

[California Supreme Court Precludes Pass-On Defense in Clayton Act Claim and Finds Standing Under the UCL](#)

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The Supreme Court of California today issued its decision in [Clayworth v. Pfizer, Inc.](#), addressing issues raised under California's antitrust statute, [The Clayton Act](#), and [California's Unfair Competition Law](#) ("UCL"). Under each statute, the Court rejected defenses raised by the defendants and reversed a summary judgment issued in their favor.

An array of retail pharmacies brought suit against pharmaceutical manufacturers over the defendants' alleged price-fixing in the sale of brand-name pharmaceuticals in the United States, whereby the cost of such drugs sold in this country were artificially inflated. The manufacturers contended that the pharmacies were not damaged since they were able to pass along the forced overcharges to third party customers or their health insurance plans. In cross-motions for summary judgment, the manufacturers urged that the "pass-on defense" precluded the pharmacies' claims under both the Clayton Act and the UCL.

The trial court agreed with the manufacturers and held that the pass-on defense was available under the Clayton Act to show the pharmacies suffered no compensable damages and further demonstrated the lack of standing under the UCL since the pharmacies could not show any "lost money or property." After the Court of Appeal affirmed the ruling, the Supreme Court granted review.

The bulk of the Supreme Court's decision addressed the Cartwright Act claim. After discussing the statutory language of both federal (i.e., the Sherman Act) and state antitrust law, and the development of the pass-on defense under each, the Court found that, unlike federal law, the Cartwright Act provides that indirect purchasers as well as direct purchasers may sue for price fixing. As a consequence, with the exception of a few situations not applicable in the case before it, antitrust violators may not assert as a defense that any illegal overcharges had been passed on by a direct purchaser plaintiff to indirect purchasers, and therefore the full measure of the overcharge is recoverable by the direct purchaser.

In turning to the UCL claim, the issue was primarily one of standing. The Court concluded that the plaintiff pharmacies possessed standing even under the more restrictive standard established in 2004 by Proposition 64 since the pharmacies had "lost money or property as a result of the defendant's unfair business practices," with the lost money being the overcharges they had paid due to the price-fixing scheme. That the pharmacies may have passed along their increased costs to consumers and thus not be able to prove any right to restitution was beside the point, since the Court would not "conflate[] the issue of standing with the issue of the remedies to which a party may be entitled." The same rule applied as to the defense of mitigation of damages – it is not a basis to extinguish standing.

As for the issue of "remedies" under the UCL claim, and for which the pharmacies sought only restitution and injunctive relief, the Court avoided the issue of restitution and focused solely on

the issue of injunctive relief, finding the asserted lack of monetary loss to be no obstacle to the claim for injunctive relief. Since there was standing, there was the right to pursue injunctive relief, and there was no need for the plaintiffs to have a viable claim for restitution in order to seek injunctive relief. The Court found that there is nothing in the UCL that “conditions a court’s authority to order injunctive relief on the need in a given case to also order restitution” because the “two are wholly independent remedies.” Since a finding that the pharmacies could pursue injunctive relief was sufficient to preclude summary judgment for the manufacturers, the Court expressed “no opinion [as to] whether the pharmacies may eventually be entitled to restitution.”

Clayworth is but the first of several UCL cases pending before the California Supreme Court, as discussed in [one of our prior blogs](#).