Class Action Insights From Justices' App Store Opinion

By **Leiv Blad and Rachel Maimin**

Leiv Blad

On May 13, 2019, the U.S. Supreme Court issued its opinion in Apple Inc. v. Pepper et al.,[1] a blockbuster antitrust case masquerading as an arcane procedural decision. The decision exponentially increases the settlement value of antitrust class actions brought by buyers of products on software platforms who otherwise would have had to proceed under state law as indirect purchasers. The decision also offers an early glimpse into the antitrust approach (and judicial temperament) of Justice Brett Kavanaugh, who may not be the business-friendly conservative most assumed he would be.

The Dispute

Rachel Maimin

The plaintiffs in Apple were purchasers of applications from Apple's App Store.[2] As Justice Kavanaugh explained, the App Store — by "contract and through technological limitations" — is the only place where iPhone owners can legally purchase apps.[3] Apple's business model for selling apps is as follows: (1) app developers pay Apple a $99 annual membership fee to sell apps through the App Store; (2) app developers set the retail price; and (3) Apple keeps a 30% commission on every app sale.[4]

Four iPhone owners sued Apple, alleging that it had "unlawfully monopolized the iPhone apps aftermarket."[5] The crux of the complaint was that, if Apple had any competition in the apps marketplace, Apple would reduce the 30% commission it charged to app developers, which would lower the app prices users paid.[6]

The case seemingly presented an innocuous procedural question on Apple's motion to dismiss, namely, whether Apple — as opposed to the app developers — was properly named as a defendant under the Supreme Court's decision in Illinois Brick Co. v. Illinois.[7] The Supreme Court there precluded businesses who purchased concrete blocks from contractors and other resellers from suing the manufacturer for an overcharge that the contractors and resellers allegedly passed on to the indirect purchasers.[8] The Supreme Court held that only the direct purchasers had cognizable claims under the Sherman Act.[9] The court based its decision on the procedural and administrative concern that allowing indirect purchasers to sue the original seller would (1) unduly complicate all aspects of the litigation, including apportioning the recovery among all potential plaintiffs; (2) create conflicting claims to a common fund; and (3) dilute the incentive for injured parties to pursue antitrust claims.[10]

There was no disagreement among the parties — or even any of the justices on the court — that the holding in Illinois Brick would control in Apple; the only question was what result Illinois Brick commanded. Apple argued that users were indirect purchasers from Apple because the direct seller set the retail price and that declaring users to be direct purchasers would raise all of the problems the court raised in Illinois Brick.[11] Conversely, the users argued that the direct seller was simply the entity from whom they directly purchased goods.[12]

The Decision

Justice Kavanaugh stated that Illinois Brick permitted the suit against Apple to proceed, but in doing so glossed over the issue of whether the developer fee was passed on to users and largely ignored the procedural and administrative concerns on which the court based its decision in Illinois Brick.[13] Justice Kavanaugh greatly simplified the question presented:

> The sole question presented at this early stage of the case is whether these consumers are proper plaintiffs for this kind of antitrust suit — in particular, our precedents ask, whether the consumers were 'direct purchasers' from 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.

Framing the question this way reduced the issue to the identity of the purported seller, not to the economic reality of the transaction. As Justice Neil Gorsuch stated in dissent, "[t]he problem is that the 30% commission falls initially on the developers," meaning that the developers paid the fee and that users were injured only if developers passed on the fee. If that is the case, the procedural concerns on which the court based its decision in Illinois Brick would appear to require that the court bar the users from suing Apple under the Sherman Act.

Yet, using surprisingly harsh language, Justice Kavanaugh stated that the court should not engage in that inquiry. Instead, he castigated Apple's defense as a means to "gerrymander Apple out of this and similar lawsuits," depriving Apple's consumers from seeking relief for allegedly monopolistic conduct.[14] To Justice Kavanaugh, Apple's financial arrangement with developers was not a means to compensate Apple for services rendered, but an example of monopolistic actors "structur[ing] transactions with manufacturers or suppliers so as to evade antitrust claims by consumers and thereby thwart effective antitrust enforcement."[15]

Illinois Brick "is not a get-out-of-court-free card for monopolistic retailers to play any time that a damages calculation might be complicated."[16] To the contrary, Justice Kavanaugh noted, the text of the Clayton Act "broadly affords injured parties a right to sue under the antitrust laws."[17] Accordingly, Justice Kavanaugh held, the court "decline[d] to green-light monopolistic retailers to exploit their market position. ..." and affirmed the ruling of the U.S. Court of Appeals for the Ninth Circuit, which had reversed the district court's decision dismissing the complaint.[18]

The Possible Effects

The decision is a boon to class action lawyers. Had the dissent prevailed, buyers of apps would be indirect purchasers whose claims would have arisen from state law, not the Sherman Act. They would have had to overcome all of the problems in proof that Illinois Brick identified and their class certification motions would have been fraught with peril, meaning that their claims would have been far less valuable in settlement negotiations. Now, they avoid all of those pitfalls, and antitrust defendants operating software platforms will see their litigation costs rise accordingly.

Equally interesting is what the decision means for the Supreme Court's approach to antitrust. It is unclear why the court even chose to grant certiorari in Apple. There was no split in the circuits, and the issue was both new and not particularly pressing. One would have expected the court to follow its typical course and let the issue percolate through the

lower courts. Instead, the court granted certiorari merely to affirm a single circuit's decision in an issue of first impression.

Why? The four justices in dissent may have wanted to hear the case on the assumption that the court's conservative wing would drive another stake through the heart of the class action bar. It seems unlikely that the liberal justices would have voted to hear the case given that their view had prevailed in the Ninth Circuit. Perhaps Justice Ruth Bader Ginsburg knew of Justice Kavanaugh's views and wanted to use the moment to limit the reach of Illinois Brick.

Whatever the reason the court granted certiorari, Apple seems a significant moment in the court's antitrust jurisprudence. Without Justice Kavanaugh, the court was evenly split on the theory of antitrust, and these authors (and seemingly everyone else) assumed that the new justice would swing the court in the conservative direction. But perhaps we were too quick to reach a judgment. Perhaps Justice Kavanaugh has Brandesian views of big corporations generally and big tech companies particularly. It is too early to tell, but Justice Kavanaugh's alignment with the court's liberal wing on his first antitrust opinion seems to suggest that the times are changing.

Leiv Blad is a partner and co-chair of antitrust and trade regulation and Rachel Maimin is a partner at Lowenstein Sandler LLP.

[1] No. 17-204 (2019).

[2] Id. at 2.

[3] Id. at 2.

[4] Id. at 2.

[5] Id. at 2 (citation and quotation marks omitted).

[6] Id. at 3.

[7] 431 U.S. 720 (1977).

[8] No. 17-204 (2019) at 3 (citing Illinois Brick Co., 431 U.S. 720 (1977)).

[9] Id. at 5.

[10] Illinois Brick Co., 431 U.S. at 729-36.

[11] Id. at 12.

[12] Id. at 7-8.

[13] Id. at 7.

[14] Id. at 9.

[15] Id. at 10-11.

[16] Id. at 12.

[17] Id. at 7.

[18] Id. at 11.