Antitrust, Vol. 26, No. 1, Fall 2011.

Clayworth v. Pfizer and the Curious Case of the Pass-On Defense

BY DANIELLE R. FOLEY AND MATTHEW D. TAGGART

JUST OVER A YEAR AGO, IN JULY 2010, the California Supreme Court held in *Clayworth v. Pfizer* that the pass-on defense does not apply to claims under California's antitrust statute, the Cartwright Act.[1] The decision drew great attention, not just because it involved a question of first impression,[2] but because, as explained in this article, the California Court created an exception to the rule that could have wide-ranging effects on the actual use of the pass-on defense and the scope of discovery available in multi-party complex antitrust suits brought under the Cartwright Act.

Although the California Court purported to follow persuasive federal precedent, it actually may have invited precisely the kind of complex damages allocation among direct and indirect purchasers that the U.S. Supreme Court sought to avoid by rejecting the pass-on defense more than thirty years ago.[3] Even so, as discussed below, the exception created by the California Supreme Court makes good sense in light of the realities of complex antitrust litigation involving multiple parties in a distribution chain.[4]

Hanover Shoe and the Rejection of the Pass-On Defense

Understanding *Clayworth* requires first revisiting the U.S. Supreme Court's 1968 decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[5] There, the Supreme Court held that defendants cannot avoid antitrust liability by claiming that direct purchaser plaintiffs suffered no injury as the result of having "passed on" the supracompetitive prices, or overcharges, to other downstream members of the distribution chain.[6] Instead, the Court ruled that overcharges are the appropriate measure of antitrust damages, and that with limited exceptions, a direct purchaser can recover the full amount of any overcharge regardless of any pass-on that may have occurred.

The Supreme Court justified its ruling on both economic and practical grounds. In terms of economics, the Court reasoned that even if a direct purchaser plaintiff passes on the overcharge through its own price increases, it still suffers injury—e.g., lost sales or lost profits.[7] In terms of practical considerations, the Court expressed concern that the pass-on defense would undermine judicial economy and reduce the incentives for injured parties to bring suit. For example, the majority indicated that requiring trial courts to inquire into secondary effects of price fixing, such as "hypothetical" alternative prices that allegedly would have been charged but for the overcharges, marginal profits, sales volume, and even costs per unit, would present "insurmountable" complexities best avoided. Similarly, the Court expressed concern that such a defense would undermine enforcement because the individual consumers to whom most overcharges are ultimately passed on have neither the resources nor the inclination to pursue class action litigation:

> These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them.[8]

At the same time, the *Hanover Shoe* Court recognized two exceptions under which defendants might assert the pass-on defense.[9] Under the "cost-plus" exception, a direct purchaser enters into a cost-plus pricing contract with an indirect purchaser before it begins paying the artificially inflated price to the seller. Under the ownership or control exception, the defendant owns or controls the direct purchaser, all but eliminating the risk that the latter will file a private action against its owner. Courts have also recognized a third exception, the co-conspirator exception, where the intermediary is a co-conspirator, and therefore "the defendants and the middlemen are viewed as a single entity—the conspiracy—from which the plaintiff is a direct purchaser."[10]

The same considerations that drove the *Hanover Shoe* decision played a prominent role in the *Clayworth* decision.

Clayworth Up Close

Clayworth presented the California Supreme Court with an issue of first impression: whether the pass-on defense is available in Cartwright Act cases.

Clayworth involved an action by a group of sixteen California pharmacies against a number of leading pharma-

Danielle R. Foley is a partner in the Washington, D.C. office and Matthew D. Taggart is a senior associate in the Los Angeles office of Venable LLP, where they specialize in antitrust litigation and complex class action matters. *The authors thank Venable associate Ryan M. Andrews for his important contributions to this article.*

ceutical manufacturers under section 1 of the Cartwright Act and California's Unfair Competition Law (UCL), alleging that they engaged in a conspiracy to fix prices of brand-name pharmaceuticals in the U.S. market, including in California.[11] The manufacturers raised pass-on as an affirmative defense, alleging that the pharmacies' claims were barred because they passed on the alleged overcharges to their customers and therefore did not suffer any injury.[12] The parties filed cross summary judgment motions on the pass-on defense. The plaintiffs argued that the defense was unavailable in light of *Hanover Shoe* and the legislative history of the Cartwright Act, as well as public policy. In contrast, the defendants argued that the pass-on defense was available under the plain language of the Act and foreclosed the plaintiffs' Cartwright Act claims.[13]

For purposes of deciding the summary judgment motions, the trial court assumed that the manufacturers had an agreement to fix prices on their products.[14] The trial court examined the evidence as to the supply chain and pricing and found that the pharmacies had passed on all of the manufacturers' overcharges to consumers and, as a result, had sustained no damages under the Cartwright Act. Accordingly, the trial court granted the defendants' summary judgment motion, holding that, as a matter of law, a defendant could reduce or eliminate its liability by submitting proof that the plaintiff had passed on the overcharges.[15] The court of appeals affirmed on statutory construction grounds, holding that the plain language of the Cartwright Act required proof of "damages sustained," which an indirect purchaser could not establish if it recouped its losses.[16]

The California Supreme Court reversed, and held that subject to certain exceptions, no pass-on defense is available.[17] The Court concluded that "under the Cartwright Act as under federal law [ ] a pass-on defense generally may not be asserted. Instead, in an antitrust price-fixing case, the presumptive measure of damages is the amount of the overcharge paid by the plaintiff."[18]

The California Supreme Court's decision was based upon its review of the language and legislative history of the Cartwright Act, as well as consideration of the policy goals underlying the Cartwright Act. Initially, the Court found both the language of the Cartwright Act provision on damages and its legislative history to be ambiguous and unclear as to whether the Legislature meant to permit a pass-on defense.[19] Likewise, finding nothing conclusive in the statutory language or the legislative history of the specific provision at issue, the Court then turned to an analysis of the California Legislature's amendment of related parts of the Cartwright Act.[20] Writing for the majority, Justice Werdegar observed that the Legislature's intent to follow *Hanover Shoe* was manifest in its response to both the Hart-Scott-Rodino Act of 1976 (HSR) and the U.S. Supreme Court's 1978 decision in *Illinois Brick*.

HSR amended the Clayton Act to provide for *parens patriae* suits by state attorneys general on behalf of indirect purchasers,[21] including consumers, to whom overcharges are typically passed on. Congress adopted the amendment

> out of concern that consumers, the indirect purchasers who typically bear the brunt of antitrust violations in the form of higher prices, had no existing effective redress because the small amounts of their injuries made individual suits impracticable, and consumer class actions had proven a disappointing vehicle for antitrust enforcement.[22]

To avoid the problem of duplicate recovery, HSR specifically excluded from *parens patriae* damages awards any amount that "duplicates amounts which have been awarded for the same injury."[23]

California's Legislature subsequently revised the Cartwright Act to incorporate the HSR amendments to the federal Clayton Act. It authorized the state attorney general to bring claims on behalf of indirect purchasers. It also added a new provision barring duplicative recovery, which stated, "The court shall exclude from the amount of monetary relief awarded in the action any amount of monetary relief . . . which duplicates amounts which have been awarded for the same injury."[24] Justice Werdegar concluded that this "provision was specifically designed to account for duplicative damages awards resulting from allowing indirect purchasers to recover damages when, under the *Hanover Shoe* no-pass-on defense rule, direct purchasers already might have been awarded those same damages."[25] Justice Werdegar interpreted this to mean that the California Legislature presumed that no pass-on defense would be available under the Cartwright Act.

The Court also pointed to the Legislature's adoption of California's *Illinois Brick* repealer statute. In response to the U.S. Supreme Court decision barring indirect purchaser actions under federal law, the California Legislature amended the Cartwright Act to allow an injured plaintiff to sue under the Act "regardless of whether such injured person dealt directly or indirectly with the defendant."[26] Viewing this amendment in conjunction with the HSR amendments, Justice Werdegar concluded that the Legislature intended to permit indirect purchasers and direct purchasers to sue under the Cartwright Act, regardless of any pass-on that may have occurred.

Similarly, Justice Werdegar concluded that barring a universal pass-on defense further supported the "broader legislative policy considerations" behind the Cartwright Act. As Justice Werdegar explained, the Cartwright Act's overarching policy goal of deterring antitrust violations trumps the possibility of a windfall to a private party.[27] This is exemplified by the provisions in the Act for double and treble damages for private plaintiffs.[28] Justice Werdegar further observed that permitting "defendants universally to assert a pass-on defense even in cases such as this that present no risk of duplicative recovery, would hamper enforcement by reducing incentives to sue and police antitrust violations."[29]

Finally, the *Clayworth* court was concerned that the "daunting" task of proving antitrust damages and apportioning them among all of the injured parties would further hamper

[T]he *Clayworth* Court made clear that in cases involving multiple layers of purchasers—or that might involve multiple layers of purchasers—trial courts will need to engage in an analysis of the actual harm and proper allocation of damages among the purported plaintiffs . . . .

antitrust enforcement. As Justice Werdegar stated, echoing Justice White's decision in *Hanover Shoe*, a universal pass-on defense "would plunge parties and courts into mini trials" to sort out the allocation of the overcharges and measure additional ramifications, such as lost sales, that may have resulted from the alleged antitrust violation.[30] Rejecting a universal pass-on defense would obviate the need for these mini-trials for all cases except for the "small universe of cases in which multiple levels of purchasers might sue," "renders the process of proving antitrust damages less daunting, and ultimately enhances enforcement."[31]

For all of these reasons, the California Supreme Court rejected a universal pass-on defense for actions brought under the Cartwright Act.

What Does *Clayworth* Really Mean for Indirect Purchaser Actions?

Taking a closer look at *Clayworth*, it is clear that the *Hanover Shoe* pass-on defense rule will function much differently in cases brought by indirect purchasers under the Cartwright Act than in direct purchaser-only actions brought under federal law.

For cases brought strictly under Section 1 of the Sherman Act, direct purchasers are the only parties in the supply chain entitled to collect damages. In contrast, actions seeking monetary relief under the Cartwright Act could involve both direct and indirect purchasers in the supply chain. In those cases, the action and the assessment of who suffered harm and how much harm they suffered will now be fundamentally different. This is because the *Clayworth* court's rejection of the pass-on defense does not apply to all cases brought under the Cartwright Act. Instead, the court set forth several "exceptions" to its "general[]" rule preventing consideration of pass-on. In addition to the "cost plus" and "ownership and control" exceptions to the pass-on defense articulated in *Hanover Shoe*, the *Clayworth* Court made clear that in cases involving multiple layers of purchasers—or that might involve multiple layers of purchasers—trial courts will need to engage in an analysis of the actual harm and proper allocation of damages among the purported plaintiffs—precisely the kind of damages allocation that Justice White deemed "insurmountable" in *Hanover Shoe*.[32] As the California Supreme Court explained:

> [I]n light of the *Illinois Brick* repealer statute, cases may arise where application of the *Hanover Shoe* rule raises the prospect of duplicative recovery. In instances where multiple levels of purchasers have sued, *or where a risk remains that they may sue*, trial courts and parties have at their disposal and may employ joinder, interpleader, consolidation and like procedural devices to bring all claimants before the court. In such cases, if damages must be allocated among the various levels of injured purchasers, the bar on consideration of pass-on evidence must be lifted; defendants may assert a pass-on defense as needed to avoid duplication in the recovery of damages.[33]

But what does this mean? How are trial courts to handle the assessment of damages among multiple layers of purchasers in actions under the Cartwright Act? Given that such indirect purchasers' claims are likely to proceed in federal court right alongside direct purchaser claims, how will the *Clayworth* decision affect the practical realities of litigating already complex antitrust actions?

The Practical Implications of the *Clayworth* Exception

The California Supreme Court did not explain exactly how courts are supposed to handle the application of the pass-on defense where multiple purchasers are involved. Instead, the Court explained that it did not need to reach that issue given that no wholesaler, consumer, or *parens patriae* suits had been filed that "might pose a risk of duplicative recovery, and the statute of limitations for the period at issue ha[d] long since expired."[34] However, the same will not be true in many—perhaps most—cases. What if the statute of limitations has not run or if other direct or indirect purchasers have also brought suit? How then will a court marshal all of the parties and determine who is injured and how to allocate damages?

The pharmaceutical distribution chain at issue in *Clayworth* provides a good illustration of how complicated, but necessary, application of the exception could become. Generally, in the pharmaceutical industry, numerous different parties will be involved in the distribution channel—and the parties will differ depending upon whether the product is a brand or generic drug.[35] For example, most retail pharmacies purchase brand drugs through wholesalers. In contrast, most retail pharmacies contract directly with the manufacturers for generic drugs, thereby cutting out—or "bypassing"—the wholesalers. The prices that retail pharmacies then charge consumers and third-party payers depends upon the various contractual arrangements into which the relevant insurance companies, Pharmacy Benefit Managers, employers, and/or employer benefit plans have entered. Depending upon the contractual arrangements, there will be groups among these end-payers that suffered no injury or for which an overcharge will not represent their true harm. As the *Clayworth* court recognized, if each of these parties can sue the manufacturers for overcharges under the Cartwright Act, then the risk of duplicative recovery will exist. Thus, for any one transaction for which there was allegedly an overcharge, the allocation of

the damages, and the measurement of which party was actually injured, will depend upon the particular contractual arrangements involved in that transaction.

Analyzing the contractual arrangements to determine whether and to what extent any of these particular entities has been injured will be a time-consuming process and will undoubtedly require the production of vast amounts of data, including data on "downstream" sales, profits, and confidential contractual terms for thousands, if not more, transactions. Even if all of the relevant purchasers are not joined in the action, this could result in extensive third-party discovery, as well. This is, in many ways, a shift from how federal courts have often viewed the discovery of such downstream data.[36] Nonetheless, analyzing and understanding this data will be a necessary exercise for any court tasked with determining if there is a risk of duplicative recovery, and if so, applying the *Clayworth* exception.

While some commentators have argued that the issue presented in *Clayworth* is an equitable issue that should be addressed in a post-trial proceeding, this view seems to miss a fundamental point.[37] Antitrust injury is an element of a Cartwright Act claim and is something that must be established before a plaintiff can even have standing to sue.[38] Thus, the analysis of the pass-on defense will likely be considered by a court early in an action and cannot simply be deferred until after a jury has found the defendants liable. As a result, discovery regarding the application of the exception to the pass-on defense is likely to become a routine part of discovery in cases where there are, or could be, multiple direct and indirect purchasers.

Furthermore, by allowing inquiry into the amount of pass-on each indirect purchaser experienced, *Clayworth* is also likely to have an impact on the certification of indirect purchaser class actions, particularly where those actions are brought in federal court alongside direct purchaser claims. Under Federal Rule 23, class certification is only appropriate for actions where class-wide impact can be demonstrated through "evidence that is common to the class rather than individual to its members."[39] Where class-wide injury cannot be shown through common evidence, class certification is inappropriate.[40] As explained above, analyzing the pass-on that each putative class member may have experienced will require a highly individualized inquiry into the particular class member's contractual arrangements. In fact, courts have recently denied class certification where the inquiry into whether or not class members actually suffered harm due to alleged anticompetitive conduct could not be done on a class-wide basis, but instead required an individualized inquiry.[41] Thus, opening the door to discovery regarding pass-on before consideration of class certification could likely lead to a decrease in the number of indirect purchaser actions brought under the Cartwright Act that are certified.

Finally, another question left open by *Clayworth* is who bears the burden of proof on pass-on. By stating that in those cases involving multiple layers of plaintiffs, "defendants may assert a pass-on defense as needed to avoid duplication in the recovery of damages," *Clayworth* suggests that the burden would lie with defendants.[42] However, this again seems to run counter to the fact that plaintiffs must establish antitrust injury as an element of their Cartwright claim. In such circumstances, it seems plausible that the plaintiffs will ultimately bear the burden of proving that they have been injured once the defendants establish that some amount of pass-on occurred. And, plaintiffs would be in the best position to have knowledge of their pricing and sales information to be able to show the extent, if any, they were able to recover their damages from downstream purchasers. This would seem particularly true where all of the relevant purchasers have been joined in the same proceedings.

While it has been a year since *Clayworth* was decided, these questions still remain unanswered.[43]

Conclusion

Despite purporting to simply apply *Hanover Shoe*'s rule and rationale to California's Cartwright Act, *Clayworth* actually opened the door to precisely the kind of complex damages allocation that *Hanover Shoe* sought to avoid. Whether the California Supreme Court appreciated the far-reaching implications of the exception it was creating when it handed down *Clayworth* is unclear. What is clear is that the exception could be broad enough to eclipse *Clayworth*'s "general[]" rule. ■

---

1 233 P.3d 1066, 1070 (Cal. 2010); *see* CAL. BUS. & PROF. CODE §§ 16720 et seq.

2 *Id.* at 1072 ("We granted review to address a significant issue of first impression: whether under the Cartwright Act an antitrust defendant can defeat liability by asserting a pass-on defense.").

3 *See* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

4 Because many other jurisdictions have similar *Illinois Brick* repealer statutes, it is possible that the *Clayworth* decision could impact the use of the pass-on defense outside California as well. Presently, twenty-five other states and the District of Columbia have repealer statutes on the books permitting either consumers or attorneys general to prosecute claims on behalf of indirect purchasers. *See* ALA. CODE § 6-5-60 (2011); ALASKA STAT. ANN. § 45.50.577 (2011) (authorizing parens patriae suits); ARK. CODE ANN. § 4-75-315 (West 2011) (authorizing parens patriae suits); COLO. REV. STAT. ANN. § 6-4-111 (2011) (authorizing parens patriae suits); D.C. CODE § 28-4509 (2011); HAW. REV. STAT. § 480-13 (West 2011); IDAHO CODE ANN. § 48-113 (West 2011); 740 ILL. COMP. STAT. ANN. 10/7 (West 2011) (authorizing parens patriae suits); KAN. STAT. ANN. § 50-161 (West 2011); ME. REV. STAT. ANN. tit. 10, § 1104 (West 2011); MD. CODE ANN., COM. LAW § 11-209 (West 2011) (authorizing parens patriae suits); MICH. COMP. LAWS ANN. § 445.778 (West 2011); MINN. STAT. ANN. § 325D.57 (West 2011); MISS. CODE ANN. § 75-21-9 (West 2003); NEB. REV. STAT. § 59-821 (2011); NEV. REV. STAT. ANN. 598A.160 (West 2011) (authorizing parens patriae suits); N.H. REV. STAT. ANN. §§ 656:4-a, II, 356:4-c, 356:11(II) (2011); N.M. STAT. ANN. § 57-1-3 (West 2011) (authorizing parens patriae suits); N.Y. GEN. BUS. LAW § 340 (McKinney 2011); N.D. Cent. Code § 51-08.1-08 (West 2011); OR. REV. STAT. ANN. § 646.780 (West 2011) (authorizing parens patriae suits); R.I. GEN. LAWS ANN. § 6-36-12 (West 2011) (authorizing parens patriae suits); S.D. CODIFIED LAWS § 37-1-33 (2011); VT. STAT. ANN. tit. 9, § 2465 (West 2011); W. VA. CODE ANN. §§ 142-9-1, 142-9-2 (West 2011); WIS. STAT. ANN. § 133.18 (West 2011). The courts of Massachusetts, Nebraska, Florida, New Jersey, and Vermont have held that

consumers may pursue indirect purchaser claims under state consumer protection statutes. *See* Ciardi v. F. Hoffmann-La Roche, Ltd., 762 N.E.2d 303, 311–12 (Mass. 2002); Arthur v. Microsoft Corp., 676 N.W.2d 29, 35–36 (Neb. 2004); Mack v. Bristol-Myers Squibb Co., 673 So. 2d 100, 110 (Fla. Dist. Ct. App. 1996). Courts in the non-repealer states of Arizona, Iowa, North Carolina, and Tennessee have ruled that indirect purchasers have standing to sue under state antitrust statutes. *See* Bunker's Glass Co. v. Pilkington PLC, 75 P.3d 99, 109 (Ariz. 2003); Comes v. Microsoft Corp., 646 N.W.2d 440, 449-50 (Iowa 2002); Hyde v. Abbott Labs., Inc., 473 S.E.2d 680, 687 (N.C. Ct. App. 1996); Sherwood v. Microsoft Corp., No. M2000-1850-COA-R9-CV, 2003 Tenn. Ct. App. LEXIS 539, at *80 (July 31, 2003). *See also* PROCEDURAL ASPECTS OF PRIVATE ANTITRUST LITIGATION, 1715 PLI/Corp 9, 38–39 (2009).

[5] 392 U.S. 481 (1968).

[6] *Id.* at 489.

[7] *Id.*

[8] *Id.* at 494.

[9] *Id.*

[10] ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 835 & n.135 (6th ed. 2007) (quoting Technical Learning Collective, Inc. v. Daimler-Benz Aktiengesellschaft, Trade Cas. (CCH) ¶ 63,612 at 77,253, 1980 WL 1943, at *9 (D. Md. Aug. 28, 1980)); *see also* Paper Sys. Inc. v. Nippon Paper Indus. Co., 281 F.3d 629, 632–34 (7th Cir. 2002); *but see* Christopher T. Casamassima & Tammy A. Tsoumas, *The* Illinois Brick *Wall: Standing Tall*, COMPETITION, Spring 2011, at 1, 73–78 (questioning vitality of the "co-conspirator" exception).

[11] 233 P.3d at 1070.

[12] *Id.* at 1071.

[13] *Id.*

[14] *Id.* at 1071 & n.4.

[15] *Id.* at 1071.

[16] *Id.* at 1071–72.

[17] *Id.* at 1070.

[18] *Id.* at 1086.

[19] *Id.* at 1075–76.

[20] *Id.* at 1078.

[21] *Id.* at 1078 n.14 ("'Parens patriae,' literally 'parent of the country,' refers traditionally to [the] role of [the] state as sovereign and guardian of persons under legal disability . . . . State attorney generals [*sic*] have *parens patriae* authority to bring actions on behalf of state residents for anti-trust offenses and to recover on their behalf.") (internal quotation marks omitted; alterations in original) (citing Pac. Gas & Elec. Co. v. Cnty. of Stanislaus, 947 P.2d 291 (Cal. 1997)).

[22] *Id.* at 1078.

[23] *Id.* at 1079 (quoting 15 U.S.C. § 15c(a)(1)); SEN. REP. NO. 94-803, 2d Sess. 44 (1976)). According to *Clayworth*, the amendment was intended to codify *In re W. Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973).

[24] CAL. BUS. & PROF. CODE § 16760.

[25] 233 P.3d at 1079–80.

[26] CAL. BUS. & PROF. CODE § 16750(a).

[27] 233 P.3d at 1083 ("The goal of deterring antitrust violation and concerns that a given private party may receive a windfall are not of equal weight.").

[28] *Id.*

[29] *Id.* at 1083–84.

[30] *Id.* at 1084.

[31] *Id.*

[32] 392 U.S. at 943.

[33] 233 P.3d at 1086 (emphasis added and citation omitted).

[34] *Id.* at 1086.

[35] For a detailed description of the distribution and payment structure of the pharmaceutical industry, see, e.g., The Health Strategies Consultancy LLC, *Follow the Pill: Understanding the U.S. Commercial Pharmaceutical Supply Chain* (Report Prepared for the Kaiser Family Foundation, Mar. 2005), *available at* http://www.kff.org/rxdrugs/upload/Follow-The-Pill-Understanding-the-U-S-Commercial-Pharmaceutical-Supply-Chain-Report.pdf.

[36] *See, e.g.*, Meijer, Inc. v. Abbott Labs., 251 F.R.D. 431 (N.D. Cal. 2008) (denying discovery of downstream data); *In re* Aspartame Antitrust Litig., No. 2:06-CV-1732-LDD, 2008 U.S. Dist. LEXIS 109670 (E.D. Pa. May 13, 2008) (same); *In re* K-Dur Antitrust Litig., No. 01-1652, MDL Docket No. 1419, 2007 U.S. Dist. LEXIS 96066 (D.N.J. Jan. 2, 2007) (same); *In re* Auto. Refinishing Paint Antitrust Litig., No. MDL 1426, 2006 U.S. Dist. LEXIS 34129 (E.D. Pa. May 26, 2006) (same); *but see* Valley Drug Co. v. Geneva Pharm., Inc., 350 F.3d 1181 (11th Cir. 2003) (permitting discovery of downstream data); *In re* Urethane Antitrust Litig., 237 F.R.D. 454 (D. Kan. 2006) (same).

[37] *See, e.g.*, Emilio E. Varanini, *Exiting the Fun House of Mirrors:* Clayworth v. Pfizer *and the Handling of Pass-On in Post-Trial Allocation Proceedings in Federal and State Court*, COMPETITION, Spring 2011, at 1, 28.

[38] *See, e.g.*, *In re* Dynamic Random Access Memory (DRAM) Antitrust Litig., 516 F. Supp. 2d 1072, 1087–89 (N.D. Cal. 2007).

[39] *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311–12 (3d Cir. 2008).

[40] *Id.*

[41] *See, e.g.*, Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithkline, PLC, No. 04-5898, 2010 U.S. Dist. LEXIS 105646 (E.D. Pa. Sept. 30, 2010); *In re* Flash Memory Antitrust Litig., No: C 07-0086 SBA, 2010 U.S. Dist. LEXIS 59491, at *31–34 (N.D. Cal. Mar. 31, 2010); *In re* K-Dur Antitrust Litig., No. 01-1652, 2008 U.S. Dist. LEXIS 71771 (D.N.J. Mar. 27, 2008).

[42] 233 P.3d at 1086 (emphasis added).

[43] Each of the twenty-two cases citing to *Clayworth* involve its related holding that indirect purchaser pharmacies had standing to sue under California's separate Unfair Competition Law where they sought injunctive relief, even though, by passing on the overcharges, they did not suffer damages and had no right to restitutionary relief. *See, e.g.*, Kwikset Corp. v. Superior Ct., 246 P.3d 877, 884 (Cal. 2011); Allergan, Inc. v. Athena Cosmetics, Inc., 640 F.3d 1377, 1378 (Fed. Cir. 2011). None has addressed the pass-on defense issue.