GIBSON DUNN

Supreme Court Holds That iPhone Users Have Standing To Seek Federal Antitrust Damages From Apple For App Store Purchases

***Apple, Inc. v. Pepper*, No. 17-204**

Decided May 13, 2019

Yesterday, the Supreme Court held 5-4 that iPhone users are "direct purchasers" from Apple when they purchase apps on Apple's App Store, and thus have standing to sue Apple for alleged monopolistic overcharges under Section 2 of the Sherman Act, even though third-party app developers pay for the allegedly monopolized app-distribution services and set the prices for apps charged to iPhone users.

Background:

A group of iPhone users sued Apple for damages under Section 2 of the Sherman Act, alleging that Apple monopolized the retail market for the sale of apps and unlawfully used its monopoly power to charge consumers higher-than-competitive prices. According to plaintiffs, Apple requires them to purchase iPhone apps from developers exclusively through Apple's App Store. Although app developers independently set the retail price of each app, Apple charges developers a yearly fee to place their apps in the App Store, along with a commission on each sale. The iPhone users alleged that this arrangement caused them to pay inflated prices for apps and sought antitrust damages from Apple. Under *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 729 (1977), only direct purchasers, "and not others in the chain of manufacture or distribution," can sue for damages under federal antitrust law. The district court dismissed the action under *Illinois Brick*, reasoning that the app developers were the direct purchasers of Apple's app-distribution services because they paid the annual fees and commissions charged by Apple. The Ninth Circuit reversed, holding that the iPhone users could sue Apple for allegedly

> *"The [plaintiffs] pay the alleged overcharge directly to [defendant]. The absence of an intermediary is dispositive. Under* Illinois Brick*, the [plaintiffs] are direct purchasers … and are proper plaintiffs to maintain this antitrust suit."*
>
> Justice Kavanaugh, writing for the majority

Gibson Dunn filed an *amicus* brief on behalf of the Chamber of Commerce of the United States of America in support of Apple.

monopolizing and attempting to monopolize the sale of iPhone apps.

Issue:

"Whether consumers may sue anyone who delivers goods to them for antitrust damages, even when they seek damages based on prices set by third parties who would be the immediate victims of the alleged offense."

Court's Holding:

Yes. *Illinois Brick* does not bar plaintiffs' claim for alleged monopoly overcharge damages because iPhone users are properly regarded as direct purchasers.

What It Means:

- The Court's decision embraces a formal approach to antitrust standing in a claim arising under Section 2 of the Sherman Act that focuses on whether the plaintiff directly contracts with the alleged monopolist, irrespective of whether it directly bears the cost of the alleged monopolistic conduct. In doing so, the decision creates the risk that companies operating "electronic marketplaces" will be subject to suit by both the third-party sellers who pay to use the companies' services and to end-consumers who purchase the third party's products or services on the platform.
- The decision threatens to increase the cost and complexity of antitrust litigation, as courts may be required to engage in the complex task of apportioning antitrust damages among different levels of purchasers of a good or service. Justice Gorsuch, writing for a four-Justice dissent, highlighted some of the difficult questions lower courts must now address, including whether and to what extent third parties pass on alleged monopolistic charges, a question that will need to be addressed as to "all of the tens of thousands of developers who sold apps through the App Store at different prices and times over the course of years." These increased litigation costs may have a negative financial impact on the e-commerce space as a whole.
- The Court was careful to note that it was not "assess[ing] the merits of the plaintiffs' antitrust claims" or any "defenses Apple may have." Having established standing, plaintiffs must now face the challenge of showing how a claim of charging "too much" overcomes Supreme Court precedent disapproving such claims.
- The Court's decision raises the question whether it might overrule *Illinois Brick* in the future. Although certain amici argued that the Court should do so here, the Court reasoned that "[i]n light of our ruling in favor of the plaintiffs in this case, we have no occasion to consider that argument."

- Time will tell whether the Supreme Court's formal approach to standing under Section 2 will carry over into substantive Section 1 analysis, e.g., requiring a reevaluation of principal-agent relationships that are not subject to Section 1 strictures under longstanding precedent.

Gibson Dunn will be hosting a webcast on the current state of monopoly law and enforcement, including the impact of this decision, on May 23, 2019. For more details, please click here.

As always, Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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