iPhone Users have Standing to Sue Apple for Alleged Monopolization

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Authors:

Matthew C. Blickensderfer

Simon Y. Svirnovskiy

Avoiding harm to consumers has been the guiding principle for U.S. antitrust law for decades. But antitrust law limits who in a distribution network can sue antitrust violators; consumers who purchase from retailers are not permitted under federal antitrust law to sue distributors or manufacturers. To keep multiple levels of participants in a supply chain from recovering for the same unlawful acts, the Supreme Court of the United States, in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), held that only those who purchased directly from a violator have standing to sue for antitrust injuries. This "direct purchaser" rule is usually clear enough in traditional, brick-and-mortar distribution networks involving a manufacturer, distributors, retailers, and consumer. Typically, only the distributors can sue the manufacturer; only the retailers can sue the distributors; and so on. But what happens when the distribution network isn't quite so traditional or doesn't fit quite so neatly into these categories?

The Supreme Court just provided the answer. On May 13, 2019, in *Apple Inc. v. Pepper*, 587 U.S., No. 17-204, the Supreme Court held, in a 5-4 decision, that iPhone users are direct purchasers of iPhone applications (apps) from Apple, and therefore may bring a lawsuit alleging that Apple has unlawfully monopolized the app market. The plaintiff-consumers in *Pepper* alleged that Apple unlawfully monopolized the market for iPhone apps by (i) requiring sales for apps on iPhones to take place in the App Store and (ii) charging app developers a 30% commission, both of which inflated iPhone apps' prices. Apple moved to dismiss the case, arguing that developers, and not Apple, sold the apps to consumers and set the apps' prices, and that Apple merely provided distribution services to developers. In other words, Apple argued that consumers were the direct purchasers from the developers, not Apple, and were thus barred from pursuing antitrust claims against it under the Indirect Purchaser Bar from *Illinois Brick*. Justice Brett Kavanaugh, writing for the Court, disagreed, and held that iPhone owners who used the App Store were direct purchasers because they bought apps

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directly from Apple, with no intermediaries.

A Direct Purchaser is Literally Someone Who Purchases Directly from the Alleged Violator

The Court in *Illinois Brick* previously held that downstream buyers of goods or services along a supply chain may not sue for alleged antitrust violations committed by the manufacturer or service provider. In *Pepper*, Apple had argued that *Illinois Brick* allows end consumers to sue only the party that sets the retail price, but the Court disagreed with Apple's "who sets the price" theory. Instead, the Court found that *Illinois Brick* simply means that a consumer may not sue an alleged monopolist who is more than one step removed from the consumer in a vertical supply chain. To the Court, "the absence of an intermediary in the distribution chain between Apple and the consumer is dispositive." The Court found that "it is undisputed that the iPhone owners bought the apps directly from Apple" on the App Store, and so it made no difference to the Court that the developer chooses how to price her or his apps and that Apple merely takes a 30% cut of that price. The most important takeaway from *Illinois Brick*, explained Justice Kavanaugh, was from whom did the consumer buy.

Illinois Brick Survives

Thirty state attorneys general and the District of Columbia urged the Court to overrule *Illinois Brick* and the direct purchaser rule altogether. They claimed that their experiences in "*Illinois Brick* repealer," which explicitly allow consumers to sue participants up and down the supply chain using state law antitrust claims, show that *Illinois Brick's* concerns about letting indirect purchasers pursue antitrust remedies (like duplicative recovery for the same injury) were unwarranted. But, instead of overturning this 42-year-old precedent, the Court simply applied it in literal fashion.

Is the "direct purchaser" always the one the harm immediately affects?

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Writing for the four dissenters, Justice Neil Gorsuch accused the majority of watering down the *Illinois Brick* rule, which was rooted in concerns over identifying proximate cause (i.e. causation direct enough to impose legal liability) and economic reality, and replacing it with an overly formal rule based on contractual privity (the existence of a legally enforceable relationship between parties). The dissent conceded that iPhone owners pay Apple but argued that *Illinois Brick* allowed antitrust claims only by the market participants who felt the first "sting" from the anticompetitive conduct. Because Apple's 30% commission applied in the first instance to the developers, only developers should be able to sue Apple, according to the dissent. Consumers, the dissent contended, could be injured "only if the developers are able and choose to pass on the overcharge to them in the form of higher app prices." And one of the main purposes of the *Illinois Brick* rule was to eliminate the difficulty of trying to figure out whether illegal overcharges are passed on in whole, in part, or not at all to other market participants.

What are the broader implications?

Neither the majority nor the dissent acknowledged – at least explicitly – that they were dealing with a distribution model unlike the traditional, brick-and-mortar, straight-line supply chain that was at issue in *Illinois Brick*. In many instances, internet-based and tech markets just don't look like their traditional counterparts. Because the Court did not truly come to grips with this modern reality, the analysis and the result give a square peg/round hole feel.

But the majority's decision is now the law, and it has implications well beyond this case. Although the Court's decision only allows the lawsuit to proceed and makes no judgment on the merits of the plaintiffs' allegations, the failure of Apple's defense—that it is merely a marketplace and that developers set the prices for their own apps—could be far-reaching. Apple is far from the only entity with a distribution model like this. There are many online marketplaces and electronic portals through which goods or services produced by third parties are sold. The owner of a virtual marketplace often deals directly with the consumers who buy from the virtual marketplace,

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even though the third-party producers may be setting their own prices, possibly delivering the products, and performing other traditional "retail" functions for the consumer. The *Pepper* decision suggests that the consumers for the virtual marketplaces can sue the marketplaces/platforms, but not the producers of the goods and services being marketed through those platforms. And that, in turn, could cause these platforms – which include some giants of modern U.S. commerce – to rethink their business models.

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