An Epic Ruling: *The Epic Games v. Apple* Verdict Deals Apple a Big-Little Victory

By NICOLETTE J. ZULLI and CAMERON J. ASBY

"Success is not illegal," wrote U.S. District Judge Yvonne Gonzalez Rogers in handing down her decision on September 10, 2021 in the hotly charged, yearlong battle between Apple and Epic Games.[1] "Apple enjoys considerable market share of over 55% and extraordinarily high profit margins, [but] these factors alone do not show antitrust conduct," she wrote.[2] However, the U.S. District Court for the Northern District of California held, "without information, consumers cannot have a full understanding of costs. Apple contractually enforces silence, in the form of anti-steering provisions, and gains an [unlawful] competitive advantage [in doing so]."

On principle, and in an attempt to garner a coalition against the tech giant, Epic Games is among the most prominent companies to challenge Apple's control of its iPhone App Store. Apple has strict rules for its app store and requires all software developers to use its in-app payments system, which takes between 15% to 30% of each transaction—known as the "Apple Tax."[3]

The Players

Epic Games, Inc., the plaintiff, is an American video game and software developer. Epic operates Fortnite, one of the world's largest games with over 350 million accounts and 2.5 billion friend connections.[4]

Apple Inc. is one of the most valuable companies in the world. Apple introduced its app store in 2008, and since that time, its in-app purchase (IAP) mechanism has offered customers extra content and features directly within a given app, available on all Apple platforms through the Apple App Store.[5]

Prior to this litigation, Apple's app store rules forced developers who make software for iOS to follow its rules and use IAP, which charges a commission or transaction fee on every digital purchase.

The Battle

With some exceptions, Apple essentially gets a 30% non-negotiable slice of each payment as commission.[6] Likewise, the Google Play Store has a similar policy and fees.[7]

On August 13, 2020, Epic updated the Fortnite app on both the iOS and Android platforms, which allowed consumers to bypass Apple's app store and pay Epic directly for in-app currency at a discount.[8] This option allowed Epic to skirt Apple's app store rules that demanded payments go through the app store payment system, paying a 30% fee in the process.[9]

In response, Apple pulled the game from the app store within hours of the update's appearance for violating the app store guidelines.[10]

The same day, Epic Games filed an antitrust suit against Apple in the U.S. District Court for the Northern District of California in retaliation for pulling the game, alleging violations of federal and state antitrust laws, and California's unfair competition law, based on Apple's operation of its app store.[11]

"Broadly speaking," the Court explained, "Epic Games claimed that Apple is an antitrust monopolist over (i) Apple's own system of distributing apps on Apple's own devices in the App Store and (ii) Apple's own system of collecting payments and commissions of purchases made on Apple's own devices in the App Store."[12]

The aim of Epic's lawsuit was to shed light on Apple's alleged anti-competitive App Store policies and beg the question: do these policies illegally stifle competition and consumer choice?

The 16-day trial, with over 900 exhibits, took place in Oakland, California in May 2021 and included both company CEOs testifying in open court.[13]

A Partial Apple Victory

On September 10, 2021, the Court handed down its much-anticipated 185-page order, deciding that while Apple is not considered a monopoly, and *did not* engage in anti-trust behavior on any of the ten counts, Apple's conduct in enforcing anti-steering restrictions is *anticompetitive*.[14]

Apple won on nine of the ten counts against it, including a breach of contract allegation that stemmed from Epic deciding to enable alternative payments for its Fortnite players. Because it breached a legal contract with Apple, Epic will owe the company 30% of the $12 million it collected when it introduced an alternative payment system onto the iPhone version of Fortnite, the Court held. Judge Rogers further ruled that because Epic failed to prove that Apple is a monopolist, it owes Apple revenue commissions as back payment.

But perhaps most striking, Judge Gonzalez Rogers found that while marketplace owners such as Apple can set their own marketplace terms, Apple must end its "anti-steering" practices, which constitute an unreasonable restraint on competition and harm consumers due to "lack of information and transparency about policies which affect their ability to find cheaper prices, increased customer service, and options regarding their purchases."[15]

In so holding, the Court permanently enjoined Apple from prohibiting developers from including external links or other calls to action that direct players to alternative payments. The injunction was set to go into effect on December 9.

On October 8, 2021, Apple filed a notice of appeal, asking for a stay on the injunction.[16] If Apple wins the stay, which was scheduled to be decided by the appellate court in November, a rule change potentially allowing developers to circumvent app store fees of 15% to 30% may not take effect until appeals in the case have finished—a process that could take years.[17] Epic Games has likewise filed an appeal of the ruling.

The End Game

From a practical standpoint, the verdict has further implications for other antitrust suits and the gaming industry at large.

As Judge Gonzalez Rogers noted, "[b]oth Apple and third-party developers like Epic Games have symbiotically benefitted from the ever-increasing innovation and growth

in the iOS ecosystem."[18] This case is a pivotal conflict between a platform owner and a powerful game company that could set the tone and rules of engagement and competition in an era filled with giant tech and game companies.[19]

Indeed, Congress has introduced legislation to rein in the tech giant's strict app store policies. In February 2021, Epic Games filed an antitrust complaint against Apple in Europe, which tracks its U.S. case; the outcome is yet to be determined. Similarly, Epic sued Google over its control of the Play Store for Android phones, but that case has not yet gone to trial.

In fact, even before the *Epic* ruling came down, Apple began instituting major app store policy changes, allowing developers to email their users directly about non-Apple payment options to avoid paying Apple's commissions.[20]

While Apple largely won the U.S. battle, it is unclear whether it will win the ongoing war.

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Endnotes

1. Rule 52 Order After Trial on the Merits, *Epic Games, Inc v. Apple Inc.*, 493 F. Supp. 3d 817, No. 4:20-cv-05640 (N.D. Cal. Sept. 11, 2021).
2. *Id.*
3. Kif Leswing, *Apple Can No Longer Force Developers to Use In-app Purchasing, Judge Rules in Epic Games Case*, CNBC (Sept. 10, 2021, 4:04 PM), https://www.cnbc.com/2021/09/10/epic-games-v-apple-judge-reaches-decision-.html.
4. *About Epic Games*, EPICGAMES, https://www.epicgames.com/site/en-US/about (last visited Oct. 25, 2021).
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6. *Id.*
7. *Id.*
8. Malcolm Owen, *Epic Games vs. Apple Trial & Verdict – All You Need to Know*, APPLEINSIDER (Sept. 11, 2021), https://appleinsider.com/articles/20/08/23/apple-versus-epic-games-fortnite-app-store-saga----the-story-so-far.
9. *Id.*
10. *Id.*
11. *Epic Games, Inc v. Apple Inc.*, 493 F. Supp. 3d 817, No. 4:20-cv-05640 (N.D. Cal. Aug. 13, 2020).
12. Rule 52 Order After Trial on the Merits at 2, *Epic Games, Inc v. Apple Inc.*, 493 F. Supp. 3d 817, No. 4:20-cv-05640-YGR (N.D. Cal. Sept. 10, 2021).
13. Leswing, *supra* note 3.
14. Rule 52 Order After Trial on the Merits, *Epic Games, Inc v. Apple Inc.*, 493 F. Supp. 3d 817, No. 4:20-cv-05640 (N.D. Cal. Sept. 10, 2021).
15. *Id.*
16. Notice of Appeal, *Epic Games, Inc v. Apple Inc.*, 493 F. Supp. 3d 817, No. 4:20-cv-05640-TSH (N.D. Cal. Oct. 8, 2021).
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18. Rule 52 Order After Trial on the Merits, *Epic Games, Inc v. Apple Inc.*, 493 F. Supp. 3d 817, No. 4:20-cv-05640 (N.D. Cal. Sept. 10, 2021).
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20. Press Release, Apple, US Developers Agree to App Store Updates that Will Support Businesses and Maintain a Great Experience for Users (Aug. 26, 2021) (on file with author).

The Fifth Circuit Realigns Itself with the Supreme Court in *Sanchez v. Smart Fabricators*

By Melissa Vest

In *Sanchez v. Smart Fabricators of Texas, LLC*, a three-judge panel was bound by Fifth Circuit precedent in its holding that Sanchez possessed seaman status under the Jones Act as an injured welder on a jack-up oil rig. However, the panel questioned the precedent based on Supreme Court case law and recommended the Fifth Circuit conduct a re-hearing en banc to consider its precedent in comparison to the line of cases decided by the Supreme Court.[1]

Gilbert Sanchez was employed as a welder-fitter by Smart Fabricators. He worked on two different rigs while employed for a short time by Smart Fabricators. The first drilling rig, owned by Enterprise Offshore Drilling, LLC, was jacked-up next to a dock—a few steps on a gangplank and Sanchez was on land at the end of each workday. Approximately 72% of Sanchez's total work time with Smart Fabricators was on this rig. The second rig, also owned by Enterprise, was a jacked-up rig on the Outer Continental Shelf, and that is where the injury occurred. Sanchez was still aboard this rig when a tug began moving it to its new location, also on the Outer Continental Shelf. Sanchez was injured on this second rig when he tripped on a pipe welded to the deck of the drilling rig. Sanchez spent approximately 19% of his total work time with Smart Fabricators aboard this second rig.

Sanchez brought a negligence suit in state court against his employer and Enterprise under the Jones Act. The Jones Act generally prohibits the removal of a suit to federal court, but there is an option for a United States district court to conduct a summary judgment-type inquiry to determine whether the case should be remanded or whether it should be dismissed on summary judgment. The United States District Court for the Southern District of Texas conducted such an inquiry and determined summary judgment was appropriate on the basis that Sanchez was not a seaman.

After the *en banc* re-hearing, the panel unanimously issued its decision, aligning Fifth Circuit jurisprudence with that of the Supreme Court related to what qualifies an employee seaman status. In prior Fifth Circuit cases, the court struggled with the Supreme Court's two-part test issued in *Chandris, Inc. v. Latsis*, as to whether (a) the employee's duties contribute to the function of the vessel or the accomplishment of its mission, and (b) the employee has a connection to a vessel (or identifiable fleet of vessels) in navigation that was substantial in both duration and nature.[2] When considering the first prong of this test, the Fifth Circuit has traditionally relied on the simple question as to whether the employee does the ship's work.[3]