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Procedure: The Problem Cause Requirement of a Criminal Complaint in Federal Court

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and attorney's fees, modernized the terminology, and purged the procedure of unneeded provisions so as to promote the "speedy determination of litigation on its merits."[12]

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Procedure: The Probable Cause Requirement of a Criminal Complaint in Federal Court—In *United States v. Greenberg*,[1] a prosecution for income tax evasion was overturned on the ground that a proper complaint had not been filed within the time allowed by the statute of limitations. The complaint contained only the affidavit of the Internal Revenue Agent. In it the affiant stated that:

> . . . he had conducted an investigation of the federal income tax liability of Hyman Greenberg for the calendar year 1955 and other years; by examination of the said taxpayer's records; by identifying and interviewing third parties with whom the said taxpayer did business; by consulting public and private records reflecting the said taxpayer's income; and by interviewing third persons having knowledge of the said taxpayer's financial condition.[2]

The complaint also stated that based on this investigation, complainant had personal knowledge that defendant had wilfully attempted to evade and defeat a large part of his income tax. It also contained the dollar amount of income shown on defendant's tax return and the figure which represented defendant's alleged actual income.

The Government's argument was based on two main contentions: (1) that since a summons rather than a warrant was issued on the complaint, it was not necessary to show probable cause, and (2) that even if probable cause were found to be a requirement, it had in fact been shown.

The court disposed of the claim that probable cause need not be shown when only a summons is sought. It reasoned that, as far as defendant was concerned, it made little difference whether a warrant or summons issued, since if he failed to respond to the summons a warrant would issue. In addition the court noted that the specific language of Rule 4(a)[3] of the Federal Rules of Criminal Procedure did not impose a distinction in the requirements for securing a summons or a warrant.

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[12] WIS. STAT. §251.18 (1961).

[1] United States v. Greenberg, 320 F. 2d 467 (9th Cir. 1963).

[2] *Id.* at 468.

[3] Rule 4 (a): *"Issuance.* If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue."

The court then determined that in this case probable cause had not been shown.

Giordenello v. United States,[4] the leading case in this area, has set down what is required for a showing of probable cause and is quoted from extensively in the *Greenberg* case. Since the court in *Greenberg* relies so heavily on the exact language of *Giordenello*, it would be useful to examine the latter before going into a discussion of the more specific requirements enumerated in the *Greenberg* decision.

In *Giordenello*, petitioner was convicted of unlawfully purchasing narcotics. He challenged the legality of his arrest and the admissibility at the trial of the narcotics seized from his person upon arrest. Since there was no search warrant, the seizure could be justified only as incidental to a lawful arrest. The complaint stated:

> That . . . Veto Giordenello did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code.
>
> And the complainant further states that he believes that ——— ——— are material witnesses in relation to this charge.[5]

Petitioner challenged the complaint as defective because it was based on hearsay rather than personal knowledge, and because it recited no more than the elements of the crime charged. The Supreme Court refused to decide the hearsay issue because the complaint was defective in not showing probable cause.

The rationale of the *Giordenello* case is based on the Court's interpretation of Rules 3 and 4 of the Federal Rules of Criminal Procedure, as read in the light of the Fourth Amendment. Rule 3[6] requires that a complaint set forth the essential facts constituting the charge, and Rule 4[7], that there be a showing of probable cause that the offense has been committed and that defendant has committed it. The Court concluded that the inference, resulting from a reading of the Rules and the Amendment together, was that the purpose of the complaint was to allow the magistrate to decide whether or not probable cause exists.

[4] Giordenello v. United States, 357 U.S. 480 (1948).

[5] *Id.* at 481.

[6] Rule 3. *"The Complaint.* The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

[7] Rule 4: *"Warrant or Summons Upon Complaint.* (b) Form. (1) Warrant The warrant shall be signed by the commissioner and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available commissioner. (2) Summons. The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a commissioner at a stated time and place." (See note 3 *supra* for sub-section (2)).

The important thing is that the magistrate make his own decision and not rely on the conclusions of the complainant. In the words of *Johnson v. United States,* the inferences must ". . . be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."[8]

The complaint in *Giordenello* was adjudged defective because it contained nothing from which the Commissioner could have reached his own conclusion. The Court indicated that it is important for the complainant to indicate the source of his belief. It also commented on the fact that the complaint did not contain any allegation that the affiant spoke with personal knowledge. Thus, while not deciding the issue squarely, the Court seemed to indicate that the fact that personal knowledge, rather than hearsay is relied on as a factor in favor of a complaint's validity.

This examination of the general requirements of a complaint and the allusion to the policy behind these requirements, as set forth in *Giordenello,* when supplemented by an examination of the rather specific suggestions contained in *Greenberg,* indicates what a federal court will require of a complaint. In *Greenberg,* the court made the following criticisms and suggested how they could be remedied. The complainant stated that he had examined defendant's records. Apparently this is not a sufficient indication of the source of one's knowledge, for the court indicated that he should have included the information obtained in the examination. The complaint stated that third parties with whom the taxpayer had done business were interviewed. The names of these parties and the information obtained from them should have been included. The complainant alleged that he had consulted public and private records reflecting the taxpayer's income. The information obtained from these consultations should have been set forth. The complaint alleged that third persons having knowledge of taxpayer's financial condition were interviewed. Information obtained from these interviews should have been included.

A brief glance at another recent case in this area should further clarify the situation. In *DiBella v. United States,*[9] there was a proceeding for suppression of evidence obtained by an allegedly unlawful search and seizure. The complaint in this case alleged upon information and belief that the defendants had unlawfully sold, dispensed, and distributed heroin in packages not bearing tax stamps required by law. Sources were specified as one of the defendants other witnesses, deponent's personal observations, and the reports and records of the Bureau of Narcotics. This complaint was found insufficient as inadequately setting forth the sources of information and grounds for belief. The court held

[8] Johnson v. United States, 333 U.S. 10, 14 (1948).
[9] DiBella v. United States 284 F. 2d 897 (2d Cir. 1960), *reversed on other grounds,* 369 U.S. 121 (1962).

that there should have been some indication of exactly what deponent had personally observed, what he had heard from others, and what he had learned from the reports or records of the Bureau of Narcotics. It seems that if the source is indicated in a way that will satisfy the courts, that type of fact, generally known as evidentiary, must be pleaded. That the defendant distributed narcotics is an ultimate fact. The circumstances which enable one to make the assertion are evidentiary facts, and it seems that this is what the courts require.

In conclusion, the policy which the courts seek to effectuate in enforcing the requirement of a showing of probable cause is one of requiring the magistrate issuing the warrant or summons to come to his own conclusions as to whether it (probable cause) exists. The purpose is to place a barrier—presumably impartial—between the law enforcement officer who might stand to gain by acquiring a warrant, and the party whose arrest is sought. Obviously, a recital of the elements of the crime and the fact that the defendant committed it is not going to be enough. This is no more than stating a legal conclusion and is insufficient even in a civil complaint. It helps if the complainant indicates the sources of his belief. By doing this he necessarily brings in more facts. However, even this will be insufficient if these sources are stated generally as they were in *Greenberg* and *DiBella.* One is drawn unavoidably to the conclusion that the courts, in no matter what terms they state their criticisms, are all ultimately requiring evidentiary, as opposed to ultimate, facts or legal conclusions. This is the type of fact specifically suggested in *Greenberg.* These facts by their nature allow the magistrate to draw his own conclusion and thus fulfill the policy the courts are trying to enforce. MARY C. CAHILL

Sales: What Constitutes Sufficient Notification for Breach of Warranty—A tire purchased by plaintiff-Wojciuk from one of the defendants, Stuewer, blew out, causing the automobile in which the plaintiffs were riding to turn over. Plaintiff-wife suffered serious bodily injuries. Defendant-Stuewer had told the plaintiffs that the tire would never blow out, and advertisements also stated that the tire was guaranteed for life against any defects. On the day of the accident the plaintiff, Wojciuk, telephoned defendant, Stuewer, and told him of the mishap, saying, "Herb, what kind of tires did you sell me? . . . We had a blowout and a terrible accident resulted from it."[1] The plaintiffs subsequently brought suit against Stuewer for "breach of express warranty that the tire would not blow out suddenly" and for "breach of implied warranty of merchantable quality and fitness" in *Wojciuk v. United States Rubber*

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[1] Wojciuk v. United States Rubber Co., 19 Wis. 2d 224, 235, 120 N.W. 2d 47, 53 (1963).