

Extension of PLAY Constituting a PRIZE

By Karl Rutledge, Glenn Light and Mary Tran

What are prizes in association with gambling? Winning a car or cash jackpot on a slot machine may be some prizes that immediately come to mind. How about winning virtual currency in a social casino? Some may be puzzled at the thought that playing in social casinos could be considered illegal gambling activity. This is because although you may purchase the virtual currency, any virtual currency won cannot be cashed out. However, this question is becoming more relevant in states that define a prize to include the extension of play without charge.

In the United States, there is general agreement among states to a common law definition of gambling, one that prohibits only those activities in which a person pays consideration—usually cash—for the opportunity to win a prize in a game of chance.¹ That is, gambling involves any activity in which the following elements are present: (1) the award of a prize, (2) determined on the basis of chance or a future contingent event outside the user's control, and (3) where consideration must be paid. If, however, any of these three elements—prize, chance or consideration—of gambling are missing, then the activity is generally allowed under state law, not because it is a regulated gambling activity but because the activity does not constitute gambling under state law.

Consequently, if the elements of consideration and chance are present but the award of a prize is eliminated, then the activity will be legal in most, if not all, states. This is often referenced now as social gaming—some players may use real money to buy virtual currency to play, but they never receive prizes of real-world value. However, in recent years, as social gaming thrives, non-traditional awards have become increasingly popular. Non-traditional awards include extended play, avatars, the accumulation of points or virtual currency for bragging rights, and similar items. Coinciding with this proliferation is increased uncertainty and challenges as to whether such non-traditional awards constitute a prize under state gambling prohibitions.

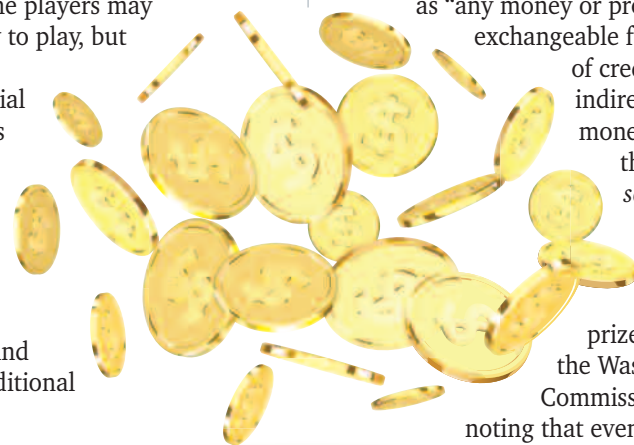
Typically, a prize requires the awarding of something of value. State gambling statutes, for example, may define gambling as risking “something of value upon the outcome of a contest of chance or a future contingent event not under his control,” with the goal of winning *something of value*.² The phrase “something of value” means, “[a]ny money or property, any token, object or article exchangeable for money or property or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein, or involving extension of a service entertainment or a privilege of playing at a game or scheme without charge.”³ Such a provision can have broad application.

This issue is rarely problematic in the physical realm. For instance, cash or merchandise are clearly items that are something of value. However, in the online world, what constitutes something of value is far murkier. This is particularly evident in the State of Washington where the delivery of entertainment is under scrutiny as to whether it constitutes a prize.

In Washington, gambling is “staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the person's control or influence, upon an agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome.”⁴ Importantly, a “thing of value,” is defined as “any money or property, any token, object or article

exchangeable for money or property, or any form of credit or promise, directly or indirectly, contemplating transfer of money or property or any interest therein, or *involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge.*”⁵

In support of the lawfulness of prizeless, social gaming in Washington, the Washington State Gambling Commission previously issued a brochure noting that even where real money is used to play in



casino games, so long as the service will not let players cash in their virtual winnings or points for real money or prizes, there is no prize.⁶ Moreover, the legality of the prizeless, social gaming was further strengthened in late November 2015, when a federal court in the Western District of Washington dismissed a class action complaint seeking recovery of monies paid to a social casino game provider because the monies were lost to an “illegal gambling operation.”⁷ The court determined that the complaint did not state a plausible claim for relief because the provider did not award something of value (requisite prize element under definition of gambling), and therefore, the game was not “illegal gambling” under Washington law.

However, this case was appealed to the Ninth Circuit Court of Appeals and in March 2018, the court held virtual currency was indeed a thing of value and reversed the lower court’s dismissal.⁸ The remand in *Kater v. Churchill Downs Inc.* to the lower court allowed the plaintiff, Cheryl Kater, to proceed with the lawsuit and spurred several other lawsuits in Washington against social gaming companies.

Of particular importance is *Fife v. Scientific Games Corp.*⁹ The plaintiff, Sheryl Fife, filed a class action in federal court in the Western District of Washington against Scientific Games Corp. (“Scientific”). Scientific filed a motion to dismiss the class action, arguing that its apps do not allow users to gamble for a “thing of value” and its games qualify for the statutory exemption for “bona fide business transactions.” Scientific, like the other defendants, offer casino gambling games for play on a phone or tablet. Again, after the initial allotment of free virtual currency runs out, players may purchase additional virtual currency, which cannot be redeemed for actual money, to continue playing its games.

Like in the other cases, Scientific argued that use of the term “without charge” in RCW 9.46.0285 implies that the game cannot be played for free. However, because the app is free to download and players are not required to bet their own money, the statute does not apply to its service. The court rejected this argument, holding that actual money is not bet but virtual coins are required to play the game and such virtual coins do cost the player money once the player uses up his coins.

Unlike the other cases, this court analyzed Scientific’s free play allotment. Scientific’s Jackpot Party Casino app allows players to gain free currency at different stages: (1) initial allotment of 6 million coins; (2) “Daily Bonus” wheel which a player may spin each day for a chance to earn 700,000 to 40 million additional coins; (3) every hour players are granted a “bonus” allotment of about 200,000 coins; and (4) when players “level up” or complete various tasks during game play, they obtain extra coins.¹⁰ The court reviewed other aspects of the game and stated of the various games offered, each one appears to require at least 48,000 coins per spin (each spin lasts a few seconds), bonuses do not sufficiently replenish the balance, and once the balance falls below the lowest bet amount, a pop-up appears prompting the player to buy more coins to continue playing.

Although the court was able to consider the actual free play distribution to players, the court again cited to *Kater* and held:

The additional free coin allotments thus do not remove Scientific’s app from the “thing of value” definition. Kater did not predicate its holding on whether the privilege of playing was permanently lost, but instead explained that the privilege was lost when a player “must buy more chips” to keep playing. It therefore does not matter that a player may obtain more free coins after an hour because, until that time, they cannot play Scientific’s games free of charge. Furthermore, although Scientific makes much of how frequently coins are awarded, the size of these awards and the speed at which coins can disappear mean that playing Scientific’s apps requires payment much of the time. Purchasing coins is therefore not only necessary to “enhance” gameplay but is also required to “extend” it.¹¹

The recent precedent in Washington presents increased challenges for social gaming operators. Specifically, even the awarding of free virtual currency does not conclusively negate the risk of a prize being found. Rather, at a minimum, thought must be given to the amount of virtual currency awarded relative to the duration of play, the delay in awarding such virtual currency and clarity as to disclosures regarding the availability of free play. Although not all states define prize to include extension of play, it is important to monitor how this issue plays out in Washington as well as other states that share a similar definition.



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¹ See, e.g., *F.C.C. v. Am. Broad. Co.*, 347 U.S. 284, 289–91 (1954) (subsequently distinguished on different grounds); see also *Commonwealth v. Plissner*, 4 N.E.2d 241, 244–45 (Mass. 1936) (holding similarly).

² ALA. CODE § 13A-12-20(4) (emphasis added).

³ ALA. CODE § 13A-12-20(11).

⁴ WASH. REV. CODE at § 9.46.0237.

⁵ *Id.* at § 9.46.0285 (emphasis added).

⁶ See <http://www.wsgc.wa.gov/publications/brochures/5-027-online-social-gaming.pdf>.

⁷ *Kater v. Churchill Downs Inc.*, No. C15-612 MJP, 2015 WL 9839755, at 1 (W.D. Wash. Nov. 19, 2015).

⁸ *Kater v. Churchill Downs Inc.*, 886 F.3d 784 (9th Cir. 2018).

⁹ *Fife v. Sci. Games Corp.*, No. 2:18-CV-00565-RBL, 2018 WL 6620485 (W.D. Wash. Dec. 18, 2018).

¹⁰ *Id.* at 4.

¹¹ *Id.*



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