

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LINDSEY K. SPRINGER

Plaintiff

Case No. 06-5123

Internal Revenue Service, et al.,

MOTION TO STAY MANDATE OF ORDER
DATED MAY 1, 2007, OR ITS EQUIVALENT

Appellant, and on the defense, bar or otherwise, Lindsey K. Springer, moves this Court pursuant to Federal Rules of Appellate Procedure 41(d)(1)(2007) and Local Rule 41(b), and under the Court's discretionary power, for an Order staying the mandate or its equivalent, pending the outcome of Appellant's Petition for Rehearing and Rehearing En Banc, which is due 45 days from May 1, 2007, under Federal Rules of Appellate Procedure on basis the Panel has directed certain events to take place within the 45 days which if the Panel decision is either reversed by the Panel or reversed by the 10th Circuit sitting En Banc, those events would be moot regarding filing restrictions and sanctions imposed in Springer III.

PROCEDURAL BACKGROUND

There are three different cases pending before this Court all of which were disposed of by Panel decision dated May 1, 2007.

Springer I was decided by the Panel upon a finding the District Court lacked "subject matter jurisdiction under the AIA. [Anti-Injunction Act, 26 U.S.C. § 7421, (1998)]" Panel decision at 7. The Panel decided that the exception under section 7421(a), listing out section

6330(e) specifically, only applied to complaints seeking injunctive relief from the United States District Court “when the IRS initiates a levy during the statutory period of suspension that is triggered by the request for a CDP hearing.” Panel decision at 8, citing to *Hart v. U.S.* 291, F. Supp 2d 635, 645 (N.D. Ohio 2003). The Panel also concluded that “contrary to Springer’s argument, the exception [under 7421(a)] is not triggered by the mere issuance of a notice of intent to levy.” Panel decision at 9. In considering the “judicially created exception to the AIA” which the Panel held “allows an injunction if it is clear that ‘under no circumstances could the Government ultimately prevail,’” the Panel decided “Springer cannot meet either of these requirements.” *Id.* The two part test, the Panel held, was not met because (1) the government ultimately could prevail in levying Springer’s assets because the issue of his income tax liability for 1990-1995 was finally determined in his earlier suit, and section 6331(a) authorizes the IRS to impose the levy, and the levy could be sustained if the CDP hearing comported with applicable law. Second, the Panel concluded Springer could not show the absence of an adequate legal remedy because Springer had “availed himself of an adequate legal remedy concerning his liability-he litigated in the Tax Court and lost. The Panel noted that Appellant’s “ability to appeal the result of the CDP hearing under 26 U.S.C. § 6330(d)(1) provides him with an adequate legal remedy concerning the levy procedure.” Panel decision at 10

Springer II was decided on grounds the “Tax Court had exclusive jurisdiction over that case.” *Id.* This, the Panel determined, was based upon the “underlying tax liability concerning income taxes.” *Id.* The Panel also concluded that, even though the IRS Notice of Determination “directed him to appeal to a United States District Court” this “notice” “does not defeat the fact the district court lacked jurisdiction. Parties cannot confer subject matter jurisdiction.” Panel

decision at 10-11.

Springer III was decided on grounds “that the PRA creates a defense, not a private right of action, and therefore, we need not reach the alternative basis for the district court’s disposition, that the AIA barred¹ the action.” *Id.*

Springer I Sanctions

The Panel decision also directed Appellant **pay** \$ 4,000.00 for appealing Springer I to the U.S. Department of Justice based upon a determination that appeal No. 05-6387 was “frivolous and brought for the purpose of delay.” The Panel concluded since Appellant filed a Petition in Tax Court that was dismissed on a “failure to state a claim” Motion of the Commissioner, “the tax court ruled against him, a judgment that is now incontestable.” Panel decision at 14 The Panel explained that although Appellant requested a CDP hearing “properly” he “challenged that hearing in a jurisdictionally defective action, Springer I, then took a frivolous appeal from the dismissal of that action.” Panel decision at 15

Springer III Sanctions

_____The Panel decision also directed Appellant **pay** another \$ 4,000.00 regarding Springer III to the U.S. Department of Justice. The Panel concluded Springer III was “dismissed as a procedurally improper means of challenging the government’s power to impose penalties arising from the failure to file federal income tax returns for 1982-2006, and his appeal from that dismissal also was frivolous.”

Accordingly, the Panel concluded the outcome of both 05-6387 and 06-5123 was “obvious” and “Springer’s arguments are wholly without merit and these appeals were brought to

¹Which means what?

delay further the collection of his federal income tax liability for 1990-1995.” Id.

In footnote 6 the Panel also concluded that Springer II was also “jurisdictionally defective” and was “frivolous.” Id.

Filing Restrictions

And finally, the Panel decision dated May 1, 2007, proposed filing restrictions upon Appellant because of the “view of his abusive pattern of filing frivolous or malicious actions and appeals pro-se, WE MUST RESTRICT SPRINGER’S ACCESS TO THE COURTS.” Panel decision at 18.

ARGUMENT FOR STAY OF MANDATE OR ITS EQUIVALENT IN SPRINGER I

Springer III Issue

1. This Panel decision conflicts with the Paperwork Reduction Act of 1980 and 1995, D.C. Circuit in *Saco River Cellular, Inc., v. FCC.*, 133 F.3d 25,31 (D.C. Cir. 1998) and *Dole v. United Steelworkers*, 494 U.S. 26, 33-40 (1990)

Springer III was decided on grounds “that the PRA creates a defense, not a private right of action, and therefore, we need not reach the alternative basis for the district court’s disposition, that the AIA barred² the action.” Panel decision at 11

A. Panel decision conflicts with *Saco River Cellular, Inc., v. FCC.*, 133 F.3d 25,31 (D.C. Cir. 1998)

“The Paperwork Reduction Act directly addresses when a claim can be raised. Although it does not expressly refer to claims arising after submission of the information, the statute provides that ‘[t]he protection provided by this section may be raised in the form of a **complete**

²Which means what?

defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.’ 44 U.S.C. § 3512(b) (Supp. IV 1998). In *Saco River Cellular, Inc. v. FCC*, 133 F.3d 25, 31 (D.C. Cir. 1998), we explained that, by explicitly allowing parties to **raise a Paperwork Reduction Act claim** at any time during ongoing proceedings, the Paperwork Reduction Act "prevents an agency or court from refusing to consider a [Paperwork Reduction Act] argument on the ground that it is untimely.”

1. Decision conflicts with Paperwork Reduction Act

The D.C. Circuit said the PRA allows a “claim to be raised” at any time during ongoing proceedings and finished by saying “the Paperwork Reduction Act ‘prevents an agency or court from refusing to consider a [Paperwork Reduction Act] argument on the ground it is untimely.’” *Saco River Cellular, Inc.* was the Petitioner in that case.

Yet, this is precisely what the IRS did administratively in Springer II, it refused to consider Appellant’s PRA claims. The District Court refused to consider those PRA claims in Springer I and II. And this Panel, sitting “de novo review,” likewise refused to consider either the PRA claims or the meaning of the statutes reach under “bar” or “otherwise.”

How can someone raise a Paperwork Reduction Act claim under section 3512 too late? The Panel directing *Saco River’s* holding is not directly on point, however, to the issue of when the claim can be raised, as it “involved **a Paperwork Reduction Act defense** that was raised when the party had not submitted the information. However, the **expansive language of the Paperwork Reduction Act** itself, along with this court's explication in *Saco River*, militates against the Center's position and supports our finding that a Paperwork Reduction Act claim can be raised after information has been submitted. *Id.* at 150

No where in either *Center for Safety v. National Hwy Traf.* 244 F.3d 144, 150 (D.C. Cir. 2001), or *Saco River Cellular, Inc., v. FCC.*, 133 F.3d 25,31 (D.C. Cir. 1998) did the D.C. Circuit say that the Public Protection Provision can only be raised as a “defense.” The Panel’s construction of *Center for Safety v. National Hwy Traf.* 244 F.3d 144, 150 (D.C. Cir. 2001), and *Saco River Cellular, Inc., v. FCC.*, 133 F.3d 25,31 (D.C. Cir. 1998) is a clear erroneous interpretation of those decisions.

One of the parties in *Savor River*, “Northeast argue[d] that even if Section(s) 3512(b) can be applied to ongoing proceedings in other circumstances, its application in this case would effectively reverse our decision in *Northeast v. FCC*, in violation of the separation-of-powers doctrine as the Supreme Court interpreted it in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). *Plaut* was a sequel to *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), in which the Court had announced a new statute-of-limitations rule for certain securities fraud suits. The Congress had responded to the *Lampf, Pleva* decision by passing a law purporting to revive suits that had been dismissed in the wake of *Lampf, Pleva*, but the Court held in *Plaut* that, as an attempt by the Congress to reopen a final judgment, the new law was unconstitutional. 514 U.S. at 225. According to *Northeast*, application of Section(s) 3512(b) in *Saco River* would have nullified the D.C. Circuit’s determination in *Northeast*, which became final when PortCell failed to seek review in the Supreme Court, that the Commission “must disqualify” PortCell's application if the agency could adduce no rational waiver policy to support it. *Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164, 1167. 897 F.2d at 1167.

The D.C. Circuit held “*Plaut* is no bar to the application of Section(s) 3512 to the present case, however, because no party in *Northeast* raised, and we did not purport to resolve, the PRA

issue.” *Saco River*, supra For the Commission and the court to apply Section(s) 3512 to this case after October 1, 1995, therefore, is merely to follow the rule, which the Supreme Court acknowledged in *Plaut* itself, that “each court, at every level, must `decide according to existing laws.” 514 U.S. at 226 (quoting *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801)).

The correct question the District Court should have addressed is did the IRS violate the PRA of either 1980 or 1995? The public protection provision of the PRA provides that "no person shall be *subject* to any penalty for failing to comply with a collection of information" that lacks a currently valid OMB control number. 44 U.S.C. Section(s) 3512(a). The *Saco River* decision explains precisely why the “statutory mandate theory” was incorrect by the District Court.

2. Decision conflicts with *Dole v. United Steelworkers*, 494 U.S. 26 (1990).

The Supreme Court in *Dole v. United Steelworkers*, 494 U.S. 26 (1990) held “typical information collection request include tax forms.” Id. 33 . In *U.S. v. Hubbell*, 530 U.S. 27 (2000) the Supreme Court said “incriminating evidence may be the by product of obedience to a **regulatory requirement**, such as filing an income tax return,..”Id. at 35 “Congress has given discretion to the Commissioner to prescribe **by regulation forms** of returns and has made it the duty of the taxpayer to comply.” *CIR v. Lane-Wells Co.*, 321 U.S. 219, 223 (1944)

“[W]hile the grammar of this text can be faulted, its meaning is clear: **the public is protected under the Paperwork Reduction Act** from paperwork regulations not issued in compliance with the Act, only when those regulations dictate that a person maintain information for an agency **or provide information to an agency.**” *Dole*, at 40.

The OMB's regulations clearly state that Section(s) 3512 "does not preclude the imposition of a penalty on a person for failing to comply with a collection of information that is imposed . . . by statute," 5 C.F.R. 1320.6(e)

As the OMB has explained, however, that principle “does not extend to situations in which a statute authorizes, or directs, an agency to impose a collection of information on persons, and the agency does so.” *Controlling Paperwork Burdens on the Public; Regulatory Changes Reflecting Recodification of the Paperwork Reduction Act*, 60 Fed. Reg. 30438, 30441 (1995). In *Saco River*, the D.C. Circuit held “there is no collection of information imposed by statute, much less a specific congressional command to provide information showing a firm financial commitment.”

“In order to fulfill that purpose, the PRA must protect a member of the public when the agency imposes the paperwork burden upon it, not merely when the agency relies upon the paperwork in making a decision, which (as this case illustrates) can be years later.” *Saco River*, supra

Filing Restrictions

The Panel decision directed Appellant in all three cases to file within 10 days any objections to the Panel’s lengthy proposed filing restrictions. Appellant has a right to Petition for Rehearing and Rehearing En Banc regarding this Panel’s decision in Springer III which holds that section 3512 does not allow Appellant to seek an injunction against being “subjected” to penalties, which includes interest, under the phrase “complete defense, bar, or otherwise, at any time...”

CONCLUSION

Appellant respectfully request the Panel issue an Order staying the decision entered May 1, 2007, pending both Panel Rehearing and if needed, for Rehearing En Banc in Springer III.

Respectfully Requested

Lindsey K. Springer
5147 S. Harvard, # 116
Tulsa, Oklahoma 74135
918-748-5539

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 17, 2007, I sent a copy of Appellant's Motion for Stay of Mandate or its Equivalent by first class mail to:

U.S. Department of Justice
Laurie Snyder
Appellate Section-Tax Division
P.O. Box 502
Washington D.C. 20044

Date

Signature