

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

Today, the Supreme Court held in a 5-4 decision that consumers who purchased apps on Apple's App Store have standing to sue Apple under the Sherman Act for allegedly monopolizing the market for iPhone apps.

Background: Under the so-called "*Illinois Brick*" rule, announced by the Supreme Court in 1977, only "direct purchasers" have standing to sue an alleged antitrust violator for charging supracompetitive prices. An indirect purchaser—*i.e.*, a party that does not purchase goods or services directly from the alleged antitrust violator—is barred from suing, even if it argues that the party that it purchased from passed on the antitrust violator's overcharges.

In this case, several iPhone users brought suit against Apple on behalf of a putative class of consumers, alleging that Apple has violated the antitrust laws by monopolizing the market for iPhone apps, charging a 30% commission on all app sales, and thereby causing consumers to pay supracompetitive prices for apps. Apple argued that the suit was barred by *Illinois Brick* because app consumers are not direct purchasers from Apple; rather, Apple contended, the consumers are purchasers from app developers, who set the price for their own apps. Any damages to consumers, Apple argued, would occur only if app developers passed on Apple's overcharge to consumers—and pass-through theories of harm, Apple contended, are precisely what *Illinois Brick* prohibits.

The district court agreed with Apple and dismissed the complaint, but the Ninth Circuit reversed, holding that consumers are direct purchasers from Apple because they purchase apps directly from Apple.

Issue: Whether the *Illinois Brick* rule bars app consumers from bringing suit against Apple, the retailer of iPhone apps, even though app developers set the price of those apps.

Court's Holding: In an opinion written by Justice Kavanaugh and joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, the Supreme Court held that app consumers are direct purchasers from Apple and thus may sue under *Illinois Brick*. The Court explained that this conclusion follows from the simple fact that consumers deal with, and purchase apps directly from, Apple. The Court rejected Apple's argument that the role of app developers in setting app prices warrants a departure from the rule that "immediate buyers" have standing to sue, explaining that making an exception to *Illinois Brick* in this context "would provide a roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers so as to evade antitrust claims by consumers and thereby thwart effective antitrust enforcement."

Justice Gorsuch authored a dissenting opinion, which was joined by Chief Justice Roberts and Justices Thomas and Alito.

Mayer Brown filed an *amicus* brief in support of petitioner on behalf of BSA | The Software Alliance.