Counsel's Advisory

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2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

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CALIFORNIA RULING BOLSTERS SUITS AGAINST CLASS ACTION COUNSEL

by
David Price

The concept of antitrust actions based on collusive behavior among plaintiffs' class action attorneys has long had academic support. A recent California court decision has lent it some indirect judicial support, as well.

In a 1996 article in the *Virginia Law Review* and elsewhere, law professors Susan Koniak of Boston University and George Cohen of the University of Virginia have argued that class action lawyers can be held liable where they collude by supporting one another's bids to become class counsel (co-counsel) rather than competing, or by conspiring with one another on fees. The main doctrinal obstacle to such suits is the "estoppel" argument that the fairness of the settlement (including the fees) cannot be relitigated once the settlement has been judicially approved.

Currently pending in California state court is a lawsuit which brings a collateral attack on the conduct of plaintiffs' class action attorneys. The suit alleges malpractice in the conduct of a class action that led to a judgment for $90 million in unpaid overtime wages. The suit alleges that the plaintiffs' attorneys inadequately represented the class because they brought claims only under the California labor code, failing to bring claims for a higher recovery available under the state's unfair competition law. On October 13, 3004, the California Supreme Court declined to review an appeals court decision allowing the malpractice action to go forward. *Janik v. Rudy, Exelrod, & Zieff*, 119 Cal. App. 4th 930, 14 Cal. Rptr. 3d 751 (Cal. App. 1st Dist. 2004), *review den.*, 2004 Cal. LEXIS 9689 (Cal. Oct. 13, 2004).

Although not entirely on point with an antitrust action, the decision is pertinent in that it rejected the view that the adequacy of the attorneys' representation must be raised within the original class action proceedings. The appeals court found that "collateral attack must be permitted when the class action court had no opportunity to, and in fact did not, consider the alleged inadequacy in the class representatives' protection of the rights of absent class members." 119 Cal. App. 4th at 944. The test, the appeals court said, is whether "the issue was not and reasonably should not have been raised in the class action proceedings." *Id.* at 946. In the context of collateral attacks brought on antitrust grounds, it is manifestly reasonable not to require claims based on collusion in fee-setting to be brought within the underlying action, considering that evidence of collusion may not emerge until later.

Where circumstantial evidence suggests collusion – *e.g.*, a sudden reconciliation among contenders for lead counsel status in a class action – investigative action by the Antitrust Division of the Justice Department, the Federal Trade Commission, or state authorities, is appropriate.

David Price is Senior Vice President for Legal Affairs of the Washington Legal Foundation.

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