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Competition Close-Up

Google Seeks *En Banc* Review in *Epic* v. *Google*: Limits of Collateral Estoppel

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Google has petitioned the Ninth Circuit for an *en banc* rehearing after the court's July 31, 2025, decision affirming a jury verdict for Epic Games. At the center of Google's request is a procedural question with broad antitrust implications: whether Epic should have been bound by the market definition adopted in its parallel litigation against Apple.

The Threshold Question: Collateral Estoppel

Google argued that Epic should have been precluded from advancing its Android-only market theory because the *Apple* court already had rejected a similar IOS-only definition. In that case, the district court defined the market broadly as "digital mobile gaming transactions" in which Apple and Google both competed. The Ninth Circuit affirmed.

Collateral estoppel is a powerful and also sometimes controversial means to streamline disputes that may arise when there are related or overlapping litigations. While there is no definitive test for preclusion, generally the issue or facts at stake must be identical in both proceedings, necessary to the case resolution, and decided after the party against whom it is applied had a full and fair opportunity to litigate the issue in the prior proceeding. It is not necessary that each of the parties or the cause of action be the same or that the cases are related. Collateral estoppel applies to facts or issues that are identical. The doctrine does not depend on whether the first decision was correct, but rather on whether the party had a full and fair opportunity to litigate the same issue. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

Before trial, Google unsuccessfully moved to bind Epic to the market definition found in *Apple*, a motion that the *Google* court rejected as being brought too late and lacking merit. The Ninth Circuit affirmed. The panel emphasized that Apple's closed iOS ecosystem differs from Google's open-license Android system. This difference means that the evidence and commercial realities of Epic, Apple, and Google, as well as other competitors and consumers, were not the same. Although both cases concerned monopolization of mobile app distribution, the facts and issues were not "identical" for purposes of estoppel and indeed were not presented as such at trial. The court also noted that Google's estoppel motion was untimely, and provided an independent reason to reject it.

Moreover, the two decisions were not irreconcilable on the merits. The court drew an analogy to fast food: McDonald's and Chick-fil-A may compete in the broad "fast food" market, but only Chick-fil-A competes directly in the "chicken sandwich" submarket. Similarly, the *Apple* and *Google* cases implicated different submarkets—one closed, one open—even though they overlapped at a higher level.

Next Steps

Whether the Ninth Circuit will grant an *en banc* review remains open. Even if it does, Google faces two hurdles: *first*, convincing the court that Epic should have been bound by the *Apple* ruling; and *second*, persuading it that no reasonable jury could have found an Android-only market. Whatever the outcome, the case highlights the narrow application of collateral estoppel in antitrust litigation. Although from one perspective, issue preclusion as to prior

criminal and collateral proceedings against defendants in antitrust can seem routine, courts will not assume sameness where factual and competitive contexts differ, even in closely related cases.