

## Rolling The Dice On Class Actions Against Gaming Cos.

Law360, New York (May 19, 2015, 12:55 PM ET) -- Is it gambling dressed up as social gaming? Several social gaming and video gaming companies have been hit with class actions alleging their games are camouflaged unlawful gambling. But the lawsuits, brought under state gambling loss recovery laws, likely will not survive a motion to dismiss: The legal claims are inappropriate for class actions and purchasing virtual coins simply is not gambling.

Loss recovery laws have been implemented by a number of states to overcome the fact that common law does not allow for recovery in gambling transactions. The statutes therefore provide the loser in a gambling transaction the right to recover from the winner any money paid over to the winner. Normally, defendants in these types of suits are individuals or entities engaged in actual contracts or bets where the outcome is uncertain, making the defendants easily ascertainable as "winners" and the plaintiffs easily ascertainable as "losers." Defendants are not typically service providers like the gaming companies at issue here.



A. Jeff Ifrah

Despite the unusual fit, loss recovery statutes were central to these class actions filed against three online gaming companies. A law firm that bills itself as "a leader in class and mass action litigation" filed the suits against Double Down Interactive LLC and Sky Union LLC in Illinois state court and against Machine Zone Inc. in Maryland federal court. The complaints, which largely mirror each other, generally allege that the companies' online games are nothing more than unlawful gambling, despite the fact that the defendant companies operate legal social gaming and video gaming sites, not real money online gaming sites.

According to complaints, the defendants' online games start off as free-to-play sites, providing players an initial allotment of chips or "gems" with which to play in-app games or with which to enhance play. But the sites offer players the option to purchase more chips or "gems" once the initial allotment runs out. This option to purchase additional chips in the games for a nominal price (referred to as "micro-transactions") is at the crux of each complaint.

Each complaint alleges that the defendant companies have earned hundreds of millions in revenue from in-app micro-transactions (\$100 million in 2014 for Sky Union; \$240 million in 2014 for Double Down and \$600 million since 2014 for Machine Zone). The complaints then provide provocative allegations of extreme play. For instance, the Sky Union complaint alleges that "[a]ccording to some reports, the players at the top of the ranking spent \$3,000 in one day to have the best odds of winning the event." The Machine Zone complaint alleges that "[i]n one report, a child who played Game of War lost over €25,000 (approximately \$27,000)

of his parents' money by playing Game of War and wagering at the casino." These statistics are accompanied by quotes from video game publications that suggest psychological exploitation by gaming companies in free-to-play games with in-app purchase options.

The point of the allegations, especially the quotes from industry publications that give the appearance of relevant authority, is to tee up what looks like a striking argument against the defendant companies. But the allegations do little toward creating a cognizable legal claim, especially as a class action.

Common and central to these cases are the loss recovery statutes of Illinois, Maryland and Michigan. The problems with the complaints is that, in order to recover under these laws, plaintiffs must allege each loss with specificity including the timing and amount of the loss associated with each player (i.e., the who, what and when). Moreover, under Illinois and Michigan law, a player must bring his or her claim within six months. The level of specificity required, in addition to timing requirements per claim, make loss recovery act claims inappropriate for class actions. Loss recovery claims under Illinois' statute, for instance, have been thrown out several times in recent history for failure to plead loser and loss. In *Fahrner v. Tiltware LLC* — in which Ifrah Law was lead counsel — the Southern District of Illinois held that plaintiffs cannot allege that they timely brought a claim without alleging the date of a loss and the amount of the loss."<sup>[1]</sup>

Moreover, where damages are requested, as here, class action certification generally requires not only that common questions of law and fact exist, but also that a class action is superior to other methods of conflict resolution. Damages-seeking class actions require extensive and expensive discovery in order to identify class members, communicate with them and give them the option to recover or opt out of the class. This is not an optimal course where a significant portion of the class probably would not identify with that class. How many purported class member players of the online games at issue would agree with the allegations in the complaints? How many would cry foul on the gaming companies?

The lack of objective criteria to form a class raises another problem with bringing these cases as class actions. As the Northern District of Illinois held in *Gomez v. Illinois State Board of Education*<sup>[2]</sup>, a class description is insufficient if membership is contingent on the prospective member's state of mind.

Several courts have noted that the "Loss Recovery Act should not be interpreted to yield an unjust or absurd result contrary to its purpose."<sup>[3]</sup> Loss recovery laws are penal in nature and "must be strictly construed."<sup>[4]</sup> Invoking the statute as an umbrella to claims that require player-by-player detail, or objectively identifiable claimants, will doubtfully past muster.

Why would a sophisticated class action law firm file claims that are not likely to survive a motion to dismiss or complaints unlikely to get class certification? It may be that the suits are intended to serve as leverage to encourage the defendants to pay up and settle out. The lawsuits may have a bit of opportunism underlying them. Revenue-rich companies in a politically tenuous industry are great targets for class action threats. The vulnerability is something we predicted recently in the fantasy sports betting realm. And the class action fear factor is a primary concern across companies, making the threat real regardless of the strength of claims.

The factual allegations in the complaints and related press releases sound a lot more like policy statements than legal claims: Online gaming companies generating hundreds of millions of dollars in revenues are exploiting "susceptible populations for large percentages of their revenue." The lawsuits are not the stuff of an egregious mass tort, but the allegations do their best to make it sound that way.

Moreover, bringing the suits as class actions creates the illusion that a big settlement will put loss recovery claims to rest. Surely the online gaming companies would like to avoid the

negative publicity and have the potential claims go away. So why not pay up to quiet the noisemakers? Settlement could require the companies stop the practice complained of, such as selling chips or “gems.” That would kill one of their main revenue generators. The defendants in these cases should be willing to gear up for a game of legal war and see the suits through dismissal, as opposed to settling out quickly. The long-term payout of discouraging predatory suits should be worth it.

—By A. Jeff Ifrah, Ifrah Law PLLC

***DISCLAIMER: Ifrah Law PLLC was lead counsel in Fahrner v. Tiltware LLC.***

*Jeff Ifrah is a founding member in Ifrah Law's New York office. Ifrah was a trial lawyer and officer in the U.S. Army Judge Advocate General's Corps and was trial counsel to the U.S. Army Communications-Electronics Command at Fort Monmouth, New Jersey. He was also a special assistant U.S. attorney in the U.S. attorney's office in New Jersey.*

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[1] Fahrner v. Tiltware LLC, No. 13-0227-DRH (S.D. Ill. Mar. 24, 2015).

[2] Gomez v. Illinois State Bd. of Educ., 117 F.R.D. 394, 397 (N.D.Ill.1987).

[3] Sonnenberg v. Oldford Grp. Ltd., No. 13-0344-DRH (S.D. Ill. Mar. 14, 2014) quoting Vinson v. Casino Queen Inc., 123 F.3d 655, 657 (7th Cir.1997).

[4] Id.