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# Antitrust Counseling and Compliance in the Wake of Sarbanes-Oxley and Arthur Andersen

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The recent corporate scandals involving financial reporting have had an impact on compliance programs, including antitrust compliance programs and client counseling. While the propriety of the prosecution and the conviction of Arthur Andersen can be debated, lawyers cannot ignore that the Justice Department based its obstruction of justice charges in large part on the acts of counsel that arguably were intended to deal with internal compliance issues. Moreover, in reaction to this case and several similar matters (Enron, Worldcom, Imclone), Congress enacted new laws that are designed to toughen laws on obstruction of justice, witness tampering, securities fraud, and disclosure issues. These laws, known as the Sarbanes-Oxley Act of 2002, Public Law 107-204, have received substantial attention in the press insofar as they impact corporate financial reporting and controls, but they have a potential impact on antitrust compliance issues as well. In light of the Arthur Andersen obstruction charges and Sarbanes-Oxley, it may be appropriate for companies to take a moment to reassess certain aspects of their antitrust compliance efforts.

### Document Retention Issues

Arthur Andersen's in-house lawyer got wind of a criminal investigation into the accounting practices of one of its accounting clients, Enron. Before Arthur Andersen itself received a subpoena, the in-house lawyer sent a memorandum to the Andersen audit team for Enron which reminded them that Andersen had a document retention policy and it would be “helpful” if the team complied with it. That prompted the prosecutors to indict Andersen for obstruction of justice based on the memorandum—but not based on the Andersen document retention policy itself. The government contended that, by the reminder memorandum, the in-house attorney had "corruptly persuaded" the audit team to destroy documents so that they would not be available for use in the criminal investigation of Enron in violation of 18 U.S.C. § 1512(b). Andersen was convicted of obstruction although posttrial juror interviews make it uncertain whether the reminder memorandum regarding the document retention policy was necessarily the basis for the conviction.

In reaction to the Arthur Andersen prosecution, Congress included several provisions in the Sarbanes-Oxley Act to deal with document destruction. These new provisions, 18 U.S.C. § 1512(c) and 18 U.S.C. § 1519, increase the penalties for obstruction of justice by means of document destruction, make it clear that the proceeding being obstructed need not be on-going but only contemplated, and fill a gap in prior law

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so that obstruction applies not only to someone who recommends document destruction but now also applies to those who perform the actual destruction of documents themselves.

Document retention policies are a vital part of most antitrust compliance policies. There is little reason to believe that a document retention policy standing alone presents significant risk of criminal liability for obstruction. But as the Arthur Andersen prosecution demonstrates, clients need to be careful about how they are used. Memoranda that remind employees of the document retention policy should be sent to all employees, not just a selected few. Moreover, because, as happened in the Andersen prosecution, the timing of such a reminder can be used to prove that the author is urging destruction of documents, any reminders ought to be sent on a regular basis—every quarter or every year—so that the company can argue that its reminder is intended to secure compliance with the document retention policy, not to deprive a government investigation of relevant documents. Finally, whenever there is reason to believe that there is an imminent or actual investigation or lawsuit for which the company may have relevant documents, company counsel should consider instructing employees to refrain from destroying those documents, commonly referenced as a "hold order," and all future reminders about document retention policies should indicate that employees are not to destroy any documents for which there is an outstanding hold order.

The new Sarbanes-Oxley provisions may also have an interesting effect on document retention issues relating to Hart-Scott-Rodino premerger notification. New Section 1519 imposes obstruction liability for alterations or destruction of documents with intent that they be unavailable for use in an actual or contemplated agency proceeding or investigation. Where merger transactions are likely to receive a second request, it may be possible to argue that an agency investigation is contemplated. Absent further clarification from the agencies, caution suggests that when (a) it becomes likely that the transaction will go forward (e.g., when the parties are close to a purchase agreement) and (b) counsel has determined that the transaction is likely to be investigated through a second request, counsel should consider instructing anyone with knowledge about the acquisition not to destroy or alter documents relevant to the acquisition or the affected business if the purpose of the destruction or alteration is to prevent the agencies from seeing the document.

### Decisions to Terminate Employees for Violating Compliance Policies

Any responsible antitrust compliance policy routinely provides that employees who violate the policy will be subject to disciplinary action or termination. Antitrust compliance policies typically provide that it is a violation of the policy to engage in any conduct that is a per se violation of Section 1 of the Sherman Act, such as price-fixing with competitors. Moreover, under many such compliance policies, an employee will violate the policy if he or she has reason to believe that a company employee may be committing a per se violation of the antitrust laws and fails to report that belief to the company compliance officer. Consequently, if a company employee engages in price-fixing, the company arguably has at least two reasons to terminate the employee: engaging in price-fixing and failing to report evidence of the price-fixing to the company compliance officer.

A new provision enacted by the Sarbanes-Oxley Act complicates the enforcement of antitrust compliance policies. Specifically, 18 U.S.C. § 1513(e) makes it unlawful to interfere with a person's employment in "retaliation" for that person's cooperation with law enforcement personnel. Prior law made it illegal to retaliate or threaten to retaliate by acts that would cause bodily harm, death, or injury to property against a person who cooperated with law enforcement personnel. This new retaliation provision is of no concern in situations where a company learns that an employee has violated its antitrust compliance policy and there is no reason to believe the offending employee has been cooperating with law enforcement personnel. But with increasing frequency, companies are first learning that employees have violated their antitrust compliance policies because the employee is cooperating with the Antitrust Division.

The Antitrust Division uses its Individual Leniency Policy as an inducement to get employees to report criminal antitrust violations: the employee can get immunity from prosecution if certain conditions are met. One of those conditions is that the employee cooperate with the Antitrust Division in investigating the violation. (The Individual Leniency Policy can be found at: http://www.usdoj.gov/atr/public/guidelines/lenind.htm.) As a result, it is not a rare occurrence that a company will learn that its antitrust compliance policy has been violated by an employee who is cooperating with the Antitrust Division.

The new retaliation provision creates a Hobson's choice for a company who learns one of its employees has violated the company antitrust compliance policy and is cooperating with the Antitrust Division. On the one hand, if it is to enforce its antitrust compliance policy, it must discipline or terminate the employee. On the other, if it does so, it runs the risk of prosecution under the new retaliation provisions of Section 1513(e). In the long run, we can hope that the Antitrust Division will provide some meaningful guidance for resolving this predicament. In the short run, clients need to keep the new retaliation law in mind. If there is any discretion in the punishment for violations of the antitrust compliance policy—either in terms of whether there will be any punishment at all or the degree of punishment—companies should consider whether that discretion should be eliminated. Otherwise, there is risk that prosecutors will argue the exercise of discretion was an act of retaliation that violated the new retaliation provision. Moreover, care must be taken to prevent anyone who has a potential motive to retaliate against the offending employee from participating in the decision to discipline or terminate the offending employee. Heads of business units whose budget may be impacted by the investigation or any ensuing prosecution, employees who may be the subject of the investigation, and lawyers assigned to handle the investigation or ensuing prosecution could have such a motive to retaliate.

## Internal Reporting of Antitrust Violations

The Sarbanes-Oxley Act may also affect antitrust compliance programs in another way. Section 307 directs the Securities and Exchange Commission to develop minimum standards of conduct for attorneys practicing before the SEC which will require attorneys to report to the company chief legal officer or chief executive officer "evidence of a material violation of securities law or breach of fiduciary duty or similar violation" by the company or its employees. It is not clear from Section 307 whether an antitrust violation would amount to a "similar violation." The SEC's rule proposal dodges the issue by simply parroting the statute but invites public comment on what the term "similar violation" should include.

If the new SEC rules create a reporting obligation that extends to antitrust violations, companies will need to review the reporting obligations of their antitrust compliance programs to be sure that they do not inadvertently cause attorneys to violate the new SEC rules. If, for example, the compliance program requires reporting to a chief compliance officer who is neither the chief executive officer nor the chief legal officer, the program may need to be amended to require reporting to the CEO or the CLO in addition to the chief compliance officer, at least where the reporting is done by attorneys. Moreover, if the chief compliance officer is an attorney, the new SEC rules may require that the compliance program be revised to require the compliance officer to report to the CLO or the CEO. The SEC's public comment on the new rules also suggests that the rules will create not only a duty to report to the CLO or CEO but also an obligation by the person receiving the report to respond to what is reported.

Once the final SEC rules issue, it may be appropriate to consider amending an existing antitrust compliance program to be sure that it conforms to any reporting and response duties imposed by the new SEC rules; otherwise, company attorneys might assume that performance of the reporting and response obligations under a compliance program is sufficient compliance with the new SEC rules.

Failure by an attorney to observe the new SEC rules will result in the loss of that attorney's right to appear before the SEC. For many in-house counsel, this may impair their ability to function

properly. But the consequences could be even more far reaching. If, for example, the company fails to disclose a violation that should have been reported by an attorney in accordance with the SEC rules, the attorney, not just the company, could be liable for violating the securities laws. In light of this, when the new SEC rules issue, it may be wise to insure that the reporting obligations of an antitrust compliance program conform to the reporting obligations of the new rules.

While Sarbanes-Oxley impacts antitrust compliance programs in several concrete ways, its greatest significance may lie in the implicit message Congress sent to prosecutors from its enactment. Prosecutors were directed to become more aggressive in prosecuting corporate wrongdoing. Given this directive and the public attitude toward corporations after the scandals of the past year, a responsible company should undertake to assess whether its antitrust compliance program is comprehensive, up to date, and effective. No company wants to be an antitrust defendant in the current environment and, although it would be naïve to think that a company's antitrust compliance policy will prevent antitrust claims or charges being brought against the company, an effective policy does help to reduce the risks.

## The Diminishing Effect of Illinois Brick on State Antitrust Enforcement

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The Supreme Court decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) held that only direct purchasers could seek damages under federal antitrust statutes. The Court's ruling was driven primarily by policy concerns: the inherent difficulties in tracing illegal overcharges down through the chain of distribution and the resulting strain on judicial resources; the risks of overlapping recoveries and multiple liability faced by defendants; and the strong incentives for direct purchasers to bring actions with the prospect of full recovery.

With the *Illinois Brick* decision cutting off damage recovery by indirect purchasers under federal law, some state legislatures reacted by enacting "*Illinois Brick* repealers." Because most (if not all) state antitrust laws require that courts interpret the laws in a manner consistent with federal antitrust laws, including federal court decisions, *Illinois Brick* resulted in precluding indirect purchasers from recovering damages under state antitrust laws. Thus, legislative action to amend state antitrust statutes was necessary to provide a damage remedy for indirect purchasers. *Illinois Brick* repealers were upheld in *California v. ARC America*, 490 U.S. 93 (1989) which held that such statutes were not preempted by federal law.

While most *Illinois Brick* repealers were enacted in the years immediately following the Court's decision, some legislative activity continues today. Some recent examples are Idaho's repealer effective July 2000 and Vermont's repealer effective February 2000.

The most significant erosion of *Illinois Brick*, however, is occurring in states where the legislatures have not acted to provide a remedy for indirect purchasers. In those states that have not passed *Illinois Brick* repealers, courts have typically continued to follow *Illinois Brick*'s prohibition on indirect purchaser recovery, maintaining that federal interpretations of antitrust law still apply to state laws. It is in these non-*Illinois Brick* repealer states where plaintiffs have turned to novel attempts at bypassing the bar to indirect purchaser recovery—the so-called end run around *Illinois Brick*.

In some cases, plaintiffs brought claims under state consumer protection or deceptive and unfair trade practices acts, even though the

complained of behavior amounted to allegations of classic antitrust violations. They argued, however, that because the claims were not being brought under state antitrust statutes, the *Illinois Brick* bar on indirect purchaser recovery did not apply. Courts have gone both ways in deciding these cases. Some have held that claims under these other statutes could not be brought because they were really antitrust claims which would otherwise be precluded by the indirect purchaser rule. Other courts, however, have reasoned that the prohibition on indirect purchaser recovery applied only to claims specifically brought under the antitrust statute and have allowed claims under a different statute to proceed, despite the fact that these statutes were never intended to redress antitrust violations and often apply to behavior that is not common in antitrust cases (such as, "fraud" or "misrepresentation"). A good summary of representative decisions on this issue is found in a recent case decided by the Vermont Supreme Court, *Elkins v. Microsoft Corp*., 2002-2 Trade Cas. (CCH) ¶ 73,864 (Vt. 2002).

A 1999 federal court decision recognizing an FTC "disgorgement" remedy further diminished the restrictions on indirect purchaser recovery. In *FTC v. Mylan Labs., Inc*., 99 F. Supp. 2d 1 (D.D.C. 1999), the court recognized the FTC's authority to obtain disgorgement under Section 13(b) of the FTC Act on behalf of indirect purchaser consumers. A number of state attorneys general had joined in the action brought by the FTC. The court further held that states having "Little FTC Acts," which require courts to follow interpretations of federal law, could also seek restitution on behalf of indirect purchasers, even if the legislatures in those states had not enacted *Illinois Brick* repealers.

A final trend is the use of common law "equitable" remedies. These include unjust enrichment claims in which plaintiffs seek disgorgement of alleged ill-gotten gains from the defendant or restitution for monetary harm allegedly suffered by plaintiffs. These claims not only avoid the prohibition on indirect purchaser recovery in nonrepealer states but they also hold some attraction for class action lawyers who traditionally have faced obstacles in getting indirect purchaser classes certified because of the difficulty in tracing alleged overcharges through a multilevel chain of distribution. At least one court has dismissed unjust enrichment claims on behalf of indirect purchasers on the grounds that such a claim was an impermissible end run around state antitrust statutes (*In re Terazosin Hydrochloride Antitrust Litigation*, 160 F.Supp.2d 1365, 1380 (S.D.Fla. 2001)), but we expect that this theory will continue to be tested in other courts.

The use of end run theories, such as consumer protection statutes and equitable theories, improperly disregard the role of legislatures to define and circumscribe the universe of appropriate antitrust plaintiffs. Nevertheless, short of federal legislation to address the indirect purchaser issue, all indications are that the trend of expanding the scope of indirect purchaser recovery will continue in the courts, even though many state legislatures have declined to amend their antitrust statutes.

# Bush Enforcement Agencies Set New Course

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The transition from the Clinton administration to the Bush administration was largely no transition at all. When Bush appointees assumed control of the antitrust enforcement agencies, the message they sent was that business would proceed as before. Over the last two years, it has been difficult to sense any change in the direction of antitrust enforcement. The situation changed markedly, however, in December 2002 with the filing by the Antitrust Division and the Federal Trade Commission of an amicus brief that urged the Supreme Court to grant certiorari in *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, L.L.P*., Case No. 02-682. The amicus brief demonstrates that the agencies under the Bush administration are seeking to narrow existing law regarding monopolization and attempts to monopolize under Section 2 of the Sherman Act.

The issue presented by the certiorari petition in *Trinko* is simply stated: courts of appeals have split on whether an alleged violation of the Telecommunications Act of 1996 by an incumbent local exchange carrier's (ILEC's) failure to lease network elements and provide interconnection services to new entrants (competitive local exchange carriers or CLECs) is a wrongful act of exclusion for purposes of Section 2. Trinko, a consumer of local phone service, brought a Section 2 claim alleging that Verizon's failure to abide by the 1996 Act had wrongfully excluded CLECs and that, but for such exclusion, Trinko would have paid lower prices. The second circuit had held the alleged constitutional violation of the 1996 Act amounted to wrongful exclusion which illegal monopolization under either an essential facilities theory or a monopoly leveraging theory.

Although on a superficial analysis, the issue for the Court was whether violations of the 1996 Act amounted to exclusionary conduct. The amicus brief addressed not only this issue, but the second circuit's essential facilities and monopoly leveraging theories as well. As to the exclusionary conduct issue, the enforcement agencies contend that it is irrelevant whether violations of the 1996 Act have occurred. Although the 1996 Act may create a duty on behalf of monopoly ILECs to deal with competitors, an ILEC's violation of this duty does not amount to exclusionary conduct for purposes of Section 2; only a refusal to deal when there is a duty to deal under the antitrust laws suffices.

The agencies next argued that there was no antitrust duty to deal under the facts of the case. The second circuit had implied an antitrust duty from the essential facilities doctrine. This was error according to the agencies: the Court has never endorsed the essential facilities doctrine and should not do so. Rather, the Court should hold that a monopolist has an antitrust duty to deal only when a refusal to deal "represents a sacrifice of profit or goodwill that makes sense only because [the refusal] has the effect of injuring competition." The monopoly leveraging theory of the second circuit is also seriously flawed, according to the amicus brief. While the second circuit endorsed use of monopoly power in one market to gain a "competitive advantage," in another, the agencies stated that monopoly leveraging is illegal only when use of monopoly power in one market creates at least a dangerous probability of monopoly power being achieved in the other market. Moreover, the leveraging conduct must be conduct that is "exclusionary." Conduct is not exclusionary unless it has the effect of excluding and that conduct is economically rational *only* because of its exclusionary tendency. Consequently, the agencies urged the Court to grant certiorari in order to reverse the decision below.

It remains to be seen whether the Supreme Court accepts certiorari and adopts the agencies' position. But the amicus brief indicates a new

attitude on the part of the federal agencies that enforce the antitrust laws. Unless the Supreme Court expressly rejects the arguments of the amicus brief, those agencies can be expected to refrain from pursuing any essential facilities case, to bring monopoly leveraging cases only when the conduct dangerously threatens to create a monopoly in the target (nonleveraged) market and to challenge conduct by monopolists only when the conduct is economically rational because of its tendency to exclude competition.

The amicus brief is available at http://www.usdoj.gov/atr/cases/f200500/200558.htm.

# Washington Update

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Following is an executive summary of recent developments within the federal antitrust enforcement agencies:

**Best Practices for Merger Investigations—** On December 11, 2002, the FTC announced a series of best practice guidelines for merger investigations. The guidelines are intended (1) to expedite the process of gathering useful and focused information and (2) to reduce burdens on the parties that have received second requests. Among the changes are witnesses in investigational interviews will be given access to transcripts for review; documents no longer must be sorted to respond to individual specifications (rather, they can now be produced as they were kept in the ordinary course of business, as was the practice at DOJ); the FTC will not treat the inadvertent production of privileged materials as a waiver of the attorney-client privilege or work product protection; the second sweep requirements may be eliminated or limited depending on the circumstances in a given case; and electronic production guidelines are clearly spelled out. For more information see http://www.ftc.gov/os/2002/12/bcguidelines021211.htm.

**Muris on Economics—**In a recent speech, FTC Chairman Timothy J. Muris spoke about improving the economic foundations of competition policy. In remarks before George Mason University Law Review's Winter Antitrust Symposium on January 15, 2003, Chairman Muris spoke of "the importance of regularly reassessing the economic assumptions of current policy, of distilling economic insights into workable rules and analytical techniques, and of doing empirical research to test the economic effects of judicial decisions and public enforcement activities." For more information see http://www.ftc.gov/speeches/muris/improveconfoundatio.htm.

**New Deputy Assistant Attorney General for Economic Analysis—**David S. Sibley, formerly a professor of economics at the University of Texas at Austin, has been appointed Deputy Assistant Attorney General for Economic Analysis at DOJ's Antitrust Division. Dr. Sibley spoke last spring at the FTC/DOJ Intellectual Property Hearings on the panel discussing antitrust analysis of specific intellectual property licensing practices. He holds a B.A. in Economics from Stanford University and a Ph.D. from Yale University. For more information see http://www.usdoj.gov/atr/public/press_releases/2003/200668.htm.

**New FTC Chief Administrative Law Judge—** James P. Timony retired as the chief administrative law judge at the FTC at the end of January. In his place, FTC Chairman Timothy J. Muris has designated Stephen J. McGuire to serve as the next FTC chief administrative law judge. Mr. McGuire is currently an administrative law judge at the Environmental Protection Agency.

**Stiffer Sentences—**In a February 6, 2003, speech on the DOJ international antitrust program, Acting Assistant Attorney General R. Hewitt Pate noted that executives who obstruct justice to avoid a three-year Sherman Act penalty are taking a significant risk that they will be subject to a much lengthier jail sentence

under the new Sarbanes-Oxley Act. Sarbanes-Oxley provides that individuals can now receive twenty years in prison under some obstruction statutes and DOJ has indicated its willingness to use obstruction more frequently to prosecute antitrust violators. For more information see http://www.usdoj.gov/atr/public/speeches/200736.htm.

**Health Care Hearings—**DOJ and the FTC are holding three days of hearings regarding "Health Care and Competition Law and Policy" on February 26-28, 2003. The hearings will review how competition works, or should work, to reduce costs and increase quality in health care markets; will provide perspectives on the health care marketplace and competition law and policy; and will detail market conditions in two health care markets (Boston and Little Rock, Arkansas) to provide a frame of reference for the balance of the hearings. For more information on the hearings see http://www.usdoj.gov/atr/public/press_releases/2003/200740.htm or http://www.ftc.gov/opa/2003/01/ftcdojhearings.htm.

**First Use of Clinical Integration Test—**The FTC recently issued an opinion letter to MedSouth, Inc., a physician-independent practice association located in Denver, Colorado, regarding a proposal to partially integrate the practices of its members and to collectively negotiate for their services with payers. FTC staff advised that it would not recommend an antitrust challenge, but that it would monitor future developments. This is the first opinion that applies the so-called clinical integration test under the joint DOJ/FTC Statements of Antitrust Enforcement Policy in Health Care. For more information see http://www.ftc.gov/bc/adops/medsouth.htm.

**Merger Gun Jumping Does Not Pay—**Gemstar-TV Guide International Group Inc. reached a settlement with DOJ on February 6, 2003, that includes a record $5.6 million fine for allegations concerning premerger activities. This is the largest civil penalty to date for a case of "gun-jumping." DOJ alleged that Gemstar and TV Guide fixed prices, divvied up customers, and violated waiting periods before they merged in July 2000. The settlement gives customers who signed contracts before the merger a chance to rescind them. For more information see http://www.usdoj.gov/atr/public/press_releases/2003/200740.htm.

**Antitrust and Intellectual Property—**Speaking on antitrust and intellectual property, Acting Assistant Attorney General R. Hewitt Pate acknowledged that the results of the DOJ/FTC Intellectual Property Hearings identified many issues that should be resolved by the intellectual property community as opposed to being handled by antitrust enforcement. He proposed that the intellectual property and antitrust communities continue to work together to improve the intellectual property system. For more information see http://www.usdoj.gov/atr/public/speeches/200701.htm.

**Charging Corporations—**On January 20, 2003, DOJ released an internal memorandum on the Principles of Federal Prosecution of Business Organizations. While not specifically geared toward antitrust violations, the memorandum provides principles to guide prosecutors as they make the decision whether to seek charges against a business organization. For more information see http://www.usdoj.gov/dag/cftf/business_organizations.pdf.

# Class-Action Developments

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Class actions play a major role in antitrust litigation and settlements. Following are some of the significant legal developments in class-action litigation during the past year.

**U.S. Supreme Court opinion holds that nonnamed class members may appeal a class-action settlement in federal court.**
See *Devlin v. Scardelletti*, 122 S. Ct. 2005, 2002 WL 1270617 (2002). The petitioner in *Devlin* was a nonnamed class member who sought to appeal the approval of a class settlement. The petitioner had not successfully intervened in the district court action but made objections to the settlement at the fairness hearing. The fourth circuit held that petitioner lacked standing to appeal the approval and fairness of the class settlement because he was not a named class representative and his motion to intervene was denied by the district court. *Id*. at 2008. That ruling was reversed by the Supreme Court on June 10, 2002. In an opinion written by Justice O'Connor, the Court held that petitioner, a member of the class who has an interest in the settlement and objected to the settlement at the fairness hearing, is considered a party for the limited purpose of appealing the approval of the class settlement. *Id*. at 2009-11. The Court's ruling was based on the principle that nonnamed class members are bound by a class settlement. The opinion explained that "appealing the approval of the settlement is petitioner's only means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate." *Id*. at 2011. The Court's ruling resolved a previous disagreement among the circuits on this issue.

**U.S. Supreme Court rules that All Writs Act cannot be used to remove lawsuits from state to federal court over which a federal court has no original subject matter jurisdiction.**
See *Syngenta Crop Protection, Inc. v. Henson*, 123 S. Ct. 366, 2002 WL 31453983 (2002). The respondent in *Syngenta Crop Protection* originally filed suit in state court. Subsequently, respondent intervened in a class action in federal court and participated in the settlement of that class action. The settlement contained a stipulation that respondent's state action be dismissed with prejudice. Nevertheless, the state court allowed respondent's action to proceed. Petitioners removed respondent's state court action, asserting federal jurisdiction under the All Writs Act and the supplemental jurisdiction statute. Respondent's action was subsequently dismissed by the federal district court as barred by the class settlement. *Id*. at 368-69. The eleventh circuit vacated the district court's order, reasoning that the All Writs Act does not permit removal of the state court action to federal court. *Id*. at 369. The Supreme Court affirmed the Eleventh Circuit's ruling on November 5, 2002. Prior to the Supreme Court's decision, the second, sixth, and eighth circuits had ruled that the All Writs Act authorizes a federal court to remove a state court action to prevent the frustration of the federal court's orders, while the tenth circuit concluded that the All Writs Act does not provide removal jurisdiction. *Id*. Chief Justice Rehnquist wrote in a unanimous decision that "[t]he right of removal is entirely a creature of statute and 'a suit commenced in a state court must remain there until cause is shown for its transfer under some act of Congress.'" *Id*. (citation omitted). In affirming the eleventh circuit's decision, the Supreme Court held: "[28 U.S.C. § 1441] requires that a federal court have original jurisdiction over an action in order for it to be removed from state court. The All Writs Act, alone or in combination with the existence of ancillary jurisdiction in a federal court, is not a substitute for that requirement." *Id*. at 371.

**U.S. District Court for the District of Columbia permits defendants in antitrust case to conduct settlement discussions with individual members of a putative class action.**
See *Keystone Tobacco Co., Inc. v. United States Tobacco Co*., Nos. CIV.A.00-1415 PLF, CIV.A.00-1454 PLF—F. Supp. 2d—2002 WL 31740410 (D.D.C. Dec. 6, 2002). In *Keystone Tobacco Co*., direct purchasers filed an antitrust class action against moist, nonchewing tobacco

manufacturers, alleging that defendants illegally stifled competition. *Id*. at *1. After the court heard argument on plaintiffs' motion for class certification, but before it ruled on the motion, defendants contacted individual putative class members in an effort to individually settle with them. Defendants eventually provided putative class members with a copy of the amended complaint. *Id*. at *1-2. Plaintiffs filed an emergency motion to preclude settlement discussions with individual putative class members, which was denied by the district court. In evaluating the appropriateness of defendants' communications with putative class members and the settlement offer, the court analyzed whether the communications were misleading but did not evaluate the consideration offered. *Id*. at *4. The court found that the written communications were not misleading after concluding that putative class members received adequate information to assess the offer of settlement, the settlement agreement explained the effects of settling, and the copy of the complaint given to putative class members provided sufficient information about the merits of the claims as well as other methods of pursuing the claims. *Id*. at *4-5. While the correspondence and materials sent to putative class members "contain some self-serving advocacy for defendants' position," the district court could not "find that the statements therein are inaccurate or misleading." *Id*. at *5. However, despite defendants' efforts to avoid providing inaccurate or misleading information, the court found that some improper communications took place between defendants' sales force and putative class members. *Id*. at *6-7. Ultimately, the court held that the improper communications were not coercive and did not justify precluding defendants' settlement discussions with putative direct purchaser class members. *Id*. at *8. The court set forth narrow limitations on defendants' conduct to ensure that defendants' representatives did not mislead putative class members or act in a coercive manner. *Id*.

## Antitrust Practice Group

The antitrust practice group of Shook, Hardy & Bacon L.L.P., with lawyers in Kansas City, Washington D.C., Houston, and Overland Park, specializes in all aspects of antitrust litigation and counseling under U.S. law. If you wish to discuss any of the articles with us or find out more about our antitrust practice, please call us.

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