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SHUTTS MEETS THE BABY SHERMANS: CONSIDERATIONS AFFECTING CHOICE OF FEDERAL OR STATE COURT FOR THE PROSECUTION OF ANTITRUST CLASS ACTIONS

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I. FEDERAL VS. STATE ANTITRUST LAW

A. The History and Scope of State Antitrust Law

Federal courts have exclusive jurisdiction over federal antitrust causes of action.[1] Thus, a plaintiffs' attorney who decides to bring a cause of action under either the Sherman Act or the Clayton Act is required to initiate the cause of action in the appropriate federal district court. Federal law, however, does not provide the sole means through which the effects of anticompetitive conduct may be redressed. Almost every state, Puerto Rico, the Virgin Islands, and the District of Columbia have adopted antitrust statutes of general applicability. Only Vermont and Pennsylvania have failed to enact such statutes.[2]

The Supreme Court has determined that state antitrust statutes provide an important mechanism for plaintiffs. Their purpose is to supplement enforcement of the federal laws.[3] State antitrust laws are not preempted even when a state statute or regulation is inconsistent with federal law.[4] As a result, state antitrust laws provide plaintiffs' attorneys with a powerful alternative to the Sherman and Clayton Acts when there is a desire to either stay in state court or a desire to stay out of federal court.[5]

The origin of state antitrust enforcement was in corporation law. However, by the late 1800s, the use of this means to control the "trust problem" had largely failed.[6] As a result, states passed antitrust statutes of general applicability. Today a majority of states interpret their statutes consistently with federal law. Many states, either by statute or by judicial decision, have provided that federal law shall serve as precedent. Other states have merely provided that federal law shall provide guidance in state antitrust law decisions.[7]

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1 *See Marrese v. American Acad. of Orthopaedic Surgeons*, 470 U.S. 373 (1985).

2 *See* ABA *Antitrust Law Section, State Antitrust Practice and Statutes*, 21 (Michael L. Denger & Ky P. Ewing, eds., 1st ed. 1990), *hereinafter* "*ABA State Antitrust Practice*." A revised edition of this collection was published in 1999. *See also* 6 Trade Reg. Rep. ¶ 30,000 which provides a comprehensive listing of the relevant state antitrust laws; 6-7 Julian O. von Kalinowski, *et al*., *Antitrust Laws and Trade Regulation*, which provides concise summaries of the laws of the respective states. Technically, Arkansas, in addition to Pennsylvania and Vermont, does not have an antitrust statute of general applicability. Rather, Arkansas's antitrust law consists of a collection of sections of the Arkansas Code. *See* Ark. Stat. Ann. section 4-75-301, *et seq*. (1999).

3 For a discussion of Congress's intent on the desired relationship between federal and state antitrust laws see Herbert Hovenkamp, *State Antitrust in the Federal Scheme,* 58 Ind L.J. 375, 375-76 (1983).

4 *See California v. ARC Amer. Corp*., 490 U.S. 93 (1989). In *ARC Amer. Corp.*, the Supreme Court specifically held that state indirect-purchaser statutes were not preempted by federal antitrust law. "[N]othing in *Illinois Brick* suggests that it would be contrary to congressional purposes for state to allow indirect purchasers to recover under their own antitrust laws." *Id*. at 103.

5 Although state antitrust laws are not preempted by federal antitrust laws, it is doubtful that duplicative recoveries could be obtained by the same plaintiff under both state and antitrust statutes. *See ABA State Antitrust Practice*, *supra*, n. 2 at 37-41.

6 *See* ABA Antitrust Section, Monograph No. 21, *State Merger Enforcement* 8 (1995).

7 *See* XIV Herbert Hovenkamp, *Antitrust Law* ¶ 2410 at 302-05 (Aspen 1999).

Although state antitrust statutes are largely interpreted consistently with federal law, many state statutes apply to conduct that is not reached by federal law or are interpreted more broadly.[8] These differences may provide plaintiffs' attorneys with an incentive to seek redress under the state antitrust statutes in state court or through supplemental jurisdiction in the federal courts. The purpose of this article is to discuss a sampling of significant differences between state and federal laws and then explore the constitutional and practical issues of bringing a nationwide class action under state antitrust laws.

B. Examples of More Expansive State Laws

1. *Illinois Brick* Repealers

One important and notable difference between federal and state antitrust laws is the right of indirect purchasers to sue under a number of state antitrust laws. In 1977, the Supreme Court determined in *Illinois Brick v. Illinois* that indirect purchasers ordinarily lacked standing to bring claims for violations of federal antitrust laws.[9] The Supreme Court's decision in *Illinois Brick* followed the Court's determination in *Hanover Shoe* which prohibited the defensive use of a pass-though damages theory.[10] In response to *Illinois Brick*, several states passed statutes known as *Illinois Brick* Repealers specifically giving indirect purchasers the right to sue for violations of state antitrust laws while other states adopted such a right by judicial decision.[11] These statutes have been frequently utilized by indirect purchasers who would otherwise be denied a right of recovery under the federal law. Indirect purchaser actions have been brought in such areas of commerce as pharmaceuticals, compact discs, thermal fax paper, citric acid, and infant formula, and potentially will be brought in the recent vitamin price-fixing litigation.

2. McCarran-Ferguson Exemptions

Under federal law, the McCarran-Ferguson Act provides federal antitrust immunity for the "business of insurance." The McCarran-Ferguson Act reflects a Congressional determination to reserve to the states the power to regulate the business of insurance.[12] Under the McCarran-Ferguson Act and well-settled precedent, a party cannot prosecute a federal antitrust claim where the alleged conduct: (1) comprises part of the "business of insurance"; (2) is subject to state regulation; and (3) does not constitute "an act or agreement of boycott, coercion, or intimidation."[13] But nothing in the McCarran-Ferguson Act requires that states provide the same immunity under their respective antitrust statutes. While several states have specifically provided antitrust immunity for the regulated business of insurance by statute or by

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8 For a thorough comparison and contrast of federal and state antitrust laws broken down by proscribed conduct and permissible defenses see ABA Antitrust Section, Monograph No. 15, *Antitrust Federalism: The Role of State Law* (1988).

9 *See Illinois Brick v. Illinois*, 431 U.S. 720 (1977); indirect purchasers were specifically denied standing to sue for damages. Indirect purchasers may still bring federal antitrust causes of action which seek injunctive relief pursuant to 15 U.S.C. section 26.

10 *See Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). In this case, the Supreme Court rejected the defense that a direct purchaser was not injured by anticompetitive conduct because it passed on any overcharge to ultimate consumers. *See id.* at 494. For a general discussion of the rationale of *Illinois Brick* see Gregory J. Werden & Marius Schwartz, *Illinois Brick and the Deterrence of Antitrust Violations*, 35 Hastings L.J. 629, 631-35 (1984).

11 Those states passing *Illinois Brick* Repealer statutes include California, District of Columbia, Kansas, Maine, Minnesota, Michigan, New Mexico, North Dakota, and South Dakota. Those states enacting more limited versions of Repealer statutes include Illinois, Hawaii, Maryland and Rhode Island. Mississippi and Alabama had statutes specifically authorizing actions by both direct and indirect purchasers prior to the *Illinois Brick* decision. Finally, a few states have interpreted their statutes to permit suits by indirect purchasers even though specific *Illinois Brick* Repealer statutes have not been enacted. *See* William H. Page, *supra*, at 2. Those states include North Carolina, *see Hyde v. Abbott Labs.*, 473 S.E. 2d 680 (N.C. Ct. App.), *rev. denied*, 478 S.E. 2d 5 (N.C. 1996); Arizona, *see McLaughlin v. Abbott Labs, No.* CV 95-0628 (Ariz. Super. Ct. Yavapai Co. July 9, 1996); Tennessee, *see Blake v. Abbott Labs.*, 1996-1 Trade Cas. ¶ 71,369 (Tenn. Ct. App. 1996); and Florida, *see Mack v. Bristol-Myers Squibb Co.*, 673 So. 2d 100 (Fla. Dist Ct. App. 1996), *rev. dismissed*, 689 So. 2d 1068 (Fla. 1997) (interpreting Florida Deceptive and Unfair Trade Practice Act). *But see FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, *on recon. in part*, 99 F. Supp. 2d 1 (D.D.C. 1999) (dismissing price-fixing allegations brought by states' attorneys general on behalf of indirect purchasers under Idaho, Iowa, Kentucky, Louisiana, Maine, Missouri, Ohio, Oklahoma, South Carolina (Unfair Trade Practices Act), Texas, Utah, and Vermont antitrust laws); *Free v. Abbott Labs*, 176 F.3d 298 (5th Cir. 1999), *aff'd*, 120 S. Ct. 1518 (2000) (denying indirect purchasers of infant formula standing to sue under Louisiana antitrust laws for alleged price-fixing conspiracy); *Blewett v. Abbott Labs.*, 938 P.2d 842 (Wash. Ct. App. 1997), *rev. denied*, 950 P.2d 475 (Wash. 1998) (finding indirect purchaser lacked standing to assert price-fixing violations under Washington Consumer Protection Act); *see also* 6 Trade Reg. Rep. ¶ 30,000, *supra*, n. 3. For informative discussions of *Illinois Brick* and its implications see William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick*, 67 Antitrust L.J. 1 (1999) and Ronald W. Davis, *Indirect Purchaser Litigation: ARC America's Chickens Come Home to Roost on the Illinois Brick Wall*, 65 Antitrust L.J. 375 (1997).

12 *See Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 218, n. 18, *reh'g denied*, 441 U.S. 917 (1979)

13 15 U.S.C. sections 1012(b), 1013(b).

judicial decision, other states have declined to find such an immunity.[14] Where immunities are provided at the federal level but corresponding immunities are not afforded by a state, a cause of action under state laws may become a more attractive way for plaintiffs to seek redress.[15]

C. Examples of More Restrictive State Laws

1. Failure of Certain Laws to Reach Interstate Commerce

As discussed above, some state laws are more expansive than their federal antitrust counterpart. State laws, however, also can be more restrictive. In such cases, plaintiffs may prefer to bring their causes of action under federal rather than state law. The benefits of the more expansive nature of federal law may however be offset by the perceived advantages of initiating a lawsuit in a "friendly" state forum.[16]

One notable restriction on the application of state antitrust laws relates to conduct that occurs in interstate commerce. Although it has been largely settled that states have the constitutional ability to legislate against anticompetitive conduct that affects interstate commerce, some state courts have interpreted their statutes as reaching only activities that occur within their states. Generally these courts look to the text of the statutes and their legislative histories to aid in interpretation. Because many of these state statutes were passed prior to the present-day expansive reading of the commerce clause, several courts have concluded that the state legislatures could not have envisioned their antitrust statutes to reach conduct occurring outside the states.[17] Other courts have interpreted state antitrust statutes to reach interstate activities, so long as substantial direct effects can be demonstrated within the state.

2. More Restrictive Damages Provisions

Under federal law, the Clayton Act provides for recovery of treble damages for violations of the antitrust laws.[18] Most states have adopted identical provisions as part of their antitrust statutes. A number of states, however, provide for more-limited damages remedies. For example, under Colorado's antitrust provision, treble damages can only be recovered when a per se violation is proved.[19] Other states allow for recovery of treble damages only on proof of either wilful or flagrant violations or violations with intent to injure.[20] A few states do not allow for recovery of treble damages. For instance, Iowa allows suits only for actual damages and a court has discretion of awarding exemplary damages not exceeding twice actual damages for wilful or flagrant violations.[21] Georgia has no private damages remedy for violations of its general prohibition on contracts in restraint of trade.[22] Thus, while most state statutes parallel the federal provision in terms of damages recovery,

14 *See, e.g.*, *Quelimane Co., Inc. v. Stewart Title Guaranty Co.*, 19 Cal. 4th 26 (1998) (finding title insurers subject to the Cartwright Act), *Manufacturers Life Ins. Co. v. Super*. Ct., 10 Cal. 4th 257 (1995); *see also Grams v. Boss*, 294 N.W. 2d 473 (Wis.1980) (permitting antitrust cause of action against insurance companies).

15 The same pattern has been noted with application of the filed rate doctrine at the state level. While most state and federal courts have held that there can be no antitrust law challenge to a rate filed with a state regulatory agency, California has refused to apply the doctrine. *See Cellular Plus v. Super. Ct.*, 14 Cal. App. 4th 1224 (Cal. Ct. App. 1993).

16 There is a perception that many state courts will be more receptive to antitrust plaintiffs who sue big companies. In theory, federal courts are considered more impartial, and cases can be removed to federal court for diversity of citizenship or federal question jurisdiction. The subjective perceived advantages of a more-friendly state court judge and jury need to be weighed against the objective advantages inherent in federal court jurisdiction including the availability of national discovery. Also, it is open to question whether state court judges will necessarily be receptive to adjudicating antitrust cases involving conduct occurring at a national level, given the huge demands these cases can place on the court and its personnel.

17 *See, e.g.*, *Abbott Laboratories v. Durrett*, 1999-1 Trade Cas. ¶ 72,559 (Ala. 1999). In *Durrett*, indirect purchasers brought a cause of action for damages resulting from conspiracy by prescription drug manufacturers and wholesalers to charge higher prices to retailers than to other favored purchasers. The Alabama Supreme Court considered the legislative history of the Alabama antitrust statutes finding that although the statutes were not limited to intrastate activities on their face, the history of the statutes created a presumption that they were limited to activities occurring within Alabama. As a result, the Alabama statutes did not reach a conspiracy occurring outside the state whose effects reached the state through interstate commerce. *See id.*; *see also Mylan Labs.*, *supra*, n. 11 (dismissing price-fixing claims by states' attorneys general under Arkansas, Oregon, and Tennessee laws because challenged conduct was not limited to intrastate activity).

18 *See* 15 U.S.C. section 15.

19 Colo. Rev. Stat section 6-4-114 (1999).

20 *See, e.g.*, Mich. Comp. Laws Ann. section 445.778(8)(2) (2000) (treble damages for flagrant violations); 740 Ill. Comp. Stat. section 10/7(2) (2000) (treble damages allowed for certain offenses, but for others, the violation must be willful before treble damages will be allowed).

21 *See* Iowa Code section 553.12 (1999).

22 *See* von Kalinowski, *supra*, n. 2 at section110.09[1][b]; *see also* Del. Code. Ann. Tit. 6 section 2108 (1999) (failing to provide any private damages remedies for violations of Delaware's Antitrust Act).

several states provide for much more limited recovery. Recovery of damages considerations may be a significant concern when deciding to pursue a claim solely under state law or whether deciding to pursue federal remedies.[23]

3. Failure to Reach Intangible Rights and Services: State Law Intricacies

There are many intricacies in state antitrust laws that result from the way a particular state's statute is drafted. For instance, recently, a Tennessee appellate court interpreted the Tennessee Trade Practices Act as not reaching alleged price fixing of workers' compensation insurance premiums based upon a strict reading of the statute.[24] As distinguished from the federal Sherman Act, which prohibits restraints of "trade or commerce," the Trade Practices Act involves only "product[s] or article[s]." The court held that workers' compensation insurance was not a "product or article" within the meaning of the statute, but rather was an intangible contract right or service not reached by the Act.[25] Similarly, a federal district court held that the Alabama antitrust statute which prohibits actions designed to "regulate or fix the price of any article or commodity," does not reach an alleged conspiracy to prevent the use of ATM surcharges.[26] Because each of these cases turns on the interpretation of particular restrictive language within the state statutes, they exemplify that each state may have its own statutory intricacies and that a thorough examination of a particular state's statute is recommended prior to the commencement of a state antitrust cause of action.

II. CLASS ACTIONS AS A MEANS OF ANTITRUST ENFORCEMENT

A. Class Actions Generally in the Antitrust Context

With anticompetitive conduct that has adversely affected a large number of persons, a major consideration in determining whether to sue under federal or state antitrust laws will be the availability of a class-action device. Federal Rule of Civil Procedure 23 provides the procedural mechanism by which classes may be certified in federal court. Generally, class certification requires proof of four prerequisites including: numerosity, commonality, typicality, and adequacy of representation.[27] Further, in damages actions, certification also requires proof of additional elements: predominance of common issues, superiority of the class-action device, and manageability of the class action.[28] Although many states have adopted certification rules similar to the current Rule 23, several states maintain different certification schemes.

According to the Advisory Committee that drafted the 1966 amendment to Rule 23, "[p]rivate damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions."[29] However, antitrust causes of action for price-fixing have been frequently certified at the federal level. Recently, the Supreme Court has noted that in cases alleging violations of the antitrust laws, "[p]redominance is a test readily met . . . ."[30] While federal courts have accepted jurisdiction over many national antitrust class actions, the state courts have been more restrained. When determining whether to certify a multi-state antitrust class, state courts must deal squarely with constitutional and practical considerations that do not arise in the context of

23 Under the Sherman Act, there is no right of contribution when damages are assessed. Liability is joint and several. *See Texas Indus. v. Radcliff Materials*, 451 U.S. 630 (1981). The right to contribution may vary, however, based on state law. *See, e.g.*, *Professional Beauty Supply, Inc. v. Natl. Beauty Supply, Inc.*, 594 F.2d 1179, 1187 (8th Cir. 1979) (recognizing right to contribution under Minnesota antitrust law, however, this case was decided before *Texas Industries*).
24 *See Jo Ann Forman, Inc. v. Natl. Council on Comp. Ins., Inc.*, 13 S.W. 3d 365 (Tenn. Ct. App. 1999).
25 *See id.* at 373.
26 *See Southtrust Corp. v. Plus Systems, Inc.*, 913 F. Supp. 1517 (N.D. Ala. 1995).
27 Fed. R. Civ. P. 23(a).
28 Fed. R. Civ. P. 23(b)(3).
29 Adv. Comm. Notes to Fed. R. Civ. P. 23 (1966)
30 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

certification under the Sherman or Clayton Acts. These considerations may often present hurdles that may be difficult for many putative classes to overcome.

B. Constitutionality and Practicality of the Class-Action Device Under State Antitrust Laws

1. Where to Start: A Discussion of *Shutts*

Any discussion of the constitutionality of nationwide class actions under state antitrust law must begin with an examination of the Supreme Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Although *Shutts* is not an antitrust case, the court directly addressed due-process considerations involved in nationwide class-action litigation as they relate to unnamed and absent class members.

In *Shutts*, the Kansas district court certified a class composed of members who resided "in all fifty states, the District of Columbia, and several foreign countries."[31] Class members were owners possessing rights to land leases from which the defendant, Phillips Petroleum, produced or purchased natural gas. On behalf of class members, the named plaintiffs pursued purely state law claims seeking to recover interest on royalty payments that had been suspended by Phillips Petroleum.[32] After the class was certified, the named plaintiffs provided each class member, by first-class mail, with notice of the pending class action and the choice to either appear, be represented by the plaintiffs, or opt-out.[33] Defendant Phillips Petroleum objected to class certification on two grounds: (1) the Kansas court did not posses the requisite person jurisdiction over absent plaintiff-class members, and (2) the Kansas court improperly applied Kansas state law to the claims of all plaintiff-class members.[34]

(a) *Shutts*' Due Process Personal Jurisdiction Holding

After determining that the defendant had standing to object on behalf of absent class members, the Court considered the defendant's due-process argument.[35] The defendant argued that an absent plaintiff's failure to return the "request for exclusion" opt-out form could not jurisdictionally constitute consent by out-of-state plaintiffs. Analogizing to personal jurisdiction over an out-of-state defendant, Phillips Petroleum argued that the Kansas court could not exercise jurisdiction over absent out-of-state plaintiffs unless the absent plaintiffs had sufficient minimum contacts with the state.[36] Since the majority of the absent plaintiffs had no prelitigation contacts with the state, the defendant contended that the Kansas court violated the absent plaintiffs' due-process rights by exercising jurisdiction.

The Court rejected this argument, finding that the due process burdens placed upon a state in exercising jurisdiction over absent plaintiffs are not as great those required to exercise jurisdiction over a defendant. The Court held that a state forum may exercise jurisdiction over an absent class-action plaintiff "even though the plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant."[37] Rather, in order to bind an absent plaintiff, the Due Process Clause requires

31 472 U.S. at 799.
32 *See id.* at 799-800.
33 *See id.* at 801.
34 *See id.* at 802-03.
35 *See* 472 U.S. at 803-806.
36 *See id.* at 806.
37 *See id.* at 811.

three elements: (1) notice and an opportunity to be heard; (2) the right to opt out of the class; and (3) adequate representation by the named plaintiffs.[38]

(b) *Shutts*' Choice of Law Holding

After determining that the due process requirements for personal jurisdiction had been satisfied and that the Kansas court properly asserted personal jurisdiction over the absent plaintiffs, the Court turned to the choice of law issue. The Kansas court had applied Kansas law to every claim in the case despite the fact that 99% of the leases and 97% of the plaintiffs had no apparent connection to Kansas.[39] The Court held that application of Kansas law violated the Due Process and Full Faith and Credit Clauses of the Constitution. In arriving at this conclusion, the Court considered that there was no common fund in Kansas that would authorize the Kansas court to apply Kansas law to all claims. Furthermore, it rejected the arguments that the plaintiffs' failure to opt out constituted consent to the application of Kansas law and that the Kansas court had greater latitude in applying Kansas law based on the fact that it was adjudicating a nationwide class action.[40] The Court submitted that "Kansas must have a 'significant contact or aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to insure that the choice of Kansas law is not arbitrary or unfair."[41] The Court emphasized the importance of expectations of the parties in considering the fairness of applying a specific state's law. Finding that the Kansas court did not properly consider whether Kansas law should apply to all of the transactions, the Court remanded for consideration.

2. Expansion of *Shutts* to Preclude Exclusively Federal Causes of Action

In 1996**,** the Supreme Court extended the scope of its *Shutts* decision, making the ability of state courts to certify multi-state class actions much more significant. *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367 (1996), held that a state court judgment which, after certifying a nationwide class, properly approved a class-action settlement releasing claims subject to exclusive federal jurisdiction must be given preclusive effect in federal court, as long as the rendering court's preclusion rules would also give that judgment preclusive effect. *Matsushita*, therefore, teaches that a multi-state antitrust class-action settlement may, in fact, release federal antitrust claims. Furthermore such a release may bar class members who failed to opt out of the state class action from bringing causes of action under the Sherman or Clayton Acts. Such a release is valid even though the state court does not have jurisdiction over the exclusively federal antitrust claims.

B. Are Multi-State Class Actions Under State Laws Constitutional?

In the years following *Shutts*, numerous state courts have had the opportunity to consider the Due Process and Full Faith and Credit mandates of the decision. An analysis of all of the due process requirements that may impact the ability of a state court to assert personal jurisdiction over a nationwide class is beyond the scope of this paper. Importantly for this discussion, however, there have been numerous interpretations of the *Shutts*' choice of law holding. The resulting decisions have revealed distinct differences among the states and have created important distinctions in class certification practices.

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38 *See id.* at 811-12. The Court specified, however, that its holding was limited to "those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments." The opinion did not reach class actions seeking equitable remedies; and therefore, the due process requirements for personal jurisdiction were left unclear in class actions seeking equitable relief. *See* 472 U.S. at 811 n. 3. Relying upon the Supreme Court's explicit limitation of its holding, several courts have found that in a class action seeking equitable relief, the Due Process Clause does not require that class members be afforded the opportunity to opt out. *See, e.g.*, In re Joint Eastern & Southern Dist. Asbestos Litig., 78 F.3d 764, 778 (2d Cir. 1996); *White v. Natl. Football League*, 836 F. Supp. 1458, 1472 (D. Minn. 1993) and cases cited therein.

39 *See* 472 U.S. at 814.

40 *See id.* at 820-21.

41 *See id.* at 821-22 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981).

To determine whether a multi-state class action brought under a particular state statute is constitutional, a court must undertake the two-step choice of law analysis outlined by *Shutts*. First, a court must determine whether the law of the forum state is in conflict with that of any other jurisdiction connected to the suit. As Justice Rehnquist wrote for the majority "[t]here can be no injury in applying [a state's] law if it is not in conflict with that of any other jurisdiction connected to this suit."[42] If a conflict exists, a court must proceed to a second step. In order to constitutionally bind out-of-state residents under the forum state law, the court must determine that the forum state has a "significant contact or aggregation of contacts to the *claims* asserted by each member of the plaintiff class" so that the application of the forum state law "will not be arbitrary or unfair."[43]

As discussed above, there are substantial differences among the states in the scope of proscribed conduct and remedies allowed by their respective antitrust statutes. As a result, there is a strong probability that an effort to prosecute a multi-state class action under the antitrust law of the forum state would trigger the constitutional due process and full faith and credit inquiry required by *Shutts*. For instance, in *City of St. Paul v. FMC Corp.*,[44] the defendants sought to limit the plaintiff's nationwide indirect purchaser class action complaint to apply to indirect purchasers in Minnesota only. In determining whether conflicts existed, the district court determined that only fifteen states allowed indirect purchaser class actions and that three states prohibited them by judicial decision.[45] Curiously, although the district court determined that actual conflicts did exist, it did not undertake the second step of the *Shutts* analysis. The court failed to conduct any inquiry into Minnesota's interests in applying its state's law to the class.[46] The court simply determined that these conflicts would render application of Minnesota law unconstitutional.

The second factor of the *Shutts* choice of law analysis is equally significant in assessing the constitutionality of a multi-state antitrust cause of action. The determination of whether a state has a sufficient aggregation of contacts to the plaintiffs' claims may determine whether forum state law can be constitutionally applied. Essentially a court must examine the interest of the state in applying its own law and determine whether that interest is strong enough to permit application in light of the interests of the other states involved.

In *Shutts,* the Supreme Court held that application of Kansas contract and equity law was unfair where Kansas had no connection to a majority of the leases or the plaintiffs. Since the *Shutts* decision, a number of courts have focused on the word "claims" in determining whether sufficient contacts exist to merit constitutional application of the forum state's law. Courts have expanded their conflicts analyses to include examinations of forum state contacts with both the plaintiffs and the defendants. As one court stated "*Shutts* specifically refers to 'the claims asserted by each member of the plaintiff class.' . . . Plaintiffs' 'claims' involve forum defendants' contacts with the forum state."[47] Consequently, a number of courts have relied primarily on the defendants' rather than the plaintiffs' forum state contacts to justify constitutional application of the forum law.

In the California decision *Clothesrigger, Inc. v. GTE Corp.*, a California appellate court rejected the contention that the trial court could have found that application of California law to the claims of nonresident plaintiffs would be unconstitutional.[48] The appellate court based its decision on the sufficient aggregation of contacts to the state of California including the

42 *See id.* at 815.
43 *See id.* at 821-22 (emphasis added).
44 1991-Trade Cas. ¶ 69,305, 1990 U.S. Dist. Lexis 18142 (D. Minn. 1990).
45 *See id.* at *24-*25. The court stated "the claims of foreign purchasers against foreign defendants simply have no meaningful contact with Minnesota." *Id.*
46 *See id.* at *25.
47 *In re Seagate Techs. Secs. Litig.*, 115 F.R.D. 264, 270 (N.D. Cal. 1987).
48 *See* 191 Cal. App. 3d 605, 612-13 (Cal. Ct. App. 1987).

facts that the defendants did business in California, that a defendant's principal office was in California, that a number of plaintiffs were located in California, and that the fraudulent misrepresentations found in the defendants' advertising were prepared in California.[49]

Similarly, in *Martin v. Heinold Commodities, Inc.*,[50] the Illinois Supreme Court relied primarily on the defendant's location of its principal place of business to ensure that application of Illinois law would not be arbitrary or unfair.[51] The court found that the plaintiffs' common allegation asserting breach of fiduciary duty against the defendant implicated the interests of Illinois insofar as the defendant undertook to act as an agent in accordance with Illinois law. The defendant did so based upon the fact that its principal place of business was located in Illinois. Furthermore, the defendant made this known to the plaintiffs as evidenced by the facts that all payments were to be made to a Chicago office, all complaints were to be made to a Chicago office, all disputes in connection with customer agreements were to be governed by Illinois law and adjudicated in Illinois courts, and the customer agreement became binding only upon acceptance by the defendant at its Chicago office. As a result, the court held that the plaintiffs' claims were governed by the Illinois Consumer Fraud and Deceptive Business Practices Act.[52]

Despite some courts' reliance on the defendants' contacts to find that application of the forum state law is constitutional, other courts have held that location of the defendant's principal place of business in the forum state without more is insufficient to satisfy due process requirements. In *Duvall v. TRW, Inc.*,[53] an Ohio appellate court found that the plaintiffs failed to demonstrate a significant contact or aggregation of contacts to Ohio despite the fact that the plaintiffs relied on the defendant's incorporation and headquarters in Ohio. The court found that without more, this was an insufficient basis for constitutionally applying Ohio law to out-of-state plaintiffs.[54] Similarly, in *Norwest Mortgage, Inc. v. Super. Ct.*,[55] a California appellate court squarely rejected an argument by plaintiffs that *in personam* jurisdiction over the defendant is sufficient to allow constitutional application of the forum state's laws. The plaintiffs specifically argued that because the defendant was incorporated in California and did business in California, the state had a significant aggregation of contacts with the plaintiffs' claims. Finding that the defendant was headquartered outside of California and that the alleged injuries occurred outside of California, the court determined that the defendants' contacts did not create a significant aggregation.[56] In so doing, the court distinguished the decision in *Clothesrigger*, discussed above. The court found that the most significant contact in *Clothesrigger* was the fact that the advertising materials upon which the plaintiffs relied were created in California. There was no similar in-state activity that formed the basis for the lawsuit in *Norwest*.[57]

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49 *See id.*; *see also Renaissance Cruises, Inc. v. Glassman*, 738 So. 2d 436 (Fla. Dist. Ct. App. 1999). In *Renaissance*, the plaintiffs sought certification of a class of cruise travelers claiming deceptive trade practices for collecting "port charges" that were not wholly paid to the ports. The court found a constitutional basis to warrant application of Florida law to the entire class even though 92% of the tickets were sold to non-Florida residents. In finding sufficient contacts, the court relied on the facts that the defendant's principal place of business was in Florida, that the port charges were paid through checks issued in Florida, and that a significant number of Florida residents had been harmed. *See id.* at 439.

50 510 N.E. 2d 840 (Ill. 1987).

51 *See id.* at 847.

52 *See also Snider v. State Farm Mutual Auto. Ins.*, No. 97-L-114 (Ill. Cir. Ct., orig. order Dec. 5, 1997, revised Feb. 11, 1998) (finding that "given the fact that State Farm is situated and headquartered in Illinois and affirmatively uses Illinois courts and law, this Court could apply Illinois substantive laws, including the CFA to the entire class.") *Snider* has created considerable controversy in light of the substantial combined judgment ($1.2 billion) returned by the court and jury against the defendant. In response to decisions such as *Snider*, federal legislation has been proposed that would allow almost all class actions to be filed in or removed to federal court. For a discussion of this recent legislation and its potential implications see Thomas Merlon Woods, *Wielding the Sledgehammer: Legislative Solutions for Class Action Jurisdictional Reform*, 57 N.Y.U. L. Rev. 507 (2000); *see also* Victor E. Schwartz, *et al.*, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction*, 37 Harv. J. Legis. 483 (2000) (posing a critical view of the treatment of multi-state class actions by state courts).

53 578 N.E. 2d 556 (Ohio App. Ct. 1991).

54 *See id.* at 274-75.

55 72 Cal. App. 4th 214 (Cal. Ct. App. 1999).

56 *See id.* at 226-27. In a footnote, the appellate court also considered that the defendant had a substantial number of loans in California and that the defendant operated a servicing center in California. However, the court remained unpersuaded by these contacts.

57 *See id.* at 227.

C. Is the Analysis Different With Respect to State Antitrust Laws?

Shutts makes clear that a state must have a significant aggregation of interests to apply its law to an out-of-state resident's claims. Kansas had no such interest in *Shutts* given its connection with only 1% of the leases in the case. States have attempted to define factors that would identify whether application of the forum law to out-of-state residents would be arbitrary or unfair. A state's interest in regulating the conduct of the defendant has become a critical factor. States have been able to justify that interest primarily where the defendant has engaged in activities within the state that either have a strong relation to the claims at issue or exceed mere incorporation. In the antitrust context, analyzing a state's contacts to the plaintiffs' claims may involve an examination of many factors including not only the location of the defendants but also where and how the defendants' alleged anticompetitive conduct occurred, and where the effects of the anticompetitive conduct were felt. These inquiries would seem to be fact specific and will require a determination of whether the forum state has such a significant interest in the anticompetitive conduct at issue that it may constitutionally justify applying its own antitrust laws to the claims of out-of-state plaintiffs.

It is debatable whether a state has a constitutional right or interest in applying its own antitrust law to adjudicate the claims of class members who reside in states which do not provide an antitrust remedy for the conduct at issue. Can a state with an expansive antitrust law adjudicate under that law the claims of residents of a state that exempts the conduct? In these situations, it would be very difficult for the forum to find that it had an interest in applying its law to the claims of out-of-state plaintiffs.

A recent Florida case has cast doubt on whether a Florida court could ever find that it has constitutional ability to apply its antitrust law to out-of-state plaintiffs. In *Oce Printing Systems USA, Inc. v. Mailers Data Services, Inc.*,[58] the plaintiffs sought to certify three nationwide classes in an action under the Florida Antitrust Act. The plaintiffs alleged that the sellers, financiers, and services of ultra-high-speed printers engaged in unlawful territory allocation that forced end users to pay higher prices for maintenance and replacement parts, engaged in an unlawful group boycott, and engaged in an unlawful tying arrangement. The plaintiffs sought to certify classes encompassing: (1) end users; (2) ISOs; and (3) brokers. In finding that certification was improper, the court determined that the Florida Antitrust Act could only be invoked by putative class members within the state of Florida. It was irrelevant that the alleged agreement to restrain trade occurred in Florida.[59] Rather, the key inquiry was whether the effects of the agreement occurred in Florida. The court found that "[t]he only proper class members are End Users in Florida, ISOs in Florida, Brokers in Florida, and possibly some out-of-state entities that desired to do or did business in Florida."[60] Under this interpretation of Florida's Antitrust Act, it is unlikely that a Florida court would find that it had any interest in applying its Act to out-of-state plaintiffs or that application would not be arbitrary or unfair.

The constitutionality of applying forum state law to a nationwide or multi-state antitrust class action will depend largely upon the facts of the particular case. As demonstrated by such decisions as *Clothesrigger* and *Martin*, the defendants' contacts with the forum state are factors that should be considered in determining the forum state's interest. If the alleged anticompetitive conduct occurred almost entirely within the state, a court may find that it has a significant interest in applying its own law to out-of-state plaintiffs' claims. A determination of a forum state's interest in applying its own law, however, also hinges upon

58 760 So. 2d 1037(Fla. Dist. Ct. App. 2000).
59 *See id.* at 1042.
60 *See id.*

an examination of the scope of its law. As in the Florida *Oce Printing* decision, the court essentially found that the Florida Antitrust Act only provided a remedy to plaintiffs who felt the effects of the anticompetitive conduct within the state of Florida.

There does not appear to be an absolute constitutional prohibition to certification of multi-state or nationwide antitrust class actions. However, any determination of the question as to whether a national class action may be prosecuted under the antitrust law of the forum state is complicated. The answer requires an examination of the specific aggregation of contacts in each particular case and an interpretation by the forum state court of whether its antitrust statute can properly afford a remedy to an out-of-state plaintiff even when the out-of-state plaintiff may not be afforded the same remedy in his or her own state.

D. Practicality of Applying Other States' Statutes and the Effect on Predominance

It is important to note that simply because a state has the constitutional right to apply its own law to the claims of out-of-state plaintiffs does not mean, however, that it will elect to do so under state choice-of-law principles. This proposition makes certification of certain types of multi-state antitrust class actions even more tenuous. As discussed at the beginning of this article, numerous variations exist in the rights and remedies provided by state antitrust laws. When state laws differ, both federal and state courts following Rule 23 precedent typically require the named plaintiff to prove that application of different state laws will not defeat predominance or create manageability problems.[61] Conflicts among antitrust laws applicable to the out-of-state plaintiffs provide strong ammunition to defendants seeking to convince the court of the predominance of individual issues.

As discussed earlier, state laws may provide the only antitrust remedy to plaintiffs who are indirect purchasers. It would seem constitutionally permissible to seek to apply an *Illinois Brick* Repealer statute of the forum state to the claims of indirect purchasers who reside in states with similar Repealer statutes. Ironically, indirect-purchaser actions have been difficult to certify for other reasons. For example, in *Peridot v. Kimberly Clark*,[62] a Minnesota state court failed to certify indirect-purchaser class of first-tier business entities that purchased tissue products from distributors. Finding that the plaintiffs did not present a satisfactory means of calculating class-wide damages and finding that class members were not readily ascertainable, the court held that individual issues predominated and the class was not appropriate for certification.[63]

Given the fact that predominance often presents such a difficult barrier in multi-state actions, a determination that forum state law can be constitutionally applied to the claims of out-of-state plaintiffs increases the practical likelihood of obtaining certification.[64] The constitutional ability to apply the antitrust law of a single state to all the claims in the

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61 *See*, *e.g.*, *Castano v. American Tobacco Co.*, 84 F.3d 734, 750 (5th Cir. 1996). Some courts have even read *Shutts* for the proposition that proof of predominance through a full-blown state choice-of-law analysis is constitutionally mandated prior to certification. For example, a Louisiana appellate court citing *Shutts* has stated: "where plaintiffs seek to represent a nationwide class, the trial court must consider which states' laws will apply, and how variation in state law will affect the superiority of a class action." *Carr v. GAF, Inc.*, 711 So. 2d 802 (La. Ct. App.), *writ denied*, 721 So. 2d 472 (La. 1998). Other states have adopted a more lenient interpretation of the *Shutts* decision and do not find that the absent plaintiffs are constitutionally entitled to a determination of which law will apply prior to certification. An example of a state court decision adopting the more lenient standard is a New Jersey appellate court's decision in *Delgozzo v. Kenny*, 628 A.2d 1080 (N.J. Super. Ct. 1993). In *Delgozzo*, the trial court failed to certify a class of purchasers of blue-flame furnaces finding that common issues did not predominate based on the problems posed by potentially applying the laws of twenty-five states, the District of Columbia, and Canada. The appellate court reversed and remanded finding that *Shutts* "merely requires a showing that there are sufficient contacts between the forum state and each individual class member's claims to create forum interests in the litigation such that application of forum law will not be arbitrary or unfair." *Id.* at 1092; *see also Lobo Exploration Co. v. Amoco Prod. Co.*, 991 P.2d 1048 (Okla. Ct. App. 1999), *cert. denied*, 120 S. Ct. 1996 (2000).

62 2000-1 Trade Cas. ¶ 72,817, 2000 WL 673933 (Minn. Dist. Ct. 2000).

63 *See also Karofsky v. Abbott Labs*, 1998-1 Trade Cases ¶ 72,121 (Me. Super. Ct. 1997). The Maine court failed to certify class of indirect purchasers of prescription drugs under Me. R. Civ. P. 23(b)(3) based on the predominance of individual issues necessary to determine the overcharges passed on to consumers.

64 In *Shutts*, the Supreme court warned that courts should not use the fact that a court has jurisdiction over a claim "as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law. It may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a 'common question of law.'" *See Shutts*, 472 U.S. at 821. Courts do not run afoul of this language only when they have determined the forum state has such significant contacts with the absent plaintiffs' claims as to justify constitutionally applying forum state law.

case allows the plaintiffs to more effectively argue that common questions will predominate and that any conflicts of law among the plaintiffs' claims and the law of the forum state can be managed through groupings or subclasses to be determined at a later time. At class certification, if the named plaintiff fails to demonstrate that the forum state's antitrust law could be constitutionally applied to the out-of-state class members' claims, then that plaintiff will face a much more difficult task in showing predominance and the ultimate superiority of class action in a state with no interest in applying its own law.

III. CONCLUSION

This article has attempted to create more discussion about the selection of state courts as forums for national antitrust litigation. The differences between the laws help guide plaintiffs in their determinations of whether to seek redress under state or federal provisions or under both. When states provide more expansive prohibitions on conduct than the Sherman or Clayton Acts, plaintiffs may be inclined to pursue their remedies under state law. However, when anticompetitive conduct affects a significant number of individuals in a multi-state or even nationwide area, the primary consideration will be the ability to obtain correspondingly broad class certification. The ability to obtain nationwide certification of a class action under state law may be precluded by due process and full faith and credit considerations regarding choice of law that are simply not applicable to a cause of action brought under the Sherman and Clayton Acts. The temptation to commence a national antitrust class action in a friendly state forum must be weighed against the constitutional and practical issues that will inevitably arise.

IV. EPILOGUE

Since the writing of our paper, there have been at least two significant state court decisions which address nationwide class certification issues and reach different results. In *Washington Mutual Bank, FA v. Super. Ct. of Orange County*, the California supreme court recently articulated an analytical framework for evaluating whether certification of a nationwide class is appropriate in California.[65] *Washington Mutual* arose in the context of a class action on behalf of approximately 25,000 borrowers nationwide against their mortgage owner, Washington Mutual Bank. The borrowers alleged that they had been overcharged for replacement hazard insurance when the borrowers failed to maintain such insurance coverage on the secured property. The named plaintiff brought claims on behalf of the class alleging breach of contract, breach of implied covenant of good faith, and business practice violations under California's unfair competition law, Bus. & Prof. Code Section 17200.[66] Notably, each of the mortgage agreements contained a choice-of-law provision which specified the law of the jurisdiction in which the secured property was located.

The trial court granted certification and the appellate court affirmed, but the California supreme court reversed, on the ground that the trial court should not have "granted certification without first determining the effect of the choice-of-law agreements."[67] The supreme court's opinion is not limited to cases involving choice-of-law clauses, but also sets forth "an analytical framework for evaluating the basic choice-of-law and conflict-of-laws issues that must be resolved when certification of a nationwide or multistate class action is sought . . . ." [68]

Several significant principles emerged. First, in California, the burden of proving due-process contacts to the forum state, as required by *Shutts,* is clearly on the proponent of the nationwide class. Once this significant contact or aggregation of contacts is shown,

65 *See Washington Mutual Bank, FA v. Super. Ct. of Orange County*, 24 Cal. 4th 906, 15 P.2d 1071 (2001).
66 *See id.* at 912.
67 *See id.* at 927.
68 *See id.* at 926.

however, the burden then shifts to the defendant to demonstrate that "foreign law, rather than California law, should apply to the class claims."[69] Second, because the class-action proponent bears the burden of establishing the propriety of certification, if different states' laws apply, the proponent must present affirmative evidence that the differences will be manageable and will not destroy commonality.[70] Finally, the differences in the state law do not need to be outcome determinative to defeat class certification.[71] As a result of *Washington Mutual*, the determination of applicable law must now be made at the outset. If it is determined that the laws of multiple states are found applicable, the class action proponent must "credibly demonstrate . . . that state law variations will not swamp common issues and defeat predominance."[72]

The second case, *Avery v. State Farm Mutual Auto. Ins. Co.*,[73] affirmed a 48-state class certification of an action brought in Illinois state court under the Illinois Consumer Fraud and Deceptive Business Practices Act against State Farm. The claim was based on State Farm's alleged specification of inferior non-original equipment manufacturer replacement crash parts in contravention of a uniform promise to provide parts of "like kind and quality."[74] State Farm argued that it was error to certify a nationwide consumer-fraud class because the claims of non-Illinois class members are governed by varying consumer-fraud laws in 48 states. The Illinois appellate court disagreed, indicating that "the question of whether laws of different states apply to specific transactions alleged in a class action does not ordinarily prevent certification of the class."[75] The appellate court then found that Illinois nonetheless had significant contacts to the claims asserted by each member since State Farm was headquartered in Illinois and the deceptive claims practices occurred in Illinois. The appellate court reasoned that the State had a legitimate interest in applying its laws to insure that its residents comply with its consumer-protection laws while serving both Illinois and out-of-state consumers.[76] Further, the appellate court did not analyze differences in the remedial provisions of the consumer protection laws of other states, but simply concluded that the deceptive practices of State Farm were not specifically authorized or in compliance with the laws of any of the 48 states.[77] Relying on *Martin v. Heinhold Commodities*,[78] the appellate court concluded that Illinois had significant contacts to the claims asserted by each class member under *Shutts* and had a legitimate interest in applying its law to the 48-state class.

The decisions in *Washington Mutual* and *Avery* illustrate that the applicable legal standard for certifying nationwide class actions does vary markedly among different states. The California supreme court appears willing to give more deference to the interests of other states, and recognizes that if different state laws do apply, then a nationwide class may become unmanageable. In contrast, the *Avery* court is principally concerned with providing an Illinois remedy to citizens of other states who are alleged to be adversely affected by the conduct of an Illinois resident, and finds a nationwide class to be a proper vehicle to accomplish that objective. Such disparities among states may provide support to proponents of federal legislation which would allow the transfer of national class-action suits from state courts to federal courts.

69 *See id.* at 921. *See also Wershba v. Apple Computer, Inc.*, 89 Cal. App. 4th 324 (Cal. Ct. App. 2001) *reh'g granted* (not citable) (applying the *Washington Mutual* analysis and finding that the defendants did not meet the burden of demonstrating that other states had a greater interest in having their consumer-protection laws applied). Additionally, it is important to note that the California supreme court disagreed with several non-California state cases, including *Lobo Exploration*, *supra*, note 61, on the point that disputes over applicable law do not need to be resolved at the time of class certification. *Washington Mutual* held that a determination of applicable law was necessary to identify the commonality and manageability of the putative class. *See* 24 Cal. 4th at 921-23.

70 *See id.* at 924-26.

71 *See id.* at 926-27.

72 *See id.* at 926.

73 321 Ill. App. 3d 269, 746 N.E.2d 1242 (Ill. App. Ct. 5th Dist. 2001). Avery and Snider are both named plaintiffs in this case, previously referenced at note 52.

74 *See id.* at 273.

75 *See id.* at 281.

76 *See id.* at 282.

77 *See id.*

78 *See* discussion, *supra,* in text accompanying notes 50-52.