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No Win Situation: The Ninth Circuit Finds Mobile Casino Applications Can Be Gambling Despite No Cash Out Mechanism

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The Ninth Circuit just put the entire mobile application industry on notice. Mobile casino applications may constitute gambling under Washington state law. That is, mobile games using ***virtual*** chips, ***hypothetical*** winnings and ***no cash out*** mechanism can still be gambling.

In *Kater v. Churchill Downs*, the Ninth Circuit evaluated a putative class action stemming from the "Big Fish Casino" mobile application. *See* - F.3d --, 2018 WL 1514587 (Mar. 28, 2018). The application allows consumers to play games like blackjack, poker and slot machines. The chips are virtual, the winnings are fake. The rub, though, is that to continue playing once one runs out of chips, the consumer can purchase additional virtual chips. There is no ability to cash out. The only "goal" so to speak is to continue accumulating chips in order to continue playing.

The plaintiff allegedly purchased and lost $1,000 worth of virtual chips. Apparently dissatisfied with her decision to engage in in-app virtual purchases, she filed a putative class action lawsuit under Washington's Recovery of Money Lost at Gambling Act (the "RMLGA"). The RMLGA allows consumers in Washington to, as the law's title suggests, recover the money or thing lost illegally gambling. Many states have similar so-called loss recovery acts. They are typically decades old, have not been cited-to since World War II and were generally enacted to allow families of gambling addicts to recover illegally gambled losses incurred in backdoor casino operations.

Fast forward to the 21st Century, a handful of consumers brought claims against mobile applications under these loss recovery acts where the application (i) consisted of games of chance, (ii) allowed purchasing virtual currency through in-app purchases and (iii) allowed the "wagering" of virtual currency. Courts across the country-including the district court in *Kater*-dismissed these cases with prejudice, reasoning that no money was actually lost gambling and there was no opportunity to "win" anything of value. *See, e.g., Mason v. Machine Zone, Inc.*, 851 F.3d 315 (4th Cir. 2017); *Ristic v. Machine Zone, Inc.*, No. 15-cv-8996, 2016 WL 4987943 (N.D. Ill. Sept. 19, 2016); *Phillips v. Double Down Interactive LLC,* 173 F. Supp. 3d 731, 741 (N.D. Ill. 2016); *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871, 874 (N.D. Ill. 2016); *Kater v. Churchill Downs Inc.*, No. 15-cv-612, 2015 WL 9839755, at *3 (W.D. Wash. Nov. 19, 2015).

In its recent opinion, the Ninth Circuit, however, determined that virtual currency is, in fact, a "thing of value" under Washington state law because "a user needs these virtual chips in order to play the various games that are included within Big Fish Casino." To that end, the Court held that the plaintiff could recover the "thing of value" she allegedly lost. The Ninth Circuit thus became the first and only court in the country to so find.

It appears likely that Churchill Downs will seek an *en banc* review, and with good reason. In a relatively terse, 8-page opinion the Ninth Circuit determined that fake money "wagered" to win a fake game with no hope or dream of cashing out can still be gambling. The opinion has already had a major impact, reportedly causing some online free poker websites to cease operations in the state of Washington.

All hope is not lost however as the Ninth Circuit did not actually evaluate what the term "lost" means under the statute. The Washington statute allows only "persons ***losing*** money or anything of value" illegally gambling to recover. Of course, it is untenable that the plaintiff ***lost*** money or anything of value ***gambling***. The plaintiff, in actuality, lost nothing gambling. She lost when she made an in-app purchase of virtual currency. Once that transaction was made, she had no hope of getting her money back or retrieving the virtual currency. Whether the virtual chips are actually "wagered" or not is irrelevant; the chips can never be cashed out.

At least two courts have found this argument persuasive and dismissed similar claims on this basis. For example, one Maryland court held "any 'loss' that Plaintiff sustained occurred when she volitionally chose to spend real-world dollars in exchange for a nontransferable, revocable license to play with virtual currency in a virtual world." *Mason v. Machine Zone, Inc.*, 140 F. Supp. 3d 457, 468 (D. Md. 2015); *see also Phillips v. Double Down Interactive LLC, 173* F. Supp. 3d 731, 741 (N.D. Ill. 2016) ("When Phillips bought more chips, she was in essence buying the right to continue playing the games. And Phillips got to do just that."). This distinction as to when the "loss" occurs is crucial. In terms of real world casinos, cash is exchanged for chips. Chips can, in turn, always be redeemed for cash. A chip-*i.e.*, a thing of value-is not "lost" until it is actually wagered and the bet is lost. In these virtual casinos, however, the money is "lost" at the point of sale and the chips are "lost" in any material sense whether they are used or not because they are otherwise useless.

The Washington statute is fairly unique insofar as loss recovery statutes go. It allows recovering from the "proprietor" or the "dealer." Most similar statutes limit the persons against whom recovery can be had to the *winner* of the wager. In that sense, courts have generally held that virtual casinos are not "winners" insofar as they could never be "losers." Virtual casinos make money once the virtual chips are purchased; whether they are subsequently wagered is of no moment. This indicates that the Ninth Circuit ruling-in addition to charting a path numerous courts have thus far rejected-is inherently narrow in application.

In any event, and as a practical matter, mobile casino applications that allow for in-app purchases should pay close attention to future developments in the *Kater* appeal. Should the Ninth Circuit's decision stand, it may require significant changes in how the in-app purchase process is structured and may effect a sea change in how the social gaming industry operates.

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