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Foley's Quarterly Food Industry Web Conference Series

Presenters:  
**Richard H. Casper**, Commercial Transactions & Business Counseling  
**Bernard J. (“Bud”) Bobber**, Partner, Litigation Department  
**Eileen R. Ridley**, Partner, Litigation Department

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**Today's Presenters**



Richard Casper  
Milwaukee



Bud Bobber  
Milwaukee



Eileen Ridley  
San Francisco

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- Today's program is being recorded and will be available on our Web site
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## UNDERSTANDING THE ROBINSON-PATMAN ACT

## One of the Antitrust Laws

- Treble damages are available.
- But, as a practical matter, criminal penalties are not (compare collusive practices under Section 1, Sherman Act).
- Frequently violated.

## Enforcement

- The Federal Trade Commission, infrequently
- The U.S. Justice Department, almost never
- Private plaintiffs

## Basic Rule (Section 2(a)):

Charge the same price to all customers for the same goods.

(N.B.: You do not have to sell everything, or anything, to everyone.)

## “Same Goods”

- N.B.: Services and other intangibles are not covered.
- Goods with different trademarks (and otherwise the same) are the “same”.

## “Price”

- Is the price charged net of discounts, rebates, free goods, allowances, etc.
- Credit standards must be applied even-handedly.
- Freight terms must be the same, or accounted for in the price.

## Conditions to Applicability of the Rule

1. Two sales (*i.e.*, not a sale and an offer)
2. At least one of which is in interstate commerce (e.g., sales by a Wisconsin supplier to competing Wisconsin customers are not covered)
3. Reasonably contemporaneous
4. Possible impact on competition (*i.e.*, mere injury to a competitor is not necessarily enough)

## Types of Competitive Injury

1. Primary line = a supplier vs. its competitors
2. Secondary line = competing customers
3. Tertiary line (or beyond) = competitors of customers of a supplier's customers

## Defenses

1. Meeting competition
2. Changing market conditions
3. Equal availability
4. Cost justification

## Cost Justification Requires

1. Difference in out-of-pocket costs of the two sales
2. That is equal to or greater than the price difference
3. A study or other memorialization of the rationale, prepared before the challenge

N.B.: Annual volume discounts will not qualify.

## Meeting Competition Requires

1. Good faith belief that the supplier's customer is being offered a lower price (N.B.: Under no circumstances verify this with your competitor.)
2. Do not beat the competitive price.

## Equal Availability Requires

1. The favorable price must be offered
2. The disfavored customers must have been in a position, as a practical matter, to meet favorable price

## Dummy Brokerage/Commercial Bribery (Section 2(c))

- Adopted to prohibit circumvention of Section 2(a) by commission payments to buyer-controlled “agent”
- Also prohibits commercial bribery
- Defenses not available

## Promotional Allowances/Services (Sections 2(d) and (e))

- Relates to payments and services to customers in connection with their resale (e.g., product demonstrations, listing dealers in national ads)
- Requires proportional equality to competing resellers
- Not restricted to those who purchase directly from the supplier
- Meeting competition is a defense; cost justification is not

## Compliance

- Written policy
- Prepared/reviewed by a lawyer



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## Preventing and Managing The H1N1 Virus In The Workplace: What's An Employer To Do?

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## H1N1

- Prevention Issues
- Management Issues
- For each:
  - What must an employer do? (per law)
  - What may an employer do? (per law)
  - What may **not** an employer do? (per law)
  - What should an employer do?
    - Per Bobber (and conventional wisdom)

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## H1N1

- As an overall matter, employers should be guided in these issues not only by federal employment law, but also by
  - their own employee handbooks, policies, manuals, and contracts (including bargaining agreements), and by
  - any applicable state or local laws.

## H1N1 Prevention: Employers should

- Get and stay informed
  - <http://www.cdc.gov/h1n1flu/>
- Educate employees on best prevention practices
  - Wash hands frequently with soap and water for 20 seconds
  - Cover cough and sneezes
  - Avoid close contacts

## H1N1 Prevention

- Employers must:
  - Maintain a healthy and safe workplace (OSHA General Duty Clause)
  - Navigate obligations per state and federal laws (ADA, FMLA, state laws) and any applicable CBA
  - Remain fair and consistent in enforcing work rules and administering benefits

## H1N1 Prevention

- Employers may:
  - Implement and enforce rules of behavior mandating best practices for preventing spread of the flu
    - Ensure that any enforcement through discipline is consistent or differences are for compelling business reasons
    - Also, beware that some employees with disabilities may require accommodation to comply (such as an allergy to hand sanitizer)

## H1N1 Prevention

- Employers may:
  - Reject employee requests to suspend travel or telecommute based on fears
  - Discipline for refusal to work; but a refusal to work may be permitted in limited cases:
    - Employee reasonably believes that doing the work would put him in serious and immediate danger; Employee asked employer to fix hazard; no time to call OSHA; no other way to do the job safely

## H1N1 Prevention

- Employers may:
  - Reject employee requests to suspend travel or telecommute based on fears
  - Discipline for refusal to work
    - but a refusal to work may be permitted in limited cases under a CBA, e.g.:
    - Employee reasonably believes that doing the work would put him in serious and immediate danger; Employee asked employer to fix hazard; no time to call OSHA; no other way to do the job safely

## H1N1 Prevention

- Employer may:
  - Reject requests to supply surgical masks or respirators or permit employees to wear them
  - Require wearing surgical masks or respirators (most *should* not, though)
  - Note: respirators usage is subject to OSHA regulations

## H1N1 Prevention

- Employers may **not**:
  - Require flu shots (but *should* provide them on site at employer cost and encourage)
  - Require employees to submit to body temperature taking

## H1N1 Management

- Employers must:
  - Provide FMLA leave for employee with flu or to care for child, spouse or parent with flu if eligible
    - 50 or more employees w/in 75 miles; employed over 1 year; worked over 1250 hours in prior year; and serious health condition
  - May require use of PTO (sick days, vacation) concurrent (unless conflict with state law or CBA)

## H1N1 Management

- Employers may:
  - Require infected employee to stay away from work until recovered
    - Should counsel employee and seek agreement first; mandate as second alternative
    - May need to pay if employee is exempt from FLSA and employee worked at all that week
    - Employee may qualify for STD benefits or sick pay

## H1N1 Management

- Employers may temporarily close the facility
  - But note that some (able to work) employees probably will be eligible for unemployment benefits

## H1N1 Management

- Employer may:
  - Recommend infected employee seek medical treatment
  - Require medical release to work
  - If release is seemingly contrary to objective indications of illness, require exam by physician chosen by and paid by the employer

## H1N1 Management

- Employer may:
  - Inform local health authorities of an H1N1 diagnosis among the employees and seek guidance on employee communications

## H1N1 Management

- Employer may **not**:
  - Inquire as to employee's specific medical diagnosis
  - Notify co-workers of a particular employee's diagnosis with H1N1 (unless so advised by local health authority)
    - Generally should not notify an unnamed co-worker's diagnosis for risk of panic or overreaction,

## H1N1 Management

- Employers should:
  - Develop a crisis plan now
  - Repeatedly publish infection control procedures and support them with hand sanitizers
  - Consider how to limit close, group meetings
  - Instruct supervisors to make careful observations of employees to spot flu symptoms.

## Elements Of A Continuity Plan

- Create potential teleworking opportunities
- Create an isolation area at work
- Create back up plan for covering critical business operation
- Anticipate supply disruptions
- Set up a communication plan (employees, suppliers, customers and media) to use in case of a business shutdown



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## Food Industry Class Action Litigation Trends and Strategies

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## Food Industry Trends and Strategies

- Most Food Industry Civil Complaints Are Filed as Class Actions
- Class Action Trends Have Been the Subject of Extensive Studies Which Help to Structure Strategies
  - Hilary Hehman, *Findings of the Study of California Class Action Litigation, 2000-2006* (First Interim Report March 2009)
  - Thomas E. Willging & Shannon R. Wheatman, *An Empirical Examination of Attorneys' Choice of Forum in Class Action Cases*, Federal Judicial Center, 2005

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## Food Industry Trends and Strategies

- General Trends in Both State and Federal Class Actions
  - Filed Less Often Than Other Civil Suits
  - Usually Reflect Events Within Jurisdiction
    - Construction Defect (Los Angeles)
    - Business Torts Re Chemical Purchasers (SF – biotech industry)
  - Winning tactics lead to wide-spread use
  - Practitioners have highly developed communications systems (e.g. blogs, etc.)

## Food Industry Trends and Strategies

- General Trends in Both State and Federal Class Actions (Cont.)
  - Class action filings have been on a steady increase for the last 8-10 years
  - While the Class Action Fairness Act (CAFA) has somewhat reduced state class actions, it has not reduced the general numbers of class actions filed
    - Expanded federal diversity jurisdiction (any class member and any defendant are citizens of different states)
    - Class wide claim must have value of \$5,000,000 (as opposed to each member having claim of \$75,000)

## Food Industry Trends and Strategies

- General Trends in Both State and Federal Class Actions (Cont.)
  - Business torts (e.g., unfair competition, consumer statutes, etc.) among the most frequently filed case types
    - Food claims fall under this categories as well as general product liability claims
    - While there was some decrease in California of class actions under unfair competition claims after publicized case where AG went after abuses by attorneys – they increased thereafter (2003)

## Food Industry Trends and Strategies

- General Trends in Both State and Federal Class Actions (Cont.)
  - Disposition Trends
    - Very Few Class Actions Are Tried (Ca = 7%)
      - In California more defense verdicts than plaintiff
    - Most Class Actions are Settled (Ca = 31.9%)
    - Many Class Actions are Dismissed
      - With Prejudice (Ca = 16.8%)
      - Without Prejudice (Ca = 12.6%)
    - Relatively Few Class Actions Are Resolved by Summary Judgment (Ca = 3.9%)
    - Average time to disposition is 16 months

## Food Industry Trends and Strategies

- General Trends in Both State and Federal Class Actions (Cont.)
  - Settlements in Certified Cases often last as long as those going to trial (administration costs and post settlement activity)
  - Business tort cases have one of the highest percentages of dismissals with prejudice
  - Cases settled without certification are quicker to resolve (usually filing as class action is litigation strategy in these cases)

## Food Industry Trends and Strategies

- General Trends in Both State and Federal Class Actions (Cont.)
  - Cases which are certified last roughly twice as long as average class action case
  - Cases where certification was part of settlement have a case life that are relatively similar to average time frame for settled cases
  - Once a certification motion is granted/denied the case moves quicker to settlement/disposition

## Food Industry Trends and Strategies

- General Trends in Both State and Federal Class Actions (Cont.)
  - Trend found in cases filed under Federal Statutes and “economic torts”
    - Focus on defendant’s actions (e.g., pricing, representations) in order to avoid issues re individual injuries some claims are more “typical”
  - Major jurisdictional debates may lead to Supreme Court decisions re Rule 23 standards
    - Enforceability of class action waivers
    - Burden on Removing Defendant to Prove Amount in Controversy

## Food Industry Trends and Strategies

- General Trends in Both State and Federal Class Actions (Cont.)
  - Certification Procedures (e.g., merit inquiries, factual analysis)
  - Use of RICO
  - Damage versus equitable relief (re predominance standard)
  - Preclusion Issues
  - Removal Issues

## Food Industry Trends and Strategies

- Take A-ways
  - Likely additional class actions will be filed
  - Trend in food litigation is to base claims on business or economic torts (e.g., fraud and/or misrepresentation claims, unfair competition, consumer statutes)
  - Class actions rarely go to trial and most are filed based upon a pattern reflective of the jurisdiction or current events
  - Certification is a bell weather event (failure to certify usually means case will wither, certification usually leads to settlement)

## Food Industry Trends and Strategies

- Take A-ways (Cont.)
  - Valuable to create settlement strategy early
    - Potential certification as part of settlement may reduce life time of case
    - Likelihood of plaintiffs' counsel's interest
  - Be aware of trends in industry – especially in light of tendency of class action matters to be filed in clusters
  - Consider removal of state cases (plaintiffs' counsel is likely to have plead in an attempt to avoid federal action)

## Contact Us

**Richard Casper**

Partner

777 E. Wisconsin Ave., Ste 3500

Milwaukee, WI 53202

Tel: 414.297.5612

[rcasper@foley.com](mailto:rcasper@foley.com)

**Bud Bobber**

Partner

777 E. Wisconsin Ave., Ste 3500

Milwaukee, WI 53202

Tel: 414. 297-5803

[bbobber@foley.com](mailto:bbobber@foley.com)

**Eileen Ridley**

Partner

One Maritime Plaza Ave., Ste 600

San Francisco, CA 94111

Tel: 415.438-6469

[eridley@foley.com](mailto:eridley@foley.com)