A Third Bite In Class Action Against Apple's App Store Practices

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On August 15, 2013, Judge Gonzalez Rogers in the Northern District of California granted Apple's motion to dismiss Section 2 monopolization and attempted monopolization claims concerning the aftermarket for iPhone applications ("apps") in *In re Apple iPhone Antitrust Litig.*, No. 4:11-cv006714 (N.D. Cal.). Plaintiffs, a putative class of iPhone app purchasers/licensees, alleged that Apple monopolized the apps market by restricting software developers' access to the Apple's "App Store," making such access contingent on a revenue sharing or "apportionment" scheme, and discouraging iPhone customers from using third party apps by asserting such downloads would void a users' iPhone warranty. The court granted Apple's motion to dismiss these claims on the basis that the complaint did not adequately establish Article III or antitrust standing. Nevertheless, leave was granted for a third complaint, styled the second amended, which was filed on September, 9, 2013.

In this most recent dismissal, the court held that Article III standing was not pled sufficiently because the Plaintiffs failed to allege that each named plaintiff suffered an injury-in-fact with respect to app purchases. Plaintiffs had alleged generally that Apple's practices reduced output of lower cost alternatives for apps, resulted in higher prices for Apple-approved apps and/or resulted in iPhones being disabled or destroyed. The court held that the complaint was deficient because it contained no allegations asserting that the named plaintiffs had purchased apps despite containing allegations as to the named plaintiffs' purchases of voice and data services. Plaintiffs argued that their allegations collectively supported the inference of injury from app purchases, including affidavits subsequently filed stating plaintiffs would have liked the option to buy apps from third parties and that if the 30% revenue share Apple negotiated from developers was found to be anticompetitive, then plaintiffs believe they were overcharged. The court was not persuaded and granted the motion to dismiss for lack of standing under Fed. R. Civ. P. 12(b)(1).

The court also granted dismissal for lack of antitrust standing which was argued under Fed. R. Civ. P. 12(b)(6) and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). *Illinois Brick* held that, except in narrow circumstances, the right to collect damages for federal antitrust violations rests only with direct purchasers of the product at issue. Apple argued that with respect to apps, developers are the potential direct victims with antitrust standing, not app purchaser plaintiffs. Apple sells the apps through its App Store which Apple argued makes plaintiffs' claims "derivative of the antecedent transaction" whereby developers agree to pay Apple 30% of the price of any downloaded apps as well as a flat $99 developer fee. The plaintiffs responded by arguing that app purchasers paid Apple directly and that the 30% charge represented a fee they were forced to pay "on top of" the cost of the app. Without reaching the merits of these arguments under *Illinois Brick*, the court granted the motion to dismiss because the complaint contained no allegation that the app prices were supracompetitive or fixed, but rather only marked-up, and the theory that consumers were forced to pay a 30% fee "on top of" the cost for apps was not contained in the operative complaint.

In granting the dismissal sought by Apple, the court also rejected plaintiffs' arguments that Apple's motion was collaterally estopped by a prior ruling and improper under Fed. R. Civ. P. 12(g)(2) because the arguments could have been raised previously. The court held the relevant prior ruling was not made on identical allegations and thus had no preclusive effect on the instant motion. It also held that Apple's motions for failure to state a claim and lack of subject matter jurisdiction were not waived if not included in their first Rule 12 motion and could be raised in a Rule 12(c) motion or at trial. However, the court noted that "Apple does not enjoy unbridled ability to file successive motions to dismiss" and in declining to rule on other grounds for dismissal rendered moot by the court's rulings discussed above, the court also admonished that "Apple *may not raise* for the first time on a future motion to dismiss any argument that was *previously available but not raised* in this Motion." (emphasis in original). Plaintiffs were given 21 days to file their second amended complaint and did so on September 9, 2013, after the court denied a stipulated extension request.