# CLIENT ALERT

## *Apple v. Pepper*: Tearing Down the *Illinois Brick* Wall?—Who Can and Cannot Sue Online Platforms Under the Federal Antitrust Laws

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The Supreme Court recently heard argument in *Apple v. Pepper*, a case we are following that tests the long-standing prohibition on suits by "indirect purchasers" who are further down the supply chain—in the context of Internet-based platforms.

Under the 1977 Supreme Court decision in *Illinois Brick v. Illinois*, only "direct purchasers" can bring suit under federal antitrust laws because the court believed that: (1) direct purchasers are best positioned to enforce antitrust laws and (2) it is difficult to apportion damages and prevent duplicative recovery among multiple plaintiffs. While the *Illinois Brick* rule has been an important shield for companies facing federal antitrust claims, most states do not have an analogous defense under state antitrust law, creating a patchwork regime of recovery and greater inefficiencies for the courts.

In *Apple v. Pepper*, iPhone users sued Apple over its operation of the App Store. Apple argued successfully that these consumers were indirect purchasers under *Illinois Brick* and the district court dismissed their case. The Ninth Circuit reversed and the Supreme Court granted *certiorari*.

Oral argument before the Supreme Court on November 26 suggested that several Justices are skeptical of Apple's position and the *Illinois Brick* rule. Justice Alito questioned whether direct purchasers are actually better-positioned to enforce antitrust laws, given that no app developers have sued Apple for antitrust violations. Justice Gorsuch noted that states without an *Illinois Brick* analogue have not experienced the inefficiencies thought to result from the apportionment of damages, and asked why the *Illinois Brick* rule should not be scrapped altogether. This is notable, given that neither party in the case seeks such a broad ruling. However, the discussion from the bench was a nod toward the 31 states that filed an amicus brief asking for reexamination of the rule. Justices Breyer, Ginsburg, Kagan, Kavanaugh, and Sotomayor also seemed skeptical of Apple's position. Only Chief Justice Roberts appeared to support application of *Illinois Brick*. On the other hand, as the DOJ pointed out, neither of the parties invited the court to revisit *Illinois Brick*, and overruling it would surely disrupt a stable federal-state private enforcement ecosystem that has evolved over more than forty years. A majority thus might still hold that *Illinois Brick* is settled precedent, following Chief Justice Roberts' reasoning that allowing indirect purchasers to sue in federal court could reintroduce the risk of potentially complex and duplicative damages.

The Court's skepticism echoes similar sentiments expressed by contemporary regulators and academics. For example, last week *The New York Times* published an op-ed by FTC Commissioner Rebecca Kelly Slaughter in which she called for the court to allow the consumers in *Apple v. Pepper* to sue Apple. In doing so, Commissioner Slaughter challenged the pro-Apple position expressed by the DOJ in an *amicus* brief and at oral argument. It is worth noting that even in the *amicus* brief that ultimately supported Apple's position in this case the DOJ still expressed some doubts about the *Illinois Brick* doctrine generally.

The eventual decision in *Apple v. Pepper* could dramatically impact companies' antitrust exposure. Elimination of the *Illinois Brick* rule entirely would remove a long-standing federal antitrust defense. Even a narrower Supreme Court decision that merely

clarifies the meaning of "direct purchaser" could be consequential if that definition encompasses multiple groups of purchasers. The Supreme Court could also fashion a rule specifically applicable to Internet-based platforms or other two-sided markets. In any case, criticism from the bench, regulators, and commentators suggests that there is consensus that the *Illinois Brick* doctrine's days may be numbered, whether through the *Apple v. Pepper* decision or some future matter. This would represent a paradigm shift given that the doctrine is decades old and has had an entire ecosystem of law develop around it.

The Supreme Court's *Apple v. Pepper* decision is expected by June 2019.

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