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POINTS TO REMEMBER**MOTOR VEHICLES: ODOMETER TAMPERING**

On July 14, 1976, Public Law 94-364 took effect, amending Title VI of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §1981 et seq. Title IV of the Act makes it unlawful for any person: (1) to turn back the mileage on an odometer of a vehicle; (2) to disconnect an odometer; (3) to drive, with a fraudulent intent, a vehicle with a disconnected odometer; (4) to advertise, sell, use, or install or cause to be installed a device which causes an odometer to register an inaccurate mileage; or (5) at time of sale, pursuant to 49 C.F.R. §580.1 et seq., to fail to give a complete and accurate mileage disclosure statement, or, if a dealer or distributor, to fail to receive a complete mileage disclosure statement.

Prior to the recent amendments, there were only two federal remedies for odometer turnbacks and related activities. First, an aggrieved victim could bring a private action and recover either \$1500 or treble damages, whichever was greater, plus attorneys fees, if fraudulent intent could be proven. Secondly, the Attorney General could bring an injunctive relief action. Those remedies are still in effect and have been supplemented by the recent amendments.

The new amendments provide for both civil and criminal penalties. The civil penalties are collected in a civil action brought by the Attorney General, once such penalties have been previously assessed by the Secretary of the Department of Transportation during an administrative proceeding. Ordinarily, these civil penalty actions, should be referred to the Consumer Affairs Section, Antitrust Division for evaluation and a prosecutorial decision.

The criminal penalty is contained in 15 U.S.C. §1990c which subjects a person, including an individual director, officer or agent of a corporation, to a fine of not more than \$50,000 or to imprisonment for not more than one year, for knowingly and willfully committing any of the above enumerated acts.

The Consumer Affairs Section of the Antitrust Division has the primary responsibility for enforcement of these provisions. Because of the division of responsibilities between the National Highway Traffic Safety Administration, the agency within the Department of Transportation which administers the statute by conducting administrative investigations, and the Department of Justice which enforces the statute by conducting criminal investigations and bringing both civil and criminal litigation, the following guidelines have been established and should be followed.

By memorandum dated August 26, 1976, from the Director of the F.B.I. to the Assistant Attorney General, Antitrust Division, the F.B.I. has officially taken the position its resources should be limited to those instances "indicating organized or widespread ring-type activity in odometer tampering." The F.B.I. has further taken the position that investigations into odometer tampering should consider violations, not only of 15 U.S.C. §1990c, but also of 18 U.S.C. §§2314, 1341, and 1342. Because of the availability of both civil penalty and injunctive relief remedies, plus the private treble damage action, it is the position of the Antitrust Division that a criminal investigation and/or prosecution should be undertaken only in those instances where there is an interstate movement of vehicles, usually involving a middleman, or where there is a large scheme, probably involving more than one dealer or distributor, but not necessarily interstate in scope.

Because the Antitrust Division has already instigated several multi-state investigations and anticipates others, and because of its experience in enforcing this law, the United States Attorney is requested (1) to advise the Consumer Affairs Section of the Antitrust Division of any proposed investigations by the F.B.I. or the grand jury and (2) not to file any criminal prosecutions or civil injunctive actions without prior consultation with the Consumer Affairs Section. Because of the need to coordinate enforcement activities under the amended statute, the main responsibility for prosecution will be borne by the Division. Upon request, the Consumer Affairs Section will provide litigation assistance, including pleadings, pretrial motions, and grand jury or trial assistance.

Finally, the new amendments create a vehicle for state enforcement of the law. Sections 1990a and 1989 confer on the state attorney general the right to bring an action either in federal or state court (1) to restrain violations of the act or (2) to recover what private parties could recover from the private treble damage action. Again, because of possible duplication of investigations and the receipt of complaints by several agencies, it is essential that contacts by the United States Attorney with a state attorney general's office be coordinated with the Antitrust Division. Accordingly, the United States Attorney is requested to advise both the Consumer Affairs Section and the National Highway Traffic Safety Administration of both formal and informal referrals to the state attorney general, showing possible violations of the law.

This item has been referred to the United States Attorneys' Manual Coordinator for the Antitrust Division.

(Antitrust Division)

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CIVIL DIVISION  
Assistant Attorney General Rex E. Lee

American Federation of Government Employees v. Hoffman (C.A. D.C., No. 75-1091, decided September 15, 1976). DJ 145-4-1806.

Federal Employees.

The American Federation of Government Employees brought suit challenging the legality of the Reserve Technical Programs of the Air Force and the Army under which civilian employees performing support and maintenance functions for the Air Force and Army Reserves are required, as a condition of employment, to maintain active membership in the reserve unit they are serving. The Court of Appeals affirmed the district court in rejecting plaintiffs' contentions that the Reserve Technician Programs (1) are totally lacking statutory authorization; (2) contrary to federal civil service laws; (3) violative of the Veterans' Preference Act; and (4) inconsistent with agreements between the Civil Service Commission and the armed forces.

Attorney: Mary-Elizabeth Medaglia (Assistant U.S. Attorney), FTS 426-7281.

Ashland Oil, Inc. v. Federal Trade Commission (C.A.D.C., No. 76-1174, decided September 20, 1976). DJ 145-119-69.

Federal Trade Commission; Trade Secrets.

A congressional subcommittee sought to obtain information from the Federal Trade Commission's files. This civil suit was then brought by Ashland Oil to enjoin the FTC from transferring "trade secret" information that the FTC had obtained from Ashland (competitive data detailing the company's reserve estimates for all its natural gas leases and contracts on federal lands) to the congressional subcommittee. The basis for the suit was 15 U.S.C. 46(f), which prohibits the FTC from "mak[ing] public" trade secrets.

The court of appeals affirmed, by a 2-1 vote, the district court's ruling that the FTC could not be enjoined because "[n]o substantial showing was made that the materials in the possession of the FTC will necessarily be 'made public' if turned over to Congress." Absent such a showing, the court of appeals said, 15 U.S.C. 46(f) "does not preclude the FTC from transmitting trade secrets to Congress pursuant either to subpoena or formal request."

Attorney: Edwin E. Huddleson (Civil Division), FTS 739-3259.

Felder v. United States (C.A. 9, Nos. 75-1267, 75-1455, decided September 9, 1976). DJ 157-8-332.

Tort Claims Act.

The estate of the pilot of a small aircraft brought suit against the United States contending that the aircraft crashed as a result of wake turbulence that should have been foreseen by the air traffic controller. The district court found the government liable and awarded plaintiff \$2,359,000 in damages. On appeal, the Court of Appeals affirmed the finding of liability, but reduced the damage award by \$561,630. Holding that the proper standard of review under the Tort Claims Act was a federal standard, the court ruled that the trial court properly deducted for income tax in the award of damages, but that there had not been a sufficiently large deduction. The appellate court also held that the awards for grief and loss of companionship were excessive.

Attorney: Eloise E. Davies (Civil Division),  
FTS 739-3425.

First State Bank & Trust Co. of Guthrie v. United States (C.A. 10, Nos. 75-1722, 75-1723, decided September 22, 1976).  
DJ 157-60-259.

Tort Claims Act.

The Tenth Circuit has just affirmed, as not "clearly erroneous", a district court finding that the government converted property subject to a lien of the plaintiff bank. However, the court rejected the bank's contention that pre-judgment interest was allowable as an element of damages for conversion under state law. The court ruled that the Tort Claims Act's preclusion of pre-judgment interest (28 U.S.C. 2674) applied to conversion claims regardless of state law on damages.

Attorney: Richard A. Olderman (Civil Division),  
FTS 739-5325.

Hazelwood Chronic & Convalescent Hospital v. Weinberger (C.A. 9, No. 74-2210, decided September 23, 1976). DJ 137-61-237.

Medicare.

A private hospital formerly providing services under the Medicare Program challenged the Secretary's regulations which provide for recapture of accelerated depreciation in cases where a provider leaves the program. The district court held the regulation violated due process because of its retroactive effect. The Ninth Circuit has just reversed on the

merits, holding the regulation consistent with the Medicare Act.

Attorney: David M. Cohen (Civil Division),  
FTS 264-9233

McGrath v. Weinberger (C.A. 10, No. 75-1839, decided September 3, 1976). DJ 181-49-2.

Social Security Act.

Plaintiff brought a class action challenging the procedure authorizing the appointment of a representative payee to manage the benefits of a Social Security recipient determined to be incapable of managing them. Plaintiff contends the procedure was violative of the Due Process Clause in that neither prior notice nor an opportunity to contest the determination are afforded. The Court of Appeals held that, under the test announced by the Supreme Court in Mathews v. Eldridge, 44 U.S.L.W. 4224 (U.S. Feb. 24, 1976), the procedure was consistent with due process.

Attorney: Ruth C. Streeter (Assistant U.S. Attorney),  
FTS 474-3341

LAND AND NATURAL RESOURCES DIVISION  
Assistant Attorney General Peter R. Taft

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Commonwealth of Massachusetts v. U.S. Veterans Administration  
(C.A. 1, No. 76-1090; August 26, 1976). DJ 90-5-1-1-464.

Federal Water Pollution Control Act.

The court affirmed the dismissal of suit by the State under Section 505 of the FWPCA on jurisdictional grounds, for failure to wait 60 days before commencing an action as required by the statute. The First Circuit found that Congress did not waive the Government's sovereign immunity in the FWPCA except when there is strict compliance in the Section 505 requirements.

Attorneys: Neil T. Proto and Douglas K. Miller  
(Land and Natural Resources Division),  
FTS 739-3888, 5267.

United States v. City of Adair, Iowa (C.A. 8, No. 76-1608;  
August 10, 1976). DJ 90-1-5-1405.

Immunity of Federal Instrumentalities From Local Taxes.

The court affirmed summary judgment for the United States in its suit to set aside a special assessment levied by the City on real property owned by the Commodity Credit Corp., a federal entity. A "special assessment" was ruled outside a congressional waiver of immunity of CCC property from local "taxation."

Attorney: Michael A. McCord (Land and Natural  
Resources Division), FTS 739-2774.

Minnesota Public Interest Research Group v. Butz (C.A. 8,  
Nos. 75-1724, 1725, 1726, 1732 and 1769; August 30, 1976).  
DJ 90-1-4-608.

Wilderness Act; National Environmental Policy Act of 1969.

In a second en banc decision, the Eighth Circuit unanimously reversed the district judge both as to his interpretation of the Wilderness Act and as to his finding of the inadequacy of the EIS, regarding timber sales in the Boundary Waters Canoe Area. The injunction issued by the district court, halting timber cutting under existing sale contracts, was