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An epic battle: the *Epic Games v. Apple* antitrust decision

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Recently, District Court Judge Yvonne Gonzalez Rogers issued her long-awaited decision in the *Epic v. Apple* antitrust case. After a bench trial, the Court ruled for Apple on all counts except with respect to a violation of California's Unfair Competition Law ("UCL").

While Apple largely defeated Epic's claims, it remains important to note that the Court ruled for Epic in a significant way — holding that Apple's anti-steering provisions were anticompetitive and violated California law.

By way of background, Epic Games, creator of the blockbuster gaming hit *Fortnite*, sued Apple last fall alleging violations of federal and California antitrust laws and California's UCL, claiming that Apple was an illegal monopolist and was unreasonably restraining trade.

Epic made *Fortnite* available on iOS devices (iPhones and iPads) which generated "an immensely profitable revenue stream" for both Epic and Apple. Under Apple's contracts with Epic, Apple received a 30% commission on every *Fortnite* purchase made through the App store.

Over time, however, Epic wanted Apple to reduce its commission fee and to allow consumers of *Fortnite* to be able to make in-app purchases through Epic's own competing game store. When Apple refused, Epic chose to act unilaterally and introduced a "hotfix" software code that would enable additional payment methods for the iOS version of *Fortnite* to consumers.

The Court found that Epic failed to demonstrate that there was a restriction in output in mobile gaming transactions — a fatal flaw in demonstrating monopoly power.

After Epic initiated the alternative payment method without Apple's consent, Apple quickly responded and removed *Fortnite* from the App store. Epic responded by immediately filing its antitrust lawsuit (which it had prepared in advance) and Apple, in turn, counterclaimed and sued Epic for breach of contract.

In a lengthy opinion, the Court carefully considered the evidence presented and the law. The Court initially defined the product market to determine the area of effective competition. In a somewhat unusual step, the Court refused to apply either of the competing market definitions proffered by Epic or Apple; instead, the Court found that the evidence supported the existence of an alternative mobile gaming transactions market.

With respect to proving an unlawful restraint of trade in the iOS app distribution aftermarket and in the iOS in-app payment solutions aftermarket, the Court found that Apple's app distribution restrictions do have some anticompetitive effects.

The Court next analyzed Apple's market share in that mobile gaming market and determined it to be between 52% to 57%. While the Court found Apple's market share provided it with considerable market power, it concluded that "Apple's market share is below the general ranges of where courts found monopoly power."

Nevertheless, the Court considered additional direct and indirect evidence to determine whether Apple maintained an unlawful monopoly or unreasonably restrained competition. The Court found that Epic failed to demonstrate that there was a restriction in output in mobile gaming transactions — a fatal flaw in demonstrating monopoly power.

With respect to indirect evidence, the Court found the record was undeveloped and mixed given that neither party analyzed the same product market the Court adopted. In short, the Court stated that it could not conclude that Apple had monopoly power in the mobile gaming market but it did find that "Apple is near the precipice of substantial . . . monopoly power, with its considerable market share."

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The Court found that Apple's 30% commission rate is seemingly arbitrary and untethered to market forces; yet it allows Apple to collect "extraordinary profits" and that the high commission rates impact both developers and consumers when the costs are passed on.

Additionally, the Court found that Apple was restricting developers from opening competing game stores and competing for other developers and users on price. However, at least with respect to the traditional antitrust claims, the Court found that Apple offered procompetitive justifications for its conduct based on concerns for security and with respect to intellectual property rights and therefore did not unreasonably restrain trade.

In a groundbreaking ruling, the Court found that Epic had proved a violation of California's UCL — which prohibits unlawful, unfair or fraudulent business practices.

The Court also found that Epic failed to prove unlawful maintenance of monopoly power in the iOS App Distribution Market and in the iOS In-App Payment Processing Market because Epic failed to prove Apple has monopoly power in these markets (again because Apple's market share was below the 70% figure often required to prove monopolization under modern case law).

Epic additionally failed to prove Apple's restrictions on the distribution of apps and the use of non-in app payment processors were anticompetitive. The Court also denied Epic's claim that Apple denied it of an essential facility in the iOS App Distribution Market for failure to allege monopoly power in that market or that the iOS platform is an essential facility.

As for Epic's antitrust tying claim — that Apple is forcing distributors who use the iOS app distribution platform to also use Apple's own in-app payment processor — the Court ruled the claim could not survive because these are not separate and distinct products (a fundamental requirement for a tying claim). Instead, the Court found the products are integrated together into the iOS devices.

But notwithstanding these adverse findings on the traditional antitrust claims, all was not lost for Epic. In a groundbreaking ruling, the Court found that Epic had proved a violation of California's UCL — which prohibits unlawful, unfair or fraudulent business practices.

The Court noted the breadth of the UCL statute, that it is equitable in nature, and found that Apple's conduct, while not rising to the level of a traditional antitrust violation, nevertheless violated the UCL's unfair prong.

The Court focused on Apple's anti-steering provisions which prohibit app developers from including "buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than in-app purchases"; the Court found these anti-steering provisions unlawful particularly as they assist Apple in maintaining high commissions and prices.

After finding liability against Apple on the UCL claim, the Court issued a nationwide injunction enjoining Apple from prohibiting developers to direct consumers to other purchase mechanisms outside the App Store.

Yet, despite this significant win for Epic, the Court addressed Apple's counterclaims and ruled that Epic had breached its contract with Apple in applying its hotfix and that none of Epic's defenses applied. The Court awarded Apple monetary damages for Epic's breach and stated that "[u]limately, Epic Games overreached."

While ultimately a mixed result for Epic, the opinion is important because it provides a roadmap for other app developers to potentially bring antitrust claims against Apple, most notably on a theory that Apple's 30% commission is an unreasonable restraint of trade that cannot be justified. It also opens the door to other plaintiffs who may not be able to meet the high bar for proving a traditional antitrust claim to successfully bring a claim under California's UCL.

Apple will undoubtedly appeal Epic's victory under the UCL (we can expect appeals from both sides) and the Ninth Circuit will be called upon to address Judge Gonzalez Rogers' decision. Indeed, given the groundbreaking nature of the Court's ruling on the UCL — we are aware of no other decision that has similarly found a violation of the UCL after rejecting a traditional antitrust claim — it seems entirely possible that the Ninth Circuit could certify a question to the California Supreme Court to address the scope of the UCL in this circumstance. And so, we fully expect this epic battle to continue.

About the authors

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