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CLIENT BULLETIN

Client Bulletin #422

SUPREME COURT SAYS TWO IS TOO FEW

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EDITOR'S NOTE: *In 2009, Constangy attorneys Cliff Nelson and Chuck Roberts successfully* ***argued*** *in the U.S. Court of Appeals for the District of Columbia Circuit that decisions issued by a two-member National Labor Relations Board were invalid. Five other Courts of Appeal have sided with the NLRB. Meanwhile, the first case to address the issue made its way to the Supreme Court. In a decision issued yesterday, the Supreme Court agreed, 5-4, with the position taken by the D.C. Circuit. Congratulations, Cliff and Chuck!*

In a stunning blow to the National Labor Relations Board, the Supreme Court, in a 5-4 decision, invalidated more than 500 decisions issued by the Board during a 27-month period in which the Board was operating with only two members. The decision, issued yesterday, is ***New Process Steel, L.P. v. NLRB***.

The Board is an administrative agency established by the National Labor Relations Act and is composed of five members, appointed by the President, with the advice and consent of the Senate. The Board traditionally is comprised of two Democrats, two Republicans, and a fifth member who belongs to the same party as the sitting President. The Act provides that the "Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise" and that "three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group" of three or more members to which the Board has delegated its powers.

On December 16, 2007, the term of Board Chairman Robert J. Battista expired, leaving four members of the Board. On December 20, to be effective December 28, 2007, the Board, acting through its remaining four members (Wilma B. Liebman, Peter C. Schaumber, Peter N. Kirsanow, and Dennis P. Walsh) temporarily delegated all of its powers to the three-member group consisting of Members Liebman, Schaumber, and Kirsanow. This delegation was made in anticipation of the imminent departure of Members Walsh and Kirsanow, whose recess appointments were set to expire at year end, and was for the purpose of allowing Members Liebman and Schaumber to issue decisions as a quorum of the three-member group after Member Kirsanow departed. Because of political differences between President Bush and the Senate, the Board presciently expected that it would have only two members for an extended period of time.

June 18, 2010

From January 1, 2008 through March 27, 2010—when President Obama made two recess appointments to the Board—Members Liebman and Schaumber issued more than 500 decisions as a quorum of the three-member group that had included Member Kirsanow. This resulted in a series of test cases in the various circuit courts of appeal. On May 1, 2009, decisions were issued by two different courts of appeal with opposite results. In a case handled by our firm, ***Laurel Baye Healthcare of Lake Lanier v. NLRB***, the U.S. Court of Appeals for the District of Columbia adopted our position that the Act did not permit the Board to issue decisions with only two members. The U.S. Court of Appeals for the Seventh Circuit in Chicago, however, concluded otherwise in ***New Process Steel*** and upheld the authority of the two-member Board. Four other courts of appeal eventually issued decisions agreeing with the Seventh Circuit (albeit for varying reasons) that the Board could issue decisions with only two members. Both the employer in *New Process Steel* and the Board in *Laurel Baye* asked the Supreme Court to resolve the dispute.

The Supreme Court, in an opinion written by its most liberal member, retiring Justice John Paul Stevens, rejected the Board's position that as long as three members were on the Board at the time of the delegation, the Board could continue to operate even when it had only two members: "The Rube Goldberg-style delegation mechanism employed by the Board in 2007—delegating to a group of three, allowing a term to expire, and then continuing with a two-member quorum of a phantom delegee group—is surely a bizarre way for the Board to achieve authority to decide cases with only two members." Finding no evidence that Congress intended such an unusual result, the Court concluded that the Act, as currently written, "does not authorize the Board to create a tail that would not only wag the dog, but would continue to wag after the dog died."

The import of this decision is to place in question every decision issued by the Board during the 27-month period when it had only two members. Although it is quite likely that a substantial majority of these decisions have already been complied with and thus may no longer be in issue, there inevitably will be many cases that will have to be revisited. In election cases, where the Board certified a union as the exclusive bargaining representative, the union's status may be in jeopardy, at least for the time being. The decision, however, may have greater significance from a global perspective. It clearly tells Congress that there is a limit to the political games that can be played with the nomination and confirmation processes. And it precludes future situations in which the Board is dominated by a particular minority group. Power in the hands of a few is subject to great abuse. Businesses can be reassured that in the future, cases before the NLRB will be given the full consideration they deserve.