



# FEDERALLY SPEAKING



by Barry J. Lipson

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Welcome to **FEDERALLY SPEAKING**, brought to you by the Western Pennsylvania Chapter of the Federal Bar Association. Our purpose in bringing you **FEDERALLY SPEAKING** is to keep you abreast of what is happening on the Federal scene, whether it be a landmark US Supreme Court decision, a new Federal regulation that may impact your practice, or “heads ups” to Federal CLE opportunities. Our threefold objective is to educate, to provoke thought and to entertain. This is our 26<sup>th</sup> column. Prior columns are available on the website of the U.S. District Court for the Western District of Pennsylvania <http://www.pawd.uscourts.gov/Headings/federallyspeaking.htm>.

## **LIBERTY’S CORNER**

**THE BILL OF RIGHTS OVER ALL!** A recent editorial in the conservative *Pittsburgh Tribune Review* affirms once again the allegiance of all “true-blue” Americans to the tenets of the **Bill of Rights**, whether they be conservatives, liberals, centrists or switch-hitters. In protesting the ruling of **U.S. District Judge Barbara S. Jones** of the **Southern District of New York**, upholding “New York City’s right to deny anti-war protesters a permit to march past the **United Nation**” as “not a restriction on pure speech, but rather a restriction on the manner in which plaintiff may communicate its message,” the *Tribune Review* proclaimed: “We may not agree with the Marxist philosophies behind many of these protest groups, but this kind of ruling only sullies the **Bill of Rights**. Guess the Judge never heard of ‘**the right of the people peaceably to assemble**’.” We also “guess” that all “true-blue” Americans are “Civil Libertarians” at heart.

**TODAY PITTSBURGH, TOMMOROW THE NATION!** *Liberty’s Corner* has reported on the post 9/11 secret roundups of non-citizens residing within our borders without warrant and without access to legal counsel in various *Federally Speaking* columns. As partially summed up by Vic Walczak, Legal Director of the ACLU’s Greater Pittsburgh Chapter: “Over the past several months, we have seen **INS** detain hundreds of foreigners who have been required to register with the **INS** under the special registration program. We have documented that many of these people had status-extension applications pending (and thus were not legally out of status), but were detained anyway. Many others were detained on hyper-technical status violations. The December detention of hundreds of Iranians in Los Angeles is the most notorious example of the problem, but unfortunately the difficulties have occurred elsewhere, including here in Pittsburgh.” Vic believes that if the detained individuals would have had the benefit of legal counsel “we suspect that the detentions would not have been ordered. Many people have been asked unusual and highly intrusive questions which are not mandated by any known rules or regulations. Again, a lawyer could have prevented that problem. We also know about a Pittsburgh man who went to register in Philadelphia (where he attended school) and literally disappeared. Family and friends were unable to locate him for days. The ACLU finally tracked him down in the York detention facility.” To help resolve this problem, the Pittsburgh ACLU Chapter is the first in the Nation to establish a “Special Registration Project,” its goal being “to have a lawyer accompany every person registering with the **INS** so that inappropriate questions and demands are not made, people are not wrongfully detained, and those that are

detained can get important information to family, friends and a lawyer.” Today Pittsburgh, tomorrow the Nation!

## **FED-POURRI™**

**DOJ: DOUBLE BOOKS, DOUBLE STANDARD?** I remember an opposing counsel (let’s call him “Clever Cleaver”) who was personally fined thousands of dollars by a **Chief U.S. District Court Judge** for not producing his client’s second set of books pursuant to a discovery request. The short and dirty is that we had good reason to believe there was a “double” set of books and vigorously pursued this request. Finally plaintiff’s counsel, in an apparent attempt to show “good faith,” sent his seemingly displeased “gal Friday” to his client’s offices to look for additional records. She returned with one page that was obviously from the second set! When called forward from the back of the Courtroom by the Judge and asked how she obtained that one page, she cleverly cleaved Cleaver with just two words: “I asked.” Indeed, the **U.S. Department of Justice (DOJ)**, since the **Reagan Administration**, has also been “cleverly” maintaining a “double” set of books, to apparently obfuscate its knowing violation of the **Federal Employees Pay Act of 1945 (FEPA)**, 5 U.S.C. §§ 5541-50a, which a **Federal Judge** has now confirmed applies to **Justice Department** attorneys, in that it provides “government employees are entitled to premium pay or compensatory time for overtime work that is ordered or approved by authorized persons.” Such implicit ordering and/or approval was apparently present in the **DOJ’s** customary practices, in the **DOJ’s Attorneys Manual**, which clearly and “blatantly” advised the nearly 10,000 short-changed government attorneys, who “donated” an average of nine extra hours a week, that attorneys “should expect to work in excess of regular hours without overtime premium pay,” and in the keeping of the two sets of books. According to *News of the Weird*, U.S. Judge Robert H. Hodges Jr., of the **Court of Federal Claims**, in so finding, observed that the **DOJ** “apparently years ago simply declared itself immune from overtime-pay law for attorneys and has been maintaining two sets of time sheets (one for pay, one to track work on cases).” Presumably, the first set shows a “criminal” intent to deceive its **Federal Auditors**, and the other set shows “criminal” and “civil tort” intent to “deceive” the **Courts** and “fraudulently” obtain reimbursement from adverse parties for expenses not actually incurred, or so the **Department** might itself argue if it was prosecuting itself. Thus, *News of the Weird* further astutely observed that the **DOJ’s** argument that “it thought there ought to have been an exception in the law ... is an argument the **Department** usually scoffs at when filing its own lawsuits against lawbreakers.” One wonders how the **DOJ** can explain this “double book double standard” without incurring “double trouble,” and if this Judge, too, had learned of the **DOJ’s** dubious double book deception from similarly disgruntled current and/or former employees (who cause the downfall of many a scheme).

**FED COURT EX’ED FEDEX!** However, Clever Cleaver’s story did not end there. Being incensed over the injustice of it all, Cleaver appealed to the **U.S. Court of Appeal**. Affirmed *per curium*. He then fumed for thirty nights and twenty-nine days, and on the thirtieth day tooketh up his fine honed power pen and hastily slashed out an unstoppable *Writ of Certiorari* to the **Highest Fed Court Of the Land**. He then lashed it to his mighty private steed **FedEx d’Pegasus**, who flew it speedily overnight to DC, faster than any first class U.S. postal product could. It arrived bright and early the next day at the portals of the **U.S. Supreme Court** itself, where it was swiftly kicked “*per clerkium*” out the door. You see, Clever Cleaver, Esq., had not reckoned with **Part VII of the U.S. Supreme Court Rules of Practice and Procedure**, where **Rule 29** clearly provides that a document is only “timely filed if it is forwarded through a private delivery or courier service and is actually received by the Clerk within the time permitted for filing.” Clever, in his haste for speed and/or expediency, again figuratively cleaved himself, this time by employing **Federal Express**, and not the government’s **Constitutionally**-blessed molding monopoly, the **U.S. Postal Service**, which had the latter taken the better part of a fortnight, yet still would it have been timely. For as you see, **Rule 29** further states that a “document is timely filed if it is sent to the Clerk through the **United States Postal Service** by

first-class mail (including express or priority mail), postage prepaid, and bears a postmark showing that the document was mailed on or before the last day for filing." Daresay, other **Federal Courts** and **Agencies** have similar rules. Poor Clever Cleaver, is he beset with injustices or just ineptnesses?

**ARE PRE-DISPUTE CONSUMER ARBITRATION CLAUSES OK?** The **FTC** says no! Its position is that based "on its analysis of the **plain language** of the Warranty Act," the **Magnuson-Moss Warranty Act (MMWA)**, 15 U.S.C. §§ 2301 et seq., prohibits "pre-dispute binding arbitration" clauses as "being contrary to the **Congressional** intent." However, the **FTC** acknowledges that, under the **MMWA**, "warrantors are not precluded from offering a binding arbitration option to consumers after a warranty dispute has arisen." 64 Fed. Reg. 19700, 19708 (Apr. 22, 1999)." See also 40 Fed. Reg. 60168, 60211 (1975). The **FTC's** position is thus not "anti-arbitration," but simply "pro-choice," knowledgeable "pro-choice." **Two Circuits**, one by a divided panel, however now disagree with the **FTC**. In *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11<sup>th</sup> Cir. 2002), the **Eleventh Circuit** joined the divided **Fifth Circuit** panel in *Walton v. Rose Mobile Homes*, 298 F.3d 470 (5<sup>th</sup> Cir. 2002), in holding that the strong **Congressional** intent favoring arbitration found in the **Federal Arbitration Act ("FAA")**, 9 U.S.C. §§ 1-14, trumped the **Congressional** intent imputed by the **FTC** to the **MMWA**, and therefore the pre-dispute binding arbitration clauses contained in the original sales contracts were "binding" and enforceable (both cases involved consumer purchases of pre-manufactured and/or mobile homes). This inter-branch disagreement, and the conflicting views of **State** and lower **Federal Courts** on this issue, makes it ripe for either **Congressional** clarification or a **U.S. Supreme Court** decision. One wonders how many consumers really realize they are losing their "Day in Court," or would have the bargaining power or fortitude to reject such clauses if they actually knew they were there and objected to them? As reported in *Federally Speaking* (No. 3), the **U.S. Supreme Court**, in a split 5-4 decision, recently upheld binding arbitration clauses in employment contracts pursuant to the **FAA** (*Circuit City Stores v. Adams*, 532 U.S. 105 (2001)).

**DEATH BY SANITY.** The **U.S. Supreme Court** has forbidden the execution of the criminally insane (*Ford v. Wainwright*, 477 U.S. 399 (1986)). A recent episode of *The Practice* portrayed a Death Row inmate who had regained her sanity and become a "valuable member of society" through the post-conviction use of anti-psychotic drugs. To save her life, her attorney had her taken off this medication so she would revert to her psychotic "insane" state, to be immune from execution. Bizarre? Apparently not! Just turn the channel to "real life," to Steve Barnes' article in *The NW Arkansas Morning News*, "**Death Case 'Weird and Complicated'.**" There you will read about Charles Singleton who in 1979 at 19, while robbing a grocery store, stabbed and killed Mary Lou York. Since being on Death Row he has suffered "at least one, and possibly two or more, disabling mental illnesses for which he has been administered anti-psychotic drugs, sometimes against his will.... Jeff Rosenzweig, Singleton's attorney, ... contends that the state of Arkansas, through its Department of Correction, is medicating an inarguably insane man into something approximating sanity solely for the purpose of putting him to death." Now, according to Kelly P. Kissel of the *Associated Press*, a "sharply divided **Eighth US Circuit Court of Appeals**" sitting *in banc*, and reversing its panel's earlier ruling "that Singleton be sentenced to life in prison without the possibility of parole," has ruled that Singleton "a paranoid schizophrenic inmate who is sane only when forced to take medication is eligible for Death Row" as "his medically induced sanity makes him eligible for execution." Of the eleven **Circuit Judges**, six believe that as this inmate "prefers to be medicated, and because Arkansas has an interest in having sane inmates, the side effect of sanity should not affect his fate," four feel that "it would be wrong to execute Singleton, who becomes paranoid and delusional when not medicated, and sometimes is still psychotic while medicated," and one abstains. Was there a "single" act of forcing or "tons"? Is Singleton still actually forced or isn't he, or is the forcing just intermittent? Should it matter? Will the **U.S. Supreme Court** accept this case????? Stay tuned for future episodes.

**INTERNET PUBLISHER: SUE ME WHERE?** The *Hartford Courant* and the *New Haven Advocate*, both in Connecticut, published and posted on the Internet articles describing Virginia's Wallens Ridge State Prison as a harsh "cut-rate gulag," with a Warden, plaintiff Stanley K. Young, who allegedly encouraged

“abuse of inmates,” advocated “racism,” and displayed Confederate memorabilia in his office. The newspapers were particularly interested because the State of Connecticut, to alleviate overcrowding, had contracted with Virginia to place approximately 500 mainly minority prisoners under Warden Young’s “southern hospitality” and personal care in Virginia. Young brought suit against these newspapers for **libel** in the **U.S. District Court for the Western District of Virginia**, alleging **personal jurisdiction** there because by posting these allegedly defamatory articles on the Internet, which were accessible throughout Virginia and the World, injury was caused him in Virginia. Understandably, defendants moved under **Rule 12(b)(2)** for dismissal for lack of **personal jurisdiction**. Reversing the **U.S. District Court’s** holding that under Virginia’s long-arm statute there was **personal jurisdiction** because “the defendants’ Connecticut-based Internet activities constituted an act leading to an injury to the plaintiff in Virginia,” the **Fourth Circuit** held that “a court in Virginia could not **constitutionally** exercise jurisdiction over the Connecticut-based newspaper defendants because the defendants did not manifest an intent to aim their websites or the posted articles at a Virginia audience.” *Young v. New Haven Advocate*, No. 01-2340 (4th Cir., Dec. 13, 2002). Apparently the **Fourth Circuit** has exhibited more “southern hospitality” than the **District Court** or Warden Young, but what if a California or National publication had prepared and/or posted these articles? For **personal jurisdiction** must the “aim” be that of a sharp shooter or a shotgun shooter?

## **FOLLOW-UP**

**WHISTLEBLOWEE HIGHMARK LOWMARKS!** In the year 1996, Dame Elizabeth de Drescher was specifically assigned by the “Highmark,” Pittsburgh’s provider of the Blue Shield and the Blue Cross, the noble duty of “*Damage Controle*.” You see, Highmark had been accused of misapplying **Medicare eligibility rules**, so as to shift more of its own costs to the **Federal** government, for which “lowmark” Highmark settled with the government for \$6 million. Ms. Drescher assignment was to monitor compliance with **Medicare Regulations** and to make sure that *Marquis of Queensberry* rules and procedures were followed. But, as she has alleged in her Federal *qui tam* or whistleblower lawsuit she filed on behalf of the **United States** (*United States ex rel. Drescher v. Highmark, Inc., et al.*, Civ No. 00-CV-3513 (EDPA 2000)), she had made one fatal mistake. She took her job *too* seriously! For examples, she has asserted, she cautioned her superiors that Highmark was still mishandling claim for which it could owe the government over \$20 million; she regularly tried to “change the system,” and was “blocked” each time; and she refused to be a “team player.” For doing so, she alleged, she was shifted from her noble assignment to menial tasks, and the internal team of **Medicare** claims investigators carelessly scattered. But this whistleblower does not find herself alone. Unlike her counterparts who whistle in the wrong **Congressional** ears and thereby, according to the **Bush Administration’s** position, lose their “retaliating against corporate whistleblowers” protection under the **Sarbanes-Oxley Act of 2002**, 18 USC §1514A (see *Federally Speaking*, No. 25), her whistling in the ear of the **U.S. District Court for the Eastern District of Pennsylvania**, has caused Dame Elizabeth’s Knights in Shining Armor, in the guise of **U.S. Justice Department Prosecutors**, to come charging to her assistance through their intervention in her *qui tam* lawsuit. Does *Time’s* cover truly await her too?

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