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Antitrust UPDATE
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Seventh Circuit Declines to "Reverse the Arrow of Time" in Labor Contracts

The National Labor Relations Act contains a "hot cargo" provision that, subject to certain exceptions, forbids a union and employer to agree that the employer will refuse to deal with another employer. Indiana Constructors, a trade association of contractors doing road work in Indiana, entered into a collective bargaining agreement with the Laborers International Union that prohibited association members from subcontracting work to any firm that had not signed the collective bargaining agreement. United Rental Technologies had a collective bargaining agreement with another union and did not want to bargain with the Laborers Union. United Rentals filed suit, alleging, among other things, that the contractors' association and union conspired to exclude United Rentals from the market in violation of Section 1 of the Sherman Act.

In *United Rentals v. Indiana Constructors*, 518 F.3d 562 (7th Cir. 2008), the Seventh Circuit affirmed the district court's summary judgment for the defendants. Judge Posner found that the "hot cargo" clause in issue fell within the exception to the "hot cargo" prohibition in the NLRA. Turning to the antitrust claim, Judge Posner acknowledged the anticompetitive consequences of "hot cargo" clauses, but found that the clause in this case was squarely within the type of "hot cargo" provisions Congress permitted under its 1959 amendment to the NLRA. Posner concluded with the observation that this "type of agreement affirmatively sanctioned by Congress cannot be deemed a per se violation of the Sherman Act …. To rule otherwise would be to make the Sherman Act, enacted in 1890, repeal a statutory provision enacted in 1959, reversing the arrow of time."

FTC Brings Enforcement Action Against Patent Holder Even Absent Antitrust Violation

Negotiated Data Solutions ("N-Data") is the second generation assignee of patents relating to Ethernet connections between computers. During the 1990s a trade group developed an industry standard for Ethernet connections. The standard adopted a technology that was patented by N-Data's predecessor. The predecessor committed to licensing the patents for a one time fee of $1,000. When

N-Data gained ownership of the patents in 2003, it disregarded the original owners' licensing commitment and sought substantially higher licensing fees. It sued for patent infringement those who used the Ethernet standard but refused to pay the higher fees.

The Federal Trade Commission challenged N-Data's actions as an "unfair method of competition" under Section 5 of the FTC Act. N-Data recently settled the FTC's claim by agreeing to abide by its predecessor's commitment. What is significant about the FTC's challenge is that it did not allege that N-Data's attempt to enforce its patents violated the antitrust laws. Prior FTC actions against patent holders involved in standard setting all involved misuse of the standard setting process in a manner that adversely affected competition. The Commission's action against N-Data seems to be an attempt to use Section 5 to protect business consumers who are capable of protecting themselves. According to the Commission's statement issued along with the N-Data settlement, Section 5 applies to any activity with "some indicia of oppressiveness" and "encompass[es] not only practices that violate the Sherman Act…but also practices that the Commission determines are against public policy for other reasons." Two commissioners dissented, noting that Section 5 should not be applied against conduct that did not violate the antitrust laws in order to protect sophisticated businesses.

The FTC's action is important to patent holders who are involved in standard setting organizations. In that context, patent holders need to be careful about the representations that they make regarding their willingness to license patents that cover technology in the adopted standard.

Resale Price Maintenance Complaint Against Mattress Manufacturer Deflated

In *Jacobs v. Tempur-Pedic Intern'al, Inc.*, 2007 WL 4373980 (N.D. Ga. Dec. 11, 2007), the district court dismissed plaintiff's resale price maintenance complaint because it failed the economic plausibility standard established in the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007). *Twombly* created a heightened pleading standard by requiring antitrust plaintiffs to allege facts sufficient to show 'plausible grounds' from which to infer an antitrust violation.

In granting defendant's motion to dismiss, the *Jacobs* court held that plaintiff's allegations were exactly the kinds of "labels and conclusions" and "formulaic recitation of the elements of a cause of action" that were condemned in *Twombly*. The court, at the motion to dismiss stage, went so far as to reject plaintiff's alleged market definition in favor of the market definition tendered by the defendants.

This holding shows that courts are using the *Twombly* decision to require antitrust plaintiffs to plead their claims with a greater level of specificity and plausibility before permitting cases to proceed to costly antitrust discovery.

Get Paid to Use Less Energy? Efforts to Promote More Competitive Electric Markets

Would you be willing to back off on your normal use of electric power for an hour or more on a particularly hot day if you were paid to do so? The Federal Energy Regulatory Commission ("FERC") thinks that more businesses would be, and that could contribute to more competitive conditions in regional wholesale electric markets. FERC has recently proposed rules to facilitate and encourage the use of what it calls "demand response resources" – scheduled reductions in electric power consumption – as a competitive alternative to operating higher cost supply facilities on regional electric grid systems in the Midwest, the Northeast, the Mid-Atlantic and California. In addition to this key initiative, FERC has proposed rules to promote more competitive long-term power contracting in regional electric markets; more independent market monitoring policies to deter anti-competitive behavior; as well as more open and responsive governance of the organizations in charge of operating regional grid systems.

Demand Response Resources

FERC's proposed rules intend to create more marketable and competitive commodities, called demand response resources ("DRRs"), from the ability of individual businesses to reduce their demand for power from regional electric grids. To satisfy demand for electricity, owners of electric generation in some regional wholesale markets competitively bid their resources into the market at different prices (subject to bid caps enforced by FERC) and each is generally paid the market clearing price. FERC has recognized that scheduled incremental reductions in actual ("real-time") or anticipated ("day-ahead") use of electricity by willing retail customers serve the same purpose as incremental increases in supply in the relevant wholesale market. Either can bring supply and demand into balance.

FERC has also recognized that some businesses may be willing to bid a decreased increment of their use of electricity – a DRR – into a market at a price lower than

suppliers would bid to serve the same increment of electricity usage, particularly at times of peak demand on an electric grid when the most costly supply of energy would have to be called into service. Some DRRs that businesses have been willing to create can now be bid into some regional competitive wholesale markets, but DRRs are not treated the same as energy supply resources in all market segments. Relying on its authority to eliminate unreasonable discrimination, FERC has proposed rules that would facilitate creation and use of more DRRs as competitive alternatives to energy supply resources.

FERC proposes several reforms. In FERC-approved wholesale markets in which competitive bidding is used for ancillary services, FERC would require acceptance of price bids from DRRs "on a basis comparable to any other resources" under certain circumstances. FERC would further require that a DRR provider be permitted to specify in its bid certain parameters, such as the maximum number of hours that its DRR could be used. Additionally, FERC would prohibit a charge to a purchaser in the day-ahead energy market for buying less power in the real-time energy market, removing what could otherwise be a penalty to retail suppliers. Finally, FERC proposes to modify market rules to allow the market-clearing price to reach a level that rebalances supply and demand.

Long-Term Contracting

FERC is also considering proposals to facilitate long-term contracting in organized markets. Such long-term contracting benefits both buyers and sellers of wholesale electric energy. It allows them to better manage market risks and it promotes pricing stability. Long-term contracts also provide a solid foundation for the financing of new electric power generation. FERC is of the view that greater transparency in the market will facilitate more long-term contracting and has proposed that independent system operators ("ISO") or regional transmission organizations ("RTO") support that goal by providing an online forum, in which information about the need for and availability of such contracts may be exchanged. FERC therefore has proposed a requirement that ISOs and RTOs dedicate a portion of their websites on which market participants may post offers to buy or sell power on a long-term basis.

Market Monitoring

FERC has previously required that all ISOs and RTOs incorporate into their structures a Market Monitoring Unit ("MMU"). MMUs provide reports on and analysis of market competitiveness to the Commission, ISOs and RTOs, market participants and state commissions. The current proposal seeks to advance market monitoring by strengthening MMU independence and fostering useful, transparent market analysis.

FERC proposes that MMUs perform the following three functions: (1) evaluate existing/proposed market rules, tariff provisions and market design elements for effectiveness, and recommend proposed rule and tariff changes to the ISO/RTO, as well as to FERC and other interested entities; (2) review and report on wholesale market performance to the ISO/RTO, FERC and other interested entities; and (3) identify and notify FERC of the potential need to investigate either an ISO/RTO or a market participant. In furtherance of these goals, FERC has proposed rules supporting their fulfillment by MMUs in independent, useful and transparent ways.

Responsiveness of ISOs and RTOs to Stakeholders and Customers

FERC proposes to require each ISO and RTO to submit a filing, within six (6) months of publication of its final rule, that describes its efforts to adopt practices and procedures to ensure that each ISO/RTO is responsive to stakeholders and customers. FERC proposes to evaluate these compliance filings by considering whether they are sufficiently inclusive, fair in balancing diverse interests, properly representative of minority positions, and indicative of ongoing efforts to be responsive. FERC further proposes that each ISO and RTO include on its website a mission statement or charter, including a commitment to being responsive to customers, other stakeholders and consumers.

Antitrust Group Successfully Obtains Injunction Against Trademark Infringement

Recently, a team of Bell Boyd Antitrust attorneys, headed by Paul F. Donahue and Jason M. Marks, successfully obtained a preliminary injunction in federal court in Arizona enjoining a former distributor's infringement of a client's federally registered trademark. This matter raised numerous intellectual property, contract and regulatory issues, including analysis of labeling laws under the Food and Drug Administration, Lanham Act issues, and the distribution of products manufactured overseas, but distributed in the United States. Messrs. Donahue and Marks obtained an order that not only prohibited use of the trademark at issue, but also required a total recall of the product, and reimbursement to consumers who purchased the mislabeled nutritional supplement.

Antitrust Group Successfully Defends Pharmaceutical and Medical Device Client

Steve Kowal, a member of the Antitrust Department and chair of the firm's White Collar Criminal Defense group, persuaded the U.S. Attorney in Chicago to decline prosecution against a major pharmaceutical and medical device company. The government had conducted a lengthy and aggressive investigation relating to a product performance failure that was linked to numerous patient deaths. Nevertheless, the government was persuaded to close the investigation without pursuing either criminal or civil enforcement proceedings.

Also, Steve Kowal addressed criminal antitrust enforcement at the ABA's National Institute on White Collar Crime held in Miami. The Deputy Assistant Attorney General in charge of criminal enforcement for the Justice Department's Antitrust Division also was a member of the panel. Steve will speak at the Practicing Law Institute's program on Corporate Internal Investigations that will be held in Chicago on June 17, 2008.

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The Antitrust and Trade Regulation Group of Bell, Boyd & Lloyd LLP offers a comprehensive range of antitrust services to clients. Our attorneys assist clients in managing the antitrust dimensions of mergers and acquisitions, joint ventures, strategic alliances, e-commerce initiatives, patent and intellectual property licensing, research collaborations, distribution and franchise relations, and retail selling and advertising practices. The Antitrust Group also regularly represents clients in antitrust litigation and government investigations, including grand jury proceedings. Current engagements by the Antitrust Group involve clients in diverse industries, including pharmaceuticals and pharmacy benefit management, financial futures, heavy equipment, consumer goods, transportation and office supplies.