

---

---

RIGGING THE GAME: THE LEGALITY OF RANDOM CHANCE PURCHASES  
("LOOT BOXES") UNDER CURRENT MASSACHUSETTS GAMBLING LAW

Thomas Wood<sup>1</sup>

**I. Introduction**

Microtransactions are generally defined as any additional payment made in a video game after the customer makes an original purchase.<sup>2</sup> Over time, microtransactions have increased in prominence and are featured today in many free-to-play mobile games.<sup>3</sup> However, some video game developers, to the outrage of consumers, have decided to include microtransactions in PC and console games, which already require an upfront \$60 retail payment.<sup>4</sup> Consumer advocacy groups have increasingly criticized Microtransactions as unfair to

---

<sup>1</sup> J.D. Candidate, Suffolk University Law School, 2020; B.S. in Criminal Justice and minor in Political Science, University of Massachusetts Lowell, 2017. Thomas Wood can be reached at thomasgwood@comcast.net.

<sup>2</sup> See Eddie Makuch, *Microtransactions, Explained: Here's What You Need To Know*, GAME SPOT (Nov. 20, 2018), archived at <https://perma.cc/TUX6-D9WL> (defining microtransactions as "anything you pay extra for in a video game outside of the initial purchase"); see also *Microtransaction*, URBAN DICTIONARY (Oct. 29, 2018), archived at <https://perma.cc/XS7R-Z4TT> (describing microtransactions sarcastically as a "method that game companies use to make the consumer's wallets burn" and "the cancer of modern gaming").

<sup>3</sup> See Mike Williams, *The Harsh History of Gaming Microtransactions: From Horse Armor to Loot Boxes*, USGAMER (Oct. 11, 2017), archived at <https://perma.cc/PEY6-SFL2> (outlining how the loot box model was originally created in Asia through MMOs and free-to-play games); see also *Loot Boxes Games*, GIANT BOMB (Nov. 5, 2019), archived at <https://perma.cc/E7DT-MTEA> (listing every personal computer, console, and mobile game which includes loot boxes).

<sup>4</sup> See Makuch, *supra* note 2 (explaining how some large AAA game developers are using microtransactions to "ask for more money beyond the initial sale price, which can be \$60 or more depending on where you live and what you're after").

consumers.<sup>5</sup> Others have defended the practice of including microtransactions in console video games as a necessity for large game developers to profit from their large, increasingly higher-budget games in a multi-billion-dollar industry.<sup>6</sup>

The most recent type of microtransaction used by game developers have been what are called random chance purchases (or “loot boxes”).<sup>7</sup> Loot boxes are digital crates, packs, or boxes which can be purchased with real-world currency and give players a random chance to receive valuable items in-game.<sup>8</sup> Some consumer advocates have argued the use of loot boxes as a microtransaction is even more unethical because of its visual similarity to casino slot machines.<sup>9</sup> In fact, class action lawsuits have already been brought by gamers against

---

<sup>5</sup> See Jason M. Bailey, *A Video Game ‘Loot Box’ Offers Coveted Rewards, but Is It Gambling?*, N.Y. TIMES (Apr. 24, 2018), archived at <https://perma.cc/XT5N-FTNG> (citing consumer advocates who criticize loot boxes as being “specifically designed to exploit and manipulate the addictive nature of human psychology”); see also Chelsea King, *Forcing Players to Walk the Plank: Why End User License Agreements Improperly Control Players’ Rights Regarding Microtransactions in Video Games*, 58 WM. & MARY L. REV. 1365, 1399 (2017) (arguing that end user license agreements in video games should not receive “ironclad protection, especially when microtransactions are involved”).

<sup>6</sup> See Extra Credits, *The Loot Box Question – Designing Ethical Lootboxes: I Extra Credits*, YOUTUBE (Feb. 14, 2018) [hereinafter I Extra Credits], archived at <https://perma.cc/U8DN-677S> (arguing that developers chose to implement loot boxes because of the rising budgetary costs of developing quality video games).

<sup>7</sup> See Katherine Cross, *How the legal battle around loot boxes will change video games forever*, THE VERGE, (Dec. 19, 2017), archived at <https://perma.cc/QW5U-PEV7> (defining loot boxes as “virtual boxes with random contents that you purchase through video games with real money”). Loot boxes “contain everything from virtual cosmetic items to power-ups to gear that can dramatically alter your chances of winning the game.” *Id.*

<sup>8</sup> See Williams, *supra* note 3 (describing some of the prizes contained within video game loot boxes, including “costumes, skills, gear, or random items specific to the game”).

<sup>9</sup> See Elliott O’Day, *Comment: 21st Century Casinos: How the Digital Era Changed the Face of Gambling and What Texas Should Do to Combat It*, 19 TEX. TECH. ADMIN. L.J. 365, 384 (2018) (arguing loot boxes should be illegal under Texas state gambling law and that the state should “impose fines on online entities doing business in the form of online gambling within the state”); see also Abrar Al-Heeti, *Video game loot boxes under scrutiny by 16 gambling regulators*, CNET (Sept. 17, 2018), archived at <https://perma.cc/4NTT-JKPB> (citing regulatory commission in Australia which said loot boxes “provide games companies with an unregulated way of exploiting gambling disorders amongst their customers”).

video game developers arguing that loot boxes are unregulated, illegal gambling.<sup>10</sup> The recent question of whether loot boxes are illegal gambling has been decided through class action lawsuits on a jurisdiction-by-jurisdiction basis, and has bitterly divided federal courts in Illinois, Maryland, and Washington state.<sup>11</sup>

The argument that loot boxes are illegal gambling has also received traction in the state of Massachusetts, with some raising the possibility that gamers in MA have the ability under current consumer protection laws to sue game developers for “loot box gambling losses” incurred.<sup>12</sup> This note will discuss whether money spent from loot boxes would be subject to the Massachusetts Gambling Loss Recovery statute, which is designed to protect consumers from illegal gambling.<sup>13</sup> Part II of this note provides a brief overview of the history of gambling regulations in the United States, describes the current gambling statutory scheme in the Commonwealth of Massachusetts, and provides a detailed explanation of the history of microtransactions.<sup>14</sup> Part III of this note will discuss how microtransactions came to be such a common feature of video games, the litany of investigations by international & domestic regulators, and give a detailed explanation of the divide in federal courts over the legality of video game loot boxes.<sup>15</sup> Part IV will provide analysis to the applicability of Massachusetts law to loot boxes in video games

---

<sup>10</sup> See Madeline Ricchiuto, *Square Enix: Faces Suit Over Hoshi no Dragon Quest's Loot Boxes*, 20 CLASS ACTION REP. 1, 1 (Mar. 27, 2018) (discussing recent lawsuit brought by eight players against Square Enix for implementation of loot boxes in Hoshi No Dragon Quest); see also Dan Pascucci & Paul Huston, *Loot Box Controversy May Prompt Consumer Class Actions*, 20 CLASS ACTION REP. 1, 2 (May 29, 2018) (noting that “particular in-game features through a loot box purchase would likely violate such statutes”).

<sup>11</sup> See John T. Holden, *Article: Trifling and Gambling with Virtual Money*, 25 UCLA ENT. L. REV. 41, 85–89 (2018) (discussing circuit split between federal courts on virtual currency in video games).

<sup>12</sup> See Pascucci & Huston, *supra* note 10 (mentioning that “the loot box controversy is a particularly attractive target for class action claims under gambling loss recovery statutes in protective, consumer-friendly states like California and Massachusetts”).

<sup>13</sup> See MASS. GEN. LAWS ch. 137, §§ 1–7 (stating the requirements and exceptions to the Massachusetts Gambling Loss recovery law).

<sup>14</sup> See *infra* Part II (providing a brief history of Massachusetts gambling regulations).

<sup>15</sup> See *infra* Part III (describing the development of microtransactions in video games and specifically the use of loot boxes as a means of collecting revenue).

and conclude that loot boxes likely do not constitute illegal gambling under current state law.<sup>16</sup>

## II. History

Gambling is generally defined as a contract where parties agree to gain or lose something based on the occurrence of a specific event.<sup>17</sup> There are 3 categories of gambling: (1) gaming, (2) betting, and (3) lotteries.<sup>18</sup> Gaming is the playing of a game for stakes hazarded by the players.<sup>19</sup> Betting (or wagering) is the promise to give consideration upon the determination of an uncertain event that may involve skill or judgment.<sup>20</sup> A lottery is a game where a price is paid for the chance to win a prize.<sup>21</sup> Slot machines have traditionally been classified as lotteries under standard gambling law because slot machines require payment of tokens purchased with real world money and give out prizes depending entirely on chance.<sup>22</sup> Whether a particular slot

---

<sup>16</sup> See *infra* Part IV (determining that loot boxes likely do not violate Massachusetts's gambling laws).

<sup>17</sup> See 12B AM. JUR. PL. & PR. FORMS *Gambling* § 1, Westlaw (database updated 2019) (defining a gambling contract as “one in which the parties agree that each will gain or lose on the happening of a contingency in which they have no interest except that arising from the possibility of such gain or loss”).

<sup>18</sup> See BARBARA B. POWELL & HALPIN J. BURKE, 2 CRIM. DEF. TECH. § 52.01(2)(a), LEXIS (database updated 2019) (categorizing gambling into three sections).

<sup>19</sup> See *State v. Torres*, 831 S.W.2d 903, 905 (Ark. 1992) (defining gaming as the “risking of money, between two or more persons, on a contest or chance of any kind, where one may be the loser and the other gainer”).

<sup>20</sup> See *Commonwealth v. Sousa*, 600 N.E.2d 1012, 1012 (Mass. App. Ct. 1992) (defining betting as the hazard of money or property upon an incident by which one or both parties stand to lose or win by chance).

<sup>21</sup> See *Finster v. Keller*, 18 Cal. App. 3d 836, 843 (1971) (holding that a game is a lottery if “a price was paid for a chance of a prize, and in which it purported to be determined by chance; that is, by means making the result independent of the will of the manager of the game, according to a scheme held out to the public, whether he who paid the money should have the prize or nothing”) (citing *Commonwealth v. Sullivan*, 15 N.E. 491, 494 (Mass. 1888)).

<sup>22</sup> See 38 AM. JUR. 2D *Gambling* § 50, Westlaw (database updated 2019) (prefacing that in some jurisdictions, slot machines are not lotteries unless their construction and operation falls within the definition of a lottery).

machine is a lottery subject to gambling regulations is decided on a case-by-case basis.<sup>23</sup>

For a game (such as a slot machine) to be considered a lottery, three elements must be established: (1) a prize, (2) distribution by chance, and (3) consideration in exchange for the prize.<sup>24</sup> To satisfy the prize element, courts generally require proof that the prize given out after the game is something of value.<sup>25</sup> For the game to qualify as having a distribution by chance, courts must decide whether the game is predominately a game of skill, or game of chance.<sup>26</sup> Finally, in order for the game to qualify under the consideration element, the game must pay something of value upfront.<sup>27</sup>

### A. *The Current State of Massachusetts Gambling Law*

As one of the original colonies, the Commonwealth of Massachusetts has had a long and complex history with gaming, going

---

<sup>23</sup> See *id.* (adding that whether a slot machine falls under state lottery law depends on whether the machine is a game of skill or game of chance).

<sup>24</sup> See *Finster*, 18 Cal. App. 3d at 843 (outlining three required elements which must exist to for a game to constitute a lottery); see also 12B AM. JUR. PL. & PR. FORMS *Gambling* § 1 (listing elements of lotteries as “consideration, prize and chance,” and concluding that “gratuitous distribution of property by lot or chance does not constitute a lottery”); see also HELLE SACHSE ET AL., MA CRIM. LAW SOURCEBOOK & CITATOR § 2-270-7 (2017) (stating there are “three elements in a lottery, (1) the payment of a price for (2) the possibility of winning a prize, depending on (3) hazard or chance”) (citing *Commonwealth v. Lake*, 57 N.E.2d 923, 924 (Mass. 1944)).

<sup>25</sup> See *Definition of Gambling*, TRUTHFINDER (Apr. 23, 2019), archived at <https://perma.cc/ECC3-WNML> (“If the player has the chance to win something of value, then gambling is taking place. Again, the amount or value of the prize is inconsequential. As long as it has some value, it is considered gambling.”). See also I. Nelson Rose, *Gambling and the Law: An Introduction to the Law of Internet Gambling*, 10 UNLV GAMING RES. & REV. J. 1, 2 (2005) (explaining that the prize element “means the player can win something of value”). “If players cannot win money or merchandise, the activity is an amusement game. Some jurisdictions define ‘prize’ to include free replays. But even if technically a crime, no government is going to go after an Internet operator for running an amusement game in which the only thing a player can win is the right to play the same game again, even if there is a charge to play.” *Id.*

<sup>26</sup> See SACHSE ET AL., *supra* note 24 (citing *Lake*, 57 N.E.2d at 924). *Lake* held that “a game is now considered a lottery if the element of chance predominates and not a lottery if the element of skill predominates.” *Id.*

<sup>27</sup> See *Definition of Gambling*, *supra* note 25 (requiring that a player must pay something of value upfront in order for the game to meet the consideration element of gambling).

back and forth between supporting legalized gambling to enacting puritanical anti-gambling statutes.<sup>28</sup> On the one hand, Harvard University, the Massachusetts State House, and the Plymouth Rock memorial were all funded from gambling revenues collected by the state.<sup>29</sup> Yet in 1646, Massachusetts became the first colony to enact anti-gambling statutes out of concern for the effects legal gambling would have on the work of other pioneers.<sup>30</sup> After a financial crisis in the early 1970s, the Commonwealth reversed course again and adopted a state-run lottery program.<sup>31</sup>

Today, Massachusetts enjoys some of the most liberal gambling laws in the country, allowing for several types of gambling, including lotteries, casinos, charity bingo games & raffles, and race betting.<sup>32</sup> However, Massachusetts also imposes strict regulations on very specific forms of gambling.<sup>33</sup> For example, it is still a crime to set up or promote non-state-run lotteries in the Commonwealth.<sup>34</sup> Slot machines are also illegal under current state law, with the limited exception of state-approved “casino nights” operated by non-profit organizations.<sup>35</sup>

---

<sup>28</sup> See *Gambling in Massachusetts: Where to Gamble & State Gaming Laws*, GAMBLINGSITES.COM, (Nov. 02, 2018) [hereinafter *Gambling in Massachusetts*], archived at <https://perma.cc/4C7M-NACK> (describing Massachusetts’ lengthy history of gaming).

<sup>29</sup> See *id.* (noting that many of the Commonwealth’s landmarks “were built at least partially from lottery and raffle revenue”).

<sup>30</sup> See POWELL & BURKE, *supra* note 18, at § 52.01(2)(b) (noting how in the colonial era, Puritans in Massachusetts “discouraged gaming because it was contrary to the principals of hard work” required to survive the pioneering life).

<sup>31</sup> See *Gambling in Massachusetts*, *supra* note 28 (mentioning the financial crisis leading to the adoption of the state lottery).

<sup>32</sup> See *id.* (“Massachusetts gambling law allows for many different types of legal gambling. Massachusetts citizens can play in casinos, buy state and regional lottery tickets, bet on horse and dog racing, play in charity bingo games and raffles, and enjoy some of the most liberal social gambling laws in the country.”).

<sup>33</sup> See generally MASS. ANN. LAWS ch. 271, §§ 1–50 (LexisNexis 2018) (codifying specific prohibited forms of gambling).

<sup>34</sup> See MASS. ANN. LAWS ch. 271, § 7 (articulating the requirement of lotteries to be state sanctioned in order to be legal).

<sup>35</sup> See Caitlin E. Flanagan, *The Need for Compromise: Introducing Indian Gaming and Commercial Casinos to Massachusetts*, 42 SUFFOLK U. L. REV. 179, 194 (2008) (noting the types of games that are legal lotteries in the Commonwealth and describing the current state regulations surrounding slot machines in Massachusetts).

Gambling is defined under Massachusetts law as, either: (1) a physical game played with cards, dice, tiles or dominoes, or (2) an electronic, electrical or mechanical device or machine for something of value.<sup>36</sup> If the specific game fits either of those definitions of gambling and does not fall under at least one of five exceptions under Mass. general laws chapter 4, section 7, it is illegal gambling.<sup>37</sup> Those exceptions include: (1) Any lottery game specifically conducted by the Massachusetts lottery commission; (2) Any game that is approved by the Massachusetts Gaming Policy Advisory Committee; (3) Horse and dog race betting under MGL chapter 128A and 128C; (4) A game of bingo conducted under chapter 271; and (5) Charitable games that are conducted under chapter 271.<sup>38</sup>

Currently, Massachusetts has no laws which directly address whether online gambling is legal or illegal.<sup>39</sup> Several unsuccessful attempts have been made by state legislators to pass legislation regulating online gambling in Massachusetts.<sup>40</sup> However, Massachusetts Attorney General Maura Healey has been able to successfully impose regulations on Daily Fantasy Sports players in

---

<sup>36</sup> See MASS. ANN. LAWS ch. 4, § 7 (LexisNexis 2019) (defining illegal gambling as “a banking or percentage game played with cards, dice, tiles or dominoes, or an electronic, electrical or mechanical device or machine for money, property, checks, credit or any representative of value”).

<sup>37</sup> See *id.* (providing a general definition of illegal gambling that becomes legal if at least one of five exceptions is met).

<sup>38</sup> See *id.* (outlining the specific circumstances where gambling is not prohibited in Massachusetts).

<sup>39</sup> See *Massachusetts Online Gambling Guide*, PLAYUSA (Nov. 2, 2018), archived at <https://perma.cc/VWX9-M3JZ> (“Massachusetts does not have laws directly addressing online gaming one way or the other. As in many states, the legal framework simply hasn’t caught up to reality yet.”). Massachusetts will be “agreeable to the notion of online gambling” because it was one of the first states to legalize fantasy sports betting. *Id.*

<sup>40</sup> See Savannah Lavinder, *Poker Laws in Massachusetts*, POKERWEBSITES (May 8, 2018), archived at <https://perma.cc/DK39-SZSV> (outlining the attempts by Massachusetts legislators to legalize online gambling). In the 2013 legislative session, Senator Flanagan attempted to introduce a bill for “online lottery ticket sales,” and Senator Bruce Tarr introduce legislation to regulate “iGambling,” which failed to pass. *Id.* In the 2015 session, Senator Bruce Tarr again attempted to introduce another gambling bill, but was not able to find enough support for the legislation. *Id.* Most recently, in the January 2017 session, State Senator Bruce Tarr introduced another bill legalizing online gambling which was unsuccessful. *Id.*

Massachusetts.<sup>41</sup> Regardless of whether current law is interpreted to include internet gambling transactions in Massachusetts, it is very likely internet gambling will be legalized in the near future.<sup>42</sup>

While Massachusetts has given consumers plenty of gambling options, the Commonwealth also has legislation designed to provide protections to consumers of illegal gambling. One of these consumer protection laws is the Massachusetts gambling recovery law, which allows people who lose money from illegal gambling operations to recover that money through a civil suit.<sup>43</sup> Section 1 allows for a person who loses gambling money in an illegal gambling operation to sue for the value of goods lost in the game.<sup>44</sup> Section 2 establishes that owners of gambling establishments are equally as liable as the winner of the game.<sup>45</sup> Section 3 makes any notes, bonds, mortgages, or other securities or conveyances which are derived from illegal gambling void under state law.<sup>46</sup> In order to adequately state a claim for running an illegal gambling operation under chapter 137, a pleading must describe the defendant's address, provide a description of the property

---

<sup>41</sup> See 940 MASS. CODE REGS. 34.00 (2016) (interpreting the Commonwealth's Unfair and Deceptive Practices Act, Chapter 93A, as covering transactions made in Daily Fantasy Sports (DFS) contests in Massachusetts). Some of the protections include prohibiting DFS operators from advertising to minors, defined by the regulation as persons under the age of twenty-one, limiting the number of accounts a DFS player can have on each website, and requiring any advertisements in Massachusetts to promote responsible gaming. *Id.*

<sup>42</sup> See Lavinder, *supra* note 40 (predicting Massachusetts will legalize online poker in the near future).

<sup>43</sup> See MASS. ANN. LAWS ch. 137, §§ 1–3 (LexisNexis 2018) (outlining the mechanism for individuals who lose money from illegal gaming); see also § 5 (explaining how a person can recover money through a contract).

<sup>44</sup> See § 1 (including games like cards, dice, lotteries, and pool bets).

<sup>45</sup> See § 2 (excluding owners of licensed gambling establishments under Massachusetts law); see also 32 JOSEPH R. NOLAN & LAURIE J. SARTORIO, MASS. PRAC. CRIM. LAW § 492 (3d ed. 2018) (describing how owners who “with knowledge or consent” allow their property to be used for gambling are “liable to the same extent ... as the winner” or the beneficiary of the gambling); see also 33A E. GEORGE DAHER ET AL., MASS. PRAC. LANDLORD & TENANT LAW § 18.20 (3d ed. 2018) (stating landlords “may be liable for gaming losses incurred in a building which he owns, if he has knowledge of or consents to such gaming”).

<sup>46</sup> See § 3 (outlining the process by which types of securities and conveyances are voided by illegal gambling).

used, the games played on the property, and a description of why it was that the games constituted illegal gambling under state law.<sup>47</sup>

The Massachusetts Supreme Judicial Court has held that for a game to be considered a lottery, the three traditional elements of gambling must be established: (1) that the game is a one of chance, not of skill (“game of chance element”); (2) that the game requires consideration (“consideration element”); and (3) that the player has the possibility of winning a prize (“prize element”).<sup>48</sup> First, to meet the game of chance element, the First Circuit Court of Appeals held in *United States v. Marder* that the chance component, if any, must predominate over the skill component.<sup>49</sup> Next, to meet the consideration element, the player must be required to give something of value at the start of the game.<sup>50</sup> Finally, to meet the prize element, the Commonwealth or plaintiff must show that the winner receives something of value.<sup>51</sup> Massachusetts courts have rejected the argument that a defendant is not liable under the gambling loss recovery statute merely because the injured plaintiff had “unclean hands” when he or she agreed to participate in an illegal game.<sup>52</sup>

---

<sup>47</sup> See 12B AM. JUR. PL. & PR. FORMS *Gambling* § 2, Westlaw (database updated 2019) (listing information needed to adequately state a claim that a gambling house is in violation of law in a specific state).

<sup>48</sup> See *id.* § 1 (stating the three general elements of the existence of gambling); see also *Commonwealth v. Lake*, 57 N.E.2d 923, 924 (Mass. 1944) (clarifying that the language of Massachusetts’ definition of a “lottery” as a claim that requires three elements to be shown).

<sup>49</sup> See *United States v. Marder*, 48 F.3d 564, 569 (1st Cir. 1995) (holding that for a game to be considered a lottery, the “element of chance must be present in such a manner as to thwart the exercise of skill or judgment in a game”).

<sup>50</sup> See *Mobile Oil Corp. v. Att’y Gen.*, 280 N.E.2d 406, 411 (Mass. 1972) (limiting the consideration only to “something of value and not merely . . . registering one’s name or attending at a certain place”).

<sup>51</sup> See *id.* at 406 (holding that a promotional contest held by service stations met the prize element because winners received something of value).

<sup>52</sup> See *Kemp v. Hammond Hotels*, 115 N.E. 572, 573 (Mass. 1917) (holding that a plaintiff can “recover [losses] from the winners” of an illegal gambling operation despite being a participant in the game); see also *Bressler v. Averbuck*, 76 N.E.2d 146, 148 (Mass. 1947) (stating the “defense of unclean hands based on the illegal conduct of the plaintiff cannot prevail”).

*B. History of Microtransactions: How They Became so Prevalent in Gaming*

Microtransactions are in-game purchases which allow a person playing the video game to unlock either cosmetic features to continue the game, change the appearance of their character, or upgrade the game character's specific abilities.<sup>53</sup> There are 4 types of microtransactions: (1) In-Game Currencies; (2) Expiration; (3) In-Game items; and (4) Random chance purchases.<sup>54</sup> In-Game currency is "fake" currency that players use to "purchase" in-game items.<sup>55</sup> Expiration microtransactions, typically used in arcade games, ask the player to pay additional money when a player is "killed" in order to continue playing.<sup>56</sup> In-Game Items are in-game purchases that give players an advantage or something of value in the actual game itself.<sup>57</sup> Finally, random chance purchases (or "loot boxes") are randomized bags or packs that give players the chance to earn either ordinary or rare in-game items.<sup>58</sup>

The concept of random chance purchases was first used in collectible card games like "Magic: The Gathering" and "Yu-Gi-Oh!" which sold foils containing randomly selected cards (or "foil cards")

---

<sup>53</sup> See Makuch, *supra* note 2 (defining microtransactions as "anything you pay extra for in a video game outside of the initial purchase," such as "weapon camos," "cosmetic items," and "points"); see also Prateek Agarwal, *Economics Of Microtransactions In Video Games*, INTELLIGENT ECONOMIST (Dec. 20, 2017), archived at <https://perma.cc/6HMB-STKW> (defining microtransactions as virtual, "in-game purchases that unlock specific features," or purchases that give the user "specific abilities, characters, or content").

<sup>54</sup> See Agarwal, *supra* note 53 (categorizing microtransactions into four groups: in-game currencies, random chance purchases, in-game items, and expiration).

<sup>55</sup> See *id.* (defining in-game currency).

<sup>56</sup> See *id.* (distinguishing expiration microtransactions from physical arcade machines requiring users to pay coins to replay a game).

<sup>57</sup> See *id.* (mentioning examples of in-game purchases used in real video games, such as "pets and mounts" in World of Warcraft).

<sup>58</sup> See *id.* (defining loot boxes as a microtransaction category in which players are unaware of what is in the box, crate, bag or pack in-game). Players are unaware of what is inside of the box but may be tempted to purchase a large quantity of loot boxes, especially when the game offers "deals" to purchase these loot boxes at discount rates. *Id.*

at local retail stores.<sup>59</sup> In the 1990s, random card packs became more and more successful.<sup>60</sup> However, in 1996 and 1999, several card makers who sold random card packs faced lawsuits claiming these foil packs were an illegal lottery under RICO.<sup>61</sup> The lawsuits seemed to have little effect on the overall business model of foil card sales, as foil packs are still sold at many retail stores today.<sup>62</sup> The reason for this seems to be that courts and gambling regulators do not view foil cards “prizes” within the meaning of gambling law.<sup>63</sup>

Microtransactions, on the other hand, were not a concept known to gamers until a decade later, in 2006, when Bethesda Softworks, Inc. released “The Elder Scrolls IV: Oblivion,” a fantasy role-playing video game.<sup>64</sup> In April 2006, Bethesda released the “Horse Armor Pack,” which for \$2.50 would allow the player character to outfit their in-game horse with different kinds of armor.<sup>65</sup>

---

<sup>59</sup> See Steven T. Wright, *The evolution of loot boxes*, PC GAMER (Dec. 8, 2017), archived at <https://perma.cc/SNQ5-S7TD> (describing collectible card games as the origin of loot boxes in video games).

<sup>60</sup> See *id.* (stating that in the 1990s, “everyone wanted to be like Magic,” and that this success led to spin-offs like the Pokémon collectible card game).

<sup>61</sup> See David M. Halbfinger, *Suit Claims Pokemon Is Lottery, Not Just Fad*, N.Y. TIMES (Sept. 24, 1999), archived at <https://perma.cc/W2UW-BLD5> (outlining the arguments in the Pokémon foil pack lawsuit); see also Patrice O’Shaughnessy, *LAWSUIT IS IN THE CARDS*, N.Y. DAILY NEWS (Dec. 8, 1996), archived at <https://perma.cc/DJF5-8KDA> (describing a complaint filed against several “sports trading card companies, alleging they conduct an illegal gambling enterprise”); Stefan Fatsis, *Sports Trading Cards: Wholesale Fun or Gambling?* WALL STREET J. (Oct. 25, 1996), archived at <https://perma.cc/W8NA-QS7J> (giving arguments of both sides in the sports trading cards lawsuit).

<sup>62</sup> See Gary A. Enos, *Trading cards: a risky gamble?* ADDICTION PROFESSIONAL (June 20, 2016), archived at <https://perma.cc/HU75-JX6T> (“While the number of makers and dealers has been declining [since the 1990s class action lawsuit], the gaming-like behaviors in the public continue unabated . . . fueled by online vehicles for buying and trading.”).

<sup>63</sup> See Erik Kain, *The ESRB Is Wrong About Loot Boxes And Gambling*, FORBES (Oct. 12, 2017), archived at <https://perma.cc/GKQ5-YV65> (discussing the Entertainment Software Rating Board’s (“ESRB”) argument that loot boxes are like collectible card packs, which are not gambling). “Sometimes you’ll open a pack and get a brand new holographic card you’ve had your eye on for a while. But other times you’ll end up with a pack of cards you already have.” *Id.* Thus, players of collectible card games are always receiving a prize of value, even if it is something that they don’t want. *Id.*

<sup>64</sup> See Williams, *supra* note 3 (mentioning the importance of “The Elder Scrolls IV: Oblivion” in the history of western microtransactions).

<sup>65</sup> See *id.* (describing the features of “Horse Armor DLC”).

Almost immediately, this proposed business model was criticized by gamers – many claiming that Bethesda charged customers too much for what amounted to a meaningless ornament.<sup>66</sup> Despite this criticism, “Horse Armor DLC” became one of the most purchased downloads on the Xbox Live market.<sup>67</sup>

Given the success of foil packs in collectible card games, and the success of microtransactions in a game like “Oblivion,” it was almost inevitable that random chance purchases would soon become implemented in console games. Video game loot boxes were first invented in China and Korea, but eventually the loot box model became adopted by western game developers.<sup>68</sup> The first western video game to implement the loot box model was “Team Fortress 2,” a team-based free to play online shooter, a model which proved highly profitable for the game’s developer, the Valve Corporation.<sup>69</sup> The loot box success in “Team Fortress 2” led to other developers choosing to implement loot box models in their games.<sup>70</sup>

---

<sup>66</sup> See Omri Petite, *Bethesda: reaction to Oblivion’s Horse Armor DLC was a lesson about value*, PC GAMER (Sept. 20, 2012), archived at <https://perma.cc/9K2F-JGMM> (quoting Pete Hines, the Vice President of Bethesda, who said of the Horse Armor Controversy, “[t]he reaction to Horse Armor wasn’t just about price. It was more of a lesson: when you’re going to ask somebody to pay X, do they feel like they’re getting Y in exchange?”).

<sup>67</sup> See Williams, *supra* note 3 (noting that despite criticism, “Horse Armor DLC” became “one of the Top 10 purchased downloads” on Xbox Live); see also SCR, *Microtransactions: The History and Future*, LAZYIEST GAMING (Nov. 29, 2017), archived at <https://perma.cc/GX3K-UHCE> (criticizing consumers for allowing “Horse Armor DLC” to become financially successful).

<sup>68</sup> See Williams, *supra* note 3 (noting that since loot boxes were implemented in China and Korea, both countries “have since cracked down on the business model as a form of unregulated gambling”).

<sup>69</sup> See Wright, *supra* note 59 (stating the importance of the game’s success to the development of loot boxes in games). Gabe Newell, the co-founder of Valve, stated the choice to turn “Team Fortress 2” into a free-to-play game and instead receive revenue through loot boxes resulted in the player base being multiplied by a “factor of five.” *Id.* Valve also faced controversy for a game they later developed called “Counterstrike: Global Offensive” (“CS: GO”), which gave players the ability to purchase “skins” and bet them on a secondary market. See John Vrooman Haskell, *More Than Just Skin(s) in the Game: How One Digital Video Game Item is Being Used for Unregulated Gambling Purposes Online*, 18 J. HIGH TECH. L. 125, 127 (2017) (criticizing the unregulated “skin-betting” market in CS: GO).

<sup>70</sup> See Wright, *supra* note 59 (describing how the success of the “Team Fortress 2” loot box model led to developer Blizzard Entertainment implementing loot boxes in the game “Overwatch,” a decision which helped Blizzard earn “over \$1 billion by

### III. Facts

#### A. *Star Wars: Battlefront II: The Beginning of the Loot Box “Pay-To-Win” Controversy*

While gamers were critical of microtransactions, it wasn't until launch of the 2017 video game “Star Wars: Battlefront II” that game developers felt a large blowback from consumers against the implementation of random chance purchases in video games.<sup>71</sup> “Battlefront II” is a game set in the fictional Star Wars universe which allows players to take the role of stormtroopers, rebels, or droids in famous battles from the Star Wars film saga.<sup>72</sup> Gamers criticized EA, the publisher of “Battlefront II,” for the decision to include loot box “prizes” which allowed players to spend real world money to purchase “credits,” “Battlefront II”'s in-game virtual currency.<sup>73</sup> The purchased credits could then be used to purchase loot boxes, which gave gamers a random chance to earn an upgrade to their in-game weapons, unlock playable Star Wars characters from the movies, or cosmetic skins that made the character's in-game model distinguishable from others.<sup>74</sup>

---

early 2017”); *see also* Williams, *supra* note 3 (mentioning other games which implemented loot boxes after the success of “Team Fortress 2”).

<sup>71</sup> *See* Bailey, *supra* note 5 (quoting Christopher Hansford, the political engagement director for Consumers for Digital Fairness, as saying “the Battlefront controversy was the first real big punch in the gut” to developers who include microtransactions in their games).

<sup>72</sup> *See* *Star Wars™ Battlefront™ II*, ENTERTAINMENT SOFTWARE RATING BOARD, *archived at* <https://perma.cc/LJ5M-T5CT> (describing “Battlefront II” as “a first/third-person shooter set within the events and galaxies of the Star Wars saga”).

<sup>73</sup> *See* *Star Wars Battlefront 2's Loot Box Controversy Explained*, GAMESPOT (Nov. 22, 2017), *archived at* <https://perma.cc/6LD8-BRGC> (describing microtransaction system of “Battlefront II” in detail).

<sup>74</sup> *See* Lucas Matney, *EA response to ‘Battlefront II’ complaint is the most downvoted comment in Reddit history*, TECHCRUNCH (Nov. 13, 2017), *archived at* <https://perma.cc/JQR3-KNZQ> (noting that a Reddit post drafted by EA stating “[t]he intent [of loot boxes] is to provide players with a sense of pride and accomplishment for unlocking different heroes” became the most disliked post in Reddit's entire history); *see also* Fraser Brown, *The most downvoted comment in Reddit history is now a Star Wars Battlefront 2 mod*, PC GAMER (Mar. 5, 2018), *archived at* <https://perma.cc/7833-QZMW> (describing how players of “Battlefront II” created a free downloadable mod which plastered the phrase “pride and accomplishment” on the game's menu where loot boxes could be purchased); Jake Magee, *Press Start: The good and bad of The Game Awards 2017*, GAZETTEEXTRA (Dec. 13, 2017), *archived at* <https://perma.cc/LSG5-NAF5> (describing how Video Game Awards host

Gamers criticized this type of loot box model as an unfair “pay-to-win” scheme because the game’s slow progression system made it almost impossible to unlock everything in-game without spending additional real-world money on credits to purchase loot boxes.<sup>75</sup> Sales for the game fell below expectations, and EA’s stocks also declined during the “Battlefront II” launch.<sup>76</sup> EA later decided to reverse course by temporarily removing the loot box system.<sup>77</sup> This decision was made over the objections of some EA investors.<sup>78</sup> Since the “Battlefront II”

---

Zachary Levi sarcastically “pretended he had to use his credit card to open an envelope to read a winner and called microtransactions ‘stupid.’”).

<sup>75</sup> See Pascucci & Huston, *supra* note 10 (estimating that for players in “Battlefront II” to unlock all of the game’s content, “it would take over 4,500 hours of gameplay,” but that players could receive all of the features if they purchased roughly “\$2,100” worth of loot crates, which would be “35 times the [retail] cost of the game”); see also Owen S. Good, *EA slashes Battlefront 2 unlock hero costs after backlash*, POLYGON (Nov. 13, 2017), archived at <https://perma.cc/A5U8-ANCP> (estimating that for players to unlock valuable in-game characters like Darth Vader or Luke Skywalker, they would have to either play 40 hours of “Battlefront II” or purchase loot boxes with real world money for a random chance to unlock these characters). This slow progression system, which the game only allowed players to bypass if they paid real world money on loot boxes, created the perception that if players wanted to win, they had to spend extra money on “Battlefront II” loot crates. See Good, *supra*.

<sup>76</sup> See Kevin Anderton, *The Ongoing Controversy of Microtransactions in Gaming [Infographic]*, FORBES (Mar. 7, 2018), archived at <https://perma.cc/2UUD-UF8M> (correlating game publisher’s use of loot boxes with their declining sales of “Battlefront II”); see also Caroline Spiezio, *What’s Inside the Loot Box? It Could be Gaming’s Next Big Problem*, LAW.COM (Dec. 12, 2017), archived at <https://perma.cc/6DSZ-E5FV> (stating “Electronic Arts Inc. saw sales plunge below expectations” for “Battlefront II”); see also Tae Kim, *EA’s day of reckoning is here after ‘Star Wars’ game uproar, \$3 billion in stock value wiped out*, CNBC (Nov. 28, 2017), archived at <https://perma.cc/TH83-XFZE> (noting that after the “Battlefront II” controversy, EA’s stock went “down 8.5 percent month to date” causing EA to lose “\$3.1 billion of shareholder value” when their competitor shares were rising in the same time period).

<sup>77</sup> See Tyler Wilde, *Star Wars Battlefront 2 microtransactions have been temporarily removed*, PC GAMER (Nov. 17, 2017), archived at <https://perma.cc/46GL-8CJT> (citing EA press statement that it was not their intention to give players an unfair advantage).

<sup>78</sup> See Tae Kim, *Gamers are overreacting to EA’s ‘Star Wars’ controversy; publishers should raise prices: Analyst*, CNBC (Nov. 20, 2017), archived at <https://perma.cc/T3MG-XTAE> (citing a market analyst who described EA’s “Battlefront II” publicity as a “transitory risk” and criticized it as “a perfect storm for overreaction as it involves EA, Star Wars, Reddit, and certain purist gaming journalists/outlets who dislike [microtransactions]”); see Tae Kim, *Wall Street is*

controversy, to avoid future PR crises, several other game developers have taken steps to affirmatively tell consumers that their games would not include loot boxes.<sup>79</sup>

### *B. Investigations, Oversight, and Advocacy for New Legislation*

In response to the “Battlefront II” PR crisis, legislators and regulators have taken steps to try to respond to random chance purchases.<sup>80</sup> Hawaii State Representative Chris Lee is the leading voice against loot boxes, and has argued random chance purchase microtransactions are illegal and predatory against children.<sup>81</sup> Some in the gaming industry have defended the implementation of random chance purchases, arguing that they are necessary for developers to

---

*freaking out as EA caves again to social media outrage over its ‘Star Wars’ game*, CNBC (Nov. 17, 2017), *archived at* <https://perma.cc/CJG3-FAY7> (quoting a market analyst who stated that “the escalation of EA concessions over the past month are a potential negative indicator of pre-order sales trends and overall unit confidence”).

<sup>79</sup> See Bo Moore, *Cyberpunk 2077 trailer secretly confirms there will be no microtransactions*, PC GAMER (June 10, 2018), *archived at* <https://perma.cc/94KH-6DSV> (describing how a developer for the game “Cyberpunk 2077” planted a secret message in their game trailer which responded to a question of whether their game will have loot boxes with: “In a single player role-playing game? Are you nuts?”); see also Cory Balrog (@corybalrog), TWITTER (Mar. 6, 2018), *archived at* <https://perma.cc/KAG9-3QVX> (responding “[n]o freaking way!!!” when a fan asked the developer of the 2018 game “God of War” if the game would include microtransactions).

<sup>80</sup> See Kevin Webb, *Regulators from more than a dozen countries are looking to crack down on ‘loot boxes,’ a controversial video gaming practice that could be too much like gambling*, BUSINESS INSIDER (Sept. 17, 2018), *archived at* <https://perma.cc/WH26-DZPZ> (outlining the substance of a joint statement issued by regulators from fifteen countries and Washington state expressing concern “with the risks being posed by the blurring of lines between gambling and other forms of digital entertainment such as video gaming”); see also Emma Kent, *15 European gambling regulators unite to tackle loot box threat*, EUROGAMER (Sept. 17, 2018), *archived at* <https://perma.cc/GXR6-JDDU> (listing the fifteen countries whose regulators spoke out against loot boxes, including Austria, Czech Republic, France, Gibraltar, Ireland, Isle of Man, Jersey, Latvia, Malta, The Netherlands, Norway, Poland, Portugal, Spain, Washington State, and the United Kingdom).

<sup>81</sup> See Jeffrey N. Rosenthal & Ethan M. Simon, *Loot Boxes in Video Games: Gambling by Any Other Name?* LEGAL INTELLIGENCER (Apr. 24, 2018), *archived at* <https://perma.cc/8KRJ-3PWH> (quoting Hawaii state representative Chris Lee, who “referred to loot boxes as ‘predatory,’ and insisted they are ‘designed to prey upon and exploit human psychology in the same way casino games are’”).

profit from their games given the budgetary costs of creating quality video games today and consumer's current unwillingness to support game retail prices over \$60.<sup>82</sup>

This debate over the merits of loot boxes in video games has also led to both civil and criminal investigations against game developers like Electronic Arts, with Belgium taking the lead.<sup>83</sup> Additionally, while the random chance purchase model was first launched in China and Korea, both countries have been some of the first to require greater transparency by making game developers disclose the odds for their loot boxes.<sup>84</sup> China's disclosure rule led to the discovery that a significant number of loot box systems feature "escalating odds" making it more difficult for gamers to unlock valuable items unless they spend larger sums of money on loot boxes.<sup>85</sup>

---

<sup>82</sup> See I Extra Credits, *supra* note 6 (arguing that developers chose to implement loot boxes because of the rising budgetary costs of developing quality video games); Extra Credits, *The Legality of Loot Boxes – Designing Ethical Loot boxes: II Extra Credits*, YOUTUBE (Feb. 28, 2018) [hereinafter II Extra Credits], *archived at* <https://perma.cc/XSH8-PMRX> (arguing that loot boxes can be ethical if they are for cosmetic purposes, rather than "pay-to-win").

<sup>83</sup> See Ivana Kottasova, *The new Star Wars video game is under attack*, CNN (Nov. 16, 2017), *archived at* <https://perma.cc/8Y6Y-RG9Q> (mentioning that after "Battlefront II" backlash, regulators in Belgium began investigating whether the rewards in "Battlefront II" "are allocated by chance, and whether this might constitute a form of gambling"); *see also* Stefanie Fogel, *EA Under Investigation in Belgium Over 'FIFA' Loot Boxes (Report)*, VARIETY (Sept. 11, 2018), *archived at* <https://perma.cc/KW5Q-8UYK> (citing an investigative report showing "the Brussels public prosecutor's office is conducting a criminal investigation" into Electronic Arts for their refusal to remove loot boxes from the "FIFA 18" video game despite the fact that "the Belgian Gaming Commission decided many forms of loot boxes in video games are illegal gambling because players don't exactly know what virtual items they're getting when they buy them").

<sup>84</sup> See Spiezio, *supra* note 76 (noting that "China's Ministry of Culture set rules in 2016 that all loot crates must be transparent about how likely it is that players will win valuable and rare prizes"); *see also* Shaun Prescott, *Nexon has been fined by the Korean Fair Trade Commission over loot boxes*, PC GAMER (Apr. 10, 2018), *archived at* <https://perma.cc/W6E4-TBV8> (describing how South Korea's Fair Trade Commission (FTC) announced a \$1 million fine to Nexon, NextFloor and Netmarble, three game companies, "over deceptive in-game item sales," including the use of loot boxes).

<sup>85</sup> See Williams, *supra* note 3 (mentioning that China's Ministry of Culture forced all game companies to "disclose the odds of specific items dropping from loot boxes in their games"). The most startling discovery from the disclosure rules was the practice of using "escalating odds, meaning opening more boxes at the same time

Legislators like State Rep. Lee have advocated for similar legislation in the United States to ensure consumers are aware of the loot box odds of American developers.<sup>86</sup> Rep. Lee's advocacy on this matter has inspired members of the United States Senate, like Sen. Josh Hawley (R-MO) to propose legislation outright banning loot boxes in video games.<sup>87</sup>

Much of the advocacy against loot boxes has come after recent psychological studies have shown that loot boxes release dopamine in a player's brain, encouraging them to continue playing and spending more money.<sup>88</sup> Recently, when asked by Senator Maggie Hassan (D-

---

increased the chance of getting rarer items, and the true drop rate of some items, falling as low as 0.1 percent in some cases." *Id.* See also Lawrence Phillips, *Valve Forced to Disclose Item Drop Rates for T17 Chests*, JOINDOTA (May 9, 2017), archived at <https://perma.cc/6P36-NJR8> (noting that "the chance of receiving Rare items increases with every treasure [a.k.a. paid loot box] opened").

<sup>86</sup> See Bailey, *supra* note 5 (mentioning Rep. Lee's proposal to "force publishers to disclose the odds of loot boxes—a requirement that already exists in China").

<sup>87</sup> See Press Release, Josh Hawley U.S. Senator for Missouri, Senator Hawley to Introduce Legislation Banning Manipulative Video Game Features Aimed at Children (May 8, 2019), archived at <https://perma.cc/F7NN-U444> (arguing that game developers "who knowingly exploit children should face consequences"); Owen S. Good, *Anti-loot box bill gathers bipartisan support in Senate*, POLYGON (May 23, 2019), archived at <https://perma.cc/XA2R-QTER> (noting that Senator Blumenthal (CT) and Senator Markey (MA) issued public statements praising Senator Hawley's bill). While the likelihood of passage is low, the bill has received support from members of both political parties. See Good, *supra*. See also Jason Schreier, *U.S. Senator Says His Anti-Loot Box Bill Has The Video Game Industry Worried*, Kotaku (May 21, 2019), archived at <https://perma.cc/YCF8-LURZ> (quoting Sen. Hawley as saying his bill targets both loot boxes and pay-to-win games designed to psychologically encourage gamers to spend more money than what they initially paid to play).

<sup>88</sup> See Alex Sassoon Coby, *Loot boxes 'normalizing gambling' for kids, charity warns as Belgium bans them*, THE SUN (Aug. 30, 2018), archived at <https://perma.cc/7V7N-UQB4> (citing study demonstrating psychological similarities between playing a gambling game and loot boxes); Ali Jones, *Desire, competition, or addiction—why do we buy loot boxes?* PCGAMESN (Apr. 3, 2018), archived at <https://perma.cc/9393-HX6K> (quoting a former developer who helped create a loot box system who acknowledged that "every time you open a loot box, your situation is getting better, but it's getting better in unexpected ways, so that hits all the little cheap instant dopamine buttons"); Gabe Duverge, *Insert More Coins: The Psychology Behind Microtransactions*, TOURO UNIVERSITY WORLDWIDE (Feb. 25, 2016), archived at <https://perma.cc/CG7R-TZ47> (citing the concept of loss aversion, where "players would rather enjoy the satisfaction of winning rather than losing" as a motivation for why they impulse buy loot boxes); see also Kain, *supra* note 63 (claiming that loot boxes, like gambling, affect a player's dopamine system).

N.H.) about the “close link” between loot boxes and gambling in a public hearing, senior officials at the Federal Trade Commission (“FTC”) firmly committed to investigating the video game industry’s loot box practices.<sup>89</sup> After making this commitment to Senator Hassan, the FTC announced that they would hold a public workshop on August 7, 2019 to examine consumer protection issues associated with loot boxes.<sup>90</sup>

Senator Hassan previously sent a letter to the game industry’s self-regulatory Entertainment Software Rating Board (“ESRB”), asking that they declare loot boxes as gambling.<sup>91</sup> The ESRB rates any game which features gambling as “Adults Only,” which for game developers means that they would be unable to sell their games on the retail market.<sup>92</sup> Currently, the ESRB takes the position that loot boxes are not gambling because like collectible card games, players always receive something of value and therefore do not “lose” money to

---

<sup>89</sup> See Brian Fung, *U.S. consumer watchdog to investigate video game loot boxes*, WASHINGTON POST (Nov. 28, 2018), archived at <https://perma.cc/78SB-PGPV> (describing how Senior officials at the FTC committed to Sen. Hassan (N.H.) that they would launch a probe into the game industry’s practice of featuring loot boxes in their games).

<sup>90</sup> See Press Release, Federal Trade Commission, *FTC to Hold August Workshop on Consumer Issues Related to Loot Boxes* (Apr. 5, 2019), archived at <https://perma.cc/JJL8-6YZJ> (noting that the workshop will bring together industry representatives and consumer advocates to debate their role in game play and the digital marketplace and debate the research on the effects loot boxes have on child and adolescent behavior); see also Press Release, Federal Trade Commission, *FTC Workshop Looks into Loot Boxes* (Apr. 8, 2019), archived at <https://perma.cc/AR3K-V7SZ> (inviting members of the public to submit public comments online regarding the practice of loot boxes).

<sup>91</sup> See Cecilia D’Anastasio, *U.S. Senator Asks ESRB to Re-Examine Loot Boxes*, KOTAKU (Feb. 15, 2018), archived at <https://perma.cc/6KY5-DW6E> (noting Senator Hassan’s prior efforts to put a stop to loot boxes, including a letter to the ESRB, the game industry’s self-regulatory ratings board, urging them to declare loot boxes as a form of gambling that should be restricted to adults only).

<sup>92</sup> See *ESRB RATINGS GUIDE*, ENTERTAINMENT SOFTWARE RATING BOARD (Apr. 24, 2019), archived at <https://perma.cc/7LGC-FBY6> (explaining that the Adults Only rating is restrictive because it includes “Content suitable only for adults ages 18 and up,” and that the game may include “gambling with real currency”); see also David Clayman, *The Big A.O.*, IGN (May 13, 2012), archived at <https://perma.cc/R4X4-S7C7> (noting that when a game is given an Adults Only rating by the ESRB, major retailers refuse to sell the game in their stores or online).

gambling.<sup>93</sup> Other game developers have also sided with this argument.<sup>94</sup>

*C. The Federal Circuit Split Over the Legality of Random Chance Purchases*

The combination of both public backlash and discovery of “escalating odds” has also led to recent litigation against video game and mobile app developers who choose to implement random chance purchases.<sup>95</sup> Whether in-game loot boxes constitute illegal gambling currently depends on which jurisdiction the gamer resides in.<sup>96</sup>

The first case to decide the issue of whether random chance purchases are gambling was *Soto v. Sky Union, LLC*, in the U.S. District Court for the Northern District of Illinois.<sup>97</sup> The case involved Sky Union, a California game developer that invented “Castle Clash,” a mobile app game where players would spend virtual currency

---

<sup>93</sup> See Kain, *supra* note 63 (quoting ESRB’s argument that loot boxes are like collectible card packs, which are not gambling).

<sup>94</sup> See *Loot Boxes, Bad Gamers Anonymous* (Nov. 12, 2017) [hereinafter *Bad Gamers Anonymous*] (downloaded using iTunes) (arguing that loot boxes are similar to trading cards); *Loot Boxes, Headshots: Psychology + Gaming* (Dec. 13, 2017) [hereinafter *Loot Boxes Psychology*] (downloaded using iTunes) (rejecting claims that loot boxes are psychologically akin to gambling because loot boxes will always give players something while slot machines have a chance of giving players nothing at all); *Loot Boxes and Gambling, Daily Tech News Show* (June 16, 2018) [hereinafter *Loot Boxes and Gambling*] (downloaded using iTunes) (interviewing mobile game developer who claimed his game’s loot boxes always give players something of value).

<sup>95</sup> See Ricchiuto, *supra* note 10 (discussing recent lawsuit brought by eight players against Square Enix for implementation of loot boxes in *Hoshi No Dragon Quest*); see also Pascucci & Huston, *supra* note 10 (outlining the likelihood that class action lawsuits, including the recent suit against Square Enix, are a “far greater and more realistic point of exposure to game manufacturers”).

<sup>96</sup> See Joseph M. Casole, *United States: Loot Boxes: Gaming Or Gambling?* MONDAQ (Oct. 10, 2018), archived at <https://perma.cc/Z3QA-2GKF> (noting that even after the joint declaration against loot boxes, whether the gaming industry will overcome barriers on loot boxes will be decided on a “jurisdiction by jurisdiction basis”); see also John T. Holden, *Article: Trifling and Gambling with Virtual Money*, 25 UCLA ENT. L. REV. 41 (2018) (discussing circuit split between federal courts on virtual currency in video games).

<sup>97</sup> See generally *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871, 884 (N.D. Ill. 2016) (deciding for the first time whether random chance purchases are gambling under state law).

building armies of “Heroes” to do battle with other players online.<sup>98</sup> While the game was free to download, “Castle Clash” also gave players the option to pay real world money to purchase the game’s virtual currency (or “gems”).<sup>99</sup> These gems could be used to enter players into either the “Hero Roll,” a game of chance where players can be awarded new heroes to add to their pre-existing virtual army, or the “Talent Roll,” a game of chance where players can be awarded special abilities for the heroes already unlocked.<sup>100</sup> Both the “Hero Roll” and “Talent Roll” are based on a randomized algorithm in which the odds of selecting a high-value hero or upgrade are less than selecting a low-value one.<sup>101</sup> The plaintiffs were residents from Illinois, California, and Michigan who collectively spent thousands of dollars purchasing Castle Clash gems that were used in the “Hero Roll” and “Talent Roll.”<sup>102</sup>

The plaintiffs sued under California’s unfair competition law, which prohibits businesses from engaging in illegal gambling.<sup>103</sup> Specifically, the plaintiffs alleged that the “Hero Roll” and “Talent Roll” in “Castle Clash” were actually a slot-machine-type scheme in violation of Section 330(b) of the California Penal Code.<sup>104</sup> To prove

---

<sup>98</sup> See *id.* at 874 (outlining the popularity and prominence of free to play mobile games today). The court noted that while they had difficulty understanding the objective of Castle Clash, the game “appear[ed] to be a game of conquest in which players amass armies of ‘Heroes’ to do battle with one another.” *Id.* at 875.

<sup>99</sup> See *id.* at 875 (describing the video game currency system of Castle Clash in which players are given a small amount of free gems but may purchase gems with real money, “ranging from 230 gems for \$1.99 to 16,800 gems for \$99.99”).

<sup>100</sup> See *id.* (noting that players have the option to spend 150 gems to enter a “Hero Roll” to “win a randomly selected Hero,” or could enter a “Talent Roll” to “develop [their] Heroes without spending the time to hone their skills in battle”).

<sup>101</sup> See *id.* (stating that “[b]ecause not all characters are created equally, however, Sky Union’s randomizing algorithm is designed to return a high value Hero less frequently than it returns low value Heroes”). Like Hero Rolls, the Talent Rolls also have an algorithm where players “have a far better chance of winning a low-value Talent than they have of winning high-value Talents.” *Id.*

<sup>102</sup> See *id.* at 876 (describing the stories of the three plaintiffs: Jose Soto, Christine Exelby, and Tanner Eastmen).

<sup>103</sup> See *id.* at 877–78 (finding that the plaintiffs could sue Sky Union for unfair competition practices if they properly alleged that “Sky Union engaged in conduct that violates” California gambling laws).

<sup>104</sup> See *id.* at 878 (noting that California law prohibits the owning or manufacturing of a slot machine); see also CAL. PENAL CODE § 330b (Deering 2018) (providing that

a device is an slot machine under Section 330(b), the plaintiff must show three elements: (1) the operation of the machine must be unpredictable and governed by chance (“game of chance element”); (2) the machine must be activated by the insertion of money or some other object (“consideration element”); and (3) the user, depending on chance, may become entitled to receive a thing of value (“prize element”).<sup>105</sup>

In this case, both parties agreed that the “Hero Roll” and “Talent Roll” were games of chance, thus meeting the second element; however, Sky Union, LLC disagreed and argued that the game of chance and prize elements were not met.<sup>106</sup> The court first held that the consideration element was met because the plain language of the statute includes slot machines operated by money or “by any other means,” such as casino tokens.<sup>107</sup> However, the court still held that “Hero Roll” and “Talent Roll” were not gambling under the prize element because the “rewards” players would receive were merely “imaginary rewards.”<sup>108</sup> Additionally, the court reasoned that the prize element was not met because “Hero Roll” and “Talent Roll,” unlike tokens in slot machines, cannot be traded for real world currency or bought in a secondary marketplace.<sup>109</sup>

Soon after *Soto* was decided, the Northern District of Illinois received another microtransaction lawsuit in *Phillips v. Double Down Interactive*, also seeking an interpretation of Illinois state gambling law.<sup>110</sup> Double Down Interactive’s game, “Double Down Casino,” allowed players to purchase “casino chips” which could be used to play

---

it is a misdemeanor for any person to manufacture slot machines in the state of California).

<sup>105</sup> See *Soto*, 159 F. Supp. 3d at 878; *Trinkle v. Cal. State Lottery*, 129 Cal. Rptr. 2d 904, 910 (Cal. Ct. App. 2003) (outlining the simplified elements California courts require to prove that a device is a prohibited slot machine).

<sup>106</sup> See *Soto*, 159 F. Supp. 3d at 878 (noting that Sky Union disputed “whether its game satisfies the first and third of these elements” of California gambling law).

<sup>107</sup> See *id.* at 878–79 (comparing the gems used to activate Hero and Talent rolls to “physical tokens” used in casino operated slot machines).

<sup>108</sup> See *id.* at 879 (arguing that Heroes, Talents, and Gems earned by Rolls are “imaginary rewards” because they “cannot be redeemed for real money or sold to either Sky Union or other players”).

<sup>109</sup> See *id.* at 881–84 (rejecting plaintiff’s arguments that Castle Clash’s system violated Illinois and Michigan gambling laws under similar reasoning that “Heroes and Talents cannot be bought or sold”).

<sup>110</sup> See *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731, 737 (N.D. Ill. 2016).

casino games (including slot machines) on their iPhone and Android devices.<sup>111</sup> The plaintiff wagered and lost over \$1,000 of casino chips.<sup>112</sup> All of the games on the casino app satisfied the game of chance element because the outcome of each game was based entirely on an algorithm in the game's code.<sup>113</sup> In this case, Double Down Interactive raised a novel argument not raised by Sky Union—that the court should not even turn to the traditional lottery elements because the plaintiff failed to show that she “lost” money gambling.<sup>114</sup>

Under the Maryland gambling recovery statute, a plaintiff may only recover what he or she “lost” from the person who “won” it, and that what was lost (and correspondingly won) must be money or some other thing of value. Here, the court held that the plaintiff was not entitled to recover under Illinois' gambling loss recovery statute because “[w]hen [the plaintiff] bought more chips, she was in essence buying the right to continue playing the games.”<sup>115</sup> Because the plaintiff was given the right to continue playing the casino games with the virtual casino chips she purchased, Double Down's online casino games did not have a “loser” or a “winner,” as those terms are used in the Illinois Loss Recovery Act.<sup>116</sup>

In *Mason v. Mach. Zone, Inc.*, the Fourth Circuit Court of Appeals decided the validity of a gambling loss recovery suit against the developer of “Game of War: Fire Age” (“GOW”).<sup>117</sup> GOW was a “freemium” mobile game, which meant no upfront payment was

---

<sup>111</sup> See *id.* at 734 (listing “electronic games offered in Double Down Casino,” including “‘authentic’ slot machines, roulette, poker and blackjack”).

<sup>112</sup> See *id.* at 736 (describing the instances where the plaintiff purchased casino chips on the Double Down Casino app).

<sup>113</sup> See *id.* at 734 (stating that the outcome of each Double Down Casino game is “determined solely by Double Down’s computerized algorithms”).

<sup>114</sup> See *id.* at 737 (citing Double Down’s argument that they are not “winners,” and the plaintiff is not a “loser” within the meaning of the Illinois gambling loss recovery statute).

<sup>115</sup> See *id.* at 741 (arguing that the plaintiff could not recover because was not a “loser” within the meaning of the Illinois gambling loss recovery statute).

<sup>116</sup> See *Phillips*, 173 F. Supp. 3d at 741 (arguing that the plaintiff was able to use the chips she bought to continue playing Double Down's online casino games, and thus did not “lose” the value of those chips).

<sup>117</sup> See *Mason v. Mach. Zone, Inc.*, 140 F. Supp. 3d 457, 469 (D. Md. 2015) (holding random chance purchases are not gambling under Maryland state law); *Mason v. Mach. Zone, Inc.*, 851 F.3d 315, 320 (4th Cir. 2017) (agreeing with the lower court’s decision).

required to play the game on your cell phone.<sup>118</sup> However, the game gave players the option to purchase “virtual coins” with real world money.<sup>119</sup> Players who had enough virtual coins could spin the GOW “virtual casino,” which gave players a randomized chance to win prizes.<sup>120</sup> The wheel could only be spun if the player had enough virtual coins, which could be purchased with real money.<sup>121</sup> The casino wheel had several visual and auditory similarities to a casino slot machine.<sup>122</sup> After spending \$100 of real money in order to acquire more virtual coins, the plaintiff sued Machine Zone, Inc., the developer of GOW to recover her losses.<sup>123</sup>

Under Section 12-101 of the Maryland Criminal Law Code, a “person who loses money” from a “gaming device” prohibited by state

---

<sup>118</sup> See *Game of War - Fire Age*, GAMESPOT.COM (Jan. 21, 2019), archived at <https://perma.cc/ZE6L-GVVA> (explaining that GOW is a free to play massively-multiplayer-online (MMO) mobile game).

<sup>119</sup> See *Mason*, 851 F.3d at 317 (noting that “individuals engaged in paying the game can purchase virtual ‘gold,’ at prices ranging from \$4.99 for 1,200 pieces of virtual gold, to \$99.99 for 20,000 pieces of virtual gold”). This virtual gold is generally used to “improve [the player’s] virtual towns, and to progress more quickly in the game.” *Id.*

<sup>120</sup> See *id.* (describing how in addition to using virtual gold to upgrade their virtual villages, GOW players can “use their virtual gold to obtain virtual ‘chips’ for use during . . . the [GOW virtual casino]”).

<sup>121</sup> See *id.* (defining the GOW virtual casino as “a game of chance in which players can use their virtual chips for an opportunity to obtain virtual prizes for use within Game of War, by ‘spinning’ a virtual wheel”). Players are entitled to one free spin, but after that free spin, players are required to spend a minimum of 5,000 virtual chips for each additional spin. *Id.*

<sup>122</sup> See *id.* at 317–18 (“When a player spins the virtual wheel, an ‘animated light’ rotates around the wheel and, after a few seconds, the light stops on a picture of a virtual prize. The virtual prizes include virtual ‘resources’ such as ‘wood’ or ‘stone,’ which players can use to advance their position in the game, as well as additional virtual chips or virtual gold.”). Like some slot machine devices at casinos, the GOW casino featured prizes that included “an opportunity to play another game of chance within Game of War.” *Id.* at 318. For example, one virtual prize available from the virtual wheel is an opportunity for the player to select one of three virtual “treasure chests.” *Id.* The selected chest reveals either virtual chips, gold, or other resources.” *Id.*

<sup>123</sup> See *id.* at 318 (“Mason began playing Game of War on her mobile device in early 2014. After using complimentary virtual chips for a chance to win a virtual prize at the Game of War casino, Mason began purchasing virtual gold in order to obtain more chips to continue interacting with the casino function. Between early 2014 and January 2015, Mason paid over \$100 to participate in the virtual casino.”).

law can recover that money in court.<sup>124</sup> The Maryland state legislature defined a prohibited gambling device in Section 12-101 as a gaming table, paddle wheel, or wheel of fortune where games of chance are played for money or any other consideration of value.<sup>125</sup> The court presumed for the purpose of appeal that the virtual casino feature in GOW met the definition of a “prohibited gaming device,” under Section 12-101(d). However, the court concluded the plaintiff could not recover under the gambling loss recovery statute because she did not “lose money” within the meaning of the statute, only virtual currency.<sup>126</sup> Legal scholars concluded after *Soto* and *Mason* were decided that game developers were likely safe from the wrath of gamers scorned by loot boxes.<sup>127</sup>

However, in *Kater v. Churchill Downs*, the Ninth Circuit concluded that microtransactions could constitute illegal gambling under Washington state law.<sup>128</sup> The case involved Churchill Downs, Inc., the developers of “Big Fish Casino,” a free-to-play mobile game

---

<sup>124</sup> See MD. CODE ANN., CRIM. LAW § 12-110(a) (LexisNexis 2018) (“A person who loses money at a gaming device that is prohibited by this subtitle, Subtitle 2 of this title, or Title 13 of this article: (1) may recover the money as if it were a common debt; and (2) is a competent witness to prove the loss.”) (emphasis added).

<sup>125</sup> See § 12-101(d)(1)–(2) (under the criminal code, a gambling device means “(i) a gaming table, except a billiard table, at which a game of chance is played for money or any other thing or consideration of value; or (ii) a game or device at which money or any other thing or consideration of value is bet, wagered, or gambled”). The Maryland Criminal code also specified other types of games which are deemed “gaming devices” under state law, including a “paddle wheel, *wheel of fortune*, chance book, and bingo [emphasis added].” § 12-101(d)(2).

<sup>126</sup> See *Mason*, 851 F.3d at 319–20 (reasoning that the plaintiff “paid money to obtain virtual gold” instead of losing actual money in the virtual casino and concluding the statutory term “money” does not “encompass virtual resources available and used only within Game of War”).

<sup>127</sup> See Christopher Queenin, *Real Win for Virtual Casino: Lessons for Game Developers*, LAW360 (Mar. 24, 2017), archived at <https://perma.cc/X3L4-UGKK> (arguing the *Mason* case provides guidance to game developers considering implementing microtransactions in their games). *But see* Jason W. Gordon & Michael E. Strauss, *5 Trends Dominated Ad Law in 2016*, LAW360 (DEC. 30, 2016), archived at <https://perma.cc/2R4R-6ACS> (mentioning that after *Mason* was decided, the Washington State Gambling Commission launched an investigation into video game microtransactions).

<sup>128</sup> See *Kater v. Churchill Downs, Inc.*, 886 F.3d 784, 788 (9th Cir. 2018) (holding a virtual casino game constituted illegal gambling under Washington state law).

that was essentially a collection of virtual casino games.<sup>129</sup> In “Big Fish Casino,” players are able to spend their money to purchase virtual chips or earn virtual chips through winning the poker or slot machine games.<sup>130</sup> The plaintiff purchased and lost \$1,000 worth of “Big Fish Casino” virtual chips.<sup>131</sup>

The court in *Kater* started by explaining the Washington state definition of gambling, which required the plaintiffs to show: (1) Staking or risking something of value (“consideration element”); (2) On the outcome of a contest or chance (“game of chance” element); and (3) Upon an agreement or understanding that the person will receive something of value in the event of a certain outcome (“prize” element).<sup>132</sup> Washington state law defined a thing of value as including money, property, token, or an object or article exchangeable for money or property.<sup>133</sup> The court held that Churchill Downs violated Washington state gambling laws because they allow a user to play casino games or spin a virtual “slot machine” in order to earn something of value.<sup>134</sup> Additionally, the Ninth Circuit explicitly

---

<sup>129</sup> See *id.* at 785 (“Big Fish Casino is a game platform that functions as a virtual casino, within which users can play various electronic casino games, such as blackjack, poker, and slots. Users can download the Big Fish Casino app free of charge, and first-time users receive a set of free chips.”)

<sup>130</sup> See *id.* at 785–86 (noting that players “can play the games for free using the chips that come with the app, and may purchase additional chips to extend gameplay”). “If a user runs out of chips, he or she must purchase more chips to continue playing. A user can purchase more virtual chips for prices ranging from \$1.99 to nearly \$250.” *Id.*

<sup>131</sup> See *id.* at 786 (describing the losses incurred by the plaintiff).

<sup>132</sup> See *id.* at 786 (mentioning that online or virtual gambling is illegal in the state of Washington).

<sup>133</sup> See *id.* at 787 (noting items that are “things of value” under Washington State law).

[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.

*Id.*

<sup>134</sup> See *id.* at 787 (finding Big Fish Casino’s virtual chips were a thing of value under Washington state gambling law because “they are a credit that allow a user to place another wager or re-spin a slot machine”). The 9th Circuit also rejected Big Fish Casino’s argument that the court should defer to the state Gambling Commission’s refusal to enforce microtransactions as gambling because there was no indication

rejected the reasoning of the earlier microtransaction cases because those cases applied their own state laws which had stricter definitions of the term “thing of value” that did not include digital items.<sup>135</sup> In the aftermath of the *Kater* decision, legal scholars have begun to warn game developers of the possibility that other jurisdictions may follow suit and find that loot boxes are illegal under traditional state gambling laws.<sup>136</sup> Ultimately, most courts seem to conclude that a video game which includes loot boxes does not constitute gambling under state law.

#### IV. Analysis

##### A. *Loot Boxes Would Likely Not be Considered a “Lottery” Under Massachusetts Law*

If a lawsuit were brought against a game developer in Massachusetts, the most likely strategy would be for the plaintiff to argue that loot boxes, like slot machines, are essentially digital lotteries prohibited by state law.<sup>137</sup> However, even if a court were to find that loot boxes, like slot machines, meet the state definition of a lottery, the court would have to determine whether the use of loot boxes is illegal

---

“that the Commission adopted a formal position on social gaming platforms.” *Id.* at 788.

<sup>135</sup> See *id.* (“[N]or are we persuaded by the reasoning of other federal courts that have held that certain ‘free to play’ games are not illegal gambling,” because “each case Churchill Downs cites for this proposition involves the analysis of different state statutes, state definitions, and games.”).

<sup>136</sup> See Christopher Queenin, *Rolling the Dice with Microtransactions: A Ninth Circuit Decision Takes a Hard Stance Against a Social Casino App Developer Facing a Class Action*, NIXON PEABODY LLP (Apr. 5, 2018), archived at <https://perma.cc/K2C2-AMWR> (warning that Washington state video game developers should be cautious of incorporating microtransactions given the 9th Circuit’s decision in *Kater*); see also Mark Eisen, *No Win Situation: The Ninth Circuit Finds Mobile Casino Applications Can Be Gambling Despite No Cash Out Mechanism*, JDSUPRA (Apr. 16, 2018), archived at <https://perma.cc/FX3S-UYTZ> (comparing the holding of *Kater* to the other federal jurisdictions which have addressed the value of virtual currency).

<sup>137</sup> See 38 AM. JUR. 2d *Gambling* § 52, Westlaw (database updated 2019) (classifying slot machines as lotteries, provided they meet a state’s statutory elements).

under Massachusetts law.<sup>138</sup> In 2011, Section 1 of the Massachusetts gambling recovery statute was amended to include an exemption to the per se rule that lotteries are illegal in the state of Massachusetts.<sup>139</sup> Under the amended Massachusetts gambling loss recovery statute, a lottery is legal if it is approved by the Massachusetts Gaming Commission.<sup>140</sup> Because the Massachusetts Lottery Commission has not approved loot boxes as a permitted form of gambling, if a court were to find that loot boxes are akin to slot machines as previously discussed, then it would be viewed as illegal under state law.<sup>141</sup> Additionally, it is important to note that if the practice of loot boxes is deemed illegal gambling, the fact that players chose to participate in loot boxes would not be a defense to the actions of the developers.<sup>142</sup>

The Massachusetts lottery statute has been on the books since the 1700s, but the Supreme Judicial Court (“SJC”) has clarified the once ambiguous language to require proof of the three traditional elements of gambling.<sup>143</sup> Under the SJC’s interpretation, a plaintiff in Massachusetts must show: (1) the game is a one of chance, not of skill (“game of chance” element); (2) the game requires consideration (“consideration” element); and (3) the player has the possibility of winning a prize (“prize” element).<sup>144</sup> Game developers and self-

---

<sup>138</sup> See *id.* (listing the elements of gambling); 38 AM. JUR. 2d *Gambling* § 1, Westlaw (database updated 2019) (describing different modes of gambling that could meet statutory elements).

<sup>139</sup> See MASS. ANN. LAWS ch.137, § 1 (LexisNexis 2018) (noting that the gambling loss recovery statute was amended when Chapter 194 “An Act Establishing Expanded Gaming in the Commonwealth,” was passed by the state legislature).

<sup>140</sup> See *id.* (excluding from the gambling recovery statute “gaming conducted in licensed gaming establishments pursuant to chapter 23K.”); see also MASS. ANN. LAWS ch. 23K, § 3 (LexisNexis 2018) (establishing a “Massachusetts gaming commission” which decides whether to grant gaming licenses to businesses).

<sup>141</sup> See 3 JAMES B. ASTRACHAN ET AL., THE LAW OF ADVERTISING § 55.09(u) (noting that any lottery that is not state-run or approved is illegal under Massachusetts gaming law).

<sup>142</sup> See *Bressler v. Averbuck*, 76 N.E.2d 146, 148 (Mass. 1947) (refusing to allow defendant to raise defense of “unclean hands” to avoid liability for illegal gambling operation).

<sup>143</sup> See *Commonwealth v. Lake*, 57 N.E.2d 923, 924 (Mass. 1944) (clarifying that the language of Massachusetts’s definition of a “lottery” as a claim that requires three elements to be shown). Under Massachusetts law, “[t]here are three elements in a lottery, (1) the payment of a price for (2) the possibility of winning a prize, depending upon (3) hazard or chance.” *Id.* at 924.

<sup>144</sup> See *id.* (outlining the three elements to conform with traditional definitions of gambling used since the common law).

regulatory organizations like the ESRB argue that loot boxes are distinct from slot machines and rather, are closer to trading card packs that can be purchased from the store.<sup>145</sup>

First, the game of chance element would certainly be met because the act of purchasing a loot box requires no skill whatsoever and a player's skill will not improve a gamer's chances of earning an item that is more valuable.<sup>146</sup> To put it another way, the game of loot boxes is a game entirely of chance calculated by an algorithm, and not at all a game of skill.<sup>147</sup> In *Soto*, the developers of "Castle Clash" raised the argument that while "Hero Roll" and "Talent Roll" were games of chance, they should still be exempt because the rest of the game is predominantly a game of skill requiring players to strategize while building their armies.<sup>148</sup> The court in *Soto* did not address whether this argument was valid, but it is likely a Massachusetts court would reject the argument, if raised, because the dispute is not about the game in its entirety, but rather the smaller loot box component, which even Sky Union, the developer of "Castle Clash," admits is entirely a game of chance.<sup>149</sup>

A game developer could argue that the consideration element would not be met because most games with loot boxes allow the player to purchase virtual currency, not the boxes themselves. This is the

---

<sup>145</sup> See Kain, *supra* note 63 (citing the ESRB's argument that loot boxes are closer to collectible card games which consistently give players something of value, even if it is something that they don't want).

<sup>146</sup> See *Commonwealth v. Theatre Advertising Co.*, 190 N.E. 518, 520 (Mass. 1934) (holding that the test to determine whether the element of chance has been met is whether the "dominant factor" of the game is skill or chance); see also *Star Wars Battlefront 2's Loot Box Controversy Explained*, *supra* note 73 (explaining how loot boxes like "Battlefront II" are randomized based on an algorithm in the game's code).

<sup>147</sup> See *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731, 734 (N.D. Ill. 2016) ("All of Double Down's casino games are games of chance, as each game's outcome is determined solely by Double Down's computerized algorithms.").

<sup>148</sup> See *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871, 879 (N.D. Ill. 2016) (mentioning that Sky Union "gently" suggested that the remainder of the game is closer to a "pinball or other amusement device," which is exempt from gambling regulations under California Penal Code § 330b(f)).

<sup>149</sup> See *id.* at 879 (concluding that the "chance" element was met). "[A]side from Sky Union's footnote citing § 330b(f) . . . [both sides] have operated on the assumption that Rolls—indisputably games of chance—may be considered separately and apart from Castle Clash." *Id.*

exact argument that was raised by Sky Union, LLC.<sup>150</sup> Most games with loot boxes require the gamer to pay a set price for virtual coins that can be spent to figuratively roll the dice with loot boxes.<sup>151</sup> However, a Massachusetts court would likely reject this argument, as the Illinois District Court in *Soto* did, because like in the Illinois gambling statute, the consideration element under Massachusetts law includes something of value, and is not limited to merely money.<sup>152</sup> Therefore, a Massachusetts court would likely treat the virtual coins purchased with real world money as a form of consideration similar to casino tokens.<sup>153</sup>

The best argument that a game developer would have is the argument most jurisdictions have agreed with, which is that loot boxes would not satisfy the prize element traditionally required under state gambling law.<sup>154</sup> First, the argument cited by the majority of federal Circuit Courts is that the “prizes” contained in loot boxes are worthless because they cannot be converted to real world money.<sup>155</sup> Second, the argument raised by the ESRB and other game developers is that the earnings from loot boxes are like trading cards, which are not viewed as gambling because there is always something of value inside of the

---

<sup>150</sup> See *id.* at 879–80 (citing Sky Union’s argument that “when players use gems to purchase Rolls, they are not playing a slot machine because [the virtual] gems are not real currency”).

<sup>151</sup> See *id.* at 877 (describing Castle Clash’s system requiring payment gems); see also *Phillips*, 173 F. Supp. 3d at 734–35 (outlining “virtual chips” used by Double Down casino’s iPhone game); *Mason v. Mach. Zone, Inc.*, 851 F.3d 315, 317 (4th Cir. 2017) (describing “virtual gold” system used in Game of War: Fire Age); *Kater v. Churchill Downs, Inc.*, 886 F.3d 784, 785 (9th Cir. 2018) (explaining Big Fish Casino’s “virtual chips” system).

<sup>152</sup> See MASS. ANN. LAWS ch. 137 § 1 (LexisNexis 2018) (requiring that players must pay or deliver money “*or other thing of value* to another person for or in consideration of a lottery” to meet the element of payment of price) (emphasis added).

<sup>153</sup> See *Soto*, 159 F. Supp. 3d at 879 (“[I]t would make little sense to read the broad language of section 330b(d) to capture games operated by insertion of purchased physical tokens while excluding games operated by insertion of purchased virtual gems.”).

<sup>154</sup> See *id.* at 881 (holding that the “prize” element was not satisfied in this case).

<sup>155</sup> See *Queenin*, *supra* note 127 (citing Machine Zone Inc.’s successful argument in *Mason* that the prizes gained from the virtual casino in Game of War: Fire Age was “not redeemable for money,” and therefore did not meet the element of a “prize” typically seen in common law definitions of a lottery).

pack, even if it is the same type of loot.<sup>156</sup> The issue of whether virtual winnings are prizes under state gambling laws is the primary issue that has distinguished *Kater* from the other jurisdictions.<sup>157</sup> Thus, if a Massachusetts court were confronted with this issue, the court would have to decide whether loot boxes are factually similar to either: (1) casino slot machines, which have the chance of giving out prizes that can be traded for value; or (2) trading card games, which the ESRB argues is not gambling because they always give the player something of value (even if not the specific card the player wanted).<sup>158</sup> If a Massachusetts court were to look at those cases, the court would be more likely to accept the ESRB's argument that loot boxes, like trading cards, are not illegal gambling, rather than accept the reasoning of most federal circuits that the prizes in loot boxes are entirely meaningless.<sup>159</sup>

Part of the reason why many view loot boxes as a form of gambling is that many games with loot box implementation include visual and auditory similarities between a casino slot machine and a loot box mechanic in games like "Battlefront II."<sup>160</sup> Like slot machines, modern video games with loot boxes give off triumphant tunes whenever a loot box prize is opened, implying that the developer of the game certainly believes the player should find value in their virtual prizes.<sup>161</sup>

---

<sup>156</sup> See *Loot Boxes and Gambling*, *supra* note 94 (interviewing mobile game developer who claimed his game's loot boxes always give players something of value).

<sup>157</sup> See *Kater v. Churchill Downs, Inc.*, 886 F.3d 784, 788 (9th Cir. 2018) (rejecting arguments of *Mason*, *Phillips*, and *Soto*). *But see* Eisen, *supra* note 136 (comparing the holding of *Kater* to the other federal jurisdictions which have addressed the value of virtual currency).

<sup>158</sup> Compare *Kater*, 886 F.3d at 786 (concluding that a mobile application's loot boxes constitute illegal gambling), with *Kain*, *supra* note 63 (criticizing the ESRB's argument that loot boxes are more analogous to trading card packs than casino slot machines).

<sup>159</sup> See *Kain*, *supra* note 63 (noting that collectable card games always give the player something of value, even if it is not the specific card or valuable item for which the player was looking).

<sup>160</sup> See *Bailey*, *supra* note 5 (comparing the sounds given by casino slot machines to the sounds given in games which feature loot boxes). Casino slot machines give players satisfaction by blaring out the sound of "crashing coins" when a player wins, even if the slot machine winnings "come on slips of paper." *Id.*

<sup>161</sup> See *id.* (describing how FIFA 18, a soccer game with loot box features, has "fireworks explode and confetti falls" shown on screen when a player purchases a loot box and wins an "elite soccer player."). Another example is the Blizzard game

While most jurisdictions have concluded that the prizes from loot boxes are meaningless because they are virtual, social science demonstrates that gamers perceive loot box prizes to be valuable.<sup>162</sup> The problem with treating the prizes out of loot boxes as meaningless is that given the commercial success of loot boxes, it can be inferred that the prizes they receive are “something of value” because players continue to come back to purchase more loot boxes.<sup>163</sup> Thus, to the gamers who purchase loot boxes, the possibility of earning an upgrade or rare character, is something of value.

The more compelling argument for why video game loot boxes are closer to trading cards than casino slot machines is that there is always a prize that is distributed when a gamer purchases a loot box with virtual money.<sup>164</sup> Unlike casino slot machines, where there is always a hazard that the money which a player contributes will lead to players losing money, loot boxes will always give players something—whether it be a new skin, weapon, armor, or upgrade.<sup>165</sup> For this reason, a court would likely find that loot boxes are distinct from slot machines and would not satisfy the second element, the prize element. Therefore, because loot boxes do not satisfy all the three elements of the SJC’s interpretation of the ambiguous language in the Massachusetts lottery statute, they would likely not be considered illegal gambling under state law.

---

“Overwatch,” which plays a “triumphant tune” when a player’s loot box is opened. *Id.* “Overwatch” gamers are divided over whether loot boxes are gambling; one interviewee stating loot boxes were an “investment for future fun,” while another said there was “definitely a feeling of euphoria when you get something you perceive as valuable.” *Id.*

<sup>162</sup> See Jones, *supra* note 88 (quoting a former developer who helped create a loot box system who acknowledged that “every time you open a loot box, your situation is getting better, but it’s getting better in unexpected ways, so that hits all the little cheap instant dopamine buttons”).

<sup>163</sup> See Duverge, *supra* note 88 (citing the concept of loss aversion, where “players would rather enjoy the satisfaction of winning rather than losing” as a motivation for why they “impulse buy” loot boxes).

<sup>164</sup> See *Bad Gamers Anonymous*, *supra* note 94 (arguing that loot boxes are similar to trading cards).

<sup>165</sup> See *Loot Boxes Psychology*, *supra* note 94 (rejecting claims that loot boxes are psychologically akin to gambling because loot boxes will always give players something while slot machines have a chance of giving players nothing at all).

*B. While Loot Boxes are Likely Not Gambling Under Current Law, the Societal Dangers Warrant Government Regulation*

While loot boxes likely would not be considered gambling given that they do not meet the “prize” element under traditional gambling law, it is clear that the game industry’s current loot box practices are deeply problematic and warrant regulation.<sup>166</sup> The ESRB, the game industry’s self-regulatory game rating body, has been unwilling to crack down on developers that implement loot boxes.<sup>167</sup> The decision of the ESRB not to classify loot box games as adults only rated (“AO”), which would ensure that children would not be able to play games perceived by many as digital slot machines, was a grave error that has led to documented cases of addiction in children and young adults.<sup>168</sup> One of the reasons why China decided to ban loot boxes was because of studies showing “addiction patterns in children similar to what we see with gambling addicts.”<sup>169</sup>

Studies are beginning to show the addictive qualities of loot boxes are very similar to what is seen in compulsive gamblers.<sup>170</sup> As Hawaii State Representative Chris Lee noted, random chance purchases in games are currently not restricted to adults.<sup>171</sup> This is problematic because a child’s brain is statistically more impulsive and

---

<sup>166</sup> See Bailey, *supra* note 5 (describing Rep. Lee’s proposal to “force publishers to disclose the odds of loot boxes,” a policy which has been implemented successfully in China).

<sup>167</sup> See Kain, *supra* note 63 (arguing that the ESRB erred in deciding that loot boxes should not be classified as gambling).

<sup>168</sup> See Teague Morris, *Fake Stuff, Real Money: The Big, Sometimes Shady Business of Microtransactions*, FRONTIER GROUP (Jan. 8, 2018), archived at <https://perma.cc/C52C-2WZK> (listing examples of children who became addicted to loot boxes).

<sup>169</sup> See Kain, *supra* note 63 (praising China’s decision to require transparency from game developers with loot box features in their games).

<sup>170</sup> See Kain, *supra* note 63 (arguing that “the biggest concern [with loot boxes] is that children and adolescents will end up forming addictive behaviors early on”).

<sup>171</sup> See Bailey, *supra* note 5 (noting that “politicians in California, Hawaii, Indiana, and Washington state” have publicly condemned loot boxes, with Hawaii State Representative Chris Lee taking the lead); see also Spiezio, *supra* note 76 (“There is nothing that identifies that these games have in-game, chance based microtransactions that have addictive risks to kids.”) (quoting Rep. Lee).

thus more vulnerable to the addictive effects of loot boxes.<sup>172</sup> This addiction problem has been seen in numerous anecdotal examples reported by the press, including: (1) Faisal Shugaa, a seven-year-old who spent about \$5,000 on microtransactions within the “Jurassic World” iPad game; (2) Lance Perkins, a seventeen-year old who spent \$7,000 of his parents’ money on microtransactions in the “FIFA” soccer game; and (3) an anonymous fifteen-year-old Belgian teenager who racked up a \$46,000 bill in the “Game of War.”<sup>173</sup> Each of these examples serve as a warning for why consumers need greater transparency from game developers about the algorithms in their loot box systems, as well as stricter regulations of the practice of loot boxes.

The documented rise in loot box addiction demonstrates why it was prudent of the FTC to launch an investigation into the trade practices of game developers who implement addictive loot box mechanics into their games.<sup>174</sup> The FTC’s recent “Workshop on Consumer Issues Related to Loot Boxes,” will likely help to inform consumers about the addictive properties of loot box mechanics, even if regulatory action is ultimately not taken.<sup>175</sup> Of course, this Note concludes that loot boxes cannot be banned on the basis that random chance purchases violate traditional gambling laws. This is why Congress should take action by passing Senator Josh Hawley’s bill to ban loot boxes outright.<sup>176</sup> While random chance purchases may not satisfy all of the common law elements of gambling, the documented

---

<sup>172</sup> See Morris, *supra* note 168 (citing statistics that “loot boxes and other randomized reward systems are more effective on kids because children are impulsive—they have more trouble delaying gratification and saying no to emotional impulses like ‘I want this’”).

<sup>173</sup> See *id.* (listing examples of children who became addicted to loot boxes).

<sup>174</sup> See FTC to Hold August Workshop on Consumer Issues Related to Loot Boxes, *supra* note 90 (noting that the workshop will determine whether loot boxes could violate current consumer protection law).

<sup>175</sup> See *id.* (stating that one of the purposes of the FTC’s loot boxes workshop is to provide consumers with more information about the marketplace promoting loot boxes).

<sup>176</sup> See Senator Hawley to Introduce Legislation Banning Manipulative Video Game Features Aimed at Children, *supra* note 87 (stating that video games with pay-to-win schemes and loot boxes “prey on user addiction, siphoning out kids’ attention from the real world and extracting profits from fostering compulsive habits”). “One thing is clear,” Senator Hawley stated, “there is no excuse for exploiting children through such practices.” *Id.*

examples of addiction in children and young adults has caused far more harm than good to consumers.<sup>177</sup>

## V. Conclusion

Loot boxes have been an in-game item of controversy since their emergence in “Battlefront II.” While the use of loot boxes in games like “Battlefront II” has led to serious ethical questions of whether the industry should include these types of microtransactions in games, the question of law has become whether courts will view these microtransactions as gambling. To put it another way: will courts treat loot boxes like trading card packs available in supermarkets by cash registers, or like unregulated slot machines using the ambiguities of technology to skirt gambling law?

Federal courts have been divided as to whether the valuable in-game items earned from loot boxes constitute a “prize” within the traditional meaning in gambling law. With the single exception of *Kater v. Churchill Downs*, most courts have concluded that the loot from random chance purchases does not qualify as a “prize” under current gambling laws. If such a case were brought in Massachusetts, the likely result is that courts would not view loot boxes as gambling, but closer to trading cards that consistently give out prizes of some value, even if they were not the prizes that the gamer wanted or hoped for.

While this note argues that loot boxes likely do not meet the traditional definition of gambling, readers should not take this note as an endorsement of loot boxes. This Note highlights the newly released social science demonstrating that loot boxes are having an addictive effect. Self-regulation by private rating agencies like the ESRB has not led to a curtailing of this practice despite the growing problem of microtransaction addiction in young adults. Therefore, Congress should follow in the footsteps of State Rep. Lee & Senators Hassan and Hawley to seek accountability for developers who use a practice that is exploitative and leads to addiction in children and young adults.

---

<sup>177</sup> See Morris, *supra* note 168 (describing the problems of addiction caused by loot boxes and pay-to-win schemes).