

CLIENT ALERT

Ninth Circuit Limits Nationwide Antitrust Class Actions By Indirect Purchasers

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Last week the Ninth Circuit struck a nationwide class of over 200 million cell-phone buyers in *Stromberg v. Qualcomm Inc.*. A nationwide consumer class can seek immense antitrust damages – here plaintiffs estimated a “lower bound” of \$4.8 billion. The Ninth Circuit’s decision not only prohibits nationwide indirect purchaser classes bringing claims under California’s antitrust law, but imperils multi-state classes similar to those certified in past cases. *Stromberg* also has wider implications for nationwide antitrust class actions as other states consider expanding their antitrust laws.

Qualcomm produces modem chips which enable cellphones to connect with cellular networks. The plaintiffs seek to represent a class of indirect purchasers – “indirect” because they did not buy modem chips from Qualcomm, but instead bought cell phones from third parties that incorporated modem chips. Indirect purchasers cannot seek damages under the federal antitrust laws. But they can seek damages under California’s antitrust law, the Cartwright Act, as well as under the laws of about two-thirds of the states.

To determine whether California law should apply outside of California, courts consider in part each state’s interest in the application of its own law. For example, one court refused to certify a class where defendants included three companies headquartered in New Jersey, which does not allow indirect purchaser suits. The decision recognized New Jersey’s interest in shielding “resident businesses from excessive litigation.” *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-2420 YGR, 2017 U.S. Dist. LEXIS 57340, at *94 (N.D. Cal. Apr. 12, 2017). A few district courts have certified classes composed of indirect purchaser plaintiffs only from states that allow indirect purchaser suits.

In this case, Judge Lucy Koh of the Northern District of California certified a nationwide class. She held that state laws barring indirect purchaser damages are designed to protect in-state businesses, and that interest is irrelevant when the sole defendant is a California corporation. Meanwhile, she held, states have no interest in denying full recovery to their residents who are injured by out-of-state businesses.

Almost two years after initial oral argument in the case, the Ninth Circuit reversed class certification. It held that a state that forbids indirect purchaser suits has an interest in protecting out-of-state businesses from litigation by its own residents, explaining that the proscription “may reflect a policy decision calibrating liability to foster commerce in the state” by “shielding out-of-state businesses from what the state may consider to be excessive litigation.” The Ninth Circuit also criticized the district court for overlooking variations in law between the states that allow indirect purchaser suits, imperiling certification of future multi-state classes composed of indirect purchasers residing in states that allow such suits.

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