Kilpatrick

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Ninth Circuit: California antitrust law does not apply to the claims of a nationwide class

by James F. Bogan III

Takeaway: Consumer class actions primarily target a damages remedy. In the antitrust context, state antitrust law provides the path to damages for indirect purchasers, because federal antitrust law bars indirect purchaser claims. In *Stromberg v. Qualcomm Inc*., 14 F.4th 1059, No. 19-15159, 2021 WL 4448713 (9th Cir. Sept. 29, 2021), the plaintiffs persuaded the district court to apply California antitrust law on a nationwide basis and to certify a Rule 23(b)(3) nationwide damages class, giving them the ability to pursue billions of dollars in damages. But that bold effort failed on appeal in *Stromberg*, which held that the antitrust law of a single state (California) could not be applied on a nationwide basis. Instead, the panel ruled that the antitrust laws of the individual states applied to the alleged antitrust violations committed in each state, overwhelming predominance and precluding nationwide class treatment.
According to the U.S. Supreme Court's decision in *Illinois Brick*, indirect purchasers do not have standing to seek damages for violations of federal antitrust law (the Sherman Act). *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). In the wake of that decision, many states passed *Illinois Brick* "repealer laws," giving indirect purchasers the ability to seek damages under state antitrust law. California passed one such repealer law as part of its Cartwright Act, a state antitrust statute modeled after the Sherman Act but which permits indirect purchasers to pursue antitrust claims and seek the recovery of treble damages. *See* Cal. Bus. & Prof. Code § 16700 *et seq*. California is one of thirty-six "repealer" jurisdictions (including the District of Columbia), with fifteen "non-repealer states." 2021 WL 4448713, at *3.
In *Stromberg*, purchasers of cellphones sued Qualcomm for violating the Sherman Act, alleging (among other things) that Qualcomm engaged in antitrust violations enabling it to charge excessive royalties to cellphone manufacturers, which royalties the manufacturers then "passed through the distribution chain to consumers in the form of higher prices or reduced quality in cellphones." *Id*. at *2. They alleged that Qualcomm violated the Sherman Act as well as California's Cartwright Act, and they also alleged a derivative claim under California's Unfair Competition Law ("UCL") based on the Sherman and Cartwright Act violations. They sought monetary and injunctive relief on behalf of a nationwide class of cellphone purchasers. Because the plaintiffs stood steps removed from Qualcomm in the chain of distribution, they (as well as the putative class members) constituted indirect purchasers who could only seek damages under state antitrust law.
Judge Lucy Koh of the Northern District of California certified a nationwide class of consumers to pursue damages claims under the Cartwright Act and UCL. As the panel noted, the "class would number between 232.8 and 250 million people, and the lower bound on damages to the consumer class was estimated as $4.84 billion." *Id*. at *3.
The primary issue on appeal concerned Judge Koh's choice-of-law ruling, in which she determined, under California's three-part governmental interest test, that California law applied to the claims of the

nationwide class. According to that test: (1) "the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different"; (2) "if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists"; and (3) "if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state, and then ultimately applies the law of the state whose interest would be the more impaired if its law were not applied." *Id*. at *6 (cleaned up).

In her ruling, Judge Koh assumed no difference between the laws of California and the other repealer states. Moreover, as between the repealer and non-repealer states, she ruled that "while California has an interest in applying its law, other states have no interest in applying their laws to the current dispute." *Id*. at *7 (citation omitted). In so ruling, she viewed the non-repealer states' interests as limited to (1) shielding in-state businesses from antitrust liability and (2) protecting consumers. According to Judge Koh, because Qualcomm is a resident California corporation that allegedly committed the antitrust violations in California, application of the indirect purchaser rule did not implicate the non-repealer states' interests in protecting in-state businesses. She further ruled that, because California's "repealer" law provided greater protection to consumers in non-repealer states, those states would not and should not be concerned about California law providing their consumers with greater protection.

But, according to the panel, she overlooked that "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." *Id*. at *7. She also overlooked material variations in the law as between California and the other repealer states, in that "state repealer laws vary as to the type of law the repeal applies to; who can sue for damages; and the amount or type of damages indirect purchasers can recover." *Id*. at *6.

The *Stromberg* decision represents the first time the Ninth Circuit analyzed California's governmental interest test in the antitrust context. Id. at *7. In support, the panel relied on the Ninth Circuit's application of that test in *Mazza v. American Honda Motor Co*., 666 F.3d 581 (9th Cir. 2012), a consumer fraud case involving the sale of automobiles throughout the United States. In *Mazza*, the Ninth Circuit reversed the certification of a nationwide class "under California law containing class members who purchased or leased vehicles in different jurisdictions with materially different consumer protection laws." *Id*. at *7. The *Mazza* ruling put a particular emphasis on the "place of wrong," ruling that "with respect to regulating or affecting conduct within its borders, the place of the wrong has the predominant interest" and the "place of the wrong" usually will be "the state where the last event necessary to make the actor liable occurred." *Id*. at *8 (quoting *Mazza*, 666 F.3d at 593). According to the panel, "foreign states [have] a strong interest in applying their laws to transactions between their citizens and corporations doing business within their state," and that interest was overlooked by the district court. *Id*.