An ALM Publication

THE AMERICAN LAWYER

THE AM LAW LITIGATION DAILY

Litigators of the Week: Apple Turns to Gibson Dunn and Paul Weiss to Fend Off Fortnite Maker's Antitrust Challenge

By Ross Todd
September 17, 2021

"Success is not illegal."

That's the boiled-down four-word version of the 180-page ruling that Judge Yvonne Gonzalez Rogers delivered this week in the closely watched antitrust showdown between Apple and Fortnite maker Epic Games. While much of the early coverage focused on the nationwide injunction the judge issued allowing developers to offer ways to potentially bypass Apple to pay for their apps and services and communicate with customers, the ruling was pretty clearly a win for Apple and its legal team, led by **Richard Doren** and **Veronica Moyé** of **Gibson, Dunn & Crutcher** and **Karen Dunn** of **Paul, Weiss, Rifkind, Wharton & Garrison**.

Don't believe me?

Epic CEO Tim Sweeney said himself last week that the ruling "isn't a win." Epic filed its notice of appeal shortly thereafter.

Litigation Daily: I think we all know who your client is. What was at stake for Apple here?

Veronica Moyé: Nothing less than its business model. Epic's lawsuit attacked Apple's ability to offer developers and consumers a curated App Store and a protected ecosystem. The restrictions and safeguards challenged by Epic were put in place at the time the iOS ecosystem was created well over a decade ago. And that framework, along with Apple's relentless commitment to investment and innovation, helped drive the popularity and historic success of the iPhone and iPad. As the court found, "success is not illegal." Moreover, both consumers and app developers have benefitted hugely from the growth of the iOS ecosystem.

Karen Dunn: When the iPhone was first invented and third-party developers were clamoring for access to the iOS platform, Steve Jobs said: "We are trying to do two diametrically opposed things at once: provide an advanced and open platform to developers while at the same time protect iPhone users from viruses, malware, privacy attacks, etc…This is no easy task." Apple succeeded in doing the diametrically opposed, the virtually impossible task, and this case was a referendum on that.

Courtesy photos

(L-R) Richard Doren and Veronica Moyé from Gibson Dunn and Karen L. Dunn from Paul Weiss.

Who all was on your trial team and how did you divide up the work?

Rich Doren: Our trial team was a combination of lawyers from Gibson Dunn and Paul Weiss. Karen gave the opening, while Veronica, **Dan Swanson** and I handled the closing. As for witnesses, I put on Phil Schiller who, as one of the creators of the App Store, was Apple's primary fact witness; I also cross-examined Epic's lead witness, CEO Tim Sweeney. Veronica presented Tim Cook and Trystan Kosmynka, who runs Apple's App Review process, and Karen cross-examined Steve Allison, head of the Epic Games Store, and Dr. Susan Athey, one of Epic's experts. We each took other witnesses as well.

Beyond the three of us, Gibson Dunn partners Dan Swanson and **Cindy Richman**, who were the masterminds of the legal strategy underlying our case, examined the expert economists, while **Jason Lo** handled the fact and expert witnesses on security and privacy issues. Gibson Dunn's **Jay Srinivasan** examined several witnesses including two App Store executives, Epic's head of business strategy, and third parties called by Epic. Paul Weiss's **Meredith Dearborn**

also cross-examined a third-party witness. Additionally, General Counsel **Kate Adams** was on hand throughout the trial and her incredible team of in-house counsel did spectacular work partnering with us on all aspects of the trial, including preparing the Apple witnesses.

Describe for me the COVID protocols that were in place for the bench trial in Oakland. How did they affect how you put on this case?

Dunn: We are very grateful for the court's considerable efforts, which enabled us to stay safe and try this very important case in-person. The courtroom looked a bit like a hockey rink — equipped with plexiglass around the bench, the clerk and the court reporter, as well as the witness stand. It took a few turns at the podium to learn where to stand to see the person you were talking to through the reflections. Judge Gonzalez Rogers let us wear face shields rather than masks when arguing or examining witnesses, which made a huge difference. You could almost forget you were wearing a face shield, while you could never forget you were trying to talk and breathe through a mask. The number of people in the courtroom was very limited — just a few people for each side — which meant we had to plan ahead. Once we got used to the protocols, though, it all felt strangely normal. We were all so grateful to actually be in a courtroom again that a little plexiglass and a few face shields were a small price to pay!

The public and press were able to dial in to a dedicated phone line to listen in on proceedings here. Did that affect in any way the feedback you were getting from your colleagues across the country, your client or other interested onlookers?

Doren: The public access definitely added some unique elements to the trial. Even though the courtroom was almost empty (just two reporters were permitted to attend each session), testimony was being reacted to on blogs and Twitter in real time. It also meant the entire trial team could listen in to the trial from our war room, so people could hear what issues were getting a lot of air time as they prepared for upcoming witnesses. It also meant team members who could not otherwise have attended trial, even in a pre-pandemic world, got to participate. And while we thought an empty courtroom would make it difficult to react to the unexpected, the phone access really eliminated that as an issue. There were multiple instances where I would receive text messages of transcript quotes or exhibit references while arguing a point to the court. That sort of real-time support would have been difficult if not impossible in a traditional trial format; information appeared as if by magic, thanks to the remote access.

Veronica, you handled the direct examination of Tim Cook, which came late in the trial. I know Mr. Cook is accustomed to making high-pressure presentations and speaking in public, but I'm not sure he's ever had a public grilling quite like what Judge Gonzalez Rogers put him through at the end of his testimony. How did you prepare him for his first trial experience?

Moyé: The short answer is we spent a lot of time together, which was an incredible privilege. It is well known that Tim is super smart and incredibly hard-working, and for a trial lawyer preparing a witness that's a dream come true. Tim put in the work. He made it clear he was 100% committed to doing everything he could to support a win for Apple. From the time we began preparing him for his deposition in February until the day he took the stand, he was willing to give us the necessary preparation time. Importantly, Apple's in-house legal/competition teams played a key role in those preparation sessions. I think he did an outstanding job.

The judge's ruling here is a 180-page beast. Broadly speaking, what's important here for Apple in this particular case and in any future potential antitrust challenges to the app store model?

Dunn: It's 180 single-spaced pages! I think we are all still reading and re-reading it. But the key to me is that Epic came in asking for two things: First, sideloading – where third-parties could put unreviewed and untested software directly onto the iPhone. Second, alternative in-app payment systems – designed to bypass Apple's commission. The court said no to both. The court found that the law did not support requiring Apple to give away its innovations and that Apple's conduct was based on its business decision to provide a safe, secure and quality product. Encouraging innovation, privacy and security, and consumer choice – those are all procompetitive benefits under the law.

A lot of the initial coverage of the decision focused on the nationwide injunction forcing Apple to allow developers to offer alternative ways to potentially bypass Apple to pay for their apps and services. How surprised were you to see the judge find that the company's anti-steering provisions violated California's Unfair Competition Law?

Doren: We were amazed by how much of the initial press coverage was dead wrong, suggesting that Epic had won when in reality the decision validates Apple's business

model and rejects all of Epic's central challenges. Apple won all of the antitrust claims. It won its breach of contract claims. Epic owes Apple millions of dollars. In my view, there's no confusion: This is a huge victory for Apple.

As for the UCL findings, the judge expressed reservations about the anti-steering provisions during trial, even though they are common for platform businesses like the App Store. But anti-steering was not central to Epic's case. Epic's mission was to convince the court to strike down Apple's in-app payment rules so that it could offer its own payment mechanism – like the one it planted through its "hotfix" scheme. It failed.

The court did express concern with the ability of developers to communicate with consumers. It's important to note that, as part of its settlement with a putative class of app developers, Apple has agreed to clarify its guidelines and permit developers to communicate with consumers who voluntarily consent to share their contact information.

What are the lessons that other antitrust defendants can take from Apple's experience here?

Moyé: There's a lot that can be learned about how to develop a factual record and apply two-sided transaction platform economic principles like those identified by the Supreme Court in *Ohio v. American Express*. This was really the first time we've seen that in practice at trial. Given the intense worldwide scrutiny of platforms, I doubt it will be the last. And it was particularly informative (and dramatic) because it put Apple's economic expert on the subject, Professor Schmalensee, at odds with his longtime collaborator and Epic's expert, Dr. Evans. The court accepted Professor Schmalensee's testimony and recognized that the App Store is a two-sided transaction platform.

Dunn: Related to that point, the court's decision is a powerful reminder to all of us that courts are skeptical of expert opinions that are unsupported by facts. Economists must tether their theoretical opinions to the evidentiary record. My cross of Dr. Susan Athey, a leading economist, was designed to demonstrate to the court that her opinions were not based in fact or on any evidence. The court's dismissal of her opinions shows that theoretical opinions are not sufficient basis for a ruling that will have enormous implications in the real world.

What will you remember most about this matter?

Moyé: The incredible and unprecedented diversity of both our outside counsel and Apple teams. I had so many meetings with witnesses where every lawyer participating was a woman and several were also women of color. The trial showcased skills from so many lawyers from divergent backgrounds and life experiences. It felt fitting that such an important, cutting-edge case would be handled by a modern, fully inclusive team and be decided by a judge who is also a woman of color.

Dunn: One of the more memorable points for me was just before we were to give the opening statements, hundreds of people had called into the public phone line to listen in, and on that first day a technical glitch made it so people on the line could actually talk to each other. Some pretty zealous Fortnite fans were on the line discussing in very passionate terms the fate of Fortnite in the App Store. The proceeding had to be delayed until that issue could be resolved but it provided everyone with some needed comic relief at the start of this huge trial.

Doren: I feel a little sheepish about this being my most memorable moment, given all that was at stake. But part of my cross-examination of Epic's head of marketing included a virtual tour through Fortnite; this in turn introduced the court to a Fortnite character called Peely – an anthropomorphic banana. I joked that since we were in federal court we should put Peely in a suit, so we used the Agent Peely ensemble complete with tuxedo. On redirect, counsel for Epic expressed indignation that I had suggested there was something inappropriate about the unclothed version of Peely, to which the witness responded "It's just a banana, ma'am." This exchange launched a number of real-time blogs and tweets about the naked banana. The exchange even made it into Judge Gonzalez Rogers' opinion (at footnote 43), where she recognized the Peely exchange as a good-natured attempt at levity during a very serious proceeding.

On a more serious note, one thing that all of us will remember is the dedication and commitment that Apple brought to this matter. It was a true privilege to represent them.