

## Is Jury's Verdict In iPod Antitrust Litigation Irrelevant?



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On Tuesday, a jury returned a verdict in Apple Inc.'s favor in an antitrust case regarding the iPod. Plaintiffs counsel, it has been reported, has vowed to appeal. But do any of these events matter?

In a bizarre twist to the antitrust class action that has been pending for nearly a decade, U.S. District Judge Yvonne Gonzalez Rogers ruled Dec. 8 that the only remaining lead plaintiff in the litigation lacked standing to remain in the case. Notably, this event was not part of routine case management, class certification proceedings or even dispositive motions; the ruling took place after trial had begun.

Despite the lack of an actual plaintiff in the case, trial proceeded to a verdict. Moreover, the judge indicated that she would allow the substitution of at least one new class representative, presumably with provable standing. This case, therefore, presents the stark contrast between the broad discretion of courts to organize and manage cases, especially complicated ones, against the federal courts' limited power to hear cases as cabined by the Article III standing requirement of the Constitution.

### Apple's Alleged Monopoly Maintainance

The case, at least by the beginning of trial, centers on Apple's decision during a portion of the 2000s to limit both the use of digital music sold by Apple and

the performance of music on the Apple iPod to the Apple ecosystem, to the exclusion of other forms of digital music and devices. The operative complaint alleges that Apple's operation of such a digital-music, closed system was intended to and in fact maintained a monopoly in both sets of markets. In time, Apple abandoned its effort to maintain a closed system, and music interoperability has become the norm.

### The Named Class Representatives Are Found to Lack Standing

Originally filed in 2005, the litigation ultimately proceeded as a set of consolidated class actions of direct purchasers, including both individuals and companies. However, plaintiffs' counsel sought and obtained certification of a class with only three named representatives, all consumers. Apparently the time period of Apple's alleged anti-competitive acts also was shortened during the certification process.

On the eve of trial, however, Apple's counsel notified that court that none of the class representatives had purchased an iPod during the narrowed time period in dispute. After a brief investigation, the court agreed and ultimately all the named plaintiffs were dropped from the suit. Because none had actual skin in the game, none had an injury to remedy — and thus all lacked "standing."

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### Standing in Its Many Forms

The legal concept of standing, broadly speaking, is the requirement that a plaintiff invoking the powers of a court has a concrete claim to a remedy for some harm to that plaintiff. But the standing requirement has many sources and, for example, may be based upon a court's prudential considerations or statutory limits — such as the interpretation of the antitrust laws that mandates that antitrust remedies are limited to antitrust injuries. The lowest, but yet strongest, standing bar is imposed by the Constitution's Article III requirement that there be an actual "case or controversy."

To satisfy the threshold Article III standing requirement, at a minimum, a plaintiff must have suffered some actual or threatened injury due to the alleged illegal conduct of the defendant and there must be a substantial likelihood that the relief requested will redress or prevent the plaintiffs' injury. It is black letter law that this type of standing must exist on the date the complaint is filed and throughout the litigation. Further, a plaintiff must demonstrate standing for each of his/her claims and requests for relief. A plaintiff who files a putative class action is not excused from this requirement. Article III standing goes to the very power of a federal court to act; without such standing, there is no subject matter jurisdiction.

### Can A Lack of Article III Standing Be Cured?

Plaintiffs (or their counsel), when faced with the possibility of having a case being dismissed because of a standing deficiency of the existing plaintiff or plaintiffs, including class representatives, have

argued that the lack of standing may be remedied either through amendment or the intervention of new parties. Although it is not clear what procedural grounds were being asserted in the iPod case to add a substitute class representative, existing case law suggests that either alternative may be unavailable as a matter of law. Courts encountering the situation of a class representative without standing have generally concluded that the absence of a lead plaintiff with standing deprives the court of jurisdiction to consider a motion to intervene or file an amended pleading adding a new plaintiff with standing.

Because Article III standing is a jurisdictional requirement that cannot be waived, courts have held that a plaintiff without standing to file a complaint similarly lacks standing to make motions in an effort to cure the jurisdictional deficiency. Notably, this principle has been applied by courts even when the suit was brought as a putative class action and non-named class members might have had standing. The holdings of these cases flow from the fact that a court without jurisdiction has only the authority to dismiss the case; any orders or judgments entered by a court that lacks jurisdiction are void.

Courts have also held that the intervention or substitution of a new party cannot cure an existing and fatal standing defect. The general reasoning appears the same; as the court lacks subject matter jurisdiction, it lacks the power to consider the question of whether new parties can be added.

These situations can be compared to those in class actions in which the adequacy — but not the

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standing — of the named plaintiff is questioned. Courts freely allow the intervention of additional class representatives if existing representatives are found inadequate. However, where the class representative lacks standing, courts have concluded that they have no option but to dismiss the case because they lack power to act.

### **The Apple Litigation Proceeded Regardless**

The trial court in the iPod litigation elected to proceed with trial of the case, a decision that gives credit to the no doubt extensive investment of time and effort in the case by the court and the parties. Dismissal of the case on subject-matter jurisdiction grounds would resolve little and, at least in theory, could allow another “me-too” suit to be filed because the dismissal would likely have no preclusive effect and the statutes of limitations may have been tolled during the pendency of the original suit.

Moreover, courts typically have broad discretion to manage a case within the structure provided by the Federal Rules of Procedure. Indeed, the Federal Rules require that they be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding. Getting to the merits this far into the game seems to meet those prudential goals.

Nonetheless, if the case now tried to a verdict is a nullity because the court had no power to hear it, was allowing it to proceed any more efficient of a result? Apple's win at trial may have no preclusive effect, and the court and the jury's work will have been wasted. And, if there is an appeal, regardless of the parties' arguments, the Ninth Circuit will have

to determine if it has jurisdiction. Courts are obligated to do so and the issue cannot be waived. The Ninth Circuit, in that case, will have to weigh pragmatic considerations (which often drive the outcome of procedural issues in class or multi-district litigation) against the constitutional-based requirement that there must at all times be a plaintiff with standing in order for the court to have jurisdiction to consider motions filed in the case, including an appeal.

Whatever the ultimate result of the controversy, the example of a class action proceeding for years against an iconic American brand-name company without any plaintiff that had an interest in the outcome surely will be fodder for those who argue that the class action system is often run for the benefit of lawyers as opposed to actual injured consumers.

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