High Court Clarifies Standards For Antitrust Claims

By **Boris Bershteyn, Paul Eckles, Karen Hoffman Lent, Matthew Martino and Danielle Menitove** (May 14, 2019, 4:57 PM EDT)

On May 13, 2019, in a 5-4 decision in Apple Inc. v. Pepper, the U.S. Supreme Court held that consumers of iPhone apps are direct purchasers of Apple and therefore have standing to sue the company for alleged monopolization of the aftermarket for iPhone apps in violation of Section 2 of the Sherman Act. The decision is notable because many had wondered whether the court would use this case as an opportunity to overrule Illinois Brick Co. v. Illinois,[1] or at least clarify how it should be applied.

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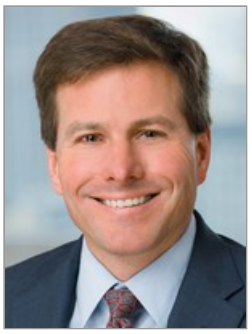

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The court chose the latter approach. Illinois Brick therefore continues to preclude indirect purchasers from bringing federal antitrust claims seeking damages. The court's decision sets forth a bright-line rule to determine whether a consumer is an indirect or direct purchaser: If there is an intermediary in the distribution chain between the plaintiff and the defendant, then the plaintiff is an indirect purchaser; if there is no intermediary, the plaintiff is a direct purchaser who can pursue an antitrust claim for damages. That test should be considered by all companies in structuring their business dealings to protect themselves from potential federal antitrust claims brought by customers in circumstances like Apple's, where they arguably do not set the price charged to the customer.

In a putative class action brought by purchasers of iPhone apps, the plaintiffs alleged that Apple monopolized the retail market for the sale of apps and unlawfully used its monopolistic power to charge consumers higher-than-competitive prices. Although Apple sells apps directly to iPhone owners through the App Store, Apple does not itself create apps. Instead, independent app developers create the apps and contract with Apple to make them available in the App Store. The app developers, rather than Apple, set the retail price for their apps, and Apple receives a 30% commission on all app sales.

In December 2013, the district court granted Apple's motion to dismiss, holding that the plaintiffs were not direct purchasers under Illinois Brick because app developers set the purchase price of apps. In January 2017, the U.S. Court of Appeals for the Ninth Circuit reversed, concluding that the plaintiffs were direct purchasers under Illinois Brick because they purchased apps directly from Apple.

Writing for the majority, Justice Brett Kavanaugh succinctly agreed with the Ninth Circuit, explaining: "The sole question presented at this early stage of the case is whether these consumers are proper plaintiffs for this kind of antitrust suit — in particular, our precedents ask, whether the consumers are 'direct purchasers' from Apple." Because "[i]t is undisputed that the iPhone owners bought the apps directly from Apple … under Illinois Brick, the iPhone owners were direct purchasers who may sue Apple for alleged monopolization."

The majority reasoned that its conclusion was consistent with the provision of the Clayton Act permitting "any person who [has] be[en] injured in his

business or property" to sue for treble damages. According to the court, that broad statutory language "readily covers consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer."

Matthew Martino

The majority also reasoned that its holding was fully consistent with Illinois Brick's bright-line rule authorizing suits by direct purchasers and barring suits by indirect purchasers. The court elaborated that the rule "means that indirect purchasers who are two or more steps removed from the antitrust violator in a distribution chain may not sue"; "[b]y contrast, direct purchasers — that is, those who are 'the immediate buyers from the alleged antitrust violators' — may sue." The court unambiguously concluded: "The absence of an intermediary" in the distribution chain between Apple and the consumer "is dispositive." Accordingly, the plaintiffs were deemed direct purchasers and thus could pursue their claim for damages under the antitrust laws.

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The majority rejected Apple's theory that Illinois Brick allows a consumer to sue only the party that sets the retail price, whether or not that party is in privity with the complaining party. Such a "who sets the price" theory was, according to the court, inconsistent with both the relevant statutory text and case precedent. With respect to the latter, the court noted that Apple's theory "elevate[d] form (what is the precise arrangement between manufacturers or suppliers and retailers?) over substance (is the consumer paying a higher price because of the monopolistic retailer's actions?)."

Numerous states submitted an amicus brief arguing that the court should overrule Illinois Brick and allow indirect purchaser suits. The majority expressly declined to resolve that issue in light of its ruling in favor of the plaintiffs.

Justice Neil Gorsuch authored the dissent, which Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito joined. The dissent described Illinois Brick as precluding a plaintiff from suing "a defendant for overcharging someone else who might (or might not) have passed on all (or some) of the overcharge to him," and viewed the majority's decision as allowing precisely such a "pass-on case [to] proceed."

The dissent criticized the majority for adopting a "revisionist version of Illinois Brick" and doing exactly what it purportedly sought to avoid: "exalt[ing] form over substance." "Instead of focusing on the traditional proximate cause question where the alleged overcharge is first (and thus surely) felt, the court's test turns on who happens to be in privity with whom." According to the dissent, the majority's test could be easily evaded by Apple amending its contracts to cause consumer payments to flow directly to app developers who subsequently would remit commissions to Apple.

The primary practical implication of the court's decision is that Illinois Brick remains an obstacle to federal antitrust claims for damages, but that its scope arguably has been limited and defendants have the potential to be liable to consumers for treble damages even if they do not set the price that consumers paid. As the dissent noted, the decision may cause companies to structure their business dealings in order to avoid directly selling to customers where the company does not have the power to set the price, thus insulating themselves from Sherman Act claims brought by those customers. That said, it may not have been possible for the court to preserve the Illinois Brick doctrine without giving businesses incentives to structure transactions in a manner designed to limit federal antitrust liability.

The court's decision leaves one significant issue unresolved. The majority declined to decide whether Illinois Brick's direct purchaser requirement extends to antitrust claims seeking injunctive relief. The dissent, by contrast, expressly stated that Illinois Brick should apply to such claims. Thus, whether injunctive relief claims are subject to Illinois Brick's direct purchaser requirement remains an open issue.

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[1] Illinois Brick Co. v. Illinois , 431 U.S. 720 (1977).
