

## The Missouri Municipal League vs. FCC and Baby Bells

8<sup>th</sup> Circuit Court of Appeals Case No. 01-1379      Filed: August 14, 2002      Cite as 299 F.3d 949 (8<sup>th</sup> Cir. 2002)

The Telecommunications Act of 1996 substantially amended the Telco Act of 1934. Its intended purposes are to increase competition in the area of telecommunications services and to ensure delivery of universal service. To help achieve these goals the Act codified for 'removals of barriers to entry'. The Act states, "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

Municipalities were entities, for purposes of removals of barriers to entry provision of the Telecommunications Act, prohibiting state laws from preventing 'any entity' from providing telecommunications services, so that the Missouri statute that prohibited municipalities and other political subdivisions from providing telecommunication services was preempted by Act.

Municipalities and public utilities petitioned for review of the FCC order, 2001 WL 28068, denying their petition to preempt a Missouri statute that prevents municipalities and public utilities from providing telecommunication services or facilities. The Court of Appeals, Wollman, Chief Judge, held that statute was preempted by the Telecommunications Act. Order vacated and remanded to the Commission for further consideration.

governed by a state statute of limitations, the cause of action accrues, for limitations purposes, when the plan administrator formally denies the claim for benefits, unless there was a "repudiation by the fiduciary which is clear and made known to the beneficiary." *Bennett*, 141 F.3d at 839. Here, there was no pre-denial repudiation by Hartford. But even if the three-year limitations period was therefore equitably tolled until Mrs. Wilkins's claim was denied, Hartford denied the claim by letter dated March 7, 1995, so her November 1999 complaint was filed substantially out of time.

Given our decision that Mrs. Wilkins's ERISA claim is time-barred, Hartford's appeal of the district court's award of attorney's fees, and Mrs. Wilkins's appeal of the court's denial of prejudgment interest and a twelve percent penalty, are moot. The judgment of the district court is reversed, and the case is remanded with directions to dismiss the complaint. Appellant's motion to supplement the record is granted.



**THE MISSOURI MUNICIPAL LEAGUE; The Missouri Association of Municipal Utilities; City Utilities of Springfield; City of Sikeston, Missouri; Columbia Water & Light; American Public Power Association, Petitioners,**

v.

**FEDERAL COMMUNICATIONS COMMISSION; United States of America, Respondents,**

**Southwestern Bell Telephone Company; State of Missouri, Intervenor on Appeal.**

**National Association of Telecommunications Officers and Advisors; United Telecom Council, Amici on Behalf of Petitioners.**

No. 01-1379.

United States Court of Appeals,  
Eighth Circuit.

Submitted: Nov. 12, 2001.

Filed: Aug. 14, 2002.

Municipalities and public utilities petitioned for review of the Federal Communication Commission's (FCC) order, 2001 WL 28068, denying their petition to preempt a Missouri statute that prevents municipalities and public utilities from providing telecommunications services or facilities. The Court of Appeals, Wollman, Chief Judge, held that statute was preempted by Telecommunications Act.

Vacated and remanded.

1. States ⇌ 18.S1

Telecommunications ⇌ 75.1

In evaluating whether a state statute is preempted by the Telecommunications Act, the Federal Communications Commission (FCC) determines whether the statute violates the removals of barriers to entry provision of the Act, prohibiting state laws from preventing any entity from providing telecommunications services; if it does, then the FCC considers whether the statute falls within the reservation clause of the Act, providing that Act does not prevent state from imposing competitively neutral requirements to advance universal telecommunications services, and if it does not, then the FCC must preempt the statute. Communications Act of 1934, § 253, as amended, 47 U.S.C.A. § 253.

## 2. Statutes $\S$ 219(2)

In reviewing an administrative agency's interpretation of a statute, the Court of Appeals must determine whether congressional intent is clear from the plain language of the statute; if congressional intent is clear, a contrary interpretation by an agency is not entitled to deference, but if the language of the statute is ambiguous, and the legislative history reveals no clear congressional intent, the Court of Appeals must defer to a reasonable interpretation of the statutory provision made by the agency.

## 3. States $\S$ 18.11

A federal statute which purports to alter the balance of federal and state powers can be unambiguous without addressing every interpretive theory offered by a party; it need only be plain to anyone reading the statute that Congress intended to alter the federal-state balance in the relevant area.

## 4. States $\S$ 18.11

Plain-statement rule, stating that absent a clear indication of Congress's intent to change the balance of federal and state powers, the proper course is to adopt a construction which maintains the existing balance, does not require federal courts to limit a statute's scope where Congress's intent is plain, and, in fact, any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress.

## 5. States $\S$ 18.11

The plain statement rule requires the Court of Appeals to determine whether the statutory language of a federal statute purporting to alter the traditional balance of federal and state powers plainly re-

quires preemption; it does not mandate that the Court conduct a balancing test of the federal interests against the state interests or that it delve into the wisdom of the competing federal and state policies.

## 6. States $\S$ 18.81

### Telecommunications $\S$ 75.1

Municipalities were entities, for purposes of removals of barriers to entry provision of Telecommunications Act, prohibiting state laws from preventing "any entity" from providing telecommunications services, so that Missouri statute that prohibited municipalities and other political subdivisions from providing telecommunication services was preempted by Act; word "entity" included all organizations, word "any" was required to be interpreted expansively, and although regulation of municipalities was traditionally state interest, Act contained preemption clause, expressly requiring Federal Communications Commission to preempt any statute that conflicted with Act. Communications Act of 1934,  $\S$  253, as amended, 47 U.S.C.A.  $\S$  253; V.A.M.S.  $\S$  392.410, subd. 7.

James Baller, argued, Washington, DC (Sean A. Stokes, Allison L. Driver, William Andrew Dalton and Richard B. Geltman, on the brief), for Petitioners.

Richard K. Welch, argued, Washington, DC, for Respondent.

Ronald Molteni, argued, Jefferson City, MO, for Intervenor State of Missouri.

Geoffrey M. Klineberg, argued, Washington, DC, for Intervenor Southwestern Bell.

Before WOLLMAN,<sup>1</sup> Chief Judge, BOWMAN, and STAHL,<sup>2</sup> Circuit Judges.

1. The Honorable Roger L. Wollman stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on January 31, 2002. He has been succeeded by the Honorable David R. Hansen.

2. The Honorable Norman H. Stahl, United States Circuit Judge for the First Circuit, sitting by designation.

WOLLMAN, Chief Judge.

Various Missouri municipalities, municipal organizations, and public power companies (the Missouri Municipals) have petitioned for review of the Federal Communications Commission's (Commission) order denying the Missouri Municipals' petition to preempt a Missouri statute that prevents municipalities and municipally owned utilities from providing telecommunications services or telecommunications facilities. We vacate the order and remand to the Commission for further consideration.

I.

In February 1996, Congress enacted the Telecommunications Act of 1996 (the Act), which extensively amended the Communications Act of 1934, 47 U.S.C.A. §§ 151-615 (West 2001). The Act's intended purposes are to increase competition in the area of telecommunications services and to ensure the delivery of universal service. To help achieve these goals, § 101(a) of the Act, codified at 47 U.S.C. § 253, provides for "removals of barriers to entry," as follows:

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

...

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency. 47 U.S.C.A. § 253 (West 2001 Supp.).

Section 392.410(7) of the Revised Statutes of Missouri prohibits the state's political subdivisions from obtaining the certificates of service authority necessary to provide telecommunications services or facilities directly or indirectly to the public. It provides:

No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing telecommunications services or facilities;

- (1) For its own use;
- (2) For 911, E-911 or other emergency services;
- (3) For medical or educational purposes;
- (4) To students by an educational institution; or

(5) Internet-type services. The provisions of this subsection shall expire on August 28, 2002. Mo.Rev.Stat. § 392.410(7) (West 2001 Supp).<sup>3</sup>

[1] The Missouri Municipals filed a petition with the Commission, asking that it preempt Mo.Rev.Stat. § 392.410(7) as being in violation of § 253(a) of the Act. The Commission employs a two-step process in examining statutes under § 253. First, it determines whether the statute violates § 253(a). If it does, then the Commission considers whether the statute falls within the reservation clause of § 253(b). If it does not, then the Commission must preempt the statute. Finding that the Missouri statute does not violate § 253(a), the Commission denied the petition, thus eliminating the need for § 253(b) review. *In the matter of the Missouri Municipal League*, 16 F.C.C.R. 1157 (2001). The Commission expressed its disagreement with the policy of the Missouri statute because it had found previously that "municipally-owned utilities . . . have the potential to become major competitors in the telecommunications industry . . . [and] can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small rural communities." *Id.* at 1162; *see also id.* at 1173 (Separate Statement of Commissioner Susan Ness). Even though it expressed its desire that states not adopt the type of complete barriers to entry found in § 392.410(7), the Commission felt bound by legal authorities not to preempt the statute, particularly a decision of the United States Court of Appeals for the District of Columbia, *City of Abilene v. FCC*, 164 F.3d 49 (D.C.Cir.1999). *Missouri Municipal League*, 16 F.C.C.R. at 1164-65; *see also id.* at 1172 (Separate Statement of Chairman William E. Kennard and Commissioner Gloria Tristani); and *id.* at 1173 (Separate Statement of Commissioner Susan Ness). The Missouri Municipals then filed a petition for a re-

view of the Commission's order. Southwestern Bell Telephone Co. and the State of Missouri intervened in support of the Commission's decision.

We have jurisdiction to review final orders of the Commission under 47 U.S.C.A. § 402(a) (West 2001) and 28 U.S.C.A. § 2342(1) (West 1994).

## II.

[2] We review agency determinations under the two-step process set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). First, we must determine whether congressional intent is clear from the plain language of the statute. If congressional intent is clear, a contrary interpretation by an agency is not entitled to deference. If the language of the statute is ambiguous, however, and the legislative history reveals no clear congressional intent, we must defer to a reasonable interpretation of the statutory provision made by the agency. *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933, 936 (8th Cir.2000), *aff'd*, — U.S. —, 122 S.Ct. 1155, 152 L.Ed.2d 167 (2002).

[3,4] A second plain-language standard also applies in this case. The Supreme Court requires that Congress make a plain statement that it intends to preempt state law where the preemption affects the traditional sovereignty of the states. *Gregory v. Ashcroft*, 501 U.S. 452, 460-61, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). In *Gregory*, the Court "confronted a statute susceptible of two plausible interpretations, one of which would have altered the existing balance of federal and state powers . . . [and] concluded that, absent a clear indication of Congress's intent to change the balance, the proper course was to adopt a construction which maintains the existing balance." *Salinas v. United States*, 522 U.S. 52, 59, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997). As the Court

3. Missouri House Bill 1402, 2002 Mo. Legis. Serv. H.B. 1402 (Vernon's), signed into law on July 11, 2002, extended the expiration date

to August 28, 2007, as well as making certain other changes in the wording of § 392.410(7), none of which affect our analysis in this case.

pointed out in *Salinas*, however, a "statute can be unambiguous without addressing every interpretive theory offered by a party. It need only be 'plain to anyone reading the Act'" that Congress intended to alter the federal-state balance in the relevant area. *Id.* at 60, 118 S.Ct. 469 (quoting *Gregory*, 501 U.S. at 467, 111 S.Ct. 2395). Thus, the *Gregory* plain-statement rule does not require courts to limit a statute's scope where Congress's intent is plain, and, in fact, "[a]ny other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution." *Salinas*, 522 U.S. at 60, 118 S.Ct. 469 (quoting *United States v. Albertini*, 472 U.S. 675, 680, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985)).

[5] In summary, the *Gregory* rule requires us to determine whether the statutory language plainly requires preemption. *Gregory* does not mandate that we conduct a balancing test of the federal interests against the state interests or that we delve into the wisdom of the competing federal and state policies. We do not assume that Congress exercises its Supremacy Clause power lightly, however, and we must be "certain of Congress' intent" before we find that federal law overrides the balance between state and federal powers. *Gregory*, 501 U.S. at 460, 111 S.Ct. 2395. Even so, no matter how great the state interest, we should not strain to create ambiguity in a statute where none exists. See *Salinas*, 522 U.S. at 59-60, 118 S.Ct. 469. Accordingly, we ask a single question, is the statute's meaning plain? If so, that ends our analysis, with the result that it must be held that Congress has preempted state law.

The dispute hinges on the meaning of the phrase "any entity" in § 253 of the Act. More precisely, do the words "any entity" plainly include municipalities and so satisfy the *Gregory* plain-statement rule? We hold that they do. Accordingly, because § 253 satisfies the *Gregory* plain-

statement rule, it also satisfies *Chevron*'s clear-statement rule and thus the Commission's contrary interpretation cannot stand.

[6] We begin with the language Congress used, and, because the statute does not define the term "entity," we presume that "the ordinary meaning of that language accurately expresses the legislative purpose." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992); see also *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187, 115 S.Ct. 788, 130 L.Ed.2d 682 (1995). There is no doubt that municipalities and municipally owned utilities are entities under a standard definition of the term. An entity is "[a]n organization (such as a business or a governmental unit) that has a legal identity apart from its members," and a public entity is a "governmental entity, such as a state government or one of its political subdivisions." Black's Law Dictionary 553 (7th ed.1999). Although municipalities in Missouri derive all of their powers from the state, and although a state can control its subdivisions in an almost limitless way, see, e.g., *Sailors v. Bd. of Educ.*, 387 U.S. 105, 107-08, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967), municipalities and other political subdivisions have an existence separate from that of the state. It is true that as political subdivisions of the state, municipalities should not be considered independent entities. Nevertheless, the question before us is not the source from which municipalities derive their power, but whether they are included within the meaning of "any entity" as used in § 253(a). The plain meaning of the term "entity" includes all organizations, even those not entirely independent from other organizations.

Furthermore, Congress's use of "any" to modify "entity" signifies its intention to include within the statute all things that

could be considered as entities. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997) (citations omitted). Time and time again the Court has held that the modifier "any" prohibits a narrowing construction of a statute. See *Dept. of Hous. & Urban Dev. v. Rucker*, — U.S. —, —, 122 S.Ct. 1230, 1233, 152 L.Ed.2d 258 (2002) (in statute requiring lease term providing for lease termination if public housing tenant or specified others engage in "any drug-related criminal activity," Congress's "use of the term 'any' to modify 'drug-related criminal activity' precludes" limiting the statute to cover only "drug-related activity that the tenant knew, or should have known, about"); *Brogan v. United States*, 522 U.S. 398, 400-01, 405, 118 S.Ct. 805, 139 L.Ed.2d 830 (1998) ("any false, fictitious or fraudulent statement" includes false statements of whatever kind); *Gonzales*, 520 U.S. at 5, 117 S.Ct. 1032 ("any other term of imprisonment" means all prison sentences, both state and federal, where Congress did not add any language limiting the breadth of the term "any"); *Freitag v. Comm'r*, 501 U.S. 868, 873-74, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991) ("any other proceeding" allows Chief Judge to assign all types of cases to a special trial judge); *United States v. James*, 478 U.S. 597, 605, 106 S.Ct. 3116, 92 L.Ed.2d 483 (1986) ("any damage" and "liability of any kind" include all possible damages from a government project, not limited to just property damage); *United States v. Turkette*, 452 U.S. 576, 580-81, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981) ("any enterprise" includes both legitimate and illegitimate enterprises); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588-89, 100 S.Ct. 1889, 64 L.Ed.2d 525 (1980) ("any other final action" includes all actions that constitute the agency's last word); and *Bhd. of RR Trainmen v. Balt. & O.R. Co.*,

331 U.S. 519, 529, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947) ("any proceeding arising under this Act" allows intervention in all cases under the statute); accord *Southern Co. v. FCC*, 293 F.3d 1338, 1349 (11th Cir.2002) (plain meaning of "any" is "all" unless specifically limited in statute).

In *Salinas v. United States*, the Court was called upon to decide whether the federal bribery statute, which applies to "any business transaction," applies only to bribes affecting federal funds. The defendant, who had bribed a state official, argued that because the bribery statute upset the federal-state balance, the *Gregory* plain-statement rule required a plain statement of congressional intent that the bribery statute apply to bribes having no effect on federal funds. In holding that the bribery statute included bribes of state officials, even where no federal funds were affected, the Court stated that "the word 'any,' which prefaces the business or transaction clause, undercuts the attempt to impose this narrowing construction." *Salinas*, 522 U.S. at 57, 118 S.Ct. 469. The Court also stated that "the plain-statement requirement articulated in *Gregory* . . . does not warrant a departure from the statute's terms." *Id.* at 60, 118 S.Ct. 469.

In *City of Abilene v. FCC*, the Court of Appeals for the District of Columbia reviewed a Commission order that refused to preempt a Texas statute similar to Mo. Rev.Stat. § 392.410(7), holding that § 253 did not contain a plain statement sufficient to preempt a traditional area of state sovereignty. With all due deference to our sister circuit's holding, and mindful of our desire to maintain uniformity among the circuits, *United States v. Auginash*, 266 F.3d 781, 784 (8th Cir.2001), we do not find *City of Abilene* to be persuasive. The D.C. Circuit noted that the mere possibility that the term "entity" could include municipalities does not satisfy *Gregory*.

*City of Abilene*, 164 F.3d at 52–53. The court, however, made no mention of the Supreme Court's cases regarding the effect of the modifier "any" on the modified term, referring instead to Congress's "tone of voice" regarding the term "any" and the "emphasis" Congress meant to place on different words. *Id.* at 52. Counsel for the Commission stated at oral argument that the D.C. Circuit did not consider *Salinas* because of that court's rules regarding cases not cited in the original briefs. Whatever the reason for the D.C. Circuit's decision not to consider and discuss *Salinas* and like cases, we view the lack of such a discussion as detracting from the persuasiveness of its opinion. The Supreme Court has repeatedly instructed us regarding the proper manner of interpreting the modifier "any," and we follow that direction here. We find no reference in any of the Supreme Court's decisions regarding the word "any" about Congress's "tone of voice" and "emphasis." We note that a district court in Virginia, after considering both the "any" cases and *City of Abilene*, concluded that "any entity" should be read broadly and held that a Virginia statute similar to Mo.Rev.Stat. § 392.410(7) must be preempted. *City of Bristol v. Earley*, 145 F.Supp.2d 741, 747–49 (W.D.Va.2001) ("it strains logic to interpret the term 'any entity' in § 253(a) to mean 'any entity except for municipalities and other political subdivisions of states'").

Accordingly, we conclude that because municipalities fall within the ordinary definition of the term "entity," and because Congress gave that term expansive scope by using the modifier "any," individual municipalities are encompassed within the term "any entity" as used in § 253(a). This language would plainly include municipalities in any other context, and we should not hold otherwise here merely because § 253 affects a state's authority to regulate its municipalities. Congress need

not provide specific definitions for each term in a statute where those terms have a plain, ordinary meaning and Congress uses an expansive modifier to demonstrate the breadth of the statute's application. See *Gregory*, 501 U.S. at 467, 111 S.Ct. 2395 (statute need not explicitly mention judges to have judges included in the definition); *Salinas*, 522 U.S. at 60, 118 S.Ct. 469 (statute need not address every interpretive theory offered in order to be unambiguous).

We recognize Missouri's important interest in regulating its political subdivisions. The *Gregory* standard is designed to respect such interests. That *Salinas* was a criminal case in which the state had no interest in allowing its officials to take bribes does not detract from its fundamental holding regarding the authority of Congress to change the balance of state and federal powers when it employs plain language to do so. *Salinas* held that by using the clearly expansive term "any," Congress expressed its intent to alter this relationship. We conclude that the same must be said about the preemption provision set forth in § 253.

Missouri also argues that because the state controls its municipalities' authority, § 253 does not apply to this case. Section 253 directs the Commission to preempt laws that prohibit "the ability of any entity" to provide telecommunications services. Missouri argues that because § 392.410(7) addresses its municipalities' authority to provide telecommunications services rather than their ability to do so, § 253 does not apply. Missouri contends that if § 392.410(7) is held to be preempted, it would not be able to prevent its attorney general's office from providing telecommunications services. Putting aside the highly fanciful nature of this argument, it needs only to be noted that unlike municipalities, the Missouri Attorney General's



office has no independent authority to provide telecommunications services. Section 392.410(7) is a prohibition on the ability to exercise the authority that municipalities otherwise possess, precisely the type of prohibition that § 253 is designed to prevent. See *City of Bristol*, 145 F.Supp.2d at 748 (Virginia municipalities otherwise have authority to provide telecommunications services and state statute designed to prohibit them from exercising that authority preempted by § 253).

The Commission's order is vacated, and the case is remanded to the Commission for further proceedings consistent with the views set forth in this opinion.



UNITED STATES of America,  
Appellee,

v.

Joseph Michael SCOLARO, also  
known as, Joseph Michael  
Pena, Appellant.

No. 01-3365.

United States Court of Appeals,  
Eighth Circuit.

Submitted: May 15, 2002.

Filed: Aug. 15, 2002.

Defendant was convicted in the United States District Court for the Northern District of Iowa, Michael J. Melloy, J., of possession of stolen firearms, and he appealed. The Court of Appeals, Heaney, Circuit Judge, held that sentencing enhancement for use or possession of firearm with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense was properly applied on basis that defendant's assault of the owner of the stolen guns

made possible his possession of the guns, regardless of whether he used the guns to commit the assault.

Affirmed.

Bright, Circuit Judge, filed dissenting opinion.

#### 1. Criminal Law ⇨1139, 1158(1)

Court of Appeals reviews the district court's legal conclusion concerning the application of sentencing guidelines enhancement de novo and its factual findings for clear error. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

#### 2. Sentencing and Punishment ⇨668

Plain meaning of section of federal Sentencing Guidelines providing method for determining relevant conduct contemplates conduct taken prior to, and in order to facilitate, the charged offense. U.S.S.G. § 1B1.3(a)(1)(A, B), 18 U.S.C.A.

#### 3. Sentencing and Punishment ⇨726(4)

Enhancement for use or possession of firearm with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense was properly applied on basis that defendant's assault of the owner of the stolen guns made possible his possession of the guns, regardless of whether he used the guns to commit the assault. U.S.S.G. §§ 1B1.3(a)(1)(A, B), 2K2.1(b)(5), 18 U.S.C.A.

Stephen A. Swift, argued, Cedar Rapids, Iowa, for appellant.

Stephanie M. Rose, argued, Asst. U.S. Attorney, Cedar Rapids, Iowa, for appellee.

Before MURPHY, HEANEY and BRIGHT, Circuit Judges.