



## Virtual gambling

VIDEO GAME STUDIOS, ANXIOUS TO HOLD THE ATTENTION OF PLAYERS ARE INCREASINGLY EMBEDDING CASINO GAME FEATURES WITHIN THEIR GAMES WITH LEGAL RAMIFICATIONS THAT ARE BEING DECIDED BY THE COURTS. **MARC DUNBAR** AND **DANIEL MCGINN** REPORT

In 2016, Marc Dunbar published a seminal article<sup>1</sup> examining the legality of gambling in virtual worlds. The article traced the genesis of case law on the topic and concluded that, while gambling with virtual currency in closed-loop virtual worlds was generally considered to be permissible by reviewing courts at the time, the variance present in each state's regulatory regime would require careful analysis and an eye towards developing precedent if working within the space.

Since the article was published, there have been several new developments. The number of free-to-play games has grown exponentially since 2016, as have the player bases and profitability of such games. Free-to-play mobile gaming revenue is projected to exceed US\$75 billion USD in 2023.<sup>2</sup>

As the market expands, so does the innovation within these gaming environments as each studio seeks to keep hold of both the attention and the wallets of players. One method of doing so that has proven to be popular, effective, and lucrative, is to introduce aspects of casino gaming into the conventional video gaming environment. Virtual casino gaming and virtual currencies<sup>3</sup> have become mainstays of free-to-play games on mobile devices, consoles, and computers. As revenue climbs, player bases grow, and new potential customers enter the market. The industry continues to evolve with more gaming variety, different incentives, and novel advertising to capture a share of the available pot and monetize the database of players frequenting the virtual gaming environment.

<sup>1</sup> Available at <https://www.imgl.org/publications/imgl-magazine-volume-3-no-1/gambling-in-virtual-worlds/>

<sup>2</sup> <https://www.statista.com/statistics/1107021/f2p-mobile-games-revenue/>, last accessed April 19, 2023.

<sup>3</sup> For the purposes of this article, the term “virtual currency” will refer to fictitious proprietary representations of “currency” created by game designers for use within social gaming environments which by the terms and conditions of the game have no value in the real world and cannot be monetized into “real world” fungible currency via a “currency exchange” sanctioned by the game creators.

Hand in hand with the increase in virtual casino gaming options and an increase in participants goes a rise in consumer protection and other litigation related to these virtual environments. As players can log on and participate from anywhere, a variety of jurisdictions are hearing these cases, resulting in differing interpretations as to whether and to what extent these types of social gaming environments are permissible.<sup>4</sup> This article discusses appellate reviews of trial court cases discussed in the prior article, as well as the next wave of challenges to ascertain whether the use of virtual currencies purchased with real money and then lost within a closed virtual environment constitutes illegal gambling.

*Mason v. Machine Zone, Inc.*, 851 F.3d 315 (4th Cir. 2017), was a case stemming from a claim that thousands of individuals lost money participating in an unlawful “gaming device” that allows players to “spin” a virtual wheel to win virtual prizes for use within the video game *Game of War: Fire Age* (*Game of War*). In the case the federal appellate court reviewed the trial court’s determination that the class action plaintiffs failed to state a claim under Maryland’s gambling loss recovery statute. The trial court found that *Game of War* itself was a game of skill, while the alleged illegal activity was more akin to theater entertainment than gambling. Of particular note, the trial court recognized that the player could not “cash out” or otherwise exchange the virtual currency for real money pursuant to the game’s Terms of Service.

On appeal, the Fourth Circuit, examining only the loss recovery claim, affirmed the trial court’s holding. Reaching this conclusion, the appellate court determined that neither party involved won or lost any money in the virtual casino. Instead, because Mason paid money for virtual gold that she obtained, and later exchanged that gold for unredeemable “virtual chips,” there was no money at stake, nor could she receive any money or resources redeemable for money as a result of her spin. Thus, she could not win or lose money in the *Game of War* virtual casino.

Reaching this conclusion, the Fourth Circuit focused heavily on the term “money” as used in the Maryland Loss Recovery

Statute. The court determined the term did not encapsulate virtual resources only available and useable within *Game of War*, and to hold otherwise would improperly expand the statutory language. Notably, the court also rejected Mason’s contention that the existence of a secondary market for selling *Game of War* accounts for cash showed that “money” is at stake in the virtual casino. The court noted that Mason failed to allege that she or class members tried to sell their accounts or other virtual resources on the secondary market for money, and as such rejected the contention that the existence of the market alone demonstrated that money was won or lost. It is unclear whether such an allegation would have impacted the outcome, but it is worth noting as the law in this area continues to develop.

The Northern District Court of Illinois examined a virtual casino in *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731 (N.D. Ill. 2016). The Double Down Casino featured casino games of chance determined solely by Double Down’s computerized algorithms and was accessible via website, free downloadable application, or Facebook. Players use virtual “chips” to wager on the games. Players are granted a bundle of chips free of charge on their first login and receive free chips each day. Players are not able to “cash out” their chips with Double Down for “‘real world’ money, goods, or other items of monetary value.” Phillips filed a class-action complaint against Double Down in the Circuit Court of Cook County, Illinois, alleging that Double Down operates unlawful gambling devices, and that by “operating its virtual casino, [Double Down] has illegally profited from thousands of Illinois consumers.”

Similar to the holding in *Mason*, the court determined that while the Double Down Casino was a gambling device, there were no “winners” or “losers”. The court reasoned that Double Down is not a winner, because it does not actively participate in the game of chance. Instead, Double Down makes its money from the purchase of chips, independent of the casino gaming activity. Phillips, on the other hand, was not a loser because she got exactly what she paid for; the chips allowed her to play

<sup>4</sup> Numerous cases unrelated to gambling are also progressing against prominent gaming companies, particularly centered around minors and the disaffirmance of EULAs. See *R.A. by & through Altes v. Epic Games, Inc.*, No. 5:19-CV-325-BO, 2020 WL 865420 (E.D.N.C. Feb. 20, 2020); *Doe v. Epic Games, Inc.*, 435 F. Supp. 3d 1024 (N.D. Cal. 2020); *Reeves v. Niantic, Inc.*, No. 21-CV-05883-VC, 2022 WL 1769119 (N.D. Cal. May 31, 2022); *V.R. v. Roblox Corp.*, No. 22-CV-02716-MMC, 2023 WL 411347 (N.D. Cal. Jan. 25, 2023).



the games. Thus, all Phillips' claims were dismissed.<sup>5</sup>

While the Fourth Circuit affirmed the previously reported holding in *Mason*, and the Illinois District Court followed similar logic, the Ninth Circuit overruled the trial court in *Kater v. Churchill Downs Inc.*, 886 F.3d 784 (9th Cir. 2018). The *Kater* case centered around a virtual casino, dubbed the Big Fish Casino, that offered players the ability to receive free daily deposits of chips that could be used to play a variety of casino games. These game chips could also be purchased with real-world money if a player did not want to wait until the next

day's deposit of free credits, and could be transferred to another player for a fee charged by the game operator. Unlike *Mason*, there was not a separate virtual world, or virtual resources that were useful within the virtual world. Instead, the chips awarded from successful games of chance that extended game play time. *Kater* alleged violations of Washington's Recovery of Money Lost at Gambling Act, the Washington Consumer Protection Act, and unjust enrichment. The Ninth Circuit determined that the trial court erred when it dismissed the case with prejudice and also erred in holding that the virtual

<sup>5</sup> *Ristic v. Machine Zone, Inc.*, No. 15-CV-8996, 2016 WL 4987943 (N.D. Ill. Sept. 19, 2016), which dealt with an Illinois player seeking to recover alleged gambling losses based on the same application and casino gaming present in *Mason*, followed similar reasoning regarding "winners" and "losers".

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chips were not “things of value” and that no illegal gambling occurred.

The trial court relied heavily on Big Fish Casino’s Terms of Use, which users must accept before playing any games, stating that virtual chips have no monetary value and cannot be exchanged “for cash or any other tangible value.” However, the Ninth Circuit noted that the existence of the transfer mechanism and an associated secondary market for such chip allowed players to effectively “cash out” their chips into fiat currency. Further, the court noted that Churchill Downs profits from such transactions because it charges a transfer fee on all transfers of virtual chips.

The Ninth Circuit, in reversing the trial court, held that the virtual chips were indeed “things of value.” The appellate court found that because the chips are necessary for the privilege of playing the games within the Big Fish Casino, such that winning chips enables a user to play for free and running out of chips requires a user to purchase more, they are “things of value” because “they extend[ed] the privilege of playing the game without charge,” even though they “lack[ed] pecuniary value on their own.”<sup>6</sup> It is important to note that the Ninth Circuit’s opinion did not rely on the player’s ability to redeem points for money or merchandise. Quite the opposite in fact, as the court rejected this argument by finding that Big Fish Casino’s Terms of Use expressly prohibited the sale or transfer of the virtual chips. Value in an unauthorized secondary market did not matter to the court; instead, it was the value within the gaming environment through extended game play which was the crux of the illegal gambling analysis by the court.

As a result of its determination that the virtual chips were “things of value”, the Ninth Circuit found that the Big Fish Casino constituted illegal gambling under Washington law, and therefore the value of the virtual chips lost was recoverable under the Washington Recovery of Money Lost at

Gambling Act. The court also distinguished this ruling from *Mason, Double Down*, and *Soto v. Sky Union, LLC*<sup>7</sup>, based on the differing statutes and definitions across states.<sup>8</sup>

More recently, class action plaintiffs and attorneys have taken aim at the distributors of either virtual currency or gaming applications. In *Taylor v. Apple, Inc.*, 2022 WL 35601 (N.D. Cal. 2022), appeal dismissed in part, WL 18635795 (9th Cir. 2022), and appeal dismissed, No. 22-15237, 2022 WL 18777162 (9th Cir. 2022), named plaintiff Taylor sued Apple on the premise that her son was induced to spend money on loot boxes<sup>9</sup> in the game *Brawl Stars*, which her son downloaded from the Apple Store. Specifically, Taylor alleged that her son bought virtual currency sold by Apple, which he then spent on loot boxes, which Taylor alleged were legally equivalent to slot machines under California law. It is worth noting that virtual currency could be spent on other virtual items within the game as well. Ultimately, the court determined that the loot boxes themselves were not per se illegal, and that all Taylor’s son purchased from Apple was virtual currency, which he received.

In *Coffee v. Google LLC*, 2022 WL 94986 (N.D. Cal. 2022), Plaintiffs downloaded the games *Final Fantasy Brave Exvius* and *Dragon Ball Z Dokkan Battle* from the Google Play Store onto their mobile devices. Plaintiffs alleged that they “purchased virtual coins with [real] money to buy chances on loot boxes and lost property in the form of the virtual coins they used to buy chances on loot boxes,” asserting various claims under California law based on their contention that loot boxes are illegal slot machines. *Id.* The Coffee court, similar to that in Taylor, found that the plaintiffs got exactly what they paid for.<sup>10</sup> Furthermore, the court determined that loot boxes are not slot machines because they do not award a “thing of value” under California law, quoting Taylor.<sup>11</sup>

The court also took judicial notice of the Google Play Terms of Service prohibiting the sale or transfer of any in-app content

6 Kater, citing *Bullseye Distrib. LLC v. State Gambling Comm’n*, 127 Wash. App. 231, 110 P.3d 1162 (2005).

7 159 F.Supp.3d 871 (N.D. Ill. 2016) (applying California law), discussed in the prior article.

8 Similar cases have been settled on the same arguments and holdings applying Washington law, e.g., *Wilson v. Huuuge* 944 F.3d 1212 (9th Cir. 2019); *Wilson v. Playtika*, 349 F. Supp. 3d 1028 (W.D. Wash. 2018); *Reed v. Light and Wonder*, 2021 WL 2473930 (W.D. Wash. 2021) and 18-cv-0565-RSL, (W.D. Wash. 2022).

9 Loot boxes are generally randomized chances within the game to obtain important or better weapons, costumes, or player appearance or other in-game items designed to enhance gameplay.

10 The court also reiterated that virtual currency is not a good or service under the California Consumers Legal Remedies Act, a common holding.

11 “Finally, the allegations of the complaint further fail to show that the games violate the Penal Code because the loot boxes do not offer players a chance to win “a thing of value.” Plaintiffs insist that the loot boxes contain items that are of significant subjective value to those who play the games and purchase them. While that undoubtedly is true, the lack of any real-world transferable value to the items takes them outside the meaning of the statute.”

and cited to the Kater principle regarding sales in violation of the terms of use. Thus, because the loot boxes themselves were not illegal, nor was selling and profiting from virtual currency, Plaintiff's characterization of the Google Play Store as a virtual casino was unpersuasive to the court, and the case was dismissed.<sup>12</sup>

With such sundry judicial analyses, state legislatures are beginning to define virtual currencies within their borders and clarify the roles of regulators over the transfer of virtual currencies between issuers and purchasers. The authors' home state, Florida, recently enacted legislation defining "virtual currency" from a financial regulation perspective. The Florida Legislature excluded mediums of exchange that are issued by or on behalf of a publisher and used solely within an online game, game platform, or family of games sold by the same publisher or offered on the same platform.<sup>13</sup> Other states have attempted to make similar distinctions about whether these in-game virtual currencies fall within the jurisdiction of state financial regulators, or if their use and conduct could be within the scope of gaming regulators.

Nevada adopted a similar approach to Florida, defining virtual currency as digital representation of value used as a medium of exchange, unit of account or store of value, that does not have legal tender status recognized by the United States, but excluding "game-related digital content" and "a loyalty card or gift certificate"<sup>14</sup>. New York defines

virtual currency as digital units of exchange but excludes "digital units solely related to gaming platforms" and "digital units that cannot be converted into, or redeemed for, fiat currency or [virtual currency]."<sup>15</sup>

Louisiana, Arkansas, and Texas also exclude both rewards points that are unable to be exchanged for legal tender and "digital representations of value" issued by publishers in gaming environments from their state's virtual currency definition.<sup>16</sup> Tennessee, when defining property, excludes and separately defines "game-related digital content" such as a virtual wallet or gems, gold, or tokens, but excludes from that term any such item that can be redeemed outside the game for money, goods, or services, or that can be otherwise monetized.<sup>17</sup> Therefore, it appears that the current trend is to keep closed-loop virtual currency in games away from the financial regulators, thereby shifting the burden on its lawful use to gaming commissions across the country.

As noted by Dunbar in 2016, the lines between gaming and gambling continue to blur, and they become less clear by the day. As these recent cases and legislative changes reflect, subtle differences in definition of money, determinations of value, transferability of currency or items, specificity, clarity, and acknowledgement of terms of use, the role of the defendant in the related transactions, and the forum of the legal challenge can all have a drastic impact on whether the use of virtual currency and casino gaming are permissible.

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<sup>12</sup> A similar case against the maker of the games Clash Royale and Brawl Stars, challenging the legality of loot boxes purchasable for both real and virtual currency, is currently on appeal in the 9th Circuit, styled as Peter Mai, et al v. Supercell Oy, Feb 02, 2023 (No. 23-15144). The trial court held that virtual currency was not a "good or service" and that loot boxes were not gambling under California law.

<sup>13</sup> Ch. 2022-113, Laws of Florida. The law also removed consumer affinity or rewards program "points" that can be applied solely as payment for purchases with the issuer and their designated merchants but are unable to be converted or redeemed for currency or another medium of exchange from the definition of virtual currency in a money transmitting context. Maine did the same, see ME ST T. 32 § 6102.

<sup>14</sup> 120A.122, NV. Rev. Stat. Ann.

<sup>15</sup> 23 NYCRR 200.2(p).

<sup>16</sup> LA R.S. 6:1382; AR ST § 4-11-102; TX Bus. & Com. § 12.001. See also CO ST. § 38-13-102(10) and (32), defining the terms in the context of unclaimed property, and DE ST. TI 12 § 1130, defining the terms in context of estates; RI ST. § 19-14-1, excluding most rewards programs, in-game currency, native digital tokens used in blockchain service platforms, and items defined in 12 C.F.R. 1005.20(a) with exceptions.

<sup>17</sup> TN ST § 66-29-102.