“HOME FREE” – A NEW NORMAL: MANDATORY ARBITRATION CLAUSES WITH CLASS ACTION WAIVERS AND THE FUTURE OF THE INDIRECT PURCHASER RULE

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I. INTRODUCTION

On January 9th, 2007, while clothed in his trademark long-sleeved black turtleneck, jeans, and tennis shoes, the keynote speaker at the Macworld 2007 Convention, Steve Jobs, addressed an enraptured San Francisco crowd of journalists, techies, lay observers and industry insiders. Jobs began his nearly one-and-a-half-hour-long sermon by saluting the revolutionary technology that Apple had produced over the prior two decades, particularly the Macintosh computer and the iPod. Jobs boasted to the assembled crowd that the Macintosh and the iPod not only changed Apple but also upended the entire computer and music industries. Jobs then introduced the iPhone;[1] a technology that like its Apple predecessors, has completely revolutionized its respective industry.[2]

A year later on July 10th, 2008, Apple's App Store was opened, once again allowing Apple to transform not only the technology landscape but also American and international culture at large.[3] Indeed, the App store, which currently houses over 1.8 million apps,[4] has not only created millions

1. See Protectstar Inc., *iPhone 1 – Steve Jobs MacWorld Keynote in 2007 – Full Presentation, 80 mins*, YOUTUBE (May 16, 2013), https://www.youtube.com/watch?v=VQKMoT-6XSg [https://perma.cc/6QEX-7BFL] for Steve Jobs' 2007 keynote speech.

2. To this day nearly 50% of smartphone users in the United States are iPhone owners. *See* S. O'Dea, *Share of Smartphone Users That Use an Apple iPhone in the United States from 2014 to 2021,* STATISTA (Sept. 10, 2020), https://www.statista.com/statistics/236550/percentage-of-us-population-that-own-a-iphone-smartphone/ [https://perma.cc/6ZWP-2Q5H] (exhibiting that in the year 2021 45.4% of smartphone users are iPhone owners).

3. *The App Store Turns 10*, APPLE (July 5, 2018), https://www.apple.com/newsroom/2018/07/app-store-turns-10/#:~:text=When%20Apple%20introduced%20the%20App,travel%20and%20so%20much%20more [https://perma.cc/NN4X-SAU5].

4. J. Clement, *Number of Apps Available in Leading App Stores as of 2nd Quarter 2020,* STATISTA (Oct. 27, 2020), https://www.statista.com/statistics/276623/number-of-apps-available-in-leading-app-stores/ [https://perma.cc/XPS9-LPZL].

of jobs[5] and generated half a trillion dollars in commerce during 2019,[6] but has clearly become a welcomed and universal presence within our collective daily lives. Yet, despite the seeming acceptance of the App Store by the general public, much criticism has been levied against Apple. In particular, Apple's detractors maintain that, notwithstanding the output-increasing impact of Apple's mobile ecosystem on the national and world economy, Apple has misused its monopoly on distribution of third-party apps for the system. This criticism came to a head in 2019 when the Supreme Court addressed whether App Store customers had standing to sue for Apple's alleged violations of federal antitrust laws.

In *Apple Inc. v. Pepper*, the Supreme Court held in a 5-4 decision that the class of plaintiffs who purchased apps on the Apple App Store has standing as direct purchasers to pursue antitrust claims against Apple.[7] The decision was praised by some, particularly in the plaintiffs' bar, as a logical continuation of Supreme Court antitrust jurisprudence.[8] Conversely, the Court's ruling was derided by many within the business community as a dangerous and unmerited extension of antitrust standing.[9] Ironically, as the late Justice Ginsburg commented at oral argument, under current Supreme Court case law, Apple could have entirely avoided this litigation and been "home free" if it had adopted an arbitration clause with a class action waiver

5. *iOS App Economy Creates 300,000 New US Jobs as Developers Adapt During Pandemic,* APPLE NEWSROOM (Sept. 2, 2020), https://www.apple.com/newsroom/2020/09/ios-app-economy-creates-300000-new-us-jobs-as-developers-adapt-during-pandemic/ [https://perma.cc/S68L-ZE4L].

6. Nick Statt, *Apple Says the App Store Created $519 Billion in Commerce Last Year*, THE VERGE (June 15, 2020, 6:34 PM), https://www.theverge.com/2020/6/15/21292203/apple-app-store-ios-apps-billings-revenue-517-billion-2019-antitrust-regulation [https://perma.cc/CE55-D24W].

7. Apple Inc. v. Pepper, 139 S. Ct. 1514, 1515 (2019) (holding that iPhone owners are direct purchasers under *Illinois Brick*).

8. *See* Greg Stohr, *Apple Must Face iPhone App Antitrust Suit, Supreme Court Rules*, BLOOMBERG NEWS (May 13, 2019, 10:06 AM), https://www.bloomberg.com/news/articles/2019-05-13/apple-loses-at-u-s-supreme-court-on-iphone-app-antitrust-suit [https://perma.cc/T2MK-N5N4] (describing how one of the lawyers called the ruling "a major victory for consumers"); *Mathew Hans and Phillip Zeeck, Apple v. Pepper—A Straightforward Decision Raising Complicated Issues,* AMERICAN BAR ASS'N (Nov. 12, 2019), https://www.americanbar.org/groups/litigation/committees/trial-evidence/articles/2019/apple-pepper-complicated-issues/ [https://perma.cc/HVA6-5FVF] (stating that the five-justice majority applied the direct purchaser rule in a straightforward fashion).

9. *See* Tony Romm and Reed Albergotti, *Apple's Supreme Court Loss Sends Antitrust Shock Waves Through Silicon Valley*, WASH. POST (May 13, 2019, 6:36 PM), https://www.washingtonpost.com/technology/2019/05/13/apples-supreme-court-loss-sends-antitrust-shock waves-through-silicon-valley/ [https://perma.cc/RG8C-QA4A] (commenting that the decision has "unsettled" and sent "shock waves" throughout the tech industry).

in its terms of use.[10] Indeed, while much ink has been spilt over the significance of the *Pepper* decision, its import and impact will likely be minimal. Given the increasing use of arbitration clauses as well as class action waivers within many markets in the modern digital economy, judicial decisions with fact patterns akin to *Pepper* may become a rarity.

The rising use of mandatory arbitration clauses and class action waivers, sanctioned by Supreme Court precedent and enthusiastically endorsed by much of the business community, will bar many potential plaintiffs from the ability to assert antitrust violations in the courts. Moreover, as explained in this case note, another paradox of the potential limited application of *Pepper* is that while the plaintiffs in *Pepper* were found to have standing to proceed in the absence of an arbitration clause in Apple's terms of use, only indirect purchasers might be permitted to pursue antitrust claims against companies that adopt arbitration clauses with class action waivers under state repealer statutes that were enacted in the wake of *Illinois Brick Co. v. Illinois*.[11] Consequently, defendants that have inserted mandatory arbitration clauses and class action waivers in their terms of use will effectively bar direct purchasers from pursuing direct antitrust claims in the courts as well as on a class-wide basis.[12] This inflexible outcome directly contradicts what the Supreme Court sought to accomplish in *Illinois Brick* (wherein it expressly limited federal antitrust standing to direct purchasers).

Indeed, when the *Pepper* case was first filed in the Northern District of California over a decade ago, AT&T was, along with Apple, named as a defendant.[13] However, after the Court held in *AT&T Mobility LLC v. Concepcion*[14] that the Federal Arbitration Act preempts state laws prohibiting contracts from disallowing class-wide arbitration, the district court compelled arbitration, and AT&T was ultimately dismissed from the

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10. *See infra* notes 184-189 and accompanying text.

11. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (holding that indirect purchasers were not injured by the antitrust violation and therefore may not sue for damages). *See also* OFF. OF THE ATT'Y GEN. STATE OF CONN., TESTIMONY OF ATTORNEY GENERAL GEORGE JEPSEN BEFORE THE JUDICIARY COMMITTEE 4 (2018), https://www.cga.ct.gov/2018/JUDdata/Tmy/2018HB-05252-R000309-Jepsen,%20George,%20Office%20of%20Attorney%20General-TMY.PDF [https://perma.cc/7STR-4E6B] (listing the states that have enacted repealer statutes subsequent to the *Illinois Brick* ruling).

12. *See infra* Part VI (discussing the implications, or lack thereof, of the Court's decision in *Apple v. Pepper*).

13. In Re Apple & AT&T & TM Antitrust Litig., 596 F. Supp. 2d 1288 (N.D. Cal. 2008) (denying AT&T's motion to dismiss; granting in part and denying in part Apple's motion to dismiss).

14. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351–52 (2011) (reversing the Ninth Circuit's earlier decision and holding that the Federal Arbitration Act preempts a state law that prohibits contracts from disallowing class-wide arbitration).

action.[15] In the wake of the paradigm shifting *Concepcion* decision, many tech companies rushed to adopt mandatory arbitration clauses with class action waivers — if they were not already in place.[16] Unusually, Apple did not follow suit and continues to employ a standard choice of venue provision, requiring all users of its iTunes store to litigate any dispute in the courts of California.[17]

As commerce becomes more digitized and companies such as Amazon, Facebook and Microsoft dominate market share in their respective industries, direct purchasers of their products will continue to procure their goods and services online after agreeing to terms of service (containing arbitration clauses with class action waivers) via the simple click of a mouse. Given this, the importance of cases like *Pepper* and even *Illinois Brick*, will diminish if direct purchasers are denied access to the courts to pursue individual antitrust claims – let alone on a class-wide basis. Instead, those direct purchasers will be increasingly relegated to secretive arbitration tribunals wherein they will only be allowed to assert individual claims "with no effective means of review."[18] Accordingly, it is probable that fewer private antitrust actions will be filed, and direct purchasers will have to either rely on governmental antitrust authorities to enforce their antitrust claims or be relegated to pursue individual claims in arbitration.

Yet, recent data submitted to Congress demonstrates that few consumers avail themselves of their individual arbitration rights.[19] This likely means that only well-resourced plaintiffs whose mere end goal is the pursuit of martyrdom upon the altar of the *Illinois Brick* doctrine will file

15. *In re* Apple iPhone Antitrust Litig., No. 11-cv-06714-YGR, 2013 U.S. Dist. LEXIS 116245, at *51 (N.D. Cal. Aug. 15, 2013).

16. Myriam Gilles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825, 853 (2012) (noting that "all the clauses I examined contained class action waivers . . . nearly all the clauses had been amended in the aftermath of *Concepcion*. Indeed, I could find few arbitration clauses that hadn't been amended in 2011-2012").

17. *Apple Media Services Terms and Conditions*, APPLE, https://www.apple.com/legal/internet-services/itunes/us/terms.html [https://perma.cc/3ENA-HC5C] (last updated Sept. 16, 2020) ("You and Apple agree to submit to the personal and exclusive jurisdiction of the courts located within the county of Santa Clara, California, to resolve any dispute or claim arising from this Agreement.").

18. *Concepcion,* 563 U.S. at 351. It is interesting to note that Justice Scalia partially justified the Court's disallowance of mandatory class arbitration premised on the lack of "effective means of review" when the same is true of the arbitration of individual claims.

19. *See* David Dayen, *Tech Companies' Big Reveal: Hardly Anyone Files Arbitration Claims,* THE AMERICAN PROSPECT (Nov. 26, 2019), https://prospect.org/power/tech-companies-hardly-anyone-files-arbitration-claims/ [https://perma.cc/GTU5-G6NF] (indicating that forced arbitration clauses in consumer and employment contracts build barriers to disputing the conduct of large companies).

individual claims via the opaque avenue of arbitration; or to paraphrase Judge Richard Posner, only a lunatic or a fanatic would pursue such claims on an individual basis.[20]

The ultimate purpose of this case note is to analyze and assess whether *Pepper* will have the impact that many predicted. However, prior to any evaluation of *Pepper*, I will first briefly define the statutory basis for antitrust suits, particularly as it pertains to direct and indirect purchaser standing. I will then review the Supreme Court jurisprudence that led to the development of the Indirect Purchaser Rule as well as its ultimate impact. Subsequently, I will discuss *Pepper*, its decade-long journey through the federal courts, the Supreme Court's grant of certiorari, the competing interests surrounding the case, the oral argument before the Supreme Court, as well as the ultimate decision penned by Justice Kavanaugh. Lastly, I will endeavor to evaluate, given the Supreme Court's recent jurisprudence addressing the enforceability of mandatory arbitration clauses, whether the impact of *Pepper* will be mitigated by recent Supreme Court jurisprudence enforcing mandatory arbitration clauses with class action waivers.

II. ANTITRUST STANDING: DIRECT AND INDIRECT PURCHASERS

As stated by the Court in *Pepper*: "A claim that a monopolistic retailer (here, Apple) has used its monopoly to overcharge consumers is a classic antitrust claim."[21] In order to assert standing in a direct purchaser action, a plaintiff must first allege that there has been a violation of Section 2 of the Sherman Act, which provides in relevant part that "[e]very 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. . . ."[22] A plaintiff may then utilize Section 4 of

20. *See* Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (noting that "only a lunatic or a fanatic sues for $30"); *see also* Andermann v. Sprint Spectrum L.P., 785 F.3d 1157, 1160 (7th Cir. 2015) (stating that it would not be worthwhile for the plaintiffs to pursue their claim via arbitration because even if they prevail they "will be entitled only to modest statutory damages"); *see, e.g.*, Richard D. Freer, *SCOTUS Analysis: Lamps Plus Inc. v. Varela,* EMORY L. NEWS CTR. (July 17, 2019), http://law.emory.edu/news-and-events/releases/2019/07/2019-07-17-SCOTUS-Freer-Lamps-Plus-v-Varela.html [https://perma.cc/R2E3-LLF4] (noting that "no one but a zealot or a nut (to paraphrase Judge Posner) will go through arbitration for a return of $30, a requirement that claimants proceed alone may ensure that very few claims will be pursued, even if well-grounded in law and fact").

21. Apple Inc. v. Pepper, 139 S. Ct. 1514, 1519 (2019).

22. Sherman Act, 15 U.S.C. § 2 (1890). The Courts have applied a rule of reason to Section 2 claims. The mere existence of a monopoly is not, by itself, a violation of Section 2. A monopoly is only illegal if it unreasonably restrains trade through exclusionary conduct.

the Clayton Act, which provides a private right of action to "any person who shall be injured in his business or property" to enforce the antitrust laws and sue the alleged violator.[23]

Despite the broad language of Section 4 of the Clayton Act, federal courts have long been wary of granting standing to every potential plaintiff injured by an antitrust violation for fear of allowing a plaintiff whose injury is "too remote" to pursue claims.[24] Because such remote or indirect purchasers did not directly purchase from the antitrust violator, federal courts have reasoned that the mountain they must climb to prove their claim is too steep, and therefore indirect purchasers should be barred from asserting any claim.[25] Instead, such courts have often applied the common law principle

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See State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (stating that "most antitrust claims are analyzed under a 'rule of reason,' according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect").

23. Clayton Act, 15 U.S.C. § 15(a) (1914). The section reads in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

24. Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 917 (3d Cir. 1999) (dismissing plaintiff's claim by stating that injuries that they allegedly suffered from defendants' wrongdoing are simply too remote from that wrongdoing to be cognizable under the antitrust laws); *see generally* Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983) (denoting that the remote and obviously speculative character of the alleged harm is plainly sufficient to place it beyond the reach of Section 4); Mr. Furniture Warehouse, Inc. v. Barclays Am./Commercial Inc., 919 F.2d 1517 (11th Cir. 1990) (holding that the injury suffered by Mr. Furniture was remote and not the type of injury that Congress was likely to be concerned with and therefore provided a private remedy under Section 4); Kloth v. Microsoft Corp. 444 F.3d 312 (4th Cir. 2006) (holding that as indirect purchasers with remote injuries, the plaintiffs could not sue the manufacturer because they lacked standing); *In Re* Antitrust Zinc Litigation, 155 F.Supp.3d 337, 365 (S.D.N.Y 2016) (stating that Plaintiffs are "simply too remote from that market to have antitrust standing"). *But see* Blue Shield of Va. v. McCready, 457 U.S. 465 (1982) (holding that McCready's loss was not too remote or indirect to pursue a remedy under Section 4).

25. *See Steamfitters Local Union*, 171 F.3d 912 (dismissing plaintiffs' claims because the harm was too remote); *Associated Gen. Contractors of Cal.*, 459 U.S. 519 (finding plaintiffs' allegations of harm insufficient due to its indirectness); *Mr. Furniture Warehouse*, 919 F.2d 1517 (holding that Mr. Furniture did not have antitrust standing because his injury was too remote, and not the kind that Congress intended to forestall); *Kloth*, 444 F.3d 312 (holding that plaintiffs' claims of injuries were indirect and too remote to give them standing); *In Re Antitrust Zinc* Litigation, 155 F.Supp.3d 337 ("[P]laintiffs are simply too remote from

of proximate cause in order to bar potential plaintiffs from bringing suit.[26] This has resulted in much inconsistency and confusion in antitrust standing jurisprudence[27] and has led to decisions that run counter to one of the main goals of antitrust law – namely, "to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keeping quality up."[28]

Furthermore, as an illegal overcharge is commonly passed through a distribution chain to multiple consumers or purchasers, many consumers and purchasers along the stream of commerce are often injured by a single overcharge.[29] For instance, when a price-fixing manufacturer overcharges for the goods that it sells, the consumer who purchases the goods directly from the price-fixing manufacturer is the first consumer that is injured by the overcharge.[30] This "direct purchaser" may then incorporate the price-fixed good into the products it sells and thereby pass on all or some portion of the price-fixing manufacturer's overcharge to its distributors. The distributors subsequently pass on all or part of that overcharge to consumers further down the stream of commerce. As neither the distributors nor the consumers further down the stream of commerce purchased the goods directly from the price-fixing manufacturer, they are not considered "direct purchasers" for purposes of antitrust standing, but rather are adjudged as "indirect purchasers" because their injury is deemed to be too remote to allow for

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that market to have antitrust standing. . . .").

26. *See, e.g.*, Daniel C. Richman, *Antitrust Standing, Antitrust Injury, and the Per Se Standard*, 93 YALE L. J. 1309, 1310 (1984) (arguing that the application of tort analysis to questions of standing under Section 4 of the Clayton Act has stemmed from a failure to recognize the nature of the per se standard in antitrust law). This is essentially the argument made by the dissenters in *Pepper*: "The Court today risks replacing a cogent rule about proximate cause with a pointless and easily evaded imposter." *Pepper*, 139 S. Ct. at 1530.

27. Richman, *supra* note 26 (arguing that courts' use of the common law principle of proximate cause in antitrust cases has produced inconsistent results and therefore led to much confusion in standing case law).

28. *The Antitrust* Laws, FED. TRADE COMM'N, https://www.ftc.gov/tips-/advice/competit ion-guIdance/guIde-antitrust-laws/antitrust-laws [https://perma.cc/Y848-6EE4] (last visited Sept. 4, 2020) (summarizing the core federal antitrust laws and stating Congress' objective when passing these laws).

29. *See* Ryan M. Sandrock, *Apple v. Pepper and the Future of the Direct Purchaser Enforcement Regime*, 33 A.B.A. ANTITRUST MAGAZINE 6, 7 (2019) (delineating how a single illegal overcharge may injure a multitude of consumers further down the stream of commerce).

30. ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS (2007), htt ps://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf [https://perm a.cc/MFR8-RZUD] (hereinafter "AMC Report") (recommending that Congress overrule the Supreme Court's decisions in *Illinois Brick and Hanover Shoe* to the extent necessary to permit both direct and indirect purchasers to recover for their respective injuries).

recovery.[31] This has come to be known as the Indirect Purchaser Rule, also colloquially known as the *Illinois Brick* Doctrine.

The Indirect Purchaser Rule, is actually the consequence of both *Illinois Brick* as well as its predecessor case, *Hanover Shoe,* decided a decade earlier.[32] In *Hanover Shoe*, the Supreme Court allowed a direct purchaser to fully recover for an illegal overcharge irrespective of whether the direct purchaser ultimately "passed on" none, some, or the entire overcharge to consumers further down the stream of commerce.[33] In *Illinois Brick*, the Supreme Court denied standing to downstream consumers, ultimately reasoning that they were indirect purchasers regardless of whether or not the overcharge had been "passed on" to them.[34] The Court held that the first/direct purchaser may receive the entirety of the defendant's overcharge in damages and those damages are not reduced by the amount of the overcharge that the direct purchaser passed on to subsequent purchasers further down the stream of commerce.[35] Therefore, indirect purchasers may not lay claim to any damages as they have already been recovered via the direct purchaser.[36] Understanding the reasoning behind these two cases as well as the genesis of the *Illinois Brick* Doctrine that emanated from the Court's decisions is crucial to understanding *Pepper*.

III. THE DEVELOPMENT OF THE INDIRECT PURCHASER RULE

A. Hanover Shoe – A look at the notion of the "Pass-on" in Supreme Court Antitrust Jurisprudence

Prior to *Hanover Shoe* the Supreme Court addressed, albeit in dicta,

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31. *Id.* To be clear, *Illinois Brick* does not apply to suits by indirect purchasers seeking injunctive relief under Section 16 of the Sherman Act because such suits do not raise the same concerns about duplicative recovery or the apportionment of damages. *See* Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 111 n.6 (1986) ("Thus, because standing under § 16 raises no threat of multiple lawsuits or duplicative recoveries, some of the factors other than antitrust injury that are appropriate to a determination of standing under § 4 are not relevant under § 16.").

32. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968) (holding that United Shoe violated the Sherman Act through its illegal monopolization of the shoe machine industry); Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

33. *Hanover Shoe*, 392 U.S. at 482.

34. *Illinois Brick*, 431 U.S. 720.

35. *Id.*

36. *Id.*; *see also* Herbert Hovenkamp, *Apple v. Pepper: Rationalizing Antitrust's Indirect Purchaser Rule*, 120 COLUM. L. REV. FORUM 14, 15 (2020) (stating that "indirect purchasers would not be able to claim any damages, since they had already been recovered in full by the direct purchaser").

direct purchaser claims and the notion of the pass-on in just one case.[37] In *Keogh v. Chicago & Northwestern Ry. Co.*,[38] the Court held that the plaintiff, a manufacturer of excelsior and flax tow out of Minnesota that had alleged that the defendant corporations (eight interstate railroad companies) had conspired to fix freight rates, lacked a valid cause of action under the Sherman Act as "not only does the injury complained of rest on hypothesis (citation omitted); but the damages alleged are purely speculative."[39] Additionally, in what is the first allusion to the pass-on concept in Supreme Court antitrust jurisprudence, the Court further reasoned that because the challenge was to a legally sanctioned rate, "no court or jury could say that, if the rate had been lower, Keogh would have enjoyed the difference between the rates or that any other advantage would have accrued to him. *The benefit might have gone to his customers, or conceivably, to the ultimate consumer* (emphasis added)."[40] For the ensuing forty-six years, until *Hanover Shoe*, the Court did not grant certiorari to any case which concerned either direct purchasers or pass-ons.

In *Hanover Shoe*, the plaintiff brought a private action against United Shoe Machinery Corporation ("United Shoe"), a distributor of shoemaking

37. There were a number of "passing-on" cases litigated in several Circuit Courts, particularly the Seventh and Eighth Circuits, prior to the *Hanover* decision. *See* Twin Ports Oil Co. v. Pure Oil Co., 119 F. 2d 747 (8th Cir. 1941) (holding that an increase in the price of gasoline to plaintiff was not immediately reflected in a corresponding increase in the retailers' price during the years in question, and therefore, there was no loss in margins, nor in the sale of plaintiff's property that could be attributed to the alleged "buying program"); Nw. Oil Co. v. Socony-Vacuum Oil Co., 138 F.2d 967 (7th Cir. 1943) (deciding that plaintiff has wholly failed to prove any loss to its property or business but rather has shown, by all reasonable inferences, that the increased cost of which it complained was passed on to the ultimate consumer and therefore the district court rightfully directed a verdict for defendant); Clark Oil Co. v. Phillips Petroleum Co., 148 F.2d 580 (8th Cir. 1945) (holding that plaintiff's alleged damages are neither logically nor legally inferable, but rather are merely supplied via conjecture); Turner Glass Corp. v. Hartford-Empire Co., 173 F. 2d 49 (7th Cir. 1949) (concluding that plaintiffs have not satisfied their burden of proving that defendants have caused them to sustain pecuniary damages); Wolfe v. National Lead Co., 225 F. 2d 427 (9th Cir. 1955) (finding that after an inquiry into the relevant facts that plaintiff's contention that they could not possibly pass on increased costs to their customers is unconvincing); Beacon Fruit Co. v. H. Harris & Co., 260 F. 2d 958 (1st Cir. 1958) (affirming that the imposition on plaintiffs of a five-cent charge per package of produce sold through auction service did not constitute a restraint of trade and had not tended to suppress competition). *See also* Earl E. Pollock, *Automatic Treble Damages and the Passing-on Defense: The Hanover Shoe Decision*, 13 ANTITRUST BULL. 1183, 1194–96 (1968) (listing a number of "passing-on" cases that appeared before several circuit courts prior to *Hanover*).

38. Keogh v. Chi. & Northwestern Ry. Co., 260 U.S. 156 (1922) (holding that the damages alleged by the plaintiffs are conjecture and purely speculative).

39. *Id.* at 164.

40. *Id.* at 165.

machinery, alleging that United Shoe monopolized the shoe machinery industry through its practice of solely leasing — but refusing to sell — its shoemaking machinery.[41] The Court held that United Shoe was in violation of Section 2 of the Sherman Act. United Shoe had maintained that it should be permitted to show that Hanover Shoe was not actually injured because it had ultimately "passed on" the costs of the injury downstream to consumers of their product.[42] The Court, however, found that defendants in antitrust cases cannot reduce their liability by showing that the plaintiffs had not absorbed the entire overcharge.[43] The Court reasoned that it would be too difficult to isolate the extent that an overcharge had been passed on to the purchasers further along the stream of commerce.[44] Furthermore, the Court held that buyers are equally entitled to damages, even if they raise the price for their own product, because at whatever price the buyers ultimately sell their product, the price they pay the seller remains illegally high, and their profits would be greater were their costs lower.[45] Importantly, another reason for barring the "pass-on" defense was the Court's concern that antitrust violators "would retain the fruits of their illegality" if direct purchasers could not sue for the entirety of the harm, including the portion of the overcharge arguably passed on to indirect purchasers, because indirect purchasers "would have only a tiny stake in the lawsuit," and therefore presumably little incentive to sue.[46]

B. *Illinois Brick – Antitrust Standing and the Genesis of the Indirect Purchaser Rule*

Less than a decade later, the Court rendered its decision in *Illinois Brick,* a case which in many respects paralleled *Hanover Shoe*. In *Illinois Brick*, the State of Illinois and other local governmental entities in Illinois brought a suit against eleven concrete block manufacturers alleging that they had engaged in a price fixing conspiracy in violation of Section 1 of the Sherman Act.[47] The manufacturers sold bricks to masonry contractors, who

41. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 482 (1968).

42. *Id.*

43. *Id.* at 494.

44. *Id.* at 493–94.

45. *Id.* at 489; *see also* William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. CHI. L. REV. 602 (1979) (arguing that *Hanover Shoe* would strengthen antitrust enforcement by increasing direct purchasers' incentive to sue because they would capture the entire overcharge in a successful suit).

46. *Hanover Shoe*, 392 U.S at 494.

47. Illinois Brick Co. v. Illinois, 431 U.S. 720, 726–27 (1977); *see* Sherman Act, 15

then submitted bids to general contractors for specific portions of larger construction projects.[48] The State of Illinois and local government entities subsequently awarded construction projects to general contractors who accepted bids from masonry contractors using bricks purchased from the manufacturers.[49] Accordingly, the plaintiff government entities were three levels removed from the defendant manufacturers. The Court considered whether a plaintiff can sue for damages "in the context . . . in which the plaintiff, an indirect purchaser, seeks to show its injury by establishing pass-on by the direct purchaser. . . ."[50] The majority ultimately held they could not sue for damages due to the risks of duplicative recovery and the difficulty of trying to apportion damages among the purchasers in the stream of commerce.[51]

Prior to deciding the case before it on the merits, the Court explicitly assented to establishing a rule of symmetry, stating that whatever rule it adopts regarding "passed on" damages, must be applied equally to plaintiffs and defendants.[52] Given this constraint, the majority had only two options — either overrule *Hanover Shoe* or apply it offensively.[53] The Court chose the latter route. In doing so, the majority opinion reexamined *Hanover Shoe* and reaffirmed it,[54] reasoning that in order to deter antitrust violators without diluting the effectiveness of the antitrust laws, the recovery for improper overcharges must be concentrated with the direct purchasers.[55] The majority drove this point home by stating: "However appealing this attempt to allocate

U.S.C. § 1 (1890) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

48. *Illinois Brick*, 431 U.S. at 720 ("[T]he State of Illinois and 700 local governmental entities, brought this antitrust treble-damages action under § 4 of the Clayton Act alleging that petitioners, concrete block manufacturers (which sell to masonry contractors, which in turn sell to general contractors, from which respondents purchase the block in the form of masonry structures) had engaged in a price-fixing conspiracy in violation of § 1 of the Sherman Act.").

49. *Id.*

50. *Id.* at 726.

51. *Id.* at 721.

52. *Id.* at 726 ("[H]aving decided that, in general, a pass-on theory may not be used defensively by an antitrust violator against a direct purchaser plaintiff, we must now decide whether that theory may be used offensively by an indirect purchaser plaintiff against an alleged violator.") and 728 ("[W]e conclude that, whatever rule is to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants.").

53. *Id.* at 729 ("[B]ecause *Hanover Shoe* would bar petitioners from using respondents' pass-on theory as a defense to a treble-damages suit by the direct purchasers (the masonry contractors), we are faced with the choice of overruling (or narrowly limiting) *Hanover Shoe* or of applying it to bar respondents' attempt to use this pass-on theory offensively.").

54. *Id.* at 735.

55. *Id.* at 734–35.

the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits, and seriously undermine their effectiveness."[56]

In their dissent, Justice Brennan, joined by Justices Blackmun and Marshall, rejected the majority's reasoning because, according to them, consumers further downstream, i.e., indirect purchasers, would ultimately bear the brunt of any injury stemming from an antitrust violation with no feasible path to relief. Justice Brennan maintained that this was clearly not the intention of the drafters of Section 4.[57]

The dissenters also disagreed with the majority's focus on the deterrence aspect of the antitrust laws and instead insisted that the main intention of the Clayton Act was to ensure disgorgement of overcharges and compensation to the injured.[58] Furthermore, unlike the majority, the dissenters did not believe that apportioning damages among direct and indirect purchasers was any more difficult than the apportioning of damages for other antitrust issues.[59] Justice Blackmun penned a separate dissent in which he opined that had *Illinois Brick* preceded *Hanover Shoe,* the Court would have granted standing to indirect purchasers,[60] a notion which some antitrust scholars agree with.[61]

In the annals of Supreme Court antitrust jurisprudence, *Hanover Shoe* and *Illinois Brick* will forever be inextricably linked; it seems relatively clear that the emergence of the eponymous *Illinois Brick* doctrine can be attributed to what Justice Blackmun appropriately termed an "unhappy chronology."[62]

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56. *Id.* at 737.

57. *Id.* at 749.

58. *Id.*

59. *Id.* at 759–60; *see also* AMC Report, *supra* note 30, at 268 (noting that the "dissenters were not persuaded that the complexity of assessing and allocating damages for both direct and indirect purchasers was any greater than the complexity of other antitrust issues").

60. *Illinois Brick*, 431 U.S. at 765 ("If *Hanover Shoe* had not preceded this case, and were it not 'on the books,' I am positive that the Court today would be affirming, perhaps unanimously, the judgment of the Court of Appeals. The policy behind the Antitrust Acts and all the signs point in that direction, and a conclusion in favor of indirect purchasers who could demonstrate injury would almost be compelled.") (citation omitted).

61. *See* Roger D. Blair & Jeffrey L. Harrison, *Reexamining the Role of Illinois Brick in Modern Antitrust Standing Analysis,* 68 GEO. WASH. L. REV. 1, 42 (1999) (arguing that had Illinois Brick followed several more recent antitrust decisions it would have been "unnecessary"); *see, e.g.*, AMC Report, *supra* note 30, at 438 (separate statement of Commissioner Donald G. Kempf, Jr.) ("I've always thought that the strange twin rulings in *Hanover Shoe* and *Illinois Brick* are explainable mainly by the order in which they arrived at the Supreme Court. Had *Illinois Brick* been the first case, I can't imagine that the Court would have held that persons clearly injured by an antitrust violation could not recover.").

62. *Illinois Brick*, 431 U.S. at 765 ("I add these few sentences only to say that I think the plaintiffs-respondents in this case, which they now have lost, are the victims of an unhappy

Indeed, in their attempt to safeguard *stare decisis* and fidelity to the texts of *Hanover Shoe* and the Sherman Act, the *Illinois Brick* majority left within its wake a difficult to apply rule that has spawned a labyrinthine stratification of antitrust jurisprudence across both state and federal courts.

C. Cases and Statutory Responses to the Illinois Brick Ruling

While the *Illinois Brick* decision was derided by many academics and practitioners alike,[63] it has been applied by the Supreme Court a number of times in the four decades since. The doctrine was first revisited again by the Court in *Blue Shield of Virginia v. McCready*.[64] In *McCready*, an employee ("McCready") was provided coverage under a prepaid group health plan purchased by her employer from Blue Shield of Virginia ("Blue Shield").[65] The plan provided reimbursement for part of the cost incurred by subscribers for outpatient treatment, including psychotherapy. However, Blue Shield's practice was to reimburse subscribers for services provided by psychiatrists, but not by psychologists, unless the treatment was supervised by and billed through a physician. McCready was treated by a clinical psychologist and submitted claims to Blue Shield for the costs of the treatment. After the claims were routinely denied because they had not been billed through a physician, McCready brought a class action alleging that Blue Shield and the Neuropsychiatric Society of Virginia, Inc., had engaged in an unlawful conspiracy in violation of Section 1 of the Sherman Act to exclude psychologists from receiving compensation under Blue Shield's plans.[66] McCready further alleged that Blue Shield's failure to reimburse her was in furtherance of the conspiracy and had caused injury to her business or property.[67]

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chronology. If *Hanover Shoe* had not preceded this case, and were it not 'on the books,' I am positive that the Court today would be affirming, perhaps unanimously, the judgment of the Court of Appeals.") (citation omitted).

63. The decision immediately caused Congress to create a taskforce to analyze and evaluate alternatives to *Illinois Brick*. *See* Barak D. Richman & Christopher R. Murray, *Rebuilding Illinois Brick: A Functionalist Approach to the Indirect Purchaser Rule*, 81 S. CAL. L. REV. 69, 83 (2007) (noting that "critics outside the Court have remained vocal and resolute, doggedly reciting the rule's many significant shortcomings and determinedly assembling a legitimate case for reform").

64. Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982).

65. *Id.* at 465–67.

66. *Id.* at 469–70.

67. For such an injury, McCready claimed that she was entitled to treble damages under Section 4 of the Clayton Act. The District Court granted defendants' motion to dismiss, holding that McCready had no standing under Section 4 to maintain her suit. *See* McCready v. Blue Shield of Virginia, 649 F.2d 228, 229 (4th Cir. 1981) (discussing the unreported

In the majority opinion, in which he was joined by the two other *Illinois Brick* dissenters, Justice Brennan placed a limit on the application of the Indirect Purchaser Rule. The majority granted standing to McCready, although a strict reading of *Illinois Brick* would certainly have relegated her to indirect purchaser status.[68] The Court reasoned that *Illinois Brick* sought to prevent duplicative recovery by allowing both direct and indirect purchasers to claim damages and recover from a defendant's single overcharge.[69] Given this reading of *Illinois Brick*, the *McCready* majority held that there was no prospect of a duplicative recovery.[70] *McCready*, however, seems to have been an anomaly, and the limited reading of *Illinois Brick* applied in *McCready* soon made way for a stricter bright-line rule in subsequent Supreme Court antitrust jurisprudence.

The Court revisited the *Illinois Brick* decision less than a decade after *McCready*. In *Kansas v. UtiliCorp United*, an investor-owned public utility operating in Kansas and Western Missouri purchased natural gas from a pipeline company for its own use and for resale to its commercial and residential customers.[71] Together with a second utility and several other gas purchasers, it sued the pipeline company and five gas production alleging they had conspired to inflate the price of gas paid by the utilities. The plaintiffs sought treble-damages, pursuant to Section 4 of the Clayton Act, for both the amount overcharged by the pipeline company and the decrease in sales to their customers caused by the overcharge.[72]

The states of Kansas and Missouri initiated separate Section 4 actions against the same defendants for the alleged antitrust violation. Acting as *parens patriae,* they asserted claims on behalf of residents of Kansas and Missouri who had purchased gas from any utility at inflated prices.[73] Although the utilities passed the overcharge from natural gas suppliers on to consumers, the Court denied standing to the consumers, stating "that a departure from the direct purchaser rule may be necessary when an indirect

district court opinion, which was overturned by the Fourth Circuit).

68. *See generally* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (holding that indirect purchasers were not injured by the antitrust violation and therefore may not sue for damages).

69. *McCready*, 457 U.S. at 474.

70. *Id.* at 475 ("But permitting respondent to proceed in the circumstances of this case offers not the slightest possibility of a duplicative exaction from petitioners. McCready has paid her psychologist's bills; her injury consists of Blue Shield's failure to pay her. Her psychologist can link no claim of injury to himself arising from his treatment of McCready; he has been fully paid for his service and has not been injured by Blue Shield's refusal to reimburse her for the cost of his services.").

71. Kansas v. UtiliCorp United, 497 U.S. 199, 199–200 (1990).

72. *Id.* at 199–203.

73. *Id.* at 199.

purchaser buys under a pre-existing cost-plus contract does not justify an exception in this case."[74] Departing from the more flexible approach adopted in *McCready*, the Court has employed the *Utilicorps* majority's reasoning when assessing antitrust cases in which *Illinois Brick* is implicated.[75]

In the decades since the genesis of the *Illinois Brick* doctrine, there has been a considerable amount of debate surrounding its implementation and future.[76] Most importantly, in the wake of *Illinois Brick*, beginning with California in 1978,[77] over 30 states[78] and the District of Columbia enacted what are colloquially known as "repealers" that permit indirect purchasers to pursue antitrust claims under state law.[79]

With the enactment of repealer statutes, antitrust litigation under these statutes has become increasingly common. This has led to a bifurcated

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74. *Id.* at 217.

75. The dissent criticized the rule as "rigid" stating that: "None of the concerns that caused us to bar the indirect purchaser's suit in *Illinois Brick* exist in this case." *Id.* at 225. The survival of the *Illinois Brick* doctrine is due mainly to what can be described as a perfect storm of confluence and chronology that has left in its wake "an inflexible and sweeping categorical rule that is in tension with the tenor of modern antitrust law." Richman & Murray, *supra* note 63, at 83.

76. *See* Robert G. Harris and Lawrence A. Sullivan, *Passing On the Monopoly Overcharge: A Response to Landes and Posner*, 128 U. PA. L. REV. 1280 (1979-1980) (arguing that Congress should pass legislation to overrule *Illinois Brick* in the interest of deterring cartelization and monopolization as well as compensating the actual victims of the antitrust violations); Roger D. Blair & Jeffrey L. Harrison, *Reexamining the Role of Illinois Brick in Modern Antitrust Standing Analysis*, 68 GEO. WASH. L. REV. 1 (1999) (maintaining that the decision is obsolete); Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Illinois Brick*, 100 IOWA L. REV. 2115 (2015) (contending that *Illinois Brick* should be overruled); Kevin J. O'Connor, *Is the Illinois Brick Wall Crumbling?*, 15 ANTITRUST 34 (2001) (asserting that the ability of indirect purchasers to seek remedies in state courts could lead to a statutory change designed to coordinate direct and indirect purchaser litigation).

77. AMC Report, *supra* note 30, at 268.

78. Additionally, even some states that did not enact repealer statutes have allowed indirect purchasers to pursue price fixing cases under their antitrust laws. *See* Daniel R. Karon, *Your Honor, Tear down That Illinois Brick Wall - The National Movement Toward Indirect Purchaser Antitrust Standing and Consumer Justice*, 30 WM. MITCHELL L. REV. 1351, 1363–1391 (2004) (identifying the states that do not possess repealer statutes, yet still permit indirect purchasers to pursue price-fixing claims).

79. AMC Report, *supra* note 30, at 268. In *California v. ARC America Corp.*, the Supreme Court held that these state repealer statutes are valid and not preempted by federal law. 490 U.S. 93, 105 (1989). While claims brought under repealer statutes were originally litigated primarily in state courts, after the enactment of the Class Action Fairness Act ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified at 28 U.S.C. §§ 1332, 1453, 1711–15 (2012)), such claims are now litigated predominately in federal court. Stephen Carr, *Reconsidering Indirect-Purchaser Class Actions*, 67 Fla. L. Rev 913, 925 (2015) (observing that since the enactment of CAFA "many state-law indirect-purchaser claims now end up in federal court alongside direct-purchaser class actions").

system of antitrust enforcement wherein direct purchasers have traditionally filed under federal antitrust law, and, conversely, indirect purchasers have pursued their state antitrust claims under state law. In response to the unintended reality of the stratification of antitrust claims, Congress established the Antitrust Modernization Commission ("AMC") to evaluate and scrutinize the existing antitrust laws.[80] In 2007, the AMC issued a report criticizing *Illinois Brick* and concluded that direct and indirect purchaser litigation would not only be more efficient, but also fairer, if it were to occur in one federal court for all purposes rather than in different courts.[81] In order to facilitate this, the AMC Report recommended that Congress enact a comprehensive statute that would essentially overrule *Illinois Brick* and *Hanover Shoe.*

However, despite these recommendations and the mounting opposition to *Illinois Brick* by those in academia as well as many within the business community, the Supreme Court has yet to overrule *Illinois Brick* and there has been no legislative fix. It is with this negative attitude toward *Illinois Brick* lurking in the background that *Apple v. Pepper* appeared before the Court.

IV. APPLE V. PEPPER: PATH TO SCOTUS

A. Definition of a Digital Marketplace

To understand *Apple v. Pepper*, one must first understand the basic structure of the digital marketplace. A digital marketplace is an online marketplace that facilitates transactions between sellers and consumers through the medium of a third-party platform.[82] Examples include popular sites such as Amazon, eBay, and Alibaba, among others. An app store is a sub-type of a digital marketplace. App stores typically take the form of an online store, in which users can browse through different app categories, view information about each app (such as reviews or ratings) and acquire the app either for a fee or at no cost.[83]

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80. Antitrust Modernization Commission Act of 2002, Pub. L. No. 107–273, 116 Stat. 1856 (2002).

81. AMC Report, *supra* note 30, at 270.

82. *See* Richard Kestenbaum, *What Are Online Marketplaces and What Is Their Future?*, FORBES (Apr. 26, 2017, 6:59 AM), https://www.forbes.com/sites/richardkestenbaum/2017/04/26/what-are-online-marketplaces-and-what-is-their-future/#9b8a30a3284b [https://perma.cc/AP22-U24X] (defining online marketplace).

83. APPLE APP STORE, https://developer.apple.com/app-store/categories/ [https://perma.cc/TR8P-YYVL] (last visited Nov. 22, 2020); GOOGLE PLAY, https://play.google.com/store?hl=en_US [https://perma.cc/3RX4-6GXA] (last visited Nov. 22, 2020); *see Google Play Store*,

The operating system for apps available in the digital marketplace is functionally a duopoly.[84] The two dominant players are Apple and Google; Apple customers (iPhone and Mac users) may download apps through Apple's App Store and Android users may download apps through the Google Play store. While these two platforms may seem identical in terms of functionality and purpose, there is one paramount difference – iPhone users are precluded from downloading any app onto their phones other than through the Apple App Store. In contrast, Android users may download apps through other platforms.

In order to list apps for sale on the Apple App Store, third party developers must enroll in the Apple Developer Program, the cost of which is a $99 membership per year.[85] Furthermore, while the developers may determine the ultimate sales price of their respective app, Apple requires that the sales price ends in ninety-nine cents.[86] Additionally, developers must agree to allow Apple to deduct a 30% commission fee from all app purchases; Apple then remits the remaining 70% to the developers.[87] Apple's incarnation of an app store has allowed them to create a monopoly for app distribution on all iOS devices, including iPhones and iPads.[88] Moreover, it has been argued that the creation of this monopoly has forced the developers to raise their prices, effectively passing on the cost of Apple's commission to consumers.[89]

ANDROID CENTRAL (Apr. 29, 2019), https://www.androidcentral.com/google-play-store/home [https://perma.cc/M7FF-GPBA] (discussing the functionality of the google play store).

84. A duopoly is a type of oligopoly where two firms have dominant or exclusive control over a market. *See* FTC v. H.J. Heinz Co., 246 F.3d 708, 724 (2001) (defining a duopoly as "a market with only two competitors").

85. *Developer Support*, APPLE, https://developer.apple.com/support/purchase-activation / [https://perma.cc/AQS2-ZFSJ] (last visited Nov. 22, 2020).

86. Stephen Nellis, *Developers Sue Apple Over App Store Practices*, REUTERS (June 4, 2019, 11:54 AM), https://www.reuters.com/article/us-apple-antitrust/developers-sue-apple-over-app-store-practices-idUSKCN1T5249 [https://perma.cc/QDF2-3KL3].

87. *Principles and Practices*, APPLE APP STORE, https://www.apple.com/lae/ios/app-store/principles-practices/ [https://perma.cc/XFR8-74HU] (last visited Nov. 8, 2020).

88. Justice Sotomayor referred to this during oral arguments as a "closed loop" in which "Apple took 30 percent from the customer – not from the developer." Transcript of Oral Argument at 6–7, Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019) (No. 17-204).

89. *See* Romm & Albergotti, *supra* note 9 (noting that "the 2011 lawsuit was led by plaintiff Robert Pepper, who argued that consumers ultimately felt the brunt of Apple's policies because developers raised the prices of their apps to cover Apple's commission").

B. *In Re Apple & AT&T Anti-Trust Litigation – Apple I – Laying the Groundwork for Apple v. Pepper*

Shortly after the debut of the iPhone, a class of consumers filed suit in the Northern District of California against both Apple and AT&T Mobility ("AT&T"), formerly the exclusive seller of the iPhone.[90] After several years of litigation, the District Court compelled arbitration of claims against AT&T pursuant to the Federal Arbitration Act,[91] and the District Court decertified the case from its class-action status.[92] Although the Court decertified the class, this case, which is colloquially referred to as *Apple I*, laid the groundwork for the suit that would eventually reach the Supreme Court.

In *Apple I*, the plaintiffs alleged that Apple violated Section 2 of the Sherman Act through their monopolization, as well as attempted monopolization of the aftermarket for iPhone applications.[93] Additionally, the plaintiffs alleged that both Apple and AT&T violated Section 2 through their congruous monopolization and attempted monopolization of the aftermarket for iPhone voice and data services, as well conspiracy to monopolize said aftermarket.[94]

The *Apple I* plaintiffs alleged that prior to the launch of the iPhone on or about June 29, 2007, Apple entered into a five-year contract with AT&T, under which AT&T would be the exclusive provider of cell phone voice and data services for iPhone customers through 2012.[95] In effect, the undisclosed five-year exclusivity agreement locked iPhone users into using AT&T for five years, contrary to the users' contractual expectations.[96] The plaintiffs also alleged that Apple required software manufacturers to share 30% of the manufacturers' revenues from the sale of iPhone apps in order to sell iPhone apps on the App Store.[97] In addition to technological features that prevented iPhone consumers from downloading apps from anywhere but the App Store,

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90. *See In re* Apple & AT&T Antitrust Litig., No. C 07-5152 JW, 2008 WL 2323762 (N.D. Cal. June 4, 2008) (alleging various violations of federal antitrust laws and other consumer protection laws arising from an arrangement between seller and service provider upon the introduction of the device to the market).

91. *See infra* note 191 and accompanying text (discussing the Federal Arbitration Act).

92. *See In re* Apple & AT&T Antitrust Litig., 826 F. Supp. 2d 1168, 1179 (N.D. Cal. 2011) (granting AT&T and Apple's motions to compel arbitration and to decertify class).

93. *In re* Apple & AT & TM Antitrust Litig., 596 F. Supp. 2d 1288, 1296 (N.D. Cal. 2008) ("[D]efendants did not disclose to them the existence of the five-year exclusivity provision in the Agreement, or that Plaintiffs would be locked into using ATTM after the expiration of their initial two-year service contracts.").

94. *Id.* at 1295.

95. *Id.*

96. *Id.* at 1296.

97. *Id.* at 1295.

Apple allegedly discouraged iPhone customers from downloading competing third-party application software by refusing to honor warranties if customers downloaded competing applications.[98]

Apple sought dismissal of the complaint, arguing that the plaintiffs had "neither alleged legally cognizable markets under the Sherman Act, nor legally sufficient monopolization of those markets."[99] Judge Ware of the Northern District of California held that the plaintiffs had sufficiently alleged relevant aftermarkets, market power, and monopolization for voice and data services as well as the applications aftermarkets to state a claim.[100] Judge Ware also denied AT&T's motion to compel arbitration.[101] In a subsequent order, the District Court granted class certification to "all persons who purchased or acquired an iPhone in the United States and entered into a two-year agreement with Defendant AT&T Mobility, LLC for iPhone voice and data service any time from June 29, 2007, to the present."[102] However, following the Supreme Court's decision in *Concepcion*,[103] the District Court de-certified the class.[104]

C. *In Re Apple iPhone Antitrust Litigation – Apple II*

Shortly after the decertification of the class in *Apple I*, a new suit was commenced by iPhone users (*Apple II*).[105] The new complaint was nearly identical to the *Apple I* complaint; however, the *Apple II* plaintiffs filed solely against Apple and did not name AT&T as a defendant.[106] The Plaintiffs alleged only one claim for unlawful monopolization of an aftermarket for iPhone applications in violation of Section 2 of the Sherman Act and a second claim for attempted monopolization of the same aftermarket.[107] Concerning the alleged aftermarket, the Plaintiffs contended

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98. *Id.*

99. *In re* Apple & AT & TM Antitrust Litig. at 1301 (quoting Apple's motion at 1–2).

100. *Id.* at 1304–06.

101. *Id.* at 1299.

102. Proposed Order Granting Plaintiffs' Motion for Class Certification, *In Re Apple iPhone Antitrust Litigation*, No. 07-05152 (N.D. Cal. May 10, 2010), ECF No. 240-1.

103. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

104. In re Apple & AT&T Antitrust Litig., 826 F. Supp. 2d 1168, 1179 (N.D. Cal. 2011) (granting AT&T and Apple's motions to compel arbitration and to decertify class).

105. Second Amended Complaint, In re Apple iPhone Antitrust Litigation, No. 11-07614, 2013 WL 6387366 (N.D. Cal. Sept. 5, 2013) (stating that the named Plaintiffs filed individually and on behalf of a class of "[a]ll persons in the United States . . . who purchased an iPhone application or application license from Apple for use on an iPhone at any time from December 29, 2007 through the present").

106. *Id.*

107. *Id.* at 4.

that Apple has instituted, first, "an anticompetitive scheme to monopolize the aftermarket for iPhone applications in order to control and derive supracompetitive profits from the distribution of iPhone apps worldwide."[108] Second, Plaintiffs claimed that in implementing a closed iPhone operating system, known as an "iOS," the App Store is the only store in the world for iPhone users to buy Apps for their iPhones. Thus, Apple "cornered 100% of the worldwide distribution market for iPhone applications" and effectively foreclosed iPhone customers from buying applications from any source other than Apple.[109]

While the Plaintiffs conceded that the majority of apps available for download on the App Store are free of charge, they alleged that, for paid apps, "iPhone consumers have been overcharged hundreds of millions of dollars."[110] Like *Apple I*, the plaintiffs also alleged that Apple receives a "30% commission off the top and then remits the balance, or 70% of the purchase price, to the developer."[111] Apple then sells or licenses the apps directly to the consumer and collects the entirety of the purchase price and only pays the developers after the sale.[112] At no time during the transaction do the app developers directly sell or license the apps to iPhone customers or collect payments directly from the customers.[113] Rather, Apple sells the apps directly to its iPhone users. The Plaintiffs alleged that they were injured by Apple's conduct because they paid more for apps than they would have in a competitive market.[114] Additionally, the Plaintiffs maintain that, given the structure of Apple's App Store, they were deprived of freedom of choice – choosing between the App Store and lower cost market alternatives – as well as injured by a reduction in the output and supply of iPhone apps, which would have been more abundantly available in a competitive market if not for Apple's monopoly pricing.[115]

The District Court, in an unusual application of the *Illinois Brick* doctrine, ruled that the 30% commission deducted by Apple is not a fixed fee, but a cost passed-on to consumers by the independent software developers.[116] As such, the District Court held that any injury to Plaintiffs is

108. *Id.* at 1.
109. *Id.* at 1, 4.
110. *Id.* at 3.
111. *Id.* at 9.
112. *Id.*
113. *Id.*
114. *Id.* at 9.
115. *Id.* at 9–10.
116. In re Apple iPhone Antitrust Litig., No. 11-CV-06714-YGR, 2013 WL 6253147, at *6 (N.D. Cal. Dec. 2, 2013) ("[T]he Court finds that the 30% figure for which Plaintiffs complain is not a fixed fee, but a cost passed-on to consumers by independent software

indirect, resulting from the software developers' own costs.[117] Given that it found that none of the exceptions to the *Illinois Brick*[118] doctrine applied, the District Court held that the plaintiffs lacked standing as indirect purchasers and granted Apple's motion to dismiss with prejudice.[119]

D. Apple II Before the Ninth Circuit and the Resulting Circuit Split

The plaintiffs appealed the District Court's *Apple II* ruling to the Ninth Circuit Court of Appeals.[120] The Ninth Circuit framed the issue as whether the plaintiffs purchased their apps directly from the app developers or directly from Apple.[121] The Ninth Circuit applied *Illinois Brick* and the Indirect Purchaser Rule in what it termed a "bright line" fashion, similar to what it had done in the previous case of *Delaware Valley Surgical Supply, Inc. v. Johnson & Johnson*.[122] In that case, the Ninth Circuit held that one of the plaintiffs, a hospital in the market for medical supplies, "which purchased its [Johnson & Johnson] products through a separate contract with a third-party distributor" was an indirect purchaser of J&J.[123]

Apple argued that a bright line reading of *Illinois Brick* warranted the court holding that the plaintiffs be considered indirect purchasers. Thus, according to Apple, it does not sell apps but rather sells "software distribution services to developers."[124] In Apple's view, because it sells distribution services to app developers, it cannot simultaneously be a distributor of apps to app purchasers, and the plaintiffs therefore lack standing to sue.[125] The Ninth circuit, while not opining as to whether Apple

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developers. As such, any injury to Plaintiffs is an indirect effect resulting from the software developers' own costs."), *rev'd and remanded*, 846 F.3d 313 (9th Cir. 2017).

117. *Id.*

118. The District Court looked to the Ninth Circuit's analysis of the meaning of price fixing as applied in *Illinois Brick* in *In re ATM Fee Antitrust Litigation*. The District Court found that under *In re ATM Fee*, Apple's conduct did not amount to price fixing. *Id.*; *see also* In re ATM Fee Antitrust Litig., No. C 04-02676 CRB, 2010 WL 3701912 (N.D. Cal. Sept. 16, 2010) (holding that price paid by plaintiffs must be the price set and not merely "fixed" in some broad sense for plaintiffs to be a direct purchaser under the narrowly defined injury requirement of Section 4 of the Clayton Act).

119. In re Apple iPhone Antitrust Litig., 2013 WL 6253147, at *7.

120. In re Apple iPhone Antitrust Litig., 846 F.3d 313 (9th Cir. 2017).

121. *Id.* at 322.

122. Del. Valley Surgical Supply Inc. v. Johnson & Johnson, 523 F.3d 1116 (9th Cir. 2008) (holding that the hospital that contracted separately with the distributor for sale and delivery of medical supplies from the manufacturer was not a direct purchaser pursuant to the direct purchaser rule).

123. *Id.* at 1118, 1125.

124. *In re Apple iPhone Antitrust Litig.*, 846 F.3d at 323.

125. *Id.* at 323.

sells distribution services within the meaning of *Illinois Brick*, disagreed with Apple's characterization and held that the plaintiffs do have standing.[126] The court's analysis rested on the difference between a manufacturer/producer on the one hand and a distributor on the other. The Ninth Circuit considered Apple to be the distributor of iPhone apps, having sold the apps directly to consumers through the App Store, and therefore stated that *Hanover Shoe*, *Illinois Brick*, *and Delaware Valley* compelled them to grant standing to the plaintiffs.[127]

The Ninth Circuit's ruling seemingly conflicted with an earlier Eighth Circuit ruling in *Campos v. Ticketmaster*, which held that only concert venues, but not concertgoers, had standing to sue Ticketmaster for their inflated ticket prices.[128] In *Ticketmaster*, the plaintiffs alleged that Ticketmaster was a monopoly supplier of tickets to large-scale popular music shows that possessed exclusive contracts with nearly every promoter within the U.S.[129] These exclusive contracts allegedly fostered an environment in which Ticketmaster had a monopoly over ticketing for every large scale concert and show within the U.S. and allowed it to handle the vast majority of ticket sales regardless of whether Ticketmaster had an exclusive contract with the venue or stadium hosting the concerts and shows.[130] The Eight Circuit held that the plaintiff concert and show goers lacked standing as the concert promoters, who had agreed to sell tickets only through Ticketmaster, were the direct purchasers of "ticket distribution services" from Ticketmaster. Consequently, the ultimate buyers of tickets, the concert and show goers who had no other relationship with Ticketmaster, were, according to the Eighth Circuit, merely indirect purchasers.[131]

As Professor Herbert Hovenkamp concludes, the Eighth Circuit's opinion produced a "perverse" result.[132] According to the *Ticketmaster* court, a buyer that is able to pass on all or part of the overcharge has standing to sue as the direct purchaser.[133] Yet, end of the line buyers who absorb all of the overcharge are labeled as indirect purchasers and therefore lack standing and are left without a remedy. Professor Hovenkamp's analysis is apt, and it is clear that the facts before both Circuits, at least superficially, mirror one another. As in *Pepper*, the consumers in *Ticketmaster* transacted

126. *Id.* at 324.
127. *Id.* at 324–25.
128. Campos v. Ticketmaster Corp., 140 F.3d 1166 (8th Cir. 1998).
129. *Id.* at 1168.
130. *Id.* at 1171.
131. *Id.*
132. Hovenkamp, *supra* note 36, at 18.
133. Hovenkamp, *supra* note 36, at 18.

directly with the antitrust violator; however, the Eight Circuit's reading of *Illinois Brick* dictated that the consumers be considered indirect purchasers.[134] The Eighth Circuit's reasoning is flawed, as what logically results from it is that only venues may sue Ticketmaster, even if they have passed on all their damages. Given that venues, many of which have exclusive contracts with Ticketmaster, would certainly be hesitant to engage in a legal battle with a ticketing giant such as Ticketmaster, it is unlikely that concertgoers will ever receive a remedy. The Ninth Circuit, on the other hand, correctly analyzed the *Illinois Brick* rule through a different lens, and its holding resulted in a split between the two Circuits with regards to the application of the *Illinois Brick* doctrine, particularly as it relates to transactions conducted via a digital marketplace. This Circuit split was brewing as Apple appealed the Ninth Circuit's ruling.[135]

V. APPLE V. PEPPER: BEFORE SCOTUS

A. The Conversation Surrounding Pepper

After the Ninth Circuit's ruling, Apple sought certiorari, arguing that the Ninth Circuit's application of the Indirect Purchaser Rule was inconsistent with the Supreme Court's rulings in *Hanover*, *Illinois Brick*, and *Utilicorp*, even arguing that the Ninth Circuit had instituted a "new rule."[136]

134. *See Ticketmaster*, 140 F.3d at 1171 ("The plaintiffs' inability to obtain ticket delivery services in a competitive market is simply the consequence of the antecedent inability of venues to do so.").

135. Professor Hovenkamp points out that the *Pepper* decision effectively overruled *Ticketmaster* sub silentio as the majority propagated a categorical rule that the buyer who pays directly to the defendant should be counted as the direct purchaser. Hovenkamp, *supra* note 36, at 18.

136. Petition for Writ of Certiorari at 27-28, In Re Apple iPhone Antitrust Litigation, 2017 WL 3393652 (U.S) (2017) (No. 17-204) ("In lieu of identifying pass-through damages and the potential for duplicative recoveries, the Ninth Circuit would focus on 'functions' and delivery. These concepts, however, find no support in this Court's precedents. There is *nothing* in *Hannover Shoe, Illinois Brick,* or *UtiliCorp* that so much as hints at this approach. The Ninth Circuit tried to justify its new rule by pointing out that in this Court's leading cases 'distributors' were held to be direct purchasers from 'manufacturers,' and end consumers were held to be direct purchasers from distributors or retailers."). *See also* Appellate Brief at 42, In Re Apple iPhone Antitrust Litig., 2018 WL 3870180 (U.S.) (2018) (No. 17-204) ("The contrast is stark. Under the Ninth Circuit's new rule, so long as a defendant 'functions' as a 'distributor' of goods to a plaintiff, that plaintiff is a 'direct purchaser' from the defendant with standing to seek damages. The analysis is complete, and it does not matter (i) whether 'Apple does [or does] not take ownership of the apps,' (ii) whether Apple 'mark[s] up' the price of apps or takes a 'commission,' or (iii) 'who determines the ultimate price paid by the buyer of an iPhone app.'").

Interest in the case was strong. In terms of direct and indirect purchaser jurisprudence, it had been nearly fifty years since *Hanover*, forty since *Illinois Brick*, and thirty since *Utilicorp*. Additionally, this would be the first Supreme Court case to address direct/indirect purchaser jurisprudence since the 2007 AMC report recommended the reversal of *Illinois Brick*. Significantly, the case would be an opportunity to learn where the newly appointed Justices Gorsuch and Kavanaugh would come out on the issue. Moreover, the Supreme Court would be able to address antitrust standing principles in the context of a rapidly evolving digital economy that simply did not exist when *Hanover Shoe* and *Illinois Brick* were decided. The excitement surrounding the case is evidenced by the number of amicus briefs submitted to the Court. Of particular interest are the briefs submitted on behalf of the U.S. government (DOJ and FTC), Chamber of Commerce, 31 states, and several prominent antitrust scholars.[137]

The government argued that the Ninth Circuit's ruling was contrary to Supreme Court precedent and that the plaintiffs should be seen as indirect purchasers because they purchased apps but not the app-distribution services that Apple allegedly monopolized.[138] This was an interesting argument from the government, not only because of its reading of the Indirect Purchaser Rule, but unlike Apple, the government conceded that the plaintiffs purchased apps directly from Apple rather than from the app developers.

The Chamber of Commerce was also critical of the Ninth Circuit's ruling and argued in favor of the preservation of *Illinois Brick*, proclaiming in apocalyptic terms that the ruling "threatens to severely distort the e-commerce marketplace, where consumers spend trillions of dollars every year. . . . Left in place, the Ninth Circuit's decision will result in a cascade of new antitrust cases, even in circumstances where no anticompetitive conduct has occurred."[139] The Chamber of Commerce's argument can be viewed to a certain extent as a manifestation of a level of distrust by its

137. See *Apple Inc., v. Pepper No. 17-204*, SUPREME CT. OF THE U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-204.html [https://perma.cc/UY8B-VQJH] (last visited Nov. 22, 2020) for the amicus briefs.

138. Brief for the United States as Amicus Curiae at 26, Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019) (No. 17-204), https://www.supremecourt.gov/DocketPDF/17/17-204/46060/20180508135603183_17-204%20Apple%20v.%20Pepper%20%20-%20AC%20Pet.pdf [https://perma.cc/FC3D-NL3X] (noting that "the benefit that consumers derive from the allegedly monopolized services is contingent on the independent decisions of app developers to utilize those services to distribute apps that consumers find desirable (i.e., to make their apps available in the App Store). This case is thus analogous to *Hanover Shoe.*").

139. Brief of United States Chamber of Commerce as Amicus Curiae in Support of Petitioner at 1, Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019) (No. 17-204), https://www.supremecourt.gov/DocketPDF/17/17-204/59852/20180817125351471_Pepper%20Amicus%20Brief.pdf [https://perma.cc/BWE7-DG9Y].

membership of the Courts' ability, or lack thereof, to act as gatekeepers in certain antitrust matters. Therefore, the Chamber argued that the *Illinois Brick* doctrine in its current incarnation is a necessary barrier to prevent certain consumers from being able to bring claims and to prevent courts from making damages calculations that they are ill-equipped to make.[140]

There were also arguments made in favor of the plaintiffs, most prominently by the 31 states that enacted repealer statutes.[141] In their joint brief, these states brought attention to the fact that, since *Illinois Brick,* state courts have successfully overseen decades of indirect purchaser litigation.[142] Directly challenging the Chamber's outlook, the repealer states argued that over the last four decades they have competently brought *parens patraes* actions on behalf of their citizens and that state courts across the country have shown themselves more than capable of applying gatekeeping rules to proof of indirect purchaser damages.[143] Furthermore, despite the disparate state court systems, the repealer states argued that their successful litigation of indirect purchaser claims demonstrated that the *Illinois Brick* majority wrongly predicted that courts would be unable to calculate pass-on damages, something which the *Illinois Brick* majority viewed as "virtually unascertainable."[144]

Additionally, over a dozen antitrust scholars submitted a brief in which they similarly argued that the Ninth Circuit's ruling should be affirmed, and that courts and experts have shown themselves more than capable to assess pass-on damages.[145] The Scholars argued that while the state of econometric methodology was "primitive" at the time of *Illinois Brick*, advances in econometrics in the forty years since have turned a once difficult and involved endeavor into a relatively straightforward process that allows qualified experts to accurately calculate damages in complex antitrust cases.[146]

All of the briefs seem to be iterations of the same two-sided argument

140. *Id.*

141. Brief for Texas, Iowa, and 29 Other States as Amici Curiae in Support of Respondents, Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019) (No. 17-204), https://www.supremecourt.gov/DocketPDF/17/17-204/65335/20181001143715665_17-204%20Amici%20Brief.pdf [https://perma.cc/TB9A-7PYV].

142. *Id.* at 12.

143. *Id.*

144. Illinois Brick Co. v. Illinois, 431 U.S. 720, 725 (1977).

145. *See* Brief of Antitrust Scholars as Amici Curiae in Support of Respondents, Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019) (No. 17-204), https://www.supremecourt.gov/DocketPDF/17/17-204/65336/20181001144219809_Apple%20v.%20Pepper%20-%20Brief%20of%20Antitrust%20Scholars.pdf [https://perma.cc/F3HH-FCZD] (arguing that advances in economic analysis have mitigated many of the concerns expressed by the *Illinois Brick* Court).

146. *Id.* at 8.

– namely, whether or not courts and experts are equipped to evaluate and assess pass-on damages. It seems clear that in the four decades since *Illinois Brick*, courts and experts have proven time and again that they are. According to the *Illinois Brick* majority, the computation of passed-on overcharges requires the assessment of demand and supply elasticities as well as an assortment of complex variables influencing pricing decisions.[147] However, according to Professors Hovenkamp and Areeda in their seminal treatise *Antitrust Law*, "that is not the typical way in which passed-on damages are computed in litigation."[148] Indeed, experts typically use the generally accepted "yardstick"[149] or "before-and-after"[150] methods.[151] Using either of these methods allows for the computation of the price the plaintiff would have paid but for the anticompetitive conduct "without reference to the amount 'passed on' by the intermediary."[152]

However, not addressed by the *amici* was the risk that, given the proliferation of mandatory arbitration clauses and class action waivers and their across-the-board enforcement by recent Supreme Court jurisprudence, direct purchasers will have fewer opportunities to bring antitrust claims in Federal Courts. As will be discussed further on this case note, given recent Supreme Court precedent in cases such as *Concepcion*, *Italian Colors*, *Epic*, and *Lamps*, in all likelihood, companies that employ these provisions will, as Justice Ginsburg predicted, be "home free" and no longer subject to direct purchaser claims.[153] That would leave indirect purchasers (and regulators) as the only viable antitrust plaintiffs – the exact opposite of the result intended by *Hanover Shoe* and *Illinois Brick.*

B. Oral Argument

Oral argument in *Apple II* was heard on November 26th, 2018. Apple argued that only the app developers have standing to sue and the plaintiffs

147. *Id.* at 27 (citing to *Illinois Brick*, 431 U.S. at 741–43).

148. *Id.* (citing to 2A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 330b, at 219 (4th ed. 2014)).

149. The "yardstick" method compares prices paid by the plaintiff to prices paid by a comparable firm unaffected by the antitrust violation. *Id.* at 383–84.

150. The "before-and-after" method compares the plaintiff's prices paid before and after the monopolization or price-fixing activity. *Id.* at 382–83.

151. *See* Eleven Line, Inc. v. N. Tex. State Soccer Ass'n, Inc., 213 F.3d 198, 207 (5th Cir. 2000) (noting that "the two most common methods of quantifying antitrust damages are the "before and after" and "yardstick" measures of lost profits").

152. Brief of Antitrust Scholars*, supra* note 145, at 27–28 (citing to 2A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 346k, 220–21).

153. Transcript of Oral Argument at 63, Apple v. Pepper, 139 S. Ct. 1514 (2019) (No. 17-204).

are barred from doing so under *Illinois Brick* because the price set by the developers is another step within the chain that links the buyers to Apple, thereby making the plaintiffs indirect purchasers.[154] Indeed, in an exchange with Justice Sotomayor, who stated that the first sale is from Apple to the customer, Apple's counsel maintained that the initial transaction is between Apple and the developer.[155] The Solicitor General, Noel Francisco, argued that the only reason consumers are harmed in the form of paying higher prices is because the app makers decide to increase their prices in order to recoup the commission paid to Apple. Accordingly, Francisco argued, the app makers' increase of prices, not Apple's commission, is the proximate cause of the injury to customers, and therefore plaintiffs are indirect purchasers.[156]

The plaintiffs argued that the antitrust violation was the actual existence of the Apple App Store in a "closed loop", as Justice Sotomayor described it.[157] Furthermore, the plaintiffs argued that plaintiffs satisfied *Illinois Brick* standing because Apple, by way of its express conduct, directed its "monopoly abuses" at the plaintiffs.[158] The plaintiffs further argued that Apple's position unnecessarily sought to expand and adjust the bright-line rule established in *Illinois Brick* in order to deny direct purchasers in the digital marketplace, such as the plaintiffs, a remedy.[159]

But it was Justice Ginsburg's questioning of Apple's counsel that predicted the limited import of the Court's decision regardless of how it ruled. Rather than focus on antitrust standing under *Illinois Brick*, Justice Ginsburg homed in on whether direct purchasers would ever be able to assert a claim on a class basis in court given the Court's recent jurisprudence

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154. *Id.* at 3–4 (counsel for Apple arguing that "[t]he case is barred by the Court's *Illinois Brick* doctrine because the developers' pricing decisions are necessarily in the causal chain that links the commission to any consumer damages. If the commission increases beyond the competitive level, but apps developers do not change their apps prices, consumers suffer no damages. And if app developers do change their prices to pass on some or all of the overcharge, well, that is precisely the kind of damages theory that the *Illinois Brick* doctrine prohibits").

155. *Id.* at 5.

156. Justice Kagan was very critical of this argument and stated that it was:

> not [an] intuitive argument . . . 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 – from my perspective, I've just engaged in a one-step transaction with Apple.

Id. at 21.

157. *Id.* at 6.

158. *Id.* at 33.

159. *Id.*

governing arbitration clauses and class action waivers.

C. The Decision – The Kavanaugh Led Majority

In a 5-4 decision (surprisingly to many) penned by then newly appointed Justice Kavanaugh, without ruling on any of the antitrust issues involved on the merits, the majority affirmed the Ninth Circuit's holding strictly on the standing issue.[160] The majority's decision provides an important insight into how the members of the Court read the *Illinois Brick* decision as a so called "bright line rule." The Court distinguished *Apple II* from *Illinois Brick* by reasoning that iPhone owners are not consumers at the bottom of a vertical distribution chain who are attempting to sue manufacturers at the top of the chain.[161] Rather, there is no intermediary in the distribution chain between Apple and the consumer. The consumers, i.e., iPhone owners, purchase the apps from and pay the purported overcharge directly to the alleged antitrust violator, Apple and the absence of an intermediary is dispositive.[162]

The majority rejected Apple's theory of the case, which maintained that *Illinois Brick* stipulates that consumers may only sue the party who ultimately sets the retail price, whether or not that party sells the good or service directly to the consumer.[163] While Apple argued the app developers, not Apple, set the retail price charged to consumers, thereby classifying the consumers as indirect purchasers, the Court found three main problems with this theory.[164] First, that theory contradicts statutory text and precedent.[165] The Court stated that any ambiguity regarding *Illinois Brick* should be resolved by resorting to the statutory text, which provides that "any person" injured by an antitrust violation may sue to recover damages.[166] Moreover, it should not be resolved through a rewriting of *Illinois Brick* and dismantling of its bright-line rule.[167] The second difficulty offered by the Court is that Apple's reading of *Illinois Brick* is not persuasive either economically or legally.[168] An Apple inspired reading would logically lead to the drawing of an arbitrary line among retailers based on their financial arrangements with

160. Apple Inc. v. Pepper, 139 S. Ct. 1514, 1519 (2019).
161. *Id.* at 1521.
162. *Id.*
163. *Id.*
164. *Apple*, 139 S. Ct. 1514 at 1522.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*

their manufacturers or suppliers.[169] Such a reading would therefore

> permit a consumer to sue a monopolistic retailer when the retailer set the retail price by marking up the price it had paid the manufacturer or supplier . . . but not when the manufacturer or supplier set the retail price and the retailer took a commission on each sale.[170]

Last, if accepted, Apple's theory would provide a roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers in the digital economy so as to entirely evade federal antitrust claims by consumers and thereby thwart effective antitrust enforcement.[171]

Conversely, in ruling for the plaintiffs, the Court directly countered Apple's arguments that ruling in favor of the plaintiffs would undermine the three rationales[172] of *Illinois Brick* and proffered its own rationales for the continued viability of *Illinois Brick*. One was the facilitation of more effective enforcement of antitrust laws.[173] The Court stated that Apple's reading of *Illinois Brick* makes little sense, because allowing only the upstream app developers—and not the downstream consumers—to sue Apple contradicts the longstanding goal of effective private enforcement and consumer protection in antitrust cases. Second, while Apple argued that calculating damages might be too complicated in cases involving monopolistic retailers, the Court countered by stating that *Illinois Brick* is not a "get-out-of-court-free card" for monopolistic retailers to play any time that a damages calculation might involve convoluted or byzantine computations.[174] Lastly, the Court stated that Apple's assertion that allowing consumers to sue will result in "conflicting claims to a common fund—the amount of the alleged overcharge" is patently untrue.[175] If the Plaintiffs are to prevail they will be entitled to the "*full amount*" of the unlawful overcharge that they paid to Apple.[176] Unlike *Illinois Brick*, the overcharge has not been passed on at all, and therefore there will be no need to "trace the effect of the overcharge through each step in the distribution chain."[177]

Justice Kavanaugh ended the opinion by reiterating the goals of

169. Apple v. Pepper, 139 S. Ct. 1514 (2019).

170. *Id.* at 1515.

171. *Id.* at 1521–24.

172. *Id.* at 1524 (listing the three reasons the *Illinois Brick* Court barred indirect purchaser suits: "(1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants").

173. *Id.*

174. *Apple*, 139 S. Ct. 1514 (2019).

175. *Id.*

176. *Id.* at 1525.

177. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

antitrust law as a whole, stating:

> Ever since Congress overwhelmingly passed and President Benjamin Harrison signed the Sherman Act in 1890, "protecting consumers from monopoly prices" has been "the central concern of antitrust." (citation omitted) The consumers here purchased apps directly from Apple, and they allege that Apple used its monopoly power over the retail apps market to charge higher-than-competitive prices. Our decision in *Illinois Brick* does not bar the consumers from suing Apple for Apple's allegedly monopolistic conduct. We affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.[178]

In his dissenting opinion in which he was joined by Justices Alito, Roberts, and Thomas, Justice Gorsuch vehemently protested the majority's reading of *Illinois Brick*. According to Justice Gorsuch, the majority erred in allowing a "pass-on" case to proceed and in granting standing to indirect purchasers despite *Illinois Brick*'s insistence that "these convoluted 'pass on' theories of damages violate traditional principles of proximate causation."[179] The dissenters insisted that *Illinois Brick* was just the other side of the same proverbial *Hanover Shoe* coin. In *Hanover* an antitrust *defendant* could not rely on a pass-on theory to avoid damages, while *Illinois Brick* addressed whether an antitrust plaintiff could rely on a pass-on theory to recover damages.[180] However, while Justice Gorsuch and the other dissenters may view the *Hanover Shoe*/*Illinois Brick* coin as one which is in mint condition and the currency can clearly be delineated, it seems that based upon forty plus years of direct and indirect purchaser jurisprudence that the coin is moss covered and tarnished beyond recognition.

As Justice Kavanaugh adroitly stated, the phrase "'[t]here's an app for that' has become part of the 21st-century American lexicon."[181] Ultimately the approach employed by the *Pepper* dissenters ignored the realities of the digital marketplace as well as the function of the iPhone App Store in particular. Conversely, the *Pepper* majority grasped on a fundamental level that when a consumer purchases an app from the iPhone App Store, they believe that they are directly transacting with Apple, not a third party.

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178. Apple Inc. v. Pepper, 139 S. Ct. 1514, 1525 (2019).
179. *Id.* at 1525–26.
180. *Id.* at 1526–27.
181. *Id.* at 1518.

VI. POST APPLE V. PEPPER

A. Implications of the Court's Decision

After the Court granted standing to the *Pepper* plaintiffs, but did not overrule *Illinois Brick,* scholars, pundits, lawyers, and interested observers alike attempted to predict what would happen in Apple II upon remand, what the *Pepper* decision means or should mean for the future of *Illinois Brick*[182] and, most significantly, what the ruling portends for other tech giants who operate and transact within the digital marketplace.[183] There were those who postulated that the Ninth Circuit would rule in Apple's favor upon remand.[184] Some thought it was likely that Apple would attempt to settle to mitigate any further damage.[185] And yet other observers opined that this would completely change the way in which consumers purchase apps from within a digital marketplace.[186] While it remains to be seen which of the various prognostications proffered will come to fruition, few, if any, opined that

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182. *See generally* Bruce H. Kobayashi & Joshua D. Wright, *What's Next in Apple Inc. v. Pepper: The Indirect-Purchaser Rule and the Economics of Pass-Through*, 2018 CATO SUP. CT. REV. 249 (2018-2019) (arguing that unless the plaintiffs expand upon their claim, it seems unlikely that they will be able to prevail upon remand); Jeffrey L. Harrison, *After Forty Years of Antitrust Revision and Apple v. Pepper, What Now Illinois Brick?* (July 1, 2019) (remarking that *Apple v. Pepper* reveals a sharp division at the Supreme Court on the issue of what *Illinois Brick* means, and that whatever role *Illinois Brick* may have ever played in rationalizing antitrust law is now unneeded); *Clayton Antitrust Act and Sherman Antitrust Act - Antitrust Trade and Regulation - Antitrust Standing - Apple Inc. v. Pepper*, 133 HARV. L. REV. 382 (2019) (stating that the ruling signals the unraveling of *Illinois Brick*).

183. *See* Geoffrey A. Manne & Kristian Stout, *The Evolution of Antitrust Doctrine after Ohio v. Amex and the Apple v. Pepper Decision That Should Have Been*, 98 NEB. L. REV. 425, 454-459 (2019) (discussing the implications of the *Pepper* holding). *See also* Issie Lapowsky, *Supreme Court Deals Blow to Apple in Antitrust Case,* WIRED (May 13, 2019, 1:04 PM), https://www.wired.com/story/supreme-court-apple-decision-antitrust/ [https://perma.cc/B4LW-4YWU] (expressing the reactions of those within the tech space to the Court's ruling).

184. *See generally* Kobayashi & Wright, *supra* note 182, at 267 (suggesting that upon remand the court will rule that the plaintiffs didn't suffer competitive harm).

185. *See* Kif Leswing, *Apple Failed to Close Off a Big Antitrust Threat, But It Probably Won't Feel the Harm for Years,* CNBC (May 13, 2019, 4:57 PM), https://www.cnbc.com/2019/05/13/apple-v-pepper-supreme-court-loss-little-harm-now-long-term-threat.html [https://perma.cc/L9QC-SN9V] (stating that Apple may look to settle given the inherent risks allowing the case to move forward poses to its business).

186. *See* Adi Robertson, *How Apple's Supreme Court Loss Could Change the Way You Buy Apps,* THE VERGE (May 14, 2019, 4:04 PM), https://www.theverge.com/2019/5/14/18618127/apple-pepper-supreme-court-loss-kavanaugh-opinion-app-store-antitrust-explainer-vergecast [https://perma.cc/7QFM-VSQ6] (noting that "if the plaintiffs' case holds up, it could change the relationship between digital platforms and their users, giving customers the basic right to sue tech platforms for violating antitrust law").

Pepper may have a limited application due to the prevalence of arbitration clauses with class action waivers in the digital marketplace.

Yet, Justice Ginsburg more than hinted at that during oral argument in a telling exchange with Apple's counsel during rebuttal:

> Ruth Bader Ginsburg:
>
> Mr. Wall, I have a question about this Court's case law, and I'd -- I'd like your answer to it. If Apple had in every agreement with an iPhone owner a provision that you can sue -- you can't sue, you have to go to an arbitrable forum in a one-by-one, then Apple would be home free in this case?
>
> Daniel M. Wall:
>
> We -- we do not have such a provision.
> In fact, the -- all of the relevant agreements with both developers and consumers state that -- that there shall be litigation in the Northern District of California.
>
> Ruth Bader Ginsburg:
>
> Yeah, I -- I know -- I know you don't, but suppose you did.
>
> Daniel M. Wall:
>
> If -- if that were the case, then this would be a matter for arbitration, and I don't think it changes the legal question.
>
> Ruth Bader Ginsburg:
>
> And -- and it would take this case out of this Court, put it in an arbitrable forum, with a single complainant?
>
> Daniel M. Wall:
>
> Indeed, it -- it would, but that's not this case.[187]

This brief discussion, seemingly a non-sequitur, did not really follow from the previous line of questioning.[188] However, to some Supreme Court watchers, it was clear that Justice Ginsburg was voicing her concern about the import of several very recent Supreme Court rulings, including *Concepcion, Epic* and *Lamps*, which held that class-action waivers in mandatory arbitration agreements are enforceable.[189]

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187. Transcript of Oral Argument at 63–64, Apple v. Pepper, 139 S. Ct. 1514 (2019) (No. 17-204).

188. *Id.*

189. When the Court initially decided *Illinois Brick*, the rule promulgated by the Second Circuit in Am. Safety Equip. Corp. v. J. P. Maguire & Co, 391 F.2d 821 (2d Cir. 1968) (prohibiting arbitration of antitrust claims) was in effect. However, what has come to be colloquially known as the *American Safety* rule began to deteriorate after the Supreme Court's

While *Pepper* was closely watched for its implication on antitrust standing for direct purchasers, and much has been written about its application of *Illinois Brick* to a relatively new means of commerce, in reality, given the Court's ruling in *Concepcion*, *Italian* Colors, *Epic*, and *Lamps, Pepper* is likely to have little precedential value and influence over the development of federal antitrust law. Accordingly, *Pepper's* implication for antitrust standing – particularly for direct purchasers interacting with large companies that dominate the digital marketplace –will be minimal. To understand this, a brief discussion of the decisions in *Concepcion, Italian Colors*, *Epic*, and *Lamps* and their effect upon the arbitration clauses of some of the largest tech companies is warranted.

B. AT&T v. Concepcion, Italian Colors and Epic – Supreme Court Jurisprudence on the Enforceability of Arbitration Clauses Over the Last Decade

In 1925, Congress enacted the Federal Arbitration Act (the "FAA").[190] The FAA provides for the enforcement and legitimacy of arbitration agreements and awards within the United States. Since its enactment, the Supreme Court has ruled in a number of decisions that the FAA is to be interpreted in a broad fashion as well as universally applied in both federal and state courts.[191] The question of whether the FAA preempts state law has appeared before the Court a number of times since its enactment.[192] This was

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ruling in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (permitting international arbitration of antitrust claims). While the Court in *Mitsubishi* did not overturn the *American Safety* rule, in 1994, the Ninth Circuit ended the continued existence of the rule when it held that *Mitsubishi* effectively overruled "*American Safety* and its progeny." *See* Nghiem v. NEC Elec., Inc., 25 F.3d 1437, 1442 (9th Cir. 1994) (allowing a domestic arbitration of an antitrust claim to proceed). Other Circuits have followed the Ninth Circuit's lead and have similarly allowed antitrust claims to be subjected to domestic arbitration. *See* Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Illinois Brick*, 100 IOWA L. REV. 2115, 2124 (2015) ("Other circuits followed suit and began to revisit their rules against allowing domestic antitrust claims to be arbitrated, ultimately holding that, despite the fact that *Mitsubishi* involved international arbitration, the opinion required that domestic antitrust lawsuits be subject to arbitration.").

190. 18 Pub. L. No. 68-401, 43 Stat. 883 (codified as amended at 9 U.S.C. § 1 et seq.).

191. *Id.*; *see also* Claudia Salomon and Samuel de Villiers, *The United States Federal Arbitration Act: A Powerful Tool For Enforcing Arbitration Agreements And Arbitral Awards*, LATHAM & WATKINS (Apr. 17, 2014), https://m.lw.com/thoughtLeadership/the-us-fed-arbitration-act [https://perma.cc/4SDH-9T73] (noting that "Supreme Court decisions over the last several decades ensure that the FAA's 'pro-arbitration mandate' must be broadly interpreted and universally applied by both state and federal courts").

192. CONGRESSIONAL RESEARCH SERVICE, MANDATORY ARBITRATION AND THE FEDERAL ARBITRATION ACT 7–11 (2017), https://fas.org/sgp/crs/misc/R44960.pdf [https://perma.cc/Y

the question before the Court in *Concepcion* when it held that a mandatory arbitration agreement with a class action waiver was enforceable despite state law that provided otherwise.

The facts of the case are relatively straightforward. A married couple, the Concepcions, signed a two-year service contract with AT&T, and believed that upon signing the contract, they would receive two free cell phones. However, they were subsequently charged a $30.22 sales tax upon the receipt of the phones. When the Concepcions signed their contract, it provided for arbitration of all disputes between the parties but required that claims be brought by the parties on an individual basis and not as members of a class. Nevertheless, the Concepcions sued AT&T in the Southern District of California, alleging false advertising and that the contract was inherently unconscionable in nature.[193]

The Southern District consolidated the Concepcions' claim with another pending class action suit against AT&T on the same issue.[194] AT&T filed a motion seeking to compel arbitration. Relying on the California Supreme Court's decision in *Discover Bank* v. *Superior Court*,[195] the District Court denied the motion finding that the arbitration provision was unconscionable because AT&T had not shown that individual arbitration adequately substituted for the deterrent effects of class actions.[196]

The Ninth Circuit affirmed, also finding that the provision was unconscionable under California law as announced in *Discover Bank*.[197] It also held that the *Discover Bank* rule[198] was not preempted by the FAA because that rule was simply "a refinement of the unconscionability analysis applicable to contracts generally in California."[199]

In a 5-4 decision authored by Justice Scalia, the Supreme Court

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U59-WG6A] (discussing Supreme Court opinions that addressed the relationship between the FAA and state law).

193. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 336–37 (2011).

194. *Id.* at 337.

195. Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005) (declaring Discover Bank's arbitration clause as unconscionable and against public policy).

196. The motion was denied sub nom., Laster v. T-Mobile USA, Inc., No. 3:05-cv-01167, 2008 WL 5216255 (S.D. Cal. Aug. 11, 2008); affirmed sub nom., Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009); cert. granted, 560 U.S. 923 (2010).

197. *Laster*, 584 F.3d 849.

198. The rule propagated by the *Discover Bank* court states that a class-action waiver will be unenforceable under California law when it appears in a "consumer contract of adhesion," when the disputes "predictably involve small amounts of damages," and where the plaintiff alleges that "the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Discover Bank*, 113 P.3d at 1110.

199. *Laster*, 584 F.3d at 857.

reversed the Ninth Circuit and held that California's *Discover Bank* rule is preempted by the FAA because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[200] Reminiscent of *Hanover Shoe* and Judge Posner's statement in *Carnegie*,[201] the dissent, written by Justice Breyer, disagreed and maintained that bringing claims on a class basis is appropriate where the claim is for a relatively small amount asking: "What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?"[202]

Since its holding almost a decade ago, *Concepcion* has been much maligned in academic literature and has even been described as a "tsunami that is wiping out existing and potential consumer and employment class actions"[203] as well as "the real game-changer for class action litigation, as it permits most of the companies that touch consumers . . . to place themselves beyond the reach of aggregate litigation by simply incorporating class waiver language into their standard-form contracts."[204] In the wake of *Concepcion,* many companies either amended their arbitration clauses to add class-action waivers or, if they had not employed arbitration clauses prior to the Court's ruling, adopted binding arbitration clauses with class action waivers.[205]

Since *Concepcion*, the Supreme Court has further expanded its interpretation of the FAA to enforce arbitration agreements with class action

200. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 333 (citing to *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941) (determining that a state (Pennsylvania) law stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congressional legislation)).

201. *See supra* note 20 (discussing Judge Posner's thoughts on pursuing individual arbitration claims).

202. *Concepcion*, 563 U.S. at 365.

203. Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704 (2012).

204. Myriam Gilles, *AT&T Mobility vs. Concepcion: From Unconscionability to Vindication of Rights,* SCOTUSBLOG (Sept. 15, 2011, 4:25 PM), https://www.scotusblog.com/2011/09/att-mobility-vs-concepcion-from-unconscionability-to-vindication-of-rights [https://perma.cc/62UY-2ATH].

205. Professor Gilles examined the language employed in the binding arbitration clauses of thirty-seven companies across various industries. In addition to finding that nearly all of these companies had amended their arbitration clauses in the wake of *Concepcion*, she also found that all of the companies' arbitration clauses contained class action waivers. This displays a clear increase in the adoption of class action waivers compared to the decade prior to the Court's decision in *Concepcion*. For instance, Professor Gilles cites to a 2009 study conducted by the Searle Institute, which found that 36.5% of arbitration clauses contain class action waivers. In 2012, merely three years after *Concepcion*, all of the arbitration clauses examined by Professor Gilles contained class action waivers. *See* Gilles, *supra* note 16, at 850–853.

waivers beyond consumers to businesses and employees. In doing so, it has narrowed access to the courts for potential plaintiffs who seek to vindicate their rights. Three cases exemplify the Court's approach, namely *Am. Express Co. v. Italian Colors,*[206] *Epic Systems Corp. v. Lewis*[207] and *Lamps Plus, Inc. v. Varela*.[208]

In 2013, two years after the *Concepcion* decision, the Court heard *Italian Colors*. The question before the Court was whether a group of merchants could sue American Express for violation of the antitrust laws. The merchants maintained that, pursuant to the effective vindication doctrine,[209] they were exempt from the mandatory arbitration provision they had signed with American Express, via their "Card Acceptance Agreement", given the prohibitively high cost of arbitration conducted on a non-class basis. In an opinion written by Justice Scalia, the Court held that the prohibitively high cost of arbitration is not a sufficient reason for a court to overrule an arbitration clause that forbids class action suits.[210] According to the majority, federal law does not guarantee that a claim will be resolved affordably.[211] The Court reasoned that, while it may be expensive to arbitrate claims and prove a statutory remedy on an individual basis rather than on a class basis, the clause is enforceable since the *right* to pursue a remedy was not eliminated.[212]

Roughly a year before *Pepper* was argued, the Court decided *Epic*. In *Epic*, the issue before the Court was whether the National Labor Relations Act[213] prohibits the enforcement of an agreement which not only requires employees to resolve disputes with their employers through individual arbitration under the FAA but also compels employees to waive their right to participate in or receive benefit from any class, collective, or representative proceedings.[214] The Court ruled that the FAA "instructed

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206. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).

207. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

208. Lamp Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019).

209. *Italian Colors,* 570 U.S. 228. The Court relied on the Effective Vindication Doctrine, which maintains that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985). *See also Italian Colors*, 570 U.S. at 242 (Kagan, J., dissenting) ("An arbitration clause will not be enforced if it prevents the effective vindication of federal statutory rights, however it achieves that result.").

210. *Italian Colors*, 570 U.S. at 234–35.

211. *Id.* at 233.

212. *Id.* at 236.

213. 29 U.S.C. §§ 151–169.

214. *See generally* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (holding that pursuant to the FAA, arbitration agreements requiring individual arbitration are enforceable).

federal courts to enforce arbitration agreements according to their terms,"[215] and that the NLRA "does not mention class or collection action procedures" and therefore, cannot be read to displace the FAA.[216]

In a scathing dissent, Justice Ginsburg, joined by Justices Kagan, Breyer, and Sotomayor, referred to the majority's decision as "egregiously wrong."[217] Noting the extreme imbalance once prevalent in workplaces across the nation and Congress' attempts to rectify it through enactment of the NLRA and the Noriss-LaGuardia Act,[218] Justice Ginsburg stated that when Congress passed laws it likely intended to protect employees' joining together to engage in collective litigation.[219] Explicitly hindering the abilities of employees to engage in class-based litigation and compelling them to sign employment contracts that contain mandatory arbitration provisions is not only unlawful under the NLRA,[220] it would also signify that "[e]mployees' rights to band together to meet their employers' superior strength would be worth precious little if employers could condition employment on workers signing away those rights."[221]

The final chapter in Justice Ginsburg's battle against mandatory arbitration clauses occurred during the same term that the Court heard and decided *Pepper*. In *Lamps*, an employee of Lamps Plus Inc., Frank Varela, sued his employer when it inadvertently released sensitive tax information upon falling prey to a hacker. Although Varela had signed an arbitration agreement with Lamps Plus Inc. upon commencing his employment, he filed a class action on behalf of all of the employees who had their personal information exposed by the data breach.

The District Court as well as the Ninth Circuit found that the language contained within the contract was ambiguous as to whether or not a signer was permitted to pursue class wide arbitration.[222] The Ninth Circuit ruled that under California law,[223] an ambiguous contract is construed against the

215. *Id.* at 1619.

216. *Id.* at 1624.

217. *Id.* at 1633.

218. 29 U.S.C. § 101 et seq.

219. *Epic Sys. Corp.*, 138 S. Ct. at 1641.

220. *See* 29 U.S.C. § 157 (noting that "[e]mployees shall have the right to self-organization . . . for the purpose of collective bargaining or other mutual aid or protection").

221. *Epic Sys. Corp.*, 138 S. Ct. at 1641; *see also* National Licorice Co. v. NLRB, 309 U.S. 350, 364 (1940) (holding that individual contracts obtained as the result of an unfair labor practice may not be the basis of advantage to the violator of the Act nor of disadvantage to employees).

222. Varela v. Lamps Plus, Inc., 2016 WL 9110161, at *7 (C.D. Cal. 2016); Varela v. Lamps Plus, Inc., 701 F. App'x 670, 673 (9th Cir. 2017).

223. *Lamps*, 701 F. App'x at 672; *see* Powerine Oil Co. v. Super. Ct., 118 P.3d 589, 598 (2005) (holding that a contract is ambiguous when it is capable of two or more constructions,

drafter, and therefore "[t]he construction posited by Varela—that the ambiguous Agreement permits class arbitration—the district court properly found the necessary 'contractual basis' for agreement to class arbitration."[224] The Supreme Court reversed the Ninth Circuit holding that, pursuant to *Concepcion*, state law is preempted by the FAA to the extent that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives."[225] Furthermore, the Court concluded that courts evaluating arbitration agreements may not extrapolate from an ambiguously worded agreement that the parties have consented to arbitrate their claims on a class-wide basis.

Justice Ginsburg, staying consistent and echoing the same sentiments of her recent dissent in *Epic*, did not mince words when criticizing the majority's holding. Justice Ginsburg stated that the FAA was enacted "to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate *commercial* disputes"[226] not to regulate contracts in which one party has significantly less bargaining power than the other.[227] Justice Ginsburg ended her dissent by stating that "[n]otwithstanding recent steps to counter the Court's current jurisprudence, mandatory individual arbitration continues to thwart 'effective access to justice' for those encountering diverse violations of their legal rights."[228]

It is clear that when Justice Ginsburg was questioning Apple's counsel, a mere six months after she rendered her dissent in *Epic* and only five weeks after hearing the oral argument in *Lamps,* that her contempt for mandatory arbitration clauses, which she would soon crystallize once again in her dissent in *Lamps*, was on her mind. Aside from her criticism of the possibility of forcing direct purchaser antitrust claimants into arbitration, the irony that Justice Ginsburg was perhaps hinting at is that, if arbitration clauses were enforceable, the pursuit of antitrust claims would be left solely to indirect purchasers under state repealer statutes. Such a result would entirely circumvent the reasoning of *Hanover Shoe* and *Illinois Brick* rejecting the pass-on defense and preserving such claims for direct purchasers. Indirect purchasers would not be bound by arbitration clauses with antitrust violators with whom they have no direct privity, but as the

both of which are reasonable).

224. *Lamps*, 701 F. App'x at 673.

225. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1415 (2019) (citing to AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011)).

226. *Id.* at 1420 (citing to Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1643 (2018)).

227. *Id.* (citing to Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967)).

228. *Id.* (citing to DIRECTV, Inc. v. Imburgia, 577 U.S. 47 (2015) (resolving when arbitration provisions are subject to the FAA)).

Court in *Hanover Shoe* presciently warned, antitrust violators will "retain the fruits of their illegality" because no one will be able to bring suit against them, either due to being barred from bringing suit or because they "would have only a tiny stake in the lawsuit."[229]

C. Survey of Companies' Terms and Conditions in the Digital Marketplace

As most companies that operate within a digital marketplace now employ binding arbitration clauses that contain class action waivers agreed to through the click of a mouse, it is very likely that the Court's decision in *Pepper* will be of little practical import for the future of direct purchaser litigation. That is the salient point made by Justice Ginsburg in her exchange with Apple's counsel. Since most customers in the digital marketplace are precluded from bringing antitrust (and all other) claims on either an individual or class basis because they are bound by arbitration clauses, many antitrust claimants will never see the inside of a courtroom. And, to quote Justice Ginsburg, many of these companies that operate and conduct transactions within a digital marketplace will be "home free,"[230] while companies such as Apple, who do not employ binding arbitration clauses that contain class action waivers, are leaving themselves vulnerable to potential litigation.

In order to demonstrate the above point, I have surveyed the terms of use of some of the largest companies by market capitalization in order to ascertain whether they contain binding arbitration provisions with class action waivers, or whether they employ traditional venue provisions. I chose

229. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 494 (1968). In a perceptive and forward-thinking article published in the *Iowa Law Review*, Professors Mark A. Lemley and Christopher R. Leslie make a similar argument. *See generally* Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Illinois Brick*, 100 IOWA L. REV. 2115 (2015). They state that the use of mandatory arbitration clauses and class action waivers is especially damaging to consumers who suffer antitrust injuries, as antitrust injuries impose relatively low costs on a great number of victims. *Id.* at 2130–2131. Lemley and Leslie contend that in the post *Italian Colors* world, class actions – which the Supreme Court has recognized serve a valuable function in enforcing the antitrust laws – will no longer be brought by direct purchasers. *Id.* at 2130. Consequently, Professors Lemley and Leslie believe that a class of indirect purchasers will likely serve as "better" antitrust plaintiffs, as it is likely that they will not be bound by arbitration clauses to the antitrust violator. *Id.* However, not all indirect purchasers can or will bring claims, as they are limited to states that possess repealer statutes and, as the Court has previously implied in *Hanover Shoe*, have less incentive to bring claims because of their "tiny stake." *Hanover Shoe*, 392 U.S. at 494.

230. Transcript of Oral Argument at 63, Apple v. Pepper, 139 S. Ct. 1514 (2019) (No. 17-204).

a mix of companies, tech companies and companies that operate within a digital marketplace, as well as non-tech companies who operate both within as well as outside of a digital marketplace.

I examined the terms and service agreements of the following companies: Apple, Microsoft, Facebook, Alphabet (Google), JPMorgan Chase, Johnson & Johnson, Visa, Walmart, Samsung Electronics, Intel, Cisco Systems, ExxonMobil, Mastercard, Disney, Verizon, AT&T, Comcast, Oracle, Netflix, Adobe Systems, and PayPal. I have included a chart with the relevant language of each respective agreement.[231]

Regardless of the permutation of the language of the terms of use and service agreements, out of the twenty-one companies selected, surprisingly only twelve employ binding arbitration provisions and class action waivers. The other nine have standard venue provisions. Out of the nine with standard venue provisions, five[232] had provisions limiting litigation to either Federal or State Courts sitting in California, two[233] had provisions limiting litigation to either Federal or State Courts in New York, one[234] had a provision limiting to the state courts in Delaware, and one[235] limiting litigation to the federal courts in Virginia.[236] For example, Apple's venue provision is as follows:

> Except to the extent expressly provided in the following paragraph, this Agreement and the relationship between you and Apple shall be governed by the laws of the State of California, excluding its conflicts of law provisions. You and Apple agree to submit to the personal and exclusive jurisdiction of the courts located within the county of Santa Clara, California, to resolve any dispute or claim arising from this Agreement.[237]

Yet, *Pepper* will further incentivize companies that have not already done so to amend their venue provisions to adopt binding arbitration and class action waiver provisions. Arbitration is an opaque process that is a black box to most consumers and greatly benefits sophisticated parties such as large corporations like Apple. Furthermore, arbitrations are private affairs that operate outside of the court system. Ordinarily, the only way to know if a company arbitrated any dispute with a consumer is through court

231. *See* Appendix A (listing companies surveyed that possess binding arbitration clauses as well as class action waivers within their terms of use/service).

232. Apple, Facebook, Google, Cisco, and Oracle.

233. Johnson & Johnson and Mastercard.

234. Intel.

235. ExxonMobil.

236. *See* Appendix B (listing companies surveyed that possess venue provisions).

237. *Apple Media Services Terms and Conditions*, APPLE, https://www.apple.com/legal/internet-services/itunes/us/terms.html [https://perma.cc/P7PD-WFBM] (last visited Nov. 29, 2020).

proceedings seeking to enforce or challenge an arbitration award.[238] Therefore, it is likely that savvy companies that currently employ venue provisions in their terms and conditions will read the *Pepper* decision, see the writing on the wall, and amend their terms and conditions to include a mandatory arbitration provision containing a class action waiver to replace their venue provisions.

In 2018, several academics at Stanford Business School sought to discover whether companies have an informational advantage when selecting arbitrators for consumer arbitrations, something which would only further incentivize companies to employ binding arbitration provisions.[239] In conducting their study, the authors looked at data from over 9,000 securities arbitrations[240] and concluded that industry-friendly arbitrators are forty percent more likely to be selected than their consumer-friendly counterparts. The authors found that companies, as repeat and more sophisticated players in this process, have an informational advantage over consumers when selecting arbitrators.[241] Given this fact, companies that find themselves the respondents in arbitration claims, over time, have become better at eliminating pro-consumer/anti-industry arbitrators and selecting arbitrators who have proven sympathetic to them in the past. Professor Seru, one of the authors of the study, states that:

> This is a systematic problem. . . . If you look at the data across many, many years, you see a pattern that is biased against consumers and in favor of firms. It may or may not be intentional, but given the design of the system and information available to

238. Arbitration has become relatively commonplace in the U.S. The arbitration process is governed by an administrator/forum who determines the procedural rules. Administrators often provide a list of potential arbitrators and govern the arbitrator selection process. One of the unique features of arbitration is the amount of control that both consumer claimants and firm respondents have over the process of selecting the respective arbitrator that will hear the claim. For instance, in FINRA and JAMS arbitration, the administrator sends a list of potential arbitrators to the claimant and respondent. Each party can remove/strike a fixed number of arbitrators from the consideration set/list, and then must rank the remaining arbitrators, assigning one to the most preferred arbitrator. The arbitrator with the lowest combined (most preferred) rank is appointed as the arbitrator. *See* Mark Egan, Gregor Matvos and Amit Seru, *Arbitration With Uninformed Consumers* (Harv. Bus. Sch. Fin., Working Paper No. 19-046, 2020), https://www.gsb.stanford.edu/faculty-research/working-papers/arbitration-uninformed-consumers [https://perma.cc/8WW8-SHUT] (examining the informational advantage that firms have when engaging in arbitration).

239. *Id.* at 1–2.

240. In their paper, the authors assert that securities disputes present a good laboratory to study arbitration in general because "the selection mechanism is similar to other major arbitration forums; arbitration is mandatory for all disputes, eliminating selection concerns; and the parties choose arbitrators from a randomly generated list." *Id.* at 39.

241. *Id.* at 3.

consumers and firms, it's the outcome one ends up with.[242]

One potential way to counteract this is by hiring an experienced arbitration attorney. However, this is a solution that can be afforded only by a litigant with a large enough claim to support the cost or the proverbial "zealot" who is willing to experience martyrdom and endure the tedious arbitration process in order to merely stick it to the company with which they may have a dispute.[243] Another solution suggested by Seru is to have customers who have the same grievance against a large company, band together. That would incentivize arbitrators to have "more respect" for the consumer side and potentially act as a countervailing force when they decide how pro-business they wanted to be.[244]

However, given the existence of class action waivers that are often employed by companies in conjunction with binding arbitration clauses, this is not a practical solution. Take for example Walmart's class action waiver:

> YOU AGREE THAT ANY ARBITRATION WILL TAKE PLACE ON AN INDIVIDUAL BASIS . . . CLASS ARBITRATIONS AND CLASS ACTIONS ARE NOT PERMITTED AND YOU ARE AGREEING TO GIVE UP THE ABILITY TO PARTICIPATE IN A CLASS ACTION.[245]

Given the explicit and strong language present within this class action waiver as well as many others that are more or less constructed in the same tone and

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242. Edmund L. Andrews, *Why the Binding Arbitration Game Is Rigged against Customers,* STAN. BUS. INSIGHTS (Mar. 8, 2019), https://www.gsb.stanford.edu/insights/why-binding-arbitration-game-rigged-against-customers [https://perma.cc/LEQ3-NZDC].

243. Interestingly, the Consumer Financial Protection Bureau did propose a rule that would have prevented financial companies from forcing consumers to sign mandatory arbitration provisions in exchange for services. The proposed rule would have allowed customers to enter class-action suits. However, Congress rejected the proposed rule in 2017. *Id.*

244. *Id.* Recently, Judge William Alsup of the Northern District of California rejected a company's attempt to circumvent its own mandatory arbitration clause in favor of using the class action device to adjudicate claims of several thousand of its employees who had commenced individual arbitrations. *See* Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062, 1067–68 (N.D. Cal. 2020) ("The irony, in this case, is that the workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them. The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. No doubt, DoorDash never expected that so many would actually seek arbitration. Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order.").

245. *Walmart Wellness Terms of Service*, WALMART, https://www.walmart.com/help/article/walmart-wellness-terms-of-service/3afed3d0904a416d920ceb3527a9e4c9 [https://perma.cc/3PF3-6QN6] (last visited Nov. 29, 2020).

fashion as Walmart's, it would not be possible for numerous consumers to assert their respective claims on a class basis in an arbitration forum.[246]

As businesses and the law firms that advise them absorb the ramifications of *Pepper* and consider the ruling along with other recent Supreme Court decisions addressing antitrust standing as well as the enforceability of arbitration provisions with class action waivers, they will continue to adjust to the legal environment. In fact, in the wake of *Pepper*, Apple has broken with its own past precedent and has implemented a binding arbitration clause, as well as class action waiver, for one of its products. On August 20th, 2019, three months after the Court's decision in *Pepper*, Apple, in conjunction with Goldman Sachs, launched its own credit card called the Apple Card. Unlike Apple's other products such as the app store, which continues to employ a traditional venue provision, the Apple Card contains an arbitration clause.[247]

VII. CONCLUSION

Pepper is the first Supreme Court case to address antitrust standing in the context of the digital marketplace. Yet, at its core, the Court's application of *Illinois Brick* and the Indirect Purchaser Rule was in keeping with its traditional analysis of only allowing direct purchasers to pursue federal antitrust claims in federal court. Nevertheless, *Pepper's* significance for future antitrust claims arising from anti-competitive behavior in the digital marketplace is likely to be diminished by the Court's recent jurisprudence, finding mandatory arbitration clauses with class actions waivers enforceable across all industries and applicable to nearly every conceivable claim –

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246. The enforceability of mandatory arbitration provisions and class action waivers continues to march forth unimpeded by the courts, Congress, or state legislatures. Indeed, the Delaware Supreme Court in a recent landmark decision held that arbitration clauses in bylaws or certificates of incorporation requiring shareholders to individually arbitrate federal securities and other claims are enforceable. Salzberg v. Sciabacucchi, 227 A.3d 102 (Del. 2020).

247. The arbitration clause reads as follows:

> YOU ARE GIVING UP THE RIGHT TO LITIGATE CLAIMS (AS DEFINED BELOW) AND THE RIGHT TO INITIATE OR PARTICIPATE IN A CLASS ACTION. You hereby knowingly and voluntarily WAIVE THE RIGHT TO BE HEARD IN COURT OR HAVE A JURY TRIAL on all Claims subject to this Agreement. You further acknowledge that you have read this arbitration provision carefully, agree to its terms, and are entering into this Agreement voluntarily and not in reliance on any promises or representations whatsoever except those contained in this Agreement.

GOLDMAN SACHS, PATH TO APPLE CARD TERMS OF USE 5, https://www.goldmansachs.com/terms-and-conditions/Path-to-Apple-Card-Terms-of-Use.pdf [https://perma.cc/K3AM-PTXS].

including antitrust claims.

This result is clearly at variance with the original purpose of the Indirect Purchaser Rule as made clear in *Hanover Shoe.* Justice Ginsburg more than hinted at this perversion of the Court's intent at oral argument; and perhaps that is why the minority in *Pepper* went out of its way to find that the plaintiffs in *Pepper* lacked direct purchaser standing. Regardless, without congressional intervention or a drastic retreat by the Supreme Court from its recent decisions applying the FAA in the broadest possible manner, plaintiffs will continue to find their access to the courts and jury trials severely restricted.

VIII. APPENDIX A

Company	Binding Arbitration Provision	Class Action Waiver
Microsoft[248]	Binding Arbitration and Class Action Waiver if You Live in (or, if a Business, Your Principal Place of Business is in) the United States . . . you and we agree to binding individual arbitration before the American Arbitration Association ("AAA") under the Federal Arbitration Act ("FAA"), and not to sue in court in front of a judge or jury.	Class action lawsuits, class-wide arbitrations, private attorney-general actions, and any other proceeding where someone acts in a representative capacity aren't allowed. Nor is combining individual proceedings without the consent of all parties.
Samsung Electronics[249]	By using the Samsung Services, you unconditionally consent and agree that: (i) any claim, dispute or controversy . . . will be resolved exclusively by final and binding arbitration administered by JAMS and conducted before a sole arbitrator in accordance with the rules of JAMS; (ii) this clause is made pursuant to a transaction	[T]here shall be no authority for any claims to be arbitrated on a class or representative basis, arbitration can decide only your and/or the applicable Samsung Entity's individual claims; the arbitrator may not consolidate or join the claims of other persons or parties who may be similarly situated; and you will not file or participate in a class action against us.

248. *Microsoft License Terms,* MICROSOFT, at §11 https://www.microsoft.com/en-us/Useterms/Retail/Windows/10/Useterms_Retail_Windows_10_EnglishGermany.htm [https://perma.cc/Z83J-KS2Z] (last updated June 2018).

249. *Samsung+ and Samsung Members Terms of Service*, SAMSUNG ELECTRONICS, at §10.2 https://www.samsung.com/us/samsungplus/terms/ [https://perma.cc/Z38C-T4QB] (last updated Mar. 1, 2019).

	involving interstate commerce, and shall be governed by the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16;	
Visa[250]	Any Disputes between you and Visa shall be resolved through binding arbitration; except that, if you are a US resident, you may assert claims in small claims court (if your claims qualify).	ANY CLAIM SHALL BE ARBITRATED ON AN INDIVIDUAL BASIS. THIS MEANS THAT BOTH YOU AND VISA ARE PROHIBITED FROM JOINING OR CONSOLIDATING CLAIMS IN ARBITRATION BY OR AGAINST OTHERS UNLESS BOTH YOU AND VISA AGREE OTHERWISE IN WRITING, AND YOU AND VISA ARE PROHIBITED FROM ARBITRATING ANY CLAIMS AS A REPRESENTATIVE OR MEMBER OF A CLASS. BY ENTERING INTO THESE TERMS, YOU AND VISA ARE EACH WAIVING THE RIGHT TO PARTICIPATE IN A CLASS ACTION.
Verizon[251]	YOU AND VERIZON BOTH AGREE TO RESOLVE DISPUTES ONLY BY ARBITRATION OR IN SMALL CLAIMS COURT. YOU UNDERSTAND THAT BY THIS AGREEMENT YOU ARE GIVING UP THE RIGHT TO BRING A CLAIM IN COURT OR IN FRONT OF A JURY.	THIS AGREEMENT DOESN’T ALLOW CLASS OR COLLECTIVE ARBITRATIONS EVEN IF THE AAA OR BBB PROCEDURES OR RULES WOULD . . . NO CLASS OR REPRESENTATIVE OR PRIVATE ATTORNEY GENERAL THEORIES OF LIABILITY OR PRAYERS FOR RELIEF MAY BE MAINTAINED IN ANY ARBITRATION HELD UNDER THIS AGREEMENT.
AT&T[252]	AT&T and you agree to arbitrate all disputes and	You agree that, by entering into this License, you and AT&T are ach waiving

250. *Visa Solution Terms of Service*, VISA, at §18(h)(1), https://usa.visa.com/legal/checkout/terms-of-service.html [https://perma.cc/HVK5-5ARA] (last updated Jan. 22, 2020).
251. *Customer Agreement*, VERIZON, https://www.gowireless.com/vz-customer-agreement/ [https://perma.cc/M23B-WS8W] (last updated May 15, 2017).
252. *AT&T Expressions End User License Agreement*, AT&T, at §9.1.1, https://www.att.com/legal/terms.expressions.html [https://perma.cc/3PWL-BWG2] (last updated June 20, 2015).

	claims between us. This agreement to arbitrate is intended to be broadly interpreted.	the right to a trial by jury or to participate in a class action. This License evidences a transaction in interstate commerce, and thus the Federal Arbitration Act governs the interpretation and enforcement of this provision.
Comcast[253]	Any Dispute involving you and us shall be resolved through individual arbitration. In arbitration, there is no judge or jury and there is less discovery and appellate review than in court.	THERE SHALL BE NO RIGHT OR AUTHORITY FOR ANY CLAIMS TO BE ARBITRATED OR LITIGATED ON A CLASS ACTION, JOINT OR CONSOLIDATED BASIS OR ON BASES INVOLVING CLAIMS BROUGHT IN A PURPORTED REPRESENTATIVE CAPACITY ON BEHALF OF THE GENERAL PUBLIC (SUCH AS A PRIVATE ATTORNEY GENERAL), OTHER SUBSCRIBERS, OR OTHER PERSONS. . . . THIS WAIVER OF CLASS ACTIONS AND COLLECTIVE RELIEF IS AN ESSENTIAL PART OF THIS ARBITRATION PROVISION AND CANNOT BE SEVERED FROM IT.
Netflix[254]	You and Netflix agree that any dispute, claim or controversy arising out of or relating in any way to the Netflix service, these Terms of Use and this Arbitration Agreement, shall be determined by binding arbitration or in small claims court.	You agree that, by agreeing to these Terms of Use, the U.S. Federal Arbitration Act governs the interpretation and enforcement of this provision, and that you and Netflix are each waiving the right to a trial by jury or to participate in a class action. This arbitration provision shall survive termination of this Agreement and the termination of your Netflix membership.

253. *Comcast Website Terms of Service*, COMCAST, https://www.xfinity.com/corporate/legal/visitoragreement?pc=1 [https://perma.cc/K7MZ-CLUV] (last updated Dec. 19, 2017).

254. *Netflix Terms of Use*, NETFLIX, at §7.1, https://help.netflix.com/legal/termsofuse [https://perma.cc/556X-HKBB] (last updated Jan. 1, 2021).

Adobe[255]	If you have any concern or dispute, you agree to first try to resolve the dispute informally by contacting us. If a dispute is not resolved within 30 days of submission, any resulting legal actions must be resolved through final and binding arbitration, except that you may assert claims in small claims court if your claims qualify.	You may only resolve disputes with us on an individual basis, and you may not bring a claim as a plaintiff or a class member in a class, consolidated, or representative action.
Paypal[256]	You and PayPal each agree that any and all disputes or claims that have arisen or may arise between you and PayPal, shall be resolved exclusively through final and binding arbitration, rather than in court, except that you may assert claims in small claims court.	You and PayPal agree that each of us may bring claims against the other only on an individual basis and not as a plaintiff or class member in any purported class or representative action or proceeding. Unless both you and PayPal agree otherwise, the arbitrator(s) may not consolidate or join more than one person's or party's claims and may not otherwise preside over any form of a consolidated, representative or class proceeding.
Disney[257]	the dispute shall be resolved by binding arbitration before a neutral arbitrator whose decision will be final except for a limited right of appeal under the U.S. Federal Arbitration Act. YOU ARE GIVING UP THE RIGHT TO LITIGATE A DISPUTE IN COURT BEFORE A JUDGE OR JURY.	PROCEEDINGS TO RESOLVE OR LITIGATE A DISPUTE IN ANY FORUM WILL BE CONDUCTED ON AN INDIVIDUAL BASIS. Neither you nor Disney will seek to have a dispute heard as a class action or private attorney general action or in any other proceeding in which either party acts or proposes to act in a representative capacity.
Walmart[258]	EXCEPT FOR DISPUTES THAT QUALIFY FOR SMALL CLAIMS COURT, ALL DISPUTES ARISING OUT OF OR RELATED TO THESE TERMS OF USE OR ANY ASPECT OF THE RELATIONSHIP BETWEEN YOU AND WALMART,	YOU AGREE THAT ANY ARBITRATION WILL TAKE PLACE ON AN INDIVIDUAL BASIS; CLASS ARBITRATIONS AND CLASS ACTIONS ARE NOT PERMITTED AND YOU ARE AGREEING TO GIVE UP THE ABILITY TO PARTICIPATE IN A CLASS ACTION.

	WHETHER BASED IN CONTRACT, TORT, STATUTE, FRAUD, MISREPRESENTATION, OR ANY OTHER LEGAL THEORY, WILL BE RESOLVED THROUGH FINAL AND BINDING ARBITRATION	
JPMorgan Chase[259]	YOU HEREBY AGREE THAT ANY DISPUTE, CLAIM OR CONTROVERSY ARISING NOW OR IN THE FUTURE UNDER OR RELATING IN ANY WAY TO THIS AGREEMENT, OR TO THE ONLINE SERVICE ("CLAIM"), REGARDLESS OF THE NATURE OF THE CAUSE(S) OF ACTION ASSERTED (INCLUDING CLAIMS FOR INJUNCTIVE, DECLARATORY, OR EQUITABLE RELIEF), SHALL BE RESOLVED BY BINDING ARBITRATION.	YOU WILL NOT BE ABLE TO BRING A CLASS ACTION OR OTHER REPRESENTATIVE ACTION (SUCH AS AN ACTION IN THE FORM OF A PRIVATE ATTORNEY GENERAL) TO LITIGATE ANY CLAIMS IN COURT BEFORE EITHER A JUDGE OR JURY; NOR WILL YOU BE ABLE TO PARTICIPATE AS A CLASS MEMBER IN A CLASS ACTION OR OTHER REPRESENTATIVE ACTION IN ARBITRATION OR IN COURT BEFORE EITHER A JUDGE OR JURY.

255. *Adobe General Terms of Use*, ADOBE, at §14.1 and §14.3 https://www.adobe.com/legal/terms.html [https://perma.cc/YP8V-7CGD] (last updated Apr. 16, 2020).

256. *PayPal Platform Seller Account Agreement*, PAYPAL, at §11, https://www.paypal.com/us/webapps/mpp/ua/platform-seller-agreement [https://perma.cc/8VV5-EJKL] (last updated Apr. 20, 2020).

257. *English – Terms of Use – United States*, DISNEY, at §8 and §8(B), https://disneytermsofuse.com/app/uploads/2020/10/Disney-US-English-Terms-of-Use-060920a-1.pdf [https://perma.cc/B935-HMYD] (last updated June 9, 2020).

258. *Terms of Use*, WALMART, at §20, https://one.walmart.com/content/walmart_customer_spark_community/terms-of-use.html [https://perma.cc/MS9V-4UCZ] (last visited Jan. 18, 2021).

259. *Online Service Agreement*, JP MORGAN CHASE, at §12, https://www.chase.com/content/dam/mobile/en/legacy/documents/legal-docs/COLSA2.pdf [https://perma.cc/2W86-7TAN] (last updated May 20, 2018).

IX. APPENDIX B

Company	Venue Provision
Apple[260]	[t]his Agreement and the relationship between you and Apple shall be governed by the laws of the State of California, excluding its conflicts of law provisions. You and Apple agree to submit to the personal and exclusive jurisdiction of the courts located within the county of Santa Clara, California, to resolve any dispute or claim arising from this Agreement.
Facebook[261]	For any claim, cause of action, or dispute you have against us that arises out of or relates to these Terms or the Facebook Products ("claim"), you agree that it will be resolved exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County. You also agree to submit to the personal jurisdiction of either of these courts for the purpose of litigating any such claim, and that the laws of the State of California will govern these Terms and any claim, without regard to conflict of law provisions.
Google[262]	California law will govern all disputes arising out of or relating to these terms, service-specific additional terms, or any related services, regardless of conflict of laws rules. These disputes will be resolved exclusively in the federal or state courts of Santa Clara County, California, USA, and you and Google consent to personal jurisdiction in those courts.
Cisco[263]	If there is any dispute relating to the Site or these Terms, you and Cisco agree to exclusive personal jurisdiction and venue in the state and federal courts of Santa Clara County, State of California, U.S.A.
Oracle[264]	All matters relating to your access to, and use of, the Site and Content provided on or through or uploaded to the Site shall be governed by U.S. federal law or the laws of the State of California. Any legal action or proceeding relating to your access to, or use of, the Site or Content shall be instituted in a state or federal court in San Francisco or Santa Clara County, California.
Johnson &	All disputes between you and us arising out of or related to the Services or this Agreement, whether based in contract, tort, statute, fraud, misrepresentation

260. *Apple Media Services Terms and Conditions*, APPLE, at §G(i), https://www.apple.com/legal/internet-services/itunes/us/terms.html [https://perma.cc/HK79-L4SD] (last updated Sept. 16, 2020).

261. *Terms of Service*, FACEBOOK, at §4(4), https://www.facebook.com/terms.php [https://perma.cc/6P4C-ZMA4] (last updated Oct. 22, 2020).

262. *GOOGLE TERMS OF SERVICE*, GOOGLE, https://policies.google.com/terms?hl=en-US%2014/18 [https://perma.cc/KUP4-Q669] (last updated Mar. 31, 2020).

263. *Cisco Web Site Terms of Use*, CISCO, https://www.cisco.com/c/en/us/about/legal/terms-conditions.html [https://perma.cc/J9JJ-HDE5] (last updated Sept. 7, 2018).

264. *Terms of Notice*, ORACLE, at §22, https://www.oracle.com/legal/terms.html [https://perma.cc/5VXW-4SBV] (last updated Apr. 22, 2016).

Johnson[265]	or any other legal theory and including non-contractual disputes or claims, will be subject to the exclusive jurisdiction of the federal and state courts located in the State of New York, U.S.A., and you waive any jurisdictional, venue or inconvenient forum objections to such courts.
Mastercard[266]	You expressly agree that any action at law or in equity arising out of or directly or indirectly relating to these Terms of Use or this Site shall be filed only in the federal or state courts sitting in New York. You hereby consent and submit to personal jurisdiction of such courts for the purposes of any action related to the Mastercard Site, your access or use thereof, or these Terms of Use, and to extra-territorial service of process.
Intel[267]	The Terms and the relationship between you and Intel shall be governed by the laws of the State of Delaware, USA without regard to its conflict of law provisions and each party shall submit to the personal and exclusive jurisdiction of the courts located within the State.
ExxonMobil[268]	This Agreement shall be governed by the internal substantive laws of the Commonwealth of Virginia, USA (without giving effect to its principles of conflict of laws). Where federal jurisdiction exists over any action, suit or proceeding arising out of or in any way connected with this Agreement, you and ExxonMobil designate the United States District Court for the Eastern District of Virginia, Alexandria Division, for the exclusive resolution of that dispute and submit to the jurisdiction of that court. Where federal jurisdiction does not exist over that action, suit or proceeding, you and ExxonMobil designate the Circuit Court for the County of Fairfax, Virginia, for the exclusive resolution of that dispute and submit to the jurisdiction of that court.

265. *Terms of Service*, JOHNSON & JOHNSON, at §21, https://www.jnjvisionpro.com/legal-notice [https://perma.cc/HQ4R-WAWY] (last updated July 18, 2019).

266. *U.S. Terms of Service*, MASTERCARD, https://www.mastercard.us/en-us/vision/who-we-are/terms-of-use.html [https://perma.cc/VPR9-XWPY] (last visited Jan. 18, 2021).

267. *Intel Terms of Use*, INTEL, https://www.intel.com/content/www/us/en/legal/terms-of-use.html [https://perma.cc/DBB4-YSJW] (last visited Jan 18, 2021).

268. *Terms and Conditions*, EXXON MOBIL CORPORATION, at §14, https://www.xtoenergy.com/legal-pages/Terms-and-conditions [https://perma.cc/3N8K-KRAW] (last updated June 12, 2018).