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ADJUDICATORY ISSUE

(Information)

November 7, 1996

SECY-96-230

For: The Commission
From: John F. Cordes, Jr.
Solicitor
Subject: LITIGATION REPORT - 1996 - 8

United States v. Construction Products Research, Civ. No. 3:94MC112 (AHN) (D. Conn., decided Oct. 11, 1996)

This is a long-running subpoena enforcement suit against a supplier of cement to the nuclear industry. Earlier this year, we won an important victory in the United States Court of Appeals for the Second Circuit that (a) found the NRC subpoena enforceable despite a claim that the NRC lacked jurisdiction over the cement supplier, and (b) rejected the cement supplier's claim that many of the subpoenaed documents fell within the attorney-client privilege. See 73 F.3d 464 (2d Cir. 1996), discussed in Litigation Report 1996-1, SECY-96-041. Very recently, the Supreme Court refused to review the Second Circuit's decision. See Order List, October 15, 1996 (denying certiorari in No. 95-2007) (copy attached).

Even so, the cement supplier has refused to comply fully with the NRC subpoena, and has continued to invoke the attorney-client privilege. Working closely with the Department of Justice, we moved for a contempt order and for a writ of assistance to enforce the court of appeals decision. The district court now has denied our motion and refused to reconsider its denial. The district court instead has ordered the government to seek in camera judicial review of the disputed documents. The court intends to undertake a document-by-document privilege review.

As we view the court's document-by-document approach as incompatible with the prior court of appeals decision rejecting the attorney-client privilege, we are consulting with the Department of Justice on whether (and when) to appeal.

CONTACT: Charles E. Mullins
415-1606

NOTE: TO BE MADE PUBLICLY AVAILABLE IN 5
WORKING DAYS FROM THE DATE OF THIS PAPER

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In re: Perfection Service, Inc., No. 96-60311 (Bkrptcy Ct., N.D. Ohio, order issued Aug. 20, 1996)

As reported in Litigation Report 1996-6, SECY-96-155, this bankruptcy proceeding involves a bankrupt well-logging operation. In early July, we filed a pleading protesting against the bankruptcy trustee's planned abandonment of equipment belonging to the bankrupted company, because we were concerned that this could include sealed sources owned by the company. We then worked out an agreement with the court and the parties for the sale of the sealed sources to another business.

The settlement did not work out as planned, however, because two of the sealed sources proved to have a leak and because the site of the bankrupt's defunct business proved to contain some residual contamination. We then returned to the bankruptcy court, and after lengthy negotiations with the bankruptcy trustee and with the bankrupt's principal creditor, a local bank, we reached a fresh settlement agreement.

The bankruptcy court embodied the new agreement in a court order. The agreement required, *inter alia*, that the creditor bank and the owners of the real property where the bankrupt's business operated contribute money that would enable the trustee to dispose of the leaking sealed sources. The court order also provided that no property could be removed from the building without NRC approval. The NRC agreed to facilitate the removal of any leaking sealed sources. And an outside buyer agreed to purchase the remaining sources. This court order should wind up this unusual case.

CONTACT: Susan G. Fonner
415-1629

Nejfelt v. Jackson, No. 96C-3081 (N.D. Ill., filed May 23, 1996)

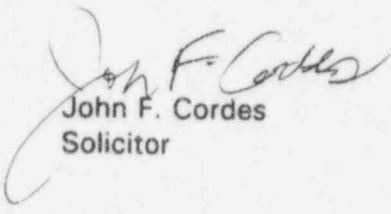
This lawsuit by an NRC employee alleges agency violations of the Americans with Disabilities Act and the Rehabilitation Act in conditions of employment. We are working

The Commission

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with the United States Attorney's office in defending the suit. A copy of the complaint is available from my office.

CONTACT: J. Bradley Fewell
415-1569



John F. Cordes
Solicitor

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ATTACHMENT 1

United States v. Construction Products Research, Civ. No. 3:94MC112 (AHN) (D. Conn.,
decided Oct. 11, 1996)

109

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :

V. :

Civ. No. 3:94MC112 (AHN)

CONSTRUCTION PRODUCTS
RESEARCH, INC., ET AL. :

RULING ON PETITIONER'S MOTION FOR RECONSIDERATION
AND PETITIONER'S MOTION FOR WRIT OF ASSISTANCE

Petitioner, the United States of America, moves for reconsideration of the court's December 11, 1995 order denying its motion to hold the respondents, Construction Products Research, Inc. ("CPR"), Five Star Products ("FSP") and H. Nash Babcock ("Babcock"), in contempt for their failure to turn over certain documents. Petitioner also applies for a writ of assistance to effect respondents' compliance with a judgment issued by the Second Circuit Court of Appeals in connection with the production of these documents.

For the following reasons, Petitioner's Motion for Reconsideration [doc. # 101] is GRANTED. Upon reconsideration, the court's original ruling adopting the Magistrate's ruling is re-affirmed. The Application for Writ of Assistance [doc. # 103] is DENIED.

FACTS

On January 2, 1996, the Second Circuit affirmed this court's enforcement of an administrative subpoena issued by the Nuclear Regulatory Commission ("NRC") to CPR, FSP and Babcock, seeking

the production of employment records and employment related documents. See United States v. Construction Products Research, Inc., 73 F.3d 464 (2d Cir. 1996). Prior to and subsequent to that ruling, the respondents have continually refused to turn over some of the requested documents because they claim that these are protected by the attorney-client privilege. Among other things, in affirming the enforcement of the subpoena, the Second Circuit stated that CPR, FSP and Babcock have failed to establish these claims of privilege. See 73 F.3d at 473-474.

On January 26, 1996, in light of the Second Circuit's ruling, the government moved for reconsideration of this court's affirmation of Magistrate Judge Donna F. Martinez's October 20, 1995 recommended ruling denying the government's motion for civil contempt and the respondents' motion for leave to file documents under seal for in camera inspection. See United States v. Construction Products Research, Inc., Civ. No. 3:94MC112 (D. Conn. Dec. 11, 1995) (affirmation of recommended ruling by J. Martinez). On April 2, 1996, prior to a decision on its prior motion for reconsideration and after the respondents had continued to withhold allegedly privileged documents, the government applied, pursuant to Rule 70, Fed. R. Civ. P., and the All Writs Act, 28 U.S.C. § 1651(a), for a writ of assistance to effect respondents' compliance with the Second Circuit's ruling. In its application, the government requested that the court order the seizure of all unproduced documents covered by the

administrative subpoena. (See Pet'r's Application Writ Assistance Other Appropriate Relief Effect Compliance Second Circuit's Final J. [hereinafter "Pet'r's Application Writ"] at 2.)

The government bases both its motion for reconsideration and its application for writ of assistance on the argument that the Second Circuit has already decided the privilege issue. (See Pet'r's Mot. Recons. Dist. Ct. Den. Pet'r's Mot. Contempt at 4-5; Pet'r's Application Writ at 2.) It claims that the respondents are precluded from further asserting attorney-client privilege because the Second Circuit held that no privilege existed. (*Id.*)

The respondents claim that the proper procedure to adopt is for the government to make a motion to compel production of the privileged documents. (See Resp'ts' Opp. Mot. Recons. at 2.) A court would then inspect each document in camera and determine if it was protected by the attorney-client privilege. (*Id.*) This is the procedure recommended by Judge Martinez in her ruling on the government's motion for civil contempt. See United States v. Construction Products Research, Inc., Civ. No. 3:94MC112 at 4-5 (D. Conn. Oct. 20, 1995) (recommended ruling by J. Martinez).

DISCUSSION

At the end of its opinion, the Second Circuit stated:

We have reviewed Respondents' privilege log, and find it deficient. The log contains a cursory description of each document, the date, author, recipient and "comment." Further, under a heading entitled "Basis of Claim," each of the documents is alleged to be an "Attorney-Client

Communication." These general allegations of privilege, however, are not supported by the information provided. . . . The descriptions and comments simply do not provide enough information to support the privilege claim, particularly in the glaring absence of any supporting affidavits or other documentation.

73 F.3d at 473-74 (emphasis added). This came at the conclusion of an opinion affirming the enforcement of an administrative subpoena and was in response to the respondents' general claims of privilege as a defense to the subpoena. See Construction Products, 73 F.3d at 468. The Court never inspected the documents to ascertain if any were in fact protected by the attorney-client privilege.

This court reads the above quoted language to mean that the Second Circuit considered the information before it to be inadequate to allow it to make a determination on the privilege issue. The Court was not, however, ordering the alleged privileged documents to be disclosed.

While Judge Martinez advised the parties that the correct way to proceed was for the government to file a motion to compel production of the documents and allow a judicial officer to inspect them in camera, no such motion has ever been filed. No judicial officer has ever inspected the documents in camera to determine if they are in fact protected by the attorney-client privilege. The court feels strongly that alleged privileged documents, particularly those alleged to be protected by the attorney-client privilege, should not be disclosed without being

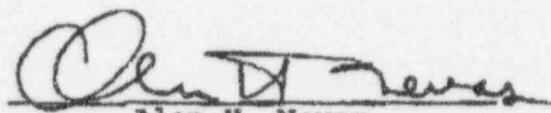
reviewed by a judicial officer. Without the benefit of an in camera review which specifically addresses the privilege claims asserted, the court is reluctant to order the disclosure of such documents.

Accordingly, the government is directed to file a motion to compel production of the withheld documents. A judicial officer should then review each document in camera to determine if it is protected by the attorney-client privilege.

CONCLUSION

For the reasons stated above, Petitioner's Motion for Reconsideration [doc. # 101] is GRANTED. Upon reconsideration, the court's original ruling adopting the Magistrate's ruling is re-affirmed. The Application for Writ of Assistance [doc. # 103] is DENIED.

SO ORDERED this 11th day of October, 1996 at Bridgeport, Connecticut.


Alan H. Nevas
United States District Judge

(ORDER LIST: 519 U.S.)

TUESDAY, OCTOBER 15, 1996

APPEAL -- SUMMARY DISPOSITION

96-63 HANSBERGER, VICKI, ET AL. V. UNITED STATES

The appeal is dismissed as moot.

CERTIORARI -- SUMMARY DISPOSITION

96-184 LIFE INSURANCE CO. OF GA V. JOHNSON, DAISEY

The petition for a writ of certiorari is granted.
The judgment is vacated and the case is remanded to the
Supreme Court of Alabama for further consideration in
light of BMW of North America, Inc. v. Gore, 517 U. S.
(1996).

ORDERS IN PENDING CASES

A-254 RICHARD McVICAR, WARDEN V. LEE OTIS GRIFFIN

The application to recall the mandate addressed
to The Chief Justice and referred to the Court is denied.

M-14 EDWARD EMERY V. CITY OF TOLEDO

M-16 STEVEN JOHNSON V. EMMITT L. SPARKMAN, ET AL.

M-17 A. C. JONES V. LARRY E. NANCE, ET AL.

M-18 WILLIAM F. HELBLING V. SALVATORE BEVERE, ET AL.

M-19 JAMES MEREDITH WHITAKER V. NANCY PAGE WHITAKER

M-20 JANE DOE, ET AL. V. PURITY SUPREME, INC., ET AL.

The motions to direct the Clerk to file petitions
for writs of certiorari out-of-time are denied.

M-15 MICHAEL J. SWEENEY V. NATIONAL TRANSPORTATION SAFETY BOARD

The motion to direct the Clerk to file a petition
for a writ of certiorari out-of-time under Rule 14.5
is denied.

95-897 AUER, FRANCIS, ET AL. V. ROBBINS, DAVID, ET AL.

The motion of International Association of Chiefs
of Police for leave to file a brief as amicus curiae is
granted.

96-243 SUITUM, BERNADINE V. TAHOE REGIONAL PLANNING

The motion of Tahoe Sierra Preservation Council for leave to file a brief as amicus curiae is granted. The motion of Tahoe Lakefront Owners' Association for leave to file a brief as amicus curiae is granted. The motion of Southeastern Legal Foundation for leave to file a brief as amicus curiae is granted. The petition for a writ of certiorari is granted.

CERTIORARI DENIED

95-1567 INDIANA V. BRYANT, ROSS
 95-1966 RUSSO, PAUL, ET AL. V. UNITED STATES
 95-1999 NEBRASKA V. RYAN, DENNIS
 95-2007 CONSTRUCTION PRODUCTS, ET AL V. UNITED STATES
 95-2038 MINCIELI, JOHN V. BRUDER, AUDREY
 95-9123 QUATREVINGT, STEVEN V. LOUISIANA
 95-9480 GREEN, NASHIRA V. FRANCO, FERNANDO, ET AL.
 96-20) CARIBBEAN PET. CORP. V. COASTAL FUELS OF PR
)
 96-200) COASTAL FUELS OF PR, INC. V. CARIBBEAN PETROLEUM CORP.
 96-25 EDMONDS, THEODORE V. UNITED STATES
 96-43 WILKINSON, DAVID V. LEGAL SERVICES CORP., ET AL.
 96-53 PRICE, BILLY, ET AL. V. UNITED STATES
 96-70 COLUMBIA MACHINE, INC. V. SCHNIDRIG, HERMAN
 96-73 MALONEY, THOMAS V. UNITED STATES
 96-91 CSX TRANSPORTATION, INC. V. WILSON, LANZY
 96-93 LEVITOFF, MARK, ET AL. V. GLICKMAN, SEC. OF AG.
 96-100 FUTERNICK, SHELDON, ETC. V. CATERINO, JON, ET AL.
 96-102 BRADSHAW, J. LARRY V. UNITED STATES
 96-123 UNITED STATES V. NORTHROP CORP., ET AL.
 96-135 KEVORKIAN, JACK V. MICHIGAN
 96-156 ANGELONE, RONALD, ETC., ET AL V. MONTCALM PUBLISHING CORP.
 96-193 MYERS, MARTIN V. BURNS, THOMAS, ET AL.
 96-194 ROBOSERVE, INC. V. KATO KAGAKU CO., LTD.
 96-195 DILLARD DEPT. STORES V. HAROLD'S STORES, INC., ET AL.
 96-197 REHMAN, DONALD V. GARWOOD, MCKENNA, ET AL.

ATTACHMENT 2

In re: Perfection Service, Inc., No. 96-60311 (Bkrptcy Ct., N.D. Ohio, order issued Aug. 20, 1996)

FAX TRANSMITTAL

of pages 2

To: Susan Renner	From: Art Harris
Dist./Agency: NRC 301 415-1529	Phone:
Fax #: 301 415-3200	Fax:

NSN 7540-01-317-7366

5009-101

GENERAL SERVICES ADMINISTRATION

FILED
96 AUG 20 PM 4:05
CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CANTON

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION
CANTON, OHIO

IN RE:

PERFECTION SERVICE, INC.

Debtor

CASE NO. 96-60311

CHAPTER 7

CHIEF BANKRUPTCY JUDGE
JAMES H. WILLIAMS

AMENDED AND AGREED ORDER
GRANTING AND APPROVING
TRUSTEE'S NOTICE AND MOTION TO
SELL PERSONAL PROPERTY FREE AND
CLEAR OF LIENS, CLAIMS AND
ENCUMBRANCES AND NOTICE OF
PROPOSED ABANDONMENT

This matter came before the Court on an emergency and expedited hearing upon the Trustee's Notice and Motion to Sell Personal Property Free and Clear of Liens, Claims and Encumbrances and Notice of Proposed Abandonment ("Notice and Motion"), this Court's prior Order entered on July 18, 1996, approving the Notice and Motion, and, the proposed agreed amendments thereto.

Based upon the Notice and Motion, the amendments thereto, and by agreement and stipulation of the parties, the Court hereby finds:

1. Appropriate, timely, adequate and sufficient notice of the Notice and Motion and the opportunity to interpose an objection thereto were given to and served upon all known creditors and other parties in interest in accordance with Sections 363 and 545 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004 and 6007.

2. With respect to the amendments to the Notice and Motion as agreed to by the parties, in that all parties affected by such amendments have agreed to such terms, no additional or further notice of the Notice and Motion as amended or the entry of this Amended Order is necessary.

3. As amended, the Trustee seeks authority and approval to sell the Trucks and Sources (as those terms are defined in the Notice and Motion), free and clear of any and all liens, claims and encumbrances to Best Wireline, Inc. ("Best Wireline") for an increased purchase price of Seventy Thousand Dollars (\$70,000.00).

4. As to the Sources to be sold to Best Wireline, only those Sources found to be non-leaking and contamination free, based upon a review and inspection of the Sources, will be sold to Best Wireline. Such sale and transfer of the Trucks and Sources by the Trustee to Best Wireline will be coordinated with and under the observation of the Nuclear Regulatory Commission ("NRC").

5. As to the Sources found to be leaking radioactive material, the Trustee, with the assistance and cooperation of the

NRC, is authorized to undertake those steps necessary to insure their proper removal and disposal. The Trustee will also undertake those steps necessary to insure the removal and clean-up of any related items.

6. Lorena and Arthur Medford (the "Medfords") are the owners of the real property located at 110 Marrietta Street, Stone Creek, Ohio and the building thereon ("Premises"), where the Debtor's personal property, including the Trucks and Sources, is located. The Medfords were the lessors under a lease with the Debtor for the Premises.

7. To facilitate the sale of the Trucks and Sources to Best Wireline and to defray the administrative costs incurred herein, but without admitting any liability as to any costs associated with the removal, disposal or clean-up of the leaking radioactive Sources and related items, the Medfords have agreed to waive any and all claims for rent, relating to the Premises, incurred by the Debtor and/or the estate from the commencement of the this chapter 7 proceeding. In addition, without admitting any liability as to the costs associated with the removal, disposal and clean-up of the leaking radioactive Sources and related items, the Medfords have agreed to pay to the Trustee, within ten (10) days of the entry of this Order, the sum Five Thousand Dollars (\$5,000.00) as and for costs and expenses of administration.

8. Huntington National Bank has agreed, without admitting any liability as to any costs associated with the removal, disposal and clean-up of the leaking radioactive Sources and related items,

to allow the Trustee to retain from the proceeds of sale of the Trucks and Sources the sum of Twenty-five Thousand Dollars (\$25,000.00), subject to the terms herein, as and for the costs and expenses of administration. The remaining proceeds of sale, Forty-five Thousand Dollars (\$45,000.00), shall be paid by the Trustee to Huntington National Bank upon its claim and lien.

9. As to the abandonment of the remaining personal property and its removal from the Premises, the parties have agreed that such abandonment shall not be effective until the NRC, after conducting such tests and surveys as it deems necessary, notifies the Trustee, Huntington National Bank and the Medfords, in writing, that the NRC has not identified any significant health or safety hazards at the Premises that would prevent the removal of the remaining personal property or the use of the Premises. After such notification by the NRC, the remaining personal property shall be deemed abandoned without further order of the Court, and Huntington National Bank shall have thirty (30) days to remove the remaining personal property from the Premises. During such 30 day period, Huntington National Bank shall incur no liability relating to the personal property, except such costs and expenses it will incur in the removal and transportation of such property.

10. The issuance of the written notice from the NRC as set forth in paragraph 9 above, shall not constitute a guarantee to any of the parties herein with respect to the acceptability of the remaining personal property or the Premises for unrestricted use or on any environmental matters, and does not foreclose the NRC from

making recommendations to the parties regarding further actions related to the remaining personal property or the Premises.

11. Should the costs and expenses to be incurred for the proper removal, disposal and clean-up of the leaking Sources and clean-up, removal and disposal of other contaminated material on the Premises, not exceed Sixteen Thousand Five Hundred Dollars (\$16,500.00), the Trustee shall pay over to Huntington National Bank, the difference between the actual environmental clean-up costs and \$16,500.00, but in no amount greater than Six Thousand Dollars (\$6,000.00).

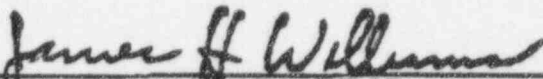
12. Should the Trustee recover any proceeds of insurance upon a claim based upon the environmental clean-up costs incurred by the estate, from such proceeds of insurance, the Trustee will pay to the Medfords an amount up to Five Thousand Dollars (\$5,000.00) as and for repayment of their prior contribution to the estate. In addition, if not already re-paid pursuant to the terms of paragraph 11 above, the Trustee will pay to Huntington National Bank an amount up to \$6,000.00 (minus any payments made pursuant to paragraph 11 herein) as and for re-payment of its prior contribution to the estate. The amounts to be paid herein by the Trustee shall be paid pro-rata until paid in full.

Based upon the foregoing findings and by agreement and stipulation of the parties, the Court finds and IT IS THEREFORE ORDERED that the Order Granting and Approving Trustee's Notice and Motion to Sell Personal Property Free and Clear of Liens, Claims

and Encumbrances and Notice of Proposed Abandonment, entered on July 18, 1996, is hereby AMENDED as set forth herein.

IT IS FURTHER ORDERED that all terms of this Court's prior Order not amended or modified by this Order shall remain in full force and effect.

IT IS SO ORDERED.



CHIEF BANKRUPTCY JUDGE
JAMES H. WILLIAMS

AGREED AND CONSENTED TO:

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Counsel for Trustee

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Arthur I. Harris
Assistant U.S. Attorney
1800 Bank One Center
600 Superior Avenue, East
Cleveland, OH 44114-2600

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Amended and Agreed Order Granting and Approving Trustee's Notice and Motion to Sell Personal Property Free and Clear of Liens, Claims and Encumbrances and Notice of Proposed Abandonment was sent by regular U.S. mail service this _____ day of August, 1996, to:

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Roetzel & Andress
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Dennis Traver, Esq.
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Deputy Clerk