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# *Breaking Down the* Epic v. Apple *Fight*

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### *Epic v. Apple*

On August 17, 2020, the publisher of the popular electronic game Fortnite, Epic Games, launched a complaint against Apple. The case revolves around restrictions that Apple places on firms that want to make applications or "apps" available on devices powered by Apple's mobile operating system, iOS. Epic complains that the restrictions Apple places on access to the iOS violate Sections One and Two of the Sherman Act as well as California's analog to the Sherman Act, the Cartwright Act, and California's unfair competition law. The case has been assigned to Judge Yvonne Gonzalez Rogers. As described more fully below, the Court denied the primary relief sought by Epic's TRO request but the Court is now scheduled to hear Epic's motion for preliminary injunction on September 28, 2020.

We have been asked by a number of clients to provide an overview of the complaint and the litigation and a quick assessment of potential options. In our view, companies that rely on Apple to distribute to distribute their applications should monitor the case, and they might consider reaching an agreement with Apple to toll any statute of limitations that might begin to run with regard to potential damages related to Apple's practices in the event that the court determines them to violate Federal or state antitrust law. We do not believe that firms should rush to file follow-on cases given the obstacles that lie in front of Epic.

### Background

Apple is an iconic technology company. Founded by Steve Jobs and Steve Wozniak in 1976, the company played a critical role in the popularization of home computing in the late 1970s and early 80s, built a loyal customer base with its Macintosh line of computers in the 1990's and has risen to new and dizzying commercial success since the introduction of the iPhone in 2006.

As anyone who has used mobile devices produced by Apple know, the company places restrictions, and at times significant restrictions, on the ability of firms to make apps available to users of iPhones, iPads, and other devices powered by Apple's mobile operating system, iOS. As a practical matter, consumers must use the Apple App Store to download apps to iOS. Although Apple does not require firms to charge consumers for apps, it does demand a cut of revenue (often 30%) generated by firms that choose to require payment for their apps or that make it possible for consumers to make purchases of downloadable content from with an app, an in-app purchase.

Epic Games is a video game public and developer. The privately-held company was founded in 1991 by Tim Sweeney, who is said to own or control a majority of stock in the business. It has attracted investment from a long list of entertainment businesses and private equity investors, including the

Chinese media conglomerate, Tencent. Epic has published a series of blockbuster games for personal computers and gaming consoles, including Unreal and Gears of War. Its first games were first person, primarily single-player games that could be played on PCs.

In 2011, after Microsoft balked at introducing a fourth game in the Gears of War series with an expected budget of more than $100 million, Epic begin work on a cloud-based multi-player game. That game became Fortnite. With the release in 2017 of a version of the game that supports massive numbers of players all seeking to be the last person standing, Fortnite became an international phenomenon. The core Fortnite game, the multi-player, king of the hill version, is a free-to-play game. Fortnite generates revenue by selling in-game content, including weapons, costumes, and cosmetic enhancement for the game's characters. Epic also sells a "pass" that enables users to access specialized content and that may be required to play the game in multi-player mode when other users venture to certain parts of the Fortnite virtual world.

Although the game was originally only available for play within the walled gardens of the respective consoles for which the game was released, Fortnite ultimately persuaded Sony and Microsoft to allow players to play games with players who had a different platform. Epic then introduced versions of the game on other platforms, including Apple's iOS. Epic was originally willing to play by Apple's App Store rules. It paid Apple the 30% that Apple demands for in-app-purchases and used the payment service built into the App Store. In August 2020, it introduced an option allowing users to bypass Apple to purchase, at a discount, the in-game currency that is used to purchase passes and other in-game content. Apple, considering the move a violation of its App Store guidelines, then removed Fortnite from the App Store.

## The Claims

Epic's complaint against Apple revolves around the restrictions that Apple places on developers that distribute apps through the App Store. The complaint seeks to require Apple to allow Fortnite on the Apple App Store without: (1) what Epic labels a "30% tax on the purchase of paid apps;" and (2) any restrictions on the manner in which Epic can collect in-game revenue from players. Specifically, Epic styles its requested relief as an injunction that would permit companies like Epic to offer its own iOS-compatible apps through stores other than the Apple App Store and to collect payments from players playing Fortnite on Apple mobile devices without those payments going through Apple's payment processing systems.

To that end, Epic defines different aspects of the Apple mobile operating system as separate products that fall into separate markets: (i) iOS App Distribution Market, which it defines as the manner in which apps are loaded on to the device; and (ii) iOS In-App Payment Processing Market, which it defines as the manner in which third parties can effect payments for content accessible within an app.

The complaint alleges ten separate claims under Sections 1 and 2 of the Sherman Act and under California's Cartwright Act against Apple, challenging the restrictions that Apple has levied on the markets for iOS app distribution and in-app payment:

1. Monopolization of the iOS App Distribution Market in violation of Section 2 of the Sherman Act;

2. Denial of access to an essential faculty in the iOS App Distribution Market in violation of Section 2 of the Sherman Act;

3. Unreasonable restraints of trade in the iOS App Distribution Market in violation of Section 1 of the Sherman Act;

4. Monopolization of the iOS In-App Payment Processing Market in violation of Section 2 of the Sherman Act;

5. Unreasonable restraints of trade in the iOS In-App Payment Processing Market in violation of Section 1 of the Sherman Act;

6. Tying of the iOS app store to In-App Purchases in the iOS In-App Payment Processing Market in violation of Section 1 of the Sherman Act;

7. Unreasonable restraints of trade in the iOS App Distribution Market in violation of the Cartwright Act;

8. Unreasonable restraints of trade in the iOS In-App Payment Processing Market in violation of the Cartwright Act;

9. Tying of the iOS app store to In-App Purchases in violation of the Cartwright Act; and

10. A violation of California's unfair competition law.

The complaint seeks only injunctive relief and does not seek damages. Upon filing its complaint, Epic immediately moved for a temporary restraining order and preliminary injunction. Epic's TRO application sought an order from the Court requiring Apple to: (1) immediately restore Fortnite to the Apple App Store but enjoin Apple's rules and payment requirements; and (2) to restore access to Apple's developer tools to third parties who develop programs based on Epic's *Unreal Engine* platform.

On August 25, 2020, without engaging on the merits of the underlying antitrust dispute, the District Court denied the requested injunction as to Epic and Fortnite but granted the temporary restraining order as to reinstatement of access to *Unreal Engine.* The Court agreed with Apple that Epic's imminent and purportedly irreparable harm of players not being able to access or play Fortnite on Apple mobile devices was a "self-inflicted" wound. If Epic believes the restrictions are anticompetitive, it can remain on the platform, its Fortnite players can continue to play and Epic may sue for damages. The Court was, however, sympathetic to the third party developers who were not participants in Epic v. Apple dispute but were nevertheless cut off from *Unreal Engine* as a result of Apple's enforcement of its policies versus Epic.

On September 8, 2020, Apple answered the Epic complaint and counterclaimed alleging: (1) breach of contract; (2) breach of covenant of good faith and fair dealing; (3) declaratory relief; (4) unjust enrichment; (5) intentional interference with prospective economic advantage; and (6) injunctive relief. The answer and counterclaim emphasize the same themes of the opposition to the TRO. Apple has built a massively successful app platform not only for Apple but for one billion users but also for 27 million app developers worldwide. Apple asserts that after Epic achieved tremendous success and earned massive profit in the Apple ecosystem it launched a calculated attack that resulted in a self-inflicted injury. Epic's breach and secret "hotfix" was both premeditated but and an intentional breach. Finally, the Apple complaint seeks an injunction prohibiting Epic's operation of an unauthorized external payment mechanism and prohibiting Epic's removal of Apple's in-app payment collection function.

## Assessment

Epic's claim is that by requiring developers to distribute their apps exclusively on the App Store, where they are subject to a 30% surcharge for paid app, and by charging a 30% fees on revenues from In-App Purchases, Apple has, among other things, unlawfully exploited its monopoly power in the iOS App Distribution Market ant the iOS In-App Purchase Market, has engaged in unreasonable trade practices whose anticompetitive effect outweighs any consumer benefit. Under Epic's view of the world, despite the substantial costs incurred by Apple to develop and operate its iOS technology, the App Store and the surrounding development tools, Apple's closed-app system must be opened up such that app developers can offer their apps on platforms other than the App Store and receive revenues from In-App payments directly or through other means without paying a 30% share to Apple.[1] In short, Epic argues that once the ecosystem is opened, revenues collected from the sale of Apple Apps and in-game or in-app purchases need no longer pass through the Apple toll booth. Epic alleges that changing the rules associated with the App Store would benefit developers and consumers insofar as Epic and other developers would, in theory, lower their prices if they were not compelled to share as much revenue with Apple. Epic's claim, distilled to its essentials, is that Apple is requiring it (and consumers) to pay too much for the privilege of accessing iOS users on iOS devices in the manner Epic wants to access them.

Notwithstanding any facial appeal to its claims, Epic faces an uphill legal battle. Beyond Judge Rodgers Gonzales' skepticism about the manner in which Epic rolled out its challenges to Apple's practices, Epic's objections to Apple's conduct extend only to the boundaries of the iOS operating system. Epic does not claim that it has been barred from access to everyone who has an iOS device when those people are using devices other than their iOS device. The complaint concedes that iOS users who have other devices, including hundreds of different Android devices, PCs, laptops (including PCs and laptops sold by Apple), and Fortnite-compatible game consoles from Microsoft, Sony, and Nintendo, can continue to play Fortnite on those devices and purchase in-app content on those platforms not subject to any charges by Apple. Nor does Epic argue that the restrictions on access to iOS somehow impede its opportunities with Sony or Microsoft, raising fundamental questions as to whether Epic has adequately defined a relevant economic market when those alternatives are excluded.

Comparable claims have not gotten much traction in the recent antitrust past. eBay (rejecting claims alleging supracompetitive fees), Facebook (rejecting claims of limited access by third parties), Qualcomm (rejecting claims of supracompetitive licensing fees) Google, and Apple have all successfully turned back such claims in the Ninth Circuit and elsewhere.[2] As the courts that have addressed those claims have explained, antitrust law does not license courts to micromanage the commercial relationships between companies and their clients unless there is some reason to believe that the commercial relationship is having a spillover effect into some large world that stretches beyond the confines of that commercial relationship. The only consequences that Epic presents in its complaint against Apple are effects within the iOS ecosystem.

## Recommendation

For these reasons, we recommend that clients merely watch Epic's case against Apple proceed. If Epic were to succeed (or if regulators were to intervene), any changes to Apple's practices, terms and conditions that Epic secures would inure to the benefit of anyone who makes an app available for distribution through the App Store without the expense and exposure that necessarily follows litigation of highly publicized antitrust claims. By sitting this round out, companies with similar complaints about the App Store can later capitalize on any injunction entered in Epic's lawsuit, while Epic bears the costs

and risks of litigating novel theories of exclusionary conduct and competitive harm that have not fared particularly well in the Ninth Circuit.

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*If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:*

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[1] Epic acknowledges that it could sell the same in-app content outside of the Fortnite app, but does not want to force players to leave the Fortnite environment whenever they want to refill the electronic wallets that they must tap to consume the content that Epic makes available within Fortnite. Epic wants the experience of playing the game (and spending money) to be as seamless as possible, and it does not want to share the revenue associated with that experience with Apple at the price that Apple demands for making that experience available to a user on an Apple device through an app downloaded to that device through the app store.

[2] One risk for defendants in these monopolization cases is a recent potential expansion of the enforcement Cartwright Act beyond the limits of federal antitrust enforcement. While the scope of California and federal antitrust enforcement had historically been parallel and symmetrical, recent decisions of the California Supreme Court have expressed a view that California's Cartwright Act must be viewed on its own and that federal decisions on the Sherman Act are instructive but not conclusive.