

October 2021

Follow @Paul_Hastings



Ninth Circuit Rejects Certification of Nationwide Class in Antitrust Case

By [Michael F. Murray](#)

In *Stromberg v. Qualcomm*, a unanimous Ninth Circuit panel reversed the certification of a nationwide class of approximately 240 million members. The Ninth Circuit ruled that a nationwide plaintiff class alleging antitrust violations under California's Cartwright Act could not be certified because of differences in state laws regarding the ability of antitrust plaintiffs to recover damages. The decision suggests both that litigation based on the FTC's lawsuit against Qualcomm may soon be ending (in Qualcomm's favor) and a broader trend against nationwide classes in indirect purchaser class action litigation.

Background

The Federal Trade Commission (the "FTC") sued Qualcomm Incorporated, a cellular technology company, in January 2017, alleging antitrust violations regarding its practices for selling modem chips and licensing its patent portfolio, including its standard essential patents. The FTC prevailed in the district court, but Qualcomm appealed, with the support of the United States, and the U.S. Court of Appeals ruled that Qualcomm's practices did not violate the antitrust laws.

Before that ruling, many follow-on consumer class actions based on the same allegations were filed against Qualcomm and consolidated in the same district court that ruled on the FTC's case. The plaintiffs in those cases consist of consumers across the nation who bought cellphones indirectly from Qualcomm that allegedly were sold at higher prices or reduced quality due to Qualcomm's practices. These indirect purchaser plaintiffs asserted federal antitrust claims and California Cartwright Act and Unfair Competition Law claims and sought certification of a nationwide class, numbering approximately 240 million people with estimated damages of at least \$4.8 billion. Qualcomm opposed class certification on the ground, as relevant here, that state laws differ regarding the ability of such indirect purchasers to recover antitrust damages. Qualcomm observed that some states have rejected the federal policy, announced in the *Illinois Brick* Supreme Court decision, of barring damages for indirect purchasers by enacting *Illinois Brick* "repealer" statutes, while other states have accepted that federal policy and are considered "non-repealer" states. These differences, Qualcomm argued, predominate and, therefore, prevent class certification.

The district court rejected that argument and certified a nationwide plaintiffs' class to seek damages, as well as an injunction. It concluded that plaintiffs could seek damages on behalf of the entire nationwide class under California's Cartwright Act and California's choice of law rules. The district court reasoned that, although repealer states would preclude such damages under state law, California, as a non-repealer state, has an interest in regulating a California company and states that would preclude

damages have no such interest because their state laws disadvantage their resident consumers. The Ninth Circuit agreed to hear Qualcomm's interlocutory appeal of the district court's decision.

Decision

A unanimous Ninth Circuit—in a decision written by Judge Ryan Nelson and joined by Judges Jay Bybee and visiting Judge Eugene Siler, Jr.—reversed the district court's decision. It concluded that the damages class was improperly certified “under a faulty choice of law analysis because differences in relevant state laws swamp predominance.” The court observed that material differences exist between states with laws that allow indirect purchasers to recover and those that do not, and even among states with laws that allow indirect purchasers to recover.

The court in particular faulted the district court's conclusion that states other than California have “no interest” in applying their laws in the current dispute, contrary to its prior precedents in *Mazza v. American Honda Motors* and *Senne v. Kansas City Royals Baseball Corp.* Instead, the court concluded, “other states, including non-repealer states, have an interest in how their markets are managed and how best to enforce antitrust violations and regulate commerce in their states.” Specifically, “non-repealer laws reflect the state calculation that antitrust enforcement is best served by having indirect purchasers realize the benefit of antitrust enforcement outside of court processes” and “further state interests in reducing the risk that transactions within their borders expose businesses to excessive and ‘complicated’ antitrust litigation with ‘duplicative damages’ recovery.” The court concluded that “the district court improperly impaired non-repealer state policy by allowing California to set antitrust enforcement policy for the entire country,” which is a “false federalism.” The court also observed that even among repealer states, state laws “are hardly uniform,” such that a single class could be certified.

The court consequently reversed class certification of a nationwide class seeking damages and remanded to the district court for consideration of differences in state law among repealer states. It also concluded that the certification of the injunctive relief class should be reevaluated in light of the Ninth Circuit's prior decision rejecting the merits of plaintiffs' claims in *FTC v. Qualcomm*.

Implications

The Ninth Circuit's decision has at least three implications for antitrust and class action jurisprudence. First, it continues to undermine claims against Qualcomm regarding the conduct the FTC challenged. The court's decision reads its own *FTC v. Qualcomm* opinion broadly and suggests, although does not expressly state, that the district court should dismiss the case.

Second, the decision adds to an existing trend away from nationwide class actions in indirect purchaser litigation. The Ninth Circuit's previous decision in *Mazza* is a significant part of that trend. This decision reinforces and expands *Mazza*, a misrepresentation and omissions case, to the antitrust context. The court also emphasized that, in its view, federalism does not tolerate nationwide antitrust class actions under the Cartwright Act.

Finally, the Ninth Circuit's decision indicates that future indirect purchaser cases likely will require state-by-state analysis and that Plaintiffs likely will propose separate state classes. That holds for cases that involve plaintiffs in both repealer and non-repealer states, as well as cases that involve plaintiffs solely in repealer states. The court expressed skepticism that repealer states' laws are sufficiently similar such that a single class of plaintiffs in those states could be certified. Clients facing such class actions will need to navigate state-by-state analysis in such cases.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Atlanta

K Whitner
1.404.815.2228
kwhitner@paulhastings.com

San Francisco

Sean D. Unger
1.415.856.7056
seanunger@paulhastings.com

Washington, D.C.

Michael F. Murray
1.202.551.1730
michaelmurray@paulhastings.com

Paul Hastings LLP

Stay Current is published solely for the interests of friends and clients of Paul Hastings LLP and should in no way be relied upon or construed as legal advice. The views expressed in this publication reflect those of the authors and not necessarily the views of Paul Hastings. For specific information on recent developments or particular factual situations, the opinion of legal counsel should be sought. These materials may be considered ATTORNEY ADVERTISING in some jurisdictions. Paul Hastings is a limited liability partnership. Copyright © 2021 Paul Hastings LLP.