

2 Courts Dismiss Class Actions Involving Virtual Casinos

Law360, New York (December 1, 2015, 11:16 AM ET) -- A Maryland court recently dismissed a case in which a woman alleged that a virtual currency-based casino within an online empire building strategy game constituted illegal gambling, despite the existence of a secondary market for the player accounts.[1] A Washington state court dismissed claims that social casino games using purchasable virtual casino chips constitute gambling under Washington state law.[2] Both of these cases represent a significant development for social game companies that use gamblification (i.e., the use of gambling mechanics for nongambling purposes) to monetize their games.

In the Maryland case, the defendant operated an empire building strategy game available for Android and Apple iOS devices. In the game, players are offered virtual currency (“gold”) in exchange for real money. However, the gold can only be used to buy things to enhance gameplay and to use in a “virtual casino” within the game. In the casino, players can acquire virtual chips to play a spinning wheel. After each spin, players receive a virtual prize, ranging from an in-game resource such as virtual wood or stone (useful elsewhere in the game) to additional chips or gold. The defendant does not, however, offer a mechanism for players to cash out the gold or virtual goods for real money.

The plaintiff alleged that she lost, over the course of about one year, more than \$100 “wagering” in the virtual casino. She sued, purporting to represent a nationwide class of players and a subclass of Maryland players, alleging: (1) that the casino was an unlawful “slot machine or device” under Cal. Penal Code § 330b; (2) that the defendant (which operated in California) violated California Unfair Competition Law by owning and operating this unlawful device, proximately causing her and her class economic damages; (3) that her and her class have conferred a benefit upon the defendant that it should not be permitted to retain; and (4) that her and her subclass are entitled to restitution under Maryland law.

The court granted the defendant’s motion to dismiss for a number of reasons.

In addressing the plaintiff’s claims under Cal. Penal Code § 330b, the court stated that “California law defines a ‘slot machine or device’ as a ‘machine, apparatus, or device’ that is operated by insertion of a coin or other object ‘or by any other means’ and that ‘by reason of any element of hazard or chance’ grants the user any of the following: (1) a ‘thing of value,’ (2) an ‘additional chance or right to use the slot machine or device,’ or (3) a token that may be exchanged for a ‘thing of value.’”

In focusing on whether the in-game casino function was a “machine, apparatus, or device,” the court concluded that the defendant’s software is downloaded to individuals’ Apple or Android devices, and that there is “no cognizable reading of Section 330b that would reach a software developer whose software was only installed onto the devices of others.” Thus, the court concluded that the in-game casino function is not a “slot machine or device.”

The court went further, noting that even if the court were to embrace the plaintiff's expansive understanding of "slot machine or device," the court would still find that the defendant has not violated § 330b due to an important exception to the statute, which states: "Pinball and other amusement machines or devices, which are predominantly games of skill, whether affording the opportunity of additional chances or free plays or not, are not included within the [proscribed category]."

The court found that the empire building strategy game, as a whole, is a game of skill, not chance, and that, as a result, the exception applied. In doing so, the court refused to view the in-game casino separately from the game as a whole as argued by the plaintiff. On this point, the court stated that, "applying Plaintiff's logic, one could excise the free replay and similar chance-based functions of any number of skill-based games — including pinball — and, viewing those aspects in isolation, find the games to violate section 330b."

Based on these findings, that the casino function was not a "slot machine or device" and that the game as a whole was predominantly a game of skill, the court concluded that the game does not violate § 330b. The court also dismissed plaintiff's unfair competition claims, in part because the court found no cognizable loss.

The court found that there was no real-dollar value attached to gold, chips, or any casino prizes. On the contrary, the court found that the defendant's terms of service provide that "Virtual Currency and Virtual Goods may never be redeemed for 'real world' money, goods or other items of monetary value from [the defendant] or any other person'; that players receive a nontransferable 'revocable license to use the Virtual Goods and Virtual Currency' solely for personal entertainment purposes; and that, aside from the foregoing license, players have 'no right, title, or interest in or to any such Virtual Goods or Virtual Currency.'"

The court further noted that although the TOS expressly bar players from buying or selling any "Virtual Currency or Virtual Goods outside the Services or in exchange for 'real world' money or items of value," the plaintiff alleged that players have created secondary markets to buy and sell player accounts. The court noted that plaintiff did not allege that the defendant hosted or sanctioned these secondary markets, nor did she allege that she has ever sold or attempted to sell an account — nor even that she intends to do so in the future.

The court further analyzed the facts and found:

Plaintiff was not wagering with dollars; she was playing with virtual gold. Plaintiff acquired that "gold" in the "gold store," where she exchanged her real-world currency for a nontransferable, revocable license to use virtual currency for entertainment purposes. At the moment of that antecedent transaction, Plaintiff's "loss," if any, was complete: then and there she had swapped something of value (real money) for something of whimsy (pretend "gold").

Plaintiff could spend her "gold" as she pleased within the bounds of Defendant's ToS: she could acquire resources to "hasten [her] advancement in the game", or she could exchange her "gold" for chips to spin the casino wheel. What she could not do is cash out of the game. In this respect, while the casino function aesthetically resembles classic games of chance, the underlying transaction is more akin to purchasing cinema or amusement park tickets. Consumers of such services pay for the pleasure of entertainment per se, not for the prospect of economic gain.

This is a very important case for social game companies that use gamblification. The U.S. District Court for the District of Maryland expressly ruled that where the game operator merely provides software, it is not a slot machine under Cal. Penal Code § 330b. It also ruled that where the game operator offers no cash-out for virtual items, the items have no value, for gambling analysis purposes, even if there is a secondary market for the virtual items (as long as the secondary market is not hosted or sanctioned by the game operator). Additionally, the court held that for purposes of determining whether a game is a skill-based game, the relevant analysis was based on the game as a whole, and that it would have been improper to excise a mini-game feature to perform the analysis.

In the Washington case, the court dismissed class action claims that social casino games using purchasable virtual casino chips constitute gambling under Washington state law. The court found that the virtual chips have no “value” and therefore the game did not constitute gambling because the plaintiff was not “staking or risking something of value.”

The court disagreed with the plaintiff’s allegations that the virtual chips had value because they allow users to “extend gameplay” and can be sold in a secondary market. The court noted that the games are free to play and there is never a possibility of receiving real cash or merchandise, and that extended gameplay cannot result in any gain to the user aside from the amusement that accompanies it. In so deciding, the court distinguished cases where extended play in the form of free games were actually redeemed for cash. Regarding the secondary market, the court pointed to the terms of service, which stated that “the virtual chips have no cash value, and cannot be exchanged for cash or merchandise.” The court noted that allowing users to sue the defendant for damages based on their own breach of contract would be contrary to basic principles of law and equity.

This is another significant win for social game companies on a fundamental business practice — the ability to sell virtual goods for use in gamblification (i.e. the use of gambling mechanics for nongambling purposes).

In the Maryland case, one of the issues the court focused on was that the game, as a whole, was a strategy game and that it would be improper to view the mini-game itself as the game for purposes of deciding whether the game was based on skill or chance. In contrast, in the Washington case, the games themselves were casino games. Yet, the court still found no gambling because the virtual chips have no value. This is another significant decision for companies using gamblification to monetize their games.

As two of the first cases to squarely address facts and issues related to virtual currency, gambling mechanics and secondary markets, the ruling represents a positive development for social game companies. However, it is important to remember that other states’ gambling laws differ from the specific wording of the statutes at issue here and differing facts may lead to a different result. As such, the use of gamblification features must still be carefully assessed on a state-by-state basis and with regard for the specific facts of each offering.

Another case, with similar issues but slightly different facts, is pending in Illinois.[3] In that class action, the plaintiff has alleged that the Double Down Casino smartphone application constitutes unlawful gambling. In that app, customers get free chips to play simulated casino games, but are able to purchase chips if they run out. There is no cash-out feature and an unauthorized secondary market is alleged to exist.

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[1] Mason v. Machine Zone, Inc., No. 1:15-cv-01107 (D. Md. Oct. 20, 2015).

[2] Kater v. Churchill Downs Inc., No. 2:15-cv-00612 (W.D. Wash. Nov. 19, 2015).

[3] Phillips v. Double Down Interactive LLC, No. 1:15-cv-04301 (N.D. Ill. filed May 14, 2015).

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