Federal Sovereignty, Discovery and the *Touhy* Doctrine

By Bill Daniels

the Advocate Magazine, November 2007

I stumbled across an odd manifestation of federalism the other day when I tried to subpoena two Veterans Administrations employees in a product liability case.

It all started out normally enough. My client was injured at a V.A. facility and these were two percipient witnesses. I called them up and asked if I could depose them at a convenient time and place. They agreed to accept service by facsimile and I duly faxed them copies of their subpoenas.

Then came the letter from a senior attorney with the Department of Veterans Affairs:

> *Dear Mr. Daniels,*
> *The United States Department of Veterans Affairs (VA) hereby requests that your office voluntarily withdraw its subpoena directed to its employee(s). The Superior Court does not have jurisdiction to compel the production of the records because Federal regulations prohibit their disclosure.*
> *VA regulations restrict disclosure of official information by VA employees. 38 CFR, part 14 provides:*
> *VA personnel shall not, in response to a request or demand for testimony or production of records in legal proceedings, comment or testify or produce records without the prior written approval of the responsible official designated in §14.807(b). VA personnel may only testify concerning or comment upon official VA information, subjects or activities, or produce records that were specified in writing, submitted to and properly approved by the responsible VA official. 38 CFR §14.806.*

While the VA attorney relied primarily on two federal decisions to support his position, *United States ex rel Touhy v. Ragen* (1951) 340 U.S. 462 and *Swett v. Schenk* (9th Cir. 1986) 792 F.2d 1447, he also noted that the state courts have weighed in on the issue as well.

The California Court of Appeals, denying enforcement of a state court subpoena against a federal official, observed, "[A]n attempt to compel compliance with [a court subpoena] founders like the Titanic on the hard rock of sovereign immunity." Civiletti v. Municipal Court (1981) 116 Cal.App.3d 105, 109, citing Touhy v. Ragen.

Okay, now I know you're thinking, "Hey, the Titanic hit an iceberg so what's that *Civiletti* court talking about? Besides, I'm entitled to my discovery and what's the big deal here?"

Well, it turns out that even though our appellate courts may mix their metaphors from time to time, this is an area where the feds hold the playing cards, meaning you need to be aware of the *Touhy* doctrine when pursuing a claim involving federal turf.

Touhy involved a habeus corpus proceeding in District Court, in which an inmate in Illinois' state penitentiary at Joliet was looking to get out. The inmate subpoenaed the F.B.I.'s file in his case, under the theory that the documents would prove he was fraudulently convicted. When the special agent in charge refused to comply, citing a Justice Department regulation similar to the V.A. reg in my case, the court held the special agent in contempt. The Seventh Circuit reversed and the U.S. Supreme Court affirmed the reversal.

The head of a federal agency has the authority, the Supremes held, to publish regulations restricting judicial access to documents or witnesses within the agency, under the doctrine of sovereign immunity.

That doctrine is not restricted to actions to which the United States itself is a party. It extends to officials of the federal government when they act as agents of the United States. The general rule is that a suit is against the sovereign if the effect of the court order sought would be to compel the federal government to act or would "interfere with the public administration."

Civiletti, *supra*, 116 Cal.App.3d at 109. There are two exceptions to this general rule: (1) actions by officers beyond their statutory powers and (2) powers exercised within the scope that are themselves constitutionally void, either on their face or in the manner they are used. *Dugan v. Rank* (1963) 372 U.S. 609, 621-622.

In my case, I scratched my head a little, called around a lot and eventually was able to reach a compromise that allowed both sides to inspect the equipment I am alleging is defective. The V.A. attorney explained that, even though he understood that any recovery against the manufacturer would help the government with its workers compensation lien, the policy of the agency was to discourage access by lawyers in discovery, because someone, somewhere, had decided long ago that it is the best way to conserve government resources. The justice system just has to make due on its own, I suppose.

So, the next time you find yourself with a case involving injury on a federal reservation or with federal employees as potential witnesses, make sure you've got the *Touhy* doctrine clearly in your sight. Forewarned, as they say, is forearmed.

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