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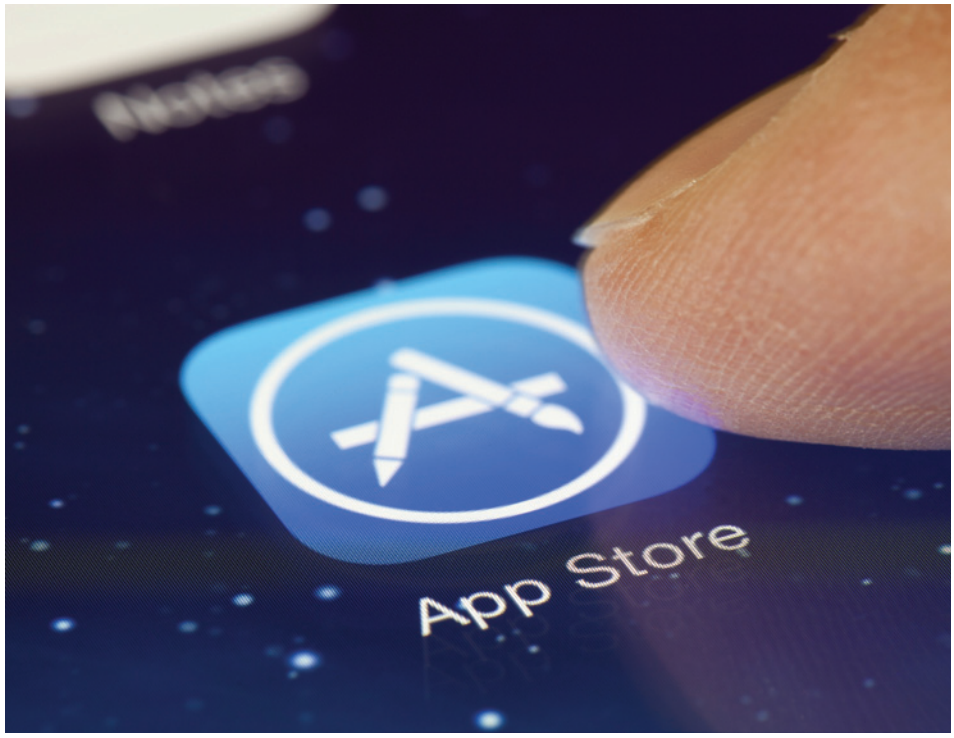
Apple Lawsuit Could Impact How Courts View Antitrust Cases

BY FRANK READY

The U.S. Supreme Court's move to review the *Apple v. Pepper* case could mean big things for lawyers and clients who have regularly depended on a common, stalwart antitrust defense— which may be about to find itself on the endangered species list.

"No matter what the decision is, it's going to have an impact, a dramatic impact on the marketplace, including the marketplace involving intellectual property rights, software sales and other product sales," said Todd Seelman, the national chair of the antitrust and competition practice at Lewis Brisbois.

Whether or not he's talking about small dent to the fender or a crater in the New Mexico desert will largely come down to how the Supreme Court rules. The suit, filed by a group of iPhone users, alleges that the company has established an unlawful monopoly over iOS apps and that the 30 percent cut it takes from developers has in turn been passed along to consumers.



In defense, Apple is banking on its self-prescribed role as a distributor and legal precedent from the 1977 Supreme Court decision in *Illinois Brick Co. v. Illinois*, which ruled that a plaintiff must be directly injured by anti-competitive conduct in order to seek damages.

"*Illinois Brick* has been a defense to many antitrust actions," Seelman said. "As long as the manufacturer has an intermediary, one or two intermediaries, between it and the purchaser, they can't be sued in federal court."

In order for *Illinois* Brick to apply here, Apple would have to successfully argue that they are not the direct seller of the apps in their store—but even that get-out-of-jail-free card might not be worth holding if the rules to the game change.

Seelman suggested that the precedent may have reached its sell-by date. "I think in many ways *Illinois* Brick is probably ineffective, and I think if it's addressed may well be overturned."

Without the precedent, Apple and other manufacturers could have to seriously rethink their distribution models to avoid costly antitrust actions in the future.

Jane Winn, a professor of law at the University of Washington, speculated on how the application of a new antitrust paradigm might impact the Apple e-commerce ecosystem.

"It might be like killing the goose that laid the golden eggs. Consumer advocates and the government can override Apple's judgment about the best way to manage its e-commerce ecosystem, including its pricing strategy. But then it won't be the same ecosystem; it's not going to feel the same to the app developers and end users that participate in that ecosystem today for a reason," Winn said.

Oddly enough, the trouble facing *Illinois* Brick could have more to do with the realities of today's federal court system than the relative cutting edge state of today's e-commerce market.

According to Seelman, one of the original issues with regards to Judge Byron White's decision in *Illinois* Brick was the complexity of getting federal courts involved in apportionment.

"Judge White said that the federal courts should not be in position of apportioning out who is damaged from what price fixing along the distribution channel. It's too complex and it's more efficient to have the direct purchaser be the one to sue," Seelman said.

And yet it happens more often than you might think. Seelman said that as many as 23 states allow for indirect purchaser actions. Those actions occasionally get bumped up to federal court, which then wind up dealing with indirect actions under state law.

"Contrary to what was said in 1977, the federal courts are in effect dealing with issues of injury and apportionment for direct and indirect purchasers," Seelman said.

Editor's Note: This article has been updated to accurately reflect the Judge who wrote the Illinois Brick decision.

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