

Antitrust Spotlight: *Epic v. Apple*

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Sizing Up the Final Challenge

by [Parker Miller](#) and [Valarie Williams](#)

To complete many, if not most, of the classic video games, the player must overcome a final obstacle or a series of obstacles using the strategies and tactics learned playing the game. With much more at stake and the world watching, Epic and Apple entered the closing arguments and post-trial briefing of their federal antitrust trial in the same position. Having listened to the other side and taken questions from the court, both sides had some idea of what arguments were interesting to the court and what needed further support.

Rather than scripted closing arguments, Judge Yvonne Gonzalez Rogers invited the parties to engage in open-ended discussion where she could ask questions (and follow-up questions) with both parties reacting to the questions and the other party's answer, often referred to as "hot tubbing." While the judge questioned both sides on a wide variety of issues, three particular themes emerged:

- **The Static Nature of the App Store.** The App Store hasn't changed much, Judge Gonzalez Rogers pointed out. She seemed hesitant to accept Apple's assertion that it was in a highly competitive environment (an argument seemingly based on Qualcomm's similar assertion that Qualcomm faced a "hyper-competitive" market in its Ninth Circuit Court of Appeals win over the Federal Trade Commission) when the fee paid to Apple for in-app purchases hasn't changed in years. Epic picked up the point, arguing that the terms and conditions of the App Store had become less friendly to app developers. When Apple tried to argue that the App Store Small Business Program was an example of a developer-friendly evolution, Epic argued that the Small Business Program is a result of litigation, not competition. The judge seemed troubled by the fact that a "competitive" market, as Apple claimed exists, had little change in fees and policies.
- **Epic's Requested Remedies.** Apple took direct aim at the scope of the remedies Epic requested. Epic is asking for a ruling that would force Apple to open up the iPhone, allowing other iOS users to download apps from other sources and preventing Apple from favoring its in-app payment system. The judge picked up the argument, asking if a U.S. court had ever enacted the sweeping changes that Epic requested. Further, the judge seemed troubled that if she ordered the remedies requested by Epic, Epic and potentially other developers would end up benefiting from Apple's investment in research and development, and resulting intellectual property, without paying for it.

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- **The Economics of the App Store for Game Developers.** During the trial, Judge Gonzalez Rogers asked Apple CEO Tim Cook pointed questions about whether game developers were actually subsidizing the entire App Store, including non-gaming apps that don't generate revenue for Apple, all so Apple could offer a more attractive hardware and software combination. As part of the closing hot-tub questioning, she further questioned whether Apple had any right to revenue after the iPhone user downloads the app. Epic argued that it was developers who kept the customers coming back, and Apple has no right to further revenue after the first download.

So will Epic make it to the final screen? Has it made it past the last obstacle? The answer will likely be more nuanced than the final triumph or failure in a video game. Judge Gonzalez Rogers seemed almost equally troubled by the lack of competition Apple faces in the App Store and by the daunting challenge of implementing the remedies requested by Epic—remedies that would have a significant effect on the business model of one of the world's largest companies. She may try to find a way to put a dent in Apple's armor without actually slaying the dragon. She asked pointed questions about the prohibition against companies even telling their customers that they can go to another device to pay for in-app purchases. She could find that provision illegal without dealing specifically with the 30% fee or opening up the iPhone to other App Stores or even opening up the App Store to other payment processors. But to invoke any remedy, she would have to find that Apple has monopoly power—a finding that would make it hard to address with only small measures. Regardless, both Epic and Apple have multiple lives in reserve. There will undoubtedly be appeals either way. And if Apple wins outright, the failure to rein in Apple under existing antitrust law will be fodder for those in Congress and state legislatures who are prepared to take the battle into their own hands.

So stay tuned—we will continue to follow this epic battle into the next round.

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