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Does Implied Antitrust Immunity Apply to FERC-Regulated Industries?

By **Bradley C. Weber**

The role of the antitrust laws in industries regulated under federal statutory schemes can be limited if Congress intended to replace the antitrust laws with the regulatory regime. Where Congress has expressly stated that the antitrust laws do not apply, or that they do not apply under the circumstances set forth in a regulatory statute, an explicit antitrust immunity is created.[1] Conversely, "an antitrust-specific saving clause [in a federal statute] . . . bars a finding of implied immunity."[2] In limited circumstances, however, and despite the absence of an express statutory direction, courts will find an implied immunity from the antitrust laws to preserve the integrity of a federal regulatory scheme.

In *Credit Suisse Securities (USA) LLC v. Billing*,[3] the U.S. Supreme Court held that the securities laws implicitly preclude application of the antitrust laws to agreements among underwriting firms relating to initial public offerings (IPOs). Although the Court expressly limited the scope of its opinion to the particular conduct of underwriters in securities offerings, persons in other regulated industries—such as interstate gas pipeline companies under the jurisdiction of the U.S. Federal Energy Regulatory Commission (FERC or the Commission)—have relied on *Credit Suisse*'s implied antitrust immunity test in seeking the dismissal of antitrust claims on the grounds that they are inconsistent with FERC's regulatory regime.[4]

(Continued on page 4)

Recent Litigation in the Area of Carbon Emissions

By **Jason M. Halper** and **Cheryl L. Howard**

The increased focus over the past year on climate change and energy independence has been associated with greater legislative, regulatory, and judicial activity. One area that has received significant attention and that may provide insight and guidance with respect to future energy litigation issues involves regulation of carbon emissions. Judicial scrutiny has focused on the permissible legislative and regulatory authority of and interaction among the states, the Environmental Protection Agency (EPA), and the federal government, often with plaintiffs raising claims of federal preemption. Regulatory activity has involved, among other things, proposals for a cap-and-trade system for carbon emissions. This article discusses these developments and considers the potential energy-related litigation that may become prevalent in the future.

Litigation in Regulating Carbon Emissions

The authority for regulation of carbon emissions traces back to the Federal Clean Air Act (CAA),[1] which authorizes extensive stationary and mobile source emissions regulation. Title II of the CAA allows the EPA to regulate emission standards for moving sources, including motor vehicles.[2] The EPA's regulatory mandate has resulted in conflict between the EPA and state agencies concerning authority to regulate emissions and generated several noteworthy decisions.

Specifically, § 209(a) of the CAA provides, "No State or any political subdivision thereof shall adopt or attempt

(Continued on page 9)

IN THIS ISSUE

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ABA AMERICAN BAR ASSOCIATION Section of Litigation

From the Chairs . . .

The fall issue of the *Energy Litigation Journal* always signals the close of one bar year and the beginning of another. This is an arbitrary demarcation but one that brings with it changes and new opportunities for the coming bar year. Among the many changes, we welcome a new cochair for the committee, Walter Mayer. Walter previously served as editor-in-chief of the *Energy Litigation Journal*. Taking Walter's place as editor-in-chief for the coming year is Gregory Brown, who has been actively involved in the Energy Litigation Committee and on the *Journal*'s editorial board. Greg will continue to work with our editorial board to find and produce timely and relevant material for the *Journal*. If you have an interest in joining the board or in submitting an article for publication, please contact Greg at gbrown@jw.com.

We also welcome new talent for the website editorial board. This year Corey Wehmeyer joins Eric Getty to enhance our focus on producing timely, high-quality news material and articles for the committee's webpage at www.abanet.org/litigation/committees/energy. To join the board of web editors, contact Eric or Corey at egetty@balch.com and cwehmeyer@coxsmith.com. It is our goal this year that the Energy Litigation webpage become a central hub for our community where you can find something new and useful each time you visit. The committee is an excellent forum to network and learn from other attorneys engaging in energy litigation. However, we need the activity, participation, and ideas of the community. As always, we seek your input and collaboration on how to make the committee responsive and relevant to you.

Getting involved is as easy as a short email. If you have an idea for a program; know of an interesting issue; want to publish an article, book review, or case note; or want to serve as part of a subcommittee or on the editorial board for the *Energy Litigation Journal*, do not hesitate to contact Marty Truss at jmtruss@coxsmith.com or Walter Mayer at wmayer@velaw.com to talk about it. We would love to talk to you about the opportunities or answer any questions. ■

Editor's Note

This issue of the *Energy Litigation Journal* is the result of the hard work of Jason M. Halper, Cheryl L. Howard, and Bradley C. Weber. Halper and Howard address potential litigation in the area of carbon emissions legislation. Their article is especially relevant as we all try to assess whether the ongoing debate over potential climate change legislation will spawn increased litigation. Bradley Weber's article addresses antitrust immunity for industries regulated by FERC in the wake of the Supreme Court's opinion in *Credit Suisse Securities (USA) LLC v. Billing*.

The *Journal* would like to welcome Justin Marlles to the editorial board, where he will work closely with Gregory Brown and serve as assistant editor. We'd also like to thank Walter Mayer for the great job that he has done serving as editor-in-chief for the *Journal*. We wish him well and look forward to working with him as he goes on to serve as cochair of the committee.

As always, we encourage you to contact us if you or someone you know is interested in submitting an article for publication in the *Journal* or if you have a topic of interest you would like to propose. Please contact Gregory Brown at gbrown@jw.com or Justin Marlles at jmarlles@velaw.com with your submissions and article ideas. ■

When and How Do I Send Class Notice In Federal Class Actions?

By **Jocelyn D. Larkin**

The Class Actions Committee recently took the liberty of answering some common questions about class notice in federal cases. All references are from the text of Federal Rule of Civil Procedure 23 unless otherwise noted.

When must class notice be sent?

Class notice is *required* in three circumstances:

- After the certification of a Rule 23(b)(3) damages class
- When a proposed class settlement has been submitted for approval
- In connection with a request for attorney fees

Class notice *may* be sent

- After the certification of a Rule 23(b)(1) limited fund class or a Rule 23(b)(2) injunctive class
- Whenever the district court finds it necessary "to protect class members and fairly conduct the action"

Are the standards the same for class notice in all these circumstances?

No. Rule 23(b)(3) notice must be "the best notice that is practicable in the circumstances"—the gold standard for class notice. In the other situations, "appropriate notice" or "notice in a reasonable manner" is sufficient.

Do I have to send notice if I file a case as a class action but decide to settle the named plaintiffs' claims and simply dismiss the class claims without prejudice?

It depends. Rule 23(e)(1) provides that court approval and notice are only required of certified classes. So before the class is certified, you can dismiss without prejudice the class claims without sending notice. However, if the class has been certified, and the class is relying upon your case to pursue their claims, you must send them notice.

What is considered "the best notice that is practicable"?

Rule 23 requires "individual notice to all members who can be identified by reasonable effort." This means a notice by first-class mail. Posting the notice on the Internet or publishing the notice in newspapers or journals may serve as a useful supplement to the mailed notice.[1]

When is notice by publication used?

Where the identity of the class members is not known, publication notice may be necessary (or can be used to supplement other forms of notice). The problem is that publishing notices in newspapers can be enormously expensive and almost completely ineffective in reaching class members (particularly if the notice is in six-point font and full of incomprehensible legalese). This is a circumstance where notice professionals can be very useful. They can select the periodicals that will reach your target audience using the same sophisticated demographic data that advertising agencies use. They can also create visually attractive and readable notices.

What about notice by email?

Courts remain skeptical of the use of electronic mail but are more receptive where it is part of a comprehensive notice plan.[2]

What needs to be in the (b)(3) class notice?

The notice must include a description of the case, the class definition, the claims, the manner and deadline for opting out, and the binding effect of a class judgment. Note all of this must be "clearly and concisely state[d] in plain, easily understood language"—in other words, in plain English.

How do I put in all that information but also ensure that the notice is in plain English?

That is not a task that comes naturally to lawyers. Fortunately, the Federal Judicial Center has some excellent model notices (both full and publication versions) on its webpage (www.fjc.gov) that can give you a great start. If it is within your client's budget, you may want to get assistance from one of the notice firms that have expertise in this area.

What will a court consider in determining whether and how to order notice in a Rule 23(b)(1) or Rule 23(b)(2) case?

One important factor is the cost of notice, which can be very significant in a large class. In an injunctive relief class, notice costs run the risk of deterring the filing of the action altogether. Thus, Rule 23 gives the district court flexibility to order something less than individual notice by first-class mail (e.g. posting of notice) or to dispense with notice entirely.

Does the district court need to approve the substance of the notice before it is sent?

Yes. Ideally, the parties will have negotiated the language and submit the notice to the court in a mutually agreeable form. If unable to reach agreement, the parties can each provide the court with their proposed version of the notice. Don't expect the court to be pleased if you take the latter approach.

Who pays the costs of notice?

Under federal law, plaintiffs ordinarily bear the cost of class notice sent after class certification.[3] Where notice is being

(Continued on page 8)

(Continued from page 1)

The *Credit Suisse* Case

The plaintiffs in *Credit Suisse* were a class of 60 investors who filed two lawsuits against 10 of the nation's largest investment banks that had formed syndicates to underwrite the IPOs of numerous technology companies in the late 1990s. The plaintiffs alleged that the investment banks had conspired by agreeing not to sell securities except to buyers who would: (1) later purchase additional shares of the same security at escalating prices; (2) pay unusually high commissions on subsequent purchases; and/or (3) purchase other less-desirable securities from the underwriters. The plaintiff investors argued that such agreements among the underwriter defendants violated Section 1 of the Sherman Act, Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, and state antitrust laws. The defendants moved to dismiss these claims on the grounds that their conduct was fully regulated by the securities laws and that, as a result, the antitrust laws were necessarily displaced.

> The SEC enforces rules and regulations that forbid the conduct at issue, and investors harmed by the underwriters' unlawful actions can bring lawsuits and seek damages under the securities laws.

The district court granted the defendants' motion to dismiss, holding that in this context the federal securities laws impliedly repealed federal antitrust laws and preempted state antitrust laws.[5] On appeal, the Second Circuit Court of Appeals reversed, finding no specific express or implied congressional intent to immunize the challenged conduct from the antitrust laws, and holding that the securities laws were not sufficiently pervasive to limit the plaintiffs' antitrust claims.[6]

In an opinion written by Justice Breyer, the Supreme Court reversed the Second Circuit, concluding that the securities laws implicitly immunized the defendants' alleged conduct from the application of the antitrust laws.[7] The *Credit Suisse* Court articulated a test for assessing the defendants' potential immunity based on principles outlined in three prior Supreme Court decisions analyzing the relationship between securities law and antitrust law: *United States v. National Ass'n. of Securities Dealers*;[8] *Gordon v. New York Stock Exchange*;[9] and *Silver v. New York Stock Exchange*.[10] According to *Credit Suisse*, these decisions suggested that the appropriate test should focus on whether the regulations of the U.S. Securities and Exchange Commission (SEC) at issue and the alleged antitrust violations were "clearly incompatible," in which case the securities regulations would impliedly preclude the application of the antitrust laws to the defendants' alleged conduct.

Four necessary factors were included in the Court's *Credit Suisse* implied immunity test:

> (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; . . . (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct[; and] (4) . . . the possible conflict [between the securities and antitrust laws] affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate.[11]

In considering these four factors under the facts of the case, the Court quickly dispatched with all but the third factor—a possible conflict between the securities and antitrust laws. The bulk of the Court's opinion focused on whether there was a conflict between the securities laws and the antitrust claims alleged in the complaint, such that permitting the suit to proceed would "prove practically incompatible with the SEC's administration of the nation's securities laws."[12]

The plaintiffs argued that there was no incompatibility because the SEC had full regulatory authority over the practices alleged and had exercised that authority to disapprove of the alleged conduct. Thus, the plaintiffs contended that the antitrust laws should apply because the challenged conduct was inappropriate under both the securities and antitrust laws.

The Court rejected this argument. It reasoned that permitting the antitrust suit to proceed "would threaten serious harm to the efficient functioning of the securities markets."[13] The Court explained that determining what activity was or was not permitted by the SEC would frequently require drawing a "fine, complex, detailed line," and drawing that line required securities expertise. Furthermore, evidence tending to show lawful securities activity and evidence tending to show unlawful antitrust activity would likely overlap or be identical. According to the Court, there was a substantial risk of inconsistent results because antitrust plaintiffs could file suits in different courts with different levels of expertise. The Court concluded that, taken together, these considerations demonstrated that it was not possible to confine antitrust suits to challenging activity that is unlawful under the securities laws. Instead, the Court concluded, courts assessing antitrust claims are likely to make mistakes, which would result in underwriters avoiding conduct that is permitted or encouraged by the securities laws for fear of an antitrust lawsuit.

The Court also observed that in this

context the "enforcement-related need for an antitrust lawsuit is unusually small." The SEC enforces rules and regulations that forbid the conduct at issue, and investors harmed by the underwriters' unlawful actions can bring lawsuits and seek damages under the securities laws. Moreover, the SEC is required to consider competition when it adopts securities rules and regulations. Thus, antitrust actions are "somewhat less necessary" for purposes of addressing anticompetitive behavior in the securities context, and permitting a plaintiff to pursue an antitrust action risks circumventing the heightened pleading standards for securities actions by allowing them to "dress what is essentially a securities complaint in antitrust clothing."[14]

Trinko and Implied Limitations on Antitrust Laws

Credit Suisse complemented and further developed the principles set out by the Supreme Court three years earlier in *Verizon Communications, Inc. v. Law Offices of Curtis v. Trinko, LLP.*[16] There, the Court held that the antitrust-specific savings clause in the Telecommunications Act of 1996 precluded any argument that the act created implied antitrust immunity.[17]

Writing for the Court in *Trinko*, Justice Scalia analyzed a Sherman Act Section 2 claim based on the defendant's refusal to deal with a competitor in the context of the federal regulatory scheme created under the Telecommunications Act. In examining the challenged conduct, the Court said that "[o]ne factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny."[18] Applying that principle under an antitrust cost-benefit analysis, the Court

Regulatory Authority over Natural Gas and Electric Power

The natural gas industry in the United States is regulated by FERC pursuant to the Natural Gas Act,[i] which was amended by the Energy Policy Act of 2005[ii] The Commission's primary regulatory authority over this industry is related to the transmission and sale of natural gas for resale in interstate commerce; the construction, extension, and abandonment of natural gas facilities; and the establishment of rates for services.[iii] FERC also imposes operational and conduct rules on interstate gas pipelines to ensure open and nondiscriminatory access to, and use of, pipeline facilities for all natural gas shippers. Among other things, the Energy Policy Act enhanced the Commission's authority to police natural gas markets by increasing civil and criminal penalties for violations of the Natural Gas Act.[iv]

The U.S. electric power industry is regulated by both federal and state authorities. Retail sales of electricity are generally regulated by state public utility commissions, while other aspects of the industry, including wholesale sales, wholesale and interstate transmission service, and mergers, are subject to the jurisdiction of FERC pursuant to the Federal Power Act,[v] which was also amended by the Energy Policy Act. While the transmission and distribution of electricity are highly regulated under tariffs prescribing prices, FERC permits much wholesale electricity to be sold at market-based prices.

In carrying out Congress's public interest directive under both the Federal Power Act and the Natural Gas Act, FERC must take into account competitive considerations and federal antitrust policies.[vi] This responsibility was emphasized by the Energy Policy Act, which enhanced the Commission's authority to prohibit manipulation of energy markets, including natural gas markets, and directed FERC to facilitate price transparency in markets for the sale and transportation of natural gas.[vii] The Energy Policy Act also contains several provisions enhancing FERC's authority to address anticompetitive practices in the electric power industry[viii] and antitrust review of the licensing of nuclear power plants.

Endnotes

i. 15 U.S.C. §§ 717–717z.

ii. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

iii. *See, e.g.*, 15 U.S.C. § 717c (rates and charges); § 717f (construction, extension, and abandonment of facilities).

iv. The Energy Policy Act increased the prior $5,000 maximum fine to $1 million and the possible prison sentence from two years to five years.

v. 16 U.S.C. §§ 791a–828c.

vi. *See* Gulf States Utils. v. FPC, 411 U.S. 747, 758–60 (1973) (holding that the power granted to FERC's predecessor, the Federal Power Commission (FPC), to regulate the industry "clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations," and that the FPC was to serve the "important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings."); Alabama Power Co. v. FPC, 511 F.2d 383, 393 (D.C. Cir. 1974); Northern Natural Gas Co. v. FPC, 399 F.2d 953, 958 (D.C. Cir. 1968).

vii. Energy Policy Act of 2005, Pub. L. No. 109-58 §§ 315, 316, 119 Stat. 594 (2005).

viii. These provisions include: § 1231 (granting FERC authority to require comparable open access by non-jurisdictional transmission providers); § 1281 (price transparency in electric markets); § 1283 (prohibiting the use or employment of manipulative or deceptive devices or contrivances in connection with the purchase or sale of electric energy or transmission services subject to the jurisdiction of FERC); and § 1289 (increasing jurisdictional thresholds, expanding jurisdiction, and amending substantive standard for FERC review of mergers and acquisitions involving public utilities).

concluded that the existence of the telecommunications regulatory regime was a significant factor that militated against expanding traditional antitrust concepts to create a remedy in the case before the Court.[19]

Implied Antitrust Immunity for Conduct Regulated by FERC

A pertinent question in this discussion—and indeed the focus of this article—is whether and under what circumstances a court, in applying the *Credit Suisse* test, would find that implied antitrust immunity applies to the FERC-regulated conduct of companies in the natural gas and electric power industries. *Credit Suisse* affirmed that judicial determinations as to whether a regulatory scheme implicitly precludes antitrust enforcement vary "from statute to statute, depending upon the relation between the antitrust laws and the regulatory program set forth in the particular statute, and the relation of the specific conduct at issue to both sets of laws."[20] In support of its observation, the Court cited Justice Kennedy's 1981 opinion in *Phonetele, Inc. v. Am. Tel. & Tel. Co.*,[21] which was written while he was still on the Ninth Circuit Court of Appeals. Justice Kennedy, who did not participate in *Credit Suisse*, wrote in *Phonetele* that "no simplistic and mechanically universal doctrine of implied antitrust immunity" exists, and each case "is decisively shaped by considerations of the special aspects of the regulated industry involved."[22]

The initial step in predicting whether FERC-regulated conduct is immune from the antitrust laws is to determine whether the regulations enforced by FERC contain any type of antitrust saving clause, such as the one at issue in *Trinko*. The Natural Gas Act, which is the primary source of FERC's jurisdiction over the natural gas industry, does not contain a specific antitrust saving clause.[23] In contrast, the Federal Power Act, which regulates the electric power industry, does contain an antitrust-specific saving clause, which states that various provisions of the Federal Power Act "shall not be construed to modify, impair, or supersede the [federal] antitrust laws."[24] Thus, it appears that the antitrust-specific saving clause in the Federal Power Act, like the one cited in *Trinko*, would bar a finding of implied antitrust immunity for conduct that FERC regulates pursuant to the specified provisions in the Federal Power Act.

> The district court based its decision on a belief that the securities laws provide more extensive rights and procedures for private individuals to bring suits for the recovery damages than FERC's regulatory scheme.

Although the antitrust-specific saving clause in the Federal Power Act is likely to bar a finding of implied antitrust immunity for much of the conduct of electric power companies, the fact that FERC has extensive regulatory authority over this industry could still limit the scope of antitrust claims under a *Trinko* cost-benefit analysis. Moreover, precedents often cited to support the application of the antitrust laws in the electric power industry have been weakened by judicial and regulatory developments.

For example, the Supreme Court's 1973 decision in *Otter Tail Power Co. v. United States*[25] allowed the government to bring a Sherman Act Section 2 claim against the defendant, Otter Tail Power, based on its refusal to transmit and sell wholesale power or wheel bulk power from another competitor to municipalities formerly served by Otter Tail. Despite the holding in *Otter Tail*, it is now fairly well settled that any claimed antitrust damages based on the price paid for electricity or transmission service are barred by the "filed rate doctrine,"[26] and a number of antitrust cases have been dismissed on that ground in the last few years.[27] Moreover, in 1992, Congress substantially increased FERC's authority under the Federal Power Act to order regulated power companies to transmit electric power for others.[28] FERC has followed up by expanding significantly its regulatory oversight of transmission.[29] These developments are likely to significantly restrict the available antitrust relief that a court could order under the antitrust laws without running afoul of FERC's Federal Power Act authority. Thus, application of *Trinko*'s antitrust cost-benefit analysis to the *Otter Tail* facts today might well yield a different result.

The *Columbia Gas Transmission* Case

Unlike the Federal Power Act, which contains an antitrust-specific saving clause, the Natural Gas Act does not contain a similar provision. Thus, the question of whether implied antitrust immunity should be extended to certain conduct of interstate gas pipeline companies is not answered by an express congressional directive. This issue was considered earlier this year by a district court in the Southern District of West Virginia in *Energy Marketing Services, Inc. v. Columbia Gas Transmission Corp.*[30] There, a group of natural gas shippers filed suit alleging that the owners of several interstate gas pipelines (Pipeline Defendants) violated the antitrust laws by participating in an anti-competitive kickback scheme with certain preferred natural gas shippers (Shipper Defendants). The plaintiffs accused the Pipeline Defendants of allowing the Shipper Defendants to store, or park, gas in the pipelines and to borrow it for resale when prices were high and replace it when prices were low. In exchange for providing these "parking

and lending" services, the plaintiffs alleged that the Pipeline Defendants were allowed to keep a portion of the Shipper Defendants' profits.

In support of its motion for summary judgment, one of the Pipeline Defendants (TCO) submitted a stipulation and settlement agreement (Stipulation) between TCO and FERC's Office of Enforcement. According to TCO, the Stipulation confirmed that FERC had condoned and approved the "parking and lending" practice upon which the plaintiffs' entire theory of antitrust liability was premised. TCO also argued that the Stipulation highlighted the actual and potential incompatibility of continuous FERC oversight of interstate pipelines under the Natural Gas Act and ad hoc judicial oversight applying antitrust law. Thus, because FERC had approved the conduct that the plaintiffs were seeking to condemn under the antitrust laws, TCO argued that the *Credit Suisse* implied immunity test clearly applied.

The district court denied TCO's motion for summary judgment and found that *Credit Suisse* was not controlling.[31] In reaching this conclusion, the district court stated that:

> In the securities market, joint action is integral to the activity which the SEC both encourages and regulates. That joint action necessarily exposes the participants to antitrust complaints because they engage in sophisticated financial arrangements in concert. Here, the relationship between an interstate natural gas pipeline and shippers of natural gas on the pipeline conforms to a more traditional business model. Although the natural gas industry is undoubtedly complex, the roles of the pipeline and the shippers are fundamentally common—the pipeline is the seller of transportation and storage services and the shippers are the purchasers of those services. Shippers and the pipeline do not act "jointly" in the way described in *Credit Suisse*.[32]

The district court based its decision on a belief that the securities laws provide more extensive rights and procedures for private individuals to bring suits for the recovery of damages than FERC's regulatory scheme. The district court observed that in the securities market "[p]rivate individuals who suffer harm as a result of a violation of pertinent statutes and regulations may also recover damages' under the Securities Exchange Act."[33] According to the court, "[t]hese carefully crafted provisions seek to regulate the coexistence of SEC enforcement and private litigation. . . . Traditional antitrust suits might conflict with this regulation. This fact contributes to the unusual lack of a need for antitrust suits in the securities context. No similar special private actions, which might be compromised by antitrust claims, accompany FERC's regulatory scheme."[34]

In addition to these perceived distinctions between SEC and FERC laws and regulations, the district court also based its decision on a belief

> that the natural gas industry is distinguishable from the securities industry because FERC appears to wield somewhat less authority to remedy anticompetitive behavior than the SEC. . . . FERC lacks the authority to remedy anticompetitive behavior that the SEC wielded in *Credit Suisse.* In the natural gas context, there is an 'enforcement-related need for . . . antitrust lawsuit[s].'"[35]

Soon after the district court denied TCO's motion for summary judgment, the parties in *Columbia Gas Transmission* reached a settlement and voluntarily dismissed the case. Thus, the district court's application of the *Credit Suisse* test and its rationale for distinguishing the regulatory schemes enforced by the SEC and by FERC will not be reviewed on appeal.

Conclusion

Trinko's antitrust cost-benefit analysis foreshadowed the *Credit Suisse* implied antitrust immunity test; the two cases point to possible future limitations on antitrust claims in closely regulated industries, such as the natural gas and electric power industries. Despite *Credit Suisse*'s language limiting its holding to the securities industry, and despite the recent district court opinion in *Columbia Gas Transmission*, energy companies that are regulated by FERC can now rely on *Credit Suisse*'s implied antitrust immunity test and *Trinko*'s cost-benefit analysis in seeking the dismissal of antitrust claims on the grounds that they are inconsistent with FERC's regulations. ■

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Endnotes

1. *See*, *e.g.*, Capper-Volstead Act, 7 U.S.C. §§ 291–92 (expressly providing antitrust immunity for agricultural producers to combine in associations and to engage in cooperative functions); Webb-Pomerene Act, 15 U.S.C. § 62 (expressly providing antitrust immunity for export trade associations); McCarran-Ferguson Act, 15 U.S.C. §§ 1011–15 (expressly providing antitrust immunity for insurance companies if two conditions apply: (1) the challenged practice must be part of the "business of insurance"; and (2) the practice must be "regulated by State law." 15 U.S.C. § 1012(b)).

2. Verizon Commc'n. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 406 (2004) (analyzing the antitrust-specific saving clause in the Telecommunications Act of 1996, 47 U.S.C. § 152).

3. 551 U.S. 264 (2007).

4. *See*, *e.g.*, Energy Marketing Services, Inc. v. Columbia Gas Transmission Corp., No. 2:04-0869, 2009 WL 1351041 (S.D.W.V. April 21, 2009).

5. *See In re* Initial Pub. Offering Antitrust Litig., 287 F. Supp. 2d 497, 524–25 (S.D.N.Y. 2003).

6. Billing v. Credit Suisse First Boston Ltd., 426 F.3d 130, 170, 172 (2d Cir. 2005).

7. *Credit Suisse*, 551 U.S. at 285.

8. 422 U.S. 694 (1975).

9. 422 U.S. 659 (1975).

10. 373 U.S. 341 (1963).

11. *Credit Suisse*, 551 U.S. at 275–76.

12. *Id.* at 277.

13. *Id.* at 283.

14. *Id.* at 283–84.

15. *Gordon*, 422 U.S. at 682 (quoting United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350–51 (1963)).

16. 540 U.S. 398 (2004).

17. *Id.* at 406 (citing 47 U.S.C. § 152).

18. *Id.* at 412.

19. *Id.* at 412–16.

20. *Credit Suisse*, 551 U.S. at 271.

21. 664 F.2d 716 (9th Cir. 1981).

22. *Id.* at 727.

23. Although the Natural Gas Act does not contain an antitrust-specific saving clause, it should be noted that the Natural Gas Act does contain a provision that authorizes FERC to "transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings." 15 U.S.C. § 717s.

24. 16 U.S.C. 824k(e)(2) (the listed Sections that do not modify, impair, or supersede the antitrust laws relate to interconnection of power production and transmission facilities (824i), the open availability of transmission services (824j), requests for wholesale transmission services (824l), and sales by exempt wholesale generators (824m)).

25. 410 U.S. 366 (1973).

26. *See, e.g.*, Ark. La. Gas Co. v. Hall, 453 U.S. 571, 578 (1981); Ultimax.com, Inc. v. PPL Energy Plus, LLC, 378 F.3d 303 (3d Cir. 2004); *see also* Square D Co. v. Niagara Frontier Tariff Bur., 476 U.S. 409, 417 (1986).

27. *See, e.g.*, Public Util. Dist. No. 1 v. Dynegy Power Mktg., 384 F.3d 756 (9th Cir. 2004) (affirming dismissal of state antitrust conspiracy claims under both federal preemption and the filed rate doctrine), *cert. denied*, 125 S.Ct. 2957 (2005); Public Util. Dist. No. 1 v. IDACORP Inc., 379 F.3d 641, 651–52 (2004) (affirming dismissal of antitrust claims under field preemption, conflict preemption, and filed rate doctrine).

28. Energy Policy Act of 1992, 16 U.S.C. §§ 824j, k.

29. *See* New York v. FERC, 535 U.S. 1 (2002).

30. No. 2:04-0869, 2009 WL 1351041 (S.D.W.V. April 21, 2009).

31. *Id.*, at *8.

32. *Id.*, at *7.

33. *Id.*, at *8 (quoting *Credit Suisse*, 127 S. Ct. at 2393).

34. *Id.*

35. *Id.*

When and How Do I Send Class Notice in Federal Class Actions?

(Continued from page 3)

sent in connection with a proposed class settlement, the costs of notice are often covered by the defendant as part of the settlement package.

Why is class notice such a big deal?

Class notice, although governed by the federal civil rules, also has a constitutional dimension. Due process requires that unnamed class members be provided with notice of actions that will affect their rights.[4] If effective notice is not given to them, class members will not be bound by any class judgment or settlement. ■

Jocelyn D. Larkin is director of litigation and training for the Impact Fund.

Endnotes

1. Manual for Complex Litigation § 21. (4th Ed. 2004).

2. C. Hanson & K. Beyah, *A Look at Creative Notice Procedures in Rule 23(b)(3) Class Actions*, CADS Report, Winter/Spring 2008, at 20–21 (available at www.abanet.org/litigation/committees/classactions).

3. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974).

4. Phillips Petroleum v. Shutts, 472 U.S. 797, 811–812 (1985).

(Continued from page 1)

to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part."[3] Although § 209(a) preempts states from enacting their own standards for controlling emissions, § 209(b) provides that California may promulgate more stringent standards if it first obtains a waiver from the EPA.[4] Further, were the EPA to grant California a waiver, other states could adopt identical regulations.[5]

In 2004, California passed greenhouse gas (GHG) emissions legislation for new motor vehicles,[6] and in December 2005, the California Air Resources Board sought a waiver from the EPA to enact GHG regulations for certain new motor vehicles.[7] The EPA denied California's request in March 2008. Prior to the EPA's decision, however, automobile manufacturers filed suit in several federal courts, asserting that California's emissions standards were preempted by federal law.[8]

In *Green Mountain Chrysler Plymouth Dodge v. Crombie*,[9] the plaintiffs, comprised of new motor vehicle dealers, automobile manufacturers, and associations of automobile manufacturers, sought declaratory and injunctive relief in response to legislation regulating GHG emissions standards for new motor vehicles. The legislation at issue in *Green Mountain* was promulgated by Vermont and was substantively identical to the legislation passed in California. The plaintiffs alleged that the legislation was preempted by the CAA, the Energy Policy and Conservation Act of 1975 (EPCA),[10] and under a theory of "foreign policy" preemption.[11] The court, proceeding on the assumption that the EPA would issue a waiver for California's emissions regulations, denied each of the plaintiffs' claims of preemption.[12]

The court rejected the plaintiffs' argument that California's standards were preempted by the EPCA, which provides that "[w]hen an average fuel economy standard prescribed by this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards, or average fuel economy standards for, automobiles covered by an average fuel economy standard under this chapter."[13] The court reasoned that "once EPA issues a waiver for a California emissions standard, it becomes a motor vehicle standard of the government, with the same stature as a federal regulation."[14] Thus, if a conflict arose between the EPCA and California's guidelines, approved under §209(b) of the CAA, it would constitute a conflict between two federal regulatory schemes, in which case the preemption doctrine would not apply.[15] It should be noted that the CAA is aimed at controlling emissions, whereas the EPCA's objectives are to conserve energy.

> The presidential transition from the Bush to Obama administration has consequently brought sweeping policy changes that affect the future of these cases.

In discussing the preemption provision in the EPCA, the plaintiff argued that Vermont's GHG regulation was nothing more than a fuel economy standard and thus was preempted by the EPCA. The court rejected that argument, stating that Vermont's GHG regulation was not a *de facto* fuel economy standard because it encompassed more than just fuel economy, nor was it "related to" a fuel economy standard, as that term was intended by Congress. Rather, Vermont's GHG regulation also addressed standards for emissions that do not correlate with fuel economy, such as hydrocarbons or carbon monoxide.[16] Further, the plaintiffs did not demonstrate that Congress intended the federal government to exercise exclusive domain over the regulation of carbon dioxide emissions, nor did the plaintiffs demonstrate that the regulations would impede the EPCA's objectives. Finally, the court rejected the plaintiffs' arguments that the Vermont legislation was preempted by foreign policy considerations, stating that the plaintiffs failed to demonstrate that Vermont's legislation intruded upon the field of foreign affairs or conflicted with national foreign policy.[17] Accordingly, after conducting a full trial on these issues, the court entered a judgment in favor of the defendants.

The claims in *Central Valley Chrysler-Jeep, Inc. v. Goldstene*[18] closely resembled those in *Green Mountain*. In *Central Valley*, the plaintiffs were also automobile dealers and manufacturers that sought injunctive and declaratory relief in response to California's GHG emissions legislation for motor vehicles. Although the court reached a similar result as *Green Mountain* and granted summary judgment in favor of the defendants, it conducted a somewhat different analysis.[19] It began the EPCA analysis by determining that the EPA would not be precluded from promulgating emissions regulations, notwithstanding that the regulations might potentially affect average fuel economy standards.[20] According to the court, when the EPA determines that regulation of pollutants under the CAA is necessary and its regulations conflict with average mileage standards established pursuant to the EPCA, the agency designated by the EPCA is obligated to "harmonize" the average fuel efficiency standards with the EPA's regulations; the EPA is not precluded from enacting such regulations.[21] Additionally, citing *Green Mountain*,

the court stated that "nothing in statute or in case law support[s] the proposition that a regulation promulgated by California and granted waiver of preemption under section 209 is anything other than a 'law of the Government.'"[22] Thus, because the EPA would not be precluded from enacting regulations that might have a potential effect on average fuel economy standards, a California regulation granted waiver by the EPA would not be precluded by the EPCA.

In *Central Valley*, the court also considered and rejected the plaintiffs' claims of preemption. The court narrowly construed the EPCA's preemption provision, reasoning that state laws that "have the effect of requiring even substantial increases in average fuel economy performance are not preempted where the required increase in fuel economy is incidental to the state law's purpose of assuring protection of public health and welfare under the [CAA]."[23] Additionally, the court found that California's regulations would not conflict with either the EPA or EPCA's objective. Rather, the regulations would fulfill both the EPA's objective of achieving the "greatest degree of emission reduction achievable through the application of technology" and the "EPCA's objective of implementing the 'maximum feasible average fuel economy standards.'"[24] Finally, as in *Green Mountain*, the court rejected foreign policy preemption because plaintiffs failed to establish any U.S. foreign policy with which California's regulations might conflict.[25]

Although the plaintiffs in *Green Mountain* and *Central Valley* appealed to the Second and Ninth Circuits, respectively, the presidential transition from the Bush to Obama administrations has consequently brought sweeping policy changes that affect the future of these cases. On January 26, 2009, President Obama directed the EPA to reassess its previous denial of California's waiver request.[26] Subsequently, on May 19, 2009, President Obama announced a national fuel efficiency policy "aimed at both increasing fuel economy and reducing greenhouse gas pollution for all new cars and trucks sold in the United States."[27] According to a press release issued by the White House, this fuel efficiency policy was reached in collaboration with the Department of Transportation, the EPA, various automobile manufacturers, the United Auto Workers, environmental community leaders, the State of California, and other state governments. Further, the press release asserts that this national policy "is welcomed by the auto manufacturers because it provides regulatory certainty and predictability and includes flexibilities that will significantly reduce the cost of compliance. The collaboration of federal agencies also allows for clearer rules for all automakers instead of three standards (DOT, EPA, and a state standard)." Finally, on June 30, 2009, the EPA reversed its prior position and granted California's waiver request.[28] Considering these new developments, it is unclear whether the plaintiffs in *Green Mountain* and *Central Valley* will or can continue pursuing their appeals.[29] Nonetheless, as the states and federal government continue to legislate in the area of energy policy, suits asserting claims and theories like those in *Green Mountain* and *Central Valley* are likely to continue to explore the boundaries of permissible state legislation in the face of extensive federal regulation.

Cap-and-Trade Programs

As discussed above, the CAA grants the EPA authority to regulate carbon emissions from motor vehicles. Additionally, on April 17, 2009, the EPA issued a proposed finding that carbon dioxide "threaten[s] the public health and welfare of current and future generations" and CO_2 emissions "contribute to the atmospheric concentrations of the gases and contribute to the threat of climate change."[30] If this proposed finding is finalized, the EPA will have authority under the CAA to regulate CO_2 and other heat-trapping gases.[31] While the EPA's finding, if finalized, would authorize the EPA to regulate CO_2, EPA regulation is not the only means to do so. On February 24, 2009, President Obama requested that Congress propose legislation to regulate carbon emissions.[32] In accordance with that request, on March 31, 2009, Representatives Henry Waxman and Edward Markey released a draft of their proposed legislation, the American Clean Energy and Security Act of 2009.[33] The proposed legislation, which has been subject to numerous modifications, was passed by the House on June 26, 2009.[34] Under the legislation, limits would be placed on GHG emissions, and starting in 2012, a national cap-and-trade program for GHG would be implemented.[35]

> Under any type of cap-and-trade program—whether the result of EPA regulations or legislative action—a new market for carbon emissions will be created, which will undoubtedly spur new litigation issues and business concerns.

It has yet to be determined whether the EPA or Congress will be primarily responsible for regulating carbon emissions. Some critics have suggested that the EPA's finding was primarily a tactic to force Congress to enact legislation.[36] Further, they have expressed concern over the prospect of the EPA using the CAA to regulate carbon emissions.[37] Others believe that the EPA can and should promulgate regulations under the CAA, at least until Congress enacts legislation addressing carbon emissions.[38] Both President Obama and Lisa

Jackson, administrator of the EPA, have made clear that they would prefer that Congress enacts legislation to regulate CO_2 emissions.[39]

Whatever regulatory scheme ultimately is enacted, a cap-and-trade program is likely to be an important feature. Such a program may generate litigation issues similar to those that have arisen in the context of cap-and-trade programs utilized in other industries or that arise in the securities or commodities markets.

Under a typical environmental cap-and-trade program, participants are given a mandatory cap on the permissible amount of emissions. Participants who emit less than allowed under the cap may trade or sell the difference to participants whose emissions exceed the amount permitted by the cap.[40] The cap decreases over a period of years so that all participants are required to gradually reduce their emissions. Litigation spawned by a carbon cap-and-trade program could be quite varied.

For instance, in *Appalachian Power Co. v. EPA*,[41] the court considered the validity of an EPA regulation under which numerous nitrogen oxide (NOx) emitting facilities in various Midwestern and Southeastern states were required to abide by emissions limits announced by the EPA and to participate in an emissions trading program. Several petitioners challenged, among other things, the EPA's allocations of NOx emission allowances as arbitrary and capricious because the EPA used computer models to determine state emission projections.[42] The court affirmed the EPA's ability to utilize a computer-generated program to determine emissions growth projections,[43] and it upheld the EPA's authority to make emissions projections and limitations based on the computer-generated projections, but only if the EPA provided adequate responses to public comments and explains the bases for its decisions. As a result of the EPA's failure to "fully explain the bases upon which it chose to use" two different sets of growth-rate projections and its failure to "address what appear to be stark disparities between its projections and real world observations," the court remanded the case so that the EPA could "explain why results that appear arbitrary on their face are, in fact, reasonable determinations."[44]

More recently, in *North Carolina v. EPA*,[45] the court examined the validity of the EPA's Clean Air Interstate Rule (CAIR), which created a cap-and-trade program for both sulfur dioxide (SO_2) and NOx emissions. North Carolina, one of the petitioners, acknowledged that the EPA's authority to promulgate CAIR was derived from the CAA, but it asserted that this specific trading

program exceeded the EPA's statutory authority because it did not ensure that certain states would reduce their unlawful emissions, as required by the CAA. The EPA's statutory authority allowed it to promulgate regulations that would "achieve something measurable toward the goal of prohibiting sources 'within the State' from contributing to nonattainment or interfering with maintenance 'in any other state.'"[46] However, in determining the apportionment of allowances, the EPA utilized a region-wide approach, such that the apportionment decisions had no relation to each state's individual contribution to NOx emissions. The court clarified that the EPA regulations "must measure each state's 'significant contribution' to downwind nonattainment even if that measurement does not directly correlate with each state's individualized air quality impact on downwind nonattainment relative to other upwind states. Otherwise, the rule is not effectuating the statutory mandate of prohibiting emissions moving from one state to another, leaving EPA with no statutory authority for its action."[47] Consequently, the court held that the EPA was not authorized to implement this trading program.

Additionally, other petitioners in *North Carolina* contested the EPA's determination of their budget of SO_2 and NOx allowances. Regarding SO_2 budgets, the petitioners claimed that the EPA's budgets and region-wide cap were arbitrary and capricious because the EPA failed to explain how the budgets related to the CAA's statutory mandate. Further, the petitioners alleged that the EPA adjusted the NOx budgets "purely in the interests of fairness," which was not authorized by the CAA. Again, the court agreed with petitioners. It held that the determination of SO_2 budgets was arbitrary and capricious, or not otherwise in accordance with the law, because the EPA did not explain how its choice of SO_2 emissions caps related to the objectives of the CAA. Additionally, the NOx budget determinations were arbitrary and capricious because the "fairness" factors that the EPA utilized to determine the budgets improperly "shifted the burden of emission reductions solely in pursuit of equity among upwind states."[48]

If Congress enacts cap-and-trade legislation, it will not necessarily face the same types of regulatory restrictions that constrain the EPA.[49] However, under any type of cap-and-trade program—whether the result of EPA regulations or legislative action—a new market for carbon emissions will be created, which will undoubtedly spur new litigation issues and business concerns.

> The projected increased volume in a market for carbon allowances may lead to litigation issues similar to those commonly arising in stock and commodities markets.

First, a national cap-and-trade program may create a new trading exchange whereby carbon emissions trading may "become a global commodity market, just like crude oil."[50] Currently, there are at least two cap-and-trade markets operating in the United States. The Chicago Climate Exchange (CCX) operates a cap-and-trade program for greenhouse gases, and participants enter into a voluntary—but legally binding—commitment to reduce their annual GHG emissions.[51] Participants whose emissions exceed the targets comply with their commitment by purchasing CCX Carbon Financial Instrument contracts. Similarly, the New York Mercantile Exchange launched the Regional Greenhouse Gas Initiative (RGGI), which is "a cooperative effort of 10 northeastern states to reduce CO2 emissions."[52] However, unlike the CCX, which is comprised of companies, organizations, municipalities, and states that voluntarily agreed to reduce their carbon emissions,[53] the RGGI was the first "mandatory cap-and-trade program in the United States to reduce greenhouse gas emissions."[54] Under the RGGI, "each state limits emissions of CO_2 from electric power plants, creates CO_2 allowances, and establishes participation in CO_2 allowance auctions." This mandatory cap-and-trade system, announced in March 2008, has already led to at least one lawsuit asserting that New York's agencies lacked the authority to create the cap-and-trade system in the absence of legislation.[55]

Second, the projected increased volume in a market for carbon allowances may lead to litigation issues similar to those commonly arising in stock and commodities markets.[56] Although the U.S. carbon trading market currently is relatively small,[57] for quite some time, financial institutions have been preparing for new opportunities in carbon trading. With legislation on the horizon, it is increasingly likely that a significantly larger carbon trading market will develop.[58] A 2008 estimate predicted that federal cap-and-trade legislation could result in a U.S. carbon market valued at $1 trillion or more by 2020.[59] As the market for carbon emissions increases, it is likely that the number of lawsuits relating to the carbon market will also increase.

The details of a future cap-and-trade program for carbon emissions are far from certain. However, it is becoming more likely that businesses will need to adjust to the litigation and business issues that will inevitably result from a cap-and-trade program.

Conclusion

Recent legislative, regulatory, and judicial activities in the area of carbon emissions are representative of developments likely to occur and issues likely to arise

in other areas of the energy industry. The resulting impact on industry participants may well be significant. Where applicable, practitioners should advise clients to stay abreast of fast-moving regulatory and legislative changes, implement sound contracting practices so as to expressly spell out and secure contractual rights in private transactions, and be sensitive to the potential for litigation given the uncertainty confronting the energy industry at this time. ■

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Endnotes

1. 42 U.S.C. §§ 7401–7671(q).
2. 42 U.S.C. § 7521.
3. 42 U.S.C. § 7543(a).
4. 42 U.S.C. § 7543(b). The EPA Administrator is required to grant the waiver unless it finds "(A) the determination of the State is arbitrary and capricious, (B) such State does not need such State standards to meet compelling and extraordinary conditions, or (C) such State standards and accompanying enforcement procedures are not consistent with section 7521 (a) of this title." *Id.*
5. 42 U.S.C. § 7507. Because California was the only state to regulate emissions prior to March 30, 1996, it was the only state authorized under the statute to apply for a waiver. *See* Central Valley Chrysler-Jeep v. Goldstene, 529 F. Supp. 2d 1151, 1156 (E.D. Cal. Mar. 26, 2008).
6. Clean Car Standards, www.arb.ca.gov/cc/ccms/ccms.htm (last visited Aug. 2, 2009).
7. California Greenhouse Gas Waiver Request, www.epa.gov/oms/climate/ca-waiver.htm (last visited Aug 2, 2009).
8. The two principal cases are discussed in this article. Similar actions were brought in two other federal courts. *See* Lincoln-Dodge, Inc. v. Sullivan, 588 F. Supp. 2d 224 (D.R.I. 2008); *see also* Zangara Dodge, Inc. v. Curry, Case No. CIV 07-1305 ACT/LFG, Amended Complaint filed on May 21, 2008 (D.N.M.).
9. 508 F. Supp. 2d 295 (D. Vt. 2007).
10. 40 U.S.C. §§ 32901–32919.
11. *Green Mountain*, 508 F. Supp. 2d. at 301.
12. The court noted the undisputed fact that "if California fail[ed] to receive a waiver from EPA for its standards, then Vermont's GHG standards [were] invalid." *Id.* at 344.
13. 49 U.S.C. § 32919(a). The National Highway Traffic Safety Administration (NHTSA), an agency of the Department of Transportation, has authority to promulgate standards under the EPCA. *Green Mountain*, 508 F. Supp. 2d at 306.
14. *Green Mountain*, 508 F. Supp. 2d at 347.
15. *Id.* at 350. "The Supremacy Clause is not implicated when federal laws conflict or appear to conflict with one another. In such a case courts have a duty to give effect to both provisions, if possible." *Id.* at 343–44.
16. *Id.* at 352. Subsequently, the Supreme Court rejected a similar argument that the EPA "cannot regulate carbon dioxide emissions from motor vehicles because doing so would require it to tighten mileage standards, a job (according to EPA) that Congress has assigned to" the Department of Transportation under the EPCA. Mass. v. EPA, 549 U.S. 497, 531–32 (2007).
17. *Id.* at 397. In fact, the court noted, "[f]ar from representing an intrusion into the 'field' of foreign affairs entrusted exclusively to the national government, Vermont's regulation stands out as exemplifying a cooperative federal state approach to the global issues of climate change." *Id.* at 395.
18. 529 F. Supp. 2d 1151 (E.D. Ca. Mar. 26, 2008).
19. The court did not disagree with the "*Green Mountain* court's conclusion that California regulations that are granted waiver of preemption under section 209 of the Clean Air Act become laws of the federal government not subject to preemption." *Id.* at 1189. However, it offered an "alternative analysis that avoids the issue of 'federalization' in the hope of adding a measure of clarity to the discussion." *Id.*
20. *Id.* at 1167. In reaching this conclusion, the court referenced the Supreme Court's decision in Mass. v. EPA, 549 U.S. 497 (2007), in which (as noted above) the Court rejected EPA's argument that "it cannot regulate carbon dioxide emissions from motor vehicles because doing so would require it to tighten mileage standards, a job . . . that Congress has assigned to [the Department of Transportation]." *Id.* at 531–32.
21. *Central Valley*, 529 F. Supp. 2d at 1170.
22. *Id.* at 1173.
23. *Id.* at 1176.
24. *Id.* at 1179.
25. *Id.* at 1188.
26. Memorandum for the Administrator of the Environmental Protection Agency, *available at* www.whitehouse.gov/the_press_office/Presidential_Memorandum_EPA_Waiver/ (last visited Aug. 2, 2009).
27. President Obama Announced National Fuel Efficiency Policy, www.whitehouse.gov/the_press_office/President-Obama-Announces-National-Fuel-Efficiency-Policy/ (last visited Aug. 2, 2009). The new standards apply to car model years 2012–2016, and they will require an average fuel economy standard of 35.5 miles per gallon in 2016. *Id.*
28. California Greenhouse Gas Waiver Request, www.epa.gov/oms/climate/ca-waiver.htm (last visited Aug 2, 2009).
29. As of the publication of this article, neither the Second nor the Ninth Circuit has reached a final decision on the pending cases. Rather, on June 5, 2009, after having heard oral argument in March, the Second Circuit granted the parties' joint motion to hold the case in abeyance, with a status report due in October. *See* Green Mountain Chrysler-Plymouth Dodge v. Crombie (2d Cir., 07-4342). Likewise, in early June 2009, the Ninth Circuit granted the parties' joint motion to stay the lawsuit against California until October 2009. *See* Central Valley Chrysler-Jeep, et. al. v. Goldstene, et. al. (9th Cir., 08-17378).
30. Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases under the Clean Air Act, *available at* http://epa.gov/climatechange/endangerment.html (last visited Aug. 2, 2009).
31. Ian Talley, *EPA Chief Says CO_2 Finding May Not "Mean Regulation,"* Wall St. J., May 13, 2009, *available at* http://online.wsj.com/article/SB124214922088511421.html# (last visited Aug. 3, 2009); *see also* Mass. v. EPA, 549 U.S. 497, 500 (2007) (finding that the "EPA can avoid promulgating regulations

only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.")

32. Remarks of President Barack Obama—Address to Joint Session of Congress, www.whitehouse.gov/the_press_office/remarks-of-president-barack-obama-address-to-joint-session-of-congress/ (last visited Aug. 2, 2009).

33. E. Gail Suchman & Allesandro Sacerdoti, *Overview of Cap-and-Trade Provisions in Proposed Legislation*, New York Law Journal, May 4, 2009, *available at* www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202430378818 (last visited Aug. 2, 2009).

34. *See* John M. Broder, *House Passes Bill to Address Threat of Climate Change*, NY Times, *available at* www.nytimes.com/2009/06/27/us/politics/27climate.html?_r=1&pagewanted=print (last visited Aug. 3, 2009).

35. Suchman & Sacerdoti, *supra* note 33. For a summary of the American Clean Energy and Security Act, *see* July 2009 The American Clean Energy and Security Act (H.R. 2454) Committee on Energy and Commerce, *available at* http://energycommerce.house.gov/Press_111/20090616/dc_economyjobs.pdf.

36. *See* Teddy Davis & Ferdous Al-Faruque, *Obama Ally: EPA Finding Will Boost Cap & Trade*, ABC News, April 15, 2009, *available at* http://blogs.abcnews.com/thenote/2009/04/boxer-epa-findi.html (last visited Aug. 2, 2009) (quoting Phil Kerpen, the director of policy at Americans for Prosperity, as stating "Hold the gun to the head of the US economy and say: 'Hey, we are going to blow it up with this EPA regulation if you don't give us this legislative program.'"); *see also* Bryan Walsh, *EPA's CO_2 Finding: Putting a Gun to Congress's Head*, Time, April 18, 2009, *available at* www.time.com/time/health/article/0,8599,1892368,00.html (last visited Aug. 3, 2009) ("So the possibility that in the face of congressional inaction the EPA might take matters into its own hands and directly regulate greenhouse gases can be seen as a not so subtle threat. Either act on your own, or let an EPA bureaucrat do it for you.")

37. *See* untitled inter-agency memo, at http://abcnews.go.com/images/Politics/EPA.pdf (last visited Aug. 2, 2009) ("Making the decision to regulate CO_2 under the CAA for the first time is likely to have serious economic consequences for regulated entities throughout the U.S. economy, including small businesses and small communities."); *see also* Cap and Trade's Economic Impact, www.cfr.org/publication/18738/cap_and_trades_economic_impact.html?breadcrumb=%2Fbios%2F13408%2Ftoni_johnson (last visited Aug. 2, 2009); *see also* John Broder, *EPA Expected to Regulate Carbon Dioxide*, NY Times, Feb. 18, 2009 at www.nytimes.com/2009/02/19/science/earth/19epa.html (last visited Aug. 2, 2009) ("Even some who favor an aggressive approach to climate change said they were wary of the agency's asserting exclusive authority over carbon emissions.").

38. Dina Cappiello, *EPA Urged to Act on Climate, Not Wait for Congress*, ABC News, May 18, 2009, at http://abcnews.go.com/Politics/wireStory?id=7611604 (last visited Aug. 2, 2009) (quoting Navis Bermudez, speaking on behalf of New York Governor David A. Paterson, as stating, "While we also hope that Congress enacts comprehensive federal climate change legislation, we believe EPA can act now under the existing Clean Air Act without waiting for such legislation"); *see also EPA Finds Greenhouse Gas Emissions Endanger Health*, 29 Andrews Lit. Rptr. 5, May 15, 2009; *but see* Inimai M. Chettiar & Jason A. Schwartz, *The Road Ahead: EPA's Options and Obligations For Regulating Greenhouse Gases*, April 2009, *available at* www.policyintegrity.org/publications/documents/TheRoadAhead.pdf (last visited Aug. 3, 2009) ("If EPA adopts mandatory control regulation and Congress later enacts a cap-and-trade system, there will be significant and unnecessary transition costs for the American economy.")

39. *See* Davis & Al-Faruque, *supra* note 36 ("[T]he president would prefer not to tackle this issue through his administration's regulatory power."); *see also* Cappiello, *supra* note 38 ("President Barack Obama has made it clear that he prefers new legislation to cope with the problem."); *see also* Walsh, *supra* note 36 ("As momentous as the EPA's decision was . . . no one actually wants the EPA to regulate greenhouse gases. Not even [Lisa] Jackson or Obama, both of whom have repeatedly stated that they would much prefer Congress to set limits on greenhouse gas emissions directly, most likely through a cap-and-trade program.").

40. *See* Broder, *supra* note 34 (discussing mechanics of the proposed cap-and-trade system under the American Clean Energy and Security Act of 2009).

41. 249 F.3d 1032 (D.C. Cir. 2001).

42. *Id.* at 1051.

43. The emissions projections were used to "allocate NOx emission allowances to individual sources." *Id.*

44. *Id.* at 1054–55. For example, in two states, the actual utilization in 1998 had already exceeded the EPA's projected levels for 2007. *Id.* at 1053.

45. 531 F.3d 896 (D.C. Cir. 2008).

46. *Id.* at 907. The terms "nonattainment" and "maintenance" are used in reference to a state's ability to satisfy the national ambient air quality standards promulgated by the EPA. *Id.* at 901.

47. *Id.* at 908 (citation omitted).

48. *Id.* at 921.

49. Although a legislative cap-and-trade program generally will not face the same types of litigation issues as EPA regulations, a cap-and-trade program implemented by either authority may raise preemption issues with regard to state laws that regulate carbon emissions. *See* Clean Air Markets Group v. Pataki, 338 F. 3d 82 (2d Cir. 2003) (affirming district court holding that New York legislation restricting transfer of SO_2 allowances was preempted by the cap-and-trade system established by the CAA); *see also* Michael Kerstetter, *Nation's First Active Climate Change Program Continues With Regional Greenhouse Gas Initiative*, 20 Andrews Lit. Rptr 8, May 2009 (considering proposed federal climate change legislation and stating, "The effect [that federal legislation] would have on existing state and regional programs . . . remains to be seen.").

50. Carolyn Cui, *Trading May Yet Bloom*, WSJ, May 22, 2009, at http://online.wsj.com/article/SB124286487469441473.html (last visited Aug. 2, 2009).

51. Chicago Climate Exchange, www.chicagoclimateexchange.com/content

.jsf?id= 821 (last visited Aug. 2, 2009).

52. NYMEX to Launch Regional Greenhouse Gas Initiative (RGGI) CO_2 Allowance Futures, Options Contracts as Part of its Green Exchange Venture, Reuters, July 28, 2008 *available at* www.reuters.com/article/pressRelease/idUS101351+28-Jul-2008+PRN20080728 (last visited Aug. 2, 2009). The 10 participating states are Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. Participating States, www.rggi.org/states (last visited Aug. 2, 2009).

53. Participants include Ford Motor Company, DuPont, Allegheny Energy Inc., Bank of America Corporation, Illinois and New Mexico, and IBM, among others. Members of CCX, www.chicagoclimatex.com/content.jsf?id=64 (last visited Aug. 2, 2009).

54. Participating States, *supra* note 52.

55. Kate Galbraith, *Lawsuit Filed in Northeast Carbon Trading Scheme*, NY Times, Jan. 29, 2009, at http://greeninc.blogs.nytimes.com/2009/01/29/lawsuit-filed-against-northeast-carbon-trading-scheme/?scp=1&sq=lawsuit%20filed%20in%20northeast%20trading%20scheme&st=cse (last visited Aug. 2, 2009) (In this suit, filed on January 29, 2009, Indeck Energy alleges that New York is the only state in the RGGI that created its program without legislative approval.). *See Indeck Energy Sues State Questioning Legality of Regional Greenhouse Gas Program*, Jan. 29, 2009, www.indeckenergy.com/pdfnews/RGGI%20Lawsuit%20012909%20.pdf (last visited Aug. 2, 2009). Additionally, the plaintiff is challenging the ability of each of the participating states to partake in the cap-and-trade program in the absence of Congressional legislation. *Id.* Indeck claims that participation in the program will cost it millions of dollars, because while many power plants can pass the carbon costs on to customers, Indeck is contractually bound by a long-term fixed-price contract. *See Lawsuit Filed Over Regional Greenhouse Gas Initiative*, Jan. 31, 2009, www.boston.com/lifestyle/green/greenblog/2009/01/lawsuit_filed_over_regional_gr_1.html (last visited Aug. 2, 2009).

56. *See* Neil Baker, *Green to Gold: Carbon Trading in Europe*, Compliance Week, April 29, 2008, at www.complianceweek.com (last visited Aug. 2, 2009). For example, the European Trading Scheme (ETS), a mandatory "cap-and-trade scheme whereby emissions are limited and can then be traded," which was enacted by the European Union, has experienced regulatory issues similar to those arising in stock and commodities markets. *See* BBC News, Q&A: The Carbon Trade, at http://news.bbc.co.uk/2/hi/business/4919848.stm (last visited Aug. 2, 2009). "The European Commission has also struggled to manage the ways that member states publish information about emission levels, which is now market-sensitive data. The price of carbon fluctuated wildly in May 2006, when some states released emissions data earlier than expected." *See also* David Fahrenthold, *House Panel Passes Limit on Greenhouse-Gas Emissions*, Wash. Post, May 22, 2009, *available at* www.washingtonpost.com/wp-dyn/content/article/2009/05/21/AR2009052104251_pf.html (last visited Aug. 2, 2009) ("Over the next decades, power plants, oil-refineries and manufacturers would be required to obtain allowances for the pollution they emit. Those who need more or less could turn to a Wall-Street-like market in the allowances.").

57. *See* Cui, *supra* note 50. Conversely, carbon trading is already a multi-billion dollar industry in the European Union. *Id.*

58. *Id.* (noting that Morgan Stanley and Barclays are "among banks that continued to trade in U.S. regional markets as well as Europe anticipating that the market would balloon with U.S. legislation capping carbon emissions."); *see also* Martha C. White, *The Coming Carbon Bubble*, CNBC, July 13, 2009, *available at* www.cnbc.com/id/31891734 (last visited Aug. 17, 2009) ("Currently, there's a small amount of carbon and other emissions trading in the United States, mostly due to regional regulations or voluntary initiatives, but this market is set to explode once federal emissions regulation comes into play.").

59. Carbon Trading Exchanges—New Players in the U.S. and International Markets, http://blog.riskmetrics.com/2008/03/carbon_trading_exchanges_new_p.html (last visited Aug. 2, 2009); *see also* White, *supra* note 58 (noting that Bart Chilton, commissioner of the Commodities Futures Trading Commission, predicted that carbon trading "could grow to become a $2 trillion futures market within five years").

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