Supreme Court Issues Decision on Apple's App Store

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On May 13, 2019, the Supreme Court issued a 5-4 decision in *Apple v. Pepper*,[1] holding that iPhone users have standing as "direct purchasers" under the *Illinois Brick* doctrine to sue Apple for alleged monopolistic conduct relating to its App Store fees. The Court did not address the merits of the underlying claim, and the ruling is unlikely to expand significantly the scope of private antitrust claims outside of cases involving online platforms. Nevertheless, the decision will likely encourage plaintiffs to look for other "exceptions" to *Illinois Brick* and to continue to press for the case ultimately to be overturned.

In 2008, Apple launched its App Store, an electronic marketplace for iPhone users to download software applications ("apps") developed by third parties.[2] Apple chose to develop the App Store around an agency sales model, with developers setting prices for apps and Apple acting as a sales and delivery agent, collecting the purchase price from consumers and charging developers a 30 percent commission on consumer app purchases.

In 2011, four iPhone users sued Apple, alleging that the company had "monopolized 'the iPhone apps aftermarket'" by using its App Store to "lock[ ] iPhone owners 'into buying apps only from Apple'" at a substantial mark-up. Plaintiffs claimed that they would have less expensive choices in a competitive market, and "Apple would be under considerable pressure to substantially lower its 30% profit margin."[3]

As presented to the Supreme Court last year, the central question in the case was whether plaintiffs were "direct purchasers" from Apple under the standard set by *Illinois Brick Co. v. Illinois*.[4] In that case, the Court held that direct purchasers may sue antitrust violators, but indirect purchasers may not.

At oral argument, Justice Kavanaugh signaled his skepticism regarding Apple's position that *Illinois Brick* allows only app developers to sue Apple.[5] The company argued that its 30 percent commission initially falls on app developers, who "pass on" the charge by increasing prices. This would make the plaintiffs indirect purchasers barred from suing Apple under *Illinois Brick*. But why, Kavanaugh inquired, absent a clear application of *Illinois Brick* to the facts in *Apple v. Pepper*, should the Court not default to relying on the Clayton Act's broad language, which offers "any person injured" by a violation of the federal antitrust laws the opportunity to bring suit?[6]

That question formed the core of Monday's opinion, in which the Court held that the plaintiffs were direct purchasers entitled to sue Apple under *Illinois Brick*. In an opinion authored by Justice Kavanaugh, joined by Justices Breyer, Ginsburg, Kagan, and Sotomayor, the Court explained that the reason is simple:

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[1] ***Apple Inc. v. Pepper et al.*, 587 U.S. ___ (2019)**.

[2] *Id*. at 2.

[3] *Id*. at 2–3 (citing App. To Pet. For Cert. 45a, 54a–55a).

[4] **431 U.S. 720 (1977)**.

[5] **Transcript of Oral Argument at 23, *Apple Inc. v. Pepper et al.*, 587 U.S. ___ (2019) (No. 17-204)**.

[6] **15 U.S.C. § 15(a)**.

iPhone owners purchase apps directly from—and therefore pay the alleged overcharge directly to—Apple.[7] The Court reasoned that if it were to hold otherwise, monopolists could evade the antitrust laws by restructuring their contractual arrangements with suppliers.[8] Justice Gorsuch authored a dissent, joined by Chief Justice Roberts and Justices Thomas and Alito, in which he argued that the outcome of the case was exactly what the *Illinois Brick* Court sought to avoid: forcing courts to allocate responsibility for the amount consumers are ultimately overcharged among multiple parties in a distribution chain.[9]

Overall, the case represents an affirmation of the *Illinois Brick* direct purchaser standard, but it could leave an opening for plaintiffs to advance new "exceptions" to the *Illinois Brick* doctrine. The Court's opinion professed to follow the decades-old precedent by granting standing to plaintiffs who are "the immediate buyers from the alleged antitrust violators."[10] The ruling does arguably stray, however, from *Illinois Brick*'s stated priority of avoiding potential monopolization cases by parties at multiple levels of a distribution chain; the Court acknowledged that both consumers and app developers could have claims against Apple.

As a practical matter, the decision's application to future antitrust cases may be limited given Apple's unique positioning of the App Store as a marketplace between developers and consumers. That said, companies that operate online platforms should take note: to the extent they interact directly with consumers for billing or other purposes, they may be more likely to face antitrust suits irrespective of whether they characterize their role as mere "agents." Moreover, future plaintiffs may seize on the Court's language regarding the standard for bringing suit under the antitrust laws, the irrelevance of the upstream market structure, and the role of privity of contract, in arguing that there may be flexibility in the definition of direct purchasers in cases that turn on *Illinois Brick*.

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[7] 587 U.S., at 6–7.

[8] *Id*. at 9–11.

[9] **587 U.S., at 5 (Gorsuch, J., dissenting)**.

[10] ***Kansas v. UtiliCorp United Inc.*, 497 U.S. 199, 207 (1990)**.

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If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

Arthur J. Burke	+1 212 450 4352	arthur.burke@davispolk.com
Arthur F. Golden	+1 212 450 4388	arthur.golden@davispolk.com
Ronan P. Harty	+1 212 450 4870	ronan.harty@davispolk.com
Jon Leibowitz	+1 202 962 7050	jon.leibowitz@davispolk.com
Howard Shelanski	+1 202 962 7060	howard.shelanski@davispolk.com
Jesse Solomon	+1 202 962 7138	jesse.solomon@davispolk.com
Christopher Lynch	+1 212 450 4034	christopher.lynch@davispolk.com
Mary K. Marks	+1 212 450 4016	mary.marks@davispolk.com