



FEDERALLY SPEAKING



NUMBER 7

WHISKEY REBELLION: A BLAST FROM THE PAST

by Barry J. Lipson

*The Western Pennsylvania Chapter of the Federal Bar Association (FBA), in cooperation with the Allegheny County Bar Association (ACBA), brings you the editorial column **FEDERALLY SPEAKING***

MARK YOUR CALENDAR! At 5 pm on Wednesday, October 17, 2001, in the Engineers Society Ballroom, the not-to-be-missed “Blast from the Past,” the annual “**Whiskey Rebellion**,” will be annual once again! The FBA West Penn Chapter is reviving this tradition, conceived by The Honorables Cohill and McCune, and originally hosted by the ACBA Federal Court Section. With properly attired **Federal Troops** of the Original George W., Honest Western Pennsylvanian Rebel Farmers, Unabashed Revenuers, Corn Whiskey Punch (included), Bourbon Meat Tastees and other Revolutionary Vitals, and with Kolonial Karaoke, Sing-A-Longs and Surprises as part of the planned entertainment, how could you be elsewhere? All true “Sons and Daughters of the Bar” (and Bench) are welcome at the cost of a mere \$10.00 each; except that the cost for each “Unabashed Revenuer” is \$50.00, plus a round of drinks at the cash bar. A one hour/credit CLE on the “Legal Aspects of the Whiskey Rebellion,” will immediately precede the “Blast,” at the meager stipend of \$25.00 (including Blast). In addition, Legal Eagles who join the FBA between now and the arrival of **George Washington’s Federal Troops** will be the guests of the Chapter at the Blast and the CLE. However, *reservations* are a *must* and may be made by contacting Fran DiSalle, RSH&D, 900 Oliver Building, Pittsburgh, PA 15222 (412/434-8596).

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COMPETITION SKY HIGH! “Competition is a wonderful thing.” So concluded a recent Pittsburgh Tribune-Review Editorial about the “entry of low-cost AirTram Airways into the Pittsburgh market,” to compete with US Airways, which has “helped lead the [Pittsburgh International] airport to a record 1.96 million passengers in June [2001].” I can remember in the days of no competition, regular round trip coach between Philly and Pittsburgh being as high as in the neighborhood of half a grand, and buying cheaper tickets on flights from the City of Brotherly Love to Ohio destinations, with stopovers in Pittsburgh (I wonder if any Pittsburghers actually continued on to Ohio). But now, with competition, this Editorial reports the one-way Pittsburgh “fare to Philadelphia has fallen remarkably, from \$195 to \$98.” And this on the heels of the **U.S. Department of Justice’s** recent determination “that the proposal for United Airlines to acquire US Airways would reduce competition, raise fares, and harm consumers on airline routes throughout the

United States,” and that, therefore, the **DOJ** would “file suit to block the merger” and “be joined in its suit by the Attorneys General of several states, including ... the Commonwealth of Pennsylvania.” Can we take this as a sign that the new unanimously confirmed **President Bush/Attorney General Ashcroft** appointee, Charles James, as **Assistant Attorney General for the Antitrust Division**, will perform his antitrust enforcement “duties with unequivocal impartiality” in seeking “to protect competition in today's global economy,” as seemingly promised in the **Attorney General's** Press Release, and/or should we read anything into the fact that everyone already knew that this merger was dead and this tough **DOJ** stance may have shielded United from some serious legal problems?

DIE WHEN? IN 2010? Today, in 2001, the **Federal “Death Tax”** is 55%, with a \$675,000 exemption. It will continuously decrease by 1% a year through 2007, after dropping 5% in 2002, where it will stick for three years at 45% (but the exemption will continue increasing to a whopping \$3,500,000). Then in 2010 the **Estate Tax** will plummet to 0%. Why, then is the heading not “Die When? After 2009?” None of use really wants to include in our estate planning, “expire in [only] nine [short] years!” Because, not only would the rhyming be *even* worse, but unless **Congress** takes further action, in 2011 the 55% “**Death Tax**” re-asserts itself (with a mere \$1,000,000 exemption). Oh, well, that means of the first \$1,000,000, ten years from now, and thereafter, the heirs will get it all, while today they would only receive \$821,250. However, on amounts over \$1,000,000 or under \$675,000, there would be no change. This then is the smoke and mirrors of the **Federal Estate Tax** aspects of the **Economic Growth and Tax Relief Act of 2001**, recently signed into law by **President Bush**.

CHECKS AND BALANCES AT WORK. According to the American Immigration Lawyers Association (AILA), the **Illegal Immigration Reform and Immigrant Responsibility Act of 1996** (IIRIRA) and the **Anti-Terrorism and Effective Death Penalty Act of 1996** (AEDPA) “subject long-time lawful permanent residents to deportation for minor offenses that may have occurred years in the past.... Under the **1996 laws**, immigrants routinely are detained without bond, deported without consideration for discretionary relief, restricted in their access to counsel, and barred from appealing to the courts.... Low-level immigration officials act as judge and jury, and the **Federal Courts** lack the power to review most deportation decisions and **INS** activities.” But times may be a changing. This term the **U.S. Supreme Court** has found **habeas corpus** proceedings still available to such immigrants because **Congress** had not clearly stated its intent to foreclose all **habeas** review, which would be necessary in light of the serious constitutional questions that any such effort would raise under the **Suspension Clause** (*INS v. St. Cyr*, 69 U.S.L.W. 4510, June 25, 2001); rejected the government's assertion that the **INS** can indefinitely detain aliens who have been found deportable but are unlikely to be deported in the reasonably foreseeable future, either because their foreign citizenship cannot be clearly established or because their country of origin is unwilling to accept them (*Zadvydas v. INS*, 69 U.S.L.W. 4626, June 28, 2001: “A statute permitting indefinite detention of an alien would raise serious constitutional problems”); and refused to apply a provision of the 1996 law retroactively, absent a clear indication from **Congress** that it was meant to apply retroactively. Then, too, legislative attacks are being mounted in **Congress**, such as Representative Bob Filner's (D-CA) proposed “H.R. 87, the **Keeping Families Together Act of 2001**, which [according to the AILA] would address many of the problems that have resulted from the **1996 laws** [the **IIRIRA** and the **AEDPA**].” Indeed, in compliance with the **High Court's** Ruling the **INS** recently advised it was releasing 359 such detainees, and even **President Bush** has announced that he wanted up to 3 million illegal Mexican residents granted legal status.

ACQUISITION BY DEFAULT! The **FTC Commissioners**, with newly appointed **FTC Chairman** Timothy J. Muris recusing himself, by “default” declined to challenge PepsiCo, Inc.'s acquisition of The Quaker Oats Company. “De fault” was a 2-2-tie vote, with the two **Commissioners** voting to block this acquisition, Sheila F. Anthony and Mozelle W. Thompson, issuing on the same day as the vote a strong Statement that: “We believe that this result is regrettable. . . . [W]e believe -- and we think a court would have agreed -- that PepsiCo's acquisition of Quaker Oats is unlawful and contrary to the public interest. As a result of the Commission's failure to act today, we believe that consumers of sports drinks and, indeed, all soft drinks will suffer the consequences [FTC File No. 011-0059].”

YOU THOUGHT THEY'D GO SCOT-FREE? – THE SAGA CONTINUES! In the July 13, 2001 Federally Speaking Column we reported that the **US Department of Justice (DOJ)** had formally acknowledged that “The Carbide/Graphite Group of Pittsburgh, cooperated in the investigation” of the international graphite electrode rod price-fixing cartel, and that because they were the first to cooperate “the company and its executives received amnesty” and “obviously paid zero dollars in fines” (translation: went “scot-free”). Little enough for the “nearly \$500,000,000 contribution to the **US Treasury**, such cooperation netted the **US**, you might think. However, as we had earlier cautioned in our companion **CorpLaw® Commentaries** Column, The Carbide/Graphite Group (C/GG) would not go scot-free, but would also be “hurting, even though they cooperated with the antitrust enforcers,” because of private suits and suits by other sovereigns. Indeed, we had reported that even then the “antitrust enforcement authorities of the **European Union** have also initiated investigations.” Well, it has now been announced that C/GG has been fined \$8,850,000 by the **European Commission** as its share of the \$189,000,000 in fines levied by the **EU** against the eight co-conspirators in this international graphite rod price fixing conspiracy, which allegedly caused a 64 per cent increase in the cost of these rods. This fine equals nearly twenty per cent of the at least \$45,000,000 reserve C/GG has set aside to cover “potential liabilities which may result from civil lawsuits, claims, legal costs and other expenses associated with the antitrust matters noted above and the investigations initiated by the antitrust enforcement authorities of the **European Union**.” Not quite scot-free!

PASS THE FIFTH! The **U.S. Supreme Court** this term summarily reversed a judgment of the Ohio Supreme Court that had held that the **Fifth Amendment** privilege against self-incrimination did not apply to witnesses who claim to be innocent. “To the contrary,” the **High Court's** unanimous *per curiam* opinion stated, “one of the **Fifth Amendment's** basic functions . . . is to protect *innocent* men . . . who otherwise might be ensnared by ambiguous circumstances” (*Ohio v. Reiner*, 69 U.S.L.W. 3616, Mar. 19, 2001; emphasis *in* original).

DOPPELGANGER PROTECTION ACT. Webster defines a doppelganger as “a ghostly copy of a living person.” We define it here as a “non-material or ‘ghostly’ electronic copy of a living (still under **Copyright**) paper article.” Justice Ginsburg, writing for the 7-2 majority of the **U.S. Supreme Court**, has rejected the notion that such a “Doppelganger,” also know less colorfully as an “electronic database copy,” remains covered by the **Copyright** on the print edition of the newspaper or magazine, as being still part of a statutorily permitted revision of that original print edition. She based her finding primarily on the fact that the typical database user, such as LEXIS/NEXIS users, did not retrieve an

entire newspaper or magazine, but merely the individual article that was sought. Materializing from the Nether Realm the nebulous “**Doppelganger Protection Act**,” the **High Court** therefore held that, without the author’s permission, a newspaper or magazine publisher is barred by the **Copyright Act** from distributing such Doppelgangers of its freelance print articles through electronic databases (New York Times v. Tasini, 69 U.S.L.W. 4567, June 25, 2001).

FREE SPEECH IRONY. The Editors of the Allegheny/Beaver County Times observed in a recent editorial, with regard to the **U.S. House of Representatives** endorsement of the proposed **Flag Desecration/Burning Constitutional Amendment** for the fourth time in six years, that there is “One final irony: We’re more than willing to bet that many politicians who vote to *limit free speech* by backing this proposal, oppose the **Campaign Finance Reform** backed by U.S. Sen. John McCain because it *restricts free speech* [emphasis added].”

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*FBA - For information and reservations call Arnie Steinberg at 412/434-1190
Check this Column each month for possible revisions.

*The purpose of **FEDERALLY SPEAKING** is to keep you abreast of what is happening on the Federal scene All Western Pennsylvania CLE providers who have a program or programs that relate to Federal practice are invited to advise us as early as possible, in order to include mention of them in the **FEDERAL CLE CORKBOARD™**. Please send Federal CLE information, any comments and suggestions you may have, and/or requests for information on the Federal Bar Association to: Barry J. Lipson, Esq., FBA Third Circuit Vice President, at the Law Firm of Weisman Goldman Bowen & Gross, 420 Grant Building, Pittsburgh, Pennsylvania 15219-2266. (412/566-2520; FAX 412/566-1088; E-Mail blipson@wgbglaw.com).*

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