



Federally Speaking



Number 16

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. The views expressed are those of the author or the persons they are attributed to and are not necessarily the views of the FBA or ACBA.

LIBERTY'S CORNER

THE DEPUTY ATTORNEY GENERAL. The Deputy Attorney General, Larry D. Thompson, is a good friend of the Federal Bar Association. He advises and assists the U.S. Attorney General in formulating and implementing policies, and in the absence of the Attorney General, acts as the Attorney General. DAG Thompson was the keynote speaker at a recent FBA Chapter Presidents-Elect Two-Day Training Workshop, held in our Nation's Capital. In speaking about Post-911 America he cautioned, "we must not change the essential character of our country. If we do that the bad guys have won." He continued, "but we cannot be timid." Our actions have been "in sun light," and are "subject to judicial review." He then confirmed that "we may think outside of the box, but we are not going to think outside of the Constitution." Words one can live by.

FED-POURRI™

ANTITRUST DIVISION VISITS PITTSBURGH. Robert E. Connolly, long-time Chief of the Philadelphia Office of the Antitrust Division of the U. S. Department of Justice gave his periodic "State of the Region" Update in Pittsburgh on May 15, 2002. He brought us up to date on the criminal enforcement of the antitrust laws, which now include single industry fines approaching \$500 Million (see previous Federally Speaking reports on the Graphite Electrode Industry and the "Pittsburgh Connection"), jail sentence up to ten years (see Sunny Shelton, below), and a recent personal fine of \$7.5 million (see Sotheby and Christie, below). He also provided the FBA West Penn Chapter with a copy of the tapes of the actual Lysine Cartel meetings (starring, among others, ADM), which the FBA will show at a future CLE session if there is sufficient interest. Interestingly, he told how foreign executives actually voluntarily submit themselves to U.S. antitrust criminal jurisdiction so they will be able to come to the U.S. in the future, and travel the world freely, without fear of arrest and/or extradition (which Mr. Tennant of Christie's choose not to do, see below). Chief Connolly expressed a desire to have more reasons to visit Pittsburgh, and advised that his office will be conducting in Pittsburgh a "How to Recognize Antitrust Violations Seminar for Purchasing Agents" in the fall of 2002.

TEN YEAR ANTIRUST JAIL SENTENCE!!! U.S. District Court for Guam Judge John Unpingco sentenced Sonny Shelton to be sheltered from Guam's sunny skies, without parole, for the next ten

years. This arose out of an antitrust investigation of bid rigging on **Federal Emergency Management Agency (FEMA)** funded contracts for the repair of 1997 super-typhoon Paka caused damage. Sonny, who was in charge of procuring goods and services as Director of the Department of Parks and Recreation, was charged with conspiring with bidders to rig bids on projects worth about \$640,000, from whom he accepted kickbacks. He was found guilty of 12 counts of a 14-count **Federal** indictment for bid rigging, bribery, wire fraud and money laundering, in a prosecution conducted jointly by the **Antitrust Division of the U.S. Department of Justice** and the **U.S. Attorney's Office for Guam**. Following the trial, the prosecutors and the **Probation Office** separately submitted **Sentencing Guideline** calculations supporting a sentence of from 70-87 months. Judge Unpingco, instead, upped Sonny's sentence to 120 months, a more severe sentence than **Federal** guidelines normally recommended (though under the criminal statutes he was convicted of violating he could have received a total of 89 years). He was also ordered to pay \$112,000 in restitution for accepting kickbacks. **U.S. Assistant Attorney Joe Wilson** advised, "Shelton will have to serve the full sentence because parole has been abolished in the federal system." But what about time off for good behavior? More on criminal antitrust sentencing under "Follow Up" below.

NORTH AMERICAN LAW ENFORCEMENT PARTNERSHIPS. The **Canadian Competition Bureau** is taking the lead in looking towards developing new **North American** crime fighting partnerships, and improving existing ones, with other **North American** law enforcement agencies. The areas of initial interest are consumer and business frauds and the retrieval of the "proceeds of crime." According to Konrad von Finckenstein, the Canadian Commissioner of Competition, "sophisticated international criminal cartels, such as those we have seen relating to Vitamin A, highlight the need to work together to ensure the economic security of our citizens.... Developing solid partnerships for sharing information and conducting investigations is a critical step in tackling crime." Such cooperation was the subject matter of the recent "New Partnerships in Law Enforcement Conference," held in Ottawa, which enabled more than 125 participants from the **U.S.** and **Canada** to examine mutual areas of interest, including "Investigating Telemarketing And Consumer Fraud Cases," "Technology's Role In Anti-Competitive Offences And Investigations," and "Following The Money Trail To Find The Perpetrators Of Crimes." **U.S. Federal Enforcement Agency** representation at this Conference included the **Federal Trade Commission**, the **U.S. Postal Inspection Service**, the **U.S. Department of Defense**, and the **Fraud Section of the Criminal Division of the U.S. Department of Justice**. The Canadian Competition Bureau is an independent law enforcement agency devoted to bringing to all Canadians the benefits of a competitive economy. The Bureau oversees the application of Canada's Competition Act, Consumer Packaging and Labeling Act, Textile Labeling Act and Precious Metals Marking Act.

THIRD CIRCUIT EXTENDS ADA. In 1996, Gregory Fogleman, a security guard at Mercy Hospital in Wilkes Barre, Pennsylvania was allegedly mercilessly fired because his father, a former Mercy employee, was pursuing claims against Mercy under the **Americans with Disabilities Act (ADA)**, [42 U.S.C.S. §§ 12101-12213](#), the **Age Discrimination in Employment Act (ADEA)**, [29 U.S.C.S. §§ 621-634](#), and the **Pennsylvania Human Relations Act (PHRA)**, 43 Pa. Cons. Stat. Ann. §§ 951-963. Chief Judge Edward R. Becker, writing for the **Third Circuit Court of Appeals Court**, found that because of the additional anti-retaliation provision contained in the ADA, not present in the ADEA or PHRA, the ADA protects third parties, and survives a motion for summary judgment where, as here, the employee claimed that he was retaliated against for his father's protected activity, and this would be true even where the plaintiff claimed he was retaliated against because the employer *erroneously* thought he was engaged in a protected activity (e.g., assisting his father in the lawsuit). Both situations present a valid legal claim as a matter of law under ADA § 12203(b). In explaining why

the Court reached this result, even though this right was not explicitly contained in the ADA, Judge Becker advised, "To be sure, however, there are cases in which a blind adherence to the literal meaning of a statute would lead to a patently absurd result that no rational legislature could have intended." Here we are presented with "a conflict between a statute's plain meaning and its general policy objectives." To decide otherwise "will deter employees from exercising their protected rights." Accordingly, the Court held "that if Greg can show, as he claims, that adverse action was taken against him because Mercy thought that he was assisting his father and thereby engaging in protected activity, it does not matter whether Mercy's perception was factually correct [or not]" (**Fogleman v. Mercy Hospital Inc.**, 283 F.3d 561 (3rd Cir. 2002)).

ACLU CHARGES "BREACH OF FAITH." According to the **American Civil Liberties Union (ACLU)**, "mounting evidence now suggests that [**Attorney General**] Ashcroft is crippling the **Civil Rights Division of the Department of Justice** (DOJ), despite his promise during "his confirmation hearings ... to enforce our Nation's **Civil Rights Laws**," and this "movement away from civil rights enforcement began before September 11th and is not based on a lack of resources due to anti-terrorism concerns." On what does the ACLU base this accusation? Basically, the ACLU claims that the **DOJ's** conduct exhibits a "*pattern*" of "breach of faith" by allegedly having: a) abandoned "a landmark civil rights case against the Philadelphia transit system that used a harsh physical test that has nothing to do with the job requirements, but excludes nearly all women applicants from transit police positions;" b) failed "to fully enforce the **Voting Rights Act** in Mississippi;" c) failed "to bring any new cases against any police departments for police misconduct or abuse;" d) brought "only one new case for civil rights violations in the workplace;" and e) suggested "releasing the Adam's Mark Hotel chain accused of racial discrimination against its guests from a court ordered settlement." Mr. **Attorney General**, has there has been a "breach of faith" here, or can it be demonstrated that the ACLU is way off base on these charges? Or, perhaps, a "*pattern*" of conduct may only be used by, and not against, the **DOJ!**

FOLLOW-UP

"DUMB & HUNGRY" DEFENSE NETS JAIL & STIFF FINE! The net result of Polk Davis & Wardwell's "dumb & hungry" defense of Sotheby's former chairman, A. Alfred Taubman, for fixing "nonnegotiable fee schedules" with Christie's in the live auctioning of fine art, jewelry and furniture market, was a year and a day in Federal prison and a \$7.5 million personal fine. As reported in the January 2002 Federally Speaking column, PD&W had offered evidence to prove that this shopping mall entrepreneur and self-made millionaire lacked the interest or knowledge to "cook up" such a scheme, that he "was more concerned with what was for lunch" than the "understanding of our bottom line," and that he even fell "asleep occasionally" at Board meetings. Judge George B. Daniels of the **U.S. District Court for the Southern District of New York** advised that he did not buy that Taubman, whom he said failed to demonstrate any "contrition," was the "victim" of the schemes of others. Sotheby's ex-president, Diana D. Brooks, who had pled guilty and was the main witness against Taubman, was herself fined \$350,000 and placed on three years' probation, including one thousand hours of community service and six months of "house arrest." Judge Daniel's also admonished Ms. Brooks, "You have substituted shame for fame. ... Your decision to cooperate was self-saving, not self-sacrificing. You have not earned absolution." Anthony J. Tennant, Christie's chairman, a resident of Great Britain, was not before the Court, as he had declined to subject himself to trial in the United States.

EPA “PROTEST” RESIGNATIONS CONTINUE. The April 2002 Federally Speaking column reported on the resignation of **Environmental Protection Agency (EPA) Director of Regulatory Enforcement**, Eric Schaeffer because he was weary of “fighting” the “**White House.**” This has now been followed by another high-level “protest” resignation, the resignation of Robert J. Martin, **EPA National Ombudsman (Office of Solid Waste and Emergency Response)** because of his objection to the “decision to dissolve the **Ombudsman** function as it relates to the hazardous waste and **Superfund** programs. ... I cannot recognize in principle and conscience, however, the seizure of my files and planned transfer to the **Office of Inspector General** where I will not continue to serve as an independent **Ombudsman**, but will merely answer a telephone. ... The American people deserve nothing less than a truly independent **Ombudsman**, especially those facing threats to their health by uncontrolled hazardous and toxic waste sites across the Nation, most recently at Ground Zero in New York City.” **EPA Ombudsman** Martin had earlier stated that he was being transferred because he was a critic of corporate influence in the **EPA’s** prosecution of **Superfund** hazardous waste cleanup cases. Previously, in the Schaeffer resignation, **EPA Regulatory Enforcement Director** Schaeffer had cautioned: “Yet today, we seem about to snatch defeat from the jaws of victory. We are ... fighting a **White House** that seems determined to weaken the rules we are trying to enforce.” Schaeffer’s immediate concern centered around the reluctance of defendant electric utilities to continue towards controlling the emissions from their coal-fired smokestacks now that they anticipate the current **Bush Administration** would cutback on the applicable emission standards, emissions that Schaeffer had advised **Congress** “annually spew seven million tons of pollutants into the air, causing ‘more than 10,800 premature deaths; at least 5,400 incidents of chronic bronchitis, more than 5,100 hospital emergency visits; and more than 1.5 million lost work days’.” Both Martin and Schaeffer had joined the EPA during the apparently more environmentally friendly first **Bush Administration**.

“METHINKS SHE PROTEST TOO MUCH!” So say some of the groups that have been trying to obtain “**Freedom of Information Act**” documents from the present **Administration**. In our last five columns we have followed the attempts of the **Bush Administration** to “dance between the raindrops” of document production, focusing most recently on the documents sought from **President Bush’s Energy Task Force**, which was headed by **Vice President** Dick Cheney. Now out of the energy depleted (or so we thought) “transformaries” of California comes the apparent “I told you so’s.” It was not long ago that California was emitting energy SOS’s, seeking non-forthcoming Federal assistance. Now **Representative** Henry Waxman, a Democrat from California, made public a heavily redacted **Energy Task Force** e-mail advising the **Environmental Protection Agency (EPA)** that the administration was “desperately trying to avoid California in this report...”. This followed on the heels of the release on the internet by the **Federal Energy Regulatory Commission (FERC)**, who has been investigating whether Enron either “sparked” or took advantage of the deregulatory energy crisis in California, of Enron “smoking guns.” That is (*corporate counsel, please note*) memoranda from Enron’s counsel prominently labeled: “**CONFIDENTIAL: ATTORNEY/CLIENT PRIVILEGED/ATTORNEY WORK PRODUCT**” (**emphasis NOT added**), which were provided to **FERC** by Enron’s *new* management. These documents revealed that Enron was using advanced trading strategies, with “Hollywood-style” names such as “Get Shorty” and “Death Star,” to manipulate California’s energy supply and defraud energy consumers. One such strategy was to send electricity out of California and then send it back in, so as to avoid price caps. Another was to get “paid for moving energy to relieve congestion without actually moving any energy or relieving any congestion.” The curious reader can only ponder what other fascinating stories may reside within the **Energy Task Force** documents the **Administration** has not yet released or at least has not released in an un-redacted form.

ASHCROFT REVERSED. Judge Robert E. Jones of the U.S. District Court for the District of Oregon reversed Attorney General John Ashcroft’s Federal Register Edict (“the so-called ‘**Ashcroft**”

Directive”) and permanently enjoined him “from enforcing, applying, or otherwise giving any legal effect to the **Ashcroft Directive**” (emphasis added). As reported in the January 2002 Federally Speaking column, the **U.S. Attorney General**, reversing his predecessor’s position, had attempted to nullify the Oregon “Right to Die” statute by declaring by way of the **Ashcroft Directive** that medical doctors who prescribe **federally controlled substances** in conformity and compliance with this **State** law would violate and lose their **Federal Licensure**. Judge Jones did not find it necessary to engage in a **constitutional** analysis here as he concluded that the **Controlled Substances Act (CSA)**, 21 U.S.C. Sections 801 et seq., was controlling and that “**Congress** did not intend the **CSA** to override a state’s decisions concerning what constitutes legitimate medical practice, at least in the absence of an express **federal** law prohibiting that practice. Similarly, I conclude that **Congress** never intended, through the **CSA** or through any other current **federal** law, to grant authority to the **Attorney General** or the **DEA [Drug Enforcement Agency]** to define, as a matter of **federal** policy, what constituted the legitimate practice of medicine” (emphasis added). Under the Oregon law, if two doctors agree on euthanasia and the patient has less than six months to live, a doctor may prescribe, but not administer, a lethal dose to such a terminally ill adult Oregon State residents, provided that the one planning to die is both able to make health care decisions for him or herself and has voluntarily chosen to die.

THE FEDERAL CORKBOARD™

NEW AND EXCITING CLE. The officers of the FBA West Penn Chapter have in the works a basket full of new CLE programs and speakers that you will read about in future columns. For example, reserve October 18, 2002 for a half-day **Social Security Seminar** with nationally recognized Administrative Law Judge Kathleen McGraw. West Penn will also be continuing its popular CLE programs such as the **FBA LearnAbout™ Luncheon Series** (Open to All). Call Arnie Steinberg (412/434-1190) for information and reservations.

LUNCH WITH A FEDERAL JUDGE SERIES, for FBA members, continues. Call Susan Santiago for information and reservations (412/281-4900).

NEW FBA SECTIONS. The FBA West Penn Chapter is in the process of exploring the establishing of new Sections and expanding existing ones in such areas as International Law, Bankruptcy, Alternate Dispute Resolution, Social Security, Non-Citizens Rights and Obligations, Labor Relations, etc. If you are interested in actively participating or chairing any of these Sections, or have suggestions as to other Sections that may be of value to the Western Pennsylvania Federal Bar, please contact President Joe Perry at 412/281-4900.

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). Federally Speaking thanks LexisNexis for aiding in research.

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