

Google Play Judge Abandoned 'Gatekeeper' Role, Group Says

By **Bryan Koenig**

Law360 (June 13, 2023, 7:28 PM EDT) -- A conservative legal group backed Google's Ninth Circuit appeal Tuesday contesting certification of a class of 21 million Play Store consumers alleging the company monopolizes app distribution on Android devices, arguing that certification is based on reliance of expert testimony the district court judge should never have permitted.

The Atlantic Legal Foundation described itself in an amicus brief as a major advocate for ensuring federal judges properly play their role as evidentiary "gatekeeper," including by helping push for a forthcoming change to Federal Rule of Evidence 702. The group argues that change, which goes into effect Dec. 1, merely highlights the role the district court judge should have played when mulling the opinion of prominent antitrust economist Hal J. Singer.

"Under Rule 702, it is the consumer plaintiffs who bear the burden of establishing by a preponderance of evidence that their expert's testimony satisfies each of the requirements set forth in subdivisions (a) – (d) of Rule 702. In failing to hold plaintiffs to this burden, the district court abandoned its Rule 702 gatekeeping responsibility," the foundation said.

The amicus filing comes days after Google **submitted its own opening brief** contesting certification of a class of consumers not represented in the broader **multidistrict litigation** by state-level enforcers.

The circuit court agreed at the beginning of June to **expedite the appeal** and set oral arguments for September, which could give the panel enough time to rule before a slated November trial in the district court.

In its opening brief, Google contended that the "massive class" of consumers certified in the case made purchases involving nearly 300,000 apps and that the price for each purchase was set by the developer, who paid Google a service fee.

The consumers allege the fees are too high and that if Google charged a competitive service fee, developers would pass the savings on to consumers, but the brief argued that at least some of the developers would keep any savings for themselves. According to Google, that helps make the questions of each class member too individualized to deal with en masse.

The class is seeking an estimated \$4.7 billion in damages for antitrust claims alleging they overpaid for purchases made in the Play Store as a result of Google's policies that block competing app stores and require use of its payment system, where it collects commissions of up to 30%.

Google also last week attacked Singer's economic model the consumers used to support their certification bid, saying it "rests on crude assumptions" that fail to account for obvious factors that affect developer pricing. The model assumes every app in 35 broad Play Store categories is a substitute for the other apps in the category, lumping together games like Elmo Loves 123s and the first-person shooter Doom, Google said at the time.

The model also assumes developers would all lower prices in proportion to a lower service fee, but Google said this ignores the fact that almost all developers price their apps to end in 99-cent increments, so a savings of a few cents would not move the price.

The economic model could be a key factor in the broader litigation, which also includes claims from 39 state-level attorneys general, Fortnite developer Epic Games and dating app maker Match Group.

Google had previously sought and failed to get the trial paused entirely, pending the Ninth Circuit ruling, and has since argued that the claims from state enforcers and individual consumers should wait for a ruling because they rely on the same model as the class.

The enforcers and others contended the appeal should not prevent a trial on their claims, since different standards apply to the class allegations and because they say they have evidence beyond just the class expert Google is trying to challenge.

The class has agreed not to try its claims before a decision from the Ninth Circuit, but it's not clear yet if that will happen before November or which of the other parties will be included in the trial.

In assailing Singer's model Tuesday, the foundation argued the district court wrongly put the burden on Google to show his analysis was wrong, and that judges are principally responsible for evidentiary admissibility rather than reliability. According to the amicus brief, Rule 702 and especially the incoming changes make clear that the proposed expert

testimony must be shown as more likely than not that it "reflects a reliable application of the principles and methodology to the facts of the case."

"As explained by Google in its merits brief ... the district court admitted Dr. Singer's opinions without any meaningful scrutiny of the facts that (1) his selected economic model is not used in the antitrust context, (2) his application of this model rested on assumptions about consumer practices rather than evidence," the foundation said, "and (3) his conclusions were contrary to market evidence regarding the pricing strategy followed by app developers."

In a statement announcing the brief, the foundation said the Rule 702 changes were made necessary "by widespread judicial misapplication" of the rule, "especially by failing to recognize the burdens that the rule imposes on a party proffering expert testimony."

"These burdens include establishing expert admissibility by a preponderance of evidence, and establishing that an expert's opinion reflects reliable application of principles and methodology to the facts of the case. Under Rule 702, a judge must conduct a rigorous analysis to determine whether these burdens have been met," it said.

Google declined comment. Counsel for the consumers did not immediately respond to a request for comment Tuesday.

ALF is represented by Eric G. Lasker and Shannon N. Proctor of Hollingsworth LLP and in-house by Lawrence S. Ebner.

The consumers are represented by Glen E. Summers, Karma M. Giulianelli, Adam L. Hoeflich and Lee Mason of Bartlit Beck LLP and Hae Sung Nam of Kaplan Fox & Kilsheimer LLP.

Google is represented by Neal Kumar Katyal, Jessica L. Ellsworth and Katherine B. Wellington of Hogan Lovells, Kyle W. Mach, Justin P. Raphael, Emily C. Curran-Huberty, Glenn D. Pomerantz and Kuruvilla Olasa of Munger Tolles & Olson LLP and Brian C. Rocca, Sujal J. Shah, Michelle Park Chiu, Minna Lo Naranjo, Rishi P. Satia and Richard S. Taffet of Morgan Lewis & Bockius LLP.

The case is Mary Carr et al. v. Google LLC et al., case number 23-15285, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Matthew Perlman, Dorothy Atkins and Lauren Berg. Editing by John C. Davenport.