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Will High Court allow consumers to pursue Apple monopoly claims?

Jody Coultas (Wolters Kluwer Law & Business) · Friday, November 30th, 2018

The Supreme Court heard oral arguments on November 26 in a suit alleging that the Ninth Circuit erred in holding that iPhone App Store customers were direct purchasers of those apps and had standing to sue Apple for the monopolization and attempted monopolization of the market for the sales of iPhone apps. The liberal justices appeared open to allowing the suit to move forward, questioning Apple's contention that consumers were not directly affected by Apple's 30-percent commission charge on every third-party iPhone application. Chief Justice Roberts and the conservative justices questioned whether *Illinois Brick* should be applied and whether this suit may open up Apple to suits from app developers and consumers. The Court will likely issue its decision before the end of its current term. The case is *Apple v. Pepper*, Dkt. 17-204.

A California district court dismissed a putative class action against Apple, under the *Illinois Brick* doctrine, on the ground that the consumer plaintiffs, who had alleged that Apple was monopolizing the distribution services for its iPhone apps, were necessarily seeking pass-through damages. The Ninth Circuit reversed, holding that the consumers could sue Apple as the distributor of the third-parties' iPhone apps. According to the Ninth Circuit, the key factor was the function that Apple served, not the manner in which its compensation was received. Apple was a distributor of the iPhone apps, the Ninth Circuit explained, selling them directly to purchasers through the App Store. Because Apple was a distributor, the plaintiffs had standing—as direct purchasers—to sue.

The petition asks "[w]hether consumers may sue for antitrust damages anyone who delivers goods to them, even where they seek damages based on prices set by third parties who would be the immediate victims of the alleged offense."

Apple's attorney, Daniel M. Wall, and U.S. Solicitor General Noel J. Francisco, as amicus curiae, focused their arguments on the prohibition of *Illinois Brick* on cases brought by indirect purchasers. Under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and its progeny, damages remedies in antitrust actions are restricted to the immediate victims or "direct purchasers" of anticompetitive conduct; they are not available to downstream parties or "indirect purchasers" that claim pass-through damages. Apple argued that the only damages theory was rooted in a 30 percent commission that allegedly causes those developers to increase app prices to consumers. Thus, the case was barred by *Illinois Brick* because the developers' pricing decisions are necessarily in the causal chain that links the commission to any consumer damages. Electronic marketplaces such as the Apple App Store create a new wrinkle for the *Illinois Brick* doctrine because marketplace sponsors interact with and deliver goods to consumers directly, but they do so

as agents, on behalf of third-party sellers.

David C. Frederick, attorney for the iPhone purchasers, argued that the plaintiffs easily satisfied *Illinois Brick*, and that Apple directed its monopolistic practices toward consumers. The consumers' attorney argued that Apple's theory that the case was based on the 30 percent commission was incorrect, and the case was about the monopoly of the app store and the harm caused to consumers by Apple's anticompetitive conduct.

Chief Justice Roberts was concerned that allowing the consumers to recover damages based on the 30 percent commission charge would open Apple up to suits from consumers and developers allegedly harmed by that same commission. "In other words, to the extent it might be said that Apple is a two-sided market, they're — they're subject to suit on both sides of the market for a single antitrust price increase that they're alleged to have imposed." However, David C. Frederick, argued that app developers were unlikely to sue Apple, and that such a case would not overlap.

Justice Gorsuch noted that *Illinois Brick* has been questioned by 31 states, and questioned the necessity of the doctrine. "You're asking us to extend *Illinois Brick*, admittedly, only because of a contractual formality and the economic realities are the same," said Justice Gorsuch. "But why should we build on *Illinois Brick*? Shouldn't we question *Illinois Brick*, perhaps, given the fact that so many states have done so. They've repealed it."

Justices Kagan, Breyer, and Sotomayor seemed to suggest that they were in favor of allowing the consumers' suit to continue based on their focus on the direct nature of the relationship between consumers and Apple. "I pick up my iPhone. I go to Apple's App Store. I pay Apple directly with the credit card information that I've supplied to Apple. From — from my perspective, I've just engaged in a one-step transaction with Apple," said Justice Kagan. Justice Sotomayor contended that this case differed greatly from *Illinois Brick* in that the relationship between Apple and its customers was a "closed loop" and that consumers are the "first purchasers." Justice Breyer also suggested that *Illinois Brick* was satisfied because consumers were the direct purchasers of the apps.

The argument transcript is available at: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-204_2b82.pdf.

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