FOLLOW THE MONEY: THE SUPREME COURT DEFINES THE "FIRST PURCHASER" TO WHOM ILLINOIS BRICK LIMITS ANTITRUST DAMAGE CLAIMS AS A PERSON WITH A DIRECT CONTRACTUAL RELATIONSHIP WITH THE ALLEGED VIOLATOR

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In a 5–4 decision, in Apple, Inc. v. Pepper, [1] the U.S. Supreme Court (the "Court") followed the its 1977 precedent in Illinois Brick v. Illinois, [2] which limits the assertion of antitrust damage claims to the first purchaser from the antitrust violator. In amicus briefs, numerous state attorneys general had urged overruling Illinois Brick to permit both direct and indirect purchasers to sue. Further, the Court in Apple defined the first purchaser as any party with a direct contractual relationship with the alleged violator. The Court acknowledged that in nontraditional market settings (such as where both consumers and software developers have a direct relationship with Apple), the alleged violator could confront multiple claimants asserting different types of claims. However, the ruling does not comment on the software application ("app") purchasers' likelihood of success on their monopolization claims against Apple.

THE CLAIMS

As a result of contractual restraints and technological limitations, Apple's App Store (the "App Store") allegedly is the only place where consumers can legally purchase apps for their iPhones. The apps are not developed by Apple but by third-party developers. To sell apps on the App Store, developers must pay Apple a $99 annual membership fee and must sell the iPhone apps only on the App Store. Apple permits the developer to set the price of the app to the consumer (although the price must end in $0.99). However, Apple enters into the sale with the consumer and, after receiving payment from the consumer, deducts a 30% commission and remits the remainder to the developer.

The plaintiffs, consumers who purchased apps from the App Store, allege that Apple has monopolized the retail market for the sale of apps. They allege that because of the high commission rate that Apple charges developers as a result of its monopoly power, the prices set by developers for the App Store's sales to consumers include

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overcharges to the consumers.

ILLINOIS BRICK

Section 4 of the Clayton Act [3] creates a cause of action for damages for "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." However, in Illinois Brick, the Court held that only direct purchasers from the alleged antitrust violator may bring an antitrust damage claim. Indirect purchasers may not sue under federal law for any overcharges passed on to them by the direct purchasers.

Apple and the dissenting justices argue that consumers purchasing apps from the App Store were not direct purchasers because Apple allowed the developer to set the consumers' price for the apps and because the overcharge originates in the commission charged by Apple to the developers. As the dissent explains, "Plaintiffs can be injured only if the developers are able and choose to pass on the overcharge to them in the form of higher app prices that the developers alone control." [4]

CONSUMERS' DIRECT RELATIONSHIP WITH APPLE MAKES THEM FIRST PURCHASERS

The Court's majority, on the other hand, held that the consumers are direct purchasers because they dealt directly with Apple. "It is undisputed that the iPhone owners bought the apps directly from Apple. Therefore, under Illinois Brick, the iPhone owners were direct purchasers who may sue Apple for alleged monopolization."[5] As the Court explained, "[W]e have consistently stated that 'the immediate buyers from the alleged antitrust violators' may maintain a suit against the antitrust violators." [6] The majority opinion explains: "There is no intermediary in the distribution chain between Apple and the consumer. The iPhone owners purchase apps directly from the retailer Apple, who is the alleged antitrust violator. The iPhone owners pay the alleged overcharge directly to Apple. The absence of an intermediary is dispositive." [7]

EXPOSURE TO CLAIMS FROM MULTIPLE LEVELS IN THE DISTRIBUTION CHAIN

The majority opinion explicitly acknowledges that, under the facts, Apple is exposed to potential claims by both consumers and the developers: "It is true that Apple's alleged anticompetitive conduct may leave Apple subject to multiple suits by different plaintiffs. But Illinois Brick did not purport to bar multiple liability that is unrelated to passing an overcharge down a chain of distribution." [8]

In the majority's view, the facts here do not present a passing on of an overcharge: "The consumers seek

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damages based on the difference between the price they paid and the competitive price. The app developers would seek lost profits that they could have earned in a competitive retail market. Illinois Brick does not bar either category of suit."[9]

As the dissenters suggest, a seller in Apple's position could apparently avoid the consumer claims by having the developers contract with and bill the consumers, so that consumers would not have a direct contractual relationship with Apple.

ILLINOIS BRICK NOT OVERRULED

The Illinois Brick rule limiting antitrust claims only to direct purchases has been criticized virtually from its inception. In contrast, the laws of many states permit indirect purchasers to claim damages for violation of their state antitrust laws. As amici in the Apple case, numerous state attorneys general urged the Court to overrule Illinois Brick. Nevertheless, the Court did not overturn the Illinois Brick direct purchaser limitation, and neither the majority opinion nor the dissent provides much of a hint on the justices' attitudes toward such a reversal. The majority opinion merely notes in a footnote the amici's support for overruling Illinois Brick and states: "In light of our ruling in favor of plaintiffs in this case, we have no occasion to consider that argument for overruling Illinois Brick." [10] The dissenting opinion merely describes Illinois Brick as "a precedent which — whatever its flaws — is far more sensible than the rule the Court installs in its place." [11]

In summary, the Court applied the Illinois Brick direct purchaser rule in a simple, straightforward fashion pursuant to which the majority was satisfied that the consumers were first purchasers because they dealt directly with Apple — an approach that the dissent characterizes as a "rule of contractual privity." [12] Attempts to broaden federal antitrust damage claims to indirect purchasers will have to await another day.

Footnotes

[1] ___ U.S. ___, 2019 WL 2078087 (May 13, 2019).

[2] 431 U.S. 720.

[3] 15 U.S.C. § 15(a).

[4] 2019 WL 2078087 at *10 (Gorsuch, J., dissenting) (emphasis in original).

[5] Id. at *3.

[6] Id.

[7] Id. at *4.

[8] Id. at *7.

[9] Id. at *8

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[10] Id. at n.2.

[11] Id. at *8 (Gorsuch, J. dissenting).

[12] Id.

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