FEDERALLY SPEAKING

by Barry J. Lipson

Number 42

Welcome to **FEDERALLY SPEAKING,** an editorial column compiled for the members of the Western Pennsylvania Chapter of the Federal Bar Association and all FBA members. Its purpose 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 or enforcement action, a "heads ups" to Federal CLE opportunities, or other Federal legal occurrences of note. Its threefold objective is to educate, to provoke thought, and to entertain. This is the 42nd 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/Pages/federallyspeaking.htm ***[note revised web address].***

NEWS FLASHES!!!

NEW DATE IS: *FRIDAY, AUGUST 27, 2004 !!!*

PRESIDENT BUSH Decreed: "No *'Tomorrow's Trials Today'*" because it fell on PRESIDENT REGAN'S MEMORIAL DAY! But take heart, you can still be part of the ***Futuristic League*** of far-flung league-traveling colleagues from *Cleveland, Erie, Pittsburgh and Harrisburg* at the **Pittsburgh Federal Courthouse** on **Friday, August 27, 2004.** Join the ***FBA West Penn Chapter's*** whirlwind one-day trip into the mind-bending electronic computer world of ***Tomorrow's Trials Today!!!*** **Science Fiction?** No, much of it is **Science Fact**, in practice or on the drawing board! And with "real-time" technology you may now be able enjoy that normally unavailable ***"second bite of the apple"!*** All this, a delightful City Deli Lunch (with apple), and 7.0 hours CLE, include one hour of ethics, for $99.00 ($79.00 for current and new FBA members). *For reservations contact: Carmine DiPaolo, Fifteenth Floor, Two Gateway Center, Pittsburgh, PA 15222-1447 (412/281-4900; carmined@springerlaw.com).* ***To view complete Program details visit:*** http://www.pawd.uscourts.gov.

MARY BETH, CONGRATULATIONS!!! **U.S. Attorney General** John Ashcroft recently named ***Mary Beth Buchanan,*** **U.S. Attorney for the Western District of Pennsylvania**; **Federal Bar Association West Penn Chapter former *"Federal Lawyer of the Year Nominee;"*** and long-standing supportive member of the **FBA West Penn Chapter**, as **Director** of the **U.S. Department of Justice's Executive Office for United States Attorneys (EOUSA). EOUSA** provides administrative support to the 94 **U. S. Attorneys' Offices** across the country. In addition, **EOUSA** serves as a liaison between the **U.S. Attorneys** and other **Federal Agencies** and **DOJ** components. ***Mary Beth*** will also continue to serve us as **West Penn's U.S. Attorney,** while directing **EOUSA**. **A *"win-win" scenario. Congratulations, Mary Beth!***

ANTI-TERRORIST ACT TO BE REPEALED! Heed well, all yea **USA Patriots,** it has finally been recognized that the **Act**, enacted "after the 11 September 2001 attacks" to purportedly counteract terrorists, that "gave the security forces ***draconian*** powers," has been "grossly misused over the past two years, especially against Muslims" and, therefore, "**Congress**-led …[g]iven the abuse … that has taken place," the **Government "**will ***scrap controversial anti-terrorism laws."*** They declared, we "will ***repeal*** it ***while existing laws are enforced strictly."*** Adding fuel to this repeal pledge is the just issued **Report** on this **Anti-Terrorist Act** by the "human rights group **Amnesty International**" which "***condemned*** … it as ***'draconian'*** saying its use contravened ***basic civil liberties.***" Emphasis added. So goes into the garbage dump of history the **Prevention of Terrorism Act,** India's **USA Patriot Act.** Will the **USA Patriot Act** itself be far behind?"

LIBERTY'S CORNER

LEGISLATURE V. JUDICIARY. On "New Year's Day 2004," **U.S Supreme Court Chief Justice William Rehnquist** "bawled out **Congress** for enacting **Sentencing Guidelines** which impinged on judicial independence and could 'intimidate individual judges'" (***Federally Speaking*** No. 36). Less than six-months later the **Chief Justice** announced he was creating a **Committee on Judicial Discipline** to evaluate **Judicial Discipline** in the **Federal Judiciary**. ***Is he blinking?*** Let's be linking what followed and see! First, Representative Tom Feeney (R-Florida), of "no-downward-departures-in-sentencing" legislative fame, in imprecise ruminations on **impeachment** being Congress' only **Constitutional** method of punishing the **Federal Judiciary** ***[not so***, though the **Constitution** grants **Article 3 Federal Judges** lifetime appointments and bans **Congressional** reduction of judicial salaries, **Congress** can, of course, ***withhold "advise and consent," withhold other funds***, and ***abridge powers, jurisdiction and/or authority],*** cautioned: "I have been a vocal critic of judge-made law. Government by an aristocracy is not necessarily bad, but it's not our form of government… [But when] your only option is the nuclear option [impeachment], you're very limited…. When they try to achieve social justice or the 'right result' in their rulings instead of what the **Constitution** and the statutes dictate, then I am going to raise serious questions. I take my oath to uphold the **Constitution** just as seriously as the judges do." Then added to this hostile rhetoric is Justice Scalia's January 2004 duck-hunting trip with Vice President Cheney (while **U.S. Supreme Court** litigation involving Cheney was pending), and the heated "closed-door" remarks on March 16, 2004 of **House Judiciary Committee** Chairman F. James Sensenbrenner (R-Wisconsin) to the **Judicial Conference** over the Judiciary's "self-handling" of ethical complaints allegedly giving rise to "profound questions with respect to whether the judiciary should continue to enjoy delegated authority to investigate and discipline itself" (while further reminding his distinguished, but "shocked" audience that "**Federal Judges** in a democracy may be scrutinized and may even be unfairly criticized"), and ***"a blinking"*** there may be. But would not the type of ***"scrutiny"*** envisioned by Sensenbrenner and Feeney ***profoundly*** desensitize, make senseless, enfeeble, and perhaps "feenish" our **Constitution's** ***checks and balances,*** placing a "Bren Gun" and "Fee Knee" to the vitals of our **Federal Judiciary**, and leave harmless finked out ginks in the clink? Or would that really stink?

SIERRA CLUB CHALLENGES JUDICIAL ENVIRONMENT. It's no longer news that prior to **Congress'** return from its February 2004 recess, **President Bush** appointed hotly contested **William H. Pryor Jr**. to the **U.S. Court of Appeals for the Eleventh Circuit**, allegedly for the purpose of changing the "Judicial Environment." The crème de la crème of Environmental Advocacy Groups, the Sierra Club, has now taken action to clean up what it apparently sees as blight on the Judicial Environment. In an appeal to the **Eleventh Circuit** from **Environmental Protection Agency** decisions regarding the **Clean Air Act,** in ***Sierra Club and Georgia Forrestwatch v. Leavitt***, No. 03-10262-F (11th Cir 2004), the Sierra Club has moved to have a "prior restraint" placed on Judge Pryor's hearing that case, arguing that the recess appointment of Pryor violated the **U.S. Constitution** in that all litigants, whether or not they are part of Pryor's Priory, are entitled to "have claims decided before judges who are free from potential domination by other branches of government" (***CFTC v. Schor***, 478 U.S. 833 (1986)), and as recess appointees remain under **Senatorial** scrutiny pending the **Senate's** determination as to whether their appointments will become permanent/lifetime, permitting such recess appointments "is inconsistent with the **constitutional** guarantees of an **independent judiciary**." To win here the Sierra Club will have to overcome much prior precedent favorable to Pryor, advised prior Bush **Associate White House Counsel** Bradford A. Berenson, as "[s]ince the founding of the **Republic**, presidents have recess-appointed numerous **Federal Judges**, including **Justices of the Supreme Court**." Oh yes, it has been reported that a deal has now been struck, Democratic Senators will not block Judicial confirmation votes and Bush will not make more recess appointments for the remainder of his current term ending in January 2005. But such deal does not strike Sierra's **Pryor Motion**.

FED-POURRI™

ATTORNEY-CLIENT TRUMPED BY SARBANES-OXLEY (ACT-SO)? The SEC cautions, "fail to 'ACT-SO' and you'll Surely Excruciatingly Cee so!" But the truth seems somewhat different. Under ***specified circumstances*** the **Securities Exchange Commission Rules,** promulgated pursuant to **Section 307**

of the **Sarbanes-Oxley Act of 2002,** require attorneys to report evidence of material violations of **Securities Law**, breaches of fiduciary duty, and "similar violations," to the Chief Legal Officer or Chief Executive Officer of the client, and if the CLO or CEO "does not "appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation)," the attorney must then report such evidence to the Board of Directors, Audit Committee, or another Committee entirely made up of independent directors. See also ***Federally Speaking*** Nos. 21 & 25. While this would not technically violate the **attorney-client privilege**, as the attorney normally represents that "fictitious person or entity," the corporation, company or firm, and not any individual officer or director, it certainly can torpedo the **"attorney-client relationship,"** which is normally with the officers and/or directors. "***Ha huh,"*** you say, "but I need to know those ***specified circumstances NOW!"*** Luckily for non-securities attorneys and attorneys representing non-registered business entities, **Section 307** only appears to apply to those attorneys "appearing and practicing" before the **SEC** in the representation of clients who are registered and required to file reports with the **SEC**. But then, again, would not failure to act in a manner consistent with **Sarbanes-Oxley** be strong evidence of **common law negligence,** or the like, though the **SEC** is not then the regulator overseeing the actions of your clients and/or you? So, it would appear you should whatsoever ***"ACT-SO"!!!***

HIGH COURT TANGLED IN STICKY TAPE! "Tangled in tape," the **Supremes** appear stuck on whether or not to grant **Certiorari** in ***LePage's Inc. v. 3M Co,*** 324 F.3d 141 (3rd Cir 2003); cert. filed No. 02-1865 (June 20, 2003), and have asked for the **U.S. Solicitor General's** views. In ***LePage's*** a **Federal** jury awarded $68 million to LePage's, after trebling, in an **Antitrust** proceeding in which LePage's accused 3M of trying to drive it out of the market for "Scotch" – oops! – "Transparent Tape," by offering large retailers **"bundled rebates"** covering a wide spectrum of 3M products that, LePage's convinced the jury, they could only earn by leaving LePage's tapes out of their purchase mix (as to get these rebates they needed to meet 3M's sales goals in six 3M product categories). Earlier, the **Third Circuit** also appeared "tangled in tape," first reversing 2-1, and then ***en banc*** reversing the reversal and affirming 7-3, finally finding that there was a sufficient showing that 3M wanted to "kill" LePage's store-brand/private label niche market at large retailers, and that ***Brooke Group Ltd. v. Brown & Williamson Tobacco Corp,*** 509 US 209 (1993), does not require proof of **"below-cost"** pricing in such a **"bundled rebates"** case. Oddly, the **Solicitor General,** after reasoning that: "Unlike a low but above-cost price on a single product, a **bundled rebate** or discount can -- under certain theoretical assumptions -- exclude an equally efficient competitor, if the competitor competes with respect to but one component of the bundle and cannot profitably match the discount aggregated over the other products, even if the post-discount prices for both the bundle as a whole and each of its components are above cost," advised: "There is no pressing need for the court to address the matter at this time. While **bundled rebates** may be a common business practice, it is not clear that **monopolists** commonly **bundle rebates** for products over which they have **monopolies** with products over which they do not;" and concluded that ***LePage's*** "does not present an attractive vehicle for this court to attempt to provide such guidance." To stick, re-stick, unstuck, nonstick, or "stick it" to whom, that is the sticky **Supreme** question!

FOLLOW UP

SUPEMES SIDE-STEP STEAMY SPUDS. At least for the moment, the **Supremes** have side-stepped two very steamy non-dud spuds. They dismissed 8-0 the first hot potato, involving the ban on ***"under God"*** in the **Pledge of Allegiance** ***as recited by Public School students*** for lack of the non-custodial father plaintiff's standing to sue (***Elk Grove Unified School District v. Newdow***, 02-1624 (Sup. Ct. 2004)), a close reading of which indicates that even if Justice Scalia had not recused himself here a ***substantive*** vote would have affirmed the ban 5-4 (see also ***Federally Speaking*** Nos. 18. 27 & 34). Then, they Texas "two-stepped" 7-2 around ***Cheney v. U.S. District Court for the District of Columbia***, 03-475 (Sup. Ct. 2004), sending it back to the **District Court** to consider more deeply Cheney's **privacy claim** regarding his **Energy Task Force's** documents sought by Judicial Watch and the Sierra Club, where an un-recused Scalia joins the "**Veep's** majority" (see ***"Legislature v. Judiciary,"*** above), which cleverly creeps around ***substantive*** **High Court** review until after the November electoral sweeps (see also ***Federally Speaking*** Nos.13, 14, 15, 16 & 20).

MICHAEL MOORE TO GEORGE W. BUSH: THANKS FOR THE HOT SPOTS! By now you may have legitimately seen Cannes' ***"Palme d'Or"*** winning ***Fahrenheit 911,*** without needing to resort to ***"Burn DVD Burn"*** (see ***Federally Speaking*** No. 41, ***"Burn Witch Burn"***), which opened the last weekend in June 2004 as the ***greatest grossing*** ("Bushophiles" may say as ***"the most grossly gross"***) Documentary Film in history. Thanks to advisories that the "All-American Walt Disney Company, in apparently true ***'Mickey Mouse'*** fashion, reportedly fearing ***Governmental reprisals,*** has banned the distribution by its Miramax Film Corp.' ***in the United States but not abroad***, of Michael Moore's film ***'Fahrenheit 911',*** " this fiery ***"R Rated"*** documentary has opened in theaters throughout the USA to ***"MiraMaximum"*** publicity [by the way "Miramax" could be interpreted as meaning "a maximized remarkable variable star," Mira being a "remarkable variable star in the constellation Cetus," though in actuality it is a combination of the founders' parents' first names]. But apparently, Bushophile boomeranging censorship did not stop with Disney. According to e-mail and website reports by ***"M-I-C (see ya real soon!) K-E-Y (why? because they can't kill this friggin' movie!) M-O-O-R-E,"*** even before the film was made "Roger Friedman at FOX News reported that the head of the company which first agreed to fund our film 'got calls from Republican friends' pressuring them to back out. And they did." And most recently, he advised, the Bushophiles further stoked the fires under the ***Fahrenheit 911*** phenomena by forming "a fake grassroots front group called 'Move America Forward' to harass and intimidate theater owners into not showing 'Fahrenheit 9/11';" by "spending a ton of money this week to threaten movie theaters who even think about showing our movie;" and by at least once making "death threats." As predicted here last month, such Bushophile scorching tactics and "hot" spotlighting "would probably now permit with impunity maximum distribution in the U.S." Or as ***Mickey "M-O-U-S-E" Moore*** might say***: "Many Thanks 'W' for the Spotlights, Burn Censors Burn*** [or maybe ***"Burn Bush Burn;*** or perhaps ***"Burning Bush Burn"***]***!*** To so bake for my premiere a $21.8 million cake, the first weekend's take, is real jake!" But will all this make future ***"op-ed"*** Documentary Film TV ads, trailers and/or previews with a political take, quake to the political advertisement regulators' rake?

ASHCROFT REVERSAL AFFIRMED. Remember the **"Ashcroft Directive"** (***Federally Speaking*** Nos. 11 & 16), where "the **U.S. Attorney General**, reversing his predecessor's position, attempted to nullify the Oregon 'Right to Die' statute by declaring in the **Federal Register** that medical doctors who prescribe **federally controlled substances** in conformity and compliance with this State law would violate and lose their **Federal Licensure**?" Under 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." And do you remember Judge Robert E. Jones of the **U.S. District Court for the District of Oregon** permanently enjoining the **Attorney General** "from enforcing, applying, or otherwise giving any legal effect to the Ashcroft Directive?" Judge Jones had found "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." (See Lipson, ***The Strange Case of the Ganja Guru***, appended to ***Federally Speaking*** No. 30.) Well now the **U.S. Court of Appeals for the Ninth Circuit** (2-1), using even stronger language, has affirmed, condemning the **Ashcroft Directive** as being overreaching: "The **Attorney General's** unilateral attempt to regulate general medical practices historically entrusted to state lawmakers interferes with the democratic debate about physician-assisted suicide and ***far exceeds the scope of his authority under federal law***. …We hold that the **Ashcroft Directive** is unlawful and unenforceable because it violates the plain language of the **CSA**, contravenes **Congress's** express legislative intent, and ***oversteps the bounds of the Attorney General's statutory authority***" (***Oregon v. Ashcroft***, 04 C.D.O.S. 4510 (9th Cir 2004); emphasis added). Strike Two!

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