

# Loot Boxes—Is the Gaming Industry Involved in a Crap Shoot?

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I. INTRODUCTION .....	91
II. WHAT IS THE TRADITIONAL DEFINITION OF GAMBLING?.....	98
III. DO LOOT BOXES INVOLVE CONSIDERATION?.....	99
IV. DO LOOT BOXES INVOLVE CHANCE? .....	101
V. DO LOOT BOXES INVOLVE A PRIZE? .....	104
VI. CONCLUSION .....	110

## I. INTRODUCTION

Video games have become ubiquitous in today’s society. From mobile to console to PC, more people are playing games than ever before. According to a recent study, about 67% of Americans (i.e., approximately 211 million people) play some type of video game.<sup>1</sup> As a result of such widespread popularity, it is unsurprising that the industry generates substantial revenue. In 2018 alone, the video game industry generated \$43.4 billion in revenue.<sup>2</sup> For context, revenue from global box office ticket sales was \$41.7 billion in 2018.<sup>3</sup>

A large portion of the revenue generated in the video game industry is attributable to in-game purchases. An in-game purchase (alternatively referred to as a “micro-transaction”) is a purchase by a player of nonphysical items or points that can be used within the virtual world of

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1. Brian Crecente, *Nearly 70% of Americans Play Video Games, Mostly on Smartphones (Study)*, VARIETY (Sept. 11, 2018, 6:30 AM), <http://variety.com/2018/gaming/news/how-many-people-play-games-in-the-u-s-1202936332/>.

2. Emily Gera, *Americans Spent More than \$43 Billion on Video Games in 2018*, VARIETY (Jan. 22, 2019, 2:47 PM), <http://variety.com/2019/gaming/news/americans-spent-more-than-43-billion-on-video-games-in-2018-1203114642/>.

3. Jonathan Shieber, *Video Game Revenue Tops \$43 Billion in 2018, an 18% Jump from 2017*, TECHCRUNCH (Jan. 22, 2019, 5:00 PM), <http://techcrunch.com/2019/01/22/video-game-revenue-tops-43-billion-in-2018-an-18-jump-from-2017/>.

the game.<sup>4</sup> In-game purchases can be so lucrative for game developers that many games use in-game purchases as the sole means to generate revenue (i.e., a game is given to players for free, and then game developers rely on in-game purchases to make up for and exceed development costs). Example games that employ this model are League of Legends™, Dota 2™, Hearthstone: Heroes of Warcraft™, Killer Instinct™, and most notably, Fortnite Battle Royale™ (Fortnite).<sup>5</sup> Fortnite has become the high watermark in the industry, the measuring stick against which all other games' revenue generation is measured. Almost 70% of Fortnite players have purchased something in-game, spending on average about \$85.<sup>6</sup> Given the vast player base of Fortnite, this 70% number has resulted in over \$1 billion in in-game purchases.<sup>7</sup> For comparison, Activision Blizzard, one of the largest gaming companies in the world, made \$4 billion from in-game purchases across its entire video game portfolio in 2017 (which represented more than half of Activision Blizzard's total revenue).<sup>8</sup>

In an attempt to grab a slice of this proverbial pie, game developers have been looking for inventive ways to increase in-game purchases. Enter the loot box. A loot box (alternatively referred to as a "loot crate") is a consumable virtual item that can be redeemed to receive a randomized selection of virtual items. Depending on the game, the virtual items can include cosmetic customizations to a player's avatar or character, game-altering equipment such as weapons and/or armor, and/or in-game currency.<sup>9</sup> Loot boxes are typically sold to players for real-world currency (e.g., as a type of in-game purchase) or for in-game currency, with the real-

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4. *In-Game Purchases*, TECHOPEDIA, <http://www.techopedia.com/definition/27615/in-game-purchases> (last visited Nov. 5, 2019); see also Elliott O'Day, *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, 369-70 (2018).

5. See Gabe Gurwin, *The Best Free-to-Play Games of 2019 Will Help Frugal Gamers Survive*, DIGITAL TRENDS (Sept. 16, 2019, 12:37 PM), <http://www.digitaltrends.com/gaming/best-free-to-play-games/>.

6. Stefanie Fogel, *Poll: 'Fortnite' Players Spend Average of Nearly \$85 on Cosmetics*, VARIETY (June 26, 2018, 12:00 PM), <http://variety.com/2018/gaming/news/fortnite-lendedu-poll-1202858235/>.

7. Nick Santangelo, *Fortnite Has Reportedly Made over \$1 Billion from In-Game Purchases*, IGN (July 18, 2018, 4:33 PM), <http://www.ign.com/articles/2018/07/18/fortnite-has-reportedly-made-over-1-billion-from-in-game-purchases>.

8. Jason M. Bailey, *A Video Game 'Loot Box' Offers Coveted Rewards, but Is It Gambling?*, N.Y. TIMES (Apr. 24, 2018), <http://www.nytimes.com/2018/04/24/business/loot-boxes-video-games.html>.

9. See, e.g., *Loot Box*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Loot\\_box](http://en.wikipedia.org/wiki/Loot_box) (last visited Nov. 5, 2019).

world currency option being used to greatly accelerate a player's acquisition of in-game items. What's more, in many games, in-game items/currency can be traded with other players. Loot boxes and their ilk have become increasingly popular in recent years, especially with the rise of eSports. Loot boxes span all genres, from mobile games to sports games like EA Sports™ FIFA™ to, maybe most prominently, the first-person shooter genre, with games like Valve's Counter-Strike: Global Offensive™ and Blizzard Entertainment's Overwatch™. One developer, Electronic Arts™, pushed loot boxes to the brink in 2017 with Star Wars Battlefront II™ before receiving massive backlash from players.<sup>10</sup> Loot boxes were so prevalent and game-altering in Star Wars Battlefront II that Battlefront II earned the pejorative moniker of a "pay-to-win" system.<sup>11</sup>

Regardless of player reception of loot boxes or the revenue generated from them, though, there looms a potentially larger problem. Because loot boxes can involve the exchange of actual currency for randomized rewards, many argue that the sale of loot boxes constitutes gambling activity.<sup>12</sup> At a cursory level, it is obvious why some would consider loot boxes gambling: a player purchases something for real money and, in return, receives some reward based on chance. How is this any different from purchasing a lottery ticket and getting a randomized monetary return?

Canonical gambling activities (e.g., casino games, lotteries, sweepstakes, etc.) are typically highly regulated given the risk of exploitation of players (e.g., if the actual odds of winning a lottery are far lower than the odds that are advertised or expected by players). Such regulations usually take place at the state level (e.g., through state statutes and/or through established state gaming commissions).<sup>13</sup> Gambling regulations can take the form of requiring the casino/other gambling

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10. *Star Wars Battlefront 2's Loot Box Controversy Explained*, GAMESPOT (Nov. 22, 2017, 12:37 PM), <http://www.gamespot.com/articles/star-wars-battlefront-2s-loot-box-controversy-expl/1100-6455155>.

11. *See, e.g., id.*

12. *See* John Patrick Pullen, *With Star Wars Battlefront II, Disney and EA May Have a Gambling Problem*, FORTUNE (Nov. 15, 2017), <http://www.fortune.com/2017/11/15/star-wars-battlefront-gambling-disney-electronic-arts-loot-box-crate/>; *see also* Vic Hood, *Are Loot Boxes Gambling?*, EUROGAMER (Oct. 23, 2017), <http://www.eurogamer.net/articles/2017-10-11-are-loot-boxes-gambling>.

13. *See, e.g.,* James G. Gatto & Mark A. Patrick, *All Bets Are On! Gambling and Video Games: How the Evolution of Games Has Led to a Rise in Gambling Concerns*, LAW LEVEL (2018), [http://www.lawofthelevel.com/wp-content/uploads/sites/187/2018/09/All-Bets-Are-On\\_Gambling-and-Video-Games-Article-0918.pdf?utm\\_source=Mondaq&utm\\_medium=syndication&utm\\_campaign=inter-article-link](http://www.lawofthelevel.com/wp-content/uploads/sites/187/2018/09/All-Bets-Are-On_Gambling-and-Video-Games-Article-0918.pdf?utm_source=Mondaq&utm_medium=syndication&utm_campaign=inter-article-link).

operator to publish the odds of a given game, oversight by a gaming commission to ensure the casino/another gambling operator obeys gambling regulations and actually produces the odds published by the respective entity, minimum age requirements to participate in a gambling activity (e.g., eighteen years of age to visit a casino), and/or implementations of formal processes by which complaints can be levied/resolved.<sup>14</sup> For example, most states require that every contest operate under a set of official rules that are available to all who wish to see them, clearly state who is eligible to participate, include detailed instructions about what an entrant must submit to enter, include the start and end date of the competition, describe the available prizes, list the criteria by which the winner will be selected, and provide a method for determining prize winners in the event of a tie.<sup>15</sup> Further, regulation also typically includes licensure of the gambling operator to further curb risk of exploitation.<sup>16</sup>

Additionally, or alternatively, regulation can occur at the federal level (e.g., through various enforcement statutes that have been passed by Congress). For example, the Unlawful Internet Gambling Enforcement Act (UIGEA) makes it illegal for financial institutions to process payments associated with illegal gambling (as defined by applicable state/federal law).<sup>17</sup> In addition, the Racketeer Influenced and Corrupt Organizations Act (RICO) prohibits any person from receiving income from any act of gambling that is illegal under state or federal law.<sup>18</sup> The 1961 Interstate Wire Act (the Wire Act) also plays a role in federal regulation of gambling.<sup>19</sup> However, its potential role in loot box regulation (if any) would be uncertain, at best, given the 2011 memo issued by the Department of Justice (DOJ) that declared that the scope of the Wire Act is limited only to sports betting.<sup>20</sup>

In many instances, gambling and lotteries are regulated to some extent by both state and federal law. For example, it is illegal under state and federal law for anyone other than a state government to host a lottery.<sup>21</sup>

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14. See, e.g., *Gambling Laws in the United States*, GAMBLING LAWS, <http://www.gamblinglaws.org/us/> (last visited Sept. 29, 2019).

15. David J. Ervin & Gonzalo E. Mon, *Practical Law Commercial Transactions, Sales Promotions, Contests, and Sweepstakes*, Westlaw Practice Note 1-500-4243 (Maintained).

16. See, e.g., *Gambling License*, ST. CAL. DEP'T JUST., [http://oag.ca.gov/gambling/forms/forms\\_license](http://oag.ca.gov/gambling/forms/forms_license) (last visited Sept. 30, 2019).

17. Gatto & Patrick, *supra* note 13.

18. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (2016).

19. Interstate Wire Act, 18 U.S.C. §§ 1081-1084 (2016).

20. Gatto & Patrick, *supra* note 13.

21. Ervin & Mon, *supra* note 15.

Many of the psychological factors that lead to the dangers of traditional gambling have been shown to be present in loot boxes.<sup>22</sup> For example, the logical fallacies of Chasing, The Gambler's Fallacy, Self-Correcting and Fair, Cheating the System, and the Entrapment Effect can all occur with loot boxes.<sup>23</sup> Adolescents are particularly vulnerable to the dangers of gambling.<sup>24</sup> This is particularly relevant here given that numerous gamers are underage, and many of them are purchasing loot boxes with their parents' money. A 2011 research study of American children showed that "91 percent of kids between 2 and 17, or about 64 million people, are playing video games."<sup>25</sup> At present, though, game developers in the video game industry have not been forced to abide by the above-described regulations when implementing loot boxes. For example, game developers do not need a gambling license to sell loot boxes and do not have to publish the odds of getting any specific items from a loot box (although a select few developers have voluntarily decided to do so anyway, including those that sell games in China or distribute games through the Apple App Store or the Google Play Store).<sup>26</sup>

Various commentators have weighed in on the issue of whether loot boxes constitute gambling, arguing both sides.<sup>27</sup> Unsurprisingly, those in

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22. See, e.g., Jeff Grubb, *Australian Study: Loot Boxes Are More like Gambling than Baseball Cards*, VENTUREBEAT (Sept. 17, 2018, 2:36 PM), <http://www.venturebeat.com/2018/09/17/loot-boxes-australian-study/>.

23. See, e.g., *The Psychology of Loot Boxes and Microtransactions*, PLATINUMPARAGON (June 6, 2018), <http://www.platinumparagon.info/the-psychology-of-loot-boxes-and-micro-transactions/>.

24. See, e.g., Cam Adair, *Video Games and Gambling: An Introduction to Loot Boxes, Microtransactions, and In-App Purchases*, GAME QUITTERS (Aug. 24, 2018), <http://www.gamequitters.com/video-games-and-gambling-an-introduction-to-loot-boxes-microtransactions-and-in-app-purchases/>.

25. Don Reisinger, *91 Percent of Kids Are Gamers, Research Says*, CNET (Oct. 11, 2011, 5:22 AM), <http://www.cnet.com/news/91-percent-of-kids-are-gamers-research-says/>.

26. See, e.g., Julia Lee, *Riot Games Reveals League of Legends Loot Box Rates*, RIFT HERALD (Feb. 22, 2018, 2:12 PM), <http://www.riftherald.com/lol-gameplay/2018/2/22/17041132/league-of-legends-loot-box-rates-hextech-crafting-riot-games>; see also Lisa Marie Segarra, *Google Requires Loot Box-Laden Kids' Games Disclose the Odds of Winning Digital Goods*, FORTUNE (May 31, 2019), <http://fortune.com/2019/05/31/google-play-store-loot-boxes/>; Alex Ziebart, *Overwatch China Changes Loot Box Purchases to Dodge Gambling Laws*, BLIZZARD WATCH (June 6, 2017, 5:00 PM), <http://blizzardwatch.com/2017/06/06/new-way-buy-overwatch-loot-boxes-china/>.

27. See, e.g., Pullen, *supra* note 12; see also Hood, *supra* note 12; Erik Kain, *The ESRB Is Wrong About Loot Boxes and Gambling*, FORBES (Oct. 12, 2017, 7:00 AM), <http://www.forbes.com/sites/erikkain/2017/10/12/the-esrb-is-wrong-about-loot-boxes-and-gambling/#24a4f4912a64>; Ryan Morrison & Austin Hoffman, *Robot Congress—52—Are Loot Boxes Gambling*, HEADGUM (Oct. 24, 2017), <http://headgum.com/robot-congress/robot-congress-52-are-loot-boxes-gambling-ft-marc-whipple>.

the video game industry have held steadfastly that loot boxes are not akin to gambling activity. For example, the Entertainment Software Rating Board (ESRB), the body that provides ratings for games (e.g., “E for Everyone” or “T for Teen,” similar to the Motion Picture Association of America film rating system for movies) has stated that they do not believe loot boxes are gambling.<sup>28</sup> Similarly, the gaming industry’s trade association, the Entertainment Software Association (ESA), has said, “Loot boxes are a voluntary feature in certain video games that provide players with another way to obtain virtual items that can be used to enhance their in-game experiences. They are not gambling.”<sup>29</sup>

Many politicians in the United States, however, believe that regulation of loot boxes is in order. For example, Hawaiian State Representative Chris Lee argues that loot boxes are predatory gambling mechanisms and should be regulated.<sup>30</sup> He has proposed four statutes to do so (albeit none were ultimately passed into law).<sup>31</sup> Other states have also proposed legislation or investigated the legal status of loot boxes. For example, Minnesota has proposed legislation that would inhibit the use of loot boxes targeted at players under the age of eighteen.<sup>32</sup> In the same vein, Indiana and Washington have each proposed bills asking their respective gaming commissions to conduct studies of loot boxes.<sup>33</sup> Some at the

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28. Jason Schreier, *ESRB Says It Doesn't See 'Loot Boxes' as Gambling*, KOTAKU (Oct. 11, 2017, 12:46 PM), <http://kotaku.com/esrb-says-it-doesnt-see-loot-boxes-as-gambling-1819363091>; see also O'Day, *supra* note 4.

29. Tae Kim, *State Legislators Call EA's Game a 'Star Wars-Themed Online Casino' Preying on Kids, Vow Action*, CNBC (Nov. 22, 2017, 8:57 AM), <http://www.cnbc.com/2017/11/22/state-legislators-call-eas-game-a-star-wars-themed-online-casino-preying-on-kids-vow-action.html>.

30. Matthew Gault, *This State Legislator Wants to Ban Kids from Buying Video Game Loot Boxes*, VICE (Nov. 28, 2017, 1:49 PM), [http://motherboard.vice.com/en\\_us/article/wjgw3y/state-legislator-want-to-ban-loot-boxes](http://motherboard.vice.com/en_us/article/wjgw3y/state-legislator-want-to-ban-loot-boxes); see also Katherine Cross, *How the Legal Battle Around Loot Boxes Will Change Video Games Forever*, VERGE (Dec. 19, 2017), <http://www.theverge.com/2017/12/19/16783136/loot-boxes-video-games-gambling-legal>; David Lumb, *Can Legislation Fix Gaming's Loot Box Problem?*, ENGADGET (Feb. 24, 2018), <http://www.engadget.com/2018/02/24/loot-boxes-gambling-legislation/>; *Call to Regulate Video Game Loot Boxes over Gambling Concerns*, BBC (Nov. 24, 2017), <http://www.bbc.com/news/technology-42110066>.

31. Makena Kelly, *How Loot Boxes Hooked Gamers and Left Regulators Spinning*, VERGE (Feb. 19, 2019), <http://www.theverge.com/2019/2/19/18226852/loot-boxes-gaming-regulation-gambling-free-to-play> (“Hawaii state lawmakers made one of the most prominent change attempts, introducing four bills that would set rules for the gaming industry when it came to loot boxes and microtransactions. One pair would have prohibited anyone under the age of 21 to purchase the crate with real money. The other two would have required video game publishers to publicly disclose the probability rates of receiving rewards. Both sets ultimately failed.”).

32. *Id.*

33. Chloe Anagnos, *Government Actually Has No Business Regulating Loot Boxes*, FOUND. FOR ECON. EDUC. (Jan. 24, 2019), <http://fee.org/articles/government-actually-has-no>

federal level are also determined to investigate and regulate loot boxes. For example, the Federal Trade Commission has vowed to launch a probe into the possible link between gambling and loot boxes.<sup>34</sup> Additionally, United States Senator Josh Hawley of Missouri introduced the Protecting Children from Abusive Games Act that would ban the sale of loot boxes to minors.<sup>35</sup>

Jurisdictions outside the United States have taken decidedly firmer and swifter stances to regulate loot boxes. For example, the Gambling Regulators European Forum released a statement signed by fifteen European countries “expressing concern that the prize systems in some high-profile games are tantamount to gambling.”<sup>36</sup> Based on growing public concern about loot boxes, but also acutely aware of the possibility of overregulation, the United Kingdom has asked for information in a public referendum on loot boxes.<sup>37</sup> Taking it one step further, both the Netherlands and Belgium have already declared that some loot boxes are indeed illegal gambling activity.<sup>38</sup>

As demonstrated, if the sale of loot boxes were considered gambling activity, there could be a myriad of legal implications (both state and federal) for gaming companies and gamers. A look to the canonical definition of gambling provided in common law (e.g., as it would be applied to traditional casino games like blackjack, craps, or slot machines) and a comparison of that definition to loot box activity is provided below.

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business-regulating-loot-boxes/; David Lumb, *State Senator Wants to Regulate Loot Boxes in Washington*, ENGADGET (Jan. 25, 2018), <http://www.engadget.com/2018/01/25/washington-state-senator-regulate-loot-boxes/>.

34. Brian Fung, *U.S. Consumer Watchdog to Investigate Video Game Loot Boxes*, WASH. POST (Nov. 28, 2018), <http://www.washingtonpost.com/technology/2018/11/28/us-consumer-watchdog-investigate-video-game-loot-boxes/>.

35. Charles Singletary Jr., *Senator's Loot Crate Bill Has the Video Game Industry Nervous*, DIGITAL TRENDS (May 23, 2019, 2:58 PM), <http://www.digitaltrends.com/gaming/loot-box-ban-bill-us-senator-josh-hawley-esa/>.

36. Kevin Webb, *Regulators from More than a Dozen Countries Are Looking to Crack Down on 'Loot Boxes,' a Controversial Video Game Practice that Could Be Too Much like Gambling*, BUS. INSIDER (Sept. 17, 2018, 5:49 PM), <http://www.businessinsider.com/loot-boxes-european-regulation-2018-9>.

37. Niji Narayan, *The UK Government Seeks Public Referendum on Loot Boxes*, EUR. GAMING (Jan. 24, 2019), <http://europeangaming.eu/portal/compliance-updates/2019/01/24/37011/the-uk-government-seeks-public-referendum-on-loot-boxes/>.

38. Wesley Yin-Poole, *Now Belgium Declares Loot Boxes Gambling and Therefore Illegal*, EUROGAMER (Apr. 27, 2018), <http://www.eurogamer.net/articles/2018-04-25-now-belgium-declares-loot-boxes-gambling-and-therefore-illegal>; Wesley Yin-Poole, *The Netherlands Declares Some Loot Boxes Are Gambling*, EUROGAMER (Apr. 19, 2018), <http://www.eurogamer.net/articles/2018-04-19-the-netherlands-declares-some-loot-boxes-are-gambling>.

This comparison demonstrates that loot boxes fit the traditional definition of gambling.

## II. WHAT IS THE TRADITIONAL DEFINITION OF GAMBLING?

In most jurisdictions, “gambling” and “illegal lotteries” specifically have been defined by three characteristics often referred to as the prize-chance-consideration test: (1) payment of some form of consideration; (2) a result determined by chance (rather than skill); and (3) a prize.<sup>39</sup> This test has been elucidated by so many courts in so many jurisdictions that it is fair to say that such a test is, more or less, ubiquitous.<sup>40</sup> The test is sometimes couched in different terms, but the premise is predominantly the same.<sup>41</sup>

A classic example like blackjack can be used to demonstrate this test. In blackjack, a player makes a wager/bet, which constitutes the “consideration.” A deck of cards is shuffled, and a hand is then dealt to both the player and to the dealer, after which the player either has a stronger hand, weaker hand, or comparable hand (i.e., a push) with the dealer’s hand. Because the deck is shuffled to randomize the order of the cards, the result is determined by “chance.” Finally, the player receives a payment from the house based on the wager (if the player had the stronger hand) or loses the wager to the house (if the player had the weaker hand) based on the comparison of the player’s hand to the dealer’s hand (i.e., a “prize” is meted out). Based on the foregoing analysis, it is clear why blackjack constitutes gambling under the prize-chance-consideration test.

Under similar logic, many argue that loot boxes constitute gambling.<sup>42</sup> The loot box includes a player purchasing the loot box for real-world currency (the “consideration”), the player receiving one or more in-game items from the loot box (the “prize”), and the chosen items being determined randomly or pseudo-randomly (the “chance”). Each of the elements of the prize-chance-consideration test will be explored further below to demonstrate just how well the loot box satisfies the test’s framework.

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39. Gatto & Patrick, *supra* note 13.

40. *See, e.g.*, *Midw. Enters., Inc. v. Stenehjem*, 625 N.W.2d 234, 237 (N.D. 2001).

41. *See, e.g.*, *Chi. Patent Corp. v. Genco, Inc.*, 124 F.2d 725 (7th Cir. 1941).

42. *See, e.g.*, Cross, *supra* note 30.



### III. DO LOOT BOXES INVOLVE CONSIDERATION?

So, marching through the elements of the prize-chance-consideration test as laid out above, it must be determined whether loot boxes involve consideration. Black's Law Dictionary defines consideration as "[s]omething (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something, esp. to engage in a legal act."<sup>43</sup> As mentioned above, players can purchase loot boxes with in-game currency or real-world currency. It is doubtful that in-game currency would be held to constitute "consideration," as, typically, in-game currency is earned simply by playing the game, meaning the game developers do not receive any direct pecuniary benefit by their players continuing to play their game after already having purchased or downloaded the game. This is perhaps debatable given that the live streaming of video games (e.g., via Twitch.tv) has become a thriving industry. Thus, one could at least argue that inducing players to play games for an extended period of time may garner viewership of that game via live streaming, which consequently results in additional viewers of said live streams being led to purchase the game being streamed. Hence, there is an argument that game developers *do* stand to gain financial benefit simply by inducing players to play their game longer. Such an argument is tenuous, though, given that the primary reason game developers are providing loot boxes is not to garner some additional purchasers of their game through incentivizing current players to play more. Instead, the primary reason loot boxes are offered is to directly monetize in-game purchases made using real currency.

Real-world currency is one of the most, if not the most, recognized forms of consideration. So, assuming a loot box is purchasable with real-world currency, it would seem that there is no wriggling out of this prong of the prize-chance-consideration test. Such a statement is mostly correct. This point seems yet to be litigated, but there is an exception to the consideration prong that game developers may use as a defense.<sup>44</sup> Namely, if consumers can enter a promotion that would otherwise involve consideration through a free alternative method of entry (AMOE), consideration may be negated.<sup>45</sup> In other words, if there were an alternative method of purchasing a loot box that did not require consideration, even

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43. *Consideration*, BLACK'S LAW DICTIONARY (11th ed. 2019).

44. *Video Gaming: Is My Loot Box Legal?*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Sept. 26, 2019), <http://www.skadden.com/insights/publications/2019/09/quarterly-insights/video-gaming-is-my-loot-box-legal>.

45. See Ervin & Mon, *supra* note 15.

if there were a method of purchasing a loot box that did require consideration, the consideration prong of the prize-chance-consideration test would not be satisfied.

In order for an AMOE to negate consideration, though, the equal dignity rule must be satisfied.<sup>46</sup> The equal dignity rule requires that entries submitted through a free method have to be treated the same as entries submitted through a paid method (e.g., the AMOE must be conspicuously disclosed, consumers must be able to enter the same number of times for free as they can by making a payment, there must be the same timeline for entry, there must be the same prize pools for paid/unpaid entrants, etc.).<sup>47</sup> The AMOE exception is utilized in a variety of industries. Perhaps the best-known example is the McDonald's Monopoly™ promotion in which customers who purchase items from McDonald's receive game pieces that may confer a prize.<sup>48</sup> However, the official rules of the Monopoly promotion (an abbreviated version of which is included on every game board handed out to customers) include a "no consideration" clause (i.e., a "no purchase necessary" clause).<sup>49</sup> In bold letters, the rules proclaim that "NO PURCHASE NECESSARY TO PLAY/WIN A PRIZE. A PURCHASE WILL NOT IMPROVE CHANCES OF WINNING." The rules also provide instructions on how to "Receive a Game Piece Without Purchase (alternate method of entry 'AMOE')" that includes sending a self-addressed stamped envelope to a specified mailing address, in response to which the contestant will be mailed two game pieces.<sup>50</sup> Because McDonald's provides an AMOE that satisfies the equal dignity rule, the consideration prong of the test is negated, and no illegal lottery is deemed to have occurred.<sup>51</sup>

Hence, it would seem that there is a colorable argument that, in some cases, loot boxes meet the AMOE exception required to negate consideration. Some loot boxes that can be purchased using either real-world currency or in-game currency may satisfy the equal dignity rule (e.g., the loot boxes are the same (whether purchased for in-game currency

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46. Terese L. Arenth, N.Y.C. City Bar Ass'n CLE Program, Presentation: Sweepstakes, Skill Contests & Other Promotions on the New Platforms (May 11, 2018), Westlaw.

47. See Ervin & Mon, *supra* note 15.

48. See, e.g., *McDonald's Monopoly*, WIKIPEDIA, [http://www.wikipedia.org/wiki/McDonald%27s\\_Monopoly](http://www.wikipedia.org/wiki/McDonald%27s_Monopoly) (last visited Oct. 2, 2019).

49. *Abbreviated Rules*, MCDONALD'S MONOPOLY BRAND, <http://www.news.mcdonalds.com/static-files/4d6019f1-317c-440f-bfa7-9afb7bb80e18> (last visited Nov. 20, 2019).

50. *Id.*

51. See, e.g., Greg Goodson, *No Purchase Necessary & Giveaways: Everything You Need to Know*, HANGAR (Apr. 29, 2015), <http://blog.rafflecopter.com/2015/04/no-purchase-necessary-giveaways/>.

or real currency), players can purchase the same number of loot boxes using in-game currency as real currency, and the ability to purchase the loot box using in-game currency is conspicuously posted). Thus, in such cases, an adequate AMOE would exist and consideration may be negated.

In many cases, however, the AMOE provided through in-game currency purchases is not sufficient. For example, in some games, there are certain premium loot boxes that are solely purchasable using real-world currency, while standard loot boxes are available for in-game currency. Such premium loot boxes may have better odds of receiving superior in-game rewards or may simply have better in-game rewards available entirely. In addition, some games provide bulk discounts when purchasing loot boxes using real-world currency. In many instances, analogous bulk discounts are not available to players purchasing loot boxes using in-game currency. In circumstances where bulk discounts are not equally available or premium loot boxes are reserved for gamers who pay real money, no AMOE having equal dignity is provided, and therefore, consideration would not be negated.

To summarize, loot boxes seem to satisfy the consideration prong, with the possible exception in some instances where a negation of consideration occurs in light of the ability to purchase loot boxes using in-game currency. Such a negation of consideration would heavily depend on the intricacies of the implementation of the loot box in the relevant game.

#### IV. DO LOOT BOXES INVOLVE CHANCE?

There is a distinct dearth of cases that have been litigated on the prong of “chance.” Perhaps this is unsurprising, as this prong is rather black and white (e.g., if a result is determined randomly or pseudo-randomly, it is clear that “chance” is involved). However, one slightly tangential wrinkle worth noting has come up in a number of RICO cases.

Many plaintiffs use RICO as a basis to bring suit against companies they feel are engaged in gambling activities to the detriment of the plaintiff. A number of RICO actions have been brought against companies that market and sell collectible cards. For example, multiple cases have been brought in federal court regarding baseball cards (typically by parents and/or guardians on behalf of minors).<sup>52</sup> As background, companies like Topps, Fleer, and Upper Deck sell packs filled with random assortments of cards in them (each card depicting a baseball player). Some of the cards are rarer than others and, thus, are less likely to be in a given baseball card

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52. See *Chaset v. Fleer/Skybox Int'l.*, 300 F.3d 1083 (9th Cir. 2002).

pack than other cards. Hence, many have argued that such baseball card packs constitute illicit gambling activity (i.e., satisfy the prize-chance-consideration test, thereby falling into the definition of gambling). Such arguments have not fared well in federal court, however.

One example is a Ninth Circuit case from 2002 (a consolidation of eight cases against various defendants) where the appellants appealed granted motions to dismiss.<sup>53</sup> There, each defendant manufactured and distributed trading cards, and the appellants alleged that the random inclusion of limited edition cards was unlawful gambling.<sup>54</sup> The court described the exact mechanics by which rare cards are typically placed in card packs.<sup>55</sup> The Ninth Circuit ultimately affirmed the district courts' holdings that the plaintiff-appellants lacked standing because no cognizable legal injury under RICO was sustained.<sup>56</sup> The court's ruling was based on the reasoning that "[a]t the time the plaintiffs purchased the package of cards, which is the time the value of the package should be determined, [the plaintiffs] received value—eight or ten cards, one of which might be an insert card—for what they paid as a purchase price."<sup>57</sup> The court quoted and agreed with similar reasoning from the Fifth Circuit and the Eastern District of New York in comparable cases.<sup>58</sup> Plaintiffs did

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53. *Id.* at 1085.

54. *Id.* at 1085-86.

55. *Id.* ("The foundation of most trading card products is a base set of cards, which may include as many as eighty different cards, each with a different picture on it. Beginning in the early 1990's most trading card products also included smaller sets of "insert" or "chase" cards, which may include as many as ten or fifteen different cards, or as few as one card. These insert cards are more rare than base cards and, thus, they generally are more desirable to card collectors. Trading card packs and display boxes typically state the odds of receiving in a given pack an insert card from any of the various insert sets. Almost every card manufacturer also includes a disclaimer which states that the advertised odds are an average for the entire production run and are not guaranteed within an individual pack or box. There is a secondary market for trading cards, active at trading card conventions, trading card stores, and on the Internet, which places higher values on some cards than others.").

56. *Id.* at 1087.

57. *Id.*

58. *See Price v. Pinnacle Brands Inc.*, 138 F.3d 602, 607 (5th Cir. 1998) ("Our review of the record and the relevant law convinces us that Pinnacle has the prevailing argument. We agree with the district court that '[p]laintiffs do not allege that they received something different than precisely what they bargained for: six to twenty cards in a pack with a chance that one of those cards may be of Ken Griffey, Jr.' Injury to mere expectancy interests or to an 'intangible property interest' is not sufficient to confer RICO standing."); *Major League Baseball Props., Inc. v. Price*, 105 F. Supp. 2d 46, 51 (E.D.N.Y. 2000) ("A card purchaser buying a pack of cards enters into a bargain with the licensors and manufacturers whereby in return for payment the purchaser will receive a random assortment of regular cards and a chance to receive an insert card. This bargain delivers actual value to each party because the chance itself is of value regardless of whether or not the card purchaser later suffers a 'loss.' The bargain is not for a phantom chance. Just as a card purchaser may realize a gambling loss, so a card purchaser may also find an insert card and sell it

arguably receive “precisely what they bargained for.” However, this reasoning is problematic as it appears to almost entirely read the possibility of suing over racketeering activity involving “gambling” out of the statute. For example, even when a player at a casino is playing blackjack, the player still is getting “precisely what they bargained for.”<sup>59</sup> However, it is doubtful that anyone would argue that blackjack does not constitute gambling. Yet, under the court’s reasoning, it is very possible that such activity would nonetheless be unactionable under RICO even if the remainder of the RICO elements were satisfied.

A related case involving Pokémon cards (e.g., cards for a collectible card game based on a Nintendo franchise of video games and anime)<sup>60</sup> was brought in the Southern District of California by a set of disgruntled parents.<sup>61</sup> This suit likewise alleged that the inclusion of chase cards in cards packs and/or the inclusion of cards whose odds in card packs were incorrectly stated/promoted amounted to gambling punishable under RICO.<sup>62</sup> As with the baseball card cases, the case was dismissed for lack of standing under 18 U.S.C. § 1964(c).<sup>63</sup>

Circling back around to the prong of “chance,” it would seem that at least in the limited sphere of RICO actions, “packs” of randomly assorted items do not confer a cognizable legal injury due to gambling. Hence, if a RICO action were brought by a plaintiff in federal court against a game developer for loot boxes, the game developer would likely succeed on a motion to dismiss by arguing that the plaintiff received exactly what they expected to receive. This is likely true even if, like chase cards in baseball card packs, the odds of getting any particular item from the loot box are unpublished (meaning the player would not have known the odds of getting the items they want, so it is debatable if they could even determine what exactly they were bargaining for).

There is also an affirmative defense to the prong of “chance” that is worth mentioning here. In most states, if a game is primarily attributable to skill rather than luck/chance (as determined by factual inquiry), the activity will not be deemed gambling, even if some modicum of chance is

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or keep it for value. The chance is real, and having paid for it and received it, the card purchaser has not suffered any financial loss or RICO property injury.”)

59. *Chaset*, 300 F.3d at 1087.

60. See, e.g., *Pokémon Trading Card Game*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Pok%C3%A9mon\\_Trading\\_Card\\_Game](http://en.wikipedia.org/wiki/Pok%C3%A9mon_Trading_Card_Game) (last visited Nov. 20, 2019).

61. See *Imber v. Nintendo of Am. Inc.*, No. 99 cv 2010 B(AJB), 2000 WL 34249313 (S.D. Cal. Jan. 24, 2000).

62. *Id.*

63. *Id.*

involved.<sup>64</sup> The skill involved typically has to be some “legitimate skill” (e.g., not awarding a prize to the first person to raise their hand).<sup>65</sup> This may be relevant if items awarded from a loot box in question are somehow tied to a mini-game, an eSports competition, or some other test of skill. At present, no loot boxes in the industry appear to function in such a manner.

#### V. DO LOOT BOXES INVOLVE A PRIZE?

The prize prong in the prize-chance-consideration test will now be analyzed vis-à-vis loot boxes. Of the three factors, this factor is by far the most hotly contested and certainly the most heavily litigated. As shown below, most jurisdictions have adopted a very broad view of what can constitute a “prize.” For example, Tennessee and New Hampshire have gone so far as to say, “[A] ‘thing of value’ [(i.e., a prize)] to be the subject of gambling may be ‘any “thing” affording the necessary lure to indulge the gambling instinct. Any incitement which would impel the player to stake his money on a chance of winning . . . .”<sup>66</sup> Even with such sweeping pronouncements of what embodies a “prize,” most jurisdictions, perhaps incredulously, have thus far refused to expand their definitions to include loot boxes.

As discussed above, the prize-chance-consideration test is typically played out in state courts. Hence, we can look to state jurisprudence in a variety of jurisdictions to synthesize how the term “prize” is typically defined.

For example, we can examine a case from California involving a device known as the “Mini-Boy 7,” a video game that includes seven traditional casino games (e.g., draw poker, baccarat, craps, etc.).<sup>67</sup> The video game was played by a player inserting a quarter into the machine, at which point the player was given 10,000 points to wager and allowed to play up to four games, with the opportunity to play additional games if the player was winning.<sup>68</sup> The question there was whether the Mini-Boy 7 constituted an illicit slot machine, which according to California Penal Code, “by reason of any element . . . or chance . . . the user may receive any piece of money, credit, allowance, or *thing of value*.”<sup>69</sup> The court

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64. Ervin & Mon, *supra* note 15.

65. *Id.*

66. Heartley v. State, 157 S.W.2d 1, 3 (Tenn. 1941) (citing State v. Mint Vending Mach., 85 N.H. 22 (N.H. 1931)).

67. Score Family Fun Ctr., Inc. v. Cty. of San Diego, 275 Cal. Rptr. 358, 359 (Cal. Ct. App. 1990).

68. *Id.*

69. *Id.* (emphasis added).

ultimately determined that the Mini-Boy 7 was an illegal slot machine, by reading the term “thing of value” to include a “reward of extended play by a video game.”<sup>70</sup>

As a small aside, the court also noted that “the ability to calculate the mathematical odds of a particular result does not equate to a conclusion a result is predictable to the user. A calculation of odds is merely a calculation of likelihood; it does not result in the game becoming predictable to the user.”<sup>71</sup> In other words, just because something is calculable, does not mean that it does not involve *chance*. Interestingly, this seems to be at odds with the “precisely what they bargained for” analysis provided by the courts in the RICO cases cited above.

Regardless, it is clear from the California case that additional playing time on a game may constitute a “thing of value” (i.e., a prize). This is especially true in cases where the ability to play the game would otherwise require payment of additional money (i.e., additional consideration), but for the prize of free play. This is illustrated in a Michigan case where an Eagles Club had a draw poker machine that required a 25¢ entry fee and sometimes awarded free plays based on the resulting poker hand.<sup>72</sup> Like the California case, the Michigan court determined that because the free plays would otherwise cost the player additional payment, an “opportunity to have free plays is a thing of value.”<sup>73</sup> Additionally, this is illustrated in a Ninth Circuit case applying Washington state law, which involved a virtual casino app where players received virtual chips with which to play.<sup>74</sup> Players could earn more chips as a reward for winning games or in return for payment using real-world currency.<sup>75</sup> Even though the terms of use for the game (which must be accepted prior to playing) state that the virtual chips cannot be exchanged for cash or any other tangible value, the court agreed with the plaintiff’s argument that the “virtual chips are a ‘thing of value’ because they are a ‘form of credit . . . involving extension of . . . entertainment or a privilege of playing [the game in question] without charge.’”<sup>76</sup>

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70. *Id.* (citing *Merandette v. City & Cty. of S.F.*, 88 Cal. App. 3d 105, 114 (1979)).

71. *Id.*

72. *Automatic Music & Vending Corp. v. Liquor Control Comm’n*, 396 N.W.2d 204, 205 (Mich. 1986).

73. *Id.* at 206 (citing *Oatman v. Port Huron Chief of Police*, 310 Mich. 57, 59 (1944); *see also Henry v. Kuney*, 280 Mich. 188, 192 (Mich. 1937)).

74. *Kater v. Churchill Downs Inc.*, 886 F.3d 784, 785 (9th Cir. 2018).

75. *Id.* at 785-86.

76. *Id.* at 784, 786-87 (citing *Thing of Value*, WASH. REV. CODE § 9.46.0285 (2019)).

There are also a good number of cases in multiple jurisdictions involving pinball machines or gumball-type machines. In another Michigan case, free plays of a specific type of pinball machine constituted a prize, and therefore, the pinball machines in question were “gambling devices” within the meaning of the statute.<sup>77</sup> Similarly, in Alaska and Ohio, free play awarded on certain classes of pinball machines has been deemed to be a prize.<sup>78</sup> Likewise, a marble table game in Texas that involved dropping a metal ball into a certain hole and a baseball-type mint vending machine in Arkansas that each awarded free play were both deemed to satisfy the “prize” prong of the test.<sup>79</sup> Other jurisdictions have held that amusement, itself, can be a “thing of value.”<sup>80</sup> The idea that free plays constitute a prize is not wholly uncontroverted, however. For instance, the Supreme Court of Illinois has held that “[a] pinball game which does not pay out money or anything else of value and therefore on which money cannot be staked, hazarded, bet, won or lost, is not a gambling device [(i.e., does not include a “prize”).”<sup>81</sup>

So, a few issues are raised in this regard with respect to loot boxes. One, do loot boxes give you “free play”? Arguably no; loot boxes simply provide *enhanced* play (i.e., the ability to play with improved in-game items or customizable, aesthetically pleasing cosmetic appearances in-

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77. *Oatman v. Davidson*, 16 N.W.2d 665, 666 (Mich. 1944) (citing *State v. One 5 [cents] Fifth Inning Base Ball Mach.*, 241 Ala. 455, 458 (1941)).

78. *State v. Pinball Mach.*, 404 P.2d 923, 926 (Alaska 1965) (“A prize is something offered or striven for in a contest of chance—something which may be won by chance. Whether or not one finds amusement or entertainment in playing a pinball machine, there is always something that he is striving to win by operation of chance, namely, free games. This is the prize—the opportunity to continue to play the machine without paying for it. A pinball machine that costs money to operate and which, through the element of chance awards free games, cannot be operated without the three elements of price, chance and prize being present. Those three elements are inherent in the make-up and operation of the machine, and since they are the elements that constitute gambling, a pinball machine is in itself a gambling device.”); *Westerhaus Co. v. City of Cincinnati*, 135 N.E. 2d 318, 325 (Ohio 1956) (citing *Kraus v. City of Cleveland*, 135 Ohio St. 43 (Ohio 1939)).

79. *Hightower v. State*, 156 S.W.2d 327, 328 (Tex. Civ. App. 1941); *Rankin v. Mills Novelty Co.*, 32 S.W.2d 161, 162 (Ark. 1930).

80. *See, e.g.*, *Wash. Coin Mach. Ass’n v. Callahan*, 142 F.2d 97 (D.C. Cir. 1944); *Chi. Patent Corp. v. Genco, Inc.*, 124 F.2d 725 (7th Cir. 1941); *Davies v. Mills Novelty Co.*, 70 F.2d 424 (8th Cir. 1934); *Mills Novelty Co. v. Farrell*, 64 F.2d 476 (2nd Cir. 1933); *State v. Waite*, 131 P.2d 708 (Kan. 1942); *State v. One Bally Coney Island No. 21011 Gaming Table*, 258 P.2d 225 (Kan. 1953); *State v. Betti*, 42 A.2d 640 (Hudson Cty. Ct. 1945); *Overby v. Okla. City*, 287 P. 796 (Okla. Crim. App. 1930); *In re Wigton’s Return*, 30 A.2d 352 (Pa. Super. Ct. 1943); *Commonwealth v. Kling*, 13 A.2d 104 (Pa. Super. Ct. 1940); *State v. One ‘Jack and Jill’ Pinball Mach.*, 224 S.W. 2d 854 (Mo. Ct. App. 1949); *Crystal Amusement Corp. v. Northrop*, 118 A.2d 467 (Conn. C.P. 1955).

81. *People v. One Mech. Device*, 142 N.E.2d 98, 100 (Ill. 1957) (citing *People v. One Slot Mach.*, 25 N.E. 2d 139 (Ill. App. Ct. 1940)).



game). Still, players can continue to play the game in question without ever purchasing the loot boxes. Hence, free play is likely not provided. Does enhanced play constitute a thing of value? It certainly seems like enhanced play inherently represents a thing of value. If a player is having “more fun,” even though this is quite a difficult metric to quantify, it is nonetheless valuable. There is at least occasional support for this proposition in the jurisprudence of some jurisdictions.<sup>82</sup>

On the other side of the argument, though, unlike free play in the pinball machine cases (where the “prize” in question is the ability to play without inserting additional money), loot boxes are not preventing some other type of payment (i.e., an in-game item in the loot box does not allow you to forgo paying for anything, except of course additional loot boxes from which you could obtain said item). In fact, it might be argued that loot boxes are the inverse of “free play,” as they may sometimes award in-game items that would, but for the paid loot box, take multiple hours of gameplay to obtain. Hence, loot boxes may allow or incentivize players to play less for the same reward, rather than provide players the right to play more.

Although all of the above-referenced cases are certainly relevant, loot boxes have yet to be formally litigated in any rigorous way (although the issue of whether loot boxes are gambling could come up in a lawsuit by a disgruntled parent in California against Epic arguing that Fortnite’s use of loot boxes is predatory).<sup>83</sup> Perhaps the most analogous case presently available is a class action suit in the Northern District of Illinois surrounding Sky Union’s game Castle Clash™.<sup>84</sup> As players play Castle Clash, they earn virtual currency called “shards” that can be used to

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82. *Westerhaus*, 135 N.E.2d at 325 (citing *Kraus*, 135 Ohio St. 43) (“Amusement is a thing of value. Were it not so, it would not be commercialized. The less amusement one receives, the less value he receives, and the more amusement, the more value he receives. Whoever plays the device and obtains tokens therefrom receives more value for his nickel, with respect to the amount of amusement obtained, than the player who receives none at all . . . the greater the amount of amusement received, the more valuable the prize. The minimum amount of amusement offered in each play is that which is offered without any return of tokens. Whatever amusement is offered through the return of tokens is added amusement which a player has an uncertain chance of receiving. This added amount of amusement, the procurement of which is dependent wholly upon chance, is a thing of value . . . the lure extended by the device to the player. Since amusement has value, and added amusement has additional value, and since it is subject to be procured by chance without the payment of additional consideration therefor, there is involved in the game three elements of gambling, namely, chance, price and a prize.”).

83. Makena Kelly, *Epic Games Sued over ‘Predatory’ Llama Loot Boxes*, VERGE (Feb. 28, 2019, 9:41 PM), <http://www.theverge.com/2019/2/28/18245574/fortnite-epic-games-sued-lawsuit-predatory-llama-loot-boxes>.

84. *See Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871 (N.D. Ill. 2016).

purchase new heroes of varying strength for varying shard prices from an in-game shop.<sup>85</sup> Only a limited number of shards can be earned per day through gameplay.<sup>86</sup> However, a player can also spend gems that are purchased with real-world currency in order to receive a random hero (with more powerful heroes being less likely to be awarded than less powerful heroes) or to receive a random talent for an already owned hero (again with more powerful talents being less likely to be awarded than less powerful talents).<sup>87</sup>

In *Soto v. Sky Union, LLC*, the court's decision on whether illicit gambling was involved hinged on whether heroes and talents awarded in return for gems were "things of value" (i.e., whether or not the prize prong was satisfied).<sup>88</sup> Even though the heroes, talents, and gems could not be redeemed for real money or sold to Sky Union or other players, plaintiffs argued that the heroes and talents were still "things of value" because (1) players spent actual money on the gems used to obtain said heroes and talents; (2) the heroes and talents increase the value of a Castle Clash account that can be sold on the open market; and (3) the heroes and talents advance gameplay; hence, being awarded heroes and talents in a game of chance is like being awarded a free play in the cases previously cited.<sup>89</sup>

The court soundly rejected the first argument, stating that to expand the meaning of a "thing of value" that far would essentially mean that any time a player pays to play a game of chance, the prize prong is satisfied (which would essentially read out a part of the test from the relevant statute and, similarly, would read the prize prong out of the prize-chance-consideration test).<sup>90</sup> The court's opinion here makes good sense.

Regarding their second point, the plaintiffs explained that players can sell their accounts on a secondary market not provided or endorsed by Sky Union, and that the going price for accounts on such a secondary market usually depends on the heroes and talents that have been accumulated (more heroes/talents and rarer heroes/talents result in a higher selling price).<sup>91</sup> Increasing the value of an associated account certainly seems to satisfy the plain meaning of the term "thing of value." However, the court disagreed.<sup>92</sup> The court, by drawing analogies to traditional casino games,

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85. *Id.* at 875.

86. *Id.*

87. *Id.*

88. *Id.* at 879.

89. *Id.* at 879-80.

90. *Id.* at 879.

91. *Id.*

92. *Id.* at 884.

states that the increased resale value of an associated account does not mean that the heroes/talents are things of value because (a) the players cannot use the heroes/talents to obtain real-world currency from Sky Union, itself; and (b) the heroes/talents cannot be directly (i.e., individually) converted into real-world currency (i.e., the heroes/talents can only be sold as part of a bundled account).<sup>93</sup> The court states, in a very conclusory fashion, that “[t]he amount a player can get for selling his account to another player says little about the values of the individual items (Heroes, Talents, etc.) contained within that account.”<sup>94</sup> This analysis is insufficient at best and more likely, simply incorrect. If one were told how much a car or a computer was worth, that would convey a substantial amount about what the constituent parts of that car/computer were worth. For example, a more expensive car would be identified as having additional upgrades (e.g., heated seats, sunroof, four-wheel drive, etc.) when compared to a less expensive car of the same make, model, and year. Even if the overall price of the car/computer was not sufficient information to determine the exact value of the constituent parts, such information at least conveys that the aggregate has some value (i.e., that its constituent parts have a nonzero value and are thus, “things of value”). In addition, by comparing two accounts that were in all respects equal except for the presence of a given hero, a value for that hero could be deduced.

In addition, to refute the court’s first point, whether an item is directly redeemable from its original distributor for real-world currency is simply *not* dispositive as to whether that item has value. For example, even though common corporate stock cannot typically be returned directly to the company that originally sold it in exchange for real-world currency, no one would seriously argue that common stock is not a “thing of value.”

The *Soto* court’s reasoning as to the plaintiff’s third argument seems likewise inadequate. The court acknowledges (as identified above) that free play has previously constituted a “thing of value.”<sup>95</sup> However, it is held that here, unlike previous cases where additional gameplay costs additional money (payment of which is avoided when a free play is awarded), heroes and talents only improve gameplay.<sup>96</sup> The court states, again in a conclusory fashion, that “[a]dded enjoyment simply does not

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93. *Id.* at 879-80.

94. *Id.* at 880.

95. *Id.* at 884.

96. *Id.* at 880.

have measurable worth, and it cannot be a ‘thing of value.’”<sup>97</sup> As discussed above, the court’s opinion here seems incomplete and incorrect (i.e., enhanced or improved gameplay certainly seem to constitute “things of value”). As described previously regarding the secondary market for Castle Clash accounts, it is simply not the case that the market value for heroes/talents in Castle Clash accounts is unmeasurable. In addition, even if added enjoyment does not have measurable worth, this is not the same as having no worth at all.

Thus, two of the three arguments posed by the plaintiff in *Soto* as to why the in-game items awarded in loot boxes constitute “things of value” still have yet to be adequately rebutted. To summarize, a mountain of case law of varying relevance from a number of jurisdictions seems to imply that loot boxes do award something akin to a “prize.” However, one less developed case from the Northern District of Illinois that is arguably more relevant to loot boxes on the facts seems to imply that loot boxes do not award “things of value.” The prize prong of the prize-chance-consideration test remains highly contentious when applied to loot boxes and will likely be further litigated in the coming years.

## VI. CONCLUSION

As outlined above, loot boxes satisfy the prize-chance-consideration test. Namely, loot boxes are paid for using consideration (real-world currency), the contents of loot boxes are determined by chance (the items contained in any given loot box are randomly or pseudo-randomly selected from a group of possible items), and loot boxes confer a prize (one or more in-game items that enhance a player’s entertainment and/or increase the market value of the player’s account). Because loot boxes satisfy the prize-chance-consideration test, the sale of loot boxes constitutes gambling activity. Further, because many of the same predatory concerns posed by traditional gambling are present in loot boxes and loot boxes are frequently marketed toward juveniles, loot box sales should be actively regulated as gambling activity.

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97. *Id.*