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CLIENT ALERT

Supreme Court Allows Consumers to Sue Apple for Antitrust Violations

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In a much-anticipated decision, the Supreme Court yesterday allowed a major antitrust case to proceed against Apple for alleged monopolization of the iPhone app market. In *Apple v. Pepper*, the Court split 5-4 over whether such claims were barred by the direct-purchaser rule established by the Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Justice Brett M. Kavanaugh, joined by the Court's four more liberal justices, wrote for the majority, while Justice Neil M. Gorsuch, joined by the Court's other conservative justices, dissented.

The case arose in 2011, when four iPhone owners brought a federal antitrust suit against Apple. The complaint alleged that Apple was unlawfully monopolizing the app market by requiring its customers to buy apps exclusively from Apple's own App Store—launched in 2008, shortly after Apple introduced the iPhone—resulting in higher prices for consumers. Of the two million apps available for download, the majority are created by independent app developers who contract with Apple to make the apps available in the App Store. Developers set the retail price of each app, with Apple taking a 30% cut of each sale.

Apple moved to dismiss the suit, arguing that the iPhone owners were not proper plaintiffs for this type of antitrust lawsuit under *Illinois Brick*. The Court there limited the plaintiffs who may sue for such antitrust violations to those who purchase a product directly from an alleged violator—a "direct purchaser" rule. The decisive question before the Court in *Apple* was whether, under *Illinois Brick*, iPhone owners were direct or indirect purchasers from Apple.

The majority concluded that they were direct purchasers who could sue, stating: "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." The majority deemed it dispositive that iPhone owners pay any overcharge on apps to Apple directly, with no intermediary. The Court thus dismissed Apple's theory that *Illinois Brick* allows consumers to sue only the party that sets the retail price—in this case, the app developers—regardless of which party sells the product.

In the majority's view, Apple's "who sets the price" theory contradicts not only precedent but the statutory text, which by its terms authorizes "any person" who has been "injured" by an alleged violation of the antitrust laws to sue. The majority also found Apple's theory unpersuasive from both an economic and legal standpoint, stating that it would provide a roadmap for monopolistic retailers to structure transactions to evade antitrust claims.

Writing for a four-justice minority, Justice Gorsuch disagreed. *Illinois Brick*, he explained, forbids plaintiffs from relying on a pass-on theory to recover damages. As in that case, for instance, if a manufacturer overcharges a contractor for concrete blocks, and the contractor passes that overcharge on to its customer, the customer cannot recover damages from the manufacturer for the passed-on overcharge. The dissent viewed the Apple situation as analogous, as iPhone owners 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." By "(re)characteriz[ing] *Illinois Brick* as a rule that anyone who purchases goods directly from an alleged antitrust violator can sue, while anyone who doesn't, can't," the dissent reasoned, the majority "exalts form over substance." To afford *Illinois Brick* full effect, the dissenting justices would hold that the iPhone owners are barred from litigating their case against Apple.

In allowing the iPhone owners' case to proceed, the Court did not comment on the merits of any claims or defenses. Regardless of the ultimate outcome of the case, however, the split among the Court is notable for Justice Kavanaugh's decision to side with the more liberal justices—who have a track record of supporting antitrust plaintiffs on standing and similar issues. Future cases will reveal whether this case was an anomaly or reflective of his views on the antitrust laws more generally.

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