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Apple, Angry Birds, and Antitrust: The Direct Purchasing Requirement's Survival

SEPTEMBER 5, 2019

Blog Post | 108 KY. L. J. ONLINE | Sept. 5, 2019

Apple, Angry Birds, and Antitrust: The Direct Purchasing Requirement's Survival

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In 2018, Google Play Store users downloaded 75.5 billion apps while App Store users downloaded 29.6 billion apps.[2]

(applewebdata://8B3F5AC6-0F85-4D25-9481-

F581A9A922A0#_edn2)Google Play Store users may have downloaded

twice as many apps as App Store users, but the App Store almost doubled

Google Play Store's revenue.[3] (applewebdata://8B3F5AC6-0F85-

4D25-9481-F581A9A922A0#_edn3) Last year, the Google Play Store

made \$24.8 billion in revenue while the App Store made \$46.6 billion in

revenue.[4] (applewebdata://8B3F5AC6-0F85-4D25-9481-

F581A9A922A0#_edn4) The disparity in revenue, Killian Bell argues, is

twofold.[5] (applewebdata://8B3F5AC6-0F85-4D25-9481-

F581A9A922A0#_edn5) First, it is easier to download and install pirated

games on Android (the operating system that houses the Google Play

Store), so many developers charge nothing for their apps.[6]

(applewebdata://8B3F5AC6-0F85-4D25-9481-

F581A9A922A0#_edn6) Second, users of iOS (the operating system that

houses the App Store) are more willing to pay for their downloads.[7] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn7) At least, some of them are.

In 2011, four iPhone owners sued Apple Inc., the owner of the App Store, alleging the company unlawfully monopolized who could sell apps.[8]

(applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn8) The plaintiffs argue that "they have 'paid more for their iPhone apps than they

would have paid in a competitive market.'" [9] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn9) Apple attempted to dismiss the

case, arguing the plaintiffs did not have standing under *Illinois Brick* because they were not direct purchasers.[10] (applewebdata://8B3F5AC6-0F85-

4D25-9481-F581A9A922A0#_edn10)

Earlier this year, the Supreme Court held that the plaintiffs were direct purchasers.[11] (applewebdata://8B3F5AC6-0F85-4D25-9481-

F581A9A922A0#_edn11) Kavanaugh, writing for the five Justice majority, reasoned that the plaintiffs were direct purchasers because they bought apps

directly from Apple.[12] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn12) To do so, Kavanaugh relied on the facts of *Illinois*

Brick. [13] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn13)

In *Illinois Brick*, the state of Illinois sued the Illinois Brick Company alleging the company fixed prices.[14] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn14) Illinois Brick was a brick manufacturer and distributor.[15] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn15) Primarily, Illinois Brick Company sold bricks to masonry contractors.[16] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn16)The masonry contractors would then submit bids to general contractors.[17] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn17) Finally, the general contractors would submit bids to Illinois.[18] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn18) The court held that Illinois could not bring an antitrust claim, only a direct purchaser could do so.[19] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn19)For Justice Kavanaugh, *Illinois Brick* created a simple rule. Direct purchasers have standing.[20] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn20)

Apple and the dissent argue that *Illinois Brick's* reasoning prohibits consumers down the chain of consumption—to whom the overcharges are passed—from suing.[21] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn21) Apple maintains the defendants are downstream purchasers for two factual reasons.[22] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn22) First, independent developers set the app price, not Apple.[23] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn23) Second, Apple takes a 30% cut of the price.[24] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn24) These facts combined mean developers, in theory, could pass on the cost to consumers.[25] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn25)

The majority rejects Apple's pass on argument for three reasons. [26] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn26) First, permitting another set of plaintiffs to sue makes antitrust enforcement easier.[27] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn27) Second, the difficulty in determining costs should not prohibit this plaintiff from suing.[28] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn28) Third, *Illinois Brick* did not bar different classes of injured parties from suing, it only barred indirect purchasers.[29] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn29) In other words, Apple cannot rid itself of a monopoly suit just by claiming it is potentially liable for a monopsony suit.[30] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn30) After rejecting Apple's argument, the court held that the plaintiffs are direct purchasers.[31] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn31)

While *Illinois Brick* was upheld, the direct purchasing requirement may be nearing its end.[32] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn32) Justice Gorsuch, and 30 states as amici, reasoned that *Illinois Brick* may not further antitrust policy.[33] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn33) However, before *Illinois Brick* is overturned, Gorsuch has a few questions. [34] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn34) *Apple Inc. v. Pepper* may clearly determine whether the plaintiffs are direct purchasers, but the future for online retailers and *Illinois Brick* is murky.[35] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_edn35)

[1] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref1) Staff Editor, Kentucky Law Journal, Volume 108; J.D. Candidate, The University of Kentucky College of Law (2021).

[2] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref2) Killian Bell, *App Store Made Almost Twice as Much as Google Play in 2018*, Cult of Mac.com (January 18, 2019, 6:15 AM) <https://www.cultofmac.com/601492/app-store-google-play-revenue-2018/> (<https://www.cultofmac.com/601492/app-store-google-play-revenue-2018/>).

[3] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref3) *Id.*

[4] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref4) *Id.*

[5] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref5) *Id.*

[6] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref6) *Id.*

[7] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref7) *Id.*

[8] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref8) *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1519 (2019).

[9] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref9) *Id.*

[10] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref10) *Id.*

[11] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref11) *Id.*

[12] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref12) *Id.* at 1520.

[13] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref13) See *id.* at 1521-22.

[14] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref14) *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 726-27 (1977).

[15] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref15) *Id.* at 726.

- [16] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref16) *Id.*
- [17] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref17) *Id.*
- [18] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref18) *Id.*
- [19] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref19) *Pepper*, 139 S. Ct. at 1521.
- [20] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref20) *Id.*
- [21] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref21) *Id.* at 1525-26 (Gorsuch, J., dissenting).
- [22] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref22) *Id.* at 1521-22 (majority opinion); *Pepper*, 139 S. Ct. at 1527-28 (Gorsuch, J., dissenting).
- [23] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref23) *Pepper*, 139 S. Ct. at 1527-28 (Gorsuch, J., dissenting).
- [24] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref24) *Id.*
- [25] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref25) *Id.* at 1528.
- [26] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref26) *Id.* at 1524 (majority opinion).
- [27] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref27) *Id.*
- [28] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref28) *Id.*
- [29] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref29) *Id.* at 1525.
- [30] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref30) *Id.*
- [31] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref31) *Id.*
- [32] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref32) See *id.* at 1530-31 (Gorsuch, J., dissenting).
- [33] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref33) Faegre Baker Daniels, *Future of Antitrust Class Actions Foreshadowed in Apple Inc. v. Pepper*, JD Supra.com (May 24, 2019, 11:45 AM) <https://www.jdsupra.com/legalnews/future-of-antitrust-class-actions-21288/> (<https://www.jdsupra.com/legalnews/future-of-antitrust-class-actions-21288/>).
- [34] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref34) *Id.*
- [35] (applewebdata://8B3F5AC6-0F85-4D25-9481-F581A9A922A0#_ednref35) Daniels, *supra* note 33.



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