U.S. Department of Justice
Executive Office for United States Attorneys

United States Attorneys' Bulletin

Published by:

Executive Office for United States Attorneys, Washington, D.C.
For the use of all U.S. Department of Justice Attorneys

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COMMENDATIONS

Assistant United States Attorney PATRICK J. CHESLEY, Central District of Illinois, has been commended by L.W. Wiggs, Postal Inspector in Charge, United States Postal Service, Saint Louis, Missouri, for his excellent work in the prosecution of United States v. Raymond Dean Lindsey, which resulted in verdicts of guilty to the six mail fraud counts charged in the indictment.

Assistant United States Attorney MILES H. FRANKLIN, Eastern District of Kentucky, has been commended by Colonel Philip C. Miles, Chief of the General Litigation Division, Office of the Judge Advocate General, United States Air Force, for his outstanding litigation support for the Air Force in the case of Midwest Holding Corporation v. United States, dealing with a complex government contract.

Assistant United States Attorneys LARK INGRAM and STEVEN WISEBRAM, Northern District of Georgia, have been commended by Mr. John D. Glover, Special Agent in Charge, Federal Bureau of Investigation, Atlanta, Georgia, for the successful prosecution of United States v. Hawk, a major public corruptions case.

Assistant United States Attorney PETER OSINOFF, Central District of California, has been commended by Mr. Wilbur Jennings, Regional Attorney, Department of Agriculture, San Francisco, California, for his fine work in Simpson v. United States, wherein the defendant alleged that the Government was negligent and liable due to "failure to warn" in a recreation area.

Assistant United States Attorney THOMAS G. SCHRUP, Northern District of Iowa, has been commended by United States Attorney Evan L. Hultman, Northern District of Iowa, for the outstanding manner in which he handled the Wedelstedt case: the largest criminal tax prosecution in the history of the Northern District of Iowa.

Assistant United States Attorney MICHAEL P. SULLIVAN, Southern District of Florida, has been commended by both Acting Assistant Attorney General John C. Keeney, Criminal Division, and Director William H. Webster, Federal Bureau of Investigation, for his endurance and professionalism as sole prosecutor in the complex case of United States v. Fabio Alonso, which involved nine members of the Dade County Public Safety Department's Narcotics Squad.

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
William P. Tyson, Director

POINTS TO REMEMBER

Claims Collection Litigation Report

The Debt Collection Section of the Executive Office for United States Attorneys, with the support and cooperation of the General Accounting Office (GAO), developed a Claims Collection Litigation Report (CCLR) in an effort to implement better procedures for the referral of agency "commercial claims" to the Department of Justice for litigation and enforced collection. On January 20, 1983, GAO officially implemented the CCLR by a memorandum to the heads of Federal departments and agencies. Effective March 1, 1983, all departments and agencies will be required to use this standard litigation report when referring administratively uncollectible claims to United States Attorneys for litigation and enforced collection. A limited number of copies of the officially implemented CCLR package have been provided to each United States Attorney by GAO.

Uniform use of this standard litigation report by all agencies will serve a number of purposes. First, it will provide United States Attorneys with all of the information they must have to effectively litigate agency claims and enforce collection of a substantial sum. ("Substantial," in the context of the CCLR, means substantial in relation to the amount of each claim referred.) The CCLR will provide this essential information, as required by the Federal Claims Collection Standards (4 C.F.R. 101-105), "on top and up front" so that no time will be lost searching the client agency's file for the necessary information. This will increase the speed at which claims received from agencies are taken to judgment, or are otherwise converted to paying status, and, as a result, should increase the amount of money collected by United States Attorneys and returned to the agencies.

Second, the CCLR should improve the quality of claim referrals to United States Attorneys by prompting agencies to take more aggressive administrative action to collect on their claims. Such aggressive collection action is required by the Federal Standards (4 C.F.R. 102.1, et seq.), but has often been overlooked or ignored. Thus, both aggressive collection action by the agency and prompt referral of uncollectible claims to United States Attorneys of claims which are accompanied by a CCLR containing current, accurate and complete information, should enhance United States Attorneys' success in enforcing collection of a substantial sum on such agency claims.

Finally, the CCLR will provide the information needed by United States Attorneys from all agencies in the same order or sequence. This will enable United States Attorney debt collection personnel to design procedures around the report which will permit better utilization of the modern word and data processing equipment which many offices now have. Once the information is received and recorded in the same sequence, prerecorded programs will enable such equipment to "read" each "debtor file" to "automatically" produce the documents essential to litigation including, for example, demand letters, complaints, summons and judgments. Such an "automated" collection system will improve the efficiency and speed with which claims are handled and, as a result, United States Attorneys should be able to better serve their client agencies.

Questions concerning the CCLR should be directed to the Debt Collection Section staff (FTS 756-6287).

(Executive Office)

CIVIL DIVISION
Assistant Attorney General J. Paul McGrath

St. James Hospital v. Schweiker, St. Mary of Nazareth Hospital Center v. Schweiker, Johnson County Memorial Hospital v. Schweiker, ___ F.2d ___, Nos. 82-1253, 82-1237, 82-1213 (7th Cir. Feb. 1, 1983). D.J. ## 137-23-795, 137-23-841.

MEDICARE--HILL-BURTON INDIGENT CARE, PATIENT TELEPHONE COSTS: SEVENTH CIRCUIT HOLDS THAT HILL-BURTON INDIGENT CARE COSTS ARE NOT REIMBURSABLE EXPENSES UNDER THE MEDICARE ACT, AS AMENDED BY THE TAX EQUITY & FISCAL RESPONSIBILITY ACT OF 1982, AND UPHOLDS SECRETARY'S CHARACTERIZATION OF MEDICARE PATIENT TELEPHONE COSTS AS NON-COVERED ITEMS.

Reversing two district court decisions and affirming a third, the Seventh Circuit has upheld the Secretary of HHS's determination that (1) hospitals may not obtain reimbursement from the Medicare program for costs associated with provision of free care under the Hill-Burton Act, and (2) hospital-patient telephones constitute personal comfort items which are not covered under the Medicare program.

In deciding the Hill-Burton cost issue, the court looked not only to the legislative history of both the Hill-Burton Act and the Medicare Act but also to Section 106 of the Tax Equity and Fiscal Responsibility Act of 1982, which was enacted during the pendency of these appeals and was intended to be dispositive of this question. Over the objection of the hospitals, the court of appeals applied Section 106 of the Tax Equity Act retroactively, holding that the amendment is constitutional because (1) "strong public policy outweighs the hospitals' insubstantial interest," and (2) Section 106 ". . . is nothing more than the reaffirmation of the longstanding policy that it was never the intent of Congress to allow Medicare payments to be used to reimburse hospitals for the percentage of free care they provide indigents in repayment of their obligations under the Hill-Burton Act."

With respect to the Medicare patient telephone costs issue (presented in St James Hospital only), the court held that there was jurisdiction to review this claim even though it was "self-disallowed" and therefore not included in the hospital's cost report. Additionally, the court held that the telephone exclusion was an agency interpretation of a statutory provision relating to coverage under the Medicare Act and as such is reviewable. On the merits of this issue, the court held that the Secretary's regulation banning reimbursement of the cost of a telephone used for a Medicare patient's personal comfort is clearly authorized by

CIVIL DIVISION
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the Medicare Act (42 U.S.C. §1395y(a)(6)). Determining that the Secretary acted within his authority in promulgating this regulation and that the hospital (St. James) failed to show that the Secretary abused his discretion in determining that bedside telephones are personal comfort items, the court reversed the district court and held that the Secretary's regulation which prohibits the reimbursement of hospitals for bedside telephones provided as personal comfort items to Medicare patients is valid and enforceable.

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LAND AND NATURAL RESOURCES DIVISION
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United States v. 2,175.86 Acres in Hardin County, Texas (Kirby Forest Industries), Nos. 81-2402 and 81-2471 (5th Cir. Jan. 24, 1983). D.J. # 33-45-1525-27.

CONDEMNATION: UNITED STATES NOT LIABLE FOR INTEREST IN STRAIGHT CONDEMNATION CASE PRIOR TO AWARD WHERE IT HAS NOT ENTERED INTO POSSESSION; COMMISSION REPORT DID NOT COMPLY WITH MERZ.

The Fifth Circuit, reversing the district court (520 F. Supp. 75), held that the United States is not liable for the payment of interest in a complaint-only, or straight, condemnation action prior to payment of the award of just compensation where the Government has not entered into actual possession or interfered with the landowner's property rights prior to payment. The court held that, generally, where there are no circumstances where a delay between judgment and payment by the Government of the award should render the non-payment of interest unjust, the date of taking in an action under 40 U.S.C. 257 is the date of payment of the award when title actually passes to the Government. The court found unpersuasive the contrary decision of the Ninth Circuit in U.S. v. 156.81 Acres of Land, 671 F.2d 336 (1981), cert. denied, 103 S.Ct. 569 (1982), determining that "the judgment in condemnation does not deprive the landowner of a present use."

The court also reversed the district court's approval of the report of the Commission, finding that it did not comply with the requirements of U.S. v. Merz, 376 U.S. 192 (1964). The court agreed with both Kirby and the United States that the report was conclusory and remanded the case to the district court with instructions to follow Merz.

Judge Jolly dissented in part, grudgingly agreeing with the Merz analysis. He would, however, follow the Ninth Circuit and hold that a condemnation judgment affects the owner of unimproved property differently than the owner of improved property by preventing him from making economically viable use of his property. Such a landowner is, in Judge

Jolly's words, "entitled to interest from at least the date of judgment" as part of the just compensation due him.

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Johnston v. Davis, No. 80-2297 (10th Cir. Jan. 25, 1983). D.J. # 90-2-5-381.

NEPA: EIS RULED INADEQUATE AS TO COST-BENEFIT ANALYSIS OF PROJECT.

Under challenge was an environmental impact statement, described in Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4332(a)(C), and prepared in 1978 by the Agriculture Department's Soil Conservation Service. The EIS addressed the Toltec Reservoir Project in Wyoming to be built by a Wyoming political subdivision, Toltec Watershed Improvement District, with Federal assistance funds provided by the Soil Conservation Service under the Watershed Protection and Improvement Act, 16 U.S.C. 1001 et seq. The district court, denying all relief, held that the EIS was adequate. On appeal, the Tenth Circuit reversed with respect only to that part of the EIS containing the economic cost-benefit analysis for the project.

That analysis used a discount rate, to arrive at the present value of future project benefits, of 3-1/4 percent, which plaintiffs challenged as unrealistically low for today's economy. The Tenth Circuit held that, under Section 80(b) of the Water Resources Development Act of 1974, Congress had "grandfathered" this low discount rate for cost-benefit analyses applicable to Federal water-resource projects authorized before January 3, 1969, whose local sponsor, prior to December 31, 1969, had given "satisfactory assurances" to the relevant Federal agency that it could pay the non-Federal share of project costs. The Tenth Circuit detailed why all preconditions for the "grandfathered" discount rate had been met, and why the Soil Conservation Service "was entitled" to use that rate "in comparing alternatives" in the EIS.

Nonetheless, the Tenth Circuit declared that the EIS "must be revised" to disclose that the 3-1/4 percent discount rate reflects an artificially set rate mandated by Congress for policy reasons having nothing to do with existing discount rates reflective of the current economy, and to disclose that, if the current 7-1/8 percent discount rate were used, "the estimated costs of the project would exceed estimated benefits over the life of the project." Once this revision was made, the court declared, the EIS "will fully comply with" NEPA.

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United States v. Wisconsin, No. 79-1014 (7th Cir. Jan. 25, 1983). D.J. # 90-2-5-381.

INDIANS: PERMISSIVE OCCUPANCY SURVIVED PRESIDENTIAL REMOVAL ORDER.

In 1972, the United States filed suit on behalf of the Lac Courte Oreilles Band of Indians to determine whether the "school sections" found within the boundaries of the reservation, created for the Tribe under the Treaty of 1854, were excluded from the reservation. The district court found that the Tribe had, by Treaty in 1837 and 1842, extinguished its aboriginal right of occupancy of the land, but did retain a right of permissive occupancy. The permissive occupancy could be terminated by Presidential order if the Indians misbehaved, or absent misbehavior, the tribe would be entitled to remain on the land for a long period of time. In 1850, the President ordered the permissive occupancy terminated. The district court, while eventually finding that the school sections passed to the state, found that the right of permissive occupation survived the presidential removal order since the evidence demonstrated that the Tribe did not misbehave and that the order was issued only eight

years after the 1842 Treaty. The Seventh Circuit upheld the district court's finding on the same basis.

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Southeast Alaska Conservation Council v. Watson, Nos. 82-3206 and 82-3241 (Jan. 31, 1983). D.J. # 90-1-4-2387.

ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT OF 1980 REQUIRES EIS FOR MINING ACTIVITIES.

The Forest Service had appealed from an order that required it to prepare an EIS for certain mining activities in southeast Alaska conducted by Pacific Coast Molybdenum Co. The court of appeals agreed with the district court that Section 503(h)(3) of the Alaska National Interest Lands Conservation Act of 1980 required an EIS. The Forest Service had argued that Congress had intended an EIS only where an access road and bulk sampling were done simultaneously. The court of appeals held that ANILCA requires an EIS for bulk sampling even without the road.

In a related matter, the court of appeals reversed the district court's denial of a motion to intervene by the Southeast Alaska Seine Boat Owners and Operators Association, et al. in the Southeast Alaska Conservation Council, Inc. case (9th Cir., No. 82-3278, Jan. 31, 1983). The Ninth Circuit concluded that the district court had abused its discretion in denying intervention as of right under Fed.R.Civ.P. 24(a)(2).

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B & M Coal Corp. v. Office of Surface Mining, No. 82-1380 (7th Cir. Feb. 1, 1983). D.J. # 90-1-18-1507.

SURFACE MINING AND CONTROL ACT OF 1977 RULED CONSTITUTIONAL.

Section 518(c) of the Surface Mining and Control Act of 1977, 91 Stat. 445, 500, 30 U.S.C. 1268(c), provides that when a civil penalty has been assessed against an operator for a violation of the Act, the operator must deposit the assessed penalty amount in an interest-bearing escrow account as a precondition to obtaining further administrative and judicial review of the penalty. B & M Coal Corporation was cited for several violations of the Act and, after an informal hearing, a penalty was assessed against it. Rather than depositing the penalty and seeking further administrative review, B & M Coal brought an action in the district court seeking to have Section 518(c) declared unconstitutional as violative of procedural due process rights secured by the Fifth Amendment.

The district court upheld the constitutionality of Section 518(c), B & M Coal Corp. v. OSM, 531 F. Supp. 677 (S.D. Ind. 1982), and the Seventh Circuit affirmed. The court of appeals noted that while the Act and implementing regulations do not provide for a full adjudicatory hearing to challenge the penalty assessment until after the amount is deposited, Section 525 of the Act, 30 U.S.C. 1275, allows an operator to challenge the fact of violation (as opposed to the amount of the penalty) without any such prepayment requirement. In addition, the operator is given an opportunity to have an informal conference concerning the proposed assessment before the deposit requirement comes into effect. The court of appeals found that these procedures fully met all the due process obligations owing in this situation.

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Action for Rational Transit v. West Side Highway Project, No. 82-6197 (2d Cir. Feb. 1, 1983). D.J. # 90-5-1-4-139.

CLEAN AIR ACT CHALLENGE TO PROJECT REJECTED FOR FAILURE TO PURSUE CLAIMS IN STATE COURT AND TO APPEAL ADMINISTRATIVE FUNDING.

The court of appeals turned back Clean Air Act challenges to the Westway Project on two alternative grounds. First, the court held that the complaint failed to allege the violation of specific strategies or commitments in the relevant New York State Implementation Plan (SIP). It was not sufficient, the court said, to allege that Westway violated aims and goals expressed in the SIP. Alternatively, the plaintiff's failure to pursue the claims in state court was held to bar consideration in Federal court. Plaintiff's failure to appeal a state administrative board's finding that Westway would not violate the SIP was found to be fatal in this respect. The court summarily rejected arguments that the Department of Transportation was barred from funding Westway due to Westway's alleged failure to conform to the SIP, and the EPA had a duty to issue notices of violation with respect to the now-defunct indirect source review component of New York's SIP.

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United Brotherhood of Carpenters and Joiners of America v. Lewis, No. 82-1606 (D.C. Cir. Feb. 4, 1983). D.J. # 90-4-149.

OUTER CONTINENTAL SHELF LANDS ACT AMENDMENTS OF 1978: COAST GUARD'S DELAY IN ISSUING AND THEN ENFORCING REGULATIONS DID NOT GIVE RISE TO MANDATORY DUTY.

The Outer Continental Shelf Lands Act Amendments of 1978 required the Coast Guard to issue certain manning regulations within 6 months of the statutory enactment date. The regulations were not to be enforced until one year after their effective date. When UBC filed suit in district court the regulations had not yet been issued but, during the course of

the district court proceedings, the regulations were, belatedly, issued. The district court then dismissed the action as moot, notwithstanding UBC's claim that the regulations should be enforced "forthwith" as a remedy for their late issuance. The district court also rejected UBC's claim that the President should be compelled to make certain "ministerial" factual findings relevant to the exercise of his authority to exempt certain OCS units from coverage of the regulations.

The D.C. Circuit affirmed. While "not condoning" the Coast Guard's delay in issuing the regulations, the court concluded that Congress did not make the one-year delay in enforcement of the regulations conditional on the issuance of the regulations within six months and, accordingly, refused to require enforcement prior to expiration of the one-year lead time provision. As for the relief sought against the President, the court concluded that the President's "duty" under the provision was discretionary rather than ministerial in nature and, accordingly, found that it lacked authority to compel presidential action.

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Federal Rules of Criminal Procedure

Rule 31(d). Verdict. Poll of Jury.

The jury found defendant guilty on thirteen counts. When polled, however, the eleventh juror declared she did not agree entirely with the verdict on the first three counts. After further deliberations, the judge asked the juror to explain why and she indicated that she had changed her vote just prior to the verdict but could not stand behind it on the poll. The judge nevertheless accepted the guilty verdict on all thirteen counts. Defendant appealed, arguing that the judge acted contrary to Rule 31(d) when he accepted a jury verdict which was not unanimous on all counts. The Government admitted that the judgment should be reversed on the first three counts.

The court held that the judge violated Rule 31(d) by continuing to question the juror after she expressed her dissent and by accepting a verdict from which a juror had dissented. Since Rule 31(d) provides that "the jury may be directed to retire for further deliberations or may be discharged," these were the only courses of action available to the court. Until the jury announced a partial verdict or a unanimous verdict on all counts, with no juror disavowing any part of the verdict, no judgment of conviction could be entered.

(Reversed and remanded.)

United States v. Clarence Christian Nelson, 692 F.2d 83 (9th Cir. Nov. 9, 1982).

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Federal Rules of Criminal Procedure

Rule 16(a)(1)(A). Disclosure of Evidence by the Government. Statement of Defendant.

At the time of his arrest defendant was advised of his Miranda rights and he informed Federal agents of his desire to remain silent. Several hours later, however, in the presence of different agents, he waived his rights and made incriminating statements. These later statements, but not defendant's initial invocation of his Miranda rights, were contained in a written report obtained from the Government by defense counsel pursuant to Rule 16. When it was disclosed during the trial that all of defendant's statements were not contained in the report, defendant moved for a mistrial, claiming that the Government had denied him a fair trial by failing to make complete Rule 16 disclosures. That motion, and a post-trial motion for a suppression hearing, were denied and defendant appealed.

The court of appeals held that for the purposes of Rule 16(a)(1)(A) a defendant's post-arrest oral statements which the Government seeks to use on direct and his response to preceding set(s) of Miranda warnings comprise a single "statement." It rejected the Government's claim that responses to Miranda warnings are not discoverable because they cannot constitute a part of the prosecution's evidence at trial, and found that far from being unrelated to the Government's proof, a defendant's invocation of rights often determines the admissibility of a crucial portion of the Government's evidence. Failure to make full disclosure as required by Rule 16(a)(1)(A) was prejudicial to defendant by depriving him of notice of possible grounds for a timely suppression motion.

(Reversed.)

United States v. McElroy, No. 82-1086 (2d Cir. Dec. 22, 1982).

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