

NON-SOLICITATION AGREEMENTS BETWEEN HIGH-TECH COMPANIES ALLEGED TO BE *PER SE* UNLAWFUL UNDER SECTION 1 OF THE SHERMAN ACT

By Todd R. Seelman¹

SUMMARY

On September 24, 2010, the Antitrust Division of the U.S. Department of Justice ("DOJ") filed a civil lawsuit in U.S. District Court for the District of Columbia² against six large high-tech companies alleging that they had entered into separate, bilateral non-solicitation agreements that violated Section 1 of the Sherman Act.³ The companies, all principally based in California, were: Adobe Systems, Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc., and Pixar.⁴ Contemporaneous with its filing, the DOJ separately announced a settlement of its claims with each of the six companies.⁵ This case raises the potential overlap between state and federal laws as applied to restrictive covenants.

BACKGROUND

According to the Complaint, sometime between 2005 and 2007, each company (through direct and explicit communications) entered into five separate - but substantially similar - bilateral, non-solicitation agreements whereby the companies involved in each agreement agreed not to "cold call" the other's current high-tech employees to fill current job vacancies.⁶ These agreements were not ancillary to any legitimate collaboration between the companies nor were they limited by geography, job function, product group or time.⁷ Further, the Complaint alleged

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² *U.S. v. Adobe Systems, Inc. et al.*, Case No. 1:10-cv-01629-CKK, U.S. District Court, District of Columbia, Hon. Colleen Kollar-Kotelly. Along with the Complaint, the DOJ also filed a Competitive Impact Statement and an Explanation of Consent Decree (that dovetailed with the separately announced settlement).

³ 15 U.S.C. §1.

⁴ Compl. at ¶¶6-11.

⁵ The DOJ separately published an announcement of its settlement with each of the six companies. http://www.justice.gov/atr/public/press_releases/2010/262648.htm.

⁶ The five agreements at issue were: the Apple-Google Agreement; the Apple-Adobe Agreement, the Apple-Pixar Agreement, the Google-Intel Agreement; and the Google-Intuit Agreement. Compl. at ¶¶15-32.

⁷ *Id.* at ¶¶16, 18, 22, 25, 28, 31.

that during the term of the agreements, high-level executives at each company actively policed the agreements to ensure compliance - all without the knowledge or consent of the employees who were the subject of the agreements. The Complaint also emphasized the horizontal nature of the relationship between each company ("direct competitors for employees, including specialized computer engineers and scientists").⁸ Finally, the Complaint alleged that the agreements restrained the price and supply of available high-tech labor in the U.S. market (the agreements "reduced [each company's] ability to compete for employees and disrupted the normal price-setting mechanisms that apply in the labor setting"), and as such, the agreements constituted *per se* violations of Section 1 of the Sherman Act.⁹

IMPLICATIONS

This case illustrates the potential overlap between state and federal law applied to restrictive covenants. Historically, the enforceability of restrictive covenants, including non-solicitation agreements, has been analyzed under state law.¹⁰ However, the federal antitrust laws may apply when the restraint at issue substantially affects the free flow of interstate commerce. Further, the restraint may also trigger the applicability of *per se* treatment under Section 1 of the Sherman Act if the parties to the restraint are horizontally related and the focus of the restraint relates directly to the supply and/or price of the effected commerce.¹¹

In drafting or litigating restrictive covenants, consideration should be given to (a) the vertical/horizontal relationship of the contracting parties, (b) the breadth of the impact on the effected commerce, and (c) the extent to which the restraint relates to the price and supply of the effected commerce.

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⁸ *Id.* at ¶34.

⁹ *Id.* at ¶2, 34.

¹⁰ Generally, the parties to a restrictive covenant are vertically related and the focus of the restraint is on the future conduct of the covenantor. To the extent that state law permits the use of restrictive covenants, considerations generally look to the extent to which the restriction is (a) tied to the protection of the covenantee's legitimate interests and (b) narrowly tailored as to time, geography and scope to effectuate that protection.

¹¹ The *Adobe* Complaint alleged: (a) the interstate commerce involved was the U.S. high-tech labor market; (b) the parties to the restrictive covenants were direct competitors of one another (for the employment of high-tech labor), and (c) the restraint directly related to the price and supply of that labor.