



## Client Alert

*The SEC's recent victory in its test case under SOX Section 304 may spell more enforcement actions against CEOs and CFOs*

### **More on SOX Section 304: Recent Ruling in Test Case Likely to Lead to SEC Claims Against CEOs and CFOs**

On June 9, 2010, the United States Federal District Court for the District of Arizona refused to dismiss the SEC's claim against the former Chief Executive Officer of CSK Auto Corp. under Section 304 of the Sarbanes-Oxley Act of 2002. The ruling in this important test case is likely to lead to more SEC claims under Section 304.

The SEC instituted its claim against Maynard Jenkins, CSK's former CEO, in July 2009 seeking to compel Mr. Jenkins to reimburse CSK and its shareholders over \$4 million that the former CEO received in bonuses and profits from stock sales while CSK was issuing erroneous financial statements that subsequently were restated by CSK.

As we wrote in August 2009 ([SOX Section 304 Revised](#)), this was the first SEC enforcement action seeking reimbursement under Section 304 from an executive who was not alleged to have engaged in personal misconduct in violation of the federal securities laws. Section 304 purports to require chief executive and chief financial officers to reimburse their companies for stock-based incentive compensation and stock-trading profits received by the officers during the 12 months following the issuance of erroneous financial statements of the company that the company subsequently is required to restate due to "misconduct." Mr. Jenkins moved to dismiss the



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SEC's claim on the basis that he did not participate in the misconduct that triggered the restatement of CSK's financial statements and had no knowledge of the misconduct. The issue before the court was whether the "misconduct" that is a predicate for recovery from Mr. Jenkins under Section 304 must be his own, personal misconduct. According to the court, Section 304 requires only a showing of misconduct on the part of the company, through its officers or employees acting within the scope of their employment, and does "not necessarily require the specific misconduct of the [company's] CEO or CFO."

It is too early to predict the ultimate outcome of this SEC enforcement action, which will now proceed with discovery and, assuming no settlement is reached, an eventual trial next year. In the meantime, this recent ruling is likely to encourage other enforcement actions by the SEC to recoup stock-based compensation from CEOs and CFOs of companies that have restated their financial statements due to misconduct by the companies, even if the CEOs and CFOs, themselves, were innocent of any personal misconduct.

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*If you have any questions about what the Court's ruling in this case may mean for you or your company, please contact [Dale Short](#), Chair of the firm's Corporate Department, or the TroyGould attorney with whom you regularly work.*

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