CA No. 19-15159

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE QUALCOMM ANTITRUST LITIGATION

KAREN STROMBERG, *et al.*,
Plaintiffs-Appellees,
v.

QUALCOMM INCORPORATED,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California
No. 5:17-MD-02773-LHK
(Honorable Lucy H. Koh)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT, URGING REVERSAL

Richard A. Samp
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

June 10, 2019

CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1, Washington Legal Foundation (WLF) states that it is a non-profit corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation, nor has it issued any stock owned by a publicly held company.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 7

ARGUMENT 13

I. Choice-of-Law Rules Bar Nationwide Application of California Antitrust Law to All Class Members 13

A. Each State Has a Strong Interest in Applying Its Own Consumer Protection Laws to Product Sales Occurring within the State 14

B. The *Illinois Brick* Rule Serves a Far Broader Array of Interests than Those Recognized by the District Court 19

C. Applying California Law Nationwide Would Impair the Interests of Other States More Than California's Interests Would Be Impaired if the Court Applied the *Illinois Brick* Rule to Cellphone Sales in *Illinois Brick* States 21

II. RULE 23 CLASS CERTIFICATION IS IMPROPER BECAUSE ADJUDICATION ON A NATIONWIDE BASIS IS NOT MANAGEABLE 25

A. Providing Direct Notice to Class Members Is Feasible and Thus Mandated, but Appellees Abjure It As Too Costly 25

B. The District Court Abused Its Discretion by Certifying a Class Without Any Plan for Handling a Case of Such Massive Scope . . . 28

CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

Cases:

Amchem Products, Inc. v. Windsor,
521 U.S. 591 (1997) 28
Apple Inc. v. Pepper,
139 S. Ct. 1514 (2019) 3, 8, 19
Bonaparte v. Tax Court,
104 U.S. 592 (1881) 24
Coca Cola Co. v. Harmar Bottling Co.,
218 S.W. 3d 671 (Tex. 2007) 24
Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (174) 10, 11, 26
Hurtado v. Superior Court,
11 Cal. 3d 574 (1974) 18
Illinois Brick Co. v. Illinois,
431 U.S. 720 (1977) . . . . *passim*
In re Asacol Antitrust Litig.,
908 F.3d 42 (1st Cir. 2018) 1
In re Bridgestone/Firestone, Inc.,
288 F.3d 1012 (7th Cir. 2002) 25
In re Carrier IQ, Inc., Consumer Privacy Litig.,
No. 12-md-02330, 2016 WL 4474366 (N.D.Cal., Aug. 25, 2016) 27
In re Hotel Telephone Charges,
500 F.2d 6 (9th Cir. 1974) 28, 29
In re Hyundai and Kia Fuel Economy Litig.,
___ F.3d ___, 2019 WL 2377831 (9th Cir., June 6, 2019) (*en banc*) 23
Kansas v. Utilicorp United, Inc.,
497 U.S. 199 (1990) 4, 15, 20
Kearney v. Salomon Smith Barney, Inc.
39 Cal. 4th 95 (2006) 13
Mazza v. American Honda Motor Co.,
666 F.3d 581 (2012) 7, 8, 14, 15, 16,
17, 18, 22, 23
McCann v Foster Wheeler LLC,
48 Cal. 4th 68 (2010) 13, 17, 18, 23

Page(s)

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 26
Mousouris v. Microsoft Corp.,
No. 18-35791 (9th Cir., dec. pending) 1
Phillips Petroleum v. Shutts,
472 U.S. 797 (1985) 26, 27
Schneider v. City of New York,
371 U.S. 208 (1962) 26
Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) 1, 30

Statutes and Rules:

Clayton Act, Section 4, 15 U.S.C. § 15(a) 4

Rules Enabling Act, 28 U.S. C. § 2072(b) 30

California Unfair Competition Law (UCL),
Cal. Bus. and Prof. Code §§ 17200 *et seq.* 5

Cartwright Act, Cal. Bus. and Prof. Code §§ 16700 *et seq.* *5*

Fed.R.Civ.P. 23 . . . . *passim*

Fed.R.Civ.P. 23(b)(3) 6, 10, 15, 25, 26

Fed.R.Civ.P. 23(f) 10

Fed.R.Civ.P. 29(a)(4)(E) 1

Page(s)

Miscellaneous:

FTC, *Office of Claims and Refunds Annual Report 2017*, *available at* https://www.ftc.gov/reports/bureau-consumer-protection-consumer-refunds-program-consumer-refunds-effected-July-2016 31

Alison Frankel, *A Smoking Gun in Debate over Consumer Class Actions*?, Reuters (May 9, 2014) 27

Joanna Shepherd, *An Empirical Study of No-Injury Class Actions*, Emory Legal Studies Research Paper No. 16-402 (Feb. 1, 2016) 27

INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center headquartered in Washington, DC, with supporters in all 50 States, including many in California.[1] WLF promotes and defends free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF has frequently appeared as *amicus curiae* in this and other federal courts to oppose certification of classes in putative class actions when the prerequisites set forth in Rule 23 of the Federal Rules of Civil Procedure have not been satisfied. *See, e.g., Mousouris v. Microsoft Corp.*, No. 18-35791 (9th Cir., dec. pending); *In re Asacol Antitrust Litig.*, 908 F.3d 42 (1st Cir. 2018); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

The district court certified a nationwide class of 250 million separate cellphone purchasers, each of whom allegedly paid several dollars more for their phones due to Appellant Qualcomm, Inc.'s allegedly anticompetitive conduct. None of the members of the plaintiff class purchased anything directly from Qualcomm, which neither manufactures nor sells cellphones. The court's holding that California law should be applied to the claims of *all* class members—even

---

[1] Under Fed.R.App.P. 29(a)(4)(E), WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief. All parties have consented to the filing of this brief.

those who purchased their cellphones in States with antitrust law that directly conflicts with California law—facilitated its determination that common issues of fact and law predominated over individual issues.

WLF is concerned that this holding is based on a fundamental misunderstanding of California choice-of-law rules. Both this Court and the California Supreme Court have long understood that each of the 50 States has a strong interest in applying its own consumer protection laws to purchases made by its residents within its borders. Federal law as well as the laws of 22 States bar indirect purchasers (a category that includes all class members here) from asserting claims against alleged antitrust violators. The district court's determination that those States have no interest in applying that law to cellphone purchases within their borders runs roughshod over basic federalism principles.

WLF is also concerned by the district court's unsupported finding that this 250 million-member class is manageable. The court never explained how it expects those class members to be notified about these proceedings. Appellees say they intend to rely on notice-by-publication, which satisfies neither due process nor Rule 23 requirements when, as here, the identity of so many class members is readily ascertainable. Nor is it realistic that this case could ever be tried in a single lifetime, given the many different cellphone products and methods of sale at issue.

WLF is insufficiently familiar with the district court record to express a view on the first issue raised by Qualcomm in this appeal: whether the district court abused its discretion in finding Rule 23(b)(3) predominance and Rule 23(b)(2) cohesiveness with respect to antitrust impact. Instead, this brief focuses on the other two issues: the propriety of applying California's antitrust law to all 50 States, and whether the certified class is manageable.

STATEMENT OF THE CASE

The facts of this case are set out in detail in Qualcomm's brief. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

The U.S. Supreme Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), established a "bright-line rule" governing private enforcement of federal antitrust law, "grounded on the belief that simplified administration improves antitrust enforcement." *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1522 (2019) (citations omitted). Under that rule, an antitrust defendant is not entitled to assert a "pass on" defense—that is, a reduction in damages based on a claim that the plaintiffs passed on some or all of the defendant's overcharges to those further down the sales chain. *Illinois Brick* also held that indirect purchasers (*i.e.*, those lacking any direct relationship with the antitrust violator but who claim that the

overcharges were passed on to them) do not suffer injury "by reason of" an antitrust violation within the meaning of Section 4 of the Clayton Act, 15 U.S.C. § 15(a), and thus lack standing to sue for damages under federal antitrust law. 431 U.S. at 736-47. As the Court later explained its decision, "We decided that, because Illinois Brick [the defendant] could not use a pass-on defense in an action by direct purchasers, it would risk multiple liability to allow suits by indirect purchasers." *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 207 (1990).

All 50 States enforce their own antitrust laws. They are closely divided on whether private enforcement of their laws should follow the *Illinois Brick* model. Twenty-two States have explicitly adopted *Illinois Brick*; 26 others (including California) have adopted "*Illinois Brick*-repealer laws" that authorize suits for damages by indirect purchasers, and require courts to allocate damage awards among parties within the sales chain by determining which parties actually absorbed the defendant's overcharges.

The named plaintiffs here are indirect purchasers; they have no direct sales relationship with Qualcomm. They allege that Qualcomm engaged in anti-competitive practices that caused original equipment manufacturers of cellphones (OEMs) to pay inflated royalties to Qualcomm to license certain Qualcomm patents. They further allege that as a result of those inflated royalties, they paid

more to purchase cellphones than they would have paid had Qualcomm charged reasonable royalties. They seek damages under California's antitrust statute, the Cartwright Act, Cal. Bus. and Prof. Code §§ 16700 *et seq.*; and the California Unfair Competition Law (UCL), Cal. Bus. and Prof. Code §§ 17200 *et seq.*[2] They seek to represent a class consisting of all cellphone purchasers nationwide since February 2011 and assert that California law should apply to the claims of all class members, even those who purchased cellphones in one of the 22 States whose antitrust laws adopt the *Illinois Brick* direct-purchaser rule.

On September 27, 2018, the district court issued an Order granting in full Appellees' motion to certify a nationwide class. 1ER1-66. The Court explicitly rejected Qualcomm's claim that California law may not be applied to the claims of cellphone purchasers residing in the 22 States that follow *Illinois Brick*. 1ER51-57. The court stated that there are "material differences" between California law and the antitrust laws of those 22 States, conceding that the damages claims of class members from those States could not proceed "at all" if their claims were governed by the antitrust law of their home States. 1ER54.

But the court concluded that California choice-of-law rules required

---

[2] All parties agree that because the named plaintiffs are not direct purchasers, *Illinois Brick* prevents them from seeking damages under federal antitrust law.

application of California law to their claims because the 22 States "have no interest in disallowing the suit to proceed against Qualcomm." 1ER55. It reasoned: (1) the *Illinois Brick* rule is designed solely to protect resident defendants from excessive financial burdens; (2) applying the rule here does not serve that purpose because Qualcomm is not headquartered in any one of those 22 States; and (3) the 22 States have no interest in denying compensation to their own citizens for injuries allegedly caused by an out-of-state defendant's anticompetitive conduct. *Ibid.* Based on that conclusion, the court ruled that it need not determine whether California's interest in applying its own law outweighed other States' interests in applying their laws. 1ER 57.

The district court also held that Appellees satisfied Rule 23(b)(3)'s "superiority" requirement, rejecting Qualcomm's assertion that a 250-million-member class involving multiple products would be unmanageable. 1ER62-63. To support its conclusion that the case could be tried fairly and efficiently, the court cited cases (none of which went to trial) in which this Court approved certification of classes of up to 100 million members. It added (without citing any specifics), "The Court also expects that Plaintiffs will be able to propose efficient means to calculate and distribute damages to class members." 1ER63. The Order was silent on how the court expected Appellees to satisfy Rule 23 notification

requirements, stating only, "Plaintiffs have contacted three claims administrators who have confirmed that they will be able to reach a minimum of 70% of the estimated 232.8 million to 250 million class members using methods approved in other similarly large class actions." *Ibid.*

SUMMARY OF ARGUMENT

The district court's certification of a nationwide class hinged on its determination that California law should be applied to the claims of all class members. That determination was based on a fundamental misunderstanding of California choice-of-law rules.

The court conceded that there are "material differences" between California law and the antitrust laws of 22 States, and that the damages claims of class members from those States would be dismissed if their claims were governed by the antitrust law of their home States. Yet the court ruled that California law should be applied to all claims because those 22 States have "no interest" in applying their laws to the claims of their residents. That ruling directly conflicts with this Court's decision in *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (2012), which holds that "each state has a strong interest in applying its own consumer protection laws" to product sales occurring within the State. 666 F.3d at 592.

The district court based its “no interest” holding on its assertion that the *Illinois Brick* rule, as well as other state laws designed to limit businesses’ potential tort liability, are intended to protect only those businesses based in the State adopting such laws. 1ER55. *Mazza*, which overturned certification of a nationwide class of car buyers, expressly repudiated that assertion. It held that such “no interest” holdings err by failing to “recogniz[e] each state’s valid interest in shielding out-of-state businesses from what the state may consider to be excessive litigation.” 666 F.3d at 592-93.

Moreover, the district court failed to recognize that the *Illinois Brick* rule is not designed simply to limit potential antitrust liability but also serves other policy interests. As the Supreme Court recently explained, *Illinois Brick*’s bar on indirect-purchaser suits serves three purposes: “(1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants.” *Apple*, 139 S. Ct. at 1524. The Court determined that awarding all potential damages to direct purchasers would increase private enforcement of antitrust laws by increasing the incentives for direct purchasers to file antitrust claims. *Illinois Brick*, 431 U.S. at 745-46. It also determined that requiring an apportionment of damage awards among both direct and indirect purchasers “would add whole new dimensions of

complexity to treble-damages suits," complexity that would tax both courts and litigants. *Id.* at 737-41. Those policy rationales provide States adhering to *Illinois Brick* with additional interests in having their antitrust law applied to in-state sales.

California has *some* interest in applying its antitrust laws nationwide given that Qualcomm is a California-based company and that much of Qualcomm's allegedly anticompetitive conduct occurred in California. But California choice-of-law case law makes clear that California's interests are dwarfed by the interests of other States in applying their own, conflicting antitrust laws to product sales occurring within those States. Indeed, the district court cited no cases holding that, when a nonresident plaintiff claims injury based on his purchase of a product, California's interest in applying its laws to the sale is superior to the point-of-sale State's interest in applying its laws.

Applying the law of the State in which a putative class member purchased his cellphone is consistent with long-accepted federalism principles. California would have cause to complain if the courts of other States refused to apply California law to California residents' claims arising in California. Similar federalism-based concerns dictate application to this case of the antitrust law of the State in which cellphone sales occurred.

The class-certification order should also be reversed because Appellees

failed to demonstrate compliance with Rule 23(b)(3)'s superiority requirement. That requirement entails taking into account "the likely difficulties in managing a class action." Fed.R.Civ.P. 23(b)(3). The district court failed to conduct a meaningful manageability analysis; any such analysis reveals the utter impracticability of proceeding with the class action as proposed by Appellees.

First, Appellees have not proposed a constitutionally adequate means of providing class members with notice of the action. The Supreme Court squarely addressed notice requirements in the class action context in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). The Court held that under Rule 23, "[i]ndividual notice [of a pending Rule 23(b)(3) class action] must be sent to all class members whose names and addresses may be ascertained through a reasonable effort." 417 U.S. at 173. The names and addresses of vast numbers of cellphone purchasers are readily ascertainable from retailers and carriers, a fact that Appellees do not contest. Yet Appellees now concede that they do not intend to provide direct notice to *any* of the 250 million class members but instead intend to rely solely on "publication notice." Brief in Opposition to Rule 23(f) Petition ("Opp. Br.") at 20. Appellees' proposed notification method satisfies neither Rule 23 nor due-process requirements; notice-by-publication is inadequate where the names and addresses of class members are known. *Eisen*, 417 U.S. at 174.

Appellees contend that *Eisen* is outdated and that "the electronic tools available for class notice today far exceed those available in the 1980s." Opp. Br. 20. That contention is belied by all available evidence. Indeed, one recent study concluded that the median claims rate in publication-notice class actions is .023%, suggesting that vanishingly few class members ever learn of their lawsuits if they are not directly notified. Notice by publication may appropriately be used to supplement direct notification, particularly where addresses of some class members are unavailable. Appellees may be correct that it is cost-prohibitive to directly notify the 250 million members of this class; but if so, that strongly suggests that the class is unmanageable, not that the court should excuse compliance with Rule 23 notification requirements.

The class's unprecedented size and complexity also render adjudication of the suit unmanageable. A class of 250 million members is vastly larger than any previously certified class. Moreover, the claims of class members vary significantly. Those differences, all of which affect injury computations, include: the purchase prices of the cellphones; the brand and model purchased (*e.g.*, only some class members purchased a product containing a Qualcomm chip); the manner of purchase (*e.g.*, whether from a carrier, a manufacturer, or a retailer); whether other products or services were sold in conjunction with the cell phone;

and whether patent royalties were being paid to Qualcomm at the time of purchase. Whether differently situated class members actually suffered antitrust injury will require extensive litigation of each of these permutations. Even if liability is eventually established, calculating damages and processing claims would likely take decades.

Appellees only real response is to suggest that this gargantuan proceeding is superior to alternatives, because no individual cellphone purchaser could be expected to file an antitrust suit in which recovery would be limited to several dollars. But alternatives *are* available. Government agencies such as the Federal Trade Commission (FTC) routinely bring enforcement actions that seek restitution for injured consumers; indeed, the FTC has filed an action against Qualcomm that raises the very same antitrust claims asserted here.

ARGUMENT

I. CHOICE-OF-LAW RULES BAR NATIONWIDE APPLICATION OF CALIFORNIA ANTITRUST LAW TO ALL CLASS MEMBERS

The district court properly determined that California choice-of-law rules govern which State's laws apply to the claims of each class member. The court accurately recited those rules but then misapplied them when it determined that other States have no interest in applying their laws to their residents' claims.

California applies the "governmental interest approach" to choice-of-law issues. *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68, 87 (2010). The California Supreme Court has described that three-step approach as follows:

> First, 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. Second, 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. Third, 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 applies the law of the state whose interest would be more impaired if its law were not applied.

McCann, 48 Cal. 4th at 87-88 (quoting *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 107-08 (2006)).

Under Step 1, the district court held that California antitrust law is

"material[ly] differen[t]" from the antitrust law of the 22 States that adhere to the *Illinois Brick* rule, noting that the choice between those laws "would 'spell the difference between the success or failure of a claim.'" 1ER54 (quoting *Mazza*, 666 F.3d at 591).

The court determined under Step 2, however, that no "true conflict" existed here because "while California has an interest in applying its law, other states have no interest in applying their law to the current dispute." *Ibid.* The court asserted that 22 States adopted the *Illinois Brick* rule to protect locally headquartered businesses "from excessive antitrust liability by limiting suits for damages to those brought by direct purchasers," and thus had no interest in applying *Illinois Brick* to claims filed against Qualcomm, which is headquartered in California. 1ER54-55. In light of its Step 2 determination, the court held that California antitrust law could be applied to all class members nationwide and that it need not engage in a Step 3 comparative-interest analysis. 1ER57.

A. Each State Has a Strong Interest in Applying Its Own Consumer Protection Laws to Product Sales Occurring within the State

The district court correctly understood that one purpose of the *Illinois Brick* rule is to shield businesses from excessive antitrust liability by "eliminat[ing]

multiple recoveries." 1ER55-56 (quoting *Utilicorp United*, 497 U.S. at 208).[3] But its conclusion that *Illinois Brick* States have no interest in extending a business-shielding rule to nonresident businesses directly conflicts with this Court's *Mazza* decision as well as California Supreme Court case law.

Mazza overturned certification of a nationwide class of consumers who alleged that a car manufacturer's advertisements misrepresented its car's braking system. A California federal district court held that California law should be applied to the claims of all class members, thereby overcoming Rule 23(b)(3) "predominance" difficulties. This Court reversed, finding that the consumer-protection laws of other States differed "materially" from California law (in that they were, in general, more business friendly) and that "each class member's consumer protection claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place." *Mazza*, 666 F.3d at 594.

The *Mazza* plaintiffs raised a "no interest" argument virtually identical to the one raised here by Appellees: noting that the car manufacturer was headquartered in California, they asserted that other States had little or no interest in applying

---

[3] Without the *Illinois Brick* rule, an antitrust defendant could be held liable for treble damages to a direct purchaser, and then be required in a second suit to pay damages for the very same injuries that the direct purchaser passed along (in the form of higher prices) to indirect purchasers further down the sales chain. *See Illinois Brick*, 431 U.S. at 731 n.11.

their business-friendly rules for the benefit of nonresident businesses and to the detriment of their own citizen-plaintiffs. *Mazza* rejected that assertion, stating that "every state has an interest in having its law applied to its resident claimants," and that "each state has a strong interest in applying its own consumer protection laws" to car sales occurring within the State. *Id.* at 591-92. The Court explained:

> In our federal system, states may permissibly differ on the extent to which they will tolerate a degree of lessened protection for consumers to create a more favorable business climate for the companies that the state seeks to attract to do business in the state. ... [T]he district court erred by discounting or not recognizing each state's valid interest in shielding out-of-state businesses from what the state may consider to be excessive litigation.

Id. at 592. Similarly, each of the 22 *Illinois Brick* States has a strong interest in applying its antitrust laws to cellphone sales occurring within the State and thereby maintaining a "favorable business climate" that will attract out-of-state businesses.

The district court's efforts to distinguish *Mazza* are unavailing. Relying on some unspecified differences between state antitrust laws and the state consumer protection laws at issue in *Mazza*, the court decided that the choice-of-law rule announced in *Mazza* ("every state has an interest in having its law applied to its resident claimants") is inapplicable here. 1ER56-57. But state antitrust laws in all 50 States are intended to protect resident consumers from anticompetitive business practices; the only difference between California antitrust law and the antitrust

laws of the 22 *Illinois Brick* States is that the latter strike a somewhat different "balance between protecting consumers and attracting foreign businesses," 666 F.3d at 592, than does California. Those 22 States have a strong interest in ensuring that the balance they have chosen applies to all sales transactions occurring within their borders.

In ascertaining California's choice-of-law rules, *Mazza* adhered closely to the California Supreme Court's 2010 *McCann* decision. *McCann* addressed whether California courts should apply California or Oklahoma law to a statute-of-repose dispute that arose in a product-liability suit filed by a California resident who, while living in Oklahoma, was exposed to asbestos in a boiler manufactured by the defendant, a nonresident of Oklahoma. The court held that Oklahoma had an interest in applying its statute of repose to activities occurring in Oklahoma for the benefit of the nonresident defendant, overturning an appeals court decision that rejected the defense:

> We conclude that the Court of Appeal did not accurately assess the interest of Oklahoma embodied in the statute of repose at issue here. When a state adopts a rule of law limiting liability for commercial activity conducted within a state in order to provide what the state perceives is fair treatment to and an appropriate incentive for, business enterprises, we believe that the state ordinarily has an interest in having that policy of limited liability applied to out-of-state companies that conduct business in the state, as well as to businesses incorporated or headquartered within the state.

McCann, 48 Cal. 4th at 91.

The district court's choice-of-law discussion includes no citation to *McCann*. The only California Supreme Court choice-of-law decision it cites, *Hurtado v. Superior Court*, 11 Cal. 3d 574 (1974), is wholly inapposite. 1ER55. *Hurtado* was a wrongful death action arising from a car accident *in California* in which the defendant was a California resident and the plaintiff's decedent was Mexican. The court unsurprisingly concluded that the California car accident was governed by California law and that the plaintiff's damages claim should not be limited by a Mexican law that imposed a cap on wrongful-death damages. 11 Cal. 3d at 581-82. Indeed, *McCann* explicitly held that *Hurtado*, an auto-accident case, has no bearing on whether another State has an interest in applying its laws to consumer transactions occurring within its own borders. *McCann*, 48 Cal. 4th at 93.

Nor can Appellees plausibly argue that each class plaintiff's cause of action arises in California (where Qualcomm allegedly engaged in its anticompetitive activities) rather than in the State in which she purchased her cellphone. As *Mazza* explains, "California considers the 'place of the wrong' to be the state where the last event necessary to make the actor liable occurred." 666 F.3d at 593 (citing *McCann*, 48 Cal. 4th at 94 n.12). In this case, the "last event" giving rise to

Qualcomm's alleged liability to each plaintiff was the purchase of a cellphone; the State where each sale occurred has a significant interest in applying its law to issues arising from that sale.

B. The *Illinois Brick* Rule Serves a Far Broader Array of Interests than Those Recognized by the District Court

The district court's choice-of-law error was compounded by its failure to recognize that the *Illinois Brick* rule is not designed simply to limit potential antitrust liability but also serves other policy interests. In addition to eliminating duplicative damages against antitrust defendants, *Illinois Brick*'s bar on indirect-purchaser suits serves two other purposes: "facilitating more effective enforcement of antitrust laws [and] avoiding complicated damages calculations." *Apple*, 139 S. Ct. at 1524. An *Illinois Brick* State's interest in applying its own laws to product sales occurring within the State is considerably strengthened by its interest in achieving those two additional purposes.

The Supreme Court concluded that "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws ... is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it." *Illinois Brick*, 431 U.S. at 745-46. The *Illinois Brick* rule is premised in

part on a concern that apportioning damage awards among all those in the sales chain might "reduce the incentive [for direct purchasers] to sue," *id.* at 745, while many indirect purchasers are unlikely to benefit under an apportionment rule because they "have such a small stake in the lawsuit that even if they were to recover as part of a class, only a small fraction would be likely to come forward to collect their damages." *Id.* at 747. The Court has rejected all efforts to create exceptions to the direct-purchaser rule based on evidence that, in some circumstances, indirect purchasers may have stronger incentives than direct purchasers to file antitrust claims. *Utilicorp United*, 497 U.S. at 216. The Court reasoned that the costs of such case-by-case line drawing would unduly complicate antitrust litigation. *Ibid.*

Indeed, this desire to avoid overly complicated and time-consuming litigation is the other principal rationale underlying *Illinois Brick*'s adoption of a direct-purchaser rule. The Supreme Court reasoned that calculating the damages incurred by a direct purchaser (the amount by which the defendant's anticompetitive conduct increased the prices paid by the direct purchaser) would be a relatively straightforward exercise. In contrast, attempting to calculate damages incurred by indirect purchasers "would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness." 431 U.S. at

737. The Court concluded that allowing indirect-purchaser suits would create "massive multiparty litigations involving many levels of distribution"; it was unwilling to accept "the burdens that such [litigation] would impose on the effective enforcement of the antitrust laws." *Id.* at 740-41.

Twenty-two States have adopted the *Illinois Brick* rule, thereby signaling their acceptance of the rule's three rationales. The district court erred by altogether failing to consider two of those three rationales. Each of those States has a strong interest in having antitrust claims arising in connection with consumer sales in the State adjudicated under rules that (in the State's considered judgment) will encourage vigorous antitrust enforcement and will result in speedy and simplified proceedings.

C. Applying California Law Nationwide Would Impair the Interests of Other States More Than California's Interests Would Be Impaired if the Court Applied the *Illinois Brick* Rule to Cellphone Sales in *Illinois Brick* States

Because the district court (erroneously) determined that the 22 *Illinois Brick* States "have no interest in disallowing the suit to proceed against Qualcomm," 1ER55, it held that it "need not address" Step 3 of California's choice- of-law rules: "which state's interest would be most impaired if its policy were subordinated to the law of another state." 1ER57. This Court could choose simply

to vacate the class-certification order and remand with directions that the district court undertake the Step 3 analysis in the first instance. But because the balance so clearly favors the 22 *Illinois Brick* States, WLF urges the Court reach that issue now.

California has *some* interest in applying its antitrust laws nationwide given that Qualcomm is a California-based company and that much of Qualcomm's allegedly anticompetitive conduct occurred in California. But both *Mazza* and *McCann* make clear that California's interests are dwarfed by the interests of other States in applying their own, conflicting laws to product sales within those States.

As noted above, *Mazza* held explicitly that "each state has a strong interest in applying its own consumer protection laws" to sales transactions occurring within the State. 666 F.3d at 592. In contrast, the Court dismissed as "attenuated" California's interest in applying its law to residents of other States with respect to consumer sales within those States. *Id.* at 594. Although recognizing that (as is also true of Qualcomm) the defendant car manufacturer was headquartered in California and thus that California had some interest in regulating the defendant's conduct, the Court concluded under Step 3 that "each class member's consumer protection claim should be governed by the consumer protection laws of the

jurisdiction in which the transaction took place." *Ibid.*[4]

McCann, after undertaking a Step 3 "comparative impairment" analysis, chose to apply Oklahoma law over conflicting California law for similar reasons. 48 Cal. 4th at 96-102. The California Supreme Court noted that "California choice-of-law cases ... continue to recognize that a jurisdiction ordinarily has the predominant interest in regulating conduct that occurs within its borders," *id.* at 97-98, and that "generally ... when the law of the other state limits or denies liability for the conduct engaged in by the defendant in its territory, that state's interest is preeminent." *Id.* at 101. It held that California's interests "must be subordinated because of this state's diminished authority over activity that occurs in another state." *Id*. at 101. The court applied the law of Oklahoma (the State where the defendant exposed the plaintiff to asbestos) even though the plaintiff later became a resident of California, where his asbestos-related disease was diagnosed. *Id.* at 102.

As *Mazza* recognized, deferring to the consumer-protection laws of the State in which the product sale occurred "recognizes the importance of our most basic concepts of federalism." 666 F.3d at 593. Just as California courts recognize the

---

[4] The Court last week affirmed *Mazza*'s analysis of California choice-of-law rules. *In re Hyundai and Kia Fuel Economy Litig.*, 2019 WL 2376831, at * 10 (9th Cir., June 6, 2019) (*en banc*).

State's right to regulate the in-state transactions of California consumers without interference with the laws of other States, principles of comity suggest that California should be respectful of other States' similar rights.

A recent Texas Supreme Court decision, *Coca Cola Co. v. Harmar Bottling Co*, 218 S.W.3d 671 (Tex. 2007), is illustrative. The court held that the plaintiffs' complaints of anti-competitive injury occurring in neighboring States were not actionable under Texas antitrust laws in the absence of evidence of adverse effects on Texas commerce. In explaining its decision not to provide a cause of action for out-of-state injuries, the court explained, "A principle of federalism is that '[n]o State can legislate except with reference to its own jurisdiction.'" 218 S.W.3d at 680 (quoting *Bonaparte v. Tax Court*, 104 U.S. 592 (1881)). The court added:

> It is an especially sensitive matter for a jurisdiction to extend its laws governing economic competition beyond its borders. Such laws necessarily reflect fundamental policy choices that the people of one jurisdiction should not impose on the people of another. . . . [W]ithin our federal system one may ask: why should Texas law supplant Arkansas, Louisiana, or Oklahoma law about how best to protect consumers from anti-competitive conduct and injury in those states? Or to put the shoe on the other foot, *why should another state's law supplant Texas law about how best to protect consumers from anti-competitive conduct in Texas?* There is no good answer.

Id. at 680-81 (emphasis added).

Nor can a decision to override the law of the jurisdiction in which a

consumer sale took place be justified by supposed efficiencies derived from adopting a single nationwide rule. Judge Easterbrook dubbed that justification the "central-planner model" and observed:

> [I]t is hard to adopt the central-planner model without violence not only to Rule 23 but also to principles of federalism. Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court.

In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 1020 (7th Cir. 2002).

II. RULE 23 CLASS CERTIFICATION IS IMPROPER BECAUSE ADJUDICATION ON A NATIONWIDE BASIS IS NOT MANAGEABLE

The class-certification order should be reversed for the additional reason that Appellees failed to demonstrate compliance with Rule 23(b)(3)'s superiority requirement. That requirement entails taking into account "the likely difficulties in managing a class action." Fed.R.Civ.P. 23(b)(3). The district court failed to conduct a meaningful manageability analysis; any such analysis reveals the utter impracticability of proceeding with the class action as proposed by Appellees.

A. Providing Direct Notice to Class Members Is Feasible and Thus Mandated, but Appellees Abjure It As Too Costly

The district court certified a class of 250 million cellphone purchasers; it is uncontested that the names and addresses of vast numbers of cellphone purchasers are readily ascertainable from retailers and carriers. Yet Appellees do not propose to

provide direct notice of this lawsuit to *any* absent class members; instead, they intend to rely solely on notice-by-publication. Certification of the class under those circumstances violates both due process and Rule 23; direct notice is required when, as here, contact information for class members is available.

Under Rule 23, "[i]ndividual notice [of a pending Rule 23(b)(3) class action] must be sent to all class members whose names and addresses may be ascertained through a reasonable effort." *Eisen*, 417 U.S. at 173. The Rule 23 individual-notice requirement is constitutionally mandated; due process requires notice "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). As the Court explained in *Eisen*, *Mullane* "held that publication notice could not satisfy due process where the names and addresses of the beneficiaries were known." 417 U.S. at 174. *See also Schneider v. City of New York*, 371 U.S. 208, 213 (1962) (describing notice-by-publication as "a poor and sometimes hopeless substitute" for more direct forms of notice and stating that its "justification is difficult at best").

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), confirmed that *Eisen*'s Rule 23 notice requirements for absent class plaintiffs are constitutionally mandated. Citing *Eisen* and *Mullane*, *Shutts* held that due process requires that notice to absent

class members "must be the best practicable." 472 U.S. 812.[5] For the many class members whose names and addresses are readily available, direct notice (either by U.S. Mail or perhaps email) is practicable and thus mandated.

Appellees contend that *Eisen* is outdated and that "the electronic tools available for class notice today far exceed those available in the 1980s." Opp. Br. 20. That contention is belied by all available evidence. Legal notices can now be placed on-line; but that does not make the notices any more likely to be read than were 1980s-era print notices. Indeed, one recent study concluded that the median claims rate in publication-notice class actions is .023%, suggesting that vanishingly few class members ever learn of their lawsuits if they are not directly notified. *In re Carrier IQ, Inc., Consumer Privacy Litig.*, No. 12-md-02330, 2016 WL 4474366, at *4 (N.D. Cal. Aug. 25, 2016) (citing analysis by well-respected claims administrator); Joanna Shepherd, *An Empirical Study of No-Injury Class Actions*, Emory Legal Studies Research Paper No. 16-402 (May 1, 2016); Alison Frankel, *A Smoking Gun in Debate over Consumer Class Actions?*, Reuters (May 9, 2014) (reporting that median claims rate in consumer cases with publication notice is "1 claim per 4,350 class members").

---

[5] *Shutts* also held that a defendant has standing to object to the inadequacy of notice to absent class members, given that they could choose not to be bound by an adverse verdict if they did not receive adequate notice and an opportunity to opt out of the class. 472 U.S. at 805.

Those claims rates are far lower than in cases in which notice is sent *directly* to class members.

Appellees may be correct that it is cost-prohibitive to directly notify the 250 million members of this class; but if so, that strongly suggests that the class is unmanageable, not that the court should excuse compliance with Rule 23 notification requirements. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("notice requirements may not be waived based on high cost"); *In re Hotel Telephone Charges*, 500 F.2d 86, 91 (9th Cir. 1974) (notice publication is an impermissible method of reducing class-action costs when contact information for class members is available, "thus requiring actual notice").

B. The District Court Abused Its Discretion by Certifying a Class Without Any Plan for Handling a Case of Such Massive Scope

The class's unprecedented size and complexity also renders adjudication of the suit unmanageable. A class of 250 million members is vastly larger than any previously certified class. Moreover, as explained in detail in Qualcomm's brief, the claims of class members vary significantly. For example, demonstrating that some class members suffered antitrust injury will be insufficient to demonstrate that other class members (who paid a different price for a different cellphone brand to a different category of seller) also suffered antitrust injury. Litigating all of

those permutations within a class so large will require more litigation resources than any previous American court proceeding.

Yet the district judge certified the class without providing any indication about how she contemplated keeping the trial within manageable limits. Failing to provide any plan for managing a case of this magnitude surely constitutes an abuse of discretion. As this Court has explained, in overturning a certified class involving several million plaintiffs and "involving a great variety of individual questions":

> It cannot be lightly overlooked that as a class gets larger it may transform a litigation into a gigantic burden on the Court's resources beyond its capacity to manage or effectively control. ... In light of the fact that the proposed class action is likely to consume decades of judicial time, the potential benefit to the class should be carefully weighed against the burden the actions would place upon the federal courts.

Hotel Telephone, 500 F.2d at 91.

The district court's order includes no indication that it "carefully weighed" the costs and benefits of bringing Appellees' claims to trial. Appellees contend they can establish liability and damages without the need to separately consider all the permutations identified by Qualcomm. But Qualcomm is entitled to introduce evidence disputing that contention; the huge number of class members and the wide variations among their claims means that any trial is likely to last for decades.

In summarily rejecting Qualcomm's unmanageability claim, the district court said, "The Court also expects that Plaintiffs will be able to propose efficient means to calculate and distribute damages to class members." 1ER63. That statement makes plain that the court has not yet considered whether an "efficient means" exists for either establishing *or contesting* liability and damages, particularly in light of Qualcomm's expressed intention to raise individualized defenses. Any district court authorization to a jury to render class-wide liability and damages determinations based on averaged overcharges and without permitting Qualcomm to raise all individualized defenses would run afoul of *Wal-Mart*, which held, "Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge, or modify any substantive rights,' 28 U.S.C. § 2072(b), a class cannot be certified on the premise that [the defendant in a class action] will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. at 367. And if Qualcomm is permitted to litigate all such defenses, the district court has failed to explain how a trial could be kept within manageable limits.

Appellees only real response is to suggest that this gargantuan proceeding is superior to alternatives, because no individual cellphone purchaser could be expected to file an antitrust suit in which recovery would be limited to several

dollars. But alternatives *are* available. Government agencies such as the Federal Trade Commission (FTC) routinely bring enforcement actions that seek restitution for injured consumers; indeed, the FTC has filed an action against Qualcomm that raises the very same antitrust claims asserted here.

Over the years, FTC enforcement actions have returned billions of dollars to American consumers. Just in the one-year period ending June 2017, the FTC directly refunded $320 million to consumers and supported programs administered by defendants that delivered more than $6 billion in consumer refunds. FTC, *Office of Claims and Refunds Annual Report 2017*, at 1.

Moreover, while individual consumers may lack sufficient financial incentives to file suit on their own, that is not true of companies that maintain extensive business contacts with Qualcomm. All consumers ultimately benefit when an antitrust lawsuit filed by others culminates in a judgment that eliminates anti-competitive business practices.

CONCLUSION

The Court should reverse the class-certification order.

Respectfully submitted,

/s/ Richard A. Samp
Richard A. Samp
Cory L. Andrews
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: June 10, 2019

CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* Washington Legal Foundation. Pursuant to Fed.R.App.P. 32 and Ninth Circuit Rule 32-1, I hereby certify:

1. This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief contains 6,950 words, excluding the portions exempted by Fed.R.App.P. 32(f).

2.This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because: this brief has been prepared in a proportionately spaced typeface using WordPerfect X5 Times New Roman.

/s/ Richard A. Samp
Richard A. Samp

Attorney for Washington Legal Foundation

Dated: June 10, 2019

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of June, 2019, I electronically filed the foregoing brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that service for all participants in the case that are registered CM/ECF users will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
Richard A. Samp