

March 15, 2009

No free man shall ever be debarred the use of arms. The strongest reason for the people to retain the right to keep and bear arms is, as a last resort, to protect themselves against tyranny in government.

Thomas Jefferson

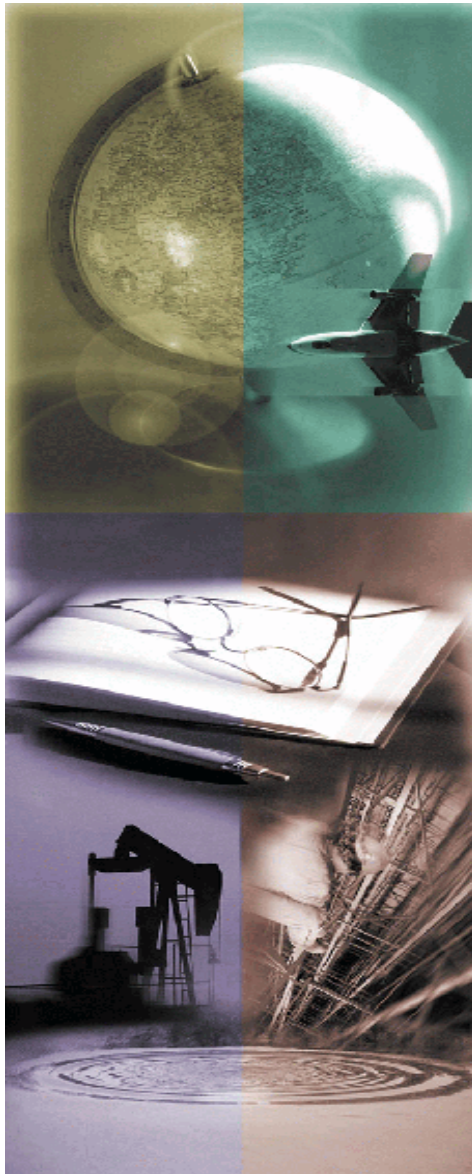
Environmental Law – Wyoming and Kansas Refineries Settle with Federal Government

Frontier Oil Corp. and Wyoming Refining Co. have reached settlements with the Environmental Protection Agency (EPA) and the Justice Department totaling more than \$141 million. The settlements include fines and mandatory pollution control improvement projects. Frontier's settlement includes \$127 million in improvement projects with a \$1.23 million penalty. Wyoming's settlement consists of \$14 million in improvement projects with \$150,000 in penalties.

Combined, these refineries produce approximately 168,000 barrels of petroleum per day. The EPA estimates that the upgrades will reduce air emissions by 7,000 tons per year, including 3,775 tons of sulfur dioxide, 2,100 tons of nitrogen oxide, and 1,200 tons of other pollutants. All three refineries will install advanced control technologies, upgrade its leak-detection and repair practices, reduce the number and severity of flaring events, and adopt strategies to ensure continued compliance with benzene waste requirements.

Litigation – Hearing Loss Litigation Is Not Making Much Noise

As reported in *The National Law Journal*, cases against Motorola, Inc. and Apple, Inc. alleging that the companies



have failed to adequately warn consumers about potential hearing loss caused by their Bluetooth headsets have dwindled. In *Birdsong v. Apple Inc.*, No. 06-02280 (N.D. Calif.), U.S. District Judge James Ware stated: “Reasonable consumers would readily understand that the volume at which they listen to their iPods can be moderated.” In June, the case was dismissed; however, eight months later a similar case against Motorola, Inc., Plantronics, Inc., and GN Netcom, Inc. settled when the defendants agreed to pay a total of \$100,000 into four institutions related to hearing loss and post warnings on their websites, product manuals, and packaging. Richard R. Pickard, general counsel for Plantronics Inc., stated: “We agreed to settle all of the plaintiffs’ claims rather than engage in expensive prolonged litigation.”

Are consumers capable of thinking for themselves?

Criminal Law – Guideline Minimums Bind Sentencing Judges

Although trial courts may have discretion to depart from U.S. Sentencing Commission guidelines, sentences may not be shorter than the recommended minimum according to the February 3, 2009, Eleventh Circuit Court of Appeals ruling in *U.S. v. Melvin*, No. 08-13497. In that case, the court stated that a judge may modify a prison term if the Sentencing Commission subsequently reduces the recommended range, but the new sentence must still follow Commission policy, which forbids judges from sentencing below the new minimum.

Sentencing guidelines are no longer considered mandatory after the decision in United States v. Booker, 543 U.S. 220 (2009). How Booker and Melvin can be reconciled will be covered in a subsequent LINC.

Litigation – No Duty to Monitor Alcohol Consumption

The New Jersey Supreme Court did not impose liability on a social club for serving alcohol to a visibly intoxicated person who later wrecked his car. The accident resulted in the deaths of the driver and three others. At its annual charitable pig roast, a social club provided alcohol by self-service from a truck. One of the participants drank to a blood alcohol level of 0.181%, although witnesses testified that he was not visibly intoxicated. The victims’ estates sued the social club for wrongful death, asserting the club had a duty to monitor guests’ alcohol consumption. The New Jersey Supreme Court, agreeing with district and state appeals courts, found that under the state’s Dram Shop Act, the social club does have a duty not to serve a visibly intoxicated guest, but has no duty to monitor guests’ alcohol consumption.

Environmental Law – Two Critical Superfund Liability Issues

As reported in *The National Law Journal*, two cases, *Burlington Northern-Santa Fe Railway Co. v. U.S. and California*, No. 07-1601, and *Shell Oil v. U.S. and California*, No. 07-1607, raise two critical issues regarding Superfund liability. These cases ask for reversal of the Ninth Circuit Court of Appeals decision holding Shell Oil Co. liable as an arranger, and for reversal of the decision that both companies are jointly and severally liable for clean-up costs at the Brown & Bryant, Inc. disposal site. Shell has asked for a reversal of arranger liability based on the fact that the company sold a useful product, not hazardous waste. Shell further contends that it lacked ownership or control once delivery trucks entered the Brown & Bryant site. The Railway has argued that liability should be apportioned instead of joint and several because it is effectively

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being held retroactively liable for contamination for which it had no fault or responsibility under governing law at the time, nor any power to prevent.

If the Ninth Circuit is ultimately reversed, Superfund scholar Martha Judy of Vermont Law School stated that “[i]t will become harder for EPA and private parties to clean up sites and to recover costs.” Steven Jones, a partner at Seattle’s The Martin Law Group, stated that industry groups are interested in what happens with these two cases because reversal could limit their exposure.

Constitutional Law – No Pets Allowed

Washington’s State Senator Ken Jacobsen, has some very specific burial plans, including instructions to bury his beloved cat with him. As reported in *The National Law Journal*, current state law prohibits this sort of thing, so Jacobsen has been working on a bill to “give cemeteries the option of burying owners with their cremated dog or cat as long as a written request is made.” The main opposition to this bill is from cemetery owners, who cite cultural and religious concerns. For example, in the Muslim culture, it would be the “ultimate insult” to be buried on grounds also used to bury animals. Jacobsen, who notes that his deceased cat was one of his best friends, is frustrated at the Legislature’s lack of concern for his bill. Referring to the Legislature, Jacobson said, “When you get out of this place, it’s nice to come home and have somebody that likes you.”

On a brighter note, you are not prohibited from playing with your pet, dressing it up, or even carrying it around in your purse. It is not prohibited, but you will be the subject of ridicule and jokes.

But we thought having a shoe thrown at you was the “ultimate insult.”

Environmental Law – State Environmental Agencies Face Big Cuts

The proposed budget for the State of Oklahoma has environmental agencies facing some tough budgetary constraints. The \$7 billion budget for the state had to make up for a \$600 million deficit, making cuts unavoidable. The current overall economy with its stagnant energy prices left the governor with difficult choices. The Oklahoma Department of Environmental Quality (DEQ) saw its budget appropriation shrink by 20% or almost \$2 million, while the Oklahoma Water Resources Board (OWRB) lost 25% for a total of \$1.1 million. On the whole, environmental agencies’ budgets were decreased by 5% with a 10% decrease in travel funds. Additional cuts were made, but the proposed budget offsets these amounts with fee increases. Some argue that making up for a smaller budget by taking more money from consumers is a losing strategy. It’s also not clear what impact these new figures will have on employees of the named environmental agencies. DEQ and OWRB are still evaluating possible employment issues. However, this is just a proposed budget, and final numbers will not be determined until closer to May 29th, the end of the legislative session.

Constitutional Law – Right-to-Carry Reform Bill Introduced in Texas

At the beginning of the 81st Regular Session of the Texas Legislature, State Representative Carl Isett (R-Lubbock) introduced pro-Second Amendment legislation. House Bill 410 seeks to repeal

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a concealed handgun requirement that licensees display their carry license if they are in possession of a handgun and are stopped by law enforcement. Current law provides that if licensees fail to display their licenses, said licenses may be suspended for 90 days.

So far, Oklahoma has had no need of such legislation. Under current Oklahoma law, an eligible person may carry a concealed handgun so long as that person has been issued a handgun license by the Oklahoma State Bureau of Investigation (OSBI). Oklahoma does require that any person carrying a concealed handgun have possession of their valid handgun license, as well as a valid Oklahoma driver's license or Oklahoma state photo ID, at all times while carrying a concealed handgun. If a person is arrested for violating this provision, that person may show proof to the court within 10 days of arrest that they have a valid handgun license, as well as provide an explanation as to why the license was not in their possession at the time of arrest. If valid proof is shown, OSBI will be notified of the dismissal of any criminal proceedings.

Concealed carriers should be warned, however, regarding their responsibilities if they come into contact with any state or federal law enforcement officer. Those in possession of concealed handguns must identify themselves as such immediately when coming into contact with law enforcement. Failure to do so can result in a fine, possible jail time, and suspension of license for six months. Those who possess concealed carry licenses but are not in possession of any firearms are not required to identify themselves as license holders when in contact with law enforcement.

For more information see the Oklahoma Self-Defense Act, 21 O.S. §1290.8.

Litigation – Slip-and-fall Case Is Not Preempted

As reported in *The National Law Journal*, on February 9, 2009, the Ninth Circuit Court of Appeals in *Martin v. Midwest Exp. Holdings Inc.*, No. 07-55063, held that the Federal Aviation Act (FAA) does not preempt claims for personal injury sustained as a result of allegedly defective aircraft stairs because such stairs are not “pervasively regulated” by the federal government. According to Chief Judge Alex Kozinski, when the Federal Aviation Administration issues pervasive regulations in an area, such as passenger warnings, state law claims in the same area are preempted by the FAA. The court in *Martin* decided that aircraft stairs are not pervasively regulated, and as such, the airline manufacturer could not avoid liability under the FAA.

Environmental Law – Clean Water Act Violations, It's Not Just Chicken Feed, Or Is It?

The Environmental Protection Agency (EPA) has issued administrative orders to the Arkansas Egg Co. These orders are a result of Clean Water Act (CWA) violations at three of Arkansas Egg's facilities. All three facilities, located in the northwest corner of Arkansas, were found to have violated their CWA discharge permits by using more chicken litter for fertilizer than was designated in their waste management plans.

Arkansas Egg was ordered to remove animal carcasses, use proper procedures for incinerating carcasses and managing liquid waste, remove liquid waste that was not properly contained, and apply liquid and solid wastes in accordance with its discharge permits and waste management plan.

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Employment Law – Right-to-Carry Concealed Weapons on Company Property

In 2004 and again in 2005, the Oklahoma Legislature passed laws that made it illegal for an employer or business owner to forbid persons from keeping firearms and ammunition in a locked vehicle on company property. Okla. Stat. tit. 21, § 1289.7a. In 2007, the Federal District Court for the Northern District of Oklahoma (Tulsa) entered an injunction prohibiting the enforcement of the laws, finding they were preempted by OSHA. *ConocoPhillips Co. v. Henry*, 520 F.Supp.2d 1282 (N.D.Okla. 2007). That decision was appealed and the Tenth Circuit Court of Appeals reversed that decision, lifting the injunction. *Ramsey Winch, Inc. v. Henry*, 2009 WL 388050 (C.A.10 Okla. 2009).

With the injunction lifted, the original laws are back in play. Therefore, a "person, property owner, tenant, employer or business entity" cannot maintain, establish, or enforce any policy or rule prohibiting persons from having firearms and ammunition on company property, provided these are in a locked vehicle. Firearms include loaded concealed handguns (provided the individual has a concealed weapon license – Okla. Stat. tit. 21 §§ 1290.8 and 1290.25); loaded rifles and shotguns; and unloaded firearms. There are no restrictions placed on the number of firearms allowed. Unloaded firearms do not have to be physically separated from ammunition.

Employers can therefore be sued if they have a policy or rule that “has the effect of prohibiting any person, except a convicted felon, from transporting and storing firearms in a locked motor vehicle, or from transporting and storing firearms locked in or locked to a motor vehicle on any property set aside for any motor vehicle.” Okla. Stat. tit. 21, § 1289.7a. Property owners or employers shall be liable for actual damages plus costs and attorney fees. It is unclear under the statute what is meant by “actual damages.”

This and similar laws create complications for organizations that must also comply with federal security requirements such as the Department of Homeland Security Chemical Facilities Anti-Terrorism Standards (CFATS), 6 CFR § 27, or proposed Transportation Safety Administration rules for protection of pipeline facilities. However, language in the text of CFATS indicates that any contradiction to relevant state laws or state court decisions would be decided in favor of the CFATS rules. The statutory language does not address the issue of federal case law. Federal litigation of this issue appears likely. Some states have handled this issue by providing exceptions in their statutes for facilities which must comply with the Department of Homeland Security standards.

Employers in Oklahoma can remind employees that although the statute does require them to allow employees to store concealed weapons in their vehicles, employers are still permitted to prohibit weapons in the actual workplace. Employers who are concerned about the safety of their workplaces should take extra steps to secure the business premises, perhaps including taking precautions to ensure firearms cannot be transported from the parking lot to the actual workplace.

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Environmental Law – Environmental Protection Agency’s Criminal Investigation Division

Unbeknownst to some, the Environmental Protection Agency (EPA) has its own criminal enforcement program, the Criminal Investigation Division (CID). The CID has offices in each of the EPA’s 10 regional offices, with several dozen additional “resident” offices located across the country. There are nearly 200 investigators in the CID and each has full law enforcement authority. They investigate allegations of violations of federal environmental law and assist the Department of Justice in the prosecution of individuals and corporations charged with criminal offenses.

Criminal Law – City Utilities Department Raided

The Utilities Department of the city of Palo Alto, California, was raided last month. Federal agents from the Office of the Inspector General with the Department of Transportation conducted the raid as part of a criminal investigation into the qualifications and certification of pipeline workers in the city’s water-gas-wastewater division. The raid was not part of a routine state or federal audit, but was apparently the result of a complaint from a whistleblower. While no arrests were made, the agents took seven boxes of documents. The agents were looking for a list of employees who were certified to work on the city pipeline, the employees’ work performance histories, contact information, and examinations which employees took to become certified to work on the pipeline.

Internet Law – Transmission Implies Interstate Commerce

As reported in *The National Law Journal*, the recent First Circuit Court of Appeals decision in *U.S. v. Lewis*, No. 07-1462, on February 2, 2009, held that internet transmissions are interstate commerce regardless of whether it can be proved that a specific transmission actually crossed state lines. The First Circuit affirmed the district court’s holding that internet transmissions are interstate commerce even if the “file is transported exclusively within a single state on the internet.” In support of its holding, affirming the district court, the First Circuit reasoned that the nature of the electronic protocol used to transmit data over the internet makes the route impossible to trace, implying that a transmission to an intended interstate recipient could potentially cross a state line before it is ultimately received.

Construction Law – Bill for New Oklahoma License Requirement for Crane Operators Defeated by House

As reported in the February 2009 LINC, a bill was introduced to impose a new licensing requirement for crane operators as a means to increase safety after a series of fatal crane accidents. This legislation, House Bill 2079 proposed by State Rep. Paul Wesselhoft, was defeated by the Oklahoma House 48 to 41. M. C. Leist, Deputy Commissioner at the Department of Labor, stated that the Department is willing to work with Wesselhoft to draft similar legislation that lawmakers will be willing to accept.