# CALIFORNIA'S UNFAIR COMPETITION LAW: AN EXISTING AND FLEXIBLE RESPONSE TO EMERGING TECH DOMINANCE ISSUES

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## CALIFORNIA'S UNFAIR COMPETITION LAW: AN EXISTING AND FLEXIBLE RESPONSE TO EMERGING TECH DOMINANCE ISSUES

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Competition and monopoly power in technology platforms have become global issues in the past decade. In many cases, challenges to those platforms have struggled to adapt the antitrust laws to new technological and economic realities. Two main solutions have arisen: writing new laws and re-invigorating existing ones. First, new legislation provides laws that specifically address issues arising in technology platforms. Second, existing law, such as California's Unfair Competition Law ("UCL"), provide effective ways to curb anticompetitive and unfair practices. This article gives an overview of proposed and enacted new legislation, and then discusses the UCL, its application in the *Epic v. Apple* decision, and its broad power to promote competition.

Monopolization of technology platforms by their owners has become a globally-recognized issue over the last decade. In many cases, enforcement actions have proven difficult, as most existing antitrust laws were written long before digital marketplaces arrived.

Two solutions have arisen: passing new legislation on the one hand, and re-invigorating existing laws on the other. On the legislative front, regulators and legislators in the U.S. and abroad have been trying to pass new laws that can further ensure competition on modern technology platforms. Foreign regulators in Europe and Asia have also enacted new legislation intended to better prevent anticompetitive conduct from platform owners.

In contrast, California's existing Unfair Competition Law ("UCL") may present an alternative route for successfully challenging anticompetitive conduct on technology platforms. As shown in the recent *Epic v. Apple* decision, more vigorous use of existing laws is another option for promoting competition, particularly where California's UCL is already broader than existing antitrust laws.

This article first summarizes legislative efforts, reviewing new laws proposed by foreign authorities, the U.S. Congress and state legislatures to address competition concerns on technology platforms. Second, it turns to California's UCL, an existing law that goes beyond the antitrust laws. It discusses the historical background of California's UCL, explains the "unfair" prong's legal framework and inherent flexibility, and considers the UCL's nationwide applicability. The article concludes by reviewing the opinion of the federal district court for the Northern District of California in *Epic v. Apple*, where the court found that Apple's conduct did not violate antitrust laws, but did violate the "unfair" prong of California's UCL.

# I. NEW LEGISLATIVE EFFORTS

### *A. Foreign Efforts*

Foreign governments have been the most successful in terms of passing new laws related to competition concerns in digital markets. In August 2021, South Korea passed a law that prohibits large app-stores from requiring that apps use their in-app purchases ("IAP") system.[2] Dutch antitrust regulators found unreasonable Apple's requirement that dating-apps use Apple's IAP system and demanded that Apple cease the practice.[3] Though Apple ceased requiring dating apps to use its IAP system, it continues to require a 27 percent commission to be paid.[4]

In addition to these narrower efforts, the EU and UK are attempting to comprehensively address digital competition through the EU's Digital Markets Act and the UK's Digital Markets Unit.

1. EU Digital Markets Act

The EU's Digital Markets Act (DMA) seeks to address the role of "gatekeeper" platforms in the digital ecosystem.[5] "Gatekeepers" are large digital platforms that meet certain financial and userbase requirements. The DMA targets gatekeepers in "core platforms," such as app stores, search engines, digital advertising, and web browsers. It would prohibit a variety of the gatekeepers' actions, such as tying app store access to the owner's IAP system, self-preferencing, or reusing private data collected in one context for another purpose. The DMA also imposes affirmative obligations: gatekeepers must ensure interoperability for certain applications and hardware, share advertising performance data, and ensure that users' access to core platforms is similar regardless of subscription level. The DMA proposes fines of up to 10-20 percent of worldwide revenue for violations of these provisions. The European Commission will have the exclusive power to enforce the DMA.

2 Jiyoung Sohn, *Google, Apple Hit by First Law Threatening Dominance Over App-Store Payments*, Wall St. J., (Aug. 31, 2021), https://www.wsj.com/articles/google-apple-hit-in-south-korea-by-worlds-first-law-ending-their-dominance-over-app-store-payments-11630403335.

3 Auth. for Consumers and Mkts., Summary of Decision on Abuse of Dominant Position by Apple, (2021), available at https://www.acm.nl/en/publications/summary-decision-abuse-dominant-position-apple.

4 Jon Porter, *Apple Proposes 27 Percent Commission in Dutch App Store Dispute*, The Verge, (Feb. 4, 2022), https://www.theverge.com/2022/2/4/22917582/apple-netherlands-antitrust-27-percent-commission-alternative-in-app-payment-systems.

5 Press Release, Eur. Council, Digital Markets Act (DMA): agreement between the Council and the European Parliament, (Mar. 25, 2022, updated May 11, 2022), available at https://www.consilium.europa.eu/en/press/press-releases/2022/03/25/council-and-european-parliament-reach-agreement-on-the-digital-markets-act/.

Originally proposed in December 2020, the DMA continues to make progress through the EU legislative process. In March 2022, the EU Parliament and Council came to a political agreement, and they released a draft version of the text in May 2022.[6]

2. UK Digital Markets Unit

In 2021, the UK government announced the creation of the Digital Markets Unit ("DMU").[7] The DMU, housed with the UK's Competition and Markets Authority ("CMA"), is tasked with overseeing regulations for the "most powerful digital firms," "promoting greater competition," and "protecting consumers and business from unfair practices." The UK government intends to empower the DMU with new legislation that address digital markets, introducing the legislation in the 2022-2023 Parliamentary session.[8]

Like the DMA, the DMU seeks to identify gatekeepers, which the DMU refers to as companies with "strategic market status" ("SMS").[9] Designated SMS companies — generally those in the digital economy with U.K. revenue over £1 billion and global revenue over £25 billion — will be required to comply with a code of conduct that ensures users are treated fairly on reasonable commercial terms, can choose freely between services provided by SMS firms and others, have access to clear, transparent information from SMS firms, and are able to make informed choices regarding services from SMS firms.[10] The DMU may impose far-reaching remedies to maintain competition in markets where SMS firms operate, and mergers involving SMS firms will be carefully reviewed by the DMU.[11]

Though the DMU is not yet fully empowered, it has already proven active using its pre-existing CMA powers. The DMU has shown great interest in the competitive implications of the mobile market in particular, as the DMU is currently investigating Apple's App Store and its IAP system, and the DMU recently published a report on the mobile ecosystem in June 2022.[12,13]

### *B. Federal Legislative Efforts*

Congress has also turned its attention towards the competitive implications of digital marketplaces. Two bills were voted out of committee in the Senate and are given the best chance of passing: the Open App Markets Act and the America Choice and Innovation Act.

In 2021, a bipartisan group of ten senators introduced the Open App Markets Act. This federal bill (1) prohibits tying IAP to access to the app store, (2) prohibits retaliation against developers offering better prices for other payment methods, (3) mandates that developers be able to freely communicate with customers, (4) prohibits using data derived from a third party app to compete with app, (5) requires that app stores permit third-party app stores, (6) prohibits unreasonable self-preferencing in app-store search, and (7) requires equal access to platform features and capabilities. This bill also exempts special-purpose hardware, such as video game consoles. While app stores could continue to charge a commission on their IAP systems, these provisions might largely eliminate Apple's and Google's ability to force their IAP system on third party developers. Beyond IAP issues, the bill might force mobile platforms to open doors into their "walled gardens," eliminating much of the platform owner's advantage.

6 *Id.*

7 Competition and Mkts. Auth., Digital Mkts. Unit, (Apr. 7, 2021) (updated July 20, 2021), available at https://www.gov.uk/government/collections/digital-markets-unit.

8 Competition and Mkts. Auth., *Digital Mkts. and the New Pro-Competition Regime*, (May 10, 2022), available at https://competitionandmarkets.blog.gov.uk/2022/05/10/digital-markets-and-the-new-pro-competition-regime/.

9 Competition and Mkts. Auth., Advice of the digital Mkts Taskforce, Appendix B: The SMS Regime: designating SMS Firms, at 22-23.

10 Competition and Mkts. Auth., Advice of the digital Mkts Taskforce, Appendix C: The SMS Regime: The Code of Conduct, (2020), at 15.

11 Competition and Mkts. Auth., Advice of the digital Mkts Taskforce, Appendix D: The SMS Regime: The Pro-Competition Interventions, (2020), at 1-2.

12 Competition and Mkts. Auth., *Investigation into Apple App Store*, (2021), available at https://www.gov.uk/cma-cases/investigation-into-apple-appstore.

13 Competition and Mkts. Auth., Mobile Ecosystems Mkt. Study, (2022).

The bill saw success in the Judiciary Committee, who voted in February to advance it on a 20-2 vote.[14] As the bill progresses, it has prompted strong reactions, both positive[15] and negative.[16] Even non-tech groups are weighing in, such as the National Taxpayers Union[17] and the American Enterprise Institute.[18] As Google and Apple defend antitrust suits filed under existing law, the Open App Markets Act may subject their platforms to a more specific set of regulations.

Another bill, the American Innovation and Choice Online Act, targets large online platform operators that engage in "self-preferencing" conduct, such as giving preference to their own products on their platform, excluding or disadvantaging competing products from other businesses on their platform, or discriminating among similarly situated users on their platform.[19] The bill also prohibits platform owners from interfering with a competing business' ability to access or interoperate with the platform, restricts the platform owner's ability to use nonpublic data generated from the platform, and prevents the platform owner from restricting a competing business' access to data the competing business generates from the platform.[20]

In June 2021, the House Committee on the Judiciary advanced the bill out of committee on a 24–20 vote. In January 2022, the Senate Committee on the Judiciary advanced the legislation on a 16–6 bipartisan vote. The bill has not yet received a floor vote in the House or Senate.

### *C. State Legislative Efforts*

Several states have considered or are considering legislation that would limit the ability of digital platform owners to act anti-competitively. These include Arizona's 2021 HB2005, Minnesota's 2022 HF1184/SF1327, and Illinois's 2022 SB3417.

These bills follow similar blueprints. First, they target large mobile app marketplaces. Arizona's HB2005 and Illinois's SB3416 apply to app stores with over 1 million in annual in-state app downloads, and Minnesota's HF1184/SF1327 applies to app stores with over $10 million in annual in-state revenue. Second, these bills create blanket prohibitions on tying access to the app store with use of the app store owner's IAP system, which usually extracts a commission of up to 30 percent for the owner. All bills prohibit tying as applied to developers, and Arizona's HB2005 and Illinois's SB3416 further prohibit it for users. The app store may not retaliate against users or developers not using its program. Finally, these bills all exempt "special purpose" app stores, or app stores for hardware built with a specific purpose, such as video game consoles and music players. Put together, these requirements might force Apple, Google, and sufficiently large desktop app stores to untie their distribution platforms from their IAP system, eliminating the app store owner's 30 percent commission for consumers.

None of these efforts have yet succeeded. The Illinois[21] and Minnesota[22] bills have lain dormant since February 2022. Though the Arizona state House passed HB2005, it never became law; the Arizona state Senate never voted on it, reportedly due to strong lobbying efforts from Apple and Google.[23] Illinois's and Minnesota's proposals have also attracted the opposition's ire, with organizations such as NetChoice[24] and the Chamber for Progress[25] advocating against passage.

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14 Lauren Feiner, *Senate committee advances bill targeting Google and Apple's app store profitability*, CNBC, (Feb. 3, 2022), https://www.cnbc.com/2022/02/03/senate-committee-advances-open-app-markets-act.html.

15 *Senate Must Pass the Open App Markets Act to Protect American Entrepreneurs and Consumers from Monopoly Power*, Am. Econ. Liberties Project, (Feb. 3, 2022), https://www.economicliberties.us/press-release/senate-must-pass-the-open-app-markets-act-to-protect-american-entrepreneurs-and-consumers-from-monopoly-power/.

16 *Open App Markets Act Full Explainer*, NetChoice, (Jan. 2022), https://netchoice.org/wp-content/uploads/2022/01/AT__-Open-App-Markets-Act-Full-Explainer.pdf.

17 Will Yepez, *App Store Bill Would Deprive Consumers of Choice*, National Taxpayers Union, (May 27, 2022), https://www.ntu.org/publications/detail/app-store-bill-would-deprive-consumers-of-choice.

18 Mark Jamison, *The Open App Markets Act Does the Opposite of What It Says*, Am. Enter. Inst., (Jan 20, 2022), https://www.aei.org/technology-and-innovation/the-open-app-markets-act-does-the-opposite-of-what-it-says/.

19 Am. Choice and Innovation Online Act, H.R. 3816, 117th Cong. (2021).

20 *Id.*

21 *Illinois Senate Bill 3417*, LegiScan, https://legiscan.com/IL/bill/SB3417/2021 (last visited July 1, 2022).

22 *SF 1327*, FastDemocracy, https://fastdemocracy.com/bill-search/mn/2021-2022/bills/MNB00036903/ (last visited July 1, 2022).

23 Nick Statt, *It's Game Over for Arizona's Controversial App Store Bill*, The Verge, (Mar. 31, 2021), https://www.theverge.com/2021/3/31/22357121/arizona-hb2005-app-store-bill-dead-apple-google-big-tech-lobbying.

24 Carl Szabo, *NetChoice Opposition to SB3417*, NetChoice, (Mar. 8, 2022), https://netchoice.org/testimony/netchoice-opposition-to-illinois-sb-3417/.

25 Montana Williams, *Testimony of Montana Williams*, Chamber of Progress, (Mar. 8, 2022), http://progresschamber.org/wp-content/uploads/2022/03/IL-SB-3417-Oral-Testimony.pdf.

## II. CALIFORNIA'S UCL AS AN EXISTING SOLUTION TO ANTICOMPETITIVE CONDUCT

Although regulators around the world have signaled a strong desire to more stringently control anticompetitive conduct in the technology industry, existing state and federal antitrust statutes were written long before digital marketplaces arrived, and new legislation can be difficult to pass.

California's Unfair Competition Law offers a flexible alternative that augments traditional antitrust statutes. It relies significantly on judicial discretion in a case-by-case analysis. As demonstrated in *Epic v Apple*, California's UCL provides a framework that can handle complex digital markets and constrain anticompetitive conduct even if a court finds that traditional antitrust claims have not been proven.

### *A. The Intentional Breadth and Flexibility of the UCL[26]*

The UCL prohibits any unlawful, unfair, or fraudulent business act or practice.[27] The UCL "imposes 'broad' and 'sweeping' prohibitions" against those types of conduct, and the history of the UCL shows that the California legislature deliberately imbued the UCL with this broad reach and flexible scope from the beginning.[28] The California legislature first passed the UCL in 1887 "to enforce basic rules of common honesty and accepted business ethics."[29] The legislature broadened the statute further in 1933 to allow both consumers and direct competitors to bring suits under the UCL to enjoin any "unfair" competition.[30] As California courts have recognized, the intent of the statute was explicitly to combat the innumerable "new schemes which the fertility of man's invention would contrive."[31]

From its inception, the UCL has allowed courts the breadth of authority to rein in forms of unfair competition that were unforeseeable to the drafters of the original statute.

Importantly, the UCL does not impose rigid rules on courts seeking to define unfair conduct. California courts have recognized that "no inflexible rule can be laid down as to what conduct will constitute unfair competition. Each case is, in a measure, a law unto itself."[32] The UCL grants trial judges the authority to analyze claims on a case-by-case basis, determining the unfairness of a defendant's conduct based principally on the context and specific factual background of that case.

### *B. The UCL's "Unfair" Prong in Practice*

California courts have interpreted the "unfair prong" to be "intentionally broad, thus allowing courts maximum discretion to prohibit new schemes to defraud."[33] The California Supreme Court has identified three flexible tests that courts may apply under the "unfair" prong of the UCL.[34]

First, under the balancing test, which applies to actions brought by consumers,[35] a court determines "whether a business practice is unfair by 'examination of the impact of the practice or act on its victim balanced against the reasons, justifications and motives of the alleged wrongdoer.'"[36]

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26 The California Attorney General recently filed an amicus brief with the Ninth Circuit in the *Epic v. Apple* appeal, further discussed *infra*, to provide the court with the historical background of California's UCL and an explanation of its current framework. Brief of the State of California as Amicus Curiae in Support of Neither Party, *Epic Games, Inc. v. Apple Inc.*, No. 21-16506 (9th Cir. Mar. 31, 2022) [hereinafter California AG Brief].

27 Cal. Bus. & Prof. Code § 17200.

28 California AG Brief, *supra* note 26, at 5 (quoting *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999)).

29 *Id.* at 5 (internal quotations omitted) (citing *Hesse v. Grossman*, 152 Cal. App. 2d 536, 540 (1957)).

30 *Id.* at 5-6.

31 *Am. Philatelic Soc'y v. Claibourne*, 3 Cal. 2d 689, 698 (1935).

32 *Pohl v. Anderson*, 13 Cal. App. 2d 241, 242 (1936).

33 *State Farm Fire & Cas. Co. v. Superior Court*, 45 Cal. App. 4th 1093, 1103 (1996).

34 California AG Brief, *supra* note 26, at 3.

35 See *Progressive W. Ins. Co. v. Superior Court*, 135 Cal. App. 4th 263, 286 (2005).

36 California AG Brief, *supra* note 26, at 9–10 (citing *Progressive W. Ins. Co.*, 135 Cal. App. 4th at 285).

Second, under the "tethering" test, which applies to actions brought by competitors,[37] courts are required to show that "any finding of unfairness to competitors under [the UCL] be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition."[38] Under this test, "unfair" means "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition."[39]

Finally, some California courts have also borrowed a test used in cases under Section 5 of the Federal Trade Commission ("FTC") Act, which requires "(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have been avoided."[40]

Significantly, each of these three tests leaves open the opportunity for plaintiffs and enforcers to pursue a claim under the UCL's unfair prong without proving that that conduct violated any other law, and courts — including federal district courts in California — have continuously reaffirmed that unfairness claims under the UCL can proceed without a violation of an antitrust statute.[41] Since there has been no "rush of trial courts finding anticompetitive unfairness without concurrent unlawfulness," courts are clearly able to use meaningful discretion to rein in only truly unfair behavior.[42]

In addition to not requiring a simultaneous antitrust violation, analysis under the UCL's unfairness prong allows for a more "nuanced and qualitative" analysis than the traditionally quantitative-focused analysis under antitrust statutes.[43] Requiring a regimented analysis akin to those performed under antitrust claims would make little sense for a statute expressly created to be broader and more flexible than antitrust laws.[44] This flexibility allows judges to perform contextual and case-specific scrutiny of allegedly unfair behavior, which is vital in rapidly developing marketplaces.

### *C. Nationwide Injunctions under California's UCL*

California's UCL also allows courts to issue nationwide injunctions against companies based in California. By limiting anticompetitive behavior taking place within the State, injunctions against California companies may result in incidental benefits to out-of-state consumers by denying companies the opportunity to injure *any* consumer with "conduct emanat[ing] from California."[45]

Such injunctions do not implicate the Commerce Clause. Indeed, the Commerce Clause does "preclude[] the application of a state statute to commerce that takes place *wholly outside of the State's borders*, whether or not the commerce has effects within the State."[46] Injunctions rooted in California law against companies headquartered in California, however, do not pose any of those concerns. A company choosing to locate themselves in California cannot simultaneously "avail itself of the benefits of California law while using California as a launching pad for anticompetitive acts with effects in other States."[47] Thus, the UCL allows courts to authorize nationwide injunctions against California companies.

37 *Nationwide Biweekly Admin., Inc. v. Superior Court*, 9 Cal. 5th 279, 303 (2020).

38 *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 186–87 (1999).

39 *Id.* at 187.

40 *Drum v. San Fernando Valley Bar Ass'n*, 182 Cal. App. 4th 247, 257 (2010) (internal quotation marks and citation omitted).

41 See *Cel-Tech Commc'ns, Inc.*, 20 Cal. 4th at 187 (designing the "tethering" test for UCL claims which does not require illegality); Sun Microsystems, Inc. v. Microsoft Corp., 87 F. Supp. 2d 992, (N.D. Cal. 2000) (issuing an injunction against Microsoft under the "unfair" prong of the UCL despite no showing of unlawfulness or fraud); Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc., 178 F. Supp. 2d 1099, 1117–19 (C.D. Cal. 2001) (holding that a UCL unfairness claim could proceed beyond pleading despite the plaintiff not claiming that any of the defendants' actions were "unlawful" or "fraudulent").

42 California AG Brief, *supra* note 26, at 14.

43 *Id.* at 20 (citing *Nationwide Biweekly Admin., Inc.* — Superior Court, 9 Cal. 5th 279, 304 (2020)).

44 *Id.* at 20.

45 *Id.* at 23 (citing *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 243 (2001)).

46 *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (emphasis added).

47 California AG Brief, *supra* note 26, at 24.

### *D. Applying the UCL Against Anticompetitive Conduct*

1. Genesis of *Epic v. Apple*

In 2010, Epic, creator of the popular game Fortnite, entered into a developer agreement with Apple.[48] Like other third party developers, in exchange for access to Apple's App Store on iPhones and iPads, Epic had to agree to (1) pay Apple a 30 percent commission on all in-app purchases, (2) refrain from setting up its own app store, (3) refrain from bypassing the Apple App Store, (4) use Apple's in-app payment technology for all purchases, and (5) comply with Apple's anti-steering provisions.[49]

These anti-steering provisions prohibited Epic from telling consumers about other, potentially cheaper payment methods for in-app purchases, methods that would bypass Apple's payment system and Apple's 30 percent commission.[50] Specifically, Epic was barred from including "buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than in-app purchase."[51] The developer agreement also prevented developers like Epic from advertising alternative pricing via other forms of payment to customers via email or text through contact information obtained from registrations within the app.[52]

In August 2020, Epic activated "Project Liberty," its attempt to push against Apple's (and Google's) app distribution and payment restrictions.[53] Bypassing Apple's usual app review process, Epic used "hotfix" updates to covertly introduce capacity into Fortnite to allow consumers to bypass Apple's IAP system and pay Epic directly for in-game items at a discount.[54] Epic conceded that this "hotfix" violated its contract with Apple.[55] When Apple found out, Apple immediately removed Fortnite from the Apple App Store and terminated Epic's developer account, and Epic responded by filing suit in federal court, alleging that Apple's restrictive App Store polices violated federal and state antitrust laws as well as California's UCL. [56]

2. Court Found No Violation of Antitrust Laws

After a bench trial in spring 2021, the federal district court rejected Epic's claims that Apple violated federal or state antitrust laws. Unconvinced by Epic's assertion that the relevant market — a threshold issue for antitrust cases — consisted of the "aftermarket" for apps and in-app transactions on just iPhones and iPads, the court adopted its own market definition of "digital mobile gaming transactions."[57] Because the Court's market definition also includes transactions on Android devices, the Court concluded that Epic did not make a prima facie showing that Apple had monopoly power in the relevant market.[58]

Furthermore, while the Court did find that Apple had market power in the relevant market, and that Epic had shown anticompetitive effects from Apple's policies, it concluded that Apple's policies had pro-competitive justifications such as improved security,[59] that Epic's proposed less-restrictive alternatives would not address those security concerns,[60] that Apple was entitled to "some" compensation even if there is no basis for the 30 percent rate,[61] and that Apple's conduct did not qualify as a conspiracy because Apple's developer

48 *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 934 (N.D. Cal. 2021).

49 *Id.* at 943-44.

50 *Id.* at 944.

51 *Id.*

52 *Id.*

53 *Id.* at 936.

54 *Id.* at 938.

55 *Id.* at 923.

56 *Id.* at 940.

57 *Id.* at 1025.

58 *Id.* at 1032.

59 *Id.* at 1039.

60 *Id.* at 1041.

61 *Id.*

agreement was a unilateral contract.[62] The court also found that the App Store and Apple's IAP system are two components of a single product.[63]

Based on the above, the Court found for Apple on all of the federal and state antitrust claims, rejecting Epic's claims for monopolization, attempted monopolization, and tying.[64]

3. Court Found Violation of California's UCL

However, while the Court did not find Apple liable under federal or state antitrust law, it nonetheless found that Apple's anti-steering provisions in its developer agreement were barred by California's UCL. In deciding which of the tests to apply, the Court categorized Epic as both a competitor as well as a "quasi consumer," reasoning that Epic "jointly consume[s] Apple's game transactions and distribution services together with iOS users."[65] It therefore used both the tethering test and the balancing test.[66] Despite Apple's "mostly valid and non-pretextual procompetitive justifications" for its overall conduct,[67] the Court noted that Epic had proved anticompetitive effects as well as excessive operating margins, and Apple had failed to provide specific justifications for its 30 percent commission rate or anti-steering policies.[68]

The Court found that Apple's anti-steering conduct violates the unfairness prong of the UCL under both the tethering and balancing tests. Finding that commercial speech, including price advertising, has always been protected, and that Apple's restrictions on the flow of information could "lock-in" users, the court concluded that Apple's anti-steering policies threatened an incipient violation of antitrust laws and also violated the spirit of the laws.[69] Under the balancing test, the Court concluded that the harm caused by Apple's anti-steering was "considerable" and the utility to be mere "entitlement."[70] The Court distinguished anti-steering in this case from conduct the court upheld in Amex.[71] Whereas Amex dealt with steering consumers towards cards with lower merchant fees in brick and mortar stores,[72] the present case concerns an information ecosystem that "actively impede[s] users from obtaining knowledge."[73]

Accordingly, the Court issued a nationwide injunction enjoining Apple from enforcing its anti-steering provisions on developers across all apps.[74] While the Court identified the relevant market for antitrust purposes to be mobile gaming transactions, it supports its injunction across all apps by noting that the UCL "does not require that the Court import that market limitation."[75] It further rejects the notion that the injunction must be limited to California to avoid a commerce clause violation. Since (1) Apple is headquartered in California, (2) the anti-steering provisions would be enforced under California law, and (3) consumers in California are harmed, the commerce clause does not preclude an application of state law.[76]

62 *Id.* at 1036.

63 *Id.* at 1047.

64 *Id.* at 922.

65 *Id.* at 1052.

66 The Ninth Circuit has declined to apply the FTC test when analyzing consumer claims under the UCL's unfairness prong. *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 736 (9th Cir. 2007)

67 *Id.* at 1054.

68 *Id.* at 1056.

69 *Id.*

70 *Id.* at 1057.

71 *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

72 *Id.* at 2289.

73 *Epic*, 559 F. Supp. 3d, at 1056.

74 *Id.* 1058.

75 *Id.* 1057.

76 *Id.*

### *E. The UCL in the Epic v. Apple Appeal*

Both Epic and Apple appealed the decision of the district court to the Ninth Circuit. On cross-appeal, Apple argued that a defendant cannot be found to have violated the UCL without also having been found guilty of a Sherman Act or Cartwright Act violation. Thus, Apple argued that since the district court found that Epic failed to prove a violation of either of these antitrust statutes, the judge erred in finding for Epic under the UCL.

The California Attorney General filed an amicus brief with the Ninth Circuit to provide the court with the historical background of California's UCL and an explanation of its current framework. While the brief supported neither party, Epic referred to it to argue that the district court's injunction against Apple under the UCL should be upheld. The Attorney General explained that both the history of the UCL as well as its interpretation by California courts show that the UCL is intentionally broader and more flexible than federal or state antitrust laws, allowing courts to grant relief based on the UCL even where they may not recognize an antitrust violation.

## III. CONCLUSION

As policymakers around the world contemplate novel approaches to restricting anticompetitive conduct by technology companies, California's century-old Unfair Competition Law presents a well-established alternative. Allowing extensive judicial discretion, flexibility, and case-by-case analysis, the UCL provides a framework that is well-equipped to regulate conduct in increasingly complex digital markets.

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