ABA SECTION OF ANTITRUST LAW

THE PRICE POINT

The Newsletter of the Pricing Conduct Committee

Volume 19, Issue 1 January 2019

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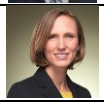	Celeste C. Saravia *Cornerstone Research*
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From the Editor:

We are looking for authors for our Spring 2019 edition – please contact us if you are interested!

Nick Grimmer
Office of the Texas Attorney General
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The Price Point is published three times a year by the American Bar Association Section of Antitrust Law Pricing Conduct Committee. Members of the Section of Antitrust Law may access past issues through the Pricing Conduct Committee's website. The views expressed in this publication are the authors' only and not necessarily those of the American Bar Association, the Section of Antitrust Law or the Pricing Conduct Committee. If you wish to comment on the contents of **The Price Point**, please write to the American Bar Association, Section of Antitrust Law, 321 North Clark Street, Chicago, IL 60654-7598 or to the Editor, Nick Grimmer (Nick.Grimmer@oag.texas.gov).

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Co-Chairs' Corner

R. Dale Grimes and Sarah Zielinski, Co-Chairs

We have an exciting new edition of the Pricing Conduct Committee's newsletter, *The Price Point*. Editor and Vice Chair Nick Grimmer has assembled some interesting material related to the pricing issues of the day.

First, Jody Boudreault provides an excellent retrospective of 2018's most important Robinson Patman Act developments.

The next two articles examine one of this Supreme Court term's most highly anticipated antitrust cases, *Apple v. Pepper*: In the first, Jody Boudreault returns with a summary of the excellent panel discussion our committee recently hosted on the case. Then, Nick Grimmer reports on his trip to see the oral argument and read the appellate tea leaves.

Next, Sarah Zielinski summarizes our recent committee town hall and all the ways you can get involved with us.

Finally, the appendix to this newsletter compiles all of our recent Price Tags—a must read for anyone wanting to keep up on all of the latest pricing conduct developments!

There are many opportunities for interested Antitrust Section members to get involved in the work of the Pricing Conduct Committee in this new Section year. These include writing or editing articles, helping organize committee programs, participating in drafting Section comments on pricing issues, and working on other policy issues.

In particular, we welcome committee members who would like the opportunity to publish an article on some pricing conduct issue, so if you are interested please contact Nick at Nick.Grimmer@oag.texas.gov. Articles in *The Price Point* are typically in the 2,000- to 2,500-word range (think 3 to 5 single-spaced pages), but can be a bit shorter or substantially longer, as appropriate for the subject matter.

Also, while we already have some excellent programs in the works for this new Section year, we are always open to new ideas! We invite committee members to propose and/or prepare committee programs; if you have an idea you would like to pursue, please contact Vice Chair Paul Saint-Antoine at paul.saint-antoine@dbr.com, who coordinates the committee's program efforts, or any other Pricing Conduct Vice Chair.

Another form of "publication" the committee employs is its Connect page, with the occasional, but frequent, posting of "Price Tags," a source for timely news and events pertaining to pricing practices. Vice Chair Jeff Perry runs the committee's Connect page, and collects the items that go into "Price Tags." Jeff is always looking for material to include, so please contact him at jeffrey.perry@weil.com if you see something that would interest our committee members.

Finally, if you are not already a member, please consider joining the Pricing Conduct Committee. Through our committee programs, regular postings on Connect and *The Price Point* newsletter, the Pricing Conduct Committee strives to keeps its members apprised of pricing-related antitrust developments, including developments relating to resale price maintenance, the Robinson-Patman Act, most favored nations clauses, loyalty discounts, and bundled pricing, to name just a few. Joining the Pricing Conduct Committee is easy, and it is free for members of the ABA Section of Antitrust Law.

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2018 Robinson Patman Act Update

Jody Boudreault

Wholesalers and manufacturers continue to be subject to Robinson Patman Act (**RPA**) claims, as their customers claim rival retailers get better prices that result in injury to competition. Just one plaintiff, however, survived a motion to dismiss in 2018.

Summary

In 2018, we learned:

- Factual allegations surrounding injury to competition continue to be a deciding factor at the motion to dismiss stage;
- "Evenhandedness" is not a separate element of functional availability;
- "Functional availability" negates the price discrimination element of a claim;
- "Reasonably contemporaneous" continues to be shorter than four years apart; and
- Online advertising is not subject to the RPA.

Ninth Circuit Affirms Judgement In *Mathew Enterprise, Inc. v. Chrysler Group LLC*[1]

In *Mathew Enterprise*, the Ninth Circuit issued an unpublished opinion affirming Chrysler's 2017 trial win over common auto dealer incentive programs.

The plaintiff had challenged Chrysler incentive programs as discriminatory under the RPA. One challenge was to Chrysler's rental assistance incentive awarded to a new dealership at the commencement of business. The Ninth Circuit affirmed the dismissal, finding a four-year difference in the commencement of business between the plaintiff and the new dealership was not "reasonably contemporaneous."[2]

The Ninth Circuit also affirmed the jury instruction on functional unavailability. Functional availability is a judicial doctrine under which "a uniform pricing formula applicable to all customers is not a price discrimination under the act[ ] if the favorable price was available, not only in theory but in fact, to all purchasers."[3] Mathew Enterprise wanted its jury instruction to include "evenhandedness" as a separate element of functional availability. The jury instruction, however, required a showing that "the incentives would not have been practically available had [plaintiff] engaged in commercially reasonable efforts to achieve them."[4] The Ninth Circuit held that evenhandedness is the same concept as equal availability of a discount.[5] Additionally the Ninth Circuit found that Mathew Enterprise "failed to take commercially reasonable steps to avail itself of the offered incentive."[6]

Finally, the Ninth Circuit held that the existence of functional availability negates an element of the plaintiff's claim.[7] Thus, a plaintiff has not proved the price discrimination element of its RPA claim if an equivalent price is realistically available to all purchasers (i.e., an incentive is functionally available).

Anticompetitive Effects Matter: Is It As Simple As Whether Prices Go Up Or Down?

The elements of a secondary line claim are (1) two or more contemporaneous sales by the same seller; (2) at different prices; (3) of commodities of like grade and quality; (4) that had an anticompetitive

[1] 738 F. App'x 569 (9th Cir. 2018).

[2] *Id.* at 570 (favorably citing *England v. Chrysler Corp.*, 493 F.2d 269, 272 (9th Cir. 1974) for the holding that "a 16-month difference in the commencement of business between two entities [is] too distant to support a discrimination claim under the Robinson-Patman Act.").

[3] *Smith Wholesale Co. v. R.J. Reynolds Tobacco Co.*, 477 F.3d 854, 867 (6th Cir. 2007) (internal citation omitted).

[4] *Mathew Enterprise,* 738 F. App'x at 570.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 570-71.

effect; and (5) that injured the plaintiff.[8] Many cases fall on lack of factual specificity regarding the anticompetitive effect of the alleged conduct.

In *Card v. Ralph Lauren Corp.*,[9] plaintiff alleged that the wholesaler gave "unfair discounts" to her competitors and she lost sales because of her rivals' lower prices. Plaintiff, however, failed to identify the discounts, that they were for the same products, that they were contemporaneous, or that they had an anticompetitive effect.[10] The claims were dismissed. Plaintiff then filed a Second Amended Complaint and defendants again moved to dismiss.[11] The court again dismissed the claim for failing to plead an anticompetitive effect: "Plaintiff must be able to plead either that the discounts were for the same products Plaintiff sold or that Plaintiff was competing with the wholesalers for the same customers such that the discounts caused an anticompetitive effect."[12]

In *Bader v. Keefe Supply Co.*,[13] an allegation that prices of prison commissary items are much higher than prices for the same items in local stores failed to prove unfair price discrimination between competitors and was dismissed.[14] The court found that it was not apparent "how any defendant engaged in anticompetitive practices."[15] Similarly, RPA allegations in *Talbert v. Keefe Group*[16] that Philadelphia prison commissary prices were higher than Commonwealth prison commissaries were dismissed. The complaint alleged that the price differentials result from differences between the realities of the market in the Philadelphia prisons (with "poor-quality food") and the Commonwealth's prisons (with "edible and tasty" food). The court held that the allegations, along with statutory defenses permitting price discrimination based on changing market conditions, show no injury to competition.[17]

In *Bunnett & Co. v. Gearheart*,[18] plaintiffs sued under the RPA's Section 2(c) brokerage provision. They alleged that their customer's promise to continue buying from their former salesman caused plaintiffs to reduce prices, resulting in competitive injury. The court held that an allegation of the sale of a single product at a reduced price fails to show injury to competition.[19] The court further held that the customer's promise of future business to the salesman without anything of value exchanged for the promise is insufficient to constitute a bribe.[20] Moreover, while the plaintiffs plead that their pricing decisions were made on false information, they did not specify what the false information was, reliance on it, or the difference in price. As a result, the court held they failed to plead that they were injured.[21]

In *Furniture Royale Inc. v. Schnadig International Corp.*,[22] plaintiff furniture retailer sued the manufacturer and Wayfair online advertising platforms alleging that the manufacturer sold its furniture on Wayfair websites at up to 40 percent off MSRP. The court found that the plaintiff had alleged price discrimination between itself and end-use consumers, and this does not show injury to competition.[23] The court then dismissed the RPA claims, holding that the RPA "is inapplicable to price discrimination between retailers and ultimate purchasers because retailers are not in competition with end-use consumers."[24]

Some plaintiffs did survive motions to dismiss. In *Best Effort First Time LLC v. Southside Oil LLC*,[25]

[8] *Card v. Ralph Lauren Corp.*, 2018 U.S. Dist. LEXIS 147609, at *19-20 (N.D. Cal. 2018) (citing *Rutledge v. Elec. Hose & Rubber Co.*, 511 F.2d 668, 677 (9th Cir.1975)).
[9] 2018 U.S. Dist. LEXIS 147609 (N.D. Cal. 2018).
[10] *Id.* at * 21.
[11] *Card v. Ralph Lauren Corp.*, 2018 U.S. Dist. LEXIS 204473 (N.D. Cal. 2018).
[12] *Id.* at *9.
[13] 2018 U.S. Dist. LEXIS 115780 (E.D. Mo. 2018).
[14] *Id.* at *9.
[15] *Id.*
[16] 2018 U.S. Dist. LEXIS 206553 (E.D. Pa. 2018).
[17] Id. at *5-6 & n.15.
[18] 2018 U.S. Dist. LEXIS 31873 (N.D. Cal. 2018).
[19] *Id.* at *31.
[20] *Id.* at *30 (finding allegations lacked necessary detail such as when and where the promises were made, the value of the promises and the injury to plaintiff).
[21] *Id.*
[22] 2018 U.S. Dist. LEXIS 210108 (D. Nev. 2018).
[23] Id. at *7.
[24] *Id.*
[25] 2018 U.S. Dist. LEXIS 55888 (D. Md. 2018).

ten Maryland retail gasoline stations' factual allegations were sufficient. Plaintiffs identified the favored purchasers as defendant-gasoline distributor's customers who operate gas stations in Maryland, buy Exxon-brand gasoline under open-price term contracts and compete in the same marketing area in Maryland as plaintiffs.[26] Plaintiffs claimed competitive injury because others were charged "considerably lower" prices while plaintiffs were charged above the "rack price."[27] As a result, plaintiffs lost retail customers, income and profits, and to cover their expenses had to raise retail prices.[28] This harmed competition.

Online Advertising Is Not Subject To The RPA

In *Shulman v. Facebook.com*,[29] the district court affirmed that the RPA covers commodities, not services such as advertising on Facebook.[30]

Nonparty Discovery Can Be Restricted

In *AlarMax Distribs. v. Honeywell Int'l, Inc.*,[31] the court considered a third-party subpoena issued by the plaintiff. An earlier court order had partially quashed the subpoena as duplicative of information produced by the defendant, overbroad in its request for irrelevant information, and disproportional under Federal Rule of Civil Procedure 26(b)(1). The plaintiff moved for reconsideration of a specification that asked for "All Documents . . . referring to the Price . . . and Net Price . . ." of defendant's purchases from the nonparty. The court affirmed that it would be an unreasonable burden to require a nonparty to produce every email communication relative to each of over 20,000 product purchases over a seven-year period.[32] The court also held that it would be duplicative of data produced by the defendant, which showed purchases, prices, special discounts, rebates and incentives of the nonparty.[33] And the court also affirmed that plaintiff could not subpoena from the nonparty information about other distributors with whom it did business as irrelevant, overbroad and duplicative.[34]

No Private Party Standing To Enforce Section 3

In *Hoglund v. Charter Communs., Inc.*,[35] a district court dismissed a private cause of action brought under the criminal statute, Section 3 of the Clayton Act. A private party cannot enforce this criminal statute.[36]

Conclusion

For plaintiffs, 2018 court decisions indicate that specific factual allegations of injury to competition are decisive in surviving a motion to dismiss. For defendants, clear communication to customers around pricing and incentives policies and the steps their customers can take to meet the requirements, may help keep the company out of litigation.

About the Author

Jody Boudreault is a senior associate with Baker Botts LLP.

[26] *Id.* at *31.
[27] *Id.* at *32-33.
[28] *Id.* at *33.
[29] 2018 U.S. Dist. LEXIS 113076 (D.N.J. 2018).
[30] *Id.* at *14.
[31] 2018 U.S. Dist. LEXIS 153342 (W.D. Pa. 2018).
[32] *Id.* at *6-7 (W.D. Pa. 2018).
[33] *Id.*
[34] *Id.* at *7-8.
[35] 2018 U.S. Dist. LEXIS 173210 (N.D. Ala. 2018)
[36] *Id.* at *7 (citing *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 381 (1958)).

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Examining *Apple v. Pepper*: A Panel Discussion

Jody Boudreault

The Pricing Conduct and Civil Practice and Procedure Committees held a program in October examining the In re *Apple iPhone Antitrust Litigation* called "Is Direct Really Correct? Bricks, Tix, Kicks, and Apps in *Apple v Pepper*." The panelists delved into the *Apple v. Pepper* case that is due to be decided this term by the Supreme Court, and this article summarizes the panel's excellent discussion.

The panelists included: Eva Cole, co-chair of the Antitrust Practice Group at Winston & Strawn who regularly defends class action lawsuits; Janet Netz, partner and co-founder of ApplEcon and a testifying damages expert; Emilio Varanini, Deputy Attorney General in the California Attorney General's Office Antitrust Section who has been involved in many class actions on behalf of the state; and Will Reiss, Principal at Robins Kaplan who regularly works as class action plaintiff's counsel. The panel was moderated by Jody Boudreault from Baker Botts. First, Cole outlined the background facts.

Background Facts

Plaintiffs are app purchasers, and most apps are developed by third party developers. Defendant Apple sells apps through its App Store, which is a closed proprietary system, giving Apple control over which apps are available. Apple charges developers an annual access fee and a commission on each third-party app purchased for an iPhone. When a customer purchases an app, the payment is submitted to Apple via the App Store; Apple retains 30% and sends 70% to the developer.

Plaintiffs argue that Apple has stifled competition and driven up prices of apps by locking out developers from the app store who are unwilling to follow Apple's policies. Plaintiffs' argue that the relevant product market is the apps themselves and consumers are the direct purchasers of those. Apple argues that the relevant product market allegedly being monopolized is the market for app distribution, and the developers are the direct purchasers.

Now, the Supreme Court must determine who has standing to sue… who are the direct purchasers?

The district court held that the plaintiffs are indirect purchasers of apps and cannot sue Apple under *Illinois Brick*. The court reasoned that because developers pay Apple's commissions and set prices in light of those commissions, to the extent prices are supra-competitive, developers are passing through an overcharge.

The Ninth Circuit disagreed, holding that plaintiffs are direct purchasers of apps from Apple within the meaning of *Illinois Brick* and therefore have standing. Its analysis turned on the function that Apple serves in the distribution chain rather than how it receives compensation or who is setting app prices. The court reasoned that Apple is a distributor of the iPhone apps; it sells them directly to purchasers through its App Store. Because Apple is a distributor, the Ninth Circuit reasoned, plaintiffs have standing under *Illinois Brick*.

Apple claims that its App Store is an agency-based two-sided market connecting app developers and consumers. A two-sided platform, they say, is one where the platform offers two different services to two different groups who both depend on the platform to intermediate between them. Here, Apple is both a seller of its own distribution services to developers, and an agent that sells apps at developer-set prices. The alleged anticompetitive conduct, Apple argues, is not on the consumer side of the platform, but in connection with Apple's role as a provider of distribution services to app developers. For Apple, the relevant question is who purchases those distribution services, and the answer is the app developers.

Plaintiffs take the position that the app store is not a two-sided transaction platform, but rather serves as a retail outlet where Apple directly sells apps to iPhone owners. A two-sided platform, they maintain, is one where the only product or service provided by the platform is facilitation of the transaction that takes place over the platform, like in credit card networks. Here, they argue, Apple's role is not to facilitate a transaction, but to sell apps directly to consumers at inflated prices. Plaintiffs say *Illinois Brick*'s bright line rule should apply: those who purchase directly from an antitrust violator should be able to sue that violator for damages, and Apple directly sells apps to consumers.

Are Plaintiffs Direct Purchasers?

Panelist Will Reiss argued that *Apple v. Pepper* is very different from previous direct purchaser cases for two reasons. First, Apple tries to characterize the allegations as a monopoly for distribution services, but that is not consistent with the actual complaint. Reiss said that characterization should fail because the standard on a motion to dismiss is that the allegations in the complaint are accepted as true. Additionally, the damages that the app developers potentially suffered are very different from the damages potentially suffered by consumers. The app developers are essentially selling apps to Apple and getting remitted the selling price minus Apple's commission, and that is an alleged monopsony violation.

Second, he said, Apple provides distribution services to consumers as well. Generally, when a retailer purchases from a wholesaler and sells to the next line in the distribution chain, they're offering distribution services. Damages here are typically measured in the difference between the price that the retailer pays and the price that it sells for. The consumers here alleged an overcharge resulting from inflated prices. Inflated prices often depend on the actions of an independent third-party actor. There's significant exclusive dealing and predatory pricing caselaw outside the *Illinois Brick* context, where a plaintiff is required to demonstrate that its damages depend on a relationship between an increase in prices versus the actual prices that the market will bear, that does not create an indirect purchaser situation. And that's really what this case is, he said. Essentially, it is the situation where the plaintiffs purchase directly from the antitrust violator, so they are clearly direct purchasers.

The States Filed an Amicus Brief Asking the Court to Overturn *Illinois Brick*

Panelist Emilio Varanini argued that the question is how antitrust law determines liability for a company that operates what seems to be a two-sided market? Should Apple be liable for setting up a two-sided platform market and preventing developers from being able to sell apps outside of its control?

Varanini argued that *Illinois Brick* should be overruled. He advocated for a new system where liability is determined at trial and damages are determined in a post-trial allocation process. Pass-on issues or how you split up the money would be handled in the allocation process. He referenced the long line of precedent for dividing up damages in the allocation process.

Varanini argued that in today's world we are debating the exact nature of Apple's business model as it impacts damages, and that seems to be getting things backwards. None of these questions should matter in his proposed system. To the extent that pass-on turns out to be an issue, he posited, that would be handled as part of post-trial allocation proceedings. If *Illinois Brick* were overruled, whether the App Store is a two-sided platform would not matter, and that may be the best answer here he said.

Is the Direct/Indirect Dichotomy Less Applicable to the Economy Today?

Panelist Janet Netz argued that the indirect/direct dichotomy used for *Illinois Brick* and *Hanover Shoe* is not as applicable to a wide swath of the economy today. She argued that as technology continues to change, there are going to be more and more situations where the direct/indirect dichotomy simply doesn't fit anymore. Comparing the Ninth Circuit decision here and the Eighth Circuit decision in *Campos v. Ticketmaster*, Netz said both of those

opinions have reasonable arguments for why consumers are direct purchasers (in the Ninth Circuit) and indirect purchasers (in the Eighth circuit). In her opinion, if we continue to try to push this square peg of platform markets into the round hole of the indirect/direct dichotomy, she would favor the Ninth Circuit approach.

Determining Standing

Panelist Eva Cole argued that we need to determine who is the direct purchaser in a complex distribution chain in the software industry. While that is not an easy question to answer, she finds the Ninth Circuit's approach overly simplistic. The Ninth Circuit doesn't really explain how you determine what function a company is serving. The court spends some time describing what it thinks is not important: who takes ownership of the product and when, the distinction between a markup or a sales commission, and who determines the ultimate price. But, she argues, the decision leaves us asking what are the questions we need to answer to determine standing?

Cole argued that before liability and damages, fundamentally courts have to determine 'does this particular party have standing to bring this claim against this defendant?' That's not unique to antitrust law; standing questions have to be determined in any case.

The Form of the Business Model and Incentives to Sue

Panelist Will Reiss discussed the potential for two poor outcomes to the case. First, a decision could insulate companies using an agency business model. Here, Apple decided to use an agency model instead of a traditional wholesale model. According to the complaint, Apple is really controlling the price and controlling the terms between the consumers and the app developers. He argued that if Apple had taken title to the apps, paid the app developers money and then resold the product, clearly consumers would be the direct purchasers. To him, this is a form over substance issue. He cautioned that if the Supreme Court immunized that behavior, it could cause a sea change in the industry, creating a perverse incentive to move away from the traditional wholesale model to avoid liability.

Second, Reiss said a decision holding that these consumers are indirect purchasers could prevent both consumers and app developers from any remedies or any incentive to sue. Reiss noted that many briefs pointed out that certain developers are injured by Apple's conduct. Apple imposes conditions on developers' prices, such as: after free, the next available price point is $0.99 and the price points increase in dollar increments. Also, because it is a closed distribution system, Apple can exclude app developers from the platform if the app developers challenge them. This, in turn, creates a real disincentive for the developers to sue. So consumers may have no remedy because they are held to be indirect purchasers and the app developers lack an incentive to sue. As a result, an alleged monopolist like Apple can essentially get away with its conduct and there's no deterrent. But one of the primary purposes of the Sherman Act is its deterrent function. Reiss concluded that there is a real potential lack of deterrence if Apple is able to escape liability.

Panelist Emilio Varanini argued that what we do not want is a damages rule that uses the form of the business model to back into issues of liability, standing and causation. Yet, that is what we are doing here with *Illinois Brick*. *Illinois Brick* is not a standing rule, it's a damages rule, Varanini posited; but the form in which a company chooses to do business should be a liability rule.

Varanini explained that the form in which you do business is supposed to be handled as part of liability. But here we are dealing with it as part of damages. He disagreed with Cole's point that this case is about standing, whether plaintiffs have an injury or not. He distinguished Article III standing from prudential standing. Prudential standing in the antitrust context, is governed by *Associated General Contractors*. And *Associated General Contractors* has components that come from *Illinois Brick* and may very well disappear if *Illinois Brick* is overruled. But it also has other components that come from tort law—causation, foreseeability, and

proximate cause. That is important here because *Illinois Brick* is not a standing rule. It is a pragmatic damages rule designed to help insure that antitrust violators are prosecuted by avoiding complexities in the federal courts. That is what it was designed to do, and that is what 90% of the Illinois brick majority decision is about. In contrast, Justice Brennan's dissent argues that courts can handle this complexity. Maybe back then with the tools available, there was a good argument that the economics wasn't as easy as Justice Brennan thought. But today it is a different world.

What does this mean for traditional industry? Well, Varanini explained, whether you're talking about a traditional industry or a two-sided platform market, the form in which you choose to do business really should be a matter for liability and not for damages, not for proximate cause, and not for standing.

Varanini also explained that if there are standing issues of whether a plaintiff has an injury *at all*, that can be dealt with as such without the need for *Illinois Brick*, because that is what *Associated General Contractors* is for. If you have issues of causation, of proximate cause, we have great proximate cause tools. Proximate cause and foreseeability have been applied for centuries and we can do it without worrying about the form of the business model.

Ultimately, Varanini urged that what we do not want is a damages rule that uses the form of the business model to back into issues of liability, standing and causation. Yet that's what we're doing here with *Illinois Brick* if Apple prevails. To the extent that antitrust laws want to favor or take account of the economics of a double-sided market, there are other ways to do that without going to *Illinois Brick*. And we certainly should not disadvantage one mode of business that might be traditional over another by saying that that model there should be a different form of *Illinois Brick*.

Varanini stressed that issues about how traditional industries choose to set up often worldwide distribution chains lead to complexities with *Illinois Brick*'s application. For instance, he noted that he has encountered *Illinois Brick* issues in cases where a manufacturer outsources some or all of the manufacturing to external manufacturers that may be located nearby. It's really the external manufacturers who should be suing. If you look at the external manufacturer setup in east Asia, however, you quickly realize that it is a forlorn hope that any of those people would have any incentive of suing. Varanini concluded that whatever rule we go with here really should not turn on the form of business model that a particular industry or market chooses to employ.

Netz asserted that all these points and arguments suggest that even applying the indirect/direct dichotomy to traditional industries can be problematic. Depending on how things are decided, she said, maybe in the future instead of selling their goods to the retailer it will be on consignment or commission to make the retailer an agent. In this way companies could use the system to set things up in terms of who is a direct and who is an indirect purchaser.

Netz further explained that in the Apple setting, either the consumers are the direct purchasers, or the app developers are the direct purchasers. Either way the direct purchaser is harmed and is not barred from sue Apple under *Illinois Brick*. But, Netz said agreeing with Varanini, developers may not have an incentive to sue. The only way the app developers can sell their app to Apple consumers is through Apple's App Store. So, app developers have to make a decision: do they sue Apple because they are not making as much money as they could? If they do sue, do they risk totally cutting off their income stream because Apple will bar them from the App Store? If that happens, then they have no way of distributing to iPhone consumers. Therefore, Netz said, trying to force the indirect/direct dichotomy on situations like the App Store where it doesn't really fit can lead to problems in traditional industries.

In traditional industries indirect/direct worked just fine, but *Apple v. Pepper* may give firms wiggle room to set up their business practices in such a way to potentially skirt antitrust law, which is not good. Netz concluded that it is a complication that the Supreme Court simply did not anticipate in

Illinois Brick when it decided that it would be less complicated to deny pass-on for both offensive and defensive use. The world the Supreme Court thought would be simplified has become more and more complicated.

Cole then discussed the point that Apple's system may benefit consumers. Apple is a closed proprietary system, so it is offering a service, not just to the app developers, but also to consumers in the form of insuring that the apps work within its operating system. And consumers do have another option; they can buy an Android phone, for example. And Android may open its library or store in a different way to allow developers to sell directly. Cole reasserted that it is important to remember that there are other options here.

Cole asserted that it is inaccurate to say developers will not have incentives to sue or to say that there will be nobody to bring a lawsuit against a violator if consumers cannot sue Apple. She asserted that suppliers regularly bring lawsuits against their distributors in many contexts and explained that it is inaccurate to holistically say there is going to be a complete lack of interest on the part of developers to bring a lawsuit. Developers might want to bring a lawsuit depending on the context, the circumstances, and what they are getting paid. One of the arguments made about *Campos v. Ticketmaster* was that no one had an incentive to sue other than the ticket purchasers. But, Cole noted, at least one band (Pearl Jam), did in fact bring a lawsuit against Ticketmaster.

The key to who will be affected by this case, Cole said, depends not only on the outcome, but more so on the Supreme Court's rationale. That rationale could impact across all industries, including more traditional industries. Cole noted that if the Supreme Court is not interested in re-writing or overturning *Illinois Brick* they are going to have to be precise in explaining what they are doing and why, so that the implications can be clearly understood.

What Would a Post-*Illinois Brick* World Look Like?

The panel turned to a discussion of what the world might look like if the Supreme Court did overturn *Illinois Brick*. Varanini first asserted that litigation would be simpler in a post-*Illinois Brick* world. Today, he said, we have complex issues that get litigated around *Illinois Brick*. We are seeing that in *Apple v. Pepper* and we have seen it in more traditional industries. That would all come to an end. Varanini suggested we would have one case on liability, one case on damages.

Based on California Supreme Court precedent, Varanini discussed what might happen if *Illinois Brick* is overruled, but *Hanover Shoe* is not. He said the issues about pass on and who should be claiming what damages at what distribution level could be handled in two ways. Pass-on could be handled post-trial in an allocation proceeding (he also noted that this is what Justice Brennan suggested in his *Illinois Brick* dissent). That's what traditional principles of equity suggest. Defendants have an interest in paying one set of damages pursuant to a liability determination. And that can be set up post-trial. To the extent the distribution layers have different damages, such as the app developers having lost sales, that can easily be handled by a trial.

What would it look like if the Court overruled *Illinois Brick* but left *Hanover Shoe* unaffected? Varanini posited it would be a far better world for ensuring that where somebody has violated the antitrust laws that damages get awarded without all these side issues. He also suggested it would be a much better world in which the interesting issues about how and whether Apple should be liable for having a closed system, are handled as part of liability. Therefore, those issues would not be imported into a rule that was designed to aid antitrust plaintiffs rather than make their lives more complicated.

Varanini contrasted a post-*Illinois Brick* world with today. He explained that today in California (which has an *Illinois Brick* repealer statute), they have complex issues like direct and indirect purchasers having to figure out how to go to trial together. In a

world where *Illinois Brick* has not been overruled and *Hanover Shoe* is precedent, that raises questions about whether pass-on is an issue that could be raised at trial. An issue which undoubtedly would divert a jury.

What happens if we go to trial together, maybe as part of a single class as happens in Canada. Issues arise about distributing payments among different layers and can be complex. But they can be done. It was done in *D-RAM*. Traditional principles of equity guide us on how to do that. We have economics that can do that. And we have other Supreme Court precedent, albeit in a settlement context, that makes it clear that allocation proceedings, with counsel representing different distribution layers is important to ensure a fair outcome.

Pass-on Damages

Reiss asked Varanini what his response would be where defendants say they are entitled to raise any defenses immediately and that pass-on shouldn't be relegated to an allocation proceeding post-trial? For example, imagine a case where plaintiffs at multiple levels of the distribution chain, a middleman and end purchaser plaintiffs in an indirect purchaser case. It comes to class certification and defendants want to be able to raise the argument that the overcharge was passed on; they feel that's a defense they're entitled to. And it's possible they could knock out both plaintiff classes before you even get to trial or before you even get to allocation issues. For instance, defendants might show that the class of middlemen passed on the overcharge and therefore didn't suffer any damages. And then they may have a unique defense with the end class that did receive the pass-on overcharge, and technically knock out both classes of the distribution chain.

Varanini responded that the answer to that question in terms of class cert is simple. In a post-*Illinois Brick* world, the issue of which layer of the distribution chain should recover, what we call indirect purchaser resellers versus indirect purchaser end users, can be handled post-trial. Unless the answer is that there is nobody at any layer of the distribution chain that suffered any damages at all, that can be handled post-trial.

Varanini pointed out that the court could overrule *Illinois Brick*. One aspect of that is antitrust law is supposed to be informed by the economics. If you look at *Kimble*, Justice Kagan pointed out that antitrust law is subject to being overruled, and *stare decisis* is weaker here than in other contexts precisely because it gives broad common law powers to the Court to rewrite the rules according to the latest in economic thinking.

Varanini also discussed pass-on. He noted that the chance that pass-on is zero is almost completely non-existant, i.e., indirect purchasers almost always suffer at least some damages. Resellers fall into two buckets, he said. One, they may not have passed on 100% or they may have passed on even more than 100% in something known as overclocking. This would be part of the post-trial allocation proceedings. Two, they may have suffered lost sales. Lost sales will always be independently recovered. In the grand scheme of things, maybe that is really what we want resellers recovering. But with the overruling of *Illinois Brick*, we could have a simpler class model. We are already moving there in many ways anyways. And we really should relegate these issues to post-trial proceedings.

Netz added her thoughts on pass-through, saying it's a legal issue. She noted that you can put pass-through off to the damages phase. But doing that is going to make things difficult in the sense that 95% of antitrust cases settle. For there to be a settlement, if you're allowing different levels of the distribution chain to recover damages, then they're going to need to know approximately to what portion of the damages they're entitled. Netz asserted that parties will have to have some idea of pass-through early on. That doesn't necessarily mean it has to be part of the proceeding. Netz described one case with two different indirect purchaser levels where they agreed among themselves as to how they would divide the recovery. They did that so that they could go to the defendant and say this is how much we want and we've already decided how we're going to divide it.

It is complicated, but it's already very complicated and Netz does not think that switching to a world with no *Illinois Brick* would make it more complicated than it is now.

The Potential for Increased Defense Exposure

Cole disagreed with Varanini and Netz, saying that a world without *Illinois Brick* would be much more complicated than it already is. Antitrust cases are notoriously complex and difficult and take many years to resolve. And in a world without *Illinois Brick* guiding the overall process you would be left with a situation where you had many more intermediaries in any distribution chain trying to claim a piece of the damages. You would have economists having to get involved on behalf of those various intermediaries. You would have to attempt to resolve the case without defendants suffering overinflated damages. Cole asserted that in this world, defense exposure would increase significantly. Federal claims would be added to state indirect purchaser claims. The complexity, cost, and defense of these lawsuits would increase exponentially. And at the end of the day only a group of 31 states has asked the Supreme Court to overturn *Illinois Brick* (plaintiffs did not). Cole concluded that the Supreme Court does not have to overturn *Illinois Brick* to come to a rational decision about whether the plaintiffs are direct purchasers and can sue Apple for the alleged conduct.

How Should *Apple v. Pepper* Be Decided?

Reiss discussed how he thinks *Apple v. Pepper* should be decided. He maintained that this case is a common application of *Illinois Brick*. Direct purchaser consumers were injured in purchasing the product from the monopolist. That, he said, is consistent with Supreme Court caselaw. Reiss then discussed policy reasons that support this. *Illinois Brick* was concerned about duplicative recovery. *Apple v. Pepper* doesn't have that problem because the potential injury to developers is lost profits and is very different from the overcharge. In a number of cases courts have said that where you have plaintiffs in different markets who've suffered different types of harm, the injury and damages aren't duplicative and both plaintiffs can recover. Just because you have different metrics to determine damages for two groups doesn't mean it's impossible to determine and allocate damages.

Reiss then discussed damages. He noted that Apple's brief does a good job in demonstrating how difficult it will be for consumers to demonstrate their damages. He added that to the extent the developers are the proper plaintiffs, he does not see how the damages analysis for them would be any easier. The damage analysis in a lost-profit scenario would show a) they sold the product for a lower price than they otherwise would've gotten in a competitive market, and b) that to the extent Apple forced them to sell apps at increased prices, it diminished their sales. That's a very complicated analysis, but courts have done it successfully. In the *eBooks* case, for example, there were thousands of different transactions and types of books. And the case was ultimately settled for over $500 million dollars. Courts are prepared to go through these analyses.

In *Apple v. Pepper*, Reiss maintained that just because the overcharge the consumer suffered was somewhat dependent on an external event in terms of the prices being set by the app developers, that is not dispositive. If the decision were to go in favor of Apple, it would promote this idea of an agency model over a traditional wholesale model, that would have adverse ramifications. And you would have difficulty deterring antitrust violations. Reiss noted that the app developers have not sued, for good reason, particularly in this market where Apple reserves the right to cut them off for any reason. Being cut off from the App Store for even a month or two would be detrimental to an app developer's business. The stakes are high here not just for the consumer but for antitrust jurisprudence for consumers, who are supposed to be the main beneficiaries of the antitrust laws.

Cole retorted that Apple gets it right when it says under the Ninth Circuit's decision applying the distributor function analysis, consumers will always be allowed to claim direct purchaser status. They'll be able to do so even where the practices or conduct at issue might affect others in the chain like

developers or content owners or other upstream entities. The key for the Supreme Court's decision is really going to be the rationale and how it explains the issue in terms of a two-sided platform. Cole expressed her interest in the Supreme Court to avoiding reliance on a pass-through theory of harm, which is the very thing *Illinois Brick* is intended to prevent.

Varanini noted that the states are the only group who called for *Illinois Brick* to be overruled. The Court may not go there. The states think this case sets up why *Illinois Brick* should be overruled. People are smuggling in other issues of liability, causation, and standing. A post-*Illinois Brick* world would make things simpler rather than more complicated. To the extent it would make it more difficult for defendants to pick off individual plaintiffs, the states would consider that a feature and not a bug. Issues such as antitrust defendants paying twice can be easily handled through the process.

Varanini thought Apple's points about what does it mean to run a platform and how antitrust law should handle a platform, are perhaps better addressed in other contexts. Whatever the Court does, it will have to be careful. One can agree or disagree with *Amex*, but the Court majority tried to delineate a true two-sided market that would force plaintiffs to show net effects in a vertical context. Whatever it does here it will need to be careful that it doesn't incentivize certain business models just to avoid antitrust damages, as opposed to business models that benefits consumers.

Netz opined that *Illinois Brick* and *Hanover Shoe* should be overruled. One of the strongest arguments for *Hanover Shoe* was that pass-through damages were virtually unascertainable. Netz urged that this simply isn't true in 2018, even if it was true in 1968. Maintaining a system that was developed on something that no longer holds does not make sense. Netz noted that switching from one regime to another will be far from easy, but we have a very complicated situation. If we overturn *Illinois Brick* it will be complicated in different ways, simplified in different ways, but it will be not hanging on to a system based on a false premise.

The Impact of the *Apple v. Pepper* Decision on the FTAIA?

Wrapping up the panel's discussion, an audience member asked about the potential impact of the *Apple v. Pepper* decision on cases involving the FTAIA where the market definition involves a high percentage of foreign sales. The U.S. Solicitor General's brief noted that *Illinois Brick* could be nonapplicable if there are market definition questions involving high foreign revenue. How does that factor in with network effects and the *Amex* analysis?

Varanini responded that it illustrates the point that *Illinois Brick* has become increasingly untenable. The U.S. Solicitor General's office is very cognizant of foreign supply chains and of the external manufacturer model. They want to deter international cartels with these long supply chains, but *Illinois Brick* is a huge disincentive to that. Basically, *Illinois Brick* enables cartels to recover money from American consumers and American intermediaries and we have offshored the hope that those monies will be recovered by foreign companies who often are tightly controlled by the manufacturer (and alleged antitrust violator). That's the whole point of these long, lengthy, global, just-in-time supply chains.

He referenced Judge Posner's view that we cannot have a rule for global supply chains that differs from what he thinks should be the appropriate U.S. rule. One could argue with the current administration and the prospect of more reshoring, why should we worry? But it gets back to a key point that underlies the Foreign Trade Antitrust Improvement Act. Really that Act wasn't designed to disempower American consumers from recovering from international cartels, but quite the reverse. As long as there is sufficient causation, and the causation differs depending on whether the price-fixed product was directly imported into this country or went through a supply chain and was incorporated into another product, it was not trying to disincentivize American consumers from recovering. Yet in an *Illinois Brick* world, that is precisely what can happen. And it is telling that the Solicitor General did not want to disadvantage the

U.S. in that regard. And it plays into the point about the need for the Court to be careful, and given what's going on elsewhere, *Illinois Brick* has really become untenable. Even if the plaintiffs win here, that will only continue to be the case.

Reiss noted that plaintiffs have an alternative route to recovering from foreign defendants by using state law. A number of indirect class actions against foreign defendants have been brought under state law: LCDs, auto parts, and technology cases in the Northern District of California. Foreign defendants sold products abroad that have been incorporated into products that have been sold in the U.S., and consumers have recovered billions of dollars. That avenue is there, not under the Sherman Act, but it is available under various state laws and has been successfully litigated over the past five years.

Cole agreed. She noted that the Supreme Court has not really addressed the conversion standard in the FTAIA, but said that there are really two separate questions. The first question is whether the plaintiff has standing to pursue their claims. Second is whether or not it is sufficiently domestic commerce such that a U.S. court can go after it. Regardless of what happens with *Illinois Brick*, the FTAIA issue stands and is going to be something that plaintiffs and defendants have to grapple with.

Varanini brought up that parties have asserted that the FTAIA supersedes state law and that it imports an *Illinois Brick* type of rule into state law. Varanini noted that while he disagrees with that position, the issue has not been decided. The U.S. Solicitor General, however, thought that that was a worrisome enough issue for U.S. national interests and enabling U.S. consumers to recover from and deter international price-fixing cartels that it felt it had to carve out a special exception. Varanini believes *Illinois Brick* is not imported into the FTAIA and the FTAIA does not prevent state law indirect purchaser claims. A world without *Illinois Brick* would remove that issue. There might be alternate issues of proximate causation, but those should be litigated as that, not as issues of damages recovery.

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Reading the Tea Leaves in *Apple v. Pepper*: A View from the Oral Argument Gallery

Nicholas G. Grimmer*

Introduction

On November 26, 2018, the Supreme Court heard oral argument in one of this term's most highly anticipated cases, *Apple v. Pepper*,[1] and I was fortunate enough to attend. The Court's decision in this case will have major implications for who may bring antitrust actions, particularly with respect to claims arising in digital and other non-traditional distribution paradigms.

The issue currently before the Court involves application—and now potentially, reconsideration—of the Court's landmark 1977 *Illinois Brick* "indirect purchaser" rule, which limits standing to sue for federal antitrust damages to *direct* purchasers.[2] *Pepper* relates to "pricing conduct" because the Court grounded *Illinois Brick* in large part on the difficulties it perceived in calculating "pass-on" damages, i.e., the extent to which indirect purchasers ultimately pay an illegal overcharge by virtue of the fact that intermediaries pass some or all of the antitrust violator's initial overcharge down the chain of distribution.

Reading appellate tea leaves is an inherently inexact exercise, but after reviewing all of the briefing in this case, attending oral argument, and combing through the argument transcript (available here), some preliminary observations are in order. The following table summarizes my (very unofficial) interpretation of the possible meaning behind each justice's comments and questions at oral argument, which are explored in more detail below.

	Comments/questions possibly indicating a belief that:		
	Illinois Brick does not apply	*Illinois Brick* applies	*Illinois Brick* should be revisited
Roberts		✓	
Thomas			
Ginsburg	✓		✓
Breyer	✓		
Alito	✓	✓	✓
Sotomayor	✓	✓	
Kagan	✓		
Gorsuch	✓	✓	✓
Kavanaugh	✓	✓	✓

Background[3]

In *Pepper*, a putative class of iPhone-user plaintiffs represented by Pepper make claims for monopolization and attempted monopolization arising from Apple's "closed system," i.e., Apple's policy mandating App-Store exclusivity for purchasing iPhone Apps. Specifically, Pepper alleges that "Apple has engaged in an anticompetitive scheme to monopolize the aftermarket for iPhone applications in order to control and derive supra-competitive profits from the distribution of iPhone apps worldwide." Those supra-competitive profits, Pepper alleges, arise from the fact that Apple retains 30% of the price consumers pay for each app before remitting the remainder to the app's developer.

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[1] *Apple, Inc. v. Pepper*, No. 17-204, __ U.S. __ (2019).

[2] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

[3] This article simply reports on the *Pepper* oral argument and gives a brief background purely for context; numerous recent articles—including Jody Boudreault's article above in this Newsletter—more fully examine the facts and relative substance and merits of each side's arguments.

Apple moved to dismiss, arguing (in part) that Pepper's claims are barred by *Illinois Brick* because neither Pepper nor any other iPhone user is a "direct purchaser" of apps from Apple. Apple reasoned that instead, they purchase "directly" from third-party app developers because Apple merely provides a market in which developers set app prices and Apple's interaction with consumers is merely as the developers' agent. On the other side of the coin, Apple reasoned that the only ones "directly" purchasing anything from Apple in this context are the app developers paying Apple for "distribution services." Pepper responded that *Illinois Brick* does not apply because he is in fact a direct purchaser from Apple, reasoning that when purchasing an app, he pays Apple directly for both the app itself, i.e., the amount to be remitted to the developer, as well as the allegedly supra-competitive 30% commission Apple retains.

The district court agreed with Apple and dismissed the case under *Illinois Brick*, reasoning that the 30% commission was a fee passed on to consumers by developers, such that Pepper is a mere indirect purchaser from Apple. The Ninth Circuit reversed, holding that Apple serves a "distributor" function whereby consumers such as Pepper purchase directly from Apple.

Once Apple petitioned for certiorari—which was granted on June 18, 2018—the Supreme Court requested the views of the Solicitor General, who ultimately filed certiorari and merits briefs supporting Apple (and would eventually participate in oral argument in support of Apple). The parties before the Supreme Court frame the question presented as follows:

> **Apple:** "Whether consumers may sue for antitrust damages anyone who delivers goods to them, even where they seek damages based on prices set by third parties who would be the immediate victims of the alleged offense."
>
> **Pepper:** "Whether *Illinois Brick* …, which construes § 4 of the Clayton Act to exclude damages claims by 'indirect purchasers' two or more steps away in a vertical supply chain from the alleged monopolist, bars owners of Apple-manufactured iPhones who purchased aftermarket software applications ('apps') from Apple through its App Store from recovering damages from Apple for monopolizing the market for such apps."

A group of thirty-one states led by Texas and Iowa filed an *amicus curiae* brief taking no position on the substantive merits of the case, but urging the Court to reconsider and ultimately overturn *Illinois Brick*. (Full disclosure: I was a principal drafter of that brief.)

The Oral Augment

Apple's counsel Daniel Wall began by arguing that Pepper's claim is exactly the kind of claim prohibited under *Illinois Brick*. On this point, he argued that Pepper's only theory of damages is that Apple charges app developers a 30% commission, which in turn causes the developers to increase the prices that consumers pay for apps. Therefore, he argued, app developers (and not iPhone users) are direct purchasers under *Illinois Brick*.

Several justices were skeptical that the issue was this simple. Justice Sotomayor suggested that this case was "dramatically different" from *Illinois Brick*, which she described as "a case of a vertical monopoly" in which a manufacturer sold into the intermediate market from which the plaintiffs made their purchases. She posited that conversely, the iPhone users here are "first purchasers" and that "Apple took 30 percent from [them], not from the developer." Justice Breyer echoed her concerns. He said he sees nothing in *Illinois Brick* in conflict with the basic notion that "if you were injured because you paid [more to the monopolist], you can collect damages."

Justice Kagan questioned the nature of *Illinois Brick*, asking whether it was about "a vertical supply chain or, instead, was it about a pass-through theory [i.e., the notion that plaintiffs cannot recover damages for costs that are passed on to them]." Other cases, Kagan noted, had both of those elements, but should *Illinois Brick* apply at all to this

case if there is no vertical supply chain? Wall responded that *Illinois Brick* was "100 percent about" not wanting antitrust plaintiffs to recover damages that are passed to them. Justice Alito then interjected that *Illinois Brick* rested less on economic theory than on wanting to achieve an "effective and efficient litigation scheme," for example, by limiting lawsuits to direct purchasers because the Court considered them to be in the best position to detect and bring suit for antitrust violations. Alito questioned whether that was true here, pointing to what Wall conceded were "tens of thousands" of app developers (the only direct purchasers, according to Apple) who have never sued Apple for an antitrust violation.

General Noel Francisco argued on behalf of the Solicitor General. He argued in part that *Illinois Brick* "reflect[s] a basic application of the background principles of proximate cause … and, in particular, the rule that damages stop at the first step," and that here, "the first step is the app maker's pricing decision, because the Respondents, the consumers, are injured if and only if the app makers decide to increase their prices in order to recoup Apple's [alleged overcharge]." Justice Kagan disagreed, "because it just seems to me that when you're looking at the relationship between the consumer and Apple, that there is only one step. I mean, I pick up my iPhone. I go to Apple's App Store. I pay Apple directly with the credit card information that I've supplied to Apple. From … my perspective, I've just engaged in a one-step transaction with Apple." Justice Kavanaugh agreed, noting that "Apple really operates as a retailer in many respects here," and in any event, "the consumers are harmed then too."

Arguing for Pepper and the iPhone users, David Frederick described *Illinois Brick* as a bright-line rule and said that his clients "easily satisfy" it, in part because "Apple directed its monopoly abuses at" them. Chief Justice Roberts indicated that he did not agree, expressing concern that, under the plaintiffs' theory, both iPhone users and app developers could sue Apple to recover duplicative damages arising from the same 30-percent mark-up of the apps. In response, Frederick argued that iPhone users and app developers would have different damages claims against Apple: iPhone users for the difference between the price they paid and the price they would have paid in a competitive market, and app developers for lost profits.

Several other justices asked tough questions of Frederick. Justice Alito asked whether every iPhone user who purchased an app would be able to seek damages that are three times the 30-percent commission, or whether damages would instead vary from app to app; Frederick acknowledged that he wasn't certain, but used his answer to make two points: first, Congress's intent with the antitrust laws was to deter antitrust violations "just like this one," and second, Apple cannot point to another e-commerce distributor that operates this way (i.e., a ruling for the plaintiffs here will not open the floodgates to similar e-commerce lawsuits).

Similarly, Justice Gorsuch wondered about the possibility that there is no actual pass-on here, i.e., that the app producer might absorb the monopoly rent. But, more favorably to the plaintiffs, he also indicated that ruling in favor of Apple would create a "danger of just incentivizing a restructuring of contracts here so that all that Apple does or people like it is make you purchase directly from the app provider and then it then returns the -- the profit to Apple later."

Justice Sotomayor, perhaps just feeling out the intricacies of the plaintiffs' position, asked an interesting hypothetical: "Let's say [Apple] collected money from [consumers] and paid all of it over to the developer [instead of remitting only 70%] and then told the developer: Give us 30 percent of that back." Frederick responded that the consumers "would still be direct purchasers" since they are still buying from Apple; he also said this would be the "form over function situation" Justice Gorsuch asked about.

Justice Kavanaugh asked one question adverse to the plaintiffs—whether anything would be different if Apple purchased the apps from the app developer and then added 30 percent on the sale, to which Frederick responded that the distinction would be irrelevant—but later turned to the (somewhat of a

surprise) issue which ended up taking center stage for much of the oral argument: the ongoing validity of *Illinois Brick*. Mirroring an argument in the 31 states' *amicus* brief, Justice Kavanaugh indicated that, particularly in light of the ambiguity about what *Illinois Brick* means here, that ambiguity should "be resolved by looking at the text of the statute," which he noted makes "broad" reference to "[a]ny person injured."

Justice Alito was even more express in his doubts about *Illinois Brick*, saying that he "really wonder[s] whether, in light of what has happened since then, the court's evaluation stands up." Justice Gorsuch expressed similar doubts, saying that *Illinois Brick* "has been questioned by 31 states before this Court in an amicus brief." He noted that many states have allowed indirect purchasers to file lawsuits similar to this one without experiencing the duplicative recovery problems *Illinois Brick* sought to avoid, and that *Illinois Brick* may actually harm deterrence in light of the fact that "direct purchasers don't always sue because there's a threat that monopolists will share the rents with the direct purchasers." He also posited that often, "indirect purchasers may be better suited to enforce the antitrust laws."

Justice Gorsuch was puzzled by the fact that the plaintiffs here are not "asking to overturn *Illinois Brick* when 31 states are." Frederick responded that it is simply unnecessary for his case: "we are direct purchasers. We satisfy the rule. We come within the bright line."

Wall, on the other hand, expressly resisted the idea that *Illinois Brick* should be overturned, noting that 17 efforts by Congress to change *Illinois Brick* had failed and calling this a "quintessentially controversial political issue" that should be left to Congress instead of the Supreme Court. Justice Ginsburg flatly disagreed, asking "Why is that so if the Court created the doctrine in the first place?"

A decision is expected within the next few months.

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Town Hall: Pricing Conduct Committee Leadership Describes How to Get Involved

Sarah Zielinski

Introduction

The leadership of the Pricing Conduct Committee ("PCC") held its annual Town Hall meeting on October 15, 2018. The purpose of the Town Hall was to update PCC members about the activities of the committee and inform members about opportunities to get involved.

Dale Grimes, Co-Chair of the PCC and partner of Bass, Berry, and Sims, kicked off the program by welcoming listeners and describing the PCC's charter. He explained that the PCC was previously known as the Price Discrimination or Robinson-Patman Act Committee and, as the name suggests, was narrow in scope. The PCC has since been renamed and expanded to involve all types of pricing conduct. Dale indicated that due to the PCC's broad scope, there are many opportunities for members to write or speak.

Dale then turned the floor over to Jody Boudreault, Vice Chair of the PCC and Senior Associate at Baker Botts, to speak about her role on the committee. Jody explained that she is responsible for the committee's membership and diversity initiatives. This role entails facilitating engagement opportunities for PCC members. This year, Jody plans to send out invitations on Connect asking PCC members to provide their opinions on what programs, articles, or mentorship opportunities they would like to see, as well as any ideas to make PCC membership more valuable.

Celeste Saravia, Vice Chair of the PCC and Principal at Cornerstone Research, spoke next. Celeste explained that her responsibilities within the leadership of the PCC are to develop and manage the committee's advisory panels. The advisory panels will be created based on different affinity groups. For example, the PCC intends to establish an International Advisory Panel, an Economist Advisory Panel, a Young Lawyers Advisory Panel, and a Government Advisory Panel. Celeste asked that committee members reach out to her if they are interested in joining these panels and having a voice in the types of content the committee creates.

The next speaker was Andrew Hatchett, the PCC's Young Lawyer Representative and an associate at Alston & Bird. Andrew explained that his responsibilities are to find ways to get young lawyers involved in the activities of the PCC. Andrew indicated that even though young lawyers may not feel qualified to write or speak in an area where they have not been practicing long, there are still many opportunities for young lawyers to get involved. Andrew invited young lawyers to reach out to him for more information.

Nick Grimmer, Vice Chair of the PCC and Assistant Attorney General in the Antitrust Division of the Texas Attorney General's Office, was next to speak. Nick explained that he is responsible for the committee's newsletter, The Price Point. Nick reminded members that the leadership is always looking for articles for the newsletter. Given that the PCC's mandate is so broad, there are many topics for members to write about. As an example, members might not think of the *Apple v. Pepper* case pending before the Supreme Court as involving pricing conduct, but because it involves pass-on and pricing decisions, it falls within the PCC's mandate. Nick encouraged members to write for The Price Point because the newsletter has very wide distribution, and when a person writes an article, the person's name and picture will appear in the newsletter. Writing for the newsletter is one of the easiest ways to get great exposure within the ABA. Nick asked members to reach out to him at Nick.Grimmer@oag.texas.gov with suggestions for articles or to volunteer to write an article.

Jeff Perry, Vice Chair of the PCC and partner at Weil Gotshal, then spoke about the committee's website and Connect page. Jeff explained that members can find a lot of information about the committee—including information about Advisory Panels, the Price Point newsletter, the Connect page, and Books and Treatises—on the PCC's web page. Jeff next spoke about the committee's Connect page, which can be accessed through the PCC's web page or from connect.americanbar.org. Connect is one of the primary ways that the PCC leadership stays in contact with its members, and we also encourage members to post themselves. Connect is also used to post announcements about upcoming programs and opportunities for participation. The Price Point newsletter is also available on the Connect page. It is also where the PCC posts its Price Tags feature, which is a monthly posting of articles, decisions, and recent developments on pricing in antitrust. Jeff explained that in previous years, the Price Tags feature was primarily authored by committee leadership, but we now want to provide an opportunity for members to get involved and post Price Tags themselves. If members are interested in contributing, please contact Jeff to sign up at jeffrey.perry@weil.com.

The next speaker was Paul Saint-Antoine, Vice Chair of the PCC and partner at Drinker, Biddle and Reath. Paul explained that his role on the committee is to supervise the development of the committee's programing. Committee programs are an excellent way to meet other people, become informed on a variety of antitrust topics, and develop a reputation and raise your profile in the larger antitrust community. Lawyers at all stages of their career can participate in committee programming. Committee programming starts with a good idea, and Paul encouraged members to bring any ideas to him so that the PCC can help develop a program around it. The time involved to put on a committee program is typically not very onerous. There are generally a few planning calls with the speakers and then participation in the program itself, which lasts an hour or 90 minutes. The programs typically take place around the lunch hour to maximize the audience. The PCC has an ambitious plan of about eight or so committee programs this year and we have several openings beginning in 2019. Thus, there are plenty of opportunities to get involved.

Tom Ensign, Vice Chair of the PCC and partner at Freshfields, could not participate in the Town Hall, so Dale Grimes explained Tom's work for the committee. For the last few years, Tom has been in charge of the PCC's Books and Treatises, and particularly a large undertaking to produce a book called Pricing Practices Around the Globe. It is a Q & A style book that asks the same questions and provides answers for different jurisdictions. Dale explained that there are over 70 authors involved in the effort and most of them are from outside the United States. The committee is very excited for the release of this publication. Dale also explained that the leadership is looking for ideas for the next book, so please contact us with your suggestions.

Sarah Zielinski, Co-Chair of the PCC and partner at McGuireWoods, concluded the Town Hall meeting. Sarah stated that a common theme throughout the Town Hall meeting was to involve members of the PCC in the work of the committee and to deliver value to members by developing programming and articles that members find interesting. Sarah reiterated that the PCC has a lot going on and many opportunities for involvement. The PCC is one of the largest committees in the Section of Antitrust Law, and the PCC leadership would like that reflected in the engagement of its members. Sarah told members to be on the lookout for future postings on Connect with additional opportunities for involvement.

About the Author

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ABA SECTION OF ANTITRUST LAW THE PRICE POINT The Newsletter of the Pricing Conduct Committee

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Appendix: Price Tags

Edited by Jeffrey Howard Perry

Price Tags is the Pricing Conduct Committee's monthly round-up of pricing issues in the news. This appendix collects all of the Price Tag posts since the last newsletter.

If you are interesting in authoring an edition of Price Tags, please reach out to Jeff Perry at jeffrey.perry@weil.com.

Ninth Circuit Rejects Efforts to Revive Airline Price-Fixing Claims

The Ninth Circuit affirmed the dismissal of allegations that American Airlines, Delta, United and other airlines conspired to fix prices, finding there was no evidence of an agreement among the defendant airlines. In March 2016, United changed its fare rules to prohibit consumers from combining several one-way legs of a trip under a single reservation. Some consumers had combined one-way legs to route their trips through less expensive markets, thus making their trip from origin to destination cheaper than a direct flight or an itinerary connecting in a more popular market. United's move to prohibit combining these "multi-city fares" had the practical effect of raising prices for some consumers. American Airlines and Delta made similar rule changes two days after United's announcements. A class of travel agents sued, alleging the nearly-simultaneous change in fare policy amounted to price-fixing. The Ninth Circuit affirmed the District Court's dismissal of the complaint, stating, "in an interdependent oligopoly it may be in a company's interest to raise prices in the hope that its competitors play 'follow the leader'" and that the plaintiffs had failed to show more than lawful conscious parallelism.

Read more here.

FTC Settles With Therapist Staffing Company Accused of Fixing Wages

The FTC announced that several therapist staffing companies have settled charges that they violated Section 5 of the FTC Act by agreeing to reduce wages paid to therapists and inviting other competitors to collude on wages. The FTC complaint alleged that owners of two competing therapist staffing companies in Texas agreed to decrease therapist wages to the same level after learning that a home health agency planned to pay decreased rates to the staffing companies for therapist services. The complaint alleged that the owners were concerned about therapists potentially switching to higher-paying staffing agencies, and so they approached their competitors about agreeing to pay lower wages as well. Under the consent order, the parties are prohibited from entering any agreements to reduce or stabilize compensation for therapists or other employees. The parties are also prohibited from inviting other competitors to enter such agreements.

Read more here.

Auto Parts Manufacturers Pay $23 million to Settle Price-Fixing Suit

Hitachi Automotive Systems and Mitsubishi Electric Corp. agreed to settle allegations that they conspired to fix prices of automotive parts by bid rigging and supply manipulation. The settlement with a class of direct purchasers of alternators, ignition coils, and starters, comes on the heels of similar settlements with direct purchasers of fuel injection systems. The suit followed an investigation into the auto parts industry by the U.S. Department of Justice.

Read more here.

District Court Denies Motions To Dismiss Generic-Drug Price Fixing Suit

The Eastern District of Pennsylvania denied motions to dismiss claims that several drug makers, including Actavis, Impax, Mylan, Par, Sandoz, and Dr. Reddy's conspired to fix the prices of six generic medications. The 21 defendants allegedly conspired at conferences, sponsored by groups like the Generic Pharmaceutical Association, to fix prices on clobetasol, digoxin, divalproex er, doxycycline, econazole, and pravastatin. The court concluded that, although the complaint's factual allegations may suggest a legitimate business justification for each act when viewed independently, the complaint taken as a whole "does support a plausible inference of a conspiracy or agreement" that is unlawful under the Sherman Act. However, the court granted a motion to dismiss by Teligent, finding the complaint failed to adequately allege that Teligent had attended the gatherings at issue or otherwise "had an opportunity to conspire with the other defendants."

Read more here.

Mazda Dealers Allege Bonus Plan Violates Robinson-Patman Act

A Florida Mazda dealership has sued Mazda alleging the "Mazda Brand Experience Program 2.0" constitutes price discrimination in violation of the Robinson-Patman Act. The tiered-rebate program provides some rebates to dealers based on Mazda's assessment of the quality of their facilities, among other things. For example, dealers who (1) construct a "Retail Evolution Image" facility; (2) are exclusive Mazda dealers; and (3) provide an exclusive dedicated general manager, allegedly can receive up to 4.5% of a car's sticker price as a rebate. Dealers who are not exclusive to Mazda and do not offer an exclusive showroom allegedly receive no rebate. Kuhn Mazda of Tampa Florida has sued, claiming the allegedly disparate pricing violates the Robinson-Patman Act.

Read more here.

Supreme Court Declines to Review Third Circuit's Dismissal of Taxi Suit Against Uber

The Supreme Circuit denied the Philadelphia Taxi Association's request for a writ of certiorari seeking review of a Third Circuit decision affirming dismissal of a lawsuit alleging Uber violated Section 2 of the Sherman Act by attempting to monopolize the for-hire vehicle market. The taxi association alleged that Uber (1) operated at a lower cost than taxis by entering the market without medallions; (2) excluded rivals from competing by ignoring applicable regulations; and (3) was dangerously close to achieving monopoly power by operating on an unfair playing field with high market share. The Third Circuit held that the taxi companies failed to plausibly allege any of the three elements of an attempted monopolization claim. The court reiterated that operating at a lower cost and offering customers lower prices (so long as not predatory) is not anticompetitive and concluded that the taxis' financial hardship is not antitrust injury. The taxi association sought Supreme Court review on the grounds that the Third Circuit left open the question of "when is an illegal presence in the marketplace predatory, anti-competitive and threatens to harm competition and not solely competitors?" and asked the Supreme Court to settle the issue. The Court denied the request last month.

Read more here.

Greek Competition Authority Fines Unilever Subsidiary $31.8 million for Abuse of Dominance

The Hellenic Competition Commission recently announced fines against a Unilever subsidiary for abusing its dominance in the margarine market by implementing restrictions that excluded competitors and limited their growth possibilities. The allegedly problematic restrictions included rebates based on sales thresholds, a ban on promoting competing products, resale price maintenance provisions, and non-compete clauses. In addition to combined fines of $31.8 million, the Commission will prohibit Unilever from engaging in the abusive practices and can impose additional fines up to ~$11,400 per day if Unilever fails to comply.

Read more here.

Federal Judge Dismisses Indirect Purchasers' Price-Fixing Suit

The District Court for the Southern District of Illinois recently dismissed a suit brought by indirect purchasers, which alleged that Becton Dickinson, two group purchasing organizations ("GPOs"), and several distributors conspired to exclude other manufacturers from the market for certain syringes and catheters. Defendants allegedly entered into long-term exclusionary supply contracts that contained: (1) sole sourcing provisions prohibiting purchases from other manufacturers, and/or (2) disloyalty penalties (or loyalty discounts). According to the Complaint, these contracts, along with other agreements by the GPOs and distributors to enforce the allegedly anticompetitive terms, had the practical effect of preventing the plaintiffs from purchasing products from other manufacturers for years. However, the court dismissed the suit for lack of antitrust standing, concluding that the claims were barred by *Illinois Brick* because plaintiffs had not adequately alleged that the companies selling directly to them were involved in the conspiracy.

Read more here and here.

Passengers Urge Supreme Court to Review Dismissal of Suit Over Checked-Bag Fees

A class of airline passengers has asked the Supreme Court to review the Eleventh Circuit's dismissal of their claim that Delta Air Lines and AirTran Airways colluded to implement fees for checked baggage. The passengers alleged that the airlines discussed their intentions to implement baggage fees during earnings calls, at industry conferences, and in joint negotiations with airports. The District Court granted the airlines' motion for summary judgment after concluding "the evidence in this case simply does not permit a reasonable factfinder to infer the existence of a conspiracy, as it does not tend to exclude the possibility that the alleged conspirators acted independently." On review, the Eleventh Circuit affirmed in a one-sentence order. The passengers are now seeking Supreme Court review, arguing that the Eleventh Circuit's decision is contrary to precedent and "would authorize publicly traded companies to enter into price-fixing agreements with their rivals so long as they did so through statements on earnings calls."

Read more here.

Indian Competition Commission Rejects Price-Fixing and Resale Price Maintenance Claims Against Uber and Ola

The Indian Competition Commission rejected claims that algorithms run by Uber and Ola (1) amount to price fixing through a hub-and-spoke cartel that facilitated collusion among drivers; (2) violate the prohibition on resale price maintenance by imposing a minimum price on drivers and (3) price discriminate to the disadvantage of riders. The Commission found that price fixing through a hub-and-spoke agreement would require agreement among all drivers to fix prices through the platform or an agreement for the platform to coordinate their prices, and determined there was no apparent agreement *among the drivers*. The Commission rejected the resale price maintenance claims on the grounds that Uber and Ola do not sell anything to the drivers and so the drivers do not *resell* anything to the riders. Without a resale, reasoned the Commission, there can be no resale price maintenance. Finally, the Commission concluded that price discrimination is only prohibited where engaged in by a dominant enterprise, and the complaining party had not claimed Uber or Ola was dominant.

Read more here.

European Commission Opens Investigation Into Airline Booking Systems

The European Commission is investigating whether "full-content" agreements between booking systems Sabre and Amadeus and airlines and travel agents restrict competition. Sabre and Amadeus aggregate information about flight schedules, availability, and fares from airlines and provide the information to travel agents who use the information to reserve and issue tickets for

consumers. Airlines pay Sabre and Amadeus a fee for any ticket booked through their systems. The "full-content" agreements require airlines to share all of their scheduling and ticketing information with the ticket distributors. The EC is investigating whether these agreements create barriers to entry and raise ticket distribution costs by preventing potential new competitors from being able to compete for these airlines and customers.

Read more here.

U.S. Supreme Court Declines to Review Airline Fee Dispute

The U.S. Supreme Court recently denied the plaintiffs' petition for writ of certiorari in a case alleging collusion among airlines to institute fees for the first bag checked by customers on flights. In March, the Eleventh Circuit had upheld a district court decision granting summary judgment to the airlines. The plaintiffs argued in their petition that the Eleventh Circuit erred when it exempted from antitrust scrutiny invitations to collude made during earnings calls, on the basis that investors had a legitimate interest in knowing whether the airline would follow the pricing of another competitor.

Read more here.

Federal Judge Declines to Gag Attorneys General in Price Fixing Case

A federal judge in Pennsylvania recently denied a request by defendants in a generic drug price-fixing case that would have limited what state attorneys general could say regarding the litigation and preceding investigation. The defendants had argued that extrajudicial statements by the attorneys general were tainting any jury pool by prematurely disclosing allegations in the case. Judge Rufe of the U.S. District Court for the Eastern District of Pennsylvania denied the requested limitation as unnecessary and was not convinced that the statements would prejudice the proceedings.

Read more here.

Brazil's CADE Alleges Collusion in Resin Market

Brazil's competition authority, CADE, recently recommended chemical manufacturer Royal Química, a consulting firm, and several individuals be convicted of colluding to fix the price of resin, an organic substance used in paints, varnishes, and brake pads. Other chemical manufacturers were also alleged to have participated, but had sought leniency earlier. CADE's court will now decide whether the accused parties will be convicted for their alleged participation in the scheme.

Read more here.

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