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NEWS

Litigators of the week: Kellogg Hansen Todd Figel & Frederick

Ben Remaly
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Supreme Court justice Brett Kavanaugh is not known for an expansive view of the federal antitrust laws, but he sided with iPhone users bringing antitrust claims – a win for their counsel at Kellogg Hansen Todd Figel & Frederick.

While the ruling on Monday did not weigh in on the merits of the case, it allows the plaintiffs to continue their monopolisation lawsuit against Apple. Based on Apple's 30% fee on all sales made through its App Store, they allege Apple has used its control over the software that can be downloaded to iPhones to force consumers to pay anticompetitive prices.

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The Supreme Court took the case after both federal antitrust agencies argued that the US Court of Appeals for the Ninth Circuit had “misapplied” *Illinois Brick*, a 1977 Supreme Court ruling that held only direct purchasers can recover damages under federal antitrust law.
The plaintiffs had to overcome more than the agencies’ briefings. Solicitor General Noel Francisco used about one-third of Apple’s allotted time for oral arguments before the Supreme Court to argue in favour of the iPhone maker's interpretation of *Illinois Brick*.
“It is always difficult to win a case when the government is on the other side,” said Kellogg partner David Frederick.

While attorneys general from 30 states and the District of Columbia had urged the court to overturn *Illinois Brick* altogether, the iPhone class chose to go a different route.
“We didn’t think [that argument] was necessary to win the case,” Frederick said, as they saw app buyers having a direct purchasing relationship with a monopolist.

The case’s challenges
Frederick said his team faced three significant challenges in proving their case. The plaintiffs needed to distinguish between consumer claims and app developer claims; show who paid the 30% overcharge; and identify the role of Apple’s policy that all prices end in 99 cents.

Apple had argued that deeming app buyers to be direct purchasers would risk the type of duplicative damages that *Illinois Brick* had sought to prevent, because the app developers also could sue Apple.
Frederick credits Kellogg partner Aaron Panner with designing the plaintiffs’ response: that if app developers brought their own claims, they would be seeking remedies for separate injuries suffered in a distinct market.

Panner reasoned that the app buyers were challenging the monopoly structure of the market, in which they could buy only from the App Store. Developers would challenge Apple’s monopsony power – the fact that it is the only buyer for applications sold on Apple’s mobile devices.

In finding who suffered from Apple’s 30% fee, Frederick believes the district court had just gotten it wrong. The US District Court for the Northern District of California said that Apple was “collecting 30% of the price of iPhone applications”.

The plaintiffs said they paid higher prices for apps purchased through the App Store than they would have in a market where they could have bought apps directly from app developers.

Frederick also said the team had shown that Apple had alternative ways to price that would not have harmed consumers.

Apple had confused the courts on its 99 cent pricing policy, he said. The plaintiffs pushed back on Apple’s claims that it let developers set prices, noting that they were limiting 99% of pricing options, and that it shows that Apple is not the agent of app developers because Apple sets the pricing rules.

“I was not that surprised,” Frederick said of Justice Kavanaugh siding with the plaintiffs, as the justice appeared during oral arguments to understand what the plaintiffs were arguing and why they were arguing it.

Frederick, who has now argued 55 cases before the Supreme Court, said Justice Kavanaugh seemed clearly influenced by their brief.

As the most senior justice in the majority, Justice Ruth Bader Ginsburg had the power to assign who would write the opinion. It made sense that she had Justice Kavanaugh do so, Frederick

said, given his “very extensive” antitrust experience on the US Court of Appeals for the District of Columbia.

That experience was not particularly in favour of antitrust enforcement, however. Judge Kavanaugh dissented from the DC Circuit’s rulings to block the Whole Foods/Wild Oats and Anthem/Cigna deals. He also overturned a Federal Communications Commission decision that found Comcast had unreasonably restrained a downstream competitor.

Frederick does not see the Supreme Court ruling in *Apple v Pepper* changing the plaintiffs’ overall strategy moving forward, but he said the judgment would help to educate the lower courts on these matters.

He credited Kellogg partner Gregory Rapawy and associate Benjamin Softness for working “extremely hard” on the briefing and in preparing for oral arguments. Frederick also praised the work of co-counsel from Wolf Haldenstein Adler Freeman & Herz.

Counsel to the plaintiffs
Kellogg Hansen Todd Figel & Frederick
David Frederick, Aaron Panner, Gregory Rapawy, and Benjamin Softness in Washington, DC

Wolf Haldenstein Adler Freeman & Herz
Partners Alexander H Schmidt and Mark Rifkin in New York and Betsy Manifold, Francis M Gregorek and Rachele R Rickert in San Diego are assisted by Michael Liskow
Counsel to Apple
Latham & Watkins
Partners Daniel Wall, Christopher Yates and Sadik Huseny in San Francisco

Counsel to the United States
Department of Justice
Solicitor general Noel Francisco, assistant attorney general Makan Delrahim, deputy solicitor general Malcolm Stewart, principal deputy assistant attorney general Andrew Finch, assistant to the solicitor general Brian Fletcher and Kristen Limarzi, James Fredricks and Adam Chandler

Federal Trade Commission
General counsel Alden Abbott