

Big Fish Casino Caught Up in Net of Legal Decisions

Ninth Circuit decision regarding Big Fish Casino causes some operators to block play in Washington State - sparks potential class actions against operators

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Big Fish Casino is a social gaming application that provides “freemium” online casino games. Similar to many other providers, users are awarded free chips when they create their account and may obtain additional chips by winning games, via free chip replenishment, or by purchasing additional chips. Big Fish Games was owned by Churchill Downs Incorporated, and subsequently sold to Aristocrat Leisure Limited earlier this year.

In 2015, Cheryl Kater brought a purported class action alleging that she (and others similarly situated) should recover monies they spent on Big Fish Casino under Washington’s “Recovery of Money Lost at Gambling Act” (“RMLGA”) and Consumer Protection Act, as well as under a theory of unjust enrichment. The crux of the argument was that Big Fish conducted illegal gambling under Washington state law—and therefore, Ms. Kater should recover any monies she spent with Big Fish.

The firm that represents Ms. Kater, Edelson PC, is well-versed in these cases. Edelson brought similar lawsuits in various jurisdictions (Maryland, Illinois, Ohio), that were ultimately dismissed. Initially, Ms. Kater’s suit was no different. The Honorable Marsha J. Pechman, who was serving as the Chief Judge of the United States District Court for the Western District of Washington at the time, dismissed Ms. Kater’s complaint in November 2015.

Ms. Kater filed an appeal, and on March 28, 2018, the Ninth Circuit overturned Judge Pechman’s decision. In sum, the Court held that the virtual chips constituted a “thing of value,” and therefore, Big Fish had conducted illegal gambling under Washington law. The decision was based on Washington’s unusual statutory definition of “thing of value,” which reads:

[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.

Wash. Rev. Code § 9.46.0285 [emphasis added].

Notably, this decision contradicted the Washington State Gambling Commission’s prior publications regarding the legality of such social gaming in Washington. Accordingly, one week after the opinion was issued, the Commission issued a neutral news release noting that online social gaming sites, including Poker Stars, have made business decisions to block Washington residents. The Commission advised concerned customers to contact the operators directly, and



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expressed no opinion on the legality of such games in light of the recent opinion. Additionally, the Commission stated, “We are not a party to the civil court case, we did not testify in the case, and we did not order these sites to discontinue free online play for Washington residents.”

Equally important, the Ninth Circuit’s decision was based on a dismissal, which requires that the reviewing court accept all allegations in the complaint as true. Consequently, the Ninth Circuit opinion qualifies many of their statements with the phrase “as alleged in the complaint.” The opinion also displays several confusing statements—such as “Churchill Downs’ allegation¹ is not included in the complaint (as the parent company of Big Fish Games in 2015, Churchill Downs is the defendant), and that Ms. Kater “must buy more chips to have ‘the privilege of playing the game’” (chips were awarded every 30 minutes for free, and also if the patron was successful in the game).

These issues may be addressed by an *en banc* panel of the Ninth Circuit, or perhaps, the United States Supreme Court. Pursuant to a recently granted extension, Churchill Downs’ deadline to file a rehearing petition is May 11, 2018.

Since the opinion was issued, four other potential class action lawsuits have been filed to date in U.S. District Court in Seattle and Tacoma against social gaming operators – Huuuge Games, DoubleDown Interactive, High 5 Games, and Playtika. Like Big Fish, each of the named operators offer “freemium” online casino games and of the four lawsuits, three lawsuits have the same named plaintiff and law firm.²

Online social gaming companies should monitor the Big Fish case and the other recent developments closely. The ultimate ruling in this case could significantly alter the legal landscape in Washington. Strategies are available for online social gaming companies to minimize any risks that this case may pose to their businesses. Companies should also review their Terms and Conditions and the viability of utilizing a binding arbitration provision.

Since this issue will likely not be finalized for some time, if you would like a risk analysis of your business model in light of this decision or to discuss strategies to minimize risk, please reach out to Karl Rutledge (krutledge@lrrc.com).

^[1] Since users receive free chips throughout gameplay, Churchill Downs contends that extending gameplay does not actually cost users anything.

^[2] Sean Wilson, alleges he lost about \$20 playing games offered by Huuuge, High 5 Games, and Playtika (\$9.99, \$1.99, and over \$10.00, respectively). Adrienne Benson, the plaintiff against Double Down Interactive, alleges she lost over \$1,000.