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Illinois Brick Indirect Purchaser Rule No Bar to Monopolization Suit Brought by iPhone Users Against Apple over App Store Purchases

Jody Coultas (Wolters Kluwer Law & Business) · Wednesday, May 22nd, 2019

Last week, a divided U.S. Supreme Court allowed a monopolization suit filed by a class of iPhone owners to proceed against Apple after concluding that the consumers had standing as direct purchasers of apps. The case is *Apple Inc. v. Pepper*, No. 17–204.

iPhone owners are direct purchasers of iPhone applications sold in the Apple iStore and have standing to sue Apple for alleged monopolization of the iPhone app market, the U.S. Supreme Court held in a five-to-four decision on May 13. Writing for the majority, Justice Brett M. Kavanaugh stated that this was a straightforward conclusion based on the text of the Sherman Act and precedent. The Court agreed with the Ninth Circuit that *Illinois Brick* did not bar the suit, noting that the absence of an intermediary between Apple and the app purchasers was dispositive. Also, the Court rejected Apple's assertion that the upstream market structure was relevant in deciding whether a downstream consumer may sue a monopolistic retailer. The decision does not make any determination as to whether the underlying monopolization and conspiracy claims are viable.

Apple released the iPhone in 2007 and controls which applications can run on an iPhone's software. Apple develops some of the apps sold to iPhone users; however, many apps are created by third-party developers. Apple earns a 30-percent commission on each third-party app purchased for use on an iPhone. Apple prohibits app developers from selling iPhone apps through channels other the Apple "App Store" and discourages iPhone owners from downloading unapproved app with threats of voided warranties if they do so.

In 2011, four consumers filed a putative class action complaint alleging monopolization and attempted monopolization of the iPhone app market by Apple and an illegal conspiracy between Apple and AT&T Mobility to monopolize the voice and data services market for iPhones. Apple's motion to dismiss the entire complaint was denied. In September 2013, the plaintiffs filed a second amended consolidated complaint, alleging that they had purchased iPhone apps and thereby had sufficient injury under Article III to support their claims.

The district court ruled that, pursuant to *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the treble-damages remedy was not available to the consumers because the allegedly supracompetitive commission was borne by the developers; the consumers were indirect purchasers.

On appeal, the U.S. Court of Appeals in San Francisco ruled that Apple acted as a distributor of the apps, not a manufacturer or producer. Thus, the appellate court ruled, consumers who purchased iPhone applications from the company's App Store 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.

Apple petitioned the U.S. Supreme Court for certiorari, asking "[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."

In an amicus brief, the U.S. Solicitor General contended that the Ninth Circuit created a circuit conflict by misapplying *Illinois Brick* in ruling that the availability of treble damages remedy depended on the defendant's functional role. To the contrary, the brief asserted, pass-through theories are prohibited by *Illinois Brick* and related cases.

Immediate buyers. Because it was undisputed that the iPhone owners bought the apps directly from Apple, the Court concluded that under *Illinois Brick*, the iPhone owners were direct purchasers who may sue Apple for alleged monopolization. The bright-line rule of *Illinois Brick* is that indirect purchasers who are two or more steps removed from the antitrust violator in a distribution chain may not sue, while immediate buyers from the alleged antitrust violators have standing to sue. The Court noted that there is no intermediary in the distribution chain between Apple and the consumer, as iPhone owners purchase apps directly from Apple and pay the alleged overcharge directly to Apple.

Who sets the price? The Court rejected Apple's theory that *Illinois Brick* allows consumers to sue only the party who sets the retail price, whether or not that party sells the good or service directly to the complaining party. Apple argued that app developers set the prices, not Apple. The Court noted that *Illinois Brick* is clear that direct purchasers from monopolistic retailers are proper plaintiffs to sue those retailers. Also, Apple's interpretation of *Illinois Brick* to a "who sets the price" rule would draw an arbitrary line among retailers based on financial arrangements. The Court failed "to see why the form of the upstream arrangement between the manufacturer or supplier and the retailer should determine whether a monopolistic retailer can be sued by a downstream consumer who has purchased a good or service directly from the retailer and has paid a higher-than-competitive price because of the retailer's unlawful monopolistic conduct." The Court also declined to assume in all cases that a monopolistic retailer who keeps a commission does not ever cause the consumer to pay a higher-than-competitive price. Finally, the Court noted that Apple's theory would provide a roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers so as to evade antitrust claims by consumers and thereby thwart effective antitrust enforcement.

Rationale of *Illinois Brick*. Apple argued that the three reasons identified in *Illinois Brick* for adopting the direct-purchaser rule applied in this case: (1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants. While the Court noted that there is no reason to determine whether the rationales of *Illinois Brick* "apply with equal force" in every case, the rationales weighed in favor of the consumers. First, the Court disagreed with Apple's argument that allowing only the upstream app developers—and not the downstream consumers—to sue Apple would mean more effective enforcement of the antitrust laws. Also, the Court was not persuaded that allowing the suit to go forward would create an overly complicated antitrust suit where a court could not

assess damages. Finally, the Court rejected Apple's argument that allowing consumers to sue will result in "conflicting claims to a common fund because this was not a case where multiple parties at different levels of a distribution chain are trying to all recover the same passed-through overcharge imposed by the manufacturer. *Illinois Brick* does not bar multiple liability that is unrelated to passing an overcharge down a chain of distribution. The Court also noted that monopoly suits brought by app developers and app purchasers will rely on fundamentally different theories of harm and will not assert dueling claims to a "common fund," as that term was used in *Illinois Brick*.

Whittling away *Illinois Brick*? Justice Neil M. Gorsuch, along with Chief Justice John G. Roberts, Jr. and Justices Clarence Thomas and Samuel A. Alito, argued that the majority had "recast" *Illinois Brick* as a rule forbidding only suits where the plaintiff does not contract directly with the defendant. The dissent contended that the suit against Apple depended on the sort of pass-on theory that *Illinois Brick* forbids because the 30 percent commission charged by Apple fell initially on the developers, and the developers were the parties who were directly injured by it.
In addition, the dissent argued that the majority opinion "replaces a rule of proximate cause and economic reality with an easily manipulated and formalistic rule of contractual privity." Also, the dissent discussed a multitude of issues a lower Court will have wade through in order to determine damages.

"I would have thought the proper course today would have been to afford Illinois Brick full effect, not to begin whittling it away to a bare formalism," said Gorsuch.

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