AN APPLE AND A PEPPER TOO MUCH TO PASS ON

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I. INTRODUCTION

Apple Inc. v. Pepper is a groundbreaking Supreme Court decision that upsets decades old settled law, disrupts business expectations by eroding proximate cause defenses, and raises the possibility—and customer disadvantage—of defendant pass-on in the not-too-distant future.[1] The first part of this Comment will give background to antitrust law, discuss the history of the pass-on doctrines, and look at the reasoning behind previous decisions pertaining to the topic. Next, the Comment will discuss the intricacies of the *Apple v. Pepper* decision. Lastly, it will look at the potential effects and implications of the *Apple v. Pepper* decision, focusing on the technology industry.

To appreciate the importance of this opinion, a general understanding of antitrust law is first required. For now, it is important to note that American antitrust law was born roughly one hundred years ago and is controlled by two major pieces of legislation: the Sherman Antitrust Act (the Sherman Act) and the Clayton Act.[2] These acts seek to promote healthy competition, prevent inefficient monopolies, distinguish anticompetitive tactics, and much more.[3] These objectives play an important role in the United States economy and legal systems by helping them function as intended.[4] The United States has one of the world's largest economies, partially thanks to its free market approach to economics.[5] However, having a free market system leaves the economy pregnable to abuse by powerful actors. The Sherman Act and Clayton Act seek to remedy any problems caused by these powerful actors.[6]

The Supreme Court changed a small but exceedingly meaningful portion of antitrust law with its decision in *Apple v. Pepper* by reviving the doctrine of plaintiff pass-on.[7] The plaintiff pass-on doctrine

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1. *See* Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & ECON. 1, 5 (2011) (stating that the complexity of antitrust law leads to difficult situations for generalist judges).

2. *See* Sherman Act, 15 U.S.C. §§ 1-7; Clayton Act, 15 U.S.C. §§ 12-27.

3. William Markham, *Why Antitrust Laws Matter?*, MARKHAM L. FIRM, https://www.markhamlawfirm.com/law-articles/why-antitrust-laws-matter/ (last visited Sept. 6, 2019).

4. Alexandra Twin, *Antitrust*, INVESTOPEDIA, https://www.investopedia.com/terms/a/antitrust.asp (last updated June 25, 2019).

5. Kimberly Amadeo, *US Economy Fast Facts and Summary: What Exactly Is the US Economy?*, BALANCE, https://www.thebalance.com/us-economy-facts-4067797 (last updated Nov. 1, 2019).

6. Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective* 9 (Harvard Bus. Sch., Working Paper No. 19-110, 2019) (discussing how the Sherman Act was used to break up powerful trusts, like Rockefeller's Standard Oil soon after its inception).

7. Apple Inc. v. Pepper, 139 S. Ct. 1514, 1523 (2019).

embraces the idea that a consumer has the ability to sue any company that delivers goods to them for antitrust damages, even if the consumer was not directly or primarily affected by the anticompetitive prices.[8] Prior to *Apple v. Pepper*, a plaintiff was required to show that he or she had been directly injured by anti-competitive actions, such as paying more than a competitive price, in order to sue a company for antitrust damages.[9]

The idea that a plaintiff had to be directly injured in order to have an antitrust claim was firmly the status quo for roughly 40 years beginning with the Supreme Court's decision in *Illinois Brick Co. v. Illinois*.[10] Now, however, companies with exclusive rights to a product can no longer protect themselves by claiming the plaintiff is not directly harmed by the company.[11] Though reviving the use of plaintiff pass-on itself is not necessarily dramatic, the potential proximate cause and procedural issues the shift raises makes this change theoretically drastic.[12]

In the *Apple v. Pepper* dissent, Justice Gorsuch notes some of the important questions the majority seemed to gloss over. Gorsuch states: "If proximate cause no longer draws its line at the first injured party, how far down the causal chain can a plaintiff be and still recoup damages? Must all potential claimants to the single monopoly rent be gathered in a single lawsuit as necessary parties?"[13] Not having a clear proximate cause line could make deciding who has meritorious claims difficult.[14]

Also significant is the opinion's potential future implications on the theory of defendant pass-on. Although standing case law does not allow a defendant to avoid being sued if his or her intermediary has passed on the uncompetitive prices, this is on unsteady footing given the resurgence of plaintiff pass-on in *Apple v. Pepper*.[15] If this is allowed in the future, companies abusing the defendant pass-on doctrine could lower economic surplus and create deadweight loss.[16] This can affect the

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8. *Id.*

9. *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 66 (1911). This case predates the other pass-on cases but is a good visualization of uncompetitive actions.

10. 431 U.S. 720, 745-46 (1977) (rejecting the defense that indirect purchasers, rather than direct purchasers, were the parties injured by an antitrust violation).

11. *Pepper*, 139 S. Ct. at 1524-25.

12. *Id.* at 1529-30 (Gorsuch, J., dissenting).

13. *Id.*

14. *Id*. at 1531.

15. *See* Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 493-94 (1968).

16. *See* *Monopoly*, ECON. ONLINE, https://www.economicsonline.co.uk/Business_economics/Monopoly.html (last visited Sept. 6, 2019). Deadweight loss is caused by market inefficiencies (such as anticompetitive practices) and

economy as a whole, all the way down to individual consumers.[17] Previously, plaintiff pass-on was not allowed in part because defendant pass-on was not allowed.[18] There was parity in allowing neither of the doctrines and we have now lost that parity. Without the uniformity, it becomes unclear whether defendant pass-on will be accepted in the future.

These changes to the antitrust landscape coincide with a rapidly evolving economy that is partially dominated by tech industry.[19] Because fewer major players operate in the tech industry, there is a greater propensity to be more monopolized than other industries.[20] In *Apple v. Pepper*, the good in question was an application (an App) from Apple's App marketplace.[21] Operation of these online marketplaces, along with other common practices, make the tech industry an interesting ecosystem in which to examine the new changes brought about by the *Apple v. Pepper* opinion. The initial implications of the opinion could have drastic effects on how these large tech companies conduct business. Deeming purchasers on the App market direct purchasers will likely lead to lawsuits claiming e-commerce markets are anticompetitive.[22]

II. BACKGROUND

A. *Understanding the History and Importance of Antitrust Law*

To fully understand the significance of *Apple v. Pepper*, it is important to recognize what triggers antitrust scrutiny and how the United States legislation has attempted to tackle antitrust problems. The general legal claims that plaintiffs use to sue—and defendants seek to avoid—are shaped by the history of the American antitrust system. *Apple v. Pepper* deals with an important subsection of that system.

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is damaging to our economic structure. *See* Alicia Tuovila, *Deadweight Loss*, INVESTOPEDIA, https://www.investopedia.com/terms/d/deadweightloss.asp (last updated Jun. 30, 2020).

17. *See generally Introducing Market Failure*, LUMEN LEARNING, https://courses.lumenlearning.com/boundless-economics/chapter/introducing-market-failure/ (last visited Feb. 13, 2020) (explaining market failures and how they can have an effect on consumers).

18. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 730-31 (1977).

19. *Supreme Court's Apple v. Pepper Opinion Increases Antitrust Risk for Online Marketplace Platform Operators*, BAKER BOTTS (May 21, 2019), http://www.bakerbotts.com/insights/publications/2019/may/antitrust-apple-v-pepper-update.

20. *See* Gene Chan, *Big Tech Oligopoly*, SEEKING ALPHA (May 14, 2019, 12:39 PM), https://seekingalpha.com/article/4263857-big-tech-oligopoly (remarking that the world's five largest companies are all technology companies and how so much value has become concentrated in the hands of a few).

21. Apple Inc. v. Pepper, 139 S. Ct. 1514, 1518 (2019).

22. *See generally Pepper*, 139 S. Ct. at 1531 (Gorsuch, J., dissenting).

The United States antitrust system originated in the late nineteenth century with the passage of the Sherman Act,[23] which was quickly followed by the Clayton Act.[24] Since their enactment, these broad and significant pieces of legislation have changed our economy and legal systems.[25] The comprehensive Sherman Act, bolstered by the Clayton Act,[26] has continuously evolved with the ever-changing landscape of our economy.[27]

The name of the field itself and the Sherman Act imply that we as a society are against trusts. But what is a trust? Antitrust law is normally seen as a monopoly killer that brings down big businesses, but there is no rule actually against being a big business.[28] More accurately, the antitrust laws are aimed at companies that gain the ability to set uncompetitive prices and partake in other anticompetitive practices.[29] Those with the ability to do so became known as trusts.[30] These trusts impede the ability of our economy to run efficiently and fairly. Because our society places a great deal of weight on fairness when it comes to how we earn capital,[31] the idea of earning a "fair profit" was a central point at the congressional hearings held for the Sherman Act.[32]

Companies open themselves up to potential antitrust issues in different ways. The key distinction of an antitrust issue is that almost always there was a "restraint of trade,"[33] an attempt to form a monopoly that raised red flags for regulators.[34] These so-called restraints are seen in a plethora of ways, including horizontal mergers, collusion, predatory

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23. 15 U.S.C. §§ 1-7.

24. 15 U.S.C. § 12.

25. Fiona M. Scott Morton, *Is Antitrust Law Keeping Up?*, YALE INSIGHTS (July 12, 2013), https://insights.som.yale.edu/insights/is-antitrust-law-keeping-up.

26. Patricia Gima, *What are the Sherman Antitrust and Clayton Acts?*, FREEADVICE LEGAL, https://business-law.freeadvice.com/business-law/trade_regulation/anti_trust_act.htm (last updated June 19, 2018).

27. Morton, *supra* note 25.

28. Wayne D. Collins, *Trusts and The Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279, 2281 (2013).

29. *Id.*

30. *Id.*

31. Paul Bloom, *People Don't Actually Want Equality, They Want Fairness*, ATLANTIC (Oct. 22, 2015), https://www.theatlantic.com/science/archive/2015/10/people-dont-actually-want-equality/411784/.

32. 21 Cong. Rec. 2730 (1890) (statement of Sen. Platt) (emphasizing that every man has the right to earn a fair profit).

33. Sawyer, *supra* note 6, at 5; *see generally* Gilbert Holland Montague, *The Defects of the Sherman Antitrust Law*, 19 YALE L. REV. 88, 97 (1909).

34. *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Aug. 25, 2020).

pricing, and price discrimination.[35] When these trusts become large or powerful enough to have effectively restrained trade in those ways, the government will begin to take action.[36] However, the government must balance protecting the economy from unfair trade practices with the "long-standing popular faith in competition and free market principles" held by the American people.[37] Even today, over a hundred years after the formation of the antitrust system, there are still those who believe "a rethink of the existing antitrust paradigm is long overdue."[38] Some believe that the antitrust laws' limitations on competition and the free market are not justified by the benefits they provide.[39]

The Sherman Act states that "[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 hereby declared to be illegal."[40] This is an exceedingly vague and broad phrase. However, it has given courts "wide latitude in interpreting and enforcing the law."[41] By granting courts this broad discretion, there is assurance that the Sherman Act will adapt and evolve as quickly as our economy does. This adaptability is necessitated by the fact that the Sherman Act was certainly not written with technological advancements and the companies that drive them in mind.[42]

Applying the Sherman Act is not without its difficulties. Since its inception, the law has had enforcement issues.[43] This in part is why Congress passed the Clayton Act. The Clayton Act bolsters the Sherman Act so that together they can better fulfill the original purpose of the Sherman Act in the long term.[44] By classifying certain practices as antitrust practices, the Clayton Act took away some uncertainty and ambiguity that led to inconsistent interpretations of the Sherman Act.[45] Congress has continued to revise the Clayton Act in order to adapt with

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35. *See* Clyde Wayne Crews & Ryan Young, *The Case Against Antitrust Law: Ten Areas Where Antitrust Policy Can Move on from the Smokestack Era*, COMPETITIVE ENTERPRISE INST. (Apr. 17, 2019), https://cei.org/content/the-case-against-antitrust-law.

36. Sawyer, *supra* note 6, at 2; *see generally* Montague, *supra* note 33 (explaining when antitrust laws should apply).

37. Sawyer, *supra* note 6, at 3; *see also* Crews & Young, *supra* note 35.

38. Crews & Young, *supra* note 35.

39. *See id.*

40. 15 U.S.C. § 1.

41. Sawyer, *supra* note 6, at 1.

42. *See* Morton, *supra* note 25.

43. *See* Montague, *supra* note 33, at 98.

44. *See* Troy Segal, *Clayton Antitrust Act*, INVESTOPEDIA, https://www.investopedia.com/terms/c/clayton-antitrust-act.asp (last updated Nov. 22, 2020).

45. *Id.*

the changing economy.[46] However, as with any legislation, it originally lacked the necessary foresight to deal with all possible situations.[47]

B. *Relevant History of Plaintiff and Defendant Pass-On Theories*

There are two theoretical arms of the pass-on doctrine: the offensive plaintiff side and the defensive defendant side. The former has historically been linked to *Illinois Brick*,[48] whereas the latter has been tethered to *Hanover Shoe*.[49] Together, these cases have historically been viewed as co-dependent antitrust theories, providing a judicially efficient means to prevent spiraling cases and promote business certainty.[50] However, half of this equation has recently been overturned by *Apple v. Pepper*.[51] Thus, it is vital to look at both decisions independently, analyzing the reasoning behind them both.

As discussed above, the pass-on doctrine can be, and has previously been, employed by both plaintiffs and defendants. A plaintiff will typically use the pass-on doctrine to argue that a seller or service provider has engaged in an uncompetitive pricing structure and inflated the price.[52] Conversely, a defendant will typically use the pass-on argument in situations limited to supply chain purchases and sophisticated entities.[53] However, this is now a non-viable argument for defendants under *Hanover Shoe*.[54] Were it not disallowed by *Hanover Shoe*, the defendant could claim—assuming that the plaintiff was a sophisticated, middle-market entity—that the plaintiff was able to

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46. Sarah Weckel Hays, *Commerce Requirements of the Clayton Act*, 36 LA. L. REV. 1040, 1040-1041 (1976).

47. Morton, *supra* note 25.

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

49. Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481 (1968).

50. Steve Williams & Jiamie Chen, *'Pepper' as a Back Door to 'Illinois Brick' (and 'ARC America')?*, RECORDER (Aug. 29, 2018, 7:19 PM), https://www.law.com/therecorder/2018/08/29/pepper-as-a-back-door-to-illinois-brick-and-arc-america/ ("On the other hand, overruling the established framework around which modern practice has developed for over 40 years would throw private civil enforcement into uncertainty and turmoil.").

51. Case Comment, *Apple Inc. v. Pepper*, 133 HARV. L. REV. 382, 387-88 (2019) [hereinafter *Apple v. Pepper* Case Comment] ("The Apple majority, however, overturned this paradigm by reweighting the aforementioned policy values in favor of victim compensation.").

52. *See* Molly M. Donovan, *Antitrust 101: The Indirect Purchaser Rule of Illinois Brick,* WINSTON & STRAWN LLP (Jan. 21, 2020), http://www.winston.com/en/competition-corner/antitrust-101-the-indirect-purchaser-rule-of-illinois-brick.html (explaining that the pass-on doctrine grants plaintiffs standing to sue "despite being so far removed from the original and direct purchaser . . . [because] they ultimately paid the alleged overcharge.").

53. *See* Jay B. Sykes, *Antitrust and the iPhone: Supreme Court to Consider Whether App Store Customers Can Sue Apple for Monopolization*, CONG. RESEARCH SERV. SIDEBAR 1, 2 (2018), http://crsreports.congress.gov/product/pdf/LSB/LSB10219.

54. Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 488 (1968).

effectively increase its own prices, recoup any increased cost, and pass-on the cost to the consumer.[55]

Put differently, "the passing-on doctrine has been asserted as a standard of proof in private antitrust actions. A party seeking to establish its applicability would attempt to trace the effects of an illegal overcharge through the various levels of a product's chain of distribution."[56] The doctrine is used "offensively by . . . claimants who are indirect purchasers to prove that they were in fact injured and therefore entitled to recover under section 4 of the Clayton Act."[57] When used defensively, defendants attempt to show that those who purchased directly from the original supplier "were not in fact injured by the overcharge since they were able to pass the added cost on to the next purchaser."[58]

As illustrated in the contrast between *Illinois Brick* and *Apple v. Pepper,* for decades only direct purchasers could sue for damages from antitrust overcharges.[59] This was true regardless of whether or not there was any passing on done by any of the parties.[60]

In *Illinois Brick*, the state of Illinois and seven hundred local government units brought suit under Section 4 of the Clayton Act.[61] The Supreme Court's holding in *Illinois Brick* was premised on three foundations.[62] The first foundation is that "suits by indirect purchasers would be too unwieldy because each downstream purchaser would attempt to show the level of damage it suffered as a result of a remote price-fixing scheme."[63] Second, "the Court decided that deterrence, rather than compensation, was the primary purpose of antitrust damages."[64] Therefore, the Court allowed direct purchasers to receive the entire amount that was deemed to be above a competitive price, even if this surpassed the actual injury suffered by that specific purchaser.[65] Third, "because the Court already had barred the use of the pass-on defense in *Hanover Shoe . . .* the *Illinois Brick Court* reasoned that it would have to either reverse *Hanover Shoe* or prohibit the offensive

55. *See* Elmer J. Schaefer, *Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis*, 16 WM. & MARY L. REV. 883, 886 (1975).

56. Karen Turner*, Antitrust Treble-Damage Action Hanover Shoe Inc. Rule Bars Offensive Use of Passing-On Doctrine by Indirect Purchaser*, 23 VILLANOVA L. REV. 381, 382 (1978).

57. *Id*. at 384.

58. *Id.* (citing *Hanover Shoe*, 392 U.S. at 487-88).

59. Illinois Brick Co. v. Illinois, 431 U.S. 720, 746 (1977).

60. *Hanover Shoe*, 392 U.S. at 488.

61. *Illinois Brick*, 431 U.S. at 726-27.

62. Roger D. Blair & Jeffrey L. Harrison, *Reexamining the Role of Illinois Brick in Modern Antitrust Standing Analysis*, 68 GEO. WASH. L. REV. 1, 1 (1999).

63. *Id.*

64. *Id.*

65. *Id.*

use of the pass-on theory to avoid multiple liability."[66] The Court opted to not overturn *Hanover*, and in doing so, the legitimacy of both the offensive and defensive pass-on doctrines were tied together.[67]

In *Apple v. Pepper,* the Court narrowed the *Illinois Brick* holding without explicitly overturning it.[68] The Court's veering from previous precedent may cause instability with the *Hanover* holding. With the precedent being altered, it raises the question of whether the Court will soon change its opinion on *Hanover*.[69] The sudden lack of sturdiness in the third foundational point from *Illinois Brick* is concerning because it potentially upsets *Hanover Shoe*.[70]

The aforementioned *Hanover Shoe* was a private action that resulted from a "U.S. Justice Department action challenging United Shoe's practice of making its shoe manufacturing machinery available on a lease-only basis."[71] It is important to note that "[i]nstead of asking for damages equal to lost profits, Hanover Shoe framed its damage claim in terms of an illegal overcharge."[72] The trial court, a Pennsylvania District Court, argued that "Hanover Shoe would have purchased the machines, if permitted to do so, at a lower cost than the cost of the leases."[73] United Shoe argued against the damages, making the first pass-on argument.[74] United Shoe claimed that because any increased cost was passed on to Hanover Shoe's customers, United Shoe was not actually harmed.[75] However, "[t]he Court rejected this so-called 'pass-on' defense."[76] As its first point, "the Court reasoned that recognizing such a defense would render antitrust cases far more complicated,"[77] a concern still relevant to this day. Additionally, "the Court feared that those who ultimately received the overcharge, the consumers, would

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66. *Id.*

67. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 745-46 (1977).

68. Apple Inc. v. Pepper, 139 S. Ct. 1514, 1521-22 (2019) (interpreting *Illinois Brick* as establishing a "bright-line rule" that allows direct purchasers to sue and rejecting Apple's argument for a price setting rule).

69. *See id.* at 1526-27 (Gorsuch, J., dissenting) (noting that *Illinois Brick* is "just the other side of the coin" of *Hanover Shoe*).

70. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 736–37 (1977).

71. Blair & Harrison, *supra* note 62, at 9; *see* Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 483–84 (1968) (explaining that Hanover Shoe used the Clayton Act to bring a private cause of action, since "a final judgment or decree in any civil or criminal suit brought by the United States under the antitrust laws . . . [is] prima facie evidence . . . [and] an estoppel between the parties."); *see generally* United Shoe Mach. Corp. v. United States, 347 U.S. 521 (1954)(affirming the district court's judgment that United Shoe is liable under the Sherman Act for illegal monopolization).

72. Blair & Harrison, *supra* note 62, at 9.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

have such a minimal stake in the outcome of an antitrust action that a violation might go unchallenged."[78] Allowing these legitimate antitrust claims to go unfought would stymie the very purpose of antitrust legislation in the United States. "[T]he importance of avoiding procedural and substantive complexity in [antitrust] actions lay in the need to maintain the incentive for private parties to undertake such suits."[79] If allowed, the pass-on doctrine would cause "the stake for each party after apportionment of damages [to] be too small to make litigation economically feasible, and the amount recovered would bear little relation to the actual injury."[80]

C. *Supreme Court's Reasoning Behind the Relevant Historical Antitrust Cases*

In *Illinois Brick*, as well as other antitrust cases, the Court has indicated three objectives: deterrence, judicial economy, and corrective justice.[81] Deterrence is "a theory that criminal laws are passed with well-defined punishments to discourage individual criminal defendants from becoming repeat offenders and to discourage others in society from engaging in similar criminal activity."[82] The Sherman Act and Clayton Act demonstrate this theory, providing harsh penalties to deter unwanted and unsavory conduct. Judicial economy "refers to efficiency in the operation of the courts and the judicial system."[83] The Court frequently emphasizes the importance of not wasting time and resources so that the judicial system is able to run smoothly.[84] Further, corrective justice is "a fundamental type of justice, concerned with the reversal of wrongs or the undoing of transactions."[85] When one party incorrectly gains at the expense of another party, corrective justice "re-establishes the initial equality by depriving one party of the gain and restoring it to the other party."[86] In regard to antitrust specifically,

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78. Blair & Harrison, *supra* note 62, at 9.

79. Turner, *supra* note 56, at 390.

80. *Id.*

81. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 737-38, 740, 745-46 (1977).

82. *Deterrence*, FREE DICTIONARY, https://legal-dictionary.thefreedictionary.com/Deterrence (last visited Jan. 24, 2019).

83. *Judicial Economy*, USLEGAL, *https://definitions.uslegal.com/j/judicial-economy/* (last visited Jan. 24, 2019).

84. *See generally* Alain Marciano et al., *The Economic Importance of Judicial Institutions, Their Performance and the Proper Way to Measure Them*, 15 J. INST. ECON. 81, 84-85 (2019) (distinguishing and measuring the two methods of judicial performance, efficiency and efficacy).

85. Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 349 (2002) (interpreting the concept as first developed by Aristotle in the Nicomachean Ethics); *see also* Elbert L. Robertson, *A Corrective Justice Theory of Antitrust Regulation*, 49 CATH. U.L. REV. 741, 743–45 (2000).

86. Weinrib, *supra* note 85, at 349; *see also* Elbert L. Robertson, *supra* note 85, at 743–45.

"when a consumer pays an illegally high price for a good, she is being deprived of what lawfully belongs to her in the amount of the overcharge she pays."[87] The ability to effectively institute a system where all three are satisfied is preferred, but difficult to achieve.

Hanover Shoe saw the Court demonstrate a willingness to compromise corrective justice for the benefit of judicial efficiency and deterrence.[88] The Court indicated that they needed to efficiently deter monopolists from using pass-on defensively.[89] In *Illinois Brick*, we have also seen "the Court reaffirm[] *Hanover Shoe's* willingness to sacrifice corrective justice for deterrence and judicial efficiency. As *Hanover Shoe* barred defensive pass-through arguments, *Illinois Brick* barred their offensive use."[90] Both Courts sacrificed corrective justice in different ways, though both reasonings stood on a refusal to allow pass-on arguments. In *Hanover Shoe*, the Court "compromised corrective justice by providing 'middlemen' plaintiffs with too much[;]" *Illinois Brick* "compromised it by providing the ultimate consumers with too little—in fact, with nothing."[91]

The inherent lack of corrective justice may not be as bad as it seems at first glance. By not allowing "pass-through defenses, the Court in *Hanover Shoe* ensured that antitrust violators would keep less than they deserved, and that victims would receive more than they deserved."[92] Because the monopolists are unable to use the middlemen—those who are also charging an uncompetitive rate—to defray some of the cost being attributed to them, the victims receive more than they should.[93] Evidently, the result is one the Court was willing to stomach, unfairly compensating those who had done wrong.[94]

Illinois Brick on the other hand left the consumers with nothing.[95] The consumers were barred from using plaintiff pass-on to attack the monopolists taking advantage.[96] The Court's holding compromises corrective justice to an extreme. In attempting to preserve judicial

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87. *Apple v. Pepper* Case Comment, *supra* note 51, at 387.

88. *Id.*

89. Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).

90. *Apple v. Pepper* Case Comment, *supra* note 51, at 388.

91. *Id.*

92. *Id*.

93. *See* Ronald W. Davis, *Indirect Purchaser Litigation: A.R.C. America's Chickens Come Home to Roost on the Illinois Brick Wall*, 65 ANTITRUST L.J. 375, 389–90 (1997); *see also* Andrew I. Gavil, *Antitrust Remedy Wars Episode I: Illinois Brick from Inside the Supreme Court*, 79 ST. JOHN'S L. REV. 553, 575–613 (2005) (reviewing internal deliberation of Justices).

94. *See* Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).

95. Daniel Berger & Roger Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 872 (1977).

96. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 735–36 (1977).

efficiency and deterrence, the scales were "tipped too far against victims."[97]

So, in *Illinois Brick*, where "the plaintiffs urged the Court to limit the *Hanover Shoe* holding to cases in which capital goods were price-fixed goods, the Court adopted the view that ruling in favor of indirect purchasers would require overruling *Hanover Shoe*."[98] In an important piece of analysis, "[t]he Court reasoned that permitting the offensive use of a [pass-on] theory while not permitting a [pass-on] defense would subject defendants to multiple liabilit[ies]."[99] In deciding there needed to be parity between offensive and defensive pass-on, "the Court held that there could be no offensive use of the theory" by the plaintiff.[100] Put simply, plaintiff pass-on was not permitted partially because defendant pass-on was not allowed. However, *Apple v. Pepper* changes that.

III. APPLE V. PEPPER

To understand the importance of the final decision in *Apple v. Pepper*, it is important to understand how the case got to the Supreme Court, the decision itself, and the dissent. A thorough understanding of every aspect of the case will help illuminate the weight of the judgment.

A. *Path to the Supreme Court*

The *Apple v. Pepper* line of litigation began with "four iPhone owners fil[ing] a putative antitrust class action against Apple in the United States District Court for the Northern District of California . . . claim[ing] to represent a class of all consumers who had purchased an iPhone App from Apple."[101] The plaintiffs claimed that by making Apple's App marketplace (App Store) the exclusive "place to purchase apps and by charging a [thirty] percent commission on App Store sales, Apple forced iPhone owners to pay above-competitive prices for apps they purchased."[102] Using *Illinois Brick*, Apple asserted that the iPhone owners were "indirect purchasers" and did not have standing.[103] Going further, "Apple argued that, even though Apple collects payment from iPhone owners for App Store sales (keeping its [thirty] percent commission), the 'economic reality' is that iPhone owners actually

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97. *Apple v. Pepper* Case Comment, *supra* note 51, at 389.

98. Blair & Harrison, *supra* note 62, at 10.

99. *Id.*

100. *Id.*

101. CRAIG A. WALDMAN ET AL., JONES DAY, INSIGHTS FROM THE SUPREME COURT'S *APPLE V. PEPPER* ANTITRUST DECISION 1 (June 2019), https://www.jonesday.com/en/insights/2019/06/insights-from-the-scotus-apple-v-pepper-decision.

102. *Id.*

103. *Id.*

purchase the apps from the App developers themselves."[104] Because App developers set their own price, Apple believed the developers had passed on (or could pass on) any uncompetitive prices.[105]

The district court agreed with Apple and deemed the consumers indirect purchasers who therefore lacked standing.[106] However, "the Ninth Circuit later reversed, holding that plaintiffs were 'direct purchasers' with antitrust standing, because Apple sold iPhone apps directly to plaintiffs."[107] The opinion described the issue as straightforward, just as the district court had, but came to exact opposite conclusion.[108] The Ninth Circuit distinguished the case from its predecessors in the following ways.

Illinois Brick bars suits against manufacturers in a vertical supply chain—where the manufacturer is the first link—by anyone other than the entity on the second link. It does not, however, bar suits against distributors who sell to consumers. Under this framework the Ninth Circuit claimed, "Apple is a distributor of the iPhone apps, selling them directly to purchasers through its App Store" and, therefore, "[p]laintiffs have standing under *Illinois Brick* to sue Apple for allegedly monopolizing and attempting to monopolize the sale of iPhone apps."[109]

Further technical distinctions the Ninth Circuit relied on go beyond the scope of this Paper.

B. *The Supreme Court Opinion*

The Court issued its 5–4 decision on May 13, 2019, affirming the Ninth Circuit's decision that consumers were "direct purchasers" of apps from Apple's App Store who have standing under *Illinois Brick* to sue Apple for antitrust practices.[110] Justice Brett Kavanaugh, writing for the majority, stated that under the test from *Illinois Brick*, consumers were not secondary purchasers and could sue Apple directly because it was Apple's fee that affected the prices of the apps.[111] By finding the App consumers were direct purchasers, the Court disregards the fact that there are middlemen in this situation, the App developers.[112] In doing

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104. *Id.*

105. *Id.*

106. *Id.*

107. CRAIG A. WALDMAN ET AL., *supra* note 101, at 1.

108. *See* In re Apple iPhone Antitrust Litig., 846 F.3d 313, 323 (9th Cir. 2017).

109. Ryan M. Sandrock, *Apple v. Pepper and the Future of the Direct Purchaser Enforcement Regime*, 33 ANTITRUST, Spring 2019, at 6, 8 (2019), available at https://heinonline.org/HOL/LandingPage?handle=hein.journals/antitruma33&div=29&id=&page= (citing *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313 (9th Cir. 2017)).

110. Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520 (2018).

111. *Id.* at 1521.

112. *Id.* at 1528 (Gorsuch, J., dissenting).

so, the idea of plaintiff pass-on was revitalized. Additionally, even if the structure for damages that consumers may win in the continuing suit may be complicated, this is not a factor used to determine standing. The Court stated that Apple's interpretation of *Illinois Brick* "did not make a lot of sense" and only served to "gerrymander Apple out of this and similar lawsuits."[113] Disagreeing with Apple's reasoning, the Court explained that if its doctrine were adopted, it would "directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases."[114] The Court thought these longstanding goals showed themselves in the *Illinois Brick* opinion in three ways: "(1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages."[115]

In regards to improving enforcement, "the Court stated that depriving consumers of standing 'makes little sense and would directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases.'"[116] "The Court then forcefully rejected the notion that damages calculations would be significantly more complex than those the Court routinely performs in 'retailer markup case[s].'"[117] Lastly, "the Court dismissed worries about duplicative damages as founded upon a misconception about the economic relations between Apple, developers, and consumers."[118] The Court saw Apple as a "bottleneck monopolist" as well as a "monopsonist."[119] A bottleneck monopoly "sells 'access' at a regulated price and may compete with independent downstream firms through a subsidiary."[120] A monopsonist "is a single buyer of labour" that has significant power.[121] Because of Apple's unique power and position, "consumers and developers would sue Apple under distinct 'theories of harm,' with no risk of duplicative damages."[122] Kavanaugh was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.[123]

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113. *Id.* at 1522-23.

114. *Id.* at 1524.

115. *Id.*

116. *Apple v. Pepper* Case Comment, *supra* note 51, at 385.

117. *Id.* (alteration in original).

118. *Id.*

119. *Pepper*, 139 S. Ct. at 1525.

120. Alvaro Bustos & Alexander Galetovic, *Vertical Integration and Sabotage with a Regulated Bottleneck Monopoly* 1 (Stanford Ctr. For Int'l Dev., Working Paper No. 316, 2007), https://kingcenter.stanford.edu/publication-keywords/bottleneck-monopoly.

121. *Monopsony*, ECON. ONLINE, https://www.economicsonline.co.uk/Business_economics/Monopsony.html (last visited Aug. 23, 2020).

122. *Apple v. Pepper* Case Comment, *supra* note 51, at 385.

123. *Pepper*, 139 S. Ct. at 1515.

The Court used language from the Clayton Act to drive home its point, indicating that "Section 4 of the Clayton Act . . . provides that 'any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . the defendant.'"[124] By emphasizing the broad nature of the terms "any person" and "injured," the Court found that the plaintiff's situation was within the statutory language.[125] As mentioned previously, the Court did not agree with Apple's interpretation of *Illinois Brick* and instead interpreted *Illinois Brick* as "establish[ing] a bright-line rule."[126] That rule, put simply, is that "if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A. But B may sue A if A is an antitrust violator."[127] The Court reasoned that because iPhone owners were paying this uncompetitive price for the Apps directly to Apple, there are "no intermediaries interven[ing] between monopolist and consumer, removing any obstacle to consumer standing."[128]

C. *The Dissent*

Justice Gorsuch's dissent interpreted "*Illinois Brick* through the lens of *Hanover Shoe.*"[129] The monopolistic entity in *Hanover Shoe* raised the defendant pass-on theory as its main defense.[130] The Court rejected that argument, and Gorsuch's dissent saw *Illinois Brick* as "merely 'the other side of the coin,' a precedent that applied the same proximate-cause principles to offensive claims as *Hanover Shoe* had applied to defensive ones."[131]

Using the idea that the pass-on theories were interconnected, the dissent stated that "'[p]laintiffs can be injured only if the developers are able and choose to pass on the overcharge to them in the form of higher App prices that the developers alone control,' their theory of harm relied upon 'exactly the kind of 'pass-on theory' *Illinois Brick* rejected.'"[132] Justice Gorsuch believed this would open Apple, and similar entities, to the duplicative damages that the majority claimed to be protecting against.[133] In his dissent, Justice Gorsuch explained that he believed "separate suits from consumers and developers would necessarily

124. *Id.* at 1520.
125. *Apple v. Pepper* Case Comment, *supra* note 51, at 386.
126. *Id.* (citing *Pepper*, 139 S. Ct. at 1514).
127. *Pepper*, 139 S. Ct. at 1521; see *Apple v. Pepper* Case Comment, *supra* note 51, at 386.
128. *Apple v. Pepper* Case Comment, *supra* note 51, at 385 (citing *Pepper*, 139 S. Ct. at 1521).
129. *Id.* at 386.
130. *See* Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 487-88 (1968).
131. *Apple v. Pepper* Case Comment, *supra* note 51, at 386 (citing *Pepper*, 139 S. Ct. at 1526-27).
132. *Id.*
133. *Pepper*, 139 S. Ct. at 1528 (Gorsuch, J., dissenting).

expose Apple to liability for duplicative damages."[134] Additionally, "[d]etermining what share of these damages belong to which party would require burdensome pass-through calculations."[135] Justice Gorsuch believed that the very steps taken by the court to explicitly avoid duplicative damages and convoluted damage calculations will bring them around in greater frequency.[136]

IV. THE EFFECTS OF THE APPLE V. PEPPER DECISION

A. *Legal Effects and Outcomes of the Decision*

The majority opinion in *Apple v. Pepper* altered fundamental reasonings behind this subsection of antitrust law. Under *Illinois Brick*, standing was limited to direct purchasers and indirect purchasers, the latter having transacted with the former rather than with the monopolist itself.[137] The indirect purchaser had no standing even if the direct purchaser passed on the full cost of the monopolistic overcharge in the form of higher prices.[138] The *Illinois Brick* Court came to this conclusion for multiple reasons. First, the Court forbade the pass-on "arguments because it judged itself ill-suited to efficiently determine what parts of an overcharge are passed on at any given stage in the chain of distribution."[139] Additionally, the Court feared that passing on would "undermine deterrence, as indirect purchasers, who could not sue as effectively as direct purchasers, would be able to claim a portion of what would previously have gone to direct purchasers in a successful suit."[140]

Of more importance is whether or not the majority opinion opened the door for bigger issues. Does this signal the revival of the doctrine of defensive pass-on? *Illinois Brick* was decided partially because *Hanover Shoe* existed and prevented the defendant pass-on doctrine.[141] It would seem counter intuitive for the Court to revive the doctrine, as it directly

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134. *Id.* at 1529.

135. *Apple v. Pepper* Case Comment, *supra* note 51, at 386 (citing *Pepper*, 139 S. Ct. at 1529-30).

136. *See Pepper*, 139 S. Ct. at 1529 (Gorsuch, J., dissenting).

137. *Antitrust Advisory: U.S. Supreme Court Clarifies the Direct Purchaser Rule, Allows App Purchaser to Proceed Against Apple*, ALSTON & BIRD (May 17, 2019), https://www.alston.com/en/insights/publications/2019/05/supreme-court-clarifies-the-direct-purchaser-rule/ ("In 2013, Apple moved to dismiss the plaintiffs' case on the ground that the consumers were not direct purchasers under the Supreme Court's long-established Illinois Brick rule that limits federal antitrust standing to persons who purchased products or services directly from the party that committed the antitrust violation.").

138. *Apple v. Pepper* Case Comment, *supra* note 51, at 382.

139. *Id.*

140. *Id.*

141. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 726 (1977).

conflicts with its plaintiff-based counterpart. However, the unraveling of precedent and the ever-changing composition of the Court could see this doctrine revived should it be raised. There is very little preventing Apple, or a similarly situated company, from raising the defendant pass-on doctrine as a defense now that the Court has shown it is not overly impressed with the precedent in the area.

B. *How Will This Affect the Massive Technology Companies That Are Prevalent in Today's Economy?*

Technology giants such as Apple, Amazon, Facebook, and Google have become wildly successful in recent history, so much so that the four companies are often referred to collectively as Big Tech.[142] A common theme between two of the four giants (Apple and Google) and an almost giant (Microsoft) is the owning and operating of an Application marketplace (App market).[143] These App markets are crucial to the success of these companies.[144] As suggested in the Court's opinion in *Apple v. Pepper*, there could be antitrust issues with these companies having complete autonomy over the marketplace.[145] The control potentially gives these companies an unlawful monopoly, though that has not been directly determined by the Court.[146] Apple is possibly in a stickier situation based on the fact that the company is not open-sourced.[147] This further restricts the ability for competition in their App market (though a deeper dive into that idea is outside the scope of this paper). Nevertheless, these App markets can give rise to consumers bringing suit if and when they were being negatively affected by Apple's (or others') ability to charge commissions that were economically detrimental to said consumers.[148] Because Apple is the sole owner and operator of their App Store, consumers were unable to do much about the potentially unfair pricing prior to the *Apple v. Pepper* opinion.[149]

Now that this avenue of recourse is open, there could also be suits regarding Apple's proprietary protection and control over user-owned hardware. Could Apple be forced to license its software to be more like its competitor Google, who distributes an open-sourced operating

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142. Jack Nicas et al., *How Each Big Tech Company May Be Targeted by Regulators*, N.Y. TIMES (Sept. 8, 2019), https://www.nytimes.com/2019/09/08/technology/antitrust-amazon-apple-facebook-google.html.

143. *Id*.

144. Apple's App Store Generated About $50B in 2019 Revenue, PYMNTS (Jan. 8, 2020), https://www.pymnts.com/news/retail/2020/apple-app-store-generated-about-50b-in-2019-revenue/.

145. Apple Inc. v. Pepper, 139 S. Ct. 1514, 1523 (2018).

146. Adi Robertson, *How Apple's Supreme Court Loss Could Change the Way You Buy Apps*, 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.

147. Chris Hoffman, *Android is "Open" and iOS is "Closed"*, HOW-TO GEEK (June 20, 2017, 4:31 PM), https://www.howtogeek.com/217593/android-is-open-and-ios-is-closed-but-what-does-that-mean-to-you/ (explaining that by not being open-sourced Apple restricts their products to only be able to use one marketplace, where as Google allows a few).

148. Adi Robertson, *supra* note 146.

149. *See generally* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (holding that in antitrust actions, direct purchasers, and not others in the chain of distribution, can recover as an injured party under the Clayton Act).

system? The avenue by which Apple may be forced to remedy their alleged monopoly is one of pure speculation at this point.

It is important to note that this case is not fully decided.[150] Part of the case has been remanded to determine whether or not Apple actually controls a monopoly with its App Store.[151] Should the plaintiffs succeed in obtaining the compensation they are asking for, the payout could be astronomical.[152] If the plaintiffs get their way, they would want Apple "to compensate 'all the purchasers, wherever they may be, who bought iPhone apps for their iPhones at any time since the phone was introduced in 2007.'"[153] It is almost unfathomable how many Apps have been purchased through the App Store over that time frame.[154] Moreover, the plaintiffs want an alternative way for consumers to purchase Apps for their Apple devices.[155]

In addition to the potentially severe penalties for Apple, a loss would clearly make it easier for injured consumers to bring suits against large technology companies that operate in similar manners to Apple.[156] This is certainly something these companies will have to be wary of in the future.[157] Microsoft is not generally lumped into the Big Tech nomenclature, nonetheless it is still a large technology-based company.[158] Microsoft has even adopted Apple's business structure.[159] As an even more specific and current example, Microsoft recently "announced an Xbox without a disc drive [requiring] its owners. . . only purchase games through one digital store."[160] This effectively cuts out

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150. Adi Robertson, *supra* note 146 (explaining potential outcomes for Apple's future wins or losses at the district court).

151. *Id.*

152. *See* Brian Fung, *iPhone Users Are Taking on Apple's App Store at the Supreme Court. Here's What It Means.*, WASH. POST (Nov. 26, 2018, 11:35 AM), https://www.washingtonpost.com/technology/2018/11/26/iphone-users-are-taking-apples-app-store-supreme-court-heres-what-it-means/ ("Under the Clayton Antitrust Act, a company that is found to have violated antitrust laws could have to pay as much as three times the estimated damages to the complaining party.").

153. Adi Robertson, *supra* note 146 (explaining the method in which plaintiffs want to be compensated for their losses).

154. *See generally* Michael Liedtke, *10 Years of Apps: How Apple's App Store Changed Our World*, CHI. TRIBUNE (Jul. 10, 2018), https://www.chicagotribune.com/business/ct-biz-apple-app-store-10-years-20180710-story.html (stating that Apple, Google, Amazon and Microsoft now offer a combined total of approximately 7 million applications).

155. Adi Robertson, *supra* note 146.

156. *Id.*

157. 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, 12:58 PM), https://www.cnbc.com/2019/05/13/apple-v-pepper-supreme-court-loss-little-harm-now-long-term-threat.html.

158. David Eaves, *Just How Big Is Microsoft?*, VISUALLY (Oct. 25, 2012), https://visual.ly/community/infographic/business/just-how-big-microsoft.

159. Adi Robertson, *supra* note 146.

160. *Id.*

the used games market, requiring direct purchase through the Microsoft store, preventing alternate methods of distribution or resale.[161] By doing this, Microsoft has seemingly created a monopoly on Xbox games.[162] Customers who are forced to buy through the Microsoft marketplace would likely have a legitimate suit should Apple lose the overall *Apple v. Pepper* line of litigation, causing potentially drastic effects for another large technology company.

The seemingly drastic nature of the potential penalties that may occur should Apple lose raises the question: How important is this decision if Apple wins the overall suit? The decision is certainly still important, but perhaps less so.[163] The mere fact that the *Illinois Brick* precedent was altered is significant, as this Comment has illustrated.[164] Apple's loss would open the door for an increase in antitrust prosecutions.[165] Though this does not necessarily mean consumers will win these suits but, for the consumers, it is better to have a chance at a remedy than no chance at all.[166] Inversely, there is a concern that the change in precedent "may unintentionally expose businesses offering digital platform services to unintended liability."[167] This fallout was likely considered when the Supreme Court made their decision in *Apple v. Pepper*.[168]

V. CONCLUSION

The pioneering decision in *Apple v. Pepper* has raised, and will continue to raise, a lot of issues and questions within the landscape of antitrust law. It still remains to be seen what the ultimate effect of the decision will be, as there is still much litigating to be done. Something to focus on in the coming months is whether or not Apple's practices are found to be anticompetitive. A decision saying as much would have a momentous effect on Apple themselves and similar e-commerce companies. Should Apple win or lose, this will forever change how companies conduct business, as litigation is now lurking around every turn, waiting for anything that can be construed as a restraint on trade.

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161. *See id.*

162. *Id.*

163. *Id.*

164. *See supra* Part II (discussing Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)).

165. Adi Robertson, *supra* note 146.

166. *Id*.

167. Greg Stohr, *Supreme Court Apple Ruling May Increase Liability Exposure for Digital Platforms*, INS. J. (May 14, 2019), https://www.insurancejournal.com/news/national/2019/05/14/526348.htm.

168. *See* Apple Inc. v. Pepper, 139 S. Ct. 1514, 1525 (2019).