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August 17, 2018

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WLF Urges Supreme Court to Uphold Decades-Old Limit on Who May Seek Antitrust Damages

(Apple, Inc. v. Pepper)

“While legislative inaction by Congress doesn’t always equal acquiescence, Congress’s long history of inaction here, combined with its deliberate amendments to § 4 of the Clayton Act, show decisively that Congress has ratified the direct-purchaser rule.”

—Cory Andrews, WLF Senior Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation filed an amicus curiae brief with the U.S. Supreme Court today, urging the Court to reinstate the trial court’s dismissal of a class action by iPhone users seeking treble antitrust damages for Apple’s allegedly improper distribution of iPhone software applications, or “apps.”

In *Apple, Inc. v. Pepper*, the Supreme Court will decide whether downstream consumers have standing to sue under § 4 of the Clayton Act, despite the Court’s 41-year-old *Illinois Brick* rule that only the direct purchaser of a good or service may sue an allegedly abusive monopolist for damages. In its brief, WLF argues that by holding that the plaintiffs may seek antitrust damages simply because Apple “functions” as a “distributor,” the Ninth Circuit has paved the way for both direct and indirect purchasers to recover treble damages for the same alleged antitrust violation. That potential for double recovery, WLF’s brief explains, upsets the business community’s long and reasonable reliance on *Illinois Brick*’s direct-purchaser rule. Under this rule, the only parties here with standing to challenge Apple’s alleged conduct are the app developers, who are directly affected by Apple’s distribution practices.

WLF argues that Congress, through more than four decades of legislative acquiescence, has ratified the direct-purchaser rule. WLF’s brief cites no fewer than 17 legislative attempts since *Illinois Brick* was decided to have Congress repeal the rule. But in over 40 years, Congress has never done so. During that same interval, not only has Congress repeatedly amended the Clayton Act, but it has twice amended § 4 itself—retaining the very language at issue in *Illinois Brick*. WLF contends that this legislative history shows that Congress has embraced the direct-purchaser rule.

WLF’s brief also argues that the Court’s direct-purchaser rule has stood the test of time. That is because the rule recognizes that direct purchasers have the most incentive to sue for anticompetitive conduct. By concentrating the potential recovery—and thus the incentive to sue—solely in direct purchasers, the rule optimizes the deterrent effect of § 4’s treble damages remedy. In contrast, end users have very little to lose by filing frivolous antitrust claims.

Celebrating its 41st year, WLF is America’s premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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