

# Daily Journal

February 9, 2022

## Top Verdicts

The largest and most significant verdicts and appellate reversals in California in 2021

### TOP DEFENSE RESULTS

## Epic Games Inc. v. Apple Inc.

### Case Info

**CASE NAME:** EPIC GAMES INC. V. APPLE INC.

**TYPE OF CASE:** ANTITRUST

**COURT:** NORTHERN DISTRICT

**JUDGE(S):** U.S. DISTRICT JUDGE YVONNE GONZALEZ ROGERS

**DEFENSE ATTORNEYS:**

Gibson, Dunn & Crutcher LLP, Richard J. Doren, Daniel C. Swanson, Cynthia E. Richman, Jay P. Srinivasan, Veronica S. Moyé, Mark A. Perry, Jason Lo, Ethan Dettmer, Rachel Brass, Theodore J. Boutros Jr., Zainab N. Ahmad, Dana L. Craig, Jennifer J. Rho, Betty X. Yang, Eli M. Lazarus, Caroline Ziser Smith, Jillian N. London, Jonathan N. Soleimani, Jennifer K. Bracht, Julian W. Kleinbrodt, Joshua M. Wesneski, Andrew J. Wilhelm, Henry H. Cornillie, Lauren Dansey, Ana Mihanovic, Sarah Akhtar, Brian W. Anderson, Ryan Azad, Anna L. Casey, Soolean Choy, Samuel Han, Daniel M. Rubin, Anthony D. Bedel, Zachary B. Copeland, Alexander N. Harris, Dana Li, Paige E. Muhlestein, Harry R. S. Phillips, Warren S. Loegering, David W. Rubin, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Karen L. Dunn, Meredith R. Dearborn; Apple Inc., Kyle D. Andeer, Heather Grenier, Jennifer Brown, Sean P. Cameron, Sean Gareth Dillon, Andrew M. Farthing, Stephanie Fine, Katherine Anne Kaso-Howard, Scott B. Murray

**PLANTIFF'S ATTORNEYS:**

Cravath, Swaine & Moore LLP, Christine A. Varney, Katherine B. Forrest, Gary A. Bornstein, Yonatan Even, Lauren A. Moskowitz, M. Brent Byars; Faegre Drinker Biddle & Reath LLP, Paul J. Riehle



RICHARD J. DOREN



DANIEL G. SWANSON



VERONICA S. MOYÉ

Apple Inc. and its large legal team — led by Richard J. Doren and Veronica S. Moyé of Gibson, Dunn & Crutcher LLP and Karen L. Dunn of Paul, Weiss, Rifkind, Wharton & Garrison LLP — won on nine out of 10 counts in a contentious and closely-watched legal battle with Fortnite developer Epic Games Inc.

When Epic Games implemented changes in Fortnite to bypass the App Store payment system in August 2020, Apple blocked the game from its store. Epic then sued, claiming that Apple was unfairly monopolizing the mobile app space with its iOS ecosystem.

Epic objected to App Store policies that included a 30% commission for in-app purchases. Apple filed a countersuit, asserting that Epic breached the terms of its developer agreement.

At stake in the case, Dunn explained, was Apple's business model, which has "worked very well for consumers, giving them access to not just gaming apps but all types of apps, in a way that they can trust and find reliable," she said.

In September, U.S. District Judge Yvonne Gonzalez Rogers of Oakland upheld the App Store's structure as legal. She rejected Epic's claims that Apple is a monopoly and ordered the game maker to pay damages for violating its developer agreement.

But the judge, in an injunction, also ordered Apple to remove its policies banning developers from telling users about alternatives to Apple's in-app purchase system. *Epic Games*

*Inc. v. Apple Inc.*, 20-CV-05640 (N.D. Cal., filed Aug. 13, 2020).

"The iPhone was designed to be more secure than any other mobile device. That has been the hallmark of the brand since its inception," Moyé said.

"What Epic wanted to do was enforce a whole different approach, much more like an Android device, where users can download anything without having to go through the App Store security process," Moyé said. "Apple rightly perceived it as a fundamental threat to their brand and business model."

The case was also important as an antitrust precedent, Moyé added. It was the first time the U.S. Supreme Court's landmark 2018 decision on two-sided transaction platform economics — *Ohio v. American Express Co.*, 138 S. Ct. 2274 — had been applied in a trial.

Gonzalez Rogers rejected Epic's attempt to characterize the App Store as providing "distribution services" and instead held that the App Store is a two-sided transaction platform, citing the Amex decision.

Apple's strategy was to focus on the business justifications for the way it conducts business. The App Store is part of and consistent with the many protections the company has in place to protect the privacy of its device users, Doren said.

"For device users that want a more open system, there are Google and Android-based devices where they can have that. For those that want privacy and secure devices designed

to protect them in that regard, they can choose Apple," he said. "It's a differentiating feature for Apple."

Though the judge's September ruling was a win for Apple, the judge did rule the company engaged in anticompetitive conduct under California's unfair competition law.

Apple asked the judge to stay the injunction, but she refused. The 9th U.S. Circuit Court of Appeals, however, agreed in December to stay the injunction pending appeal.

Attorneys for Epic Games at Cravath, Swaine & Moore LLP and Faegre Drinker Biddle & Reath LLP did not respond to requests for comment.

Epic, in its appeal, argued that Apple's restrictions "are unnecessary to further any legitimate procompetitive purpose."

"Rather, Apple documents show it made a 'policy decision' to increase its own profits by restricting app distribution and payment solutions for iPhones," Cravath, Swaine & Moore LLP partner Katherine B. Forrest wrote in a filing last month.

"Absent these restrictions, iPhone users and app developers could use alternative app stores, and users could get apps directly from developers," she added.

Epic Games has major allies in its appeal, including the U.S. Department of Justice as well as 35 state attorneys general.

Still, Doren expressed confidence that Apple would ultimately succeed in the appellate court.

— JENNIFER CHUNG KLAM