WINSTON & STRAWN LLP

BLOG

Qualcomm Chips Away at Cellular Chip Licensing Class Action

OCTOBER 6, 2021

Qualcomm Inc. has won another battle in the fight over its alleged monopoly of modem chips used in cell phones. On September 29, 2021, the Ninth Circuit vacated the district court's class certification order and remanded the matter for reconsideration. *Stromberg v. Qualcomm Inc.*, No. 19-15159, 2021 WL 4448713 (9th Cir. Sept. 29, 2021). The panel unanimously held that the district court's choice of law analysis was faulty, and that it erred in certifying a Rule 23(b)(3) damages class because the differences between relevant state laws meant that common issues of law did not predominate in the class as certified. *Id.* at *5-11. As to the Rule 23(b)(2) injunctive class, the Ninth Circuit vacated the certification order in light of its *FTC v. Qualcomm* decision, 969 F.3d 974 (9th Cir. 2020), and asked the district court on remand to first address the effect of that decision, particularly on the classes' ability to meet the Rule 23(a) threshold requirements and the viability of plaintiffs' claims with the appellate court's additional guidance. *Id.* at *11-12. For a more detailed discussion of the Ninth Circuit's *FTC v. Qualcomm* decision, *see* Winston & Strawn's Competition Corner Post here.

Plaintiffs' attorneys, in antitrust cases and in general, often seek to certify a nationwide class under the state law where the case is filed. The Ninth Circuit's decision is a clear statement that nationwide classes are inappropriate when there are material differences between states' laws that are not accounted for as part of a rigorous choice of law analysis. Time will tell how plaintiffs' attorneys will adjust their class certification strategy, but defendants are now armed with significant precedent to defend against nationwide class certification, especially in the Ninth Circuit.

Qualcomm's Business Model and Litigation History

Qualcomm is a global leader in cellular technology that, as relevant here, licenses standard essential patents (SEPs) for cellular communication technologies, including for 3G and LTE. *Stromberg v. Qualcomm, Inc.*, No. 19-15159, 2021 WL 4448713 (9th Cir. Sept. 29, 2021). SEPs are "standard essential" because any entity that wishes to practice the standard—*e.g.*, 3G—must license the relevant SEPs from their owners. *Id.* at *1. In exchange for having their patents incorporated into a standard, patent-holders like Qualcomm typically commit to licensing their SEPs on fair, reasonable, and non-discriminatory (FRAND) terms. *Id.* at *2.

At issue in the *Stromberg* litigation was Qualcomm's practice of licensing its patents solely to cellphone original equipment manufacturers (OEMs) rather than any upstream cellphone component suppliers. For its SEPs, Qualcomm typically receives a royalty of 5% of the device's wholesale net selling price. *Id.* Qualcomm is also the leading

supplier of 3G and LTE modem chips—products which practice Qualcomm's cellular SEPs—to OEMs, which OEMs then incorporate into their cell phones devices, enabling them to connect to cellular networks. *Id.* Qualcomm adopted a policy known as "no license, no chips," under which it would not supply modem chips to any customers unless they also licensed Qualcomm's SEPs. *Id.* at *8.

In January 2017, the Federal Trade Commission sued Qualcomm in a separate action, alleging that, through its "no license, no chips" policy, Qualcomm engaged in unfair methods of competition in violation of the Federal Trade Commission Act ("FTCA") and the Sherman Act. *Id.* at *2. Consumers filed various follow-on actions against Qualcomm, alleging similar issues and invoking federal and state antitrust and consumer protection laws. The cases were consolidated as a multi-district litigation before Judge Koh in the Northern District of California, the same judge who presided over the FTC matter. *Id.*

The plaintiffs in *Stromberg* are consumers who bought cell phones that contain Qualcomm chips, making them indirect purchasers of Qualcomm's products (with the OEMs being the direct purchasers). *Id.* Supreme Court precedent typically bars indirect purchasers from pursuing antitrust damages claims under federal law because they are too far removed from a distribution chain. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). After the *Illinois Brick* decision, many states—currently 35—enacted what are known as "repealer laws," which permit indirect purchasers to seek antitrust damages under their states' laws. *Stromberg*, at *3. Thus, only consumers who are citizens of a "repealer state" may join an indirect purchaser class. *Id.* For a more in-depth discussion of *Illinois Brick*, see Winston & Strawn's Competition Corner post here.

The class plaintiffs alleged that Qualcomm maintains a monopoly in chips by "(1) engaging in a 'no-license-no-chips' policy by which Qualcomm sold chips only to OEMs that paid above-FRAND royalty rates to license Qualcomm's SEPs; (2) refusing to license its SEPs to rival chip suppliers; and (3) entering into exclusive dealing arrangements with Apple that prevented rival chip suppliers from competing with Qualcomm to supply Apple's chip demand." *Id.* The plaintiffs sought injunctive and monetary relief under Section 1 (restraint of trade) and Section 2 (monopolization) of the Sherman Act, as well as California's Cartwright Act and Unfair Competition Law. *Id.*

The plaintiffs sought, and the district court certified, an indirect purchaser class under Rule 23(b)(2) and (b)(3) consisting of consumers who purchased 3G and LTE cell phones for their own use. *Id.* at *3-4. In addition to Rule 23's other requirements, the district court concluded that common questions predominate overall and for antitrust violation, antitrust impact, and damages. *Id.* at *3.

The district court also concluded that the plaintiffs could seek damages on behalf of a nationwide class under California's Cartwright Act, applying California's three-step governmental interest test to determine whether any other state's law should apply. *Id.* The district court determined that non-repealer states have materially different law because they do not permit indirect purchaser claims, but they likewise "have no interest in applying their laws here because non-repealer laws disadvantage resident consumers and are not intended to protect out-of-state businesses." *Id.* The district court also certified an injunctive relief class under Rule 23(b)(2), concluding that Qualcomm's allegedly anticompetitive conduct generally applied to the whole class. *Id.* at *4.

The class as certified was expected to include between 232.8 and 250 million people, and the "lower bound" of damages would be $4.84 billion. *Id.* at *3. Qualcomm sought interlocutory review under Rule 23(f), which the Ninth Circuit granted. The appellate court noted in its decision to grant the interlocutory appeal that it issued the *FTC v. Qualcomm* decision after this case was submitted, so it directed the parties to file supplemental briefs to address the effects of that decision. *Id.* at *4.

Ninth Circuit Vacates the Class Certification Order and Remands for Reconsideration

Upon review, the Ninth Circuit concluded that the district court had committed reversible error in certifying the Rule 23(b)(2) and (b)(3) classes.

The Ninth Circuit concluded that the district court failed to properly apply California's choice of law analysis, and found that common issues of law did not predominate as required for a Rule 23(b)(3) to be certified. When a plaintiff brings state law claims, federal courts apply the choice of law of the forum state—California here—and the Ninth Circuit reiterated that the plaintiffs bore the initial burden of establishing that applying California law is

constitutional. *Id.* at *18-19. Under Ninth Circuit precedent, "California law cannot apply to class claims if the interests of other states outweigh California's interest." *Id.* at *6; *see also Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012). The Ninth Circuit applied *Mazza*, where the Ninth Circuit established a three-step governmental interest test, which looks at (1) whether there is a difference in the law from each relevant state on the issues present; (2) if there is a difference, whether a true conflict exists between the individual interests for each state; and (3) if there is a true conflict, which state's interest would be most impaired if its policy were subordinated (the most impaired being the state whose law should then apply). *Stromberg*, at *6.

As an initial step, the Ninth Circuit noted that the district court had correctly concluded that "California has a constitutionally sufficient aggregation of contacts to the claims of each class member" because Qualcomm's primary place of business is in California, the class includes California residents, and Qualcomm made relevant business decisions in California. *Id.* But the Court agreed with Qualcomm that the district court misapplied the three-step governmental interest test, because:

- **The district court failed to address material differences between the Cartwright Act and antitrust laws of other states**: The Ninth Circuit noted that there is no dispute that material differences exist between California antitrust law and the antitrust laws of other states, most significantly the non-repealer states. *Id*. But the Court also concluded that the district court erred in overlooking differences *among* repealer states. The specifics of the repeal, who can sue for damages, and the amount or type of damages varies between repealer states, and the district court's failure to address these differences did not fulfill the first prong. *Id*.
- **The district court erred in concluding that other states have no interest in applying their laws to the current dispute**: On the second prong, the Ninth Circuit noted that it "has not yet addressed California choice of law analysis in the antitrust context." at *7. But the Court applied prior decisions in the tort context in *Mazza* and the labor context in *Senne v. Kan. City Royals Baseball Corp.*, 934 F.3d 918 (9th Cir. 2019). In both cases, the Ninth Circuit considered the importance of preserving the federal system under which states can make their own decisions about permissible conduct within their borders. *Id.* at *7-8.

Applying the logic of those cases, the Ninth Circuit found that "there is no basis for concluding that only California has an interest." *Id.* at *9. Non-repealer states have an interest in both harm to resident consumers and harm to competition and business within their borders. And non-repealer states should be permitted to make policy choices about what damages recovery is available to residents within their borders, including a bar on indirect purchaser recovery. Moreover, states have a real interest as the "place of the wrong." *Id.* at *10. In failing to account for these interests, the district court committed reversible error.

- **The district court failed to determine which states' interests would be most impaired**: Finally, because the district court incorrectly held that only California had an interest in the current dispute, it committed reversible error by not determining which states' interests would be most impaired if their policies were subordinated to California's law. at *10-11. As the appellate court established in its discussion of the second prong, non-repealer states have a strong interest in applying their own laws to consumer purchases of cell phones in their states, so applying California law nationwide improperly impaired non-repealer state policy. *Id.* at *11. And even among repealer states there exist differences in law, so the Ninth Circuit concluded that "it is not clear that a single class of all repealer state Plaintiffs could be certified under Rule 23(b)(3)." *Id.* The Court indicated that the district court should address this question after "reconducting its choice of law analysis starting at step one." *Id.*

The Ninth Circuit also vacated the Rule 23(b)(2) class in light of the* FTC v. Qualcomm *decision issued after the class certification order, and did not reach the merits of Qualcomm's cohesiveness argument. Qualcomm argued on appeal that the *FTC* decision "bars Plaintiffs from showing, based on their liability theories, that Qualcomm's conduct harmed competition in the relevant markets." *Id.* The Ninth Circuit disagreed, noting that this is still an open question because neither party had "adequately addressed" how the decision would affect the class's ability to satisfy the Rule 23 class certification requirements. *Id.* But given the overlap between the two cases, the *FTC* decision "likely has preclusive effect" for many issues raised by the *Stromberg* plaintiffs. *Id.*

The Ninth Circuit ultimately concluded that the *FTC* decision "may well warrant dismissal of Plaintiffs' claims," but that question was not before the appellate court on the interlocutory appeal from the class certification order. *Id.* at *12. The appellate court thus vacated the Rule 23(b)(2) class in light of the *FTC* decision and vacated the Rule 23(b)(3)

class based on the district court's erroneous application of choice of law analysis. *Id.* The Ninth Circuit instructed that the district court should first determine if the *FTC* decision "defeats the class on Rule 23(a) grounds" and only if the class survives that analysis should the district court determine the effect of the *FTC* decision and a correct choice of law analysis. *Id.*

9 Min Read

Authors

Jeffrey J. Amato

Dana Cook-Milligan

Related Locations

Chicago | New York | San Francisco

Related Topics

Antitrust Intelligence | Technology Antitrust | Private Civil Antitrust Litigation

Related Capabilities

Antitrust/Competition | Technology Antitrust | Class Actions & Group Litigation | Patent Litigation | Technology, Media & Telecommunications

Related Regions

North America

Related Professionals

Jeffrey J. Amato

Dana Cook-Milligan

This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.

© 2024 Winston & Strawn LLP.