

Court Enforces Arbitration Clause in Online Terms of Service Accepted by a Minor

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Epic Games, Inc. (“Epic”) is the publisher of the popular online multiplayer videogame Fortnite, released in 2017. In recent years, Fortnite has gained worldwide popularity with gamers and esports followers (culminating in July 2019 when a [sixteen-year-old player won the \\$3 million prize for winning the Fortnite World Cup](#)). Players, in one version of the game, are dropped onto a virtual landscape and compete in a battle royale to survive. In the real world, Epic recently survived its own encounter – not with the help of scavenged weapons or shield potions – but through its well-drafted end user license agreement (“EULA” or “terms”).

Earlier this month, the District Court for the Eastern District of North Carolina granted Epic’s motion to compel individual arbitration of the claims of a putative class action. The action arose in connection with a [cyber vulnerability](#) that allowed hackers to breach user accounts. The court concluded that the arbitration provision contained in the EULA was enforceable in this case, even where a minor was the person who ultimately assented to the terms. ([Heidbreder v. Epic Games, Inc.](#), No. 19-348 (E.D.N.C. Feb. 3, 2020)).

Plaintiff’s complaint alleged that inadequate data security and cyber vulnerabilities in Fortnite allowed hackers to breach user accounts, resulting in fraudulent charges against plaintiff’s debit card for in-game purchases during the period of November 2018 through January 2019 (while Fortnite is free to download and play, users have the option of storing a credit or debit card “on file” with Epic to facilitate in-game purchases and certain upgrades). Epic moved to compel arbitration based on the version of the terms agreed to in March 2019 by a user of plaintiff’s Fortnite account.

The arbitration-related clauses included: (i) an agreement to arbitrate on an individual basis only; (ii) a delegation to the arbitrator to determine whether a specific dispute was governed by the arbitration clause; (iii) a venue selection provision; (iv) a fee-sharing provision for the arbitration; and (v) a right for users to opt-out of the arbitration provision for a limited time after agreeing to the EULA.

The plaintiff advanced several arguments as to why the arbitration provision was unenforceable, each of which was rejected by the district court.

The plaintiff first argued that he never accepted the terms. Rather, he argued that while his minor child agreed to the updated terms in March 2019, the child did not have the legal capacity to accept the contract. The court set aside this argument, ruling that under basic principles of principal-agent law, the minor child-player was acting as plaintiff's agent and had both actual and apparent authority to agree to the EULA and bind plaintiff. The court noted that the plaintiff initially opened the Fortnite account in his name but did not play, instead giving his minor child "free rein over the account for over a year" and the reasonable belief that he had the implied actual authority to click "agree" to the EULA when Epic required users to agree to updated terms in March 2019.

Second, the plaintiff argued that privacy-related claims were outside the scope of the arbitration provision. The court rejected this argument, finding that based on the language of the EULA and supporting law, the actual scope of the arbitration provision was a matter to be determined by the arbitrator.

Finally, the plaintiff argued that the arbitration-related provisions were unconscionable because they applied retroactively to prior claims that occurred before the updated EULA was agreed to. The plaintiff contended that Epic knew about the breaches at the time the updated EULA was presented but didn't give notice of it to users, resulting in an unfair surprise. The court rejected this argument, and found that the EULA gave adequate notice about Epic's discretion to amend its agreement and also gave users the right to opt-out of the new arbitration provision by giving notice or by no longer playing the game.

The court's decision highlights the importance of well-drafted terms of use. Of note for providers, Epic drafted its arbitration provisions to include some "user-friendly" aspects to it (e.g., fee-sharing, a liberal opt-out provision, reasonable venue provision), considerations that may have influenced the court's decision in this case. This is just one of the most recent cases to illustrate that if implemented properly, EULAs can play an important part in creating certainty and mitigating risk associated with online platforms or services.

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- **Jeffrey D. Neuburger**
Partner