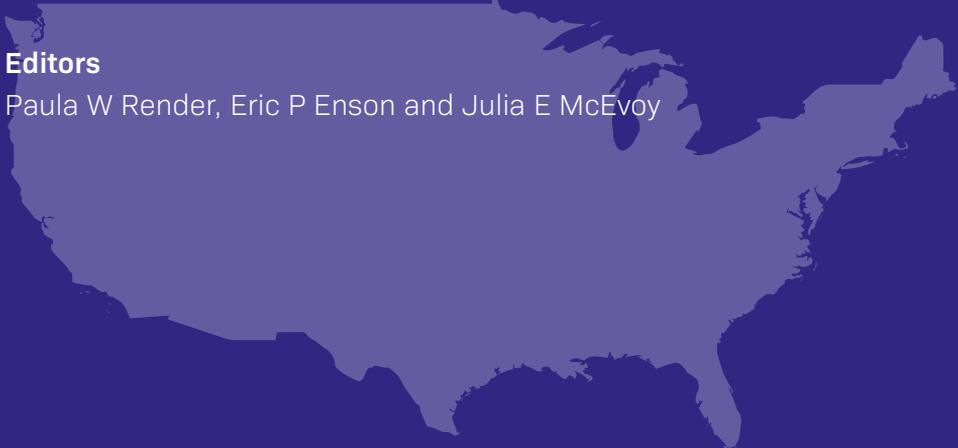


The logo for GCR INSIGHT, featuring a dark blue square on the left containing the letters 'GCR' in white, followed by the word 'INSIGHT' in dark blue to its right.

GCR INSIGHT

US COURTS

ANNUAL REVIEW

A light blue silhouette map of the United States, including Alaska and Hawaii, positioned in the background of the lower half of the cover.

Editors

Paula W Render, Eric P Enson and Julia E McEvoy

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Preface

Global Competition Review is a leading source of news and insight on competition law, economics, policy and practice, allowing subscribers to stay apprised of the most important developments around the world.

Alongside the daily content sourced by our global team of reporters, GCR also offers deep analysis of longer-term trends provided by leading practitioners from around the world. Within that broad stable, we are delighted to launch this new publication, *US Courts Annual Review*, which is our first to take a very deep dive into the trends, decisions and implications of antitrust litigation in the world's most significant jurisdiction for such cases.

The content is divided by court or circuit around the US, allowing our valued contributors to analyse both important local decisions and draw together national trends that point to a direction of travel in antitrust litigation. Both oft-discussed developments and infrequently noted decisions are thus surfaced, allowing readers to comprehensively understand how judges from around the country are interpreting antitrust law, and its evolution.

In producing this analysis, GCR has been able to work with some of the most prominent antitrust litigators in the US, whose knowledge and experience has been essential in drawing together these developments. That team has been led and indeed compiled by Paula W Render, Eric P Enson and Julia E McEvoy of Jones Day, whose insight, commitment and know-how have been fundamental to fostering the analysis produced here. We thank all the contributors, and the editors in particular, for their time and effort in compiling this report.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws during the coming year.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com.

Global Competition Review

London

June 2020

Supreme Court

Bevin M B Newman and Thomas Dillickrath
Sheppard, Mullin, Richter & Hampton LLP

The United States Supreme Court's single antitrust case of the 2019 term, *Apple, Inc v Pepper*,¹ considered and upheld the long-standing and often criticized direct purchaser rule established by *Hanover Shoe v United Shoe Machinery Co*² and *Illinois Brick Co v Illinois*, which limited standing under Clayton Act section 4 to 'the overcharged direct purchaser, and not others in the chain of manufacture or distribution.'³

Background of the case

On 29 December 2011, several iPhone owners sued Apple, Inc (Apple) in federal court on behalf of a class consisting of 'all persons in the United States . . . who purchased an iPhone application or application license from Apple for use on an iPhone at any time from December 29, 2007 through the present.'⁴ The plaintiffs alleged that Apple illegally monopolized the iPhone application (app) aftermarket, comprising 'the market for distributing software applications that can be downloaded on the iPhone for managing such functions as ringtones, instant messaging, photographic and video capability, gaming and other entertainment, Internet applications, and any other downloadable software-driven functions.'⁵ According to the plaintiffs, Apple's monopoly, which the company maintained by contract with app developers and data restrictions built into its iPhones, enabled Apple to funnel all iPhone apps sales through the App Store it established in 2008. Developers marketing apps via the App Store paid an annual fee to Apple and also agreed that Apple would retain a certain percentage of the app's retail price on each sale. Developers independently set the retail prices of the apps they marketed via the App Store, subject to Apple's requirement that retail sales prices end with '.99.'

1 139 S. Ct. 1514 (2019).

2 392 U.S. 481 (1968).

3 431 U.S. 720 (1977).

4 *In re Apple iPhone Litigation*, 2013-2 Trade Cases P 78,603, 2013 WL 6253147, *1 (N.D. Cal. 2013).

5 *Id.*

The plaintiffs cast themselves as direct purchasers with standing to sue Apple by arguing that ‘the thirty-percent portion obtained by Apple is a direct, fixed cost to consumers who are “first” in the chain to purchase the Apps,’ and that plaintiffs are, in fact, the only purchasers of iPhone apps.⁶ Apple moved to dismiss the complaint, arguing that Apple charges the 30 per cent fee to the developers, and that any distribution cost or commission imposed on the consumers is passed through, making them indirect purchasers without standing to proceed under *Illinois Brick*.⁷

The district court rejected the plaintiffs’ arguments and dismissed the complaint with prejudice on 20 September 2013. The district court found that Apple’s 30 per cent fee sprang from its agreement with the developers to pay a portion of their sales proceeds to Apple, which was passed on to the consumers as part of the purchase price, making them indirect purchasers.⁸ As the court noted:

*Plaintiffs’ attempt to recast themselves as the sole purchasers of the apps because Apple collects the entire purchase price is unavailing. To find otherwise would require the Court to ignore the other allegations in the [complaint], which identify the developers’ obligation to pay or share the thirty percent with Apple.*⁹

The plaintiffs appealed to the Ninth Circuit Court of Appeals, which reversed the lower court’s decision and remanded for further proceedings. The Ninth Circuit concluded that Apple stood in the role of a distributor from which the iPhone users had purchased the apps at allegedly supra-competitive prices. Because the plaintiffs purchased the apps directly from Apple, the Court of Appeals held that the plaintiffs had standing as direct purchasers to sue under *Illinois Brick*.¹⁰ The Court of Appeals viewed Apple’s role in collecting payment from the purchasers as irrelevant. Similarly, the Court of Appeals rejected the idea that characterizing Apple’s 30 per cent fee as a mark-up on the purchase price or a commission would impact its conclusion. Rather, the Court rested its analysis ‘on the fundamental distinction between a manufacturer or producer, on the one hand, and a distributor, on the other. Apple is a distributor of the iPhone apps, selling them directly to purchasers through its App Store. Because Apple is a distributor, Plaintiffs have standing under *Illinois Brick* to sue Apple for allegedly monopolizing and attempting to monopolize the sale of iPhone apps.’¹¹

The Ninth Circuit acknowledged that its holding created a split with the Court of Appeals for the Eighth Circuit, which had reached the opposite conclusion in a case based on a substantially similar transaction.¹² In *Campos v Ticketmaster*, the Eighth Circuit found that buyers of concert

6 *Id.* at *5.

7 *Id.*

8 *Id.*

9 *Id.* at *6.

10 *In re Apple iPhone Litigation*, 846 F.3d 313, 324 (9th Cir. 2017).

11 *Id.*

12 See *Campos v Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998).

tickets via Ticketmaster's distribution service lacked standing because 'an antecedent transaction between the monopolist and another, independent purchaser' of the distribution services absorbed or passed on all or part of the monopoly overcharge.¹³

The United States Supreme Court granted a writ of certiorari on 18 June 2018.¹⁴

Arguments before the Court

The petitioner, Apple, argued that the Ninth Circuit's focus on the functional or transactional relationship between Apple and the respondent app purchasers was misplaced and irrelevant to the *Illinois Brick* inquiry. According to Apple, the dispositive question was whether the alleged anti-competitive conduct first impacted the respondent app purchasers or someone else. Apple argued that the challenged conduct did not involve the sale of apps, but rather the upstream market for app distribution services, which implicated the relationship between Apple and the app developers, not the ultimate consumer.¹⁵

*[C]onsumers do not purchase the allegedly monopolized service from Apple, only developers do; and while consumers do purchase apps from Apple (acting as the developers' sales agent) app prices are set by developers alone. App stores 'are basically platforms connecting app users (smartphone owners) and app developers.' They are 'two-sided' platforms, where a platform operator, such as Apple, 'offers different products or services to two different groups who both depend on the platform to intermediate between them.'*¹⁶

The petitioner cautioned that allowing the Ninth Circuit's decision to stand would produce exactly the dangers that the *Illinois Brick* Court sought to avoid. The petitioner cited the Circuit Court's recognition that app developers, as direct purchasers of app distribution services, could lodge an antitrust complaint against Apple seeking recovery of the same commissions the respondents challenged, thus creating the potential for 'duplicative recoveries for the exact same commission (trebled each time) by different plaintiff groups under different characterizations of the same transaction.'¹⁷

Acknowledging its interest in the correct application of the federal antitrust laws, the Court invited the United States to submit a brief as amicus curiae. The government supported the petitioner's position that the respondent's claim to damages depended upon a pass-through of Apple's

13 *Id.* at 1169.

14 *Apple, Inc. v Pepper*, 138 S. Ct. 2647, 86 WL 3625 (2018).

15 *In Re Apple iPhone Antitrust Litigation*, 2018 WL 3870180, *5-6 (Brief of Petitioner filed Aug. 10, 2018).

16 *Id.* at *35 (Brief of Petitioner filed Aug. 10, 2018) (citing *Ohio v Am. Express Co.*, 138 S. Ct. 2274, 2280 (2018)).

17 *Id.* at *17.

allegedly supracompetitive distribution fees by the app developers to the consumers. The Court's *Illinois Brick* decision and related precedent do not support such a complaint, according to the government brief.¹⁸

The respondents challenged Apple's contentions that the alleged monopolization impacted the market for app distribution services sold to app developers, rather than apps sold to consumers, and that the respondents' claims raised the danger of duplicative damages claims with the app developers who might also seek antitrust damages from Apple based on the same conduct.¹⁹ The respondents argued that Apple was inextricably involved in the consumers' purchases of apps via the App Store through its control over which developers may sell apps via the App Store, which apps can be sold, and the pricing increments at which developers could set the retail price for apps. Thus, the respondents argued, consumers 'sustain damages directly from Apple's monopoly power.'²⁰

The respondents also asserted that the case presented no risk of duplicative damages.

If the developers that create software apps could seek antitrust damages from Apple, they would be 'differently situated plaintiffs' seeking remedies for 'different injuries in distinct markets.' As suppliers of apps – not purchasers – they would be suing Apple as a monopsonist rather than as a monopolist, and their claims presumably would rest on the allegation that Apple's restraints cause them to earn lower profits (because of lower prices received, reduced sales, or both) than they could obtain in a market not dominated by a single retailer. So calculated, their antitrust damages could be negative or zero even though iPhone owners' damages were positive – showing that app developer damages are not 'passed on' to respondents.²¹

Finally, the respondents cautioned that because the iPhone owner class was directly harmed and best situated to bring the claim against the petitioner, adopting Apple's view of *Illinois Brick* would undermine vigorous enforcement of the treble-damages remedy, a fundamental rationale for allowing direct purchasers to recover such damages.²²

The Court's decision

The United States Supreme Court affirmed the decision of the Ninth Circuit Court of Appeals holding the absence of any intermediary in the distribution chain between Apple and the consumer to be dispositive under *Illinois Brick*.²³ Justice Kavanaugh, writing for the majority, characterized the Court's decision as a 'straightforward' application of the Court's bright-line

18 *Apple Inc. v Pepper*, 2018 WL 3969563, *7 (2018) (Brief for the United States as Amicus Curiae filed Aug. 17, 2018).

19 *Apple Inc. v Pepper*, 2018 WL 4659225 (Brief of Respondents filed Sept. 24, 2018).

20 *Id.* at *3.

21 *Id.* at *2–3 (citing *Loeb Indus., Inc. v Sumitomo Corp.*, 306 F.3d 469, 481 (7th Cir. 2002)).

22 *Id.* (citing *Kansas v Utilicorp United, Inc.*, 497 U.S. 199, 214 (1990)).

23 *Apple, Inc. v Pepper*, 139 S. Ct. 1514, 1521 (2019).

precedent in *Illinois Brick* in light of a faithful reading of the statutory text of the Clayton Act.²⁴ The majority opinion embraced the Ninth Circuit's description of Apple as a retailer of apps without offering any discussion of the application of the direct purchaser rule in the novel context of a technology platform such as the App Store.

The majority opinion recited two rationales for the Court's conclusion, albeit with scant explanation. First, the opinion stated that the expansive plain language of Clayton Act section 4 that 'any person . . . injured' by an antitrust violator may sue to recover damages, 'readily covers consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer.'²⁵ Second, the opinion explained that the bright-line rule of *Illinois Brick* rests upon the principle of proximate cause and 'authorizes suits by direct purchasers but bars suits by indirect purchasers.'²⁶ Because the respondents were the 'immediate buyers' from Apple, they had standing to sue Apple for damages based on Apple's alleged antitrust violations.

The Court soundly rejected the petitioner's line of reasoning, focusing closely on Apple's argument that the respondents were not direct purchasers because the app developers – and not Apple – set the price for apps on the App Store. The Court asserted that accepting the petitioner's argument would sacrifice the bright-line rule of *Illinois Brick* in favor of an arbitrary and easily manipulated 'who sets the price' rule.²⁷ The Court reasoned that the form of an alleged monopolist's financial arrangement with its suppliers should not determine whether that retailer could be sued by downstream consumers. To hold otherwise would require the Court to assume that in all cases where a monopolistic retailer keeps a commission, it does not ever cause the consumer to pay a supracompetitive price. Such an assumption, according to the majority, would defeat the principles underlying *Illinois Brick*'s bright-line rule – administrative efficiency and promoting effective enforcement of the antitrust laws. The Court explained that applying Apple's reasoning would discourage effective enforcement of the antitrust laws by 'leaving consumers at the mercy of monopolistic retailers simply because upstream suppliers could also sue the retailers.'²⁸ The Court was unpersuaded by Apple's arguments to the contrary. The Court noted that the complexity of damages calculations in a consumer suit compared to a developer suit under the facts presented was neither unusual in an antitrust case, nor reason to enable a monopolistic retailer to avoid liability to consumers who have been harmed by the retailer's conduct.²⁹ The Court went on to reject Apple's argument that it would face the potential for duplicative damages arising from suits by both consumers and app developers, a situation *Illinois Brick* expressly sought to avoid.

²⁴ *Id.* at 1520.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 1522.

²⁸ *Id.* at 1524.

²⁹ *Id.*

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. Basic antitrust law tells us that the 'mere fact that an antitrust violation produces two different classes of victims hardly entails that their injuries are duplicative of one another.' . . . A retailer who is both a monopolist and a monopsonist may be liable to different classes of plaintiffs—both to downstream consumers and to upstream suppliers—when the retailer's unlawful conduct affects both downstream and upstream markets. . . . [T]he two suits would rely on fundamentally different theories of harm and would not assert dueling claims³⁰

The dissent

Justice Gorsuch was joined by Chief Justice Roberts and Justices Thomas and Alito in the dissent. The dissent asserted that the majority opinion had permitted a pass-through case to stand in stark contravention of *Illinois Brick*, replacing 'a rule of proximate cause and economic reality with an easily manipulated and formalistic rule of contractual privity.'³¹ The dissent predicted that each of the complications arising from pass-through damages claims that the *Illinois Brick* decision cautioned against would be implicated in the present case. The dissent warned that a trial court would have to explore whether and to what degree each app developer, given its unique market circumstances, had passed on all or part of Apple's allegedly anticompetitive commission. The dissent also explained that any portion of the alleged overcharge not passed on could be claimed by the developers as damages related to the same alleged monopolistic conduct, creating exactly the duplicative damages claims that *Illinois Brick* expressly disallowed.³²

The effect the decision will have on antitrust litigation going forward

The Court's decision in *Apple, Inc v Pepper* ultimately is a narrow one that leaves *Illinois Brick* and its predecessor, *Hanover Shoe* nominally intact. However, the decision calls into question the Eighth Circuit's *Campos v Ticketmaster* opinion, which the Ninth Circuit in *Apple* discussed, but which did not feature in either the majority opinion or dissent in the Supreme Court.³³

³⁰ *Id.* at 1525.

³¹ *Id.* at 1526.

³² *Id.* at 1528–29.

³³ *Campos v Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998).

The decision makes clear that the Court views the fundamental purpose of *Illinois Brick* and its progeny as promoting ease and efficacy of antitrust enforcement by private plaintiffs. The majority rejected each of Apple's rationales for denying the iPhone owners' standing on the basis that adopting Apple's reasoning would enable retailers to avoid consumer claims by restructuring its contractual arrangements with suppliers without altering the nature of the harm visited upon downstream consumers. The majority went so far as to assert that any ambiguity in *Illinois Brick* concerning consumers' standing to sue an antitrust violator should be resolved in favor of the inclusive language of Clayton Act section 4.³⁴ Even the dissent embraces this goal, although taking issue with the majority's application of economic reasoning in promoting private antitrust enforcement.³⁵

³⁴ *Apple, Inc. v Pepper*, 139 S. Ct. at 1520.

³⁵ The economics of the disagreement between the majority and dissent likely will play out as lower courts adjudicate app developers' claims. See *Cameron v. Apple, Inc.*, 2019 WL 8334787 (N.D. Cal.) (Plaintiffs' Consolidated Class Action Complaint for Violations of the Sherman Act and California Unfair Competition Law filed Sept. 30, 2019).



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Providing a detailed dive into key antitrust decisions from across the US over the past year, separated by court or circuit, GCR's *US Courts Annual Review* is the first of our publications to delve into the regional differences in antitrust litigation in the US, as well as the national trends that bring them together.

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