or at least keep them confined to one area of the country. This predatory activity occurred in the early 1960's against Texas Gypsum and Republic Gypsum, and again in 1968 and 1970 against Republic Gypsum, and centered primarily in the Texas and Oklahoma markets. During the 1965-1967 period, defendants had adopted a policy of ignoring the single-plant producers in the belief that "giving up" to them the 10% share of the market which was represented by the plant capacity of the independents would be compensated by higher prices in the rest of the country. However, by 1968, expansion plans by the independants threatened to erode the market positions of the defendants so they reinstituted a practice of selective price cutting to contain the single plants and restrain any further growth by them.

With respect to the methods of packaging and handling gypsum wallboard, the evidence showed that defendants, operating primarily through a "materials handling committee" of the Gypsum Association, engaged in discussions

concerning containment or elimination of competitive packaging and handling practices. In addition, indications of such discussions and agreements were laundered or "edited out" of drafts of the minutes of these meetings by Gypsum Association lawyers.

Although the evidence showed that competitive packaging and handling practices were equatable to the price of the product and that collective efforts were made by the defendants to eliminate them, Judge Teitelbaum ruled that an agreement with respect to that phase standing alone could not support a conviction in this case. Accordingly, he instructed the jury that any agreement on materials handling may be considered illegal only if they found it had the purpose and effect of raising, fixing, maintaining or stabilizing the price of gypsum board.

The defendants called 32 witnesses, including an expert economist, during their case. They introduced considerable evidence to show that various meetings held by the defendants at or shortly before price changes were for legitimate business purposes such as negotiating patent disputes, negotiating inter-company sales of products and raw materials and pursuing proper trade association activities. A major thrust of their defense was that beginning in 1968, there was increased price competition in the sale of gypsum wallboard, that the transaction price of basic wallboard decreased rapidly beginning 1968 and that prices at the end of the conspiratorial period were below the levels at the beginning of it. Defendants' contended that such activity was absolutely inconsistent with charges of price fixing. Defendants' emphasis on the period from 1968 on was due to the fact that the five-year statute of limitations period commenced on December 27, 1968. Defendants also alleged that these so-called "verification" calls were very infrequent and that they stopped engaging in them at various times between early 1968 and 1971.

During the defendants' case, they introduced a number of charts and graphs based on computer analyses of sales transactions and reports of competition. They allegedly depicted rather extensive price cutting in the form of discounts from list prices, as well as a great

dispersion of prices in various selected markets for which transaction price studies were made. Other industry witnesses almost uniformly described the market as being in a price war from the end of 1967 into 1971.

None of the computer tapes from which the summaries were prepared had been provided to the government in advance of trial. The government, alleging that defendants' failure to turn over the computer tapes constituted a violation of the Court's discovery order, moved to exclude the charts from evidence. Judge Teitelbaum denied the government's motion and also refused its request for programming information of the computer tapes used by defendants. The government also argued that the summaries should not have been admitted because no foundation had been laid for the admissibility of the computer studies, and because the studies were shown to have been inaccurate in a number of instances. Judge Teitelbaum, however, admitted the summaries and charts and ruled that any alleged inaccuracies went to the weight of exhibits and not to their admissibility.

The defendants' expert economist, who is the President of Carnegie-Mellon University and was called as a joint witness on behalf of all of the defendants, testified that his price analysis showed "rampant competition" from 1968 through 1971 and that the market behavior was inconsistent with any conspiracy.

Following the defendants' case, the government presented a short rebuttal case, followed by a short surrebuttal. Closing arguments to the jury lasted 5-1/2 days, [with the government closing first, followed by defense counsel and then a rebuttal by the government.] Following the Court's charge, which lasted approximately 2-1/2 hours, the jury retired to deliberate on the afternoon of July 8. On the morning of July 15, the jury returned verdicts of guilty as to all defendants, and the Court proceeded to sentence the defendants immediately. The Court imposed fines of $50,000 each on each of the four corporations, and sentenced the individual defendants as follows:

> Colon Brown (Chairman of the Board, National Gypsum Company) -- 6-month suspended sentence, 3 year's probation and a $50,000 fine;

J.P. Nicely (Vice President, Sales, National Gypsum Company) -- 6-month suspended sentence, 1 year's probation and a $1,000 fine;

Andrew J. Watt (Executive Vice President, U.S. Gypsum Company) -- 6-month suspended sentence, 1 year's probation and a $10,000 fine.

One condition of probation is that the individuals must pay their fines out of personal funds and cannot accept any reimbursement from their employers. Execution of sentences was stayed for all defendants pending appeal. Each of the defendants has filed a notice of appeal with the United States Court of Appeals for the Third Circuit. Including the defendants who plead nolo contendere in January, the fines levied in this case totaled $561,000.

On August 14, 1975, Judge Teitelbaum denied defendants' post trial motion for post trial interview or in camera interrogation of jurors and for disclosure of certain impounded transcript. This motion centered on two incidents which occurred near the end of the trial.

The first incident occurred during the closing arguments. Counsel for defendant Andrew J. Watt reported before court on Thursday, July 3, 1975, that his client had told him that the first alternate juror had joined Mr. and Mrs. Watt on an otherwise unoccupied elevator at the close of court the previous day. The alternate juror was reported to have said to them, "Get me on the jury; it's eleven to one." The judge called the alternate juror into his chambers where she implicitly denied making the statement by saying she had said, "I would sure like to get on this jury; I have been here so long." The judge admonished the alternate juror for having violated his instructions not to communicate with the parties or their lawyers, dismissed her from the jury and directed her not to have any communications with any of the jurors until the case was over.

Defense counsel argued that the dismissed juror's statements were an indication that the jury had engaged in premature deliberations. They requested that they be allowed to interview the alternate jurors (including the one who was dismissed) when the jury retired and the

alternates were discharged. The judge denied this request but did have the jury sworn as to whether or not they had violated his previous instructions regarding discussing the case. None responded that they had.

After the guilty verdicts the defendants renewed their request, this time asking that either they be allowed to interview all the jurors or that the court conduct such inquiry with the full participation of counsel. In his memorandum opinion denying the request, the judge cited the jurors' sworn testimony that they had not violated his instructions and the length and fervor of their deliberations (8 days) as being inconsistent with the contention that they reached a premature decision. The judge expressed his concern for maintaining the secrecy of jury deliberations and the inhibiting effect of such interviews on the free exchange of views by jurors.

The second incident which gave rise to the defendants' motion occurred on the seventh day of jury deliberations. The jury foreman sent the judge a note asking if he could meet with the judge to "discuss the condition of the jury and further guidance." The court met with counsel explaining that he would refuse to meet with the foreman if any counsel objected. He proposed to meet with the foreman in the presence of the court reporter only and, because he feared the foreman might inadvertantly disclose the status of the deliberations, to impound the transcript of the meeting. After obtaining the consent of all defendants the judge met with the foreman. After the meeting the defendants requested that the judge release the transcript. He declined as he did again when they renewed their request in their post trial motion. The judge explained that he felt those familiar with the trial could identify the views of a particular juror from some of the language used by the foreman in the meeting. Citing Rule 606(b) of the Federal Rules of Evidence which provides that a juror may not testify as to any matter or statement occurring during the course of deliberations, the judge ordered that the transcript be sent to the Court of Appeals for in camera review. Defendants renewed their request to obtain the impounded transcript in the Third Circuit. They argued that access to the transcript was necessary for preparing and prosecuting

their points on appeal. On September 16, 1975, a motions panel of the Third Circuit Court of Appeals entered a brief order granting defendants' motion for disclosure of the impounded transcript. Judge Garth dissented from the Court's order, asserting that defense counsel had unqualifiedly and unconditionally consented to the procedure proposed by the district judge (including the impounding) and therefore there was no need to disclose the transcript.

A companion criminal contempt case arising out of the same conspiracy against U.S. Gypsum, National Gypsum, Georgia-Pacific, The Celotex Corporation, Graham Morgan (Chairman of the Board of U.S. Gypsum), Andrew Watt, Colon Brown, and William Hunt (former President of Georgia-Pacific) for violation of a 1951 judgment is currently pending in United States District Court in Washington, D.C. Trial in that case is scheduled to begin on January 19, 1976.

Staff: John C. Fricano, Rodney O. Thorson, L. John Schmoll (Judgments and Judgment Enforcement), George Edelstein, Michael A. Rosen and Peter A. Mullin

* * *

CIVIL DIVISION
Assistant Attorney General Rex E. Lee

COURT OF APPEALS

FEDERAL COAL MINE HEALTH AND SAFETY ACT

DISTRICT COURTS HAVE NO JURISDICTION TO GRANT COAL MINE OPERATORS INJUNCTIVE RELIEF FROM ADMINISTRATIVE CLOSURE ORDERS.

Sink v. Morton, (C.A. 4, No. 75-1292, decided September 30, 1975; D.J. 236452-98).

Plaintiff owns and operates a small coal mine in West Virginia. A federal coal mine inspector acting pursuant to the Federal Coal Mine Health and Safety Act, 30 U.S.C. 801, et seq., issued several withdrawal orders for violations of the Act. Plaintiff filed an administrative application for relief, and also sought an injunction from the district court, which the court granted pending exhaustion of administrative remedies.

The Fourth Circuit vacated the injunction, holding that plaintiff had an adequate administrative remedy for temporary relief from the withdrawal orders, 30 U.S.C. 815(d), and that this remedy must be exhausted before resorting to the courts. The court of appeals also determined that the Act itself requires exhaustion of administrative remedies, and, thereafter, judicial review is in the courts of appeals, not the district courts.

Staff: Michael Kimmel (Civil Division)

## NATIONAL ENVIRONMENTAL POLICY ACT

SEVENTH CIRCUIT UPHOLDS BUILDING OF SCATTERED SITE HOUSING IN CHICAGO.

Nucleus of Chicago Homeowners Assoc. v. Lynn (C.A. 7, No. 74-1206, decided October 6, 1975; D.J. 145-17-253).

Plaintiffs, various community organizations and individual homeowners, brought suit against HUD seeking to enjoin the government's plan to build court-ordered low-income housing units in certain middle income and working class neighborhoods. The government had filed a negative impact statement--a determination that no environmental impact statement was necessary. Plaintiffs contended not only that an impact statement was necessary but that it should: (1) not isolate each neighborhood for separate consideration but instead assess the housing plan for the entire city since some environmental effects are cumulative; and (2) consider as an evironmental factor whether the recipient neighborhoods have adequate social services to help the new low income residents.

The district court, after a full trial on the merits, entered judgment for the government. The court of appeals affirmed. The Seventh Circuit held that HUD's determination not to file an environmental impact statement was not an abuse of discretion and that although there are benefits to comprehensive planning, the separate consideration of individual sites was not an abuse of discretion. Moreover, the court concluded that HUD's consideration of the impact of the housing on the social fabric of the communities was sufficient, and since the housing was court ordered, HUD had few options.

Staff: Judith S. Feigin (Civil Division)

## STANDING TO SUE

FOURTH CIRCUIT REJECTS TAXPAYERS' AND CONGRESSMEN'S CHALLENGE TO U.S. ACTIVITIES IN INDOCHINA FOR LACK OF STANDING.

Harrington, et al. v. Schlesinger, et al. (C.A. 4, No. 74-1573, decided October 8, 1975; D.J. 145-15-574).

Plaintiffs, seventeen taxpayers and four congressmen, sought an injunction against certain American support activities in Indochina as violative of a statutory ban on combat activities by United States Forces in Indochina. The district court dismissed the case on political question grounds. The Fourth Circuit affirmed, holding that the plaintiffs lacked standing to sue as taxpayers or as congressmen. The court, relying on United States v. Richardson, 418 U.S. 166 (1974) and Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974), concluded that the taxpayer standing requirements of Flast v. Cohen, 392 U.S. 83 (1968), were not met because plaintiffs presented no constitutional challenge to any congressional appropriation. In rejecting plaintiffs' congressional standing argument, the court held that the congressmen's voting power was not diluted by the challenged executive action, and that in seeking enforcement of a statute for which they had voted the congressmen's interests were "indistinguishable from that of any other citizen."

Staff: John M. Rogers, David M. Cohen (Civil Division)

## BANKHEAD-JONES FARM TENANT ACT

EIGHTH CIRCUIT, EN BANC, HOLDS THAT STATE LAW, NOT FEDERAL LAW, GOVERNS LIABILITY OF LIVESTOCK AUCTIONEERS FOR CONVERSION.

United States v. Chappell Livestock Auction, Inc. (C.A. 8, No. 74-1618, decided September 29, 1975; D.J. 136-45-669).

The United States instituted suit for conversion against a Nebraska livestock auctioneer who had sold cattle subject to a security interest held by the Farmers Home Administration. Under federal law, an auctioneer who auctions cattle subject to a federal security interest is liable in conversion even though he has no notice of the security interest. However, a Nebraska statute absolved the auctioneer of liability in the same circumstances. Therefore, the sole question presented in this case was whether state or federal law applied.

Although five circuits already have held that federal law controls in these identical circumstances, the Eighth Circuit and the Fourth Circuit had previously held to the contrary. The district court in this case followed the previous decision of the Eighth Circuit and a panel of the court of appeals, one judge dissenting, affirmed. According to the majority, the need for uniformity in the national program administered by the Farmers Home Administration did not outweigh Nebraska's interest in regulating the property rights of its citizens and in promoting commerce in livestock within the state.

After rehearing en banc, the court of appeals, three judges dissenting, affirmed the decision of the district court. The en banc majority adopted the opinion of the majority of the original panel and the dissenting judges adopted the opinion of the dissenting member of the original panel.

Staff: David M. Cohen (Civil Division)

## MERCHANT MARINE ACT OF 1936

C.A.D.C. UPHOLDS MARITIME ADMINISTRATION REGULATION REQUIRING PRO-RATA REDUCTION OF OPERATING SUBSIDIES FOR MERCHANT MARINE LINES NOT SUBSTANTIALLY MEETING FOREIGN FLAG COMPETITION BY REASON OF EXCESSIVE CARRIAGE OF NON-COMPETITIVE PREFERENCE CARGOES.

States Marine International, Inc. v. Peterson and American Maritime Association v. Peterson (C.A.D.C. Nos. 74-1499 and 74-1902, decided Sept. 5, 1975; D.J. 61-16-110; 61-16-111).

The Maritime Administration, after formal hearings, issued a regulation reversing prior practice by requiring pro-rata reduction of operating differential subsidies (ODS) for subsidized merchant marine lines that do not substantially meet foreign flag competition because they carry excessive amounts of non-competitive preference cargoes (e.g., U.S. military cargoes, which may not be carried by foreign vessels). The Merchant Marine Act of 1936 authorizes operating subsidies only for those scheduled cargo lines whose operations are required to "meet foreign flag competition." The unsubsidized segment of the American merchant marine challenged the regulation in the district court on the basis that no subsidies should be paid to subsidized lines for carriage of preference cargoes, since these cargoes by definition are non-competitive. The district court adopted the view of the intervening subsidized lines that the statutes did not expressly authorize reduction of ODS on account of carriage of preference cargoes, and that Congress had ratified a 36-year administrative practice of not requiring any such reduction.

The court of appeals rejected the arguments of both portions of the industry, and upheld the Administration's pro-rata subsidy reduction regulation as "a reasonable and proper determination of a difficult and complex situation, both factually and legally." Citing prior cases the court held that an agency "may reverse even a well established practice if convinced that the past course of action was incorrect." The court noted that here, based on economic data presented at the hearings preceding the issuance of its regulation, the agency became convinced that its prior interpretation should be changed to reflect "the competitive requirements of the Merchant Marine Act as they relate to carriage of preference cargoes."

In addition, the court of appeals upheld the agency's application of its new regulation to existing subsidy contracts, on the ground that such contracts were subject to any reasonable interpretation of the statute by the agency.

Staff: James C. Hair (formerly of the Civil Division)
Michael Kimmel (Civil Division)

## CIVIL RIGHTS ACT

C.A.D.C. HOLDS FEDERAL EMPLOYEES ENTITLED TO TRIAL DE NOVO IN TITLE VII DISCRIMINATION SUITS.

Hackley v. Roudebush (C.A.D.C., No. 73-2072, decided September 29, 1975; D.J. 35-16-422).

The District of Columbia Circuit, reversing Hackley v. Johnson, 360 F. Supp. 1247 (D.D.C., 1973), has now held that federal employees bringing Title VII discrimination suits under the 1972 Amendments to the Civil Rights Act, 42 U.S.C. §2000e-16, following exhaustion of administrative remedies, are entitled to trials de novo in the district court. In an extensive opinion by Judge Wright, the court reasoned that the term "civil action" in the statute, the incorporation by reference of certain private sector provisions into the federal employment provisions of the act, and the legislative history indicate that a trial de novo was intended by Congress. There are now five court of appeals decisions on the issue decided by this case. The Third and Seventh Circuits have already held that there is a right to a trial de novo. Sperling v. United States, 515 F.2d 465 (C.A. 3, 1975); Caro v. Schultz, C.A. 7, No. 74-1728, decided September 3, 1975. The Ninth and Tenth Circuits have held that there is not such a right. Chandler v. Johnson, 515 F.2d 251 (C.A. 9, 1975), adopted the holding of the district court in Hackley that a de novo trial is not required if the absence of discrimination is affirmatively established by the clear weight of the administrative record. Salone v. United States, 511 F.2d 902 (C.A. 10, 1975) indicated that substantial evidence review was appropriate in these cases. The Government has petitioned for certiorari in Sperling (S. Ct. No. 75-247) and acquiesced in certiorari in Chandler (S. Ct. No. 74-1599) and Salone (S. Ct. No. 74-1600).

Staff: Edward D. Ross, Jr., Assistant United States Attorney (District of Columbia)

DISTRICT COURT

## LIMITATIONS OF ACTIONS

GOVERNMENT RECOVERY OF MEDICARE ADVANCES TO PROVIDERS OF MEDICAL CARE ARE COVERED BY THE CONTRACT LIMITATION PERIOD OF 28 U.S.C. 2415(a).

United States v. Forrest (U.S.D.C. N.D. Okla., Civil No. 74-C-380, decided September 23, 1975; D.J. 137-59N-97).

The Social Security Administration, acting through private intermediaries advances Medicare funds to providers of medical care based on estimates of the provider's costs. At the end of each fiscal year, the provider must submit an account of actual costs to the intermediary which audits the account and determines whether there has been an overpayment or underpayment. Here the United States sued a provider to recover overpayments, and the provider pleaded the three-year limitation on tort actions contained in 28 U.S.C. 2415(b). The court, however, held that the six-year limitation on contract actions in 28 U.S.C. 2415(a) was applicable, and further determined that the limitation period did not begin to run until the intermediary had completed its audit and made an overpayment determination.

Staff: United States Attorney, Nathan G. Graham, (N.D. Okla) Assistant United States Attorney Kenneth P. Snokes, Lenard H. Gorman (Civil Division).

CRIMINAL DIVISION
Assistant Attorney General Richard L. Thornburgh

COURT OF APPEALS

NARCOTICS

USE OF CANINE TO SNIFF BAGGAGE FOR MARIJUANA IS NOT A SEARCH TRIGGERING FOURTH AMENDMENT RESTRICTIONS

United States v. Howard Bronstein and Douglas P. Pennington (C.A. 2, Nos. 75-1124, 75-1125, decided August 8, 1975)

Airline ticket agents viewing the suspicious activities of two men purchasing tickets on a San Diego - Connecticut flight, contacted the San Diego Drug Enforcement Administration which, in turn, contacted the Hartford DEA. A full description of the men and their luggage was provided. Hartford DEA thereupon secured the services of a German shepherd trained to detect marijuana. Given the opportunity to walk among fifty pieces of luggage after arrival of the San Diego flight, the dog reacted positively to only two bags, each matching the descriptions transmitted by San Diego DEA.

Appellants contended that the actions of the canine constituted a search violative of the Fourth Amendment. The Court responded by stating that had police officers detected the odor through their olfactory senses there could be no contention that the type of behavior was an unlawful search. Since dogs do not talk, their reaction to the presence of marijuana is conveyed through placing their noses to the luggage and then nipping and biting at that luggage. Conceding this conduct would possibly amount to a "technical trespass", the Court nevertheless does not assert it to amount to a search. The sniffing occurred in a public terminal, and the baggage was shipped via a public flight. Hence, applying the standard of Katz. v. United States, 389 U.S. 347, 351 (1967), "[w]hat a person knowingly exposes to the public ...is not a subject of Fourth Amendment protection."

Staff: United States Attorney (Connecticut)
Peter C. Dorsey
Assistant United States Attorney
Thomas P. Smith

Vol. 23 October 31, 1975 No. 22

NARCOTICS

## RELIABLE INFORMANT'S DETECTION OF MARIJUANA THROUGH USE OF HIS OLFACTORY SENSES MAY PROVIDE PROBABLE CAUSE FOR ISSUANCE OF A SEARCH WARRANT EVEN IF THE INFORMANT DOES NOT APPEAR IN PERSON BEFORE THE ISSUING MAGISTRATE

United States v. Steven Pond and David Fanelli (C.A. 2, Nos. 75-1100, 75-1131, decided August 28, 1975)

Appellant Pond checked a suitcase and a footlocker in San Diego onto a New York-bound train. The San Diego station agent smelled what he thought to be marijuana emanating from the luggage. The agent had often been exposed to marijuana and had correctly detected it through his sense of smell in approximately half of 25 to 30 cases in which he provided information to federal authorities. He telephoned the relevant information to San Diego Drug Enforcement Administration which thereupon relayed it to New York DEA. The New York agent submitted an affidavit detailing the station agent's information and providing the informant's prior experience in the detection of marijuana through sense smell. The warrant was issued, and the two defendants were arrested upon receiving the baggage in New York. Seventy-seven pounds of marijuana were discovered.

Although conceding that smell alone justifies securing a warrant where the affiant qualifies as recognizing the odor and the odor is distinctive appellants asserted that the informant must be the affiant so that the magistrate can properly determine the informant's qualifications to recognize the odor. The Second Circuit rejected this contention, finding that the affidavit supplied sufficient justification for the conclusion that the informant had experience in employing his sense of smell to detect marijuana, including the detection of marijuana in suitcases through use of his olfactory senses. The Court stated that a "substantial basis" did lie for the magistrate's determination as to the informant's qualification to detect the odor of marijuana.

Staff: United States Attorney (S.D. New York)
Paul J. Curran
Assistant United States Attorneys
Michael S. Devorkin
Lawrence S. Feld (on the brief)

LAND AND NATURAL RESOURCES DIVISION
Acting Assistant Attorney General Walter Kiechel, Jr.

COURT OF APPEALS

INDIANS

INDIAN PROBATE; EQUAL PROTECTION.

Constance Jean Holler Eskra, et al. v. Rogers Morton, et al. (C.A. 7, No. 74-1906, Sept. 29, 1975; D.J. 90-2-4-240).

Plaintiff, an illegitimate Indian child, brought a class action challenging a probate decision of the Board of Indian Appeals which had denied her an intestate share in the estate of her mother's aunt. The decedent, a member of the Lac Courte Oreilles Chippewa Tribe, possessed Indian trust property in the State of Wisconsin at the time of her death. 25 U.S.C. secs. 348 and 474, which provide for the descent of Indian trust property, incorporate the existing laws of the particular state where the property is located for the purpose of determining heirship. In this case, the pertinent Wisconsin statute, which has since been repealed, barred an illegitimate child from inheriting through (as opposed to inheriting from) his or her parents. The plaintiff alleged, inter alia, that the federal statutes, which incorporate this Wisconsin statute, violated the equal protection provisions of the Due Process Clause of the Fifth Amendment by impermissibly discriminating against illegitimate Indian children.

In a 2-1 decision, the Seventh Circuit reversed the district court's granting of summary judgment for the defendants and held that the statutory scheme in this case constituted a deprivation of equal protection with regard to the plaintiff.

First of all, as to the district court's reasoning that the State's function in fulfilling the presumed intent of intestate decedents constituted a rational basis for the discrimination against illegitimate children, the court concluded that this function was not a sufficient basis to withstand scrutiny under the Equal Protection Clause. Furthermore, the court held that the instant situation was not controlled by the precise holding of Labine v. Vincent,

401 U.S. 532 (1971), where the Supreme Court had held that a State may discriminate against an illegitimate child with regard to inheritance from his or her father, nor was it controlled by the rationale of Labine as explained in Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972). The instant case was distinguished on the basis that it involves inheritance through a mother, while Labine dealt with inheritance relative to a father, and different problems of proof of identity are thereby involved. A second distinction was that a mother would probably face greater obstacles to legitimation of her child as compared to a father.

Staff: Michael A. McCord (Land and Natural Resources Division); Assistant United States Attorney Warren W. Wood (W.D. Wisc.).

## DISTRICT COURTS

### ENVIRONMENT; WILDERNESS ACT

ENVIRONMENTAL IMPACT STATEMENT ON MANAGEMENT PLAN FOR THE BOUNDARY WATERS CANOE AREA BY THE FOREST SERVICE IS INADEQUATE FOR FAILURE TO ADEQUATELY DESCRIBE THE PROPOSED ACTION AND EVALUATE ITS IMPACTS AND ALTERNATIVES; THE ACTUAL DECISION, BASED ON AN INADEQUATE IMPACT STATEMENT AND OTHER IMPROPER FACTORS, IS SUBSTANTIVELY IN VIOLATION OF NEPA, SECTION 101; THE WILDERNESS ACT FORBIDS TIMBER HARVEST IN VIRGIN AREAS OF THE BOUNDARY WATERS CANOE AREA.

Minnesota Public Interest Research Group v. Butz, et al. (D. Minn., No. 4-72 Civ. 598, Aug. 13, 1975; D.J. 90-1-4-608).

This case, originally filed in November 1972, involves the interpretation of NEPA and the Wilderness Act, 16 U.S.C. sec. 1131 et seq. The Boundary Waters Canoe Area (BWCA) is a uniquely managed area of heavy recreation use in Northern Minnesota that is part of the National Wilderness System. Plaintiffs alleged, and the district court's most recent decision held, that the environmental impact statement prepared by the Forest Service on the 10-year management plan for the BWCA in Minnesota inadequately discusses the environmental impacts and alternatives of timber harvest and other management activities in the BWCA, that the special Wilderness Act provisions applicable to the BWCA forbid timber harvest in virgin areas of the BWCA, and that the decision to allow timber harvest in virgin areas was

arbitrary and capricious and in violation of Section 101 of NEPA, 42 U.S.C. sec. 4331. The court permanently enjoined future timber harvest in the virgin areas and on six pre-NEPA sales.

Staff: Assistant United States Attorney Francis X. Herman (D. Minn.); L. Mark Wine (Land and Natural Resources Division).

## ENVIRONMENT

HUD NEED NOT PREPARE FORMAL ENVIRONMENTAL STATEMENT SINCE PUBLIC HEARINGS WERE HELD ON PROJECT AND SINCE THE PROJECT WAS WELL ADVANCED; SPECIAL ENVIRONMENTAL CLEARANCE SUFFICIENT.

Bay Ridge Action Committee, Inc., et al. v. Thomas Ekeland, et al. (Civil Action No. 75 C 477, E.D. N.Y., July 25, 1975; D.J. 90-1-4-1155).

Plaintiffs sought to enjoin the completiton of the construction of an apartment complex for the elderly in Brooklyn, New York, known as the Shore Hill project. The Department of Housing and Urban Development (HUD) had a limited, financial role in the project. Prior to approving federal funding, HUD prepared a special environment clearance based on a finding that the National Environmental Policy Act of 1959 (NEPA), 42 U.S.C. sec. 4321 et seq., was inapplicable and that there was no significant environmental impact.

The court denied plaintiffs' motion for a preliminary injunction. In an opinion looking more to practicalities than to technicalities, the court held that HUD's special environmental clearance complied with NEPA, since several public hearings had been held prior to HUD's funding and since the project was already advanced in cost and in physical progress. It noted that the notice required by Hanly v. Kleindienst, 471 F.2d 823, 830 (C.A. 2, 1972), had not been given but concluded tht this defect was not fatal when the project had long been the subject of public discussion at the state level.

Staff: Assistant United States Attorney Prosper K. Parkerton (E.D. N.Y.); Jonathan U. Burdick (Land and Natural Resources Division).

## DEEP WATER PORTS

DEEP WATER PORT ACT DOES NOT APPLY TO OIL AND GAS PRODUCTION FACILITIES CONSTRUCTED ON OUTER CONTINENTAL SHELF.

Get Oil Out, Inc. v. Exxon Corporation, et al. (Civil No. 75-1967-F, C.D. Cal., Aug. 27, 1975; D.J. 90-1-4-1221).

In 1968 several oil companies obtained oil and gas leases in the Santa Barbara Channel under the Outer Continental Shelf Lands Act. The leases were unitized with the Exxon Corporation designated as the operator of the unit which was called the Santa Ynez Unit. Exxon submitted a unit development plan to Interior which involved two alternative means of transporting produced crude oil to refineries.

One alternative involved a pipeline to shore, treatment to remove impurities, and another pipeline to an existing marine terminal at a buoy within the three-mile limit of state jurisdiction. The other alternative involved a pipeline to a permanently moored vessel outside the three-mile limit which would serve as both a treatment and storage facility. In both alternatives the crude oil would be transported from the respective loading facility by barge or tanker to a nearby refinery.

Plaintiffs contended that either alternative involved a facility for the loading, unloading and further handling of oil within the meaning of the Deep Water Port Act which required a permit from the Secretary of Transportation.

The court held that the legislative history of the Deep Water Port Act demonstrates that it was not intended to apply to oil and gas production facilities permitted under leases from Interior. The court noted that Congress cannot be taken to have intended the significant burden of duplicate regulation which would be involved in application of the Deep Water Port Act as the plaintiffs had suggested.

The court also found adequate an environmental impact statement prepared by Interior on the development plan.

Staff: Irwin L. Schroeder (Land and Natural Resources Division).