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A real win for a virtual casino: game developer avoids class action liability under gambling loss recovery statute

By Christopher Queenin

In *Mia Mason v. Machine Zone, Inc.*, No. 15-cv- 2469 (4th Cir.), a Maryland resident filed a class action against Machine Zone, Inc., the developer of the mobile gaming app *Game of War: Fire Age* (*GoW*)—one of the top-grossing apps in recent years (and perhaps most well-known for its high-profile advertising campaign featuring Kate Upton). *GoW* is a multiplayer online strategy video game that centers on a player building an empire and waging battle against an opposing player's empire. To be successful in battle in *GoW*, players must progress through a leveling system in order to acquire and upgrade items, resources and abilities for use in battles. When a new level is reached, players, for example, can create new buildings, add to a fortress, produce more troops or acquire new weapons. *GoW* relies on a "freemium" pricing strategy, meaning while it is free to download the app and play the game, players can spend real money to purchase "virtual gold"—ranging from $4.99 for 1,200 pieces of virtual gold to $99.99 for 20,000 pieces of virtual gold—that players use to "speed up" their progress through levels and acquire new items and resources for use in battle.

Importantly for this case, in addition to using virtual gold to "level up," *GoW* allows players to spend virtual gold on "chips" for use on a prize wheel in the game's virtual casino. The virtual prizes include virtual items and resources for use in battle, as well as additional virtual chips or virtual gold. Players who spin the virtual wheel have no control over the outcome of the spin and, thus, no skill on the part of the player influences what virtual prize the player will receive.

This virtual casino aspect of the game is what gave rise to the putative class action complaint. The complaint alleged that class members lost money participating in an unlawful "gaming device" under the Loss Recovery Statute—specifically, the portion of *GoW* that allows players to spin the virtual wheel to win virtual prizes for use in the battle-based portion of the game. The complaint sought recovery of alleged gambling losses the class members incurred from spinning the virtual wheel—specifically, the difference between the amount of money paid to spin the virtual wheel, and the monetary value of the virtual prizes she won. The complaint also asserted claims under California's unfair competition law, as well as a common law claim of unjust enrichment. The district court dismissed the complaint at the pleading stage before ruling on plaintiff's request to certify a class action, concluding that the plaintiff did not "lose money" when she "spun" the virtual wheel and, therefore, had failed to state a claim under the Loss Recovery Statute. The district court similarly dismissed the claim under California's unfair competition law and the claim for unjust enrichment. The plaintiff appealed only from the district court's dismissal of her claim under the Loss Recovery Statute.

The Fourth Circuit affirmed the district court's decision. While the court assumed, without deciding, that the virtual casino in *GoW* was a prohibited "gaming device" under the Loss Recovery Statute, the court found that that the plaintiff did not meet the statute's requirement that a claimant "lose money." According to the court, the plaintiff did not lose *real money* in the virtual casino. While she paid real money to obtain virtual gold—which she later used to accrue virtual chips for use in the game's virtual casino—the virtual chips were not redeemable for money and could be used only in *GoW*. In contrast to real-world casinos, which operate by converting cash into chips and then converting chips *back into cash*, *GoW* did not convert chips back into cash. In fact, Machine Zone's terms of service expressly stated that "[V]irtual Currency and Virtual Goods may never be redeemed for 'real world' money, goods or other items of monetary value from Machine Zone or any other person."

Furthermore, according to the court, the "lose money" requirement meant that there must be a "winner" of the money plaintiff sought to recover. Here, the developer of *GoW* retained the real money that the plaintiff paid for virtual gold *regardless of the outcome of the virtual spin*. If plaintiff spun the wheel and won "resources" of "lesser value" than virtual gold, as she claimed she did, Machine Zone did not win money as a result. Conversely, according to the court, Machine Zone did not lose money if the plaintiff spun the virtual wheel and won high-value resources or more virtual gold. In short, the only loss that plaintiff sustained was when she chose to spend real-world dollars in exchange for a nontransferable license to play with virtual currency in a virtual world.

The takeaway from the court's ruling is that developers must ensure that in-game purchases for virtual items and currencies are *available and used only within a given online game*. The outcome in this case may have been different had Machine Zone created or facilitated a "secondary market," whereby players could trade or sell in-game items for real money. As the court pointed out, a successful *GoW* player could sell her account for sale on a secondary market, such as eBay, Facebook, and other websites, for hundreds, and, sometimes, thousands of dollars. However, only a player's entire account (which includes the player's progress in the game)—and not simply virtual gold and chips—could be sold in the secondary market and, at any rate, there was no indication in the decision that Machine Zone facilitated this secondary market. Instead, as mentioned before, Machine Zone's terms of service expressly stated that its virtual currency could not be redeemed for real world money.

The allegation that a developer created an unlawful gambling market by facilitating a secondary market for the sale of in-game purchases underlies the ongoing class action suit against Valve Corporation in the U.S. District Court for the Western District of Washington. The well-publicized suit relates to sales of "skins" for use in its game, *Counter Strike: Global Offensive* (*CO:GO*). Skins are purely cosmetic additions to weapons that do not affect gameplay (e.g., different colors, textures or finishes). The suit concerns Valve's creation of a marketplace called Steam Community Market that allowed users to buy, sell and trade skins from each other using virtual currency (that users purchased with real money). Valve allowed *CO:GO* players to link their Steam account to third-party websites. Some of which, according to the lawsuit, allowed users to gamble using skins on *CO:GO* matches, while others offered virtual casino-style games, jackpots, and lotteries. According to the suit, the skins were the casino chips that had monetary value outside the game itself, because of the ability to convert them directly into cash. The suit alleges that Valve "[k]nowingly allowed, supported, facilitated[] and/or sponsored illegal gambling" by allowing *CO:GO* players to link their individual Steam accounts to these third-party websites, and brings claims under Washington's consumer protection statute and gambling loss recovery statute, as well as claims for negligence and unjust enrichment.

The news of the class action against Valve attracted the attention of regulatory bodies. This past fall, the Washington State Gambling Commission directed Valve to stop facilitating the use of skins for gambling activities through its Steam platform. Last week, the Norwegian Gaming Authority published a note stating that a website that allows skin betting may be in violation of Norwegian law. In a discussion paper, the UK Gaming Commission had raised similar concerns. Valve, for its part, has denied any illegal activity. While other game developers—including Psyonix, Inc., the maker of the popular *Rocket League*—have refrained from Steam Marketplace integration with third-party websites for trading and selling upgrades/skins to avoid similar allegations that they inadvertently created a gambling industry, the fact remains that potential plaintiffs, regulators and, perhaps, prosecutors are paying attention. Well-intentioned additions to popular games can have unintended effects. Developers must ensure game micro-transactions do not lead to the creation of derivative gambling markets and, if so, that developers do not run afoul of any jurisdiction's regulations and anti-gambling laws.

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