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A newsletter brought to you by the Sports Law Group at Proskauer.

Welcome to *Three Point Shot*, a newsletter brought to you by the Sports Law Group at Proskauer. *Three Point Shot* brings you the latest in sports law-related news and provides you with links to related materials. In this issue, we feature contributions from Eric Zilber, Caroline E. Rimmer and Jonathan P. Mollod.

Your feedback, thoughts and comments on the content of any issue are encouraged and welcome. We hope you enjoy this and future issues.

Edited by **Robert E. Freeman**

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Ninth Circuit Does Flip Turn, Reversing Antitrust Case Against World Aquatics

In a decision that is making waves through the world of competitive swimming, the Ninth Circuit reversed a California district court's grant of summary judgment in favor of Fédération Internationale de Natation ("FINA"), now known as World Aquatics, on antitrust claims brought by a group of professional swimmers and the International Swimming League (the "ISL"). (*Shields v. World Aquatics*, No. 23-15092 (9th Cir. Sept. 17, 2024) (unpublished)).

As we covered in a prior edition of *Three Point Shot*, this legal battle first began in December 2018, when the plaintiffs – a group of professional swimmers and the ISL – filed antitrust claims against FINA, contesting the organization's rules that effectively barred national swimming federations from collaborating with "non-sanctioned" competitions such as the ISL. These rules placed national federations in a difficult position, as their cooperation with unsanctioned events could result in penalties.

FINA, first established in 1908 during the Olympic Games in London, is a Swiss organization recognized as the global governing body for aquatic sports, including swimming, and its membership includes 209 national federations. The national federations, by virtue of their membership, agree to comply with FINA rules and enforce FINA rules and penalties against swimmers. FINA sets the qualifying criteria for swimmers to participate in the Olympics and recognizes only qualifying times from competitions held or sanctioned by FINA. Swimmers themselves, however, are not members of FINA and are not required to swim in FINA-sanctioned events exclusively. FINA keeps a calendar of and holds its own international competitions, and if member federations also want to hold international competitions on their own or in partnership with independent organizations, they are required to seek FINA's prior approval.

In 2017, a nascent ISL sought to organize international competitions among the world's best swimmers, and structure them as a more traditional sports league. The ISL initially sought to hold competitions officially sanctioned by FINA (which comes with a spot on the FINA calendar alongside events such as the FINA World Championships and allows times to be official for purposes of Olympic qualification and world records). When negotiations with FINA stalled, however, the ISL went to the individual national federations to host their events. However, facing potential sanctions, the national federations declined to take the risk of getting in the water with the ISL.

Back in December 2018 the swimmers and the ISL brought a medley of antitrust claims alleging that FINA and its member federations conducted an illegal group boycott of the ISL by refusing to cooperate with the ISL. The essence of the complaint was that FINA used its control over Olympic aquatic sports to determine the terms of compensation and competition for international swimming events outside of the Olympic Games and FINA's own competitions, thus engaging in anticompetitive conduct. As the Ninth Circuit stated in its decision reversing summary judgement in favor of FINA, while FINA never imposed sanctions on any swimmers for participating in non-FINA events, plaintiffs introduced evidence that all interested parties understood FINA rules might expose swimmers to suspensions, including from competing at the Olympics and World Championships, if they participated in unaffiliated ISL events. In the ISL's view, this cut off its access to the very top-tier talent it needed to compete in the marketplace. Notably, in 2019, following the filing of the suit, FINA issued a statement that clarified it "recognizes the right of athletes to participate in any swimming event" but that if the event does not receive prior FINA approval, the "results of the competition would not be recognized by FINA." In the meantime, the ISL hosted seasons in 2019, 2020 and 2021 and sought and obtained FINA's approval for some events in which ISL partnered with member federations.

In January 2023, the district court cleared the pool and ruled in favor of FINA. In its decision, the lower court granted summary judgment on the grounds that FINA's rules, which stated "no affiliated Member shall have any kind of relationship with a non-affiliated… body [like the ISL]" without risking suspension or having the results be unrecognized internationally, did not unreasonably restrain trade under Section 1 of the Sherman Act. According to the district court, the rules did not expressly prevent swimmers from competing in unsanctioned events but instead they "prevented… *member federations* from affiliating with the ISL and other non-sanctioned entities." The district court further reasoned that the ISL could – and did – hold its own top-tier competitions without requiring any formal affiliation with member federations, and therefore found that there was no evidence of anticompetitive effects.

Generally, Section 1 of the Sherman Act prohibits "contracts, combinations, or conspiracies that unreasonably restrain trade." There are three standards for determining if restraints are unreasonable: (1) *per se*, if they always or almost always tend to restrict competition and decrease output, (2) "rule of reason" (most common), if not *per se* and following a fact-specific assessment of "'market power and market structure…to assess the [restraint]'s actual effect' on competition" or (3) "quick look," if they are not *per se* but "where it is clear that the challenged restraints' principal or only effect is anticompetitive."

In a reversal, the Ninth Circuit changed strokes and found the district court's conclusions were merely "one interpretation of the evidence," giving new life to the plaintiffs' claims. Applying a *de novo* review, the appellate court found that there were several triable issues that the district court had overlooked. Most notably, the Ninth Circuit concluded that the plaintiffs had raised a legitimate question as to whether FINA's rules constituted a *per se* violation of antitrust law (i.e., unlawful group boycott) by preventing member federations and swimmers from doing business with the ISL without risking severe sanctions. According to the appeals court, a rational jury could find that the pre-amended rule concerning federations participating in

unsanctioned events had "no purpose other than to disadvantage FINA's competitors."

The Ninth Circuit also found that the plaintiffs created a triable issue under the "quick look" standard and determined that there was enough evidence to suggest that FINA's rules may have imposed a "naked restraint on price and output" in the market for professional swimming competitions.

Significantly, the Ninth Circuit rejected the district court's conclusion that the more lenient "rule of reason" antitrust analysis was necessary. While FINA argued that the rule of reason should apply because "sports leagues and joint venture restrictions are unique antitrust contexts that are generally analyzed under the rule of reason," the Ninth Circuit instead found that (1) "FINA and its members are not a joint venture sports league, but an association of independent national federations," and (2) while "*some* restraints are necessary to create or maintain a league sport [that] does not mean *all* aspects of elaborate interleague cooperation are." Applying this rationale, the appeals court stated that "a rational trier of fact could conclude that FINA can organize swimming competitions and maintain its calendar of events without restricting participation in non-affiliated events." In addition, even though the appeals court affirmed the ruling that the plaintiffs failed to define the "relevant market" under a rule of reason analysis, the court stated that "a plaintiff is not required to define a particular market for… a rule of reason claim based on evidence of the actual anticompetitive impact of the challenged practice." In this case, the court found that, drawing all reasonable inferences in plaintiffs' favor, "a rational trier of fact could conclude that by threatening to sanction swimmers, [FINA's rules] prevented the ISL from holding events in 2018 and thereby reduced output and wages."

In the end, although the Ninth Circuit decision in the FINA case is unpublished and lacks precedential authority, it still may have an impact on future similar challenges to restrictions placed on athletes participating in non-league or governing body-sanctioned events. Regardless of the outcome of this litigation, there are bigger issues at play concerning the state of the league, as the ISL, whose founder is Ukrainian, most recently postponed its 2022 season due to the outbreak of the Russian-Ukrainian war. There have been no reported announcements about its return.

Child's Play: Roblox Must Face Tort Claims over Minors Gambling Robux in Online Casinos

"No dice," ruled a judge in the Northern District of California, denying technology and entertainment company Roblox Corp.'s ("Roblox") motion to dismiss negligence and unjust enrichment claims alleging that it failed to shield minors from third-party casino sites that use the Roblox platform's in-game currency system. (*Colvin v. Roblox Corp.*, No. 23-04146 (N.D. Cal. Sept. 19, 2024)). The claims originally arose last August when the parents of minor children brought a putative class action against the makers of popular gaming platform Roblox and three online virtual casino operators (the "Gambling Website Defendants" and, together with Roblox, the "Defendants"). The parent-Plaintiffs alleged that the Defendants "maintain and facilitate an illegal gambling ecosystem, targeted at children, through Roblox's online gaming ecosystem and digital currency."

Roblox is an online gaming platform where users can create their own games, or play games created by others, using Roblox Studio, a game development engine that enables users to design virtual environments, characters and gameplay mechanics, even for those with no programming experience. The platform, which experienced a surge in popularity during the COVID-19 pandemic, offers games in a variety of genres, such as adventure, role-playing and simulation. It also has a social multiplayer element where users create or join groups and chat with each other. According to the complaint, over 70% of Roblox users are under 18, and more than half of all users are under 13, making the platform's audience predominantly minors.

Roblox is free-to-play and offers in-game purchases through a virtual currency called Robux, which can have real-world value. Users may acquire Robux in one of several ways: either by purchasing them with real-world currency (via credit card, digital payment services, or gift cards), selecting a paid Roblox Premium membership (that comes with a monthly Robux stipend), or by

developing games or selling virtual creations, game assets, or other items to other Roblox users.

Through Roblox's Developer Exchange Program (the "Program"), creators can convert their earned Robux into real-world money. Only those who meet certain eligibility requirements set forth by Roblox and who register for the Program may participate. Roblox has skin in the game, profiting from currency conversions by taking at least a 30% marketplace fee on all in-game, user-to-creator transactions for virtual content on the platform, and setting the exchange rate when developers cash out Robux through the Program. All three Gambling Website Defendants were allegedly members of the Program, which is central to the Plaintiff's claims.

The Plaintiffs allege that, through the Program, the Gambling Website Defendants aren't just cashing in their chips—or rather, their Robux—for real-world monetary gains, but also spinning the wheel by enticing minor users to convert their Robux to gambling credits to use at off-platform online casinos, which are not licensed and which are promoted online as places to gamble Robux. This gambling operation allegedly occurs through a multi-step process (Roblox, in its first amended answer, denies allegations that Plaintiffs "lost" or "wagered" Robux on third party sites and states that any purported use of Robux to engage in "gambling" on such sites violates Roblox's terms of service). After acquiring Robux, the user navigates to one of the Gambling Website Defendants' virtual casinos (which exist outside the Roblox ecosystem). The user then links their Robux wallet on Roblox's website to the gambling site and, according to the Plaintiffs' amended complaint, "the user's Robux do not leave the Roblox platform, but instead are transferred to another Roblox account controlled by a Gambling Website Defendant." The gambling website then "converts" the minor user's Robux into credits to be wagered. A crucial step for purposes of Roblox's purported culpability comes into play at this point. Because Robux cannot be transferred to other users in the absence of a transaction or removed from the Roblox platform, a Roblox account controlled by a Gambling Website Defendant sells the user an otherwise worthless object or experience for the amount of Robux the user wishes to deposit as gambling credits on the relevant Gambling Website Defendant's online casino. By doing so, the Gambling Website Defendants "take control" of, but do not truly convert, the user's Robux. If the user wins, the Gambling Website Defendant can transfer back their winnings in Robux via a similar transaction as described above. If the user loses, the Gambling Website Defendant retains the user's Robux and can convert them into real-world currency under the Program. According to the Plaintiffs' complaint, the house always wins, as "Roblox collects a 30% fee on every transaction that deposits or withdraws funds… [thereby] earning Roblox millions in real-world revenue." Roblox, in its first amended answer, denies that it "profits" from the alleged transactions and has asserted various cross-claims against the Gambling Website Defendants and seeks injunctive relief barring them from obtaining unauthorized access to Roblox users' accounts.

Plaintiffs contend that Roblox's liability arises from its role in facilitating these transactions "under [its] virtual roof" and that Roblox maintains a level of oversight such that it ought to possess knowledge of suspicious activities (e.g., the third-party gambling transactions) that violate the platform's terms of service. As a result, the Plaintiffs claim Roblox should have located and banned the outside gambling sites' Roblox accounts and prevented future transactions. Roblox counters that it has managed its platform reasonably, and that the gambling sites evade detection by using sophisticated tactics. Roblox also argues that Plaintiffs fail to identify any affirmative act on Roblox's part that directly increased minors' risk of gambling. It also argues that Plaintiffs' alleged harm is "not reasonably foreseeable from Roblox's operation of its own platform," where gambling is prohibited, and that to impose such a duty to police millions of user accounts for possible illegal off-platform conduct would be "untenable."

In the original complaint, Plaintiffs brought nine causes of action against the Defendants, including negligence, fraud, and consumer protection-related claims. Back in March 2024, the district court dismissed some ancillary claims, but rejected Roblox's defense under Section 230 of the Communications Decency Act (CDA), finding that the Plaintiffs' claims do not treat Roblox as a publisher or speaker of third-party content on its platform. Rather, the court found that the claims focus on Roblox's alleged "facilitating transactions between minors and online casinos that enable illegal gambling." The court also

declined to create an exception to a general duty of reasonable care, ruling that Roblox has a duty to "use reasonable care in its conduct, the creation and management of its platform, to avoid creating an unreasonable risk of harm to others." Based on this, the court allowed the negligence claims to proceed. The Plaintiffs subsequently upped the ante with an amended complaint, sparking another round of motion practice.

In September 2024, the court issued another ruling that partially granted Roblox's motion to dismiss (axing the fraud-based claims and requests for injunctive relief), while preserving the Plaintiffs' negligence-related claims.

The amended negligence claims, which the court again allowed to proceed, rest on the contention that Roblox violated its duty of care by enabling, failing to detect and, ultimately, profiting from minors' gambling activities facilitated through Robux transactions. The court characterized Plaintiffs' negligence claims as misfeasance—an affirmative act that created a dangerous situation—rather than nonfeasance, or a mere failure to prevent harm, a distinction that was pivotal ("True, the complaint uses language about Roblox's failure to act and failure to prevent harm, which sounds more like nonfeasance. But the plaintiffs allege more than that—they allege that these deliberate design decisions by Roblox created the risk of harm to the minor plaintiffs who otherwise would not have been exposed to the virtual casinos").

The fact that the overwhelming majority of Roblox users are minors is central to both the allegations and the court's conclusions. The Plaintiffs argued that Roblox, given its young audience, had a heightened duty of care, especially concerning activities like gambling, which minors cannot legally engage in. The court rejected the imposition of a heightened duty of care, but still swept aside Roblox's argument that public policy factors should narrow its legal duty in this case. The court stated that the complaint "adequately alleges that it was foreseeable that minor users would navigate to virtual casinos and gamble away their Robux." This foreseeability analysis played a role in the court's decision to allow the negligence claims to proceed, with the court finding plausible Plaintiffs' claims that the burden to monitor millions of transactions is not too great for Roblox in this instance, at least based on the allegations in the complaint as to how Roblox oversees its platform. In a footnote, the court did recognize that Roblox is in fact trying to upset the operation of the online casinos and that the online casinos are engaged in a "cat and mouse game" of hiding from Roblox, such that perhaps Roblox could successfully argue in future proceedings that it is already taking reasonable care to prevent minors from gambling at outside virtual casinos (Robox's first amended answer outlines some of the evasive tactics of the Gambling Website Defendants and Roblox's efforts to detect and moderate accounts that violate its policies).

As the focus will now shift to whether Roblox took reasonable steps to prevent the alleged harms and whether it can be held liable under a negligence theory, Roblox may bolster its defense in its answer to the amended complaint and as the record develops through discovery. No matter how the chips fall in this case, the court's ruling will likely spur other online gaming and metaverse platforms like Roblox to reexamine in-game currency structures and monitoring procedures to ensure they are playing their cards right when it comes to users who are minors.

Roller Rink Scissors and Dips Out of Skater's Injury Claims

A California appellate court affirmed the dismissal of negligence and premises liability claims against roller rink owner Skateland Enterprises, Inc. ("Skateland") over injury claims brought by a skater, Plaintiff Geraldine Myers ("Myers" or "Plaintiff"), with the court finding that roller skating is "inherently risky" and Plaintiff failed to show that Skateland increased the risks of injury beyond those inherent to skating. (*Myers v. Skateland Enterprises Inc.*, No. B328404 (Cal. App. 2nd Dist. Sept. 23, 2024) (unpublished)). Hence, this appeal—a "couples-only slow skate" of sorts between Skateland and Myers—is over and Skateland's initial summary judgment award stands.

Plaintiff was injured at Skateland in December 2019 during a Sunday evening public skating session after another skater clipped her arm and caused her to fall after the rink had issued a "stop skating" instruction to allow workers to remove gum from the floor. Plaintiff was wearing her own roller skates. Evidence suggested that at the time of the fall, there were around 150 skaters

on the floor, and camera footage showed at least two floor guards in referee shirts in the vicinity of Plaintiff skating with the patrons and monitoring for unsafe behavior (or perhaps groups of friends skating a bit overzealously in a "train"); the rink also had a program director/DJ in an elevated booth who could supervise the rink and make rink-wide announcements. Testimony suggested Skateland exceeded safety standards, as industry guidelines recommend only one floor guard for every 200 skaters. Apparently, on the day of the incident, floor guards had admonished one skater after receiving a complaint about his skating that night (the man did not receive any further complaints), but later in the evening it was this same skater who bumped into Plaintiff's outstretched arm at a slow speed and caused her to fall.

In March 2021, Myers wheeled into California Superior Court in Los Angeles and filed her complaint against Skateland and the other skater (who was not involved in the appeal), advancing negligence and premises liability claims. While Plaintiff conceded that skating is an inherent risky activity, she alleged that Skateland unreasonably increased the risks of injury by failing to properly regulate the skating floor, failing to provide trained skating supervisors, and failing to prevent a rogue skater from injuring Plaintiff. Skateland countered in its motion for summary judgment that Myers assumed the risk of injury, that the "incidental contact" between Myers and the other skater "is endemic in the activity" and that Skateland followed industry safety protocols and did nothing to increase the risk associated with roller skating.

In January 2023, the trial court granted Skateland's motion for summary judgment, finding that falling is an inherent risk of roller skating and that Plaintiff failed to meet her burden to prove that Skateland did anything to unreasonably increase that risk. The trial court pointed to CCTV footage from the day in question that bolstered the defense: an adequate number of skate guards on the floor, the supposedly "reckless" skater skating in control, and depicting the incident as a "low-speed interaction." Thus, the trial court ruled that Skateland was not liable for what is an ordinary risk of roller skating: "[B]umping into other skaters and falling is an inherent risk of roller skating, especially in a group setting…."

Lacing up their quad skates, the California appellate court affirmed Skateland's award of summary judgment and concluded the assumption of risk doctrine foreclosed Myers' claims. The court stated that a defendant has no duty to eliminate or protect against risks inherent in a sport or recreational activity but cannot unreasonably "increase the risks to a participant over and above those inherent in the sport." The court also pointed out that several states in fact have enacted statutes limiting the liability of roller rink operators for the inherent risks of skating (see e.g., New Jersey, N.J.S.A. §5:14-6: "Roller skaters and spectators are deemed to… assume the inherent risks of roller skating… [which include] injuries which result from incidental contact with other roller skaters or spectators….").

Noting that collisions between skaters in a rink are an intrinsic risk of skating that could not be prevented by more skate guards or warnings, the court found that Plaintiff's claims do not raise a triable issue because there was no evidence that Skateland increased the inherent risks of the skating: "It is inevitable that a skater may move unexpectedly, or throw out an arm, resulting in unintended contact… and Skateland had no duty to decrease that inherent risk." In affirming dismissal, the court added: "Short of fundamentally changing skating by encasing skaters in a mound of bubble wrap, the possibility of injury cannot be avoided as skaters turn, slow, and speed up while maneuvering around the rink, creating an inherent risk of collisions."

Having notched a win on appeal, Skateland can now take a victory lap around the oval and "Shoot the Duck." Though, it should be noted, that since the filing of this litigation, the Skateland Northridge location has closed and been sold to a local community organization.

Proskauer has more than 50 years of experience counseling the world's premier sports organizations on their most critical and complex matters.

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