A NEW UNDERSTANDING OF WHO IS A DIRECT PURCHASER BASED ON APPLE INC. V. PEPPER

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Abstract: A group of consumers sued Apple in 2011 alleging that Apple had violated antitrust laws through their monopolization of their App Store. In trying to dismiss the suit, Apple asserted that consumers, despite purchasing apps directly from Apple through the App Store, did not have standing to sue them as monopolists because the consumers were actually buying from the app developers. The Supreme Court rejected Apple’s argument in its 2019 ruling in Apple, Inc. v. Pepper. By rejecting Apple’s view, the Supreme Court has expanded consumers’ available remedies by clarifying that consumers that buy directly from a distributor are direct purchasers for the purposes of the Illinois Brick test. The long-standing Illinois Brick rule allows only direct purchasers to sue monopolists. The Apple decision signals a shift in the Court’s view on antitrust litigation to being more pro-consumer. It also exposes many e-commerce businesses to litigation. These businesses were previously understood to be insulated from litigation based on the rule’s prior application and use. Particularly at risk appears to be e-commerce businesses that operate “digital marketplaces” and directly process payments.

INTRODUCTION

Because of Apple’s thirty percent commission and other pricing requirements, owners of Apple iPhones are overpaying for their apps. After nearly eight years of litigation, the United States Supreme Court has recognized that these consumers have standing to sue Apple for these alleged anticompetitive practices. In 2019, in Apple, Inc. v. Pepper, the Supreme Court classified consumers who purchase goods in a digital marketplace controlled by a monopolistic retailer—like Apple—as direct buyers. In doing so, the Court followed the 1977 Supreme Court decision in Illinois Brick Co v. Illinois, which held that only consumers who purchase directly from a monopolist have standing to bring an antitrust suit. By ruling in favor of consumers, the Court recognized that a monopolistic retailer who imposes mandatory fees on

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1 Apple, Inc. v. Pepper, 139 S. Ct. 1514, 1519 (2019).
2 Id. at 1525.
3 Id.
purchases should not be able to shield itself from consumers who ultimately bear the price.\(^5\)

Many modern e-commerce platforms operate using a type of store-front system where the platform is supplied its product by third parties and the product is then listed on the platform.\(^6\) For example, Apple’s App Store sells apps, Uber sells rides, and Amazon sells goods, all originating from third parties.\(^7\) Consumers purchase the products directly from the platform and then remit payment to the supplier.\(^8\) The Court’s recent ruling in Apple now makes it clear that the entity providing the platform is not shielded from antitrust suits under the direct buyer theory, contrary to prior decisions by lower courts.\(^9\)

Part I of this Article reviews the history of the 1977 Supreme Court Illinois Brick rule leading up to the Apple decision, including an Eighth Circuit case, Campos v. Ticketmaster Corp., decided the opposite way.\(^10\) Part II of this Article discusses the Apple case itself.\(^11\) Part III discusses the potential implications of the Apple decision on other players in the digital marketplace field by re-examining the aforementioned Eighth Circuit decision.\(^12\)

I. THE DIRECT PURCHASER RULE

The direct purchaser rule is the result of a line of cases starting with the 1968 United States Supreme Court’s Hanover Shoe, Inc. v. United Shoe Machinery Corp.\(^13\) In general, the direct purchaser rule bars claims by parties injured by a monopolist if they are more than one step removed within the chain

\(^5\) See id. at 1522–23 (holding that app purchasers have standing as direct purchasers to bring suit under Section 2 of the Sherman Act and Section 4 of the Clayton Act).

\(^6\) See, e.g., Stephen Layton & Laura McMullen, 8 Places to Sell Stuff Online, NERDWALLET (May 7, 2020), https://www.nerdwallet.com/article/finance/where-to-sell-stuff-online (giving examples of digital marketplaces where people can list items for sale).


\(^9\) See discussion infra Part III.A.

\(^10\) Campos v. Ticketmaster Corp., 140 F.3d 1166, 1171 (8th Cir.), cert. denied, 525 U.S. 1102 (1999); see discussion infra Part I.

\(^11\) See discussion infra Part II.

\(^12\) See discussion infra Part III.

\(^13\) See Illinois Brick Co., 431 U.S. at 726 (holding that plaintiffs in antitrust suits cannot be more than one step removed from the anticompetitive behavior); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968) (holding that defendants in antitrust suits cannot use a “passing-on” defense against direct purchasers to limit liability).
of commerce.\textsuperscript{14} The rule has been applied with devastating effects on consumers.\textsuperscript{15}

Section A of this Part discusses \textit{Hanover Shoe} and how the Supreme Court in \textit{Illinois Brick} adapted the \textit{Hanover Shoe} analysis to apply it to consumers.\textsuperscript{16} Section B of this Part discusses \textit{Campos}, where the 1998 United States Court of Appeals for the Eighth Circuit applied the direct purchaser rule in a way that resulted in an outcome opposite of \textit{Apple}.\textsuperscript{17}

\textit{A. Origins of the Direct Purchaser Rule}

Two direct purchaser rule flows from two Supreme Court decisions from the late 1960s and 1970s.\textsuperscript{18} The 1968 case \textit{Hanover Shoe} established that a defendant’s liability could not be reduced or limited in an antitrust suit when the plaintiff purchased a product directly from the defendant and passed-on the costs to downstream consumers.\textsuperscript{19} The 1977 case \textit{Illinois Brick} presented the inverse situation where the plaintiff tried to bring suit against an alleged monopolist after a middleman had passed-on the additional costs from the monopolist.\textsuperscript{20} For various policy reasons, the Court extended the bar on defendants using the “passing-on” defense to also apply to claims from plaintiffs who are two or more steps removed from the anticompetitive behavior.\textsuperscript{21} This Section discusses each case in order.\textsuperscript{22}

1. \textit{Hanover Shoe, Inc. v. United Shoe Machinery Corp.}

In \textit{Hanover Shoe}, a shoe-manufacturer plaintiff brought suit against its supplier alleging that the defendant’s monopoly on shoe-manufacturing machinery forced the plaintiff to lease equipment that it otherwise would have bought.\textsuperscript{23} The supplier-defendant asserted that, even if the plaintiff had been impacted by an illegal lease-only policy, the plaintiff passed its increased costs to its customers, so there was no legally cognizable injury.\textsuperscript{24} The Supreme

\textsuperscript{14} \textit{Apple}, 139 S. Ct. at 1520 (“[I]ndirect purchasers who are two or more steps removed from the violator in a distribution chain may not sue.”).

\textsuperscript{15} See discussion infra Part I.B.

\textsuperscript{16} See discussion infra Part I.A.

\textsuperscript{17} See 140 F.3d 1166, 1171 (8th Cir.), cert. denied, 525 U.S. 1102 (1999) (holding that consumers are not direct purchasers from Ticketmaster because the concert venues are the direct purchasers of Ticketmaster’s services).

\textsuperscript{18} See generally \textit{Illinois Brick Co.}, 431 U.S. 720; \textit{Hanover Shoe}, 392 U.S. 481.

\textsuperscript{19} \textit{Hanover Shoe}, 392 U.S. at 494

\textsuperscript{20} \textit{Illinois Brick Co.}, 431 U.S. at 726.

\textsuperscript{21} \textit{Id.} at 728–29, 737. This holding by the Court affirmed a move by some lower courts to interpret the \textit{Hanover Shoe} rule as applicable to plaintiffs as well as defendants. See Edward D. Cavanagh, \textit{Illinois Brick: A Look Back and A Look Ahead}, 17 \textit{LOY. CONSUMER L. REV.} 1, 8 n.26 (2004) (describing the split at the circuit court level); Comment, \textit{Mangano and Ultimate-Consumer Standing: The Misuse of the Hanover Doctrine}, 72 \textit{COLUM. L. REV.} 394, 405, 407 (1972) (summarizing the application of the \textit{Hanover Shoe} in the Third Circuit).

\textsuperscript{22} See discussion infra Part I.A.1. (\textit{Hanover Shoe}); Part I.A.2. (\textit{Illinois Brick}).

\textsuperscript{23} 392 U.S. at 483–84.

\textsuperscript{24} \textit{Id.} at 487–88. Defendant-supplier’s lease-only scheme was held to be an illegal monopolization based on a separate case brought by the government, as well as the findings of fact in the lower court. \textit{Id.} at 484–87. The District Court also found that the plaintiff would have
Court, however, rejected this argument, holding that a “passing-on” defense could not be used by the alleged monopolist to avoid liability.25

Underpinning the Court’s decision was the policy that allowing a passing-on defense would result in each impacted party only being able to recover the amount of damages that were not passed on to the next link.26 In essence, it would have the effect of distributing damages caused by the monopolization across the entire supply chain, leaving each party in the chain with a smaller recoverable amount.27 Ultimately, each link’s recovery may end up being so small as to not justify bringing suit.28 Additionally, the Court worried about the impracticability of ascertaining how much harm was passed on at each stage and, therefore, how much each party in the supply chain was entitled to recover.29 Thus, the Court reasoned, it makes sense to allow the first link in the chain to sue for the maximum amount of damages to both deter parties from engaging in monopoly actions and to create judicial efficiency in determining damages.30

2. Illinois Brick Co. v. Illinois

In Illinois Brick, the defendant, a supplier of concrete blocks to local construction contractors in the Chicago area, was alleged to have engaged in price fixing.31 The State of Illinois alleged that this price fixing had resulted in increased bid prices from contractors when winning local government and State construction contracts.32 The State sought recovery from the defendant-supplier for these increased bid prices.33 Relying on Hanover Shoe, the defendant asserted that the State did not have standing to bring a claim for alleged price fixing because the construction contractors were the direct purchasers of the concrete blocks and the State was at least one step removed from the monopolization and was therefore an indirect purchaser.34 The defendant-supplier contended that, under Hanover Shoe, only direct purchasers could sue.35

The Supreme Court agreed and held that only a direct purchaser had standing to bring suit.36 The Court’s decision was grounded in the policy that because the “passing-on” defense could not be used by a monopolist to limit

incurred substantial cost savings if they had been given the opportunity to purchase the equipment outright rather than lease. Id. at 487–88.
25 Id. at 492–93.
26 Id. at 494.
27 Id.
28 Id.
29 See id. at 492–93 (noting the difficulty of determining the impact of a single change in cost to a product’s ultimate price).
30 See id. at 493–94 (noting that allowing defendants to assert a pass-on cost defense would encourage future defendants to attempt to assert the defense leading to long and complicated future proceedings and the possibility of the monopolist retaining their illegal profits when all impacted parties are not plaintiffs).
31 431 U.S. at 726–27.
32 Id.
33 Id.
34 Id. at 727–28.
35 Id.
36 Id. at 748
damages from an indirect purchaser, it could not be used offensively by an indirect purchaser to recover damages. Under this reciprocal argument theory, the Court chose to bar the indirect purchaser from bringing a claim rather than overturn \textit{Hanover Shoe}. In examining whether this approach was consistent with the underlying policies of \textit{Hanover Shoe}, the Court concluded that barring an indirect purchaser from bringing a claim was in concert with judicial efficiency. Regarding deterrence, the Court noted that allowing an indirect purchaser to bring suit exposed defendants to duplicate liability to direct and indirect purchasers because the defendant would not be able to assert a passing-on defense against the indirect purchasers to decrease liabilities owed to each link in the chain. Additionally, a compulsory joinder of all of the direct and indirect parties might be required for the suit to move forward, causing further inefficiency and potentially leading to situations where parties engaging in monopoly practices escape litigation entirely. In sum, the Court’s view was that stare decisis, through the reciprocal argument theory, and judicial efficiency mandated the outcome: indirect purchasers are barred from bringing suit.

The Court’s holding severely limited the ability of consumers to recover damages resulting from monopolistic behavior. In his dissent, Justice William Brennan pointed out that consumers are often the ones most affected by anticompetitive behavior, and that precluding them from suing left only the middlemen who are often reluctant to sue their suppliers.

\textbf{B. Expansion of the Direct Purchaser Rule: Campos v. Ticketmaster Corp.}

The \textit{Illinois Brick} rule barring indirect purchasers from suing monopolists has been applied broadly by lower courts to quash private antitrust

\begin{itemize}
  \item \textit{Id.} at 728–29.
  \item \textit{Id.} at 736.
  \item \textit{Id.} at 737. The majority’s argument for judicial efficiency rests on the idea that those most directly impacted by the anticompetitive behavior (“direct purchasers”) are the ones best situated to bring suit, because it eliminates the need for any apportionment of the harm between downstream plaintiffs and consolidated claims into a single action. \textit{Id.} at 740–43. Some have questioned the difficulty of apportionment as not being an intractable problem, especially in complex antitrust litigation. See \textit{id.} at 758 (Brennan, J., dissenting) (“\textit{Hanover Shoe} correctly observed that the necessity of tracing a cost increase through several levels of a chain of distribution ‘would often require additional long and complicated proceedings involving massive evidence and complicated theories.’ But this may be said of almost all antitrust cases.”); Bill White, \textit{Recovery by Indirect Purchasers and the Functions of Antitrust Treble Damages}, 55 TEX. L. REV. 1445, 1452 (1977) (“Since companies frequently employ routine pricing procedures, such as standard markups, and managers typically use rule-of-thumb procedures to avoid the rigors of profit maximization, proof of these practices probably would eliminate the necessity of complex marginal analysis in the courtroom.”).
  \item \textit{Illinois Brick Co.}, 431 U.S. at 737–38.
  \item \textit{Id.} at 738–42.
  \item See Cavanagh, \textit{supra} note 21, at 23 (noting that Justice Byron White relied on stare decisis, the need for efficient adjudication, and the goal of minimizing multiple liability convince the rest of the Court).
  \item \textit{See Illinois Brick Co.}, 431 U.S. at 764–65 (Brennan, J., dissenting) (noting that consumers bear the brunt of antitrust violations whether they are direct or indirect purchasers).
  \item \textit{Id.} at 764 n.23 (Brennan, J., dissenting).
\end{itemize}
enforcement. For example, in 1998 in *Campos*, the United States Court of Appeals for the Eighth Circuit’s applied the *Illinois Brick* rule, which resulted in consumers being barred from bringing suit against an alleged monopolist defendant even though the consumers appeared to directly purchase from the defendant.

In that case, ticket purchasers alleged that Ticketmaster, a ticket-supplier, engaged in anticompetitive behavior by colluding with concert venues and promoters to impose monopoly prices and boycott performers who resisted its monopoly powers. Ticketmaster contracted with venues to handle their ticket sales and distributed the venues’ tickets to ticket purchasers like plaintiffs, where the venues received a fee. The District Court for the Eastern District of Missouri dismissed the case, accepting Ticketmaster’s argument that the ticket purchasers did not have a “sufficient direct link to the market to give them antitrust standing.” The court found that the venues and promoters, rather than the ticket purchasers, were the appropriate parties to bring suit because they were the ones suffering direct harm from Ticketmaster’s alleged monopolistic practices. Additionally, the court found that multiple liability, a key component of the *Illinois Brick* decision, cut in favor of Ticketmaster in this instance because ticket purchasers, venues, and promoters would all be able to recover for the same monopolistic behavior.

On appeal, the Eighth Circuit affirmed the lower court’s dismissal. The circuit court defined an indirect purchaser as “one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser.” Ultimately, the court rejected the argument that ticket purchasers were direct purchasers of the Ticketmaster’s ticket distribution services, noting that any distinct service or convenience fees associated with the ticket were merely a result of venues contracting with Ticketmaster in an antecedent transaction. The court also rejected the argument that Ticketmaster’s monopoly power was benign as far as the venues were concerned and so the venues had no incentive to bring suit.

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45 See Roger D. Blair & Jeffrey L. Harrison, *Reexamining the Role of Illinois Brick in Modern Antitrust Standing Analysis*, 68 Geo. Wash. L. Rev. 1, 18–27 (1999) (examining how lower court interpretations of the *Illinois Brick* rule have historically varied based on geographic location of the suit with some circuits interpreting the rule broadly and some narrowly).
46 *Campos*, 140 F.3d at 1169.
48 Id.
49 Id.
50 Id. at 1277.
51 Id. at 1278.
52 Id. at 1168.
53 Id. at 1172.
54 Id. at 1169.
55 Id. at 1171.
56 Id. at 1171. The court reasoned that Ticketmaster’s service and convenience fees, which are collected directly from the ticket purchasers, impacted venues because a venue not beholden to Ticketmaster’s monopoly would be able to charge as much for their tickets as Ticketmaster was charging, including fees. Id. at 1171. This reasoning is in line with other decisions holding that a monopolist charging monopoly prices is not by itself a violation of antitrust law. See *Verizon*
The Eighth Circuit’s adoption of the antecedent transaction language expanded the indirect purchaser definition significantly. In his dissenting opinion, Judge Morris Arnold argued that the majority’s indirect purchaser definition was not only expansive but also misapplied. Judge Arnold noted that, when applied correctly, the antecedent transaction test should only consider transactions that are within the direct vertical chain of transactions and those that result in a passing-on of monopoly costs from the direct purchaser to the indirect purchaser. The antecedent transaction between the venues and Ticketmaster did not result in a passing-on of monopoly costs in this case because the monopoly costs were added when Ticketmaster sold the tickets to consumers and not during the antecedent transaction. Further, the defendant’s fees were borne entirely by ticket purchasers and so the monopoly costs could not be understood to have been passed on because the venues never paid those costs.

In sum, the decision in Campos left consumers without remedy and implicitly sanctioned monopoly schemes where a monopolist middleman inserted itself between two parties and only extracted value from the downstream purchaser. The Supreme Court rectified this issue in Apple.

II. Apple, Inc. v. Pepper

In 2011, consumers, through an antitrust class action suit, alleged that Apple had monopolized and attempted to monopolize the iPhone app market, harming consumers through the thirty percent fee it kept on Apple App Store transactions that are within the

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Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.”); cf. Amanda Creedon, Antitrust Issues in Reverse Payment Settlements: Federal Trade Commission v. Actavis, Inc. et al. As A Case Study, B.C. INTELL. PROP. & TECH. F. 1, 2–3 (2015) (discussing another instance where anticompetitive behavior is not presumptively illegal). The Campos court appears to be using this reasoning not to dispose of an antitrust violation claim but rather to dispose of an argument for why ticket purchasers, not venues, are the most directly injured party and, therefore, most appropriate to bring suit. Campos, 140 F.3d at 1174 (M. Arnold, C.J., dissenting). Additionally, the court’s theory seems to be that Ticketmaster is merely extracting a middleman rent from the overall transaction rather than adding additional costs, which may not be true for all monopolies. See Blair & Harrison, supra note 45, at 21–22 (pointing out that the court’s theory did not seem to account for successive monopolies).

Campos, 140 F.3d at 1174 (M. Arnold, C.J., dissenting) (“The phrase ‘antecedent transaction,’ however, appears nowhere in the authorities relied on, and, in fact, a mere ‘antecedent transaction’ will not turn all purchasers of a monopolized product into indirect purchasers for the purposes of Illinois Brick.”). In Illinois Brick, the majority defined an indirect purchaser as one who purchases a product “which passes through two separate levels in the chain of distribution before reaching [plaintiffs].” Illinois Brick Co., 431 U.S. at 726.

Campos, 140 F.3d at 1174.

Id.

Id.

Id.

See Richard Hardack, What They Don’t Want You to Hear: Beltone, Ticketmaster, and Exclusive Dealing, 9 B.U. J. SCI. & TECH. L. 284, 313–14 (2003) (noting that the holding in Campos allows monopolist behavior as long as the anticompetitive behavior includes an arrangement between vertical non-competitors).

See Apple, 139 S. Ct. at 1521–22 (holding that a direct purchaser is one who purchases directly from a supplier as ticket purchasers did in Campos).
app sales. Relying on the *Illinois Brick Co. v. Illinois* doctrine, the district court found that app store customers were not direct purchasers and that Apple’s thirty percent fee was a cost passed on to consumers by the true injured parties, the app developers.

Although the United States District Court for the Northern District of California dismissed the case, the Court of Appeals for the Ninth Circuit reversed the district court’s dismissal. The Ninth Circuit’s reasoning echoed Judge Arnold’s dissent in *Campos v. Ticketmaster Corp.*, emphasizing that the distributor who sells to the consumer, in this case Apple, is the appropriate defendant for the consumer’s lawsuit. The court noted that its decision did not rest on the “formalities of payment or bookkeeping arrangements,” the distinction between Apple receiving a thirty percent commission or charging a thirty percent markup, nor on Apple or the app developer being the one who ultimately determined the app’s price. The court did not weigh in on whether Apple was additionally liable to app developers as direct purchasers of Apple’s distribution services, but did note that if app developers were direct purchasers, then the court believed Apple would also be open to suit by app developers.

Section A of this Part summarizes the majority opinion in *Apple, Inc. v. Pepper* and the Court’s reasoning for rejecting classifying consumers as indirect purchasers in this instance. Section B of this Part summarizes the dissent’s position and main critique of the majority opinion.

A. The Supreme Court Holds That App Purchasers Are “Direct Consumers”

On appeal, the Supreme Court affirmed the Ninth Circuit’s interpretation of what it means to be a “direct purchaser” under the *Illinois Brick* rule. The Court held that iPhone owners were direct purchasers of apps from Apple under the statutory language of antitrust law and precedent. Specifically, the Court pointed to the statutory language in § 2 of the Sherman

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66 In re Apple iPhone Antitrust Litig., 846 F.3d 313, 325 (9th Cir. 2017), aff’d sub nom. Apple, Inc. v. Pepper, 139 S. Ct. 1514, 1519 (2019).
67 Id. at 323; Campos v. Ticketmaster Corp., 140 F.3d 1166, 1174–75 (8th Cir.) (M. Arnold, C.J., dissenting), cert. denied, 525 U.S. 1102 (1999).
68 Id. at 324.
69 Id.
70 See discussion infra Part II.A.
71 See discussion infra Part II.B.
73 Id. at 1520.
Act\textsuperscript{74} and § 4 of the Clayton Act,\textsuperscript{75} allowing “any person” who has been “injured” by an antitrust violator to sue.\textsuperscript{76} The Court held that this broad language readily covered consumers who purchase goods or services at higher-than-competitive prices from a monopolist.\textsuperscript{77}

The Court noted that its ruling was consistent with precedent, including \textit{Illinois Brick} and its progeny because the Court determined app purchasers to be direct purchasers.\textsuperscript{78} The Court adopted the Ninth Circuit’s understanding of the facts in this case: app purchasers purchase apps directly from Apple with no intermediary in the form of the app developers.\textsuperscript{79} Under this understanding, consumers satisfy the \textit{Illinois Brick} test because they are direct purchasers and not two or more steps removed from the monopolist in the distribution chain.\textsuperscript{80}

Apple argued that consumers are limited to suing only the party that sets the retail price for a product.\textsuperscript{81} The Supreme Court rejected this argument for the statutory and precedential reasons above, and was critical of Apple’s chosen criteria.\textsuperscript{82} The adoption of a “who set the price” test for standing would allow a shrewd monopolist to structure its business dealings to insulate itself from antitrust actions by consumers.\textsuperscript{83} Apple argued that its “who set the price” test addressed the policy considerations underpinning \textit{Illinois Brick} by facilitating more effective enforcement of antitrust laws, avoiding complicated damages calculations, and eliminating duplicative liability for defendants.\textsuperscript{84} Ultimately, the Court rejected Apple’s arguments, stating that prohibiting consumers from suing a monopolistic retailer contradicted the goal of antitrust law, that calculation of complicated damages was hardly unusual in antitrust cases, and that duplicative liability did not apply because Apple’s anticompetitive behavior was impacting both its suppliers and its consumers.\textsuperscript{85}

\textbf{B. The Dissent Echoes the Illinois Brick Court’s Policy Concerns}

\textsuperscript{74} 15 U.S.C. § 2 (2018) (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .”). The Sherman Antitrust Act of 1890 was the first Federal statute targeting trusts and monopolies. \textit{See} 15 U.S.C. §§ 1–2 (declaring trusts in restraint of trade and monopolies as illegal); \textit{see also} Richard S. Markovits, \textit{The American Antitrust Laws on the Centennial of the Sherman Act: A Critique of the Statutes Themselves, Their Interpretation, and Their Operationalization}, 38 BUFF. L. REV. 673, 709–710 (1990) (explaining the basics provisions of the Sherman Act).


\textsuperscript{76} \textit{Apple}, 139 S. Ct. at 1520.

\textsuperscript{77} \textit{Id.}

\textsuperscript{78} \textit{Id.} at 1520–21.

\textsuperscript{79} \textit{Id.} at 1519–20.

\textsuperscript{80} \textit{Id.} at 1520–21.

\textsuperscript{81} \textit{Id.} at 1521–22.

\textsuperscript{82} \textit{Id.} at 1522–23.

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} \textit{Id.} at 1524.

\textsuperscript{85} \textit{Id.} at 1524–25.
In his dissent, Justice Neil Gorsuch argued that the majority’s ruling went against the rule of proximate cause for injuries and damages.\textsuperscript{86} Justice Gorsuch adopted Apple’s view that the app purchasers are buying from the third-party app developers and that Apple’s role in this is just as a “Internet App Store.”\textsuperscript{87} Under this view, prices are set by the developers and any change in Apple’s commission is passed on to the consumer via a change in the app’s price.\textsuperscript{88} Therefore, consumers’ injuries are a result of the app developer choosing not to eat the cost of Apple’s monopolistic mark-up, but rather passing them on to the consumer.\textsuperscript{89} By casting the app developers as the ones selling to consumers, Justice Gorsuch argued that this was exactly the situation to which \textit{Illinois Brick} should apply.\textsuperscript{90} In support, Justice Gorsuch pointed out the complications of damages calculations by noting that a trial court would need to pick apart how each app developer sets its prices and what might have changed had Apple’s commission been different.\textsuperscript{91} Further, app developers themselves may become necessary parties to prevent duplicative liability which may result in slowing down or dismissal of suits altogether, thus frustrating the purpose of antitrust laws.\textsuperscript{92}

One of the majority’s reasons for rejecting Apple’s “who set the price” test was to prevent a monopolist from avoiding antitrust liability by structuring its business practices.\textsuperscript{93} Justice Gorsuch pointed out, however, that the majority’s holding that the \textit{Illinois Brick} rule does not apply to consumers who deal directly with a retailer means that Apple will be able to avoid antitrust liability by restructuring its contract with app developers to include that consumers are buying the apps from the app developers who then pay Apple the applicable commission.\textsuperscript{94}

### III. What Remains of the Direct Purchaser Rule?

The contrasting majority opinions and dissents in both \textit{Apple, Inc. v. Pepper} and \textit{Illinois Brick Co. v. Illinois} exemplify the two schools of thought surrounding the direct purchaser rule.\textsuperscript{95} Justice Gorsuch’s dissenting opinion in \textit{Apple} and the majority opinion in \textit{Illinois Brick} demonstrate one, while the

\textsuperscript{86} Id. at 1527 (Gorsuch, J., dissenting) ("Unless Congress provides otherwise, this Court generally reads statutory causes of action as ‘limited to plaintiffs whose injuries are proximately caused by violations of the statute.’").

\textsuperscript{87} Id. at 1527–28.

\textsuperscript{88} Id.

\textsuperscript{89} Id.

\textsuperscript{90} Id.

\textsuperscript{91} Id. at 1528.

\textsuperscript{92} Id.

\textsuperscript{93} Id. at 1522–23.

\textsuperscript{94} Id. at 1530. Justice Gorsuch’s critique that the majority’s holding would allow monopolists like Apple to structure its business dealings to avoid antitrust liability should be contrasted with the prior interpretations of the direct purchaser rule which had the same result. See id. at 1522–23 (explaining how the prior rule had allowed businesses to structure their supply chain to avoid liability exactly as Apple had done). The interplay between the majority and the dissent perhaps points to a more fundamental issue with antitrust enforcement policy under the \textit{Illinois Brick} and \textit{Hanover Shoe} doctrines which, as Justice Gorsuch suggests, may call for overturning these prior cases. Id. at 1531 (Gorsuch, J., dissenting).

\textsuperscript{95} Apple, Inc. v. Pepper, 139 S. Ct. 1514 (2019); Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); see discussion supra Part II.
majority opinion in *Apple* and Justice Brennan’s dissenting opinion in *Illinois Brick* demonstrate the other.96 For example, the *Apple* majority’s statement that complicated damages calculations are par for the course in antitrust cases echoes Justice Brennan’s dissent in *Illinois Brick*.97 Additionally, the *Apple* majority’s policy decision to not leave consumers at the mercy of a well-advised monopolist is in line with Justice Brennan’s fears that the *Illinois Brick* ruling would bar consumers, who bear the brunt of most antitrust violations, from recovery.98 On the other hand, Justice Gorsuch’s dissent in *Apple* channels the same policy considerations that resulted in the *Illinois Brick* decision including complicated damages and the risk of compulsory joinder.99

Both sides appear to agree that the goal of antitrust law is to deter anticompetitive behavior, but they seem to disagree on the best way to achieve this goal.100 The *Illinois Brick* majority believed that the risks of an antitrust suit being bogged down in complicated calculations or possibly being dismissed because it lacked a necessary party meant that only direct purchasers should be able to bring suit.101 The *Apple* majority, however, believes that the risk of a complicit or unmotivated third-party should not leave consumers without a remedy due to a monopolist’s shrewd contracting practices.102 Thus, the Supreme Court’s ruling in *Apple* signals a change in priorities for antitrust litigation and a potential opening for later challenges to the *Illinois Brick* regime.103

Section A of this Part uses the Supreme Court’s clarification of the direct purchaser rule to re-examine the facts of the *Campos* case and show that it would be decided differently if it were brought today.104 Section B of this Part


97 *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 758 (1977) (Brennan, J., dissenting) (noting that long and complicated proceedings to trace cost increases through several levels of a supply chain is something that “may be said of almost all antitrust cases”).

98 *Id.* at 764 (Brennan, J., dissenting) (“The Court today regretfully weakens the effectiveness of the private treble-damages action as a deterrent to antitrust violations by, in most cases, precluding consumers from recovering for antitrust injuries. For in many instances, consumers, although indirect purchasers, bear the brunt of antitrust violations. To deny them an opportunity for recovery is particularly indefensible when direct purchasers, acting as middlemen, and ordinarily reluctant to sue their suppliers pass-on the bulk of their increased costs to consumers farther along the chain of distribution.”).

99 *Id.* at 737–38.

100 Compare id. at 745–46 (“We think the longstanding policy of encouraging vigorous private enforcement of the antitrust laws . . . . supports our adherence to the Hanover Shoe rule, under which direct purchasers are not only spared the burden of litigating the intricacies of pass-on . . . .”), with *Apple*, Inc. v. Pepper, 139 S. Ct. 1514, 1524 (2019) (“Leaving consumers at the mercy of monopolistic retailers simply because upstream suppliers could also sue the retailers makes little sense and would directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases.”).


102 *Apple*, 139 S. Ct. at 1524.

103 Note, supra note 96, at 390–91; see also *Apple*, 139 S. Ct. at 1530–31 (Gorsuch, J., dissenting) (questioning whether the majority’s ruling is a substitute for overruling *Illinois Brick*).

104 See discussion infra Part III.A.
posits which companies may be open to litigation under Apple, who may have previously understood themselves to be shielded by decisions like Campos.\footnote{See discussion infra Part III.B.}

\textit{A. Campos v. Ticketmaster Revisited}

Campos illustrates the extent to which Apple has altered antitrust doctrine.\footnote{Campos v. Ticketmaster Corp., 140 F.3d 1166, 1171 (8th Cir.), cert. denied, 525 U.S. 1102 (1999); see discussion supra Part II.} Given the new framework in Apple, Campos would not have been dismissed for lack of consumer standing if it were brought today.\footnote{See Apple, 139 S. Ct. at 1519 (holding that a direct purchaser is one who transacts directly with an entity).} If litigated today, the similarities between the alleged Ticketmaster pricing scheme in Campos and the App Store in Apple likely would have been enough to defeat Ticketmaster’s motion to dismiss.\footnote{In re Apple iPhone Antitrust Litigation, 846 F.3d at 323 (“The Eighth Circuit has considered a transaction closely resembling the transaction in the case before us.”).}

In Campos, the plaintiffs alleged that they were direct purchasers of ticket distribution services from Ticketmaster because they paid Ticketmaster for their tickets.\footnote{Campos v. Ticketmaster Corp., 140 F.3d 1166, 1171 (8th Cir. 1998), cert. denied, 525 U.S. 1102 (1999).} In addition to the ticket price, Ticketmaster added explicit convenience and service fees that were paid directly to Ticketmaster.\footnote{Id. at 1168–69.} The plaintiffs alleged that Ticketmaster’s exclusive contracts with almost every promoter gave it control over ticketing for any large-scale popular music concert at a major venue, regardless of whether Ticketmaster also had an exclusive contract with the venue.\footnote{“According to plaintiffs, Ticketmaster therefore has ironclad control over ticketing for any large-scale popular music concert at major venues in the United States.”.}

In essence, a concert-goer’s options for music concerts at major venues were to either buy through Ticketmaster or to not attend at all.\footnote{Apple, 139 S. Ct. at 1519.}

Similarly, in Apple, the plaintiffs alleged that they were direct purchasers of apps from Apple because they paid Apple directly for apps from the Apple App Store.\footnote{Id. at 1520.} Apple’s exclusive control over iPhone apps left plaintiffs with only two options: (1) buy an app through the App Store, where Apple takes its cut, or (2) not buy an app at all.\footnote{Compare id. at 1519 (alleging that Apple’s thirty percent fee is passed on to consumers through increased app prices), with Campos, 140 F.3d at 1169 (describing Ticketmaster’s additional service fees paid by consumers).} The parallels between Apple’s fee structure and Ticketmaster’s fee structure are striking.\footnote{Cf. Apple, 139 S. Ct. 1521 (“There is no intermediary in the distribution chain between Apple and the consumer. . . . The absence of an intermediary is dispositive. Under Illinois Brick, the iPhone owners are direct purchasers from Apple and are proper plaintiffs to maintain this antitrust suit.”).}

Thus, applying the Apple analysis to the facts of Campos, it is apparent that ticket purchasers that buy their tickets directly from Ticketmaster make them direct purchasers.\footnote{Cf. Apple, 139 S. Ct. 1521 (“There is no intermediary in the distribution chain between Apple and the consumer. . . . The absence of an intermediary is dispositive. Under Illinois Brick, the iPhone owners are direct purchasers from Apple and are proper plaintiffs to maintain this antitrust suit.”).}
The Supreme Court articulated three major policy concerns underpinning the decisions in *Apple* and *Illinois Brick*: (1) effective enforcement of antitrust laws, (2) avoidance of complicated damages calculations, and (3) elimination of duplicative liability for defendants.\(^\text{117}\) Regarding effective enforcement of antitrust laws, the Court’s statement in *Apple* is equally applicable to the facts of *Campos*: leaving ticket purchasers at the mercy of Ticketmaster simply because venues and promoters could also sue makes little sense.\(^\text{118}\) Indeed, as Justice Brennan noted in *Illinois Brick*, “middlemen have little incentive to sue . . . so long as they may pass on the bulk of the illegal overcharges to the ultimate consumers” and so the brunt of antitrust injuries are often ultimately borne by the end consumers of a product.\(^\text{119}\)

Regarding complicated damages, the Court in *Apple* stated that complicated damages calculations are simply a part of antitrust litigation.\(^\text{120}\) Compared to the *Apple* pricing scheme, the *Campos* pricing scheme, with its broken-down service and convenience fees, is elementary.\(^\text{121}\) Like effective enforcement, the Court’s statements in *Apple* regarding duplicative liability also apply to the facts of *Campos*: a retailer that is both a monopolist and a monopsonist may be liable to different classes of plaintiffs when the retailer’s unlawful conduct affects both the downstream and upstream markets.\(^\text{122}\) Ticketmaster’s monopolizing of the ticket distribution market may have exposed it to antitrust liability from both ticket purchasers and venues/promoters.\(^\text{123}\)

The *Campos* case, therefore, represents a simplified version of the *Apple* case and, if brought today, ticket purchasers would have standing.\(^\text{124}\) Had the suit been allowed to move forward, Ticketmaster’s alleged “ironclad control” over the ticketing of music concerts would have been tested.\(^\text{125}\) As of 2018, Ticketmaster, through various mergers—most notably, with Live Nation—and acquisitions, retained control of more than eighty percent of the online ticketing market.\(^\text{126}\)

\(^{117}\) Id. at 1524.

\(^{118}\) Id. at 1524.

\(^{119}\) *Illinois Brick Co.*, 431 U.S. at 749 (Brennan, J., dissenting).

\(^{120}\) *Apple*, 139 S. Ct. at 1524.

\(^{121}\) *See Campos*, 140 F.3d at 1171 (explaining how Ticketmaster’s fees are collected directly from ticket buyers).

\(^{122}\) *Cf. Apple*, 139 S. Ct. at 1525 (“A retailer who is both a monopolist and a monopsonist may be liable to different classes of plaintiffs—both to downstream consumers and to upstream suppliers—when the retailer’s unlawful conduct affects both the downstream and upstream markets.”).

\(^{123}\) *Cf. id* (explaining how businesses could be liable to both upstream and downstream for antitrust violations as either a monopsonist and a monopolist, respectively).

\(^{124}\) *See id.* at 1519 (ticket purchasers purchased their tickets directly from Ticketmaster and so are direct purchasers under the new *Apple* test).

\(^{125}\) *See Joycelyn Stevenson, Changes in the Ticket Distribution Industry: Is This the Beginning of the End for Ticketmaster?*, 3 VAND. J. ENT. L. & PRAC. 53, 62 (2001) (questioning whether Ticketmaster’s consolidation of power was because of their lack of competition or because of the rise of the internet).

B. Other Potential “Marketplace” Companies at Risk

As discussed in the preceding Section, the ruling in *Apple* drastically changed the landscape that antitrust suits have been operating in with respect to standing. The Supreme Court’s adoption of a rule where consumers have standing if they directly transact with a distributor may have profound implications for many e-commerce platforms that have a structure where the buyer pays the platform, and the sale price, minus the platform’s fees, is remitted to the seller.

Amazon, for example, is a large marketplace estimated to control nearly forty percent of the U.S. e-commerce market. Amazon allows third-parties to sell items on its website whereby consumers pay Amazon, which then collects applicable fees—the major fee being a “referral fee”—and sends the remainder to the seller. Before *Apple*, a consumer’s suit alleging that Amazon engaged in anticompetitive behavior by monopolizing the e-commerce space, was likely to be dismissed under a *Campos* framework, where the third-party seller, and not the consumer, was held to be the appropriate plaintiff. Following *Apple*, however, such consumers likely have standing because they deal directly with Amazon.

Similarly, “sharing” companies like Uber, Lyft, and Airbnb may now be exposed to new liability because their structure is similar to that of Apple’s: consumers pay the company, the company takes its commission or fee, and the remainder is remitted to the driver or homeowner. Interestingly, Uber is already embroiled in multiple antitrust lawsuits across the country, with many being brought by drivers. In a number of these suits, drivers allege that Uber is underpaying drivers by charging higher fares to customers than reported to drivers on their pay statements and keeping the difference. If riders were to

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127 See discussion supra Part III.A.


130 *Selling on Amazon Fee Schedule*, supra note 128.

131 See *Campos*, 140 F.3d at 1169–70 (holding that an indirect consumer bears some portion of a monopoly overcharge by virtue of an antecedent transaction between the monopolist and another independent purchaser and is therefore barred from suing the monopolist).

132 See *Apple*, 139 S. Ct. at 1520 (holding that one who transacts directly with a monopolist is a direct purchaser under the *Illinois Brick* doctrine and has standing to sue the monopolist).

133 See *id.* (holding that one who transacts directly with a monopolist is a direct purchaser under the *Illinois Brick* doctrine and has standing to sue the monopolist).


135 See *Aleksanian*, Compl. ¶ 14, Nov. 6, 2019 (“[Uber] also engaged in a second systematic contract violation which consisted of keeping a double set of books . . . during which time Uber charged different fares to customers than it reported on drivers’ pay statements.”); *Dulberg*,
bring an antitrust claim for this overcharge, it would exemplify the point made by the Court in Apple where a monopolist that is also a monopsonist may be liable for damages from both sides.\textsuperscript{136}

Another example of a company which may be open to litigation is Valve Corporation, a company that operates a video game digital distribution service known as Steam.\textsuperscript{137} Valve allows game developers to sell their video games on its Steam service and, similar to Apple, takes a thirty percent commission on all sales.\textsuperscript{138} Steam is the largest digital distribution service despite other companies’ attempts to break into the space, with only large video game publishers being able to defy Valve’s dominance.\textsuperscript{139} Steam has recently been challenged, however, by other services imposing a lower commission.\textsuperscript{140} This has resulted in Valve changing its commission structure from a flat thirty percent to a regressive amount that decreases as a video game developer’s sales increase.\textsuperscript{141} This change and the potentially lower prices for the same games on other platforms may be enough to show that Valve has been using its monopoly on video game distribution to engage in anticompetitive behavior in the form of higher-than-competitive prices for video games, similar to the allegations in Apple.\textsuperscript{142}

CONCLUSION

The Supreme Court’s ruling in Apple, Inc. v. Pepper represents a change in the Court’s policies regarding antitrust suits. Specifically, the Court has moved away from the need to promote judicial efficiency towards the need to provide consumers a remedy to anticompetitive behavior. By classifying parties who directly engage in a transaction with a monopolist to be direct purchasers, the Court has opened the door for a broad class of plaintiffs previously barred by the prior understanding of the Illinois Brick rule. The ruling in Apple, then, may have broad implications for many e-commerce businesses with fee structures similar to Apple’s whereby the full fee is collected from the consumer and payment is remitted to third-party sellers, minus the e-commerce business’ fee.

\textsuperscript{136} Apple, 139 S. Ct. at 1525 (“A retailer who is both a monopolist and a monopsonist may be liable to different classes of plaintiffs . . . when the retailer’s unlawful conduct affects both the downstream and upstream markets.”).

\textsuperscript{137} About Steam, VALVE, https://store.steampowered.com/about/ (last visited May 3, 2020).


\textsuperscript{139} Id.

\textsuperscript{140} Id.


\textsuperscript{142} See Apple, 139 S. Ct. at 1519 (discussing plaintiffs’ claim that Apple’s percentage fee charged to app developers for sales on the App Store was evidence of them paying supra-competitive prices).
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