"The Insiders" for Gambling Lawsuits: Are the Games "Fair" and Will Casinos and Gambling Facilities Be Easy Targets for Blueprints for RICO and Other Causes of Action?

by John Warren Kindt*

I. INTRODUCTION

A. The Insiders for Gambling Lawsuits

As the insider Jeffrey Wigand came forward to rattle the U.S. tobacco industry, insiders within the U.S. and Australian gambling establishments began to go public as the twenty-first century began. By 2002 government officials, scholars, and social activists who were experts on the gambling industry believed that some of the next big industry

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lawsuits would be targeted at gambling facilities.\textsuperscript{2} Gambling opponents argued that casinos and gambling facilities fueled gambling addiction and pursued players who had gambling addiction problems, even after those players complained to the gambling facility and asked to be banned.\textsuperscript{3} Casino owners maintained that their industry was not the cause of gambling addiction.\textsuperscript{4} Reportedly concurring with this viewpoint was Keith Whyte, head of the National Council on Problem Gambling (NCPG), who was previously employed by the American Gaming Association (AGA), the gambling industry’s lobbying group. Whyte stated that “[c]ausation would be very difficult to prove,”\textsuperscript{5} although


\textsuperscript{3} \textit{Gambling Likely Target}, supra note 2, at C6. For the diagnostic criteria for delimiting a pathological (“addicted”) gambler, see \textit{AM. PSYCHIATRIC ASS’N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS} 615-18, § 312.31 (4th ed. 1994) (“pathological gambling”) [hereinafter DSM-IV].

\textsuperscript{4} \textit{Gambling Likely Target}, supra note 2, at C6.

\textsuperscript{5} \textit{Id.} (quoting Keith Whyte). The National Council on Problem Gambling (NCPG) has been criticized for having both substantial financial and administrative links to progambling interests and for trying to dominate U.S. problem gambling services. In 2003 the Antitrust Division of the U.S. Department of Justice published a proposed Final Judgment, Stipulation and Competitive Impact Statement in the case of \textit{United States v. National Council on Problem Gambling, Inc.}, Civil Action No. 1:03CV01279 (filed June 13, 2003) “to obtain equitable and other relief to prevent and restrain violations of Section 1 of the Sherman Act.” 68 Fed. Reg. 38090-98 (June 26, 2003). The proposed Final Judgment enjoined the defendant NCPG from directly or indirectly

\begin{itemize}
  \item A. Initiating, adopting, or pursuing any agreement, program, or policy that has the purpose or effect of prohibiting or restraining any PGSP [problem gambling services provider] from engaging in the following practices: (1) selling problem gambling services in any state or territory or to any customer; or (2) submitting competitive bids in any state or territory or to any customer.
  \item B. Adopting, disseminating, publishing, seeking adherence to, facilitating, or enforcing any agreement, code of ethics, rule, bylaw, resolution, policy, guideline, standard, certification, or statement that has the purpose or effect of prohibiting or restraining any PGSP from engaging in any of the practices identified in Section [A] above . . .
\end{itemize}

68 Fed. Reg. 38092 (2003). For public comments, including the “interesting issues” which the Antitrust Division indicated were raised by Professors Joseph E. Finnerty, James A. Gentry, Fred Gottheil, and John Warren Kindt (i.e., Gambling Research Group), see 68 Fed. Reg. 55654-56 (Sept. 26, 2003). \textit{See also Mega-Lawsuits, supra note 2, at 31-32.}

For an example of problematic legislation interfacing with the NCPG, see South Carolina Education Lottery Act § 59-150-230(I) (Supp. 2002) (“A portion . . . of the unclaimed prize money . . . must be allocated . . . to the South Carolina Department of Alcohol and Other Drug Abuse Services or an established nonprofit public or private agency recognized as an
several academics and experts disagreed.  

B. The “Pandora’s Box” of the Gambling Industry: The Legal Discovery of Information

The gambling industry and its associates apparently have a quantum of in-house information that may make legalized gambling interests vulnerable to a cornucopia of lawsuits by attorneys general and plaintiffs’ attorneys. After filing cases in many issue areas, trial lawyers were well-advised to watch for the insiders, who could reveal any potential destruction of relevant documents or concomitant obstruction of justice, as in the tobacco cases. This type of potential scenario was highlighted in 2001 and 2002 with the felony conviction of Arthur Andersen for obstructing a federal investigation of the Enron Corporation.

With regard to pro-gambling interests, the political history indicates a preoccupation with keeping all information in-house and under control. In 1996 during the formation of the National Gambling Impact Study Commission (“NGISC” or “1996-1999 Commission”), the lobbyists for U.S. gambling interests lobbied desperately to get the subpoena power


stricken from the authority of the Commission. The legislative sponsors of the 1996-1999 Commission, such as U.S. Senators Paul Simon (D-Ill.) and Richard Lugar (R-Ind.) as well as Charles Morin, chair of the 1976-1977 U.S. Commission on the Review of the National Policy Toward Gambling, strongly opposed the lobbyists’ efforts to strip the subpoena powers from the NGISC.

Two types of subpoena powers were at issue: (1) subpoenas to testify (i.e., subpoenas ad testificandum), and (2) subpoenas to produce documents (i.e., subpoenas duces tecum). In the final legislation, the Commission’s subpoena power to compel testimony from witnesses, such as company executives, was stripped. However, the Commission retained the power to subpoena documents.

As the debate intensified over the extent of the Commission’s subpoena powers, it became apparent that the pro-gambling interests were steadfastly against permitting any process which would allow for the legal discovery of information. The major trade magazine for the gambling industry, International Gaming and Wagering Business, referenced its Washington contacts to reassure its readership.

“Washington sources also report it’s likely that a Senate bill—not the House bill that was passed several months ago—will be adopted. The Senate version would not empower the commission to subpoena records of casino operators.”


15. BLACK’S LAW DICTIONARY 1440 (7th ed. 1999).

16. Id.


19. See supra notes 10-14 and accompanying text.


21. Id.
The gambling industry favored the Senate bill, presumably because there was more opportunity to influence or even control the information that would be forwarded to the 1996-1999 Commission.\textsuperscript{22}

If the Senate bill is adopted, as is expected, it is proposed that a study group would gather information, which would be delivered to the commission. Early speculation has members of the Washington-based Advisory Commission on Intergovernmental Relations (ACIR), of which [Nevada Governor Robert] Miller is one of 27 members, comprising the study group.\textsuperscript{23}

These types of industry maneuvers to control information outraged the Congressional sponsors of the Commission.\textsuperscript{24}

During this timeframe, U.S. Representative John Ensign (R-Nev.), who had family in the gambling industry,\textsuperscript{25} worked to eliminate the Commission’s subpoena powers.\textsuperscript{26} “Ensign said members of the AGIR would gather information on gaming and present it to the gaming commission. Just as important, Ensign said, are the assurances he’s received that the subpoena powers of the commission contained in the House bill are not included in the Senate bill.”\textsuperscript{27}

Despite these efforts to control the information going to the 1996-1999 Commission and to eliminate the Commission’s subpoena powers, the Commission still retained a large degree of informational independence as well as the power to subpoena documents (but not witnesses). For attorneys general and plaintiffs’ attorneys, however, the salient part of this scenario was to highlight the gambling industry’s Pandora’s Box—paranoia involving the legal discovery of information. Furthermore, the gambling industry, its associates, and organizations would have difficulty limiting the scope of discovery in many instances. The scope would depend on which gambling issues were addressed, but because gambling issues are by nature interrelated, the Pandora’s Box could be almost impossible to control.

\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Stacked Commission Deck, supra note 10; Study Shelved, supra note 10.
\textsuperscript{25} See Gaming Interference, supra note 10, at 22.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
C. Does the Obfuscation or Control of Information Detrimental to Gambling Facilities by Progambling Interests Enhance Plaintiffs’ Cases? The Interface with Qui Tam Causes of Action and Principles

While various forms of gambling activities were being decriminalized during the last two decades of the twentieth century, progambling interests reportedly denied the existence of health care costs and other costs associated with legalized gambling activities.28 The policies and actions to suppress, obfuscate, or control studies or information reflecting poorly on the gambling industry could interface with future qui tam actions where an individual can file suit like a “private attorney general” on behalf of the government. An example of a potential cause of action interfaces with the health care costs attributed to pathological gamblers.

Enacted in 1863 to curb military procurement fraud, the False Claims Act (FCA)29 allows the U.S. government and private plaintiffs (called “relators”) to recover damages from any person or organization that knowingly presented, or caused another party to present, a false or fraudulent payment claim to the government.30 Recovery amounts included the costs of the action, fines up to $11,000 per claim, and treble the government’s damages.31 Historically in common use, “[t]en of the first [fourteen] statutes enacted by the first United States Congress relied on qui tam actions to aid the police enforcement role of government agencies.”32 FCA actions constitute a type of qui tam action, which is the short form of the Latin phrase, qui tam pro domino rege quam pro si ipso in hac parte sequitur which translates to “who as well for the King as for himself sues in this matter.”33 The legal definition of a qui tam action is: “An action brought under a statute that allows a private person to sue for a penalty, part of which the government or
some specified public institution will receive.\textsuperscript{34} Between 1986 and 1999, over 3000 suits were filed using this cause of action—primarily in the health care industry.\textsuperscript{35}

\textbf{D. The Racketeer Influenced and Corrupt Organizations Act (RICO) and Other Causes of Action}

One of the primary areas of legal vulnerability for gambling facilities was RICO\textsuperscript{36} and its parallel state legislation.\textsuperscript{37} RICO actions appeared to cover many potential scenarios involving gambling facilities. Kansas City attorney Stephen Bradley Small has sued casinos “a number of times” alleging, for example, racketeering.\textsuperscript{38}

\begin{quote}
He has handled a racketeering case against the Kansas City casinos and has represented patrons who say they were wrongfully detained and accused of cheating.

For “premises liability and garden-variety personal injury claims, realize that the casinos are self-insured, so be prepared to go to trial,” advised Small. “From a management perspective, they’re paranoid about crimes their employees may commit and they fire people often, so employee claims against casinos are plentiful.”\textsuperscript{39}
\end{quote}

In private civil cases, several potential causes of action were identified:\textsuperscript{40} (1) RICO (both federal and state); (2) premises liability; (3) tortious breaches of duty; (4) intentional infliction of emotional (and mental) distress; (5) negligent infliction of emotional (and mental) distress; (6) breach of contract (including self-exclusion contract); (7) breach of constructive or implied contract; (8) fraudulent misrepresentation; (9) punitive damages; and (10) admiralty (perhaps).\textsuperscript{41} Obviously, other causes of action could be available depending on the factual scenarios.

\begin{itemize}
\item \textsuperscript{34} Id.
\item \textsuperscript{35} ROBIN POTTER, ASS’N OF TRIAL LAWYERS OF AM., FALSE CLAIMS ACT LITIGATION IN EMPLOYMENT CASES—A VIEW FROM PLAINTIFFS/RELATORS’ COUNSEL I:1208 (2002) (annual convention reference materials).
\item \textsuperscript{37} See, e.g., IND. CODE ANN. § 35-45-6-2 (Michie 1998).
\item \textsuperscript{38} Stephanie S. Maniscalco, “Self-Exclusion” Program May Create Duty, MO. LAW. WKLY., Dec. 17, 2000, at 15 [hereinafter Self-Exclusion].
\item \textsuperscript{39} Id.
\item \textsuperscript{40} See, e.g., Third Amended Complaint for Damages, Williams v. Aztar Indiana Gaming Corp. (S.D. Ind. 2002) (No. EV-01-75-C-Y/H).
\item \textsuperscript{41} Id.
\end{itemize}
II. DELIMITATION OF PROBLEMS

A. Private Lawsuits against Gambling Facilities: Various Causes of Action: Protect the Surveillance Evidence of Big Brother Casino

By the 1990s, several types of lawsuits were being filed against the rapidly spreading U.S. gambling facilities. These lawsuits included “patron disputes over their winnings, slip-and-falls, employee rights, sexual harassment, premises liability, and casino-related automobile accidents.” Fred Del Marva, a security expert and forensic investigator in over 350 cases, advised plaintiffs’ attorneys that the casinos would:

fight you right to the ground. Make sure you can finance [your case], forget about arbitration and mediation and forget about sending out a letter of demand. It’s a waste of time. They’ll take you all the way up until experts’ depositions, then after that, maybe they’ll start making decisions.

The 2002 Chair of the Casino Litigation Group of the American Trial Lawyers Association, D. Briggs Smith, cautioned plaintiffs’ attorneys to “protect the evidence.” Attorneys need to obtain: (1) the training manuals; (2) the incident reports; (3) the marketing manuals; (4) the electronic procedures for video slot machines; and (5) surveillance tapes and devices (and their locations). The thousands of surveillance cameras and devices in each casino capture virtually every chip, slot machine, employee, customer, and area of the gambling facility (including elevators and hotel facilities). State regulations required that surveillance tapes and digitals be retained for as little as six to thirty days; therefore, quick action by plaintiffs was imperative. Furthermore, some tribal casinos required a filing within as little as ten days, or the right to a lawsuit was forfeited.

42. Diana Digges, Casino-Related Litigation on the Rise, LAWYERS WKLY. USA, Nov. 26, 2001, at 17 [hereinafter Casino-Related Litigation].
43. Id. at 17.
44. Id. at 24.
45. Id.
46. See generally BOSWELL, supra note 8, at 1783 et seq.
47. See Terry Noffsinger, Presentation/Discussion, Casino Gaming Litigation Group, Am. Trial Lawyers Ass’n, 2002 Annual Convention, Atlanta, Ga., July 20-24, 2002 (public information from filed case complaint) [hereinafter Noffsinger Presentation]. See generally BOSWELL, supra note 8, at 1783 et seq.
B. Caveats on “Smoke and Mirrors”: Expert Witnesses May Be Directly or Indirectly Funded by Progambling Interests

In finding potential expert witnesses in gambling related cases, plaintiffs’ attorneys were well-advised to “follow the money”\(^49\) and then specifically determine the history and extent of direct and indirect funding sources for considerations involving legal impeachment. Furthermore, the same questions arose regarding studies which looked unimpeachable on their face but often were linked to funding via progambling special interest groups.\(^50\)

Finally, according to an analysis by the University of Massachusetts of several gambling industry reports, some gambling studies utilized by government decisionmakers to decriminalize gambling during the 1980s and 1990s were notoriously “unbalanced” (i.e., weighted toward progambling interests).\(^51\) Critics observed that most reports supported by progambling interests contained inaccuracies or omissions, and the reports were also discredited by internal “leaked” documents originating within the gambling industry.\(^52\) The analysis prepared by the University of Massachusetts reported eight “unbalanced” and two “mostly unbalanced” studies, primarily financed by progambling interests.\(^53\) The three “mostly balanced” studies were by independent government-contracted groups, and the only “balanced” report was by the University of New Orleans.\(^54\)

Prior to 1997, the most common and obvious shortcoming of most “so-called” studies financed or generated by progambling interests was the dearth, or even total absence, of documentation—particularly

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\(^{49}\) See Casino Backlash, supra note 28, at A1; Stephen J. Simurda, When Gambling Comes To Town: How to Cover a High-Stakes Story, COLUM. JOURNALISM REV., Jan./Feb. 1994, at 36-38 [hereinafter When Gambling Comes to Town]; see generally John W. Kindt, Follow the Money, supra note 10; John W. Kindt, Gambling vs. The New Untouchables: Credibility Concerns for Academia, Criminal Justice, and the U.S. Supreme Court, Address at Benjamin N. Cardozo Law School, Yeshiva Univ., New York, New York (Nov. 15-16, 1999) (transcript on file with author).


\(^{51}\) ROBERT GOODMAN, LEGALIZED GAMBLING AS A STRATEGY FOR ECONOMIC DEVELOPMENT (Ctr. Econ. Dev., U. Mass.-Amherst ed. 1994) [hereinafter CED REPORT].

\(^{52}\) For a discussion and listing of some well-known industry-oriented reports, see John W. Kindt, The Economic Impacts of Legalized Gambling Activities, 43 DRAKE L. REV. 51, 51-56 nn.3-43 [hereinafter Economic Impacts].

\(^{53}\) See CED REPORT, supra note 51, at Exec. Summary, 68-87.

\(^{54}\) Id.
footnotes, specific citations, and source materials. Many industry-financed studies simply failed facially for lack of documentation or research rigor. Since 1997, the few consequential analyses financed directly or indirectly by progambling interests, such as the Harvard Meta-analysis, have been criticized for leaving out basic and essential information necessary for academic corroboration.

Studies financed by progambling interests can be criticized as “limited-in-scope.” Generally, the proper scope for socioeconomic studies of gambling issues was not utilized in studies supported by progambling interests. Richard Leone, a Commissioner on the U.S. Gambling Commission and President of the Century Foundation, complained that if the industry “can . . . keep the focus of the camera tight enough,” the results would constitute a distorted view of the actual costs and benefits of legalized gambling—and often highlight just the benefits.

The proper scope of review for most local socioeconomic analyses is the gambling industry’s own 35-mile radius and 100-mile radius around the gambling activity. These are the “feeder markets” supplying the gambling activity with gamblers, such as in the case of a casino.

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55. See generally, CED REPORT, supra note 51.
57. Compare Harvard Addictions Meta-analysis, supra note 56, app. II (not reporting the numbers and percentages of pathological and problem gamblers in the 150-172 studies analyzed), with Economic Impacts, supra note 52, at 89, tbl. II (reporting the numbers and percentages of pathological and problem gamblers in the studies analyzed).
59. Id.
60. See Richard C. Leone, The False Promise of Casinos, N.Y. TIMES, June 25, 2001, at A21; see also JENNIFER BORRELL, GAMBLING IMPACT LITERATURE REVIEW 1 (October 2003).
62. Press Release, Osage Tribe Economic impact of casino on surrounding 50 mile region, available at www.osagetribe.com (July 12, 2001) (net negative cash flow on 50-mile feeder market around casino equals between $40.25 million and $51 million); see, e.g., Bill Introduced Allowing “Real Time” Atlantic City Gambling Over Internet, BOSTON GLOBE, Nov. 8, 2001 (“[M]ore New York casinos will inevitably cut into Atlantic City’s ‘feeder markets’ in northern New Jersey and New York City.”).
Critics highlight that the gambling industry’s use of the terminology “feeder market” itself reveals the true nature of the socioeconomic impacts of gambling activity.\textsuperscript{63} The 35-mile feeder market often conforms roughly to the size of a U.S. county; therefore, an individual county’s statistics are often the starting point for statistical analysis (although “cross-county” 35-mile feeder markets must be analyzed and adjusted for impact variables).\textsuperscript{64} While utilizing the 35-mile and 100-mile feeder markets for supplying gamblers to the gambling activity, studies financed by the gambling industry often focused their cost to benefit analyses on just the 1-mile or 2-mile radius around the gambling activity—which prompted the summary complaint by U.S. Commissioner Leone.

A related criticism of industry-financed studies is that the analyses are often focused on “preselected positives.”\textsuperscript{65} If the industry can limit the focus of researchers to known positives or preselected areas or preselected timeframes, the research can be perfectly valid within those preselected positive constraints.

In 1995 and 1996, the American Gaming Association lobbying group financed two so-called studies by Arthur Andersen to justify the economic benefits of legalized gambling. These oft-cited studies were titled the Economic Impacts of Casino Gaming in the United States: Macro Study (AGA/Andersen Macro Study)\textsuperscript{66} and Economic Impacts of Casino Gaming in the United States: Micro Study (AGA/Andersen Micro Study).\textsuperscript{67} The AGA/Andersen Macro Study found its way into the citations of the Final Report\textsuperscript{68} of the NGISC, but the Macro Study (along with the Micro Study) highlighted the problems of industry-financed studies: (1) relatively few citations (to allow checks by outside reviewers);\textsuperscript{69} (2) a limited (or even invalid) scope for review;\textsuperscript{70} (3) the

\textsuperscript{63} Id.; Harrah’s Entertainment, Inc., Harrah’s Survey of Casino Entertainment (1996); \textit{see generally} BEAR STEARNS & CO., N. AM. GAMING ALMANAC (July 2001) [hereinafter 2001 BEAR STEARNS ALMANAC].

\textsuperscript{64} \textit{See generally} 2001 BEAR STEARNS ALMANAC, supra note 63.

\textsuperscript{65} For a discussion and listing of some well-known industry reports, \textit{see Economic Impacts, supra} note 52, at 51-56 nn.3-43.

\textsuperscript{66} Arthur Andersen, Economic Impacts of Casino Gaming in the United States: Macro Study (Dec. 1996) (prepared for the Am. Gaming Ass’n, Lobbying Group) [hereinafter Am. Gaming Ass’n/Andersen Macro Study].

\textsuperscript{67} Arthur Andersen, Economic Impacts of Casino Gaming in the United States: Micro Study (May 1997) (prepared for the Am. Gaming Ass’n, Lobbying Group) [hereinafter Am. Gaming Ass’n/Andersen Micro Study].

\textsuperscript{68} NAT’L GAMBLING IMPACT STUDY COMM’N, FINAL REPORT (June 1999) [hereinafter NGISC FINAL REPORT]; \textit{see also} NAT’L GAMBLING IMPACT STUDY COMM’N, EXECUTIVE SUMMARY (June 1999) [hereinafter NGISC EXEC. SUMMARY].

\textsuperscript{69} \textit{See} Am. Gaming Ass’n/Andersen Macro Study, \textit{supra} note 66 (only 49 footnotes).
appearance of pre-selected positives—geographic area and time-frames; and (4) little or no analysis involving socioeconomic costs in the acknowledged “feeder markets.”

Another well-known example is the Deloitte and Touche 1992 study supporting a casino complex for downtown Chicago and financed by progambling interests. This 300-page study made virtually no acknowledgement of any socioeconomic costs in the feeder markets. Similar criticisms of industry-generated studies were summarized by the University of Massachusetts researchers in the classic 1994 report, funded in part by the Ford Foundation, which analyzed and compared several industry-generated reports with academic reports.

C. Suicides Due to Pathological Gambling: Can a Wrongful Death Action Alone Survive Dismissal?

An increasing number of suicides can be directly linked to pathological gambling. Allegedly blinded by gambling advertisement revenues, no Illinois newspapers covered the increased numbers of gambling-related suicides in Will County, Illinois until the L.A. Times made the suicides front page news. Joliet, Illinois, was the host community for the two casinos mentioned in the national press story, but in sworn testimony before the 1999 U.S. Gambling Commission, the city’s legal representative, while extolling the virtues of casino gambling, stated that he was unfamiliar with the negatives revealed in the L.A. Times story. Suspicious about the cause of a retired couple’s double suicide, as well as several other area suicides, the Will County coroner was

70. See Am. Gaming Ass’n/Andersen Micro Study, supra note 67 (only three communities analyzed).
71. Id. (only relatively new markets analyzed over relatively few years).
72. See Am. Gaming Ass’n/Andersen Macro Study, supra note 66; Am. Gaming Ass’n/Andersen Micro Study, supra note 67; see also supra notes 61-64 and accompanying text.
73. Chicago Gaming Comm’n, Economic and Other Impacts of a Proposed Gaming, Entertainment and Hotel Facility (May 19, 1992) (Deloitte & Touche, Chicago, IL) [hereinafter Proposed Gaming].
74. Id.
75. See generally CED REPORT, supra note 51.
76. Id. at 68-87.
78. Id.
79. Id.
forced to issue coroner’s subpoenas to two casinos. After more subpoenas were issued for gambling records, the subpoenaed information demonstrated that several recent suicide victims had experienced significant or total asset losses due to legalized gambling activities.

With hundreds to thousands of surveillance cameras in each casino watching virtually every chip and slot machine, the duty to monitor pathological and problem gamblers would seem to be a natural obligation of the premises and could become a recognized legal duty by the early twenty-first century—regardless of whether the pathological or problem gambler had alerted any specific gambling facility. As the twenty-first century dawned, however, notice given to the gambling facility regarding the pathological or problem gambler was a significant addition to any plaintiff’s case.

Mrs. Debra Kimbrow filed a $50 million lawsuit in 1994 against Splash Casino based in Tunica, Mississippi, claiming that her husband Eric Kimbrow’s pathological “gambling problem was so bad that he killed himself” and that the casino “company exploited Kimbrow’s weakness.” “Kimbrow, 43, shot himself in the chest after running up $100,000 in debt with Splash. In the Memphis lawsuit, his wife said the casino let her husband—known there as a problem gambler—cash his personal checks even after he bounced some.”

82. Id. Professor David P. Phillips published a 1997 report, Elevated Suicide Levels Associated with Legalized Gambling, which revealed that suicide rates in communities and cities with legalized gambling were two to four times higher than in nongambling venues with comparable populations. David P. Phillips, Ward R. Welty & Marisa Smith, Elevated Suicide Levels Associated with Legalized Gambling, 27 SUICIDE & LIFE-THREATENING BEHAV. 373 (1997); see Sandra Blakeslee, Suicide Rate is Higher in 3 Gambling Cities, N.Y. TIMES, Dec. 16, 1997, at A10.
84. Id.
85. Id.
Plaintiff’s attorney, Tom Brockman, modeled his cause of action on an extrapolation of the dram shop laws. Dram shop laws hold bars liable for drunk driving accidents if bartenders do not cut off drunk customers and facilitate their safe travel away from the bars. “In Kimbrow’s case, just replace drinks with virtually unlimited credit, said [plaintiff’s attorney] Brockman: ‘Feeding Eric Kimbrow credit was the equivalent of feeding him alcohol.’” Of course, casino defense attorneys disagreed with such a legal extrapolation. In any event, by 1996 Splash Casino was bankrupt, and the Kimbrow case was “lost in the shuffle.”

D. Monetary Losses Due to “Pathological” Gambling: Actual or Constructive “Self-Exclusion” Notice to the Gambling Facility via Patron “Cards”

In a 2003 case in Evansville, Indiana, Williams v. Aztar Indiana Gaming Corp., Williams, who had never before gambled at a casino, visited the Aztar casino after receiving a free $20 coupon in January 1996, approximately six months after the casino opened. Plaintiff’s attorney, Terry Noffsinger, claimed that Williams lost the $20, went back the next day and lost $800, and eventually lost everything—which was about $175,000. As they interfaced with defendant Casino Aztar, the claims in the Williams complaint relating to RICO provided a partial blueprint for similar cases:

a. Aztar constitutes an “enterprise” as that term is defined in the RICO statutes.
b. Aztar has engaged in a “pattern of racketeering activity” by intentionally engaging in at least two acts of “racketeering activity” as defined by RICO.
c. The acts of “racketeering activity” in which Aztar has engaged are acts of “mail fraud” as defined by 18 U.S.C. § 1341.
d. Aztar has committed mail fraud by utilizing the United States Mail as part of a scheme or artifice to defraud Williams, or to obtain from him money or property by means of false or fraudulent pretenses, representations, . . . or promises.

86. Id.
87. Id.
88. Id.
90. Noffsinger Presentation, supra note 47.
91. Id.
92. Third Amended Complaint for Damages at 7-8, Williams v. Aztar Indiana Gaming Corp. (S.D. Ind. filed Jan. 4, 2002) (No. EV-01-75-C-Y/H) [hereinafter Williams Complaint].
e. Aztar has done so by, among other things, using the mail to assert that Aztar, by and through . . . or other identified representatives or agents, would not permit Williams to enter and gamble at the [c]asino without first providing “medical/psychological information which demonstrate[d] that [his] patronage of [Aztar’s] facility pose[d] no threat to [Williams’] safety . . . or well being[,]” and on multiple occasions thereafter to issue promotional materials to Williams designed to lure him to the [c]asino for purposes of gambling, as shown in rhetorical paragraph 15 of this Complaint.

f. Aztar has intentionally engaged in multiple incidents of such conduct with respect to Williams.

Under federal RICO, the damages which could be claimed included: (1) an amount equal to three times his actual damages; (2) the costs of the action; and (3) reasonable attorney’s fees. Along with any parallel state RICO statute, as in the state of Indiana, other damages would probably be recoverable, such as punitive damages.

III. Clarification of Goals

A. Actual or Implied “Self-Exclusion” Notice to Gambling Facilities: The Governmental-Societal Goals of Imposing Duties on Gambling Facilities

Despite the decriminalization of casino gambling in Missouri in 1992 and the reauthorization of slot machines in November 1994, it took until 1996 for Missouri to create a self-exclusion program to keep pathological gamblers from casino facilities. Arguendo, this delay in protective legislation per se indicated the pro-gambling interests’ impact on and dominance of the draftsmanship of the primary Missouri legislation. While it was obvious that self-exclusion was a necessary option from experience in other long-term gambling states, the self-exclusion option was left out of the original Missouri legislation—as it was in all states decriminalizing casino gambling during the 1990s. To the credit of some Missouri legislators, the self-exclusion option was created in 1996 while most other states still ignored it. Thus, the existence and timing for enacting self-exclusion statutes became one barometer indicating the degree of influence of pro-gambling lobbyists in individual states. For example, New Jersey, which was the second state to get casino gambling

94. Williams Complaint, supra note 92.
96. See IND. CODE ANN. § 35-45-6-2 (Michie 1998).
97. IND. CODE ANN. § 34-24-2, 1-8 (Michie 1998)
98. See Self-Exclusion, supra note 38, at 15.
in 1976, did not create a self-exclusion program until 2001, and it was the fifth state to do so.99

Under the Missouri Gaming Commission’s self-exclusion program, pathological gamblers could voluntarily indicate that they wished to be banned permanently from Missouri casinos.100 By 2000 the Missouri “List of Disassociated Persons” included “more than 3,500 names with about 90 people joining each month.”101 The head of the Missouri Gaming Commission indicated that each month, five to eight people were arrested for violating their bans.102 St. Charles attorney Joseph J. Porzenski noted that “while the program makes it clear that gamblers who violate the ban may not keep their winnings, there is no provision to return to them any money lost.”103 This provision was another indication of the legislative draftsmanship giving the casinos the “win-win” policy of keeping everything—even when the casinos themselves had not kept banned pathological gamblers from gambling. Specifically, the sign-up procedure involved

providing the applicant a copy of the applicable state regulation with instructions, a two-page verbal questionnaire administered by Gaming Commission staff, an application, a waiver/release form, and a power of attorney form for the release of the information to the casinos. The forms state that the applicant must be sober, understand the ban is for life and makes them ineligible to retain any winnings and may result in the denial of service at affiliates of the casino in other states.104

Since the self-exclusion forms acknowledge that Missouri casinos have affiliates in other states, the de facto reach crosses state lines and invokes issues of interstate commerce, the Commerce Clause,105 and long-arm statutes.

Accordingly, the national trend would involve lawsuits against gambling facilities “for failure to exclude gambling addicts.”106 “The theory is simple: Once a player puts a casino on notice that he or she is a pathological gambler—and asks to be banned from the casino,
receiving promotional material or using check-cashing privileges—the casino can be held liable if it doesn’t abide by the agreement.\footnote{107}

The existence or nonexistence of specific state regulations establishing a self-exclusion program, such as in Missouri, would not necessarily be determinative of the duty that the gambling facility has to keep pathological gamblers out of its facilities throughout the nation. At some point, courts will probably recognize a universal duty by all gambling facilities to ban all pathological and problem gamblers. For example, because 27 percent to 55 percent of all casino revenues come from just pathological gamblers,\footnote{108} gambling interests will be financially motivated to establish judicial precedents for a “duty” forcing casinos to allow pathological gamblers on their premises. Theoretically, the casinos could then argue that they are absolved from any responsibility toward pathological gamblers.

However, in those states with a self-exclusion program, by 2000 it was becoming increasingly recognized that gambling facilities and

the casinos have assumed a duty to keep the gamblers off the boats—and they breach that duty when a gambler slips in and loses thousands of dollars. “Even though they stress that it is the gambler’s responsibility to stay off the boat, it looks like casinos may be creating some sort of duty to protect the gamblers from themselves,” said St. Charles attorney Joseph J. Porzenski.\footnote{109}

B. Goals and Case Precedents

The predicted trend toward imposing duties on gambling facilities was evidenced as the twentieth century ended. In 1999 several Louisiana casinos settled a lawsuit with pathological gambler Joe McNeely.\footnote{110}

The former Louisiana Tech football star lost his business and marriage over gambling debts. Although he did not register himself in Louisiana’s self-exclusion program, he did notify the casinos in writing that they should stop targeting him for business. The casinos not only failed to respect his wishes, McNeely claimed, but upped the ante by sending their executives to see him when he was at his most vulnerable—most notoriously, at his mother’s funeral.\footnote{111}
The 1999 settlement was confidential because the casinos did not want to reveal the extent of their “deep pockets” or be viewed as “easy targets.”

A similar New Orleans “case testing self-exclusion principles” resulted in another confidential settlement for an undisclosed amount during the Spring of 2001. “A man had notified a casino of his addiction, asking not to be sent promotional ‘freebies.’ When the casino did so anyway, he fell back into gambling, incurred enormous debts and committed suicide.” In this instance the suicide appeared to help determine the extent of damages vis-à-vis a wrongful death action.

In Williams v. Aztar Indiana Gaming Corp., the plaintiff’s claimed facts were illustrative of similar case scenarios.

Relevant Dates:
1/96 First visit to Casino Aztar.
1/96 (Next day) Loses $800 on second visit to Aztar.
5/13/96 “Fun Card” issued to Williams.
5/16/96 First trip to Aztar using “Fun Card.”
3/97 Total Losses = $72,186!
4/97 Girlfriend places first phone calls to Aztar expressing concern over Williams’s behavior.
3/18/98 Girlfriend again talks with Aztar representative via telephone regarding her concerns about Williams’s behavior.
3/19/98 Girlfriend writes letter to Aztar asking it to ban Williams from the boat; sends information to document problem.
4/22/98 Ejection notice on Williams “submitted” internally within Aztar.
1/10/99 Williams returns to Aztar, after being banned.
11/4/99 Aztar sends its December or January offer: “no one gives you more in December than Casino Aztar!”
11/13/99 Holiday Party High: Williams was one of Aztar’s “very best players.”
5/9/00 June Newsletter Offer: “you are our most loyal guest,” and “check out the Hot Slots 100 posted in the Fun Center to find out where the big payouts are.”

112. Id.
113. Id.
114. Id.
115. No. EV01-75-C-Y/H (S.D. Ind. filed May 7, 2001).
116. Noffsinger Presentation, supra note 47.
August Newsletter Offer: “new machines are arriving all the time so you’ll have even more chances to win. And check out the Hot 100 Slots posted in the Fun Center and discover where the big payouts are.” [“In a real slot machine, there’s no skill involved.”—Deposition of Casino Aztar]

Williams’s last visit to Aztar

Lawsuit filed.117

In Williams Judge Learned Hand’s test was paraphrased that “if the burden or cost to the defendant of providing precautions is less than the probability of harm times the seriousness of the harm, if it occurs, then the defendant [casino] violates its duty.”118

C. Mega-Lawsuits and the Legal Discovery of Marketing Information Directed at Gambling’s Market Segments: The Gambling Facilities’ Interface with “Player Groups”

In 1994 Florida residents William Poulos and William Ahern filed separate lawsuits against approximately seventy defendants in the gambling industry, and in 1995 the United States District Court for the District of Nevada combined these cases as Poulos v. Caesars World, Inc.119 Plaintiffs had lost large amounts of money playing slot machines, their successor electronic gambling machines (EGMs), and video gambling machines (VGMs) during the previous twenty years.120 Among other allegations, plaintiffs “claimed that the machines induced them to play by misrepresenting their actual odds of winning.”121

117. Id.
118. Williams Complaint, supra note 92. For similar cases, see Rick Alm, Lawsuits say Harrah’s offered Improper Credit, KANSAS CITY STAR, May 31, 2002, at D1.
120. See Poulos Second Complaint, supra note 119.
Plaintiffs also alleged a classic case of fraud, but in 1997 the Nevada district court granted defendants' motion to dismiss for failure to plead fraud with particularity; however, the court denied the motion to dismiss for failure to state a claim.\(^{122}\)

The many defendants included land-based casino operators, slot and video gambling manufacturers, and cruise ship casinos. The press realized the importance of *Poulos* because plaintiffs were "suing virtually every major casino operator and slot manufacturer . . . [and] asking a federal judge for access to documents . . . [which allegedly] prove[d] a long-term effort was made by industry players to intentionally mislead slot players."\(^{123}\) While defendants' public relations (PR) representatives would have an obvious interest in limiting the public's knowledge of these potential issues, the Nevada press was outlining the relevant industry information that the legal discovery process could unearth.

Such documents could include marketing materials, memos, presentation materials and slot operations manuals. The plaintiffs are also seeking access to casino player records, which they claim will show that the playing habits of the defendants are typical among slot players. The amount of records being sought is considerable; since they would have to demonstrate a widespread history of such marketing, the plaintiffs are demanding materials that go back a decade or more.\(^{124}\)

In addition, plaintiffs' requests for information in *Poulos* provided a blueprint for future discovery requests in other pending cases.

What the plaintiffs are now seeking are any documents and materials that will show that slots and video poker machines have always been marketed in a misleading way, and that slots players perceive the machines in the same manner as the defendants. One example would be a video poker machine that claims it deals from a 52-card deck, when in fact it deals from 10 preselected cards. Another would be a slot that repeatedly places winning symbols near the payline, giving
the player the impression of just missing a big jackpot. To achieve class action status, the plaintiffs . . . [were] trying to prove such methods are pervasive among the defendants.\textsuperscript{125}

Furthermore, while the discovery of information in the United States was important, plaintiffs' attorneys were well-advised to note that because most defendants were multinational corporations, there were opportunities to obtain relevant marketing information including public information and internal memos from the international facilities that were owned by the U.S.-based companies.

IV. HISTORICAL BACKGROUND

A. Are the Gambling Industry's Games Really "Fair"? Case Trends Challenging "Fairness": Missouri ex rel. Small v. Ameristar Casino Kansas City, Inc.\textsuperscript{126}

For all practical purposes, the “games,” as “refined” by the gambling industry, have a built-in edge for “the House” with the inevitable result that over time the House will always win the entire amount of money wagered—a principle known as "gambler’s ruin."\textsuperscript{127} Statistically, a gambler can therefore only come out ahead if there is a short-term positive cash “win”—and then the gambler never wagers again.\textsuperscript{128} However, sociologists point to the overwhelming significance of the first “win” or “apparent win” for the novice gambler, which serves to “hook” the new gambler into continued gambling.\textsuperscript{129} Basic statistics indicate that continued gambling can only lead to gambler’s ruin.\textsuperscript{130}

These scenarios raised the strategic and practical issues of fairness—that is, were those jurisdictions promoting state-sponsored gambling really giving each of their citizens a fair chance of having the short-term positive cash win accompanied by a final exit from gambling? The gambler’s ruin principle suggested that the policies of the states were not fair because they promoted and advertised “continued

\textsuperscript{125} Id. at C1.
\textsuperscript{126} No. CV103-3190CC (C.C. Mo. filed May 12, 2003). This case blueprints several causes of action in these issue areas.
\textsuperscript{127} For statistical formulæ demonstrating the inevitable "gambler's ruin," see Michael Orkin & Richard Kakigi, What is the Worth of Free Casino Credit?, AM. MATHEMATICAL MONTHLY, Jan. 1995, at 3 [hereinafter Free Credit].
\textsuperscript{128} See id.
\textsuperscript{130} Free Credit, supra note 127.
gambling.” The gambler’s ruin principle delimited that over time each gambler would always lose.

These problematic areas also raised specific issues regarding fairness—that is, were the states with state-sanctioned gambling really monitoring the fairness of individualized games, and were the states’ regulators adequately trained? Were the states also deferring to determinations of fairness as formulated by the Nevada gambling interests or other interests with inherent conflicts of interest?

In 1999, the 1996-1999 Commission suggested throughout its Final Report\(^\text{131}\) that locales and states with various government-sanctioned gambling facilities had relied to their detriment and the detriment of their citizens, on the regulatory mechanisms and legislative advice of progambling lobbyists.\(^\text{132}\) Therefore, early in the twenty-first century, individuals began challenging the state regulatory mechanisms via the judicial system.\(^\text{133}\)

In 2003 the leading-edge case of Missouri ex rel. Small v. Ameristar Casino Kansas City, Inc.\(^\text{134}\) prompted questions involving fairness and an allegedly defective video gambling machine (VGM).\(^\text{135}\) The lawsuit alleged that “the casino and the state commission knowingly allowed a defective slot machine to continue to operate.”\(^\text{136}\) The machine at issue was manufactured by International Game Technology (IGT).\(^\text{137}\) For the first time, a judge, as distinguished from a gambling agent, ordered an electronic gambling machine “pulled off the floor” of a casino, and attorney “Small also implied that the other 3,000 . . . [casino’s] machines . . . [were] at risk.”\(^\text{138}\)

Also termed collectively as “electronic gambling devices” (EGDs), these VGMs appeared to be particularly vulnerable to challenges as in Small, because by the beginning of the twenty-first century, VGMs were providing from 50 percent (as an upper legal limit in Nevada only) to 90


\(^{132}\) Id.

\(^{133}\) See, e.g., Writ of Mandamus & Writ of Prohibition for Product Liability, State ex rel. Small v. Ameristar Casino Kansas City, Inc., CV103-3190CC (C.C. Mo. 2003) [hereinafter Small Relator Writ of Mandamus].

\(^{134}\) No. CV103-3190CC (C.C. Mo. filed May 12, 2003).

\(^{135}\) Id.


\(^{137}\) Judge Orders Slot Machine Pulled, supra note 136.

\(^{138}\) Id.
percent of the revenues in most casinos (and 100 percent in many
casinos). Furthermore, the VGMs were controlled by the gambling
industry's various VGM "chips," and almost uniformly state laws
mandated that VGMs "be based only on luck and chance, [although]
many players [have a false] sense that skill makes a difference."139

In the complaint in Small, numerous allegations were raised relating
to specific issues of fairness as well as supposed improprieties.140
Several allegations were directed to issues concerning the networking
between the centralized computer systems, the VGMs, and the chips
controlling the VGMs:

One particular chip . . . [allegedly] permits cheating and stealing
through the entry of a sequence of player activated button pushes.
When this occurs, the machine empties its hopper and consequently
reflects that it has "paid out" a higher number of coins than actually
has occurred. This chip has existed in the thousands of . . . [various]
slot machines at [various casinos] . . . .141

The allegations in the complaint in Small were backed by multiple
citations to the operational information accompanying the patents for
chips formulated to perform specialized VGM functions.142 Specifically,
the complaint included allegations that:

The slot machine as all . . . [of the other various] slot and video poker
machines are networked through communication links to central
computer processing equipment . . . . All game data is communicated
between a gaming machine and the central computer. Pursuant to the
. . . [jackpot system], the gaming machine requests and central
computer periodically communicate packets of game/prize information
to the slot machines. As these packets of information are depleted by
wagering activity, additional packets of information are requested by
the machine and transmitted from the . . . computer suite. The content
of the packets are win/loss and jackpot prize instructions. Most if not
potentially all of the stacks and sub stacks of packets can be preset by
the casino to contain no winning progressive jackpot. Through this

139. J. Taylor Buckley, The Quest for Gambling’s "Holy Grail," Industry Seeks Next-
Grail" Slot Addictive Game] (quoting Whittier Law Professor I. Nelson Rose).
140. See generally Small Relator Writ of Mandamus, supra note 133. Attorney Small
found language in the patents for the chip driving the electronic gambling machines which
was embarrassing and damaging to casinos and the developers of the chips. See, e.g., Berg,
141. Small Relator Writ of Mandamus, supra note 133, at 6.
142. See, e.g., Berg, et al., U.S. Patent No. 5,779,545 (issued July 14, 1998); Small
Relator Writ of Mandamus, supra note 133, at 6.
methodology the casino can assure that jackpots are not awarded for the indefinite future.\footnote{Small Relator Writ of Mandamus, supra note 133, at 9.}

Allegations involving the extent to which the VGMs could be controlled by the operators of the VGMs were also raised in the \textit{Small} complaint. The complaint established the groundwork for expert testimony involving the degree of control exercised by VGM owners and operators. The parameters for the VGM issues to be reviewed in future cases were established by \textit{Small}.

The casino can also dispense a packet with a jackpot winning instruction to a particular machine to force a jackpot to be awarded to a particular player at a predetermined time. The casino can also take the slot machine in question off line to prevent it from receiving large prize award instructions . . . . MGC [Missouri Gaming Commission] regulations require maintenance of all communications with gaming machines. Through this communications system, the casino can manage the timing and location of jackpots as well as to whom the jackpots are awarded and maximize its return (as well as progressive financial losses to players, some of which may or can result in devastating damage including personal or financial ruin). Through this system the casino can also systematically win money from any given individual or plurality of players, most particularly those it has targeted [particularly via Customer Cards]. The casino can also award jackpots or other prizes to selected players including potentially its confederates.\footnote{Id. at 9-10.}

While none of the allegations in \textit{Small} were accepted by the court, this case highlights issue areas which could easily encourage future cases.

In addition, the relator attorney, Stephen Bradley Small, claimed that several salient issues were not even addressed and that the judge’s limited focus concentrated only “on testimony about one of several computer chips”\footnote{Id.} that drove the VGM. A summary of the court testimony supported Small’s claims.\footnote{Id. at C2.}

The Missouri Gaming Commission earlier this year [2003] revoked the license for that chip after determining that a programming flaw could allow a player—in collusion with an accomplice with access to the chip—to cheat the machine by tricking it into playing excess amounts of jackpot coins.

\footnotesize
143. \textit{Small Relator Writ of Mandamus, supra} note 133, at 9.
144. \textit{Id.} at 9-10.
146. \textit{Id.}
Commission gaming enforcement manager Clarence Greeno testified that the programming flaw “had nothing to do with game outcomes.” Small, however, argued . . . in court that “this chip cheats players,” and he insisted that it continues to do so because the commission has allowed the flawed chip to remain in that lone machine until its big jackpot is won.147

The court’s myopic focus and refusal to consider most of the issues raised in the Small complaint appeared to frustrate plaintiff. The court also appeared reluctant to become enmeshed in issues involving the technological guidance systems for the VGMs.

Greeno testified that the casino sought a waiver to continue using the chip in order not to create a public perception that its big jackpot game was being manipulated in any way. When Small attempted to cross-examine Greeno, Mike Bradley, an assistant attorney general representing the commission, successfully objected and halted Greeno’s testimony before it could become a matter of public record.148

The judge ruled that the specific VGM at issue could be placed back in the casino.149 Although this case did not establish precedent per se, many arguments highlighted in the fifty-page Small complaint emphasized the vulnerability of casinos computer networks to future litigation, and the complaint serves as both a blueprint and a menu of future causes of action.150

B. Consequences of Gambling Facilities as Bars

Since most gambling facilities not only serve alcohol, but also have a large monetary incentive to ply customers with free alcoholic drinks to keep them gambling, one cause of action would be predicated on dram shop principles of liability. Gambling facilities are very similar to bars.151 A front page Wall Street Journal article summarized the drunk driving and gambling issues for government action, as well as the gambling industry’s fight against any liability for alcohol-related injuries.152

147. Id.
148. Id.
149. Id.
150. See generally Small Relator Writ of Mandamus, supra note 133.
152. Casinos Free Drinks Tragic Toll, supra note 151, at A1; see also Patrick Graham, Casinos Fight DUI Bill Pushing Club Liability, NEV. APPEAL, June 6, 1995.
Since at least 1979, the academic community has known that “[a] strong correlation exists between gambling and alcohol consumption . . . [with one study concluding] that gamblers consume alcohol on four times as many days per year as non-gamblers.”153 One academic report observed that it was “impossible to state whether gambling activities increase alcohol consumption or vice versa, but the relationship is strong.”154 However, “the level of alcohol consumption rises as the amount a gambler wagers per year increases.”155

Despite these facts, gambling facilities typically pressure against restraints on the consumption of alcohol. In 1999 these scenarios were exemplified in Illinois when three casinos lobbied for (and all of the casino licensees apparently supported) an extension of the hours during which the casinos could serve alcohol—from twenty-two hours a day to twenty-four hours a day.156 In a hearing on October 26, 1999, before the Illinois Gaming Board in Chicago, the casinos were vilified as de facto “super-bars,” and the time extension was opposed by representatives of Mothers Against Drunk Driving (MADD), the National Coalition Against Legalized Gambling (NCALG, a charity like MADD), Illinois Church Action on Alcohol Problems (ILLCAAP, headed by Anita Bedell), and J-Journey (a charity headed by Jim and Barbara Esworthy).157

Having lost his daughters Jennifer (age twenty-two) and Jackie (age eighteen) to a drunk driver, Jim Esworthy detailed to the Illinois Gaming Board the negative consequences and additional drunk driving accidents that could be anticipated from extending the hours of operation for the casino super-bars.158 The 1997 Esworthy tragedy prompted Illinois to lower the blood alcohol level required for proving drunk driving from .10 to .08, as well as to enact one of the strongest drunk driving statutes in the United States in 1998.159

153. Intoxicated Gamblers Losses, supra note 151, at 241 n.9 (citing M. Kallick, ET AL., A SURVEY OF AMERICAN GAMBLING ATTITUDES AND BEHAVIOR 71, 73 (1979) [hereinafter AMERICAN GAMBLING BEHAVIOR]).

154. AMERICAN GAMBLING BEHAVIOR, supra note 153, at 73, cited in Intoxicated Gamblers Losses, supra note 151, at 241 n.9.

155. Intoxicated Gamblers Losses, supra note 151, at 241; see also AMERICAN GAMBLING BEHAVIOR, supra note 153, at 73-74.


158. Id.

testimony, in particular, prompted the Board to reject the casinos' extension requests for the serving of alcohol.160

C. Gambling Losses Linked to Complimentary “Comped” Alcohol to the Loser

Like a bar under dram shop auspices, the question arose whether a gambling facility had a duty to cut off drunk customers. If while driving away from the casino, the drunk customer injured someone or something, the casino would presumably be liable under dram shop legal principles.161 If, while drunk at the casino, the drunk customer injures his company, his family, or himself by gambling irresponsibly, an extrapolation of dram shop principles would theoretically hold the casino liable for the amounts lost once the patron should have been cut off—and particularly if the casino continued to take advantage of the patron’s inebriated condition by continuing to provide complimentary alcohol. “The casinos countered that dramshop liability is based on the proven effect drinking has on driving. If sober gamblers also lose regularly, the casinos said, it’s impossible to attribute gambling losses to booze.”162 On a tactical level, Law Professor I. Nelson Rose has predicted the trend toward mega-lawsuits against the gambling facilities themselves.

“Casinos are in the same position today that bars were in 40 years ago—the big lawsuits are just waiting to happen. No bar owner today would allow a drunk to be served alcohol, yet casino owners allow gamblers who are obviously out of control to continue to bet,” said Rose.163

In a 1989 case, GNOC Corp. v. Aboud.164 Shmuel Aboud brought an action against a casino owned by Golden Nugget, Inc. as successor to Mirage Resorts, Inc., because he lost $250,000 while the casino’s employees kept feeding him free alcohol although he was obviously already inebriated.165 In denying summary judgment for the casino,
a United States District Court in New Jersey held that the relevant point was “whether a gambler comprehends the consequences of continued protracted gambling” and that “a casino has a duty to refrain from knowingly permitting an invitee to gamble where that patron is obviously and visibly intoxicated . . . .” The arguments went to the jury, but thereafter, Aboud lost his case on appeal to the U.S. Third Circuit Court of Appeals in a close 2-1 decision.168

In the early 1990s, Leonard Tose, owner of the Philadelphia Eagles football team, lost the team after losing $50 million in New Jersey casinos, including $3 million at the Sands Casino owned by Hollywood Casino Corp.169 Although Tose demonstrated that the casino employees supplied him with alcohol, Tose lost his series of actions, Tose v. Greate Bay Hotel & Casino, Inc.170 in 1993, and Greate Bay Hotel & Casino v. Tose171 in 1994.

In a subsequent and similar lawsuit, Hakimoglu v. Trump Taj Mahal Ass’n,172 Ayhan Hakimoglu, chairman of the Aydin Corp., “sued the Trump Taj Mahal and Caesar’s Atlantic City Hotel-Casino to block the collection of an $8 million debt, claiming the casino got him drunk.”173 Consolidating the claims in the complaint under a single theory of dram shop liability, Hakimoglu lost his case.174

It should be noted, however, that these cases were decided in venues where progambling interests have exercised protracted influence over common-law precedents impacting on gambling issues. These types of cases could be decided differently in those jurisdictions where gambling activities were more recently decriminalized.

166. Id. at 655; see Flush With Suits, supra note 83.
168. Hakimoglu v. Trump Taj Mahal, Inc., 70 F.3d 291 (3d Cir. 1995) cited to GNOC v. Aboud, 715 F. Supp. 644 (D.N.J. 1993) and Tose v. Greate Bay Hotel, 819 F. Supp. 1312 (D.N.J. 1993) to “predict that the New Jersey Supreme Court would not permit recovery” of losses by an intoxicated gambler. 70 F.3d 291, 293-94. This cursory four-page, 2-1 opinion of the Third Circuit was followed by an insightful dissent by Judge Becker who concluded “that the New Jersey Supreme Court would recognize a cause of action, in tort, allowing patrons to recover gambling debts from casinos that serve them alcohol after they are visibly intoxicated.” Id. at 294.
171. 34 F.3d 1227 (3d Cir. 1994).
173. Flush With Suits, supra note 83.
174. 70 F.3d at 304. See supra note 168 and accompanying text.
With regard to the frequency of drunk driving accidents involving gambling facilities, forensic expert Fred Del Marva claimed he received an average of one call per day and summarized the alcohol problem.\textsuperscript{175}

“On a daily basis, someone will call me with this scenario: Someone goes into a casino, drinks, half an hour later, crosses over into the oncoming lane and kills someone,” said Del Marva. “Although nobody will ever do a study proving that alcohol is provided at no cost to lower people’s inhibitions to make them game and bet differently, in my opinion, that’s what happens. Free alcohol is served to lower inhibitions and increase irrational thinking. I have videotapes of stings, where our investigators were served an enormous amount of alcohol.”\textsuperscript{176}

Since the thousands of surveillance cameras and devices in casinos can track each chip, a fortiori they can count each customer’s drinks—and cut the customer off. By the beginning of the twenty-first century, these types of alcohol-gambling cases were becoming more frequent.

V. TRENDS AND CONDITIONING FACTORS

A. Trends in Civil Lawsuits

1. Sexual Harassment Cases

One of the most famous sexual harassment cases resulted from incidents during a 1991 “Tailhook” Convention for military personnel at the Hilton Hotel and Casino complex in Las Vegas, Nevada.\textsuperscript{177} Female officers were allegedly molested or harassed during the Convention. Former Navy Lieutenant Paula Coughlin sued the Las Vegas Hilton and was initially awarded $5.2 million.\textsuperscript{178} The specifics of this case are beyond the scope of the present analysis. However, this case was famous for illustrating that in Nevada, the laws and legal principles governing the rest of the country might appear to apply, but de facto did not apply—an interpretation given by Nevada State Senator Bob Coffin.\textsuperscript{179}

\begin{itemize}
  \item \textsuperscript{175} \textit{Casino-Related Litigation}, supra note 42.
  \item \textsuperscript{176} \textit{Id.} at 24.
  \item \textsuperscript{178} \textit{Id.}
  \item \textsuperscript{179} \textit{See id.}
\end{itemize}
In the Tailhook case, the hotel lost, but the Nevada Resort Association (NRA) was brazen enough to try to eliminate the $5.2 million judgment and similar future judgments by asking the Nevada legislature for special legislation making the defendant hotel and gambling companies practically immune from the collection of the plaintiff’s judgment.\textsuperscript{180} According to Nevada State Senator Neal, who resisted pressure from his largest hotel client to “vote right,”\textsuperscript{181} the 15-2 vote approving the bill “says to the people of the nation that we are not in control here, that any time a large hotel has a problem (it can) come to the Legislature and we will fix it . . . .”\textsuperscript{182} He concluded, “That is corruption.”\textsuperscript{183}

Generic concerns involving alcohol in gambling facilities also faced the gambling industry. For example:

The prevalence of alcohol in the industry has also prompted a rise in sexual harassment cases, according to Joseph Kelly, an expert on gaming law and a defense attorney for casinos. “A casino orders a cocktail waitress to wear a skimpy outfit, a patron puts his hands where he shouldn’t, and the waitress complains,” said Kelly. “The pit boss says, too bad, the guy’s a big player and to keep serving. These kinds of cases are on the rise.”\textsuperscript{184}

In several casinos, the issue of sexual harassment has surfaced in the form of lawsuits. In one 1998 case, seven women claimed that while at work they “endured inappropriate suggestions and touching.”\textsuperscript{185} The lawsuit sought class action status against three casino boats: The Empress Casino in Hammond, Indiana; the Trump Casino in Gary, Indiana; and Harrah’s Casino in Joliet, Illinois. Plaintiffs sought back pay and unspecified damages.\textsuperscript{186} Carey Stein, the Chicago attorney representing the seven women, stated that the alleged sexual “harassment came from the employees’ managers.”\textsuperscript{187} All seven women came separately to Stein with similar stories about harassment and how they all “took their complaints to management and were ignored.”\textsuperscript{188}

\textsuperscript{180.} Id.
\textsuperscript{181.} Id. at A1.
\textsuperscript{182.} Id.
\textsuperscript{183.} Id.; see also Memorandum from Michelle L. Erb, Research Assistant Nevada Legislative Counsel Bureau (Aug. 2, 1995), news attachments (on file with author).
\textsuperscript{184.} Casino-Related Litigation, supra note 42, at 24 (quoting Joseph Kelly).
\textsuperscript{185.} Former Dealers, Waitresses sue 3 Floating Casinos for Sex Harassment, ROCKFORD REGISTER STAR (Rockford, IL), July 18, 1998, at A5.
\textsuperscript{186.} Id.
\textsuperscript{187.} Id. (quoting Carey Stein).
\textsuperscript{188.} Id. (quoting Carey Stein).
In a different scenario, it was reported in 2001 to the New Jersey Attorney General’s office that “men in the surveillance department at Caesars Atlantic City regularly focused cameras on the bodies of women in revealing clothing.”

According to one source:

Those images were then displayed on banks of surveillance monitors in full view of all employees of the surveillance department, to a chorus of “obscene language and sexually explicit comments,” the complaint said.

Two female surveillance employees who complained about being forced to sit and watch “sexually explicit camera angles” were subsequently fired . . . [according to] O. Lisa Dabreu, the Director of the State Division on Civil Rights, who filed the complaint.

These types of sexual harassment lawsuits were expected to increase during the twenty-first century, as public knowledge of these scenarios increased and as government-sanctioned gambling opportunities also increased.

2. Casino Discrimination Cases: Class Action Status

A casino discrimination suit was granted class action status in 1998. The case originated in September 1997 when several black former and current table-game employees for Station Casino in St. Charles, Missouri, alleged “that they were discriminated against in employment and advancement and subjected to unequal disciplinary actions.” To qualify as a class action, plaintiffs had to identify “more than 25 such employees who allegedly suffered discrimination in discipline, promotions or terminations.” However, before proceeding on the class action basis, this case necessitated a determination of whether the casino was “liable for discriminatory practices.” If the casino could be found liable, the judge would decide whether the case could be certified as a class action suit. Regardless of the eventual outcome in this case, it exemplified that similar class actions were feasible and that more such cases could be expected in the future.

190. Id.
191. Id.
193. Id.
194. Id.
195. Id.
196. Id.
3. Discovery Issues Involving Casino Injuries

The need for plaintiffs’ attorneys to act quickly and utilize wide-ranging discovery techniques was highlighted in 1997, when some required casino reports to federal authorities had multiple discrepancies. Due to apparent differences in the way many casinos report on-board injuries, the Coast Guard investigated several Illinois casinos in 1997.\footnote{197} Although required to be reported by the casino, by 1997 “the Coast Guard [still] had no record of 37 injuries that resulted in personal injury lawsuits against the . . . [Casino Queen] filed in the St. Clair County courthouse since 1993.”\footnote{198} Furthermore, the “Coast Guard also had no record of the alleged injuries that led to 26 negligence lawsuits filed in the Madison County courthouse against the Alton Belle since 1991.”\footnote{199} The Alton Belle had only reported seven other injuries to the Coast Guard.\footnote{200} With each violation of not informing the Coast Guard about an injury within five days, a fine of up to $25,000 could be imposed.\footnote{201} The casino representatives claimed that they were “in compliance with federal law and that their vessels . . . [were] safe.”\footnote{202} The Coast Guard had the authority retroactively to fine the casinos for the violations,\footnote{203} but even $25,000 fines were essentially meaningless because the average casino took in customer losses of over $1 million per day.\footnote{204}

\footnote{197. Mike Fitzgerald, Coast Guard to Query Casino Owners About Injuries, BELLEVILLE NEWS-DEMOCRAT (Belleville, IL), Dec. 29, 1997, at B1 [hereinafter Coast Guard to Query Casino Owners]; see also Mike Fitzgerald, Are Riverboat Casinos Underreporting Serious Injuries that Occur on Board?, BELLEVILLE NEWS-DEMOCRAT (Belleville, IL), Dec. 14, 1997, at B1.}
\footnote{198. Id.}
\footnote{199. Id.}
\footnote{200. Id.}
\footnote{201. Id.}
\footnote{202. Id.}
\footnote{203. Id.}
4. Second Hand Smoke Litigation: “Nowhere to Hide”

In 2000 the Empress Casino in Hammond, Indiana was faced with a lawsuit which “could have wide-reaching implications for the way . . . casinos deal with the problem of secondhand smoke.” The case involved casino employees seeking damages for “dangerous levels of smoke” at the casino riverboat in Hammond, which was operated by Joliet-based Horseshoe Gaming Corporation.

The current and former employees who were party to the suit claimed “that company policy prohibited them from requesting to work in a nonsmoking area.” Furthermore, they claimed that “while the Empress had a ventilation system, it was not adequate to clear the boat of secondhand smoke.” In addition to unspecified monetary damages, the employees wanted “the company to improve the poor air quality in the casino.” Because the casino was a riverboat, the employees used “the Jones Act, a federal law regulating working conditions for seamen and railway employees,” which allowed “seamen to seek damages for personal injuries from their employers.”

5. The Issue of Religious Discrimination

Accompanying the spread of legalized gambling facilities during the 1990s were concerns involving potential lawsuits predicated upon claims of religious discrimination. For example, Barbara Young was allegedly fired from the Quad-City Times newspaper in Illinois “for refusing on religious grounds to sell advertising to riverboat casinos and taverns.” For three years, Young worked for the newspaper as a co-op advertising specialist. In August 1998 she was asked to

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205. Patricia Richardson, Suit Casts a Haze Over Casino Boats, CRAIN’S CHI. BUS., Dec. 4, 2000, at 4, 53 [hereinafter Haze Over Casino].
206. Id. at 53.
207. Id.
208. Id.
209. Id.
210. Id.
212. Haze Over Casino, supra note 205.
215. Id.
216. Id.
assume more duties, which included “selling advertisements to churches and for the ‘Go’ entertainment page.”\textsuperscript{217} The conflict came with the “‘Go’ entertainment page, which feature[d] ads for casinos and taverns.”\textsuperscript{218} For religious reasons, she felt inclined not to promote gambling and alcoholic beverages.\textsuperscript{219} When Young gave a “written statement from her church pastor that further explained her religious convictions”\textsuperscript{220} to the newspaper, “Young’s boss refused to accommodate her, claiming that Young supported the sale of alcoholic beverages by dining in restaurants.”\textsuperscript{221} Represented by Davenport attorney Marlifa Greve, Young filed complaints with the Iowa Civil Rights Commission and the U.S. Equal Employment Opportunity Commission.\textsuperscript{222}

6. **Premises Liability: A Case that Sticks**

Premises liability covers a wide range of scenarios, and the high profile of gambling facilities combined with their poor social image may make them more vulnerable than other establishments to causes of action based on premises liability.\textsuperscript{223} In one example in 1995, a security guard in the Silver Star Casino was forced to escort a patron “waddling like a duck”\textsuperscript{224} out of the casino because the gambler had gotten “stuck to a toilet seat that had been smeared with glue.”\textsuperscript{225} This situation resulted in the gambler being escorted out of the casino “with nothing more than a towel covering his predicament.”\textsuperscript{226} This incident of humiliation and premises liability resulted in a $50,000 lawsuit against Boyd Gaming Corporation filed on July 14, 1998.\textsuperscript{227} Premises liability could become almost a \textit{pro forma} cause of action in various cases involving casinos, including cases involving the losses incurred by a gambler.\textsuperscript{228}

\textsuperscript{217} Id. at M6.
\textsuperscript{218} Id.
\textsuperscript{219} Id.
\textsuperscript{220} Id.
\textsuperscript{221} Id.
\textsuperscript{222} Id.
\textsuperscript{223} See, e.g., Gambler Sues After Toilet-Glue Incident, \textsc{Rockford Register Star} (Rockford, IL), July 18, 1998, at A9.
\textsuperscript{224} Id.
\textsuperscript{225} Id.
\textsuperscript{226} Id.
\textsuperscript{227} Id.
\textsuperscript{228} See \textit{supra} notes 40-42 and accompanying text.
B. The “Comprehensive Gambling Impact Statement” as the Sine Qua Non Socioeconomic Requirement of the “Environmental Impact Statement”: The Trend in Cases


Economic development issues invariably interface with the environment, so the need for an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA) becomes relevant when a proposed gambling facility is large enough to affect significantly the human environment. In fact the socioeconomic impacts of legalized gambling activities on their feeder markets (35-mile radius around typical casinos) are disproportionate and also affect interstate commerce. Compared to a nongambling development requiring the same dollar investment (such as a large shopping mall), gambling facilities have a significantly greater impact because they allegedly cater to and create an addicted, or potentially addicted, gambling market. A fortiori, proposed gambling facilities, particularly tribal facilities, fall into the category of a major federal action significantly affecting the quality of the human environment.

Too often during the 1990s, there was avoidance of meaningful EISs by federal agencies, such as the Bureau of Indian Affairs (BIA), analyzing tribal gambling proposals and the U.S. Corps of Engineers (COE), analyzing riverboat gambling proposals. Regarding gambling proposals, these federal agencies commonly opted to issue a “finding of no significant impact” (FONSI) pursuant to NEPA, which obviated the EIS requirements. Before issuing a FONSI or an EIS, the EPA required the filing of an “environmental assessment” (EA); a public document required to assist the Environmental Protection Agency (EPA) in determining whether a full-scale EIS was necessary.

Furthermore, one recommendation contained in the Final Report of the 1996-1999 Commission concluded that a “comprehensive gambling

231. See Mega-Lawsuits, supra note 2, at 25, Table 1.
234. See infra notes 261-63 and accompanying text.
235. See 40 C.F.R. § 1501.4 (2002); see also 40 C.F.R. § 1508.27 (2002).
237. NGISC FINAL REPORT, supra note 68, at 3-19, recommendation 3.18.
impact statement” (CGIS) should be required before legalizing or authorizing any proposals to expand gambling. Therefore, a comprehensive economic impact statement should necessarily be required before any tribal gambling activities are allowed, and any major gambling facilities that did not comply with this requirement have been and continue to be in violation of NEPA and other federal restrictions since the inception of those gambling facilities. Tribal and nontribal gambling operations would definitely fall under a CGIS requirement.

Specifically, the 1996-1999 Commission recommended that:

jurisdictions considering the introduction of new forms of gambling or the significant expansion of existing gambling operations should sponsor comprehensive gambling impact statements. Such analyses should be conducted by qualified independent research organizations and should encompass, in so far as possible, the economic, social, and regional effects of the proposed action.

The very tenor of this pointed recommendation highlights the importance the Commission attributed to it. Furthermore, the Commission unanimously recommended a moratorium on the expansion of any type of gambling anywhere in the United States.

238. Id.
239. Id. For the comparisons between expanded gambling and drug abuse, see Statement of Prof. John Warren Kindt, Univ. of Ill., to the National Gambling Impact Study Commission, “U.S. and International Concerns over the Socio-Economic Costs of Legalized Gambling: Greater than the Illegal Drug Problem?,” Chicago, IL, May 21, 1998. These costs tables were subsequently published in Mega-Lawsuits, supra note 2.


240. Id. at introduction by Chair Kay C. James. See also Address by Richard C. Leone, former Commissioner, 1996-1999 National Gambling Impact Study Commission, to the
2. The U.S. Department of Interior, the Bureau of Indian Affairs, and Comprehensive Gambling Impact Statements: Gambling with the White Buffalo’s Environment?

Under the 1988 Indian Gambling Regulatory Act (IGRA), the pursuit of expanded Native American gambling resulted in a plethora of cases during the 1990s. Prodded by the enormous profits in Native American gambling and by visions of sovereign independence, numerous test cases were filed by tribal gambling interests to expand gambling.

Perhaps unexpectedly, Native American gambling interests lost one test case in 2003, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*. This case began on May 11, 2001, when Wisconsin Governor Scott McCallum filed a notice of nonconcurrence with the U.S. Secretary of the Interior’s determination on February 20, 2001, that applicant Chippewa tribes could “conduct gaming on lands to be acquired in trust [i.e., after-acquired property] . . . and [that the gaming] would not be detrimental to the surrounding community.” The tribe’s gambling interests then filed suit challenging the IGRA requirement of “gubernatorial concurrence,” claiming it was unconstitutional.

An amicus curiae brief opposing the tribal claims and supporting the Wisconsin governor was filed by twenty-one states. While not specifically an issue in *Chippewa*, the determination by the Secretary of the Interior that the gaming “would not be detrimental to the surround-
ing community reveals the Interior Department’s negligent disregard, or even ignorance, of the basic socioeconomic principles of gambling: Gambling activities are almost invariably detrimental to the surrounding community (which gambling marketers designate the feeder market). Importantly, the Department of Interior apparently neither considered nor referenced the nationally authoritative and relevant study on precisely this issue: *The Economic Impact of Native American Gaming in Wisconsin.* While the shadow issue of “economic detriment,” and the perceived need for a CGIS, pervade the arguments in *Chippewa*, the case was decided primarily on the gubernatorial nonconcurrence provision, and the court held that it was constitutional despite the tribal arguments.

In a similar case, the EA prepared in February 2002 for the proposed Huron Band-Potawatomi casino in Calhoun County, Michigan, did not even mention the significant academic literature relating to the socioeconomic cost to benefit ratio of 3:1 in the gambling facilities feeder markets. Therefore, the FONSI issued July 31, 2002, by the Department of Interior should not have been issued on both procedural

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247. For a summary of these issues, see Kindt, *Crime Multiplier*, supra note 61.


249. See generally Chippewa v. Wisconsin Opinion and Order, supra note 242, at 3-6.

250. *Id.* at 35.


and substantive grounds. Primarily focusing on other issues, the Citizens Exposing Truth About Casinos (CETAC), a Michigan nonprofit corporation, filed a lawsuit challenging the Department of Interior’s decision-making processes. However, the economic detriment issues and the perceived need for a CGIS still shadowed this case.

In 2003 in TOMAC v. Norton the United States District Court for the District of Columbia finally overruled a BIA’s environmental assessment and concomitant FONSI. Importantly, the court ruled that “[t]here is a certain common sense appeal to TOMAC’s argument that a 24-hour-a-day casino attracting 12,500 visitors per day to a community of 4,600 residents cannot help but have a significant impact on that community.” The BIA was ordered to consider and analyze “secondary growth issues” with the court not deciding “whether BIA’s decisionmaking process was rational based on the conclusory statements in the record about the extensive growth-inducing effects of the casino.” The case was remanded to the BIA to substantiate its conclusions and analysis regarding the secondary (feeder market) growth issues for the proposed casino.

3. The U.S. Corps of Engineers (COE) and Comprehensive Gambling Impact Statements: Missing the Boat?

One proposed gambling riverboat in Harrison County, Indiana, exemplifies the COE interface with such proposals during the 1990s. Many of these proposed gambling projects had embarrassingly sparse EAs used to justify the issuance of related FONSIs exempting the projects from full-scale EIS requirements. The proposed gambling

257. Id.
258. Id. at 16.
259. Id. The court cited to two cases: Friends of the Earth, Inc. v. U.S. Army Corps of Engineers, 109 F. Supp. 2d 30, 38 (D.D.C. 2000) (remanding for further analysis of proposed casino projects where the record included conclusory statements but no actual analysis of impacts); Alaska v. Andrus, 580 F.2d 465 (D.C. Cir. 1978) (each case must be subject to a “particularized analysis” considering the nature of the violations and any countervailing considerations of the public interest); vacated in part as moot, 439 U.S. 992 (1978).
riverboat project for Bridgeport in Harrison County had a fairly lengthy EA\textsuperscript{261} compared with similar projects—although skeptics would argue that the more lengthy EA was due to well-organized public opposition to the project. In the Bridgeport proposal, the COE issued a FONSI, which was both procedurally and substantively remiss, because the FONSI ignored the academic literature and studies quantifying the 3:1 cost to benefit ratio\textsuperscript{262} in the gambling facilities’ self-identified feeder markets.\textsuperscript{263} Critics also noted that progambling interests would necessarily want to sidestep the 3:1 cost to benefit issues, because almost all gambling proposals would fail the cost to benefit test.

C. \textit{Since 1994 All Federal Agency Decisions Which Have Not Addressed Gambling’s Socioeconomic Costs of $3 for Every $1 in Benefits Fail Procedurally: Any Decisions Which Have Not Addressed the 3:1 Ratio Fail on the Merits}

Even prior to 1994, the gambling industry’s directly and indirectly sponsored studies revealed that the socioeconomic costs of new gambling facilities were $3 for every $1 in benefits in the feeder markets.\textsuperscript{264} Despite being attacked by industry lobbyists, the academic studies, including the 1995 Wisconsin study,\textsuperscript{265} continued to cluster around the 3:1 ratio throughout the 1990s, and the ratio was reconfirmed in 2001\textsuperscript{266} and 2003.\textsuperscript{267} Nevertheless, it appeared that there was not a single federal agency since the 1970s which had reviewed, considered, or analyzed the 3:1 ratio in EAs, FONSIs, or EISs. Accordingly, since the 1970s all proposals for expanded gambling, which had federal agency involvement, should be reviewed for procedural failure as well as substantive failures (on their merits).

D. \textit{Trends in the Political and Governmental Environments}

The fast-shuffle tactics often utilized by progambling interests and their noncompliance with state constitutional provisions were highlight-

\begin{footnotes}
\item[262] The Case of Casinos, supra note 252, at 153.
\item[263] See Crime Multiplier, supra note 61, app. See supra notes 61-64 and accompanying text.
\item[264] See supra notes 61-64, 252 and accompanying text; see also Crime Multiplier, supra note 61, app.
\item[266] The Case of Casinos, supra note 252, at 153.
\end{footnotes}
ed by the unconstitutional gambling legislation passed in New York concomitant to the 9/11 attacks on the World Trade Center.268 Even absent such a national tragedy as a public relations tool, pro-gambling interests historically evidenced little respect for pre-existing legislative restraints and constitutional safeguards. These problems were illustrated in Indiana during a 1993 special session of the Indiana General Assembly, which was convened by Governor Evan Bayh (D) to pass the 1994-1995 biannual budget. As in previous sessions, proposals were initiated to authorize casino gambling on riverboats. A riverboat gambling bill had failed on its merits during the regular session, but during the special session it “was attached as an amendment to the budget bill during a conference committee.”269 This logrolled bill passed both houses of the General Assembly. Although it was vetoed by Governor Bayh, the General Assembly repassed the budget bill, and it became law.270 Thus, the gambling riverboat bill was codified via a procedural maneuver rather than a debate on its merits.271

In 1998 Indiana citizens challenged the constitutionality of the riverboat gambling act, in Schulz, Phillips, & Becker v. Indiana.272 However, because he had served as a former Indiana gambling regulator, one Indiana Supreme Court Justice had to recuse himself from the vote on the petition to transfer the case.273 A tie resulted, which had the practical effect of denying the majority needed to grant the petition to transfer,274 and thereby once again procedural issues exempted the gambling riverboat legislation from a scrutiny of substantive issues.


270. Id.

271. IND. CODE ANN §§ 4-33-3-1 to 4-33-3-23 (Michie 1996).

272. No. 31C01-9610-CP-214 (C.C. Ind. 1998); Schulz Complaint, supra note 269.


During the 1990s, South Carolina served as the most salient illustration of a state dominated and abused by pro-gambling interests. In 1985 a gambling provision was slipped past gambling opponents into South Carolina legislation.\(^{275}\) This legislative legerdemain had the net effect of inviting numerous VGMs into the state.\(^{276}\) Sacrificing his own political career as both the governor and a potential vice-presidential candidate with George W. Bush, South Carolina Governor David Beasley led the effort to recriminalize and ban these VGMs, and by 2000 the VGMs were de facto prohibited by state law.\(^{277}\) Multiple cases involving pathological (i.e. addicted) gamblers yielded multi-million-dollar judgments against the elusive owners of VGMs.\(^{278}\)

After South Carolina recriminalized VGMs, many of the machines were simply moved into other vulnerable states, such as Georgia and West Virginia, where the VGMs were operated illegally. According to pro-gambling interests, the way to eliminate illegal gambling and illegal VGMs is to legalize what is illegal. In 2002 the Georgia legislature refused to be seduced by this legislative oxymoron and therefore, did not legalize the illegal VGMs.\(^{279}\) This policy was followed by practically every other state. However, in West Virginia the illegal VGMs were methodically and progressively legalized in specialized legislation, particularly in 2001 when Governor Bob Wise (D) engaged in political strong-arming.\(^{280}\) By 2003 West Virginia had legalized 14,325 VGMs.\(^{281}\) Apparently in violation of the West Virginia Constitution, the state’s “take” or “piece of the action” from its VGMs was specifically designated for specialized legislative programs.\(^{282}\) Citizens’ groups, represented by Jackson County attorney Larry Harless, filed a lawsuit

\(^{275}\) S.C. Code Ann. § 16-19-60 (Law. Co-op 1985) (the words “money or property” were struck from the statutory ban against distributions from gambling machines via State Senator Jack Lindsay). For the most comprehensive analysis of court cases related to pathological gambling’s interface with the political, social, and economic environments, see R. Randall Bridwell & Frank L. Quinn, *From Mad Joy to Misfortune: The Merger of Law and Politics in the World of Gambling*, 72 Miss. L.J. 565 (2002) [hereinafter *The Merger of Law and Politics in Gambling*].


\(^{277}\) *The Merger of Law and Politics in Gambling*, supra note 275, at 590-92.

\(^{278}\) See generally id.


\(^{280}\) W. Va. Governor Moves Ahead with Video-Poker Strategy, ROANOKE TIMES (Roanoke, VA), May 9, 2001, at A5.


\(^{282}\) Id.
on June 11, 2003, alleging that the West Virginia lottery was not properly enforcing existing statutes and VGM regulations and that the VGMs were an “economic threat” to the state. As summarized in 1994 and then subsequently reconfirmed in studies throughout the following years, the socioeconomic costs of new decriminalized gambling facilities clustered at costs of $3 for every $1 in benefits. In venues with loss limits, like the $500 loss limit in place in Missouri in 2004, these socioeconomic negatives and concomitant crime were less. However, in states like Illinois with no loss limits the negatives were proportionally intensified—with increased costs passed to the taxpayers. In West Virginia, Lewisburg attorney Barry Bruce and the Treasurer of the Greenbrier County Coalition Against Gambling Expansion Paula McLaughlin noted that those states with widespread gambling (and without loss limits), including Nevada, had more budget problems than those states with less gambling.

The citizens’ lawsuit was appealed directly to the West Virginia Supreme Court. The petition filed by attorney Larry Harless also alleged that the video poker machine payouts were “rigged . . . to ensure that over time, almost all players lose their money.” With regard to marketing issues, the petition also alleged that the West Virginia lottery was “violating state law by engaging in illegal ‘advertising and promotional activities to entice and induce persons to gamble, or gamble more.’” As these issues and parallel cases were becoming more public during the beginning of the twenty-first century, the legal

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283. Id.
284. See supra note 252 and accompanying text.
285. Id.
286. Id.; see also supra note 239 and accompanying text.
287. In 2003 Nevada’s Governor Kenny Guinn stated in his “State of the State” address that taxes from gambling sources were unreliable and poor fiscal policy. Nev. Gov. Kenny Guinn, State of the State Address (Jan. 20, 2003). See also supra note 239 and accompanying text.
289. Suit to Shut Down Video Gambling, supra note 281, at A12. Compare id., with Free Credit, supra note 127 (formula for “gambler’s ruin”).
290. Suit to Shut Down Video Gambling, supra note 281, at A12. On October 17, 2003, the West Virginia Supreme Court deferred to the political decisions of the legislature and left in place West Virginia’s VGMs. State ex rel. City of Charleston v. W. Va. Econ. Dev. Auth., 588 S.E.2d 655 (W. Va. 2003). Justice Starcher’s “lament instead of a dissent,” exemplified the judiciary’s distress with the legislature’s decisionmaking but declined to declare it unconstitutional. Id. at 674 (Starcher, J., concurring, but “lamenting”).
discovery in these various cases was causing an increased ripple-effect throughout the general legal community.

VI. POLICY ALTERNATIVES AND RECOMMENDATIONS


1. Gambling’s Losers as Queen Anne’s Winners

During the 1990s, a number of casino players sued some casinos claiming “that gambling operators induced them to run up debts by plying them with drink or feeding their gambling fever with excessive credit.”292 The gambling industry did not perceive much vulnerability, particularly since the major cases were in states like New Jersey and Nevada, where decades of industry influence had made the state common law favorable to the interests of the gambling industry. Many casinos viewed the lawsuits as a way for people not to accept responsibility for their actions or for themselves. However, some plaintiffs’ attorneys began arguing the legal dram shop principles, which required “bartenders to cut off drunk patrons”293 to support their arguments to hold casinos legally responsible for their patrons.294 With parallels to lawsuits involving alcohol and credit, “[i]n the end, casino credit practices may be the industry’s legal Achilles’ heel.”295 If the courts were to begin to acknowledge “that credit extended to people who [are not] in control of themselves . . . [did not constitute] a binding contract, then casinos will have to forgive inveterate losers some huge debts,”296 and the casinos’ responsibility for patrons would increase. Of course, the starting point for any gambling debts owed would be Queen Anne’s Statute of 1710, also known as the Statute of Anne,297 a common-law principle holding that anyone who lost money gambling could sue the winner and receive his money back. Speaking volumes of legal and social policies is the official title of Queen Anne’s Statute, “An Act for the Better Preventing of Excessive and Deceitful Gaming.”298

291. Statute of Anne, 1710, 9 Ann. c. 14 § 1 (Eng.).
292. Flush With Suits, supra note 83.
293. Id.
294. Id.
295. Id.
296. Id.
297. Statute of Anne, 1710, 9 Ann. c. 14 § 1 (Eng.).
298. Id.
The Statute of Anne was predicated upon the common knowledge that gambling activities can “hook” people, destroy their reasonable judgment, and make them vulnerable to being lured and entrapped into “Excessive and Deceitful Gaming.” These 300-year-old principles of the common law were misinterpreted and misunderstood by the Seventh Circuit in Williams when the court merely dismissed the directed marketing to an addicted gambler as “puffery.”

For obvious reasons, progambling interests during the 1980s and thereafter made substantial efforts state-by-state to preempt state legislation modeled on Queen Anne’s Statute so that progambling interests could directly or indirectly collect gambling debts and keep any monies lost at their gambling facilities. For example, in South Dakota, the third state (after Nevada and New Jersey) to allow nontribal casino gambling in 1988, the common law still allowed the gambling loser to recover all monies lost gambling if the action was brought within six months. The electronic gambling devices (EGDs) for casino gambling in Deadwood, South Dakota, were made specifically exempt as “authorized gaming” from the principles established by Queen Anne’s Statute. Otherwise, within six months after the losses occurred, the losers could sue the casino’s proprietors as well as any other players and receive their money back.

By comparison, when casinos came to Missouri in 1991, the courts were easily accessible because “[a]ny person who shall lose any money or property at any game, gambling device or by any bet or wager whatever may recover the same by a civil action.” This provision probably remained unused by Missouri gamblers due to the social stigma of being “a loser,” as well as a lack of knowledge among the general public. In South Carolina, however, legalized VGMs between 1991 and 2000 resulted in multiple applications of Queen Anne’s Statute and associated legal principles, which concluded with many gambling losers winning their cases.

299. Williams v. Aztar Indiana Gaming Corp., 351 F.3d 294 (7th Cir. 2003).
300. See Economic Impacts, supra note 52, at 70-74.
302. S.D. CODIFIED LAWS § 21-6-1.
305. See, e.g., Casino-Related Litigation, supra note 42, at 17.
2. **Extensions of Credit by Gambling Facilities: Not Recoverable?**

If the gambling facility extends credit to gamblers, the credit losses might not be recoverable. For the few in the public educated about Queen Anne’s Statute, they might find the statute applicable to their scenario. Otherwise the case of Anthony Lamonaco, a Walt Disney Company worker, could be illustrative.\(^{307}\)

In January 1990, Lamonaco . . . went on a two-day spree in Atlantic City and ran up $285,000 in debt at the Sands, Claridge and Bally’s Park Place, owned by Bally Entertainment Corp. An averred compulsive gambler, Lamonaco sued these casinos for the amount of the debt, saying they repeatedly extended his credit even though he was “totally out of control,” cursing dealers and smashing ashtrays as his losses mounted.\(^{308}\)

The New Jersey case went before a state judge who “ruled that the court couldn’t recognize the disorder of compulsive [i.e., pathological] gambling, in itself, as a defense against paying the debt.”\(^{309}\) With the added research available by 2002, the disorder of pathological gambling was more widely recognized. An example of this increased recognition was in the *Final Report* of the 1999 U.S. Gambling Commission.\(^{310}\) Therefore, this defense would have more weight in the twenty-first century. Regardless of this issue, the judge ruled that “there was a valid question as to whether Lamonaco was so distressed by his losses that he couldn’t enter into a legally binding contract.”\(^{311}\) The casinos settled for an undisclosed amount—presumably to avoid the chance of setting precedents inimical to the gambling industry regarding alcohol consumption as a contractual defense to casinos’ credit practices.\(^{312}\)

In 1996 experts began to opine in the national press that the extension of credit by gambling facilities could be uncollectible: “If courts begin to agree that credit extended to people who [are not] in control of themselves is not a binding contract, then casinos will have to forgive inveterate losers some huge debts.”\(^{313}\) Kansas City attorney Steve Small, who has litigated against casinos, summarized the issues as follows:

\(^{307}\) *Flush With Suits*, supra note 83.
\(^{308}\) *Id.*
\(^{309}\) *Id.*
\(^{311}\) *Flush With Suits*, supra note 83.
\(^{312}\) *Id.*
\(^{313}\) *Id.*
“Next is the negligence claim against the casino for allowing the compulsive [addicted] patron to continue to gamble. That is going to take some evidence, maybe a letter from a psychiatrist saying, ‘Do not take any more checks from the client because he is an addict.’ Where the casino has good notice, they may have a duty of care similar to that in the dram shop cases,” said Small. He said, “[T]here are defenses to gambling losses. Gambling is a contractual behavior and if you are drunk, you do not have the requisite mental status to make the wager enforceable,” he said. “Or what about contracts void as against public policy? If gambling debts are not enforceable in Missouri and someone is advanced money by an ATM, is there a challenge to enforceability of these transactions?”

These issues become more convoluted when gambling’s regulators recognize that extremely lucrative jobs are waiting for them in the gambling industry—often without a legislated one-year waiting period, as was the case in Illinois before 2004. More importantly, gambl-

314. Self-Exclusion, supra note 38.
315. See Gambling Industry Perpetual Non-Compliance, supra note 204; see also Increased Crime and Legalizing Gambling, supra note 239. In California, for example, senior administrators in the attorney general’s Division of Gambling Control were accused by former employees of “routinely quash[ing] investigations into suspected corruptions, embezzlement and theft at Indian casinos . . . ‘with the result being that millions of dollars of taxpayer money [was] basically “looted” by corruption in the casinos.’” Onell R. Soto, Agents say Indian Casino Probes Stymied, SAN DIEGO UNION-TRIB, Oct. 10, 2003, at A1 [hereinafter Indian Casino Probes Stymied]. Harlan Goodson, the head of the California Division of Gambling Control, relinquished his position and went to work for a Las Vegas law firm. Skeptics highlighted this case as another example of the “revolving door” where regulators go to work for the gambling industry. Id. (Goodson did not return calls from the press). In 1996, Harold Monteau, the head of the U.S. National Indian Gaming Commission was forced out of his position for alleged improprieties. He then took a job making money from those formerly under his regulatory mandate. Bruce Orwall, Gaming the System: The Federal Regulator of Indian Gambling is Also Part Advocate, WALL ST. J., July 22, 1996, at A9. For discussions of abuses/scandals in these issue areas, see Gambling Facilities Transformed into Educational Facilities, supra note 268, at 172-76.

By comparison, when Philip C. Parenti the administrator of the Illinois Gaming Board resigned to accept a position with Harrah’s casino company, Illinois Governor Rod Blagojevich summarily “fired” him—that rather than permit Parenti to collect several weeks salary. Assoc. Press, Gaming Board May Change Conduct Code, NEWS-GAZETTE (Champaign, IL) July 19, 2003, at B4. For a classic article on issues/scandals involving the “revolving door” in the regulation of gambling, see Brett Pulley, From Gambling’s Regulators to Casinos’ Men, N.Y. TIMES, Oct. 28, 1998, at A1. To address the problem of the regulatory revolving door, the 1999 National Gambling Impact Study Commission suggested enacting laws providing for a one-year delay before a gambling regulator could accept a position as a gambling industry employee. This was a common standard in other industries such as the defense industry. However, states basically ignored this standard, and thereby gave a free pass to gambling companies. NGISC FINAL REPORT, supra note
ling’s regulators can be charged with not only regulating a state’s gambling, but also promoting that gambling—while supposedly administering mandates to keep gambling facilities from admitting “disassociated persons,” i.e., pathological gamblers self-excluded from those facilities. These types of legislated conflicts-of-interest demonstrate the overbearing legislative power of progambling interests, operating to the detriment of the public good and common-law ethical safeguards.

In one 2002-2003 oxymoronic example in Missouri, the legislation allowed the executive director of the Missouri Gaming Commission (MGC), Kevin P. Mullally, to sit also on the Board of the National Center for Responsible Gaming (NCRG). With multi-million-dollar backing, the NCRG was funded almost exclusively by progambling interests since it was created by the main Washington-based lobbying group for progambling interests, the American Gaming Association (AGA). Consequently, the credibility of the MGC itself was compromised. Furthermore, Mullally could have opted not to accept such a high-profile position with the NCRG, and by accepting such a position, he significantly jeopardized his credibility.

68, rec. 3.17, at 3-19.

The “revolving door” incidents in Illinois after the National Commission’s 1999 Final Report exemplified the continuing regulatory problems throughout the United States. After only a few weeks as an Illinois regulator beginning in 2001,


Swoik’s career move has enraged gambling opponents and government watchdogs, who want the Gaming Board to bar such moves. Assoc. Press, Former Casino Regulator Gets New Job: Move to Gambling Association Angers Opponents, Watchdogs, STATE J.-REG. (Springfield, IL), Apr. 4, 2002, at A11 [hereinafter Casino Regulator Moves to Gambling]. The fact that Swoik went to the Illinois casino “association so quickly after leaving the Gaming Board raise[d] suspicions about cozy relationships between casinos and board staff.” Id. Previously, there had been other incidents involving the Illinois “revolving door.”

Swoik isn’t the first person to leave the Gaming Board to work in the industry. Its first administrator, attorney William Kunkle, has represented several casino groups, including Emerald Casino Inc., which is fighting to open a casino in Rosemont. Former acting administrator Joseph McQuaid is Emerald’s vice president. And Donna More, a former board legal counsel, is a regular at board meetings, representing multiple casinos.

Id.

317. See id. at 4-5.

The “Act for the Better Preventing of Excessive and Deceitful Gaming”[^318] (Queen Anne’s Statute or Statute of Anne) specified that: (1) gambling debts were unenforceable by the courts[^319]; (2) losing gamblers could sue within three months to recover their losses[^320] and (3) if losing gamblers did not sue within three months, third parties, such as family or government officials, could sue for treble damages plus litigation costs[^321]. Therefore, it would seem advantageous for third parties, such as the family members of pathological and problem gamblers, to explore the possibilities of suing to receive three times the amount of the losses. If “players cards” or “fun cards” were issued by the gambling facilities, then the gambler’s losses could be more easily tracked, as they were in Williams v. Aztar Indiana Gaming Corp[^322].

This scenario theoretically means that the only practical defenses involved marketing to the loser to convince the gambler not to be dissatisfied at losing and to keep the losses secret from family members until after the statute of limitations (SOL) of three to six months had run. As unreasonable and bizarre as this scenario might appear, the social stigma of “being a loser” appears to be so great[^323], and the denial phase so intense in pathological and problem gamblers[^324], that they necessarily destroy their own chances for recovery—both of losses and of self. The second major impediment to losing gamblers suing for their losses involved the ignorance of the gambler or the family members regarding the remedies available under Queen Anne’s Statute. This lack of knowledge could be remedied by the gambler if the gambler or family members sought legal counsel, but as a practical consequence of the social stigma phenomenon, the gamblers and involved family would usually wait too long to seek legal advice.

One solution was to extend the three to six month SOL provisions in most states to three years. Sociologists indicated that three years was

[^318]: Statue of Anne, 1710, 9 Ann. c. 14 § 1 (Eng.).
[^319]: Id.
[^320]: Id. § 2.
[^321]: Id.
[^322]: Williams Complaint, supra note 92; see Noffsinger Presentation, supra note 47.
[^323]: See, e.g., THE CHASE, supra note 129; Stakes Rise, supra note 99, at 16.
[^324]: Id.
a reasonable time for pathological and problem gambling situations to manifest themselves.\footnote{325}

Finally the gaps in the state-by-state Statutes of Anne\footnote{326} and the lack of uniformity called for federal intervention and legislation. This recommendation was reinforced by the interstate nature of the socio-economic impacts of pathological and problem gamblers.

C. Recommendation for Clarity: The Judiciary Piercing the Veil of the Gambling Industry

1. Avoiding the False Predicates of Gambling's PR

During a 1995 U.S. congressional hearing, the false predicates and consequences of gambling's ubiquitous PR juggernaut were summarized as follows:

[L]egalized gambling interests are utilizing millions of dollars to misdirect the debate and cause government decisionmakers and the public to reach invalid conclusions. First, there is the incorrect assumption that legalized gambling activities are like other business activities. Instead, legalized gambling activities have large industry-specific negatives, resulting in a cumulative negative economic impact. Second, the industry's tendency to focus attention on specialized factors provides a distorted view of the localized economic positives, while ignoring the large business-economic costs to different regions of the United States. Third, the extraordinary amount of money which is legally used to overwhelm any opposition leads to unbalanced decision-making processes by elected officials, regulatory agencies, and even the court system.\footnote{327}

In the decade since these congressional hearings,\footnote{328} the unbalanced decisionmaking of elected officials and regulatory agencies in decriminalizing organized gambling increased dramatically. However, particularly

\footnote{325}. \textit{See}, e.g., \textit{THE CHASE}, \textit{supra} note 129; \textit{ALCOHOL & DRUG ABUSE ADMIN., MD. DEPT HEALTH & MENTAL HYGIENE, TASK FORCE ON GAMBLING ADDICTION IN MARYLAND} (1990); see also DSM-IV, \textit{supra} note 3, § 312.31, at 617-18.


\footnote{328}. \textit{Id.}
alarming was the increase in cursory reviews and invalid assumptions to be found in judicial decisions. Exemplifying these problems were tribal interests being leveraged by progambling interests to file test cases that were designed to place gambling facilities in every locale. Among the nontribal cases, Pappas exemplifies the problems faced by the judiciary. In 1993 the Las Vegas Downtown Redevelopment Agency, essentially the city council of Las Vegas, used eminent domain to take the Pappas’s land allegedly “in less than 50 seconds in a summary proceeding on December 15, 1993 at which they were not even present” nor previously properly served. Finally, in December 2003, Pappas was appealed to the U.S. Supreme Court. The pivotal issue in Pappas was “whether casinos and topless clubs will be considered ‘public use’ as defined by the Fifth Amendment, to the United States Constitution.” As in Poulos, which was filed in 1994, the 1993 Pappas case had been procedurally delayed for over ten years. These problematic cases made gambling industry litigators vulnerable to claims of utilizing litigation patterns for delay.

Pursuant to the Fifth Amendment, the power of eminent domain is curtailed by the “takings clause” which provides: “nor shall private property be taken for public use without just compensation.” Prior
to *Pappas*, “public use” included such facilities as roads, public buildings, and schools.\(^{339}\)

Harry Pappas summarized his family’s frustration from the 1993 inception of the case to an adverse 2003 decision by the Nevada Supreme Court.\(^{340}\) “It should be noted that enormous amounts of ‘campaign donations’ are given to Nevada Supreme Court justices from the casino industry.”\(^{341}\) If the gambling industry were to win *Pappas*, the practical impact would be to allow “eminent domain to be used to seize small business, mom & pop businesses, homes and property for casinos and topless club expansions [and] would finally give casinos and topless clubs a constitutional standing that they have never enjoyed before.”\(^{342}\) In league with virtually unlimited financial resources, progambling interests could use eminent domain to become de facto and de jure sovereigns.

2. *Dissecting the False Predicates of Gambling’s PR*

a. *Common Sense and Common Law: Duties by Gambling Facilities to Known Pathological Gamblers.* As in the judicial trends of the 1950s and 1960s that dissected the false predicates of racism and catalyzed the U.S. Civil Rights Movement, the U.S. judiciary of the twenty-first century was posed with opportunities to expose the false predicates of the gambling industry’s PR. Courts had three hundred years of common-law policies exemplified by the Statute of Anne\(^{343}\) to prevent “Excessive and Deceitful Gaming.”\(^{344}\) In this context, two leading-edge cases were *Poulos*\(^{345}\) and *Williams*.\(^{346}\) Because *Poulos* was still pending a decision on the granting of class action status in 2003, this discussion focuses on *Williams* and its judicial history.

On March 5, 2003, the U.S. District Court for the Southern District of Indiana granted summary judgment in favor of defendant in *Williams*.
As precedent, the court cited to a recently decided 2003
Seventh Circuit case, Merrill v. Trump Indiana, Inc.,\(^{348}\) in which a
pathological gambler convicted of robbing banks (supposedly to feed his
gambling habit) sued the Trump Indiana casino.\(^{349}\) Although the facts
and issues in Merrill could be distinguished from the pending Williams
case, the district court issued summary judgment in favor of defendant
Aztar.\(^{350}\) Williams was then appealed to the U.S. Court of Appeals for
the Seventh Circuit,\(^{351}\) before which appellant claimed:

A. The Court Should Depart from Merrill and Hold, as the Indiana
Supreme Court Would Under the Circumstances Present in this Case,
that Indiana Law Recognizes a Duty of Reasonable Care on the Part
of a Casino Toward a Known Pathological Gambler.

B. In the Alternative, the Court Should Certify the Issue Presented in
this Case to the Indiana Supreme Court for its Resolution of the
Critical Question of Indiana State Law on Which Williams’ Claims Are
Based.\(^{352}\)

Appellee Aztar basically claimed that gambling facilities, specifically
casinos, had no common-law duty to keep known pathological gamblers
from destructive gambling at casinos and that no such duty should be
created.\(^{353}\)

While the Williams appeal, filed May 19, 2003, was being prepared,
the Indiana legislature was debating whether to codify a common-law
duty for casinos to prohibit the destructive gambling of known pathologi-
cal gamblers (soon to be called “registered” or “self-excluded” gam-
blers).\(^{354}\) The Indiana legislation was prodded by the adverse decision
in Williams by the district court.\(^{355}\) Indiana State Senator Larry E.
Lutz (D), representing Casino Aztar’s district, attempted to kill this
legislation via procedural maneuvers, or alternatively to grant de jure immunity to casino-style facilities for most torts.\textsuperscript{356}

The legislature ultimately recognized and rejected Senator Lutz’s attempts to add tort immunity provisions for casinos.\textsuperscript{357} Instead, the legislature added responsibilities, and arguably a duty,\textsuperscript{358} to casino-style gambling facilities to identify and exclude known pathological gamblers.\textsuperscript{359} Losing the legislative struggle, the gambling lobbyists succeeded, however, in maneuvering the drafting of precise regulations to the purview of the Indiana Gaming Commission, where the lobbyists had more influence to transfer more color of duty away from the gambling facilities and impose the initial presumption of duty on the pathological (addicted) gamblers.\textsuperscript{360}

Under the shadow of the district court’s summary judgment in \textit{Williams} on March 5, 2003,\textsuperscript{361} and concurrent with the drafting and filing of the \textit{Williams} appeal to the Seventh Circuit on May 19, 2003,\textsuperscript{362} the Indiana legislature enacted legislation (to go into effect July 1, 2003) that was beneficial to the \textit{Williams} appeal.\textsuperscript{363} This enacted legislation was obviously designed not only to assist the \textit{Williams} scenario, but also to prevent or reduce similar future scenarios involving pathological gamblers.\textsuperscript{364} Despite these legislative enactments and the policy impetus prodding the Indiana legislature, a less than cursory review of these developments and the duty issues in the \textit{Williams} appeal were raised by the Seventh Circuit during oral arguments.\textsuperscript{365} Instead, the court focused on RICO issues, which were subsequently reflected in the court’s decision.\textsuperscript{366} Accordingly, the RICO issues raised by the court extended the discussion.

When rendering its decision in \textit{Williams}, the Seventh Circuit expanded the RICO issues to a national scope.\textsuperscript{367} In \textit{Poulos v. Caesars}

\begin{itemize}
\item \textsuperscript{356} Compare id. with IND. CODE § 4-33-4-7 (2003).
\item \textsuperscript{357} IND. CODE § 4-33-4-7.
\item \textsuperscript{358} Id.
\item \textsuperscript{359} Id. §§ 4-33-4-7(a)(1), (b).
\item \textsuperscript{360} Id. § 4-33-4-7(a)(1) (“program established under the rules of the commission”).
\item \textsuperscript{361} 2003 WL 1903369, at *7-8.
\item \textsuperscript{362} See Williams Appellant Brief, supra note 351.
\item \textsuperscript{363} See supra note 354-60 and accompanying text.
\item \textsuperscript{364} Id.
\item \textsuperscript{366} 351 F.3d 294 (7th Cir. 2003).
\item \textsuperscript{367} Id.
\end{itemize}
World, Inc., which was filed under RICO in 1994 and was still pending in 2004, there were approximately seventy defendants, including most casino companies, cruise lines with gambling, and slot machine manufacturers. Aztar was also one of the defendants in Poulos. This case was filed by David Barrett of the New York City firm of Barrett, Gravante, Carpinello, and Stern, LLP.

In 1995 the district court in Florida transferred Poulos to the U.S. District Court for the District of Nevada. Poulos was brought under RICO and alleged “inter alia” repeated instances of mail fraud as the predicate offenses forming the pattern of racketeering activity engaged in by the defendant. Gambling facilities. In 1997 the Nevada U.S. District Court denied, in particular, defendants' motion to dismiss for failure to state a claim, and multiple other motions by defendants to dismiss the case on various grounds were also generally denied. Accordingly, it would be anticipated that similar challenges by defendant Aztar to plaintiff Williams should have been similarly denied or dismissed.

b. “Puffery,” the Magic Dragon: Must RICO Fall Before Fantasy? The Seventh Circuit rendered its decision in Williams on December 5, 2003. The tenor of the decision appeared to be a design to chill any RICO cases involving gamblers losses being filed in the Seventh Circuit. With regard to Aztar’s promotional mailings to pathological gambler Williams, the court held that the RICO complaint failed because ‘even if the statements in these communications could be considered ‘false’ or ‘misrepresentations,’ it is clear that they are nothing more than sales puffery on which no person of ordinary prudence and

369. Poulos Second Complaint, supra note 119.
370. Id. at 12.
371. Id. at 1.
372. See Fraud Lawsuit, supra note 121.
374. See supra note 122 and accompanying text.
375. See supra note 121 and accompanying text.
376. 351 F.3d 294 (7th Cir. 2003).
377. Id. For summaries of multiple cases and issues involving federal civil RICO actions, see The Merger of Law and Politics in Gambling, supra note 277.
comprehension would rely, and then cited to two nongambling cases for support. In this pronouncement the court misinterpreted that: (1) generic sales “puffery” or “puffing” to the pathological (addicted) gambler was more parallel to psychological entrapment with Pavlovian aspects; (2) a pathological gambler does not constitute a person of ordinary prudence and comprehension with regard to gambling; (3) defendant casino allegedly caused or substantially contributed to plaintiff’s becoming a pathological gambler; (4) defendant casino allegedly knew that plaintiff was a pathological gambler, and (5) the very policy of enacting RICO was to bring cases such as Williams into the federal court system. The court thus made assumptions involving the facts of “puffery” as delimited by academics, pathological (addicted) gambling as delimited by experts, and the nexus between these elements without allowing those facts to be gathered by a trial court. It was unfortunate that the Seventh Circuit, which had been so progressive and forward thinking in other areas, missed the opportunity to advance or even explore the issues in Williams.

378. 351 F.3d at 299.
379. Assocs. in Adolescent Psychiatry, S.C. v. Home Life Ins. Co., 941 F.2d 561 (7th Cir. 1991) (referencing examples that would be considered generic puffery, but does not discuss puffery per se); Reynolds v. E. Dyer Dev. Co., 882 F.2d 1249, 1252 (7th Cir. 1989) (referring to an advertisement extolling a subdivision as “no more than common sales puffing”).
381. Id. See generally Crime Multiplier, supra note 61, at 301-04 (“Pavlovian Marketing: Hooking New Addicted Gamblers?”). Gambling marketers cannot reasonably claim that they are not tempted to find the “hooks” for all gamblers.
382. DSM-IV, supra note 3, at 615-18, § 312.31 (“pathological gambling”).
383. Williams Complaint, supra note 92.
384. Id.
385. For examples of RICO’s policy parallels to further judicial goals in the Civil Rights Movement, as enumerated by Notre Dame Law Professor Robert Blakey who co-authored RICO, see G. Robert Blakey & Thomas A. Perry, An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: “Mother of God—Is This the End of RICO?”, 43 VAND. L. REV. 851, 921-24 (1990) [hereinafter Myths to Rewrite RICO]. For the policy impact of Williams as already generating changes by gambling companies, see Staff Report, Park Place Casinos Start Lists to Ban Addicts, LAS VEGAS SUN, Dec. 9, 2003, at A1.
With regard to the interface between sales puffery and the pathological gambler, some psychological principles should be reviewed. Psychology Professor Calvin Claus has delimited the scientific principles involved as beyond controversy. In his 2000 testimony before the Illinois Gaming Board, Professor Claus cited to the basic textbook *Schedules of Reinforcement* by famed Harvard Psychology Professor B.F. Skinner. The Pavlovian aspects of gambling were summarized as “[p]igeon, rat or human, gambling is addictive.”

If you want to train a laboratory rat to push a button, don’t reward him with a food pellet after every push—vary the number of pushes required for the payoff. Give him a pellet after four pushes one time, 16 the next, then three, then 23. By manipulating the length between payoffs, researchers can lead a rat, pigeon or human into addictive behaviors. "They could stretch the ratio to the point where that rat would literally drop over from exhaustion," [Professor Claus noted].

In this context, it was common knowledge that exhausted and oblivious gamblers constituted a continuing problem in gambling facilities, particularly casinos.

“Puffery” must be closely monitored so that it is not fake and misleading. The most-published academic in the area of “puffing and deceptiveness” has summarized the legal policy: “lies” disguised as “puffery” should not be permitted anywhere. If this is the rule when marketing is directed at a totally competent patron or the general public,

estimate would be approximately $70 billion in costs which is more than the entire revenues derived from U.S. gambling of approximately $65 billion.


387. Professor Claus, supra note 380.
390. Id.
a fortiori the puffery has crossed into allurement or entrapment when the patron is (1) a pathological gambler, (2) known to be a pathological gambler by the marketer gambling facility, and (3) specifically target-marketed by the gambling facility.\footnote{394}

Sociologists and gambling marketers have basically organized gamblers into four categories. “Pathological (hooked or addicted) gamblers” constitute the first category, and they satisfy a diagnostic screen, primarily the South Oaks Gambling Screen (SOGS)\footnote{395} or secondarily the Massachusetts Gambling Screen (MAGS)\footnote{396} or thirdly the National Opinion Research Center DSM\footnote{397} Screen (NODS).\footnote{398} Pathological gamblers consist of 1.5 to 2 percent of the public, and problem gamblers constitute another 3 to 5 percent of the public. These two categories of gamblers lose 26.5 to 55 percent of the monies collected by casinos.\footnote{399} By definition, pathological gamblers will gamble away all of their resources and then steal to continue.\footnote{400}

“Problem gamblers” are delimited as the second-most destructive category of gamblers and they satisfy enough of the diagnostic criteria in a gambling screen to be considered as gambling destructively. Problem gamblers constitute 3 to 5 percent of the public.\footnote{401}

“At-risk gamblers” satisfy only one or two of the diagnostic criteria, but these gamblers basically are gambling more than they can afford


396. See, e.g., Harvard Addictions Meta-Analysis, supra note 56, App. II.

397. DSM-IV, supra note 3, at 615-18 (which NORC used as its basis for a revised screen called NODS).


399. For a table, see Mega-Lawsuits, supra note 2, at 25. For several categories of relevant statistics, see Gambling Monies Tainted the Research, supra note 50.

400. See DSM-IV, supra note 3, at 615-18.

401. See NGISC FINAL REPORT, supra note 68, at Table 4-2.
recreationally. “At-risk gamblers” constitute approximately 5 percent of the general public.  

Finally, the “recreational gambler” constitutes the fourth category. Recreational gamblers evidence no adverse effects from gambling. This category constitutes roughly 80 percent of the public, but these gamblers lose only approximately 30 percent of the dollars collected by casinos. By design or not, therefore, the cream markets for gambling facilities are pathological and problem gamblers.

Puffing to the recreational gambler is simple advertising. Ethicists might decry or raise problematic scenarios of marketing to at-risk gamblers and problem gamblers. However, marketing to pathological (addicted) gamblers generates definite self-destructive and community-destructive behavior. If a gambling facility’s marketers are unaware that the pathological gambler is indeed pathological, the marketing facility has a defense. However, once the gambling facility has actual or constructive notice that a gambler is pathological, any defense should be lost.

Furthermore, the intended target marketing to the known pathological gambler (who is virtually helpless to resist) raises issues of mail fraud designed to take all of the gambler’s resources. In the area of player’s cards and fun cards, which track the gambler’s credit, resource base, and degree of gambling, the key question then is when the gambling facility had actual or constructive notice that the gambler is pathological.

This analysis posits that gamblers losing 10 percent of their assets as delimited by their credit reports or resources listed on their player’s cards or fun cards must be (1) stopped by the gambling facilities issuing those cards, (2) advised of their rights (including invoking the Statute of Anne), and (3) banned from those gambling facilities. Gambling facilities miscalculating their “tithes” should be held to criminal sanctions for fraud.

Do gamblers have to lose 100 percent or 50 percent of their assets as delimited on the card before the gambling facility has the duty to question them and advise them of their rights to be self-banned or casino-banned from the facility or placed on a legal list of disassociated persons? If gamblers are not so advised, have gamblers been deprived of their property by a state-sponsored action without due process of law as required by the Fourteenth Amendment?

402. Id.
c. Tracking Cards Issued by Gambling Facilities: Actual or Implied Intent to Capture Gamblers’ Resources? Issued by progressively more gambling facilities during the computer-sophisticated twenty-first century, casinos interface fun cards with a gambler’s credit report which estimates or has actual numbers of an individual’s gross worth, net worth, or both. Casinos justified this tactic because they said they needed to know whether a person who lost $100,000 could afford the loss. Casinos claim there was no way to know whether the $100,000 loser was a millionaire or not, but multi-millionaire gamblers were routinely tracked by gambling facilities who designated such gamblers “whales” (as compared to “small fish” gamblers).

More importantly, casino fun cards or player’s cards were becoming progressively more intrusive into the financial resources linked to common business credit reports. In fact, the tracking of gamblers via fun cards was goal-oriented toward delimiting each gambler’s total financial resources. Gamblers hesitating to gamble were “comped” via enticements, particularly free alcohol, to keep them gambling (often to the gambler’s drunken disadvantage via impaired judgment). 403

Gambling facilities utilizing player’s cards, in particular, have actual or constructive knowledge of each cardmember’s resource base. At least since 1997, the theories of gambling’s marketers have been in the public domain as exemplified by *Time Magazine’s* article, “How Casinos Hook You: The Gambling Industry is Creating High-Tech Databases to Reel in Compulsive Players.”

By purchasing lists from credit card companies, the casinos know what you buy, and then they can track census data to approximate your home value and income. Then there are the direct-mail lists. One such list from the early 1990s was baldly called the “Compulsive Gamblers Special” and promised to deliver 200,000 names of people with “unquenchable appetites for all forms of gambling.” Another list features “some 250,000 hardcore gamblers.” Yet another purveys the names of 80,000 people who responded to a vacation-sweepstakes-telemarketing pitch. 405

Thus, if the gambler has a resource base of $200,000 and loses $100,000, socio-business ethicists should be concerned. However, if a gambler such as Williams loses 50 percent of their total financial resources, and the gambling facility knows or should know that these gamblers are

403. *See supra* note 151-76 and accompanying text.
405. *Id.* at 69.
pathological (addicted) gamblers, the gambling facility should have a duty not to take advantage of the addiction.

A fortiori, if the gambling facility is served with actual written notice (from a reasonable source) that the gambler is a pathological “hooked” gambler, the gambling facility should have a duty not to impoverish the gambler. If the notified gambling facility advertises again or markets further to the known pathological gambler, the question is whether that marketing constitutes “puffing,” allurement, or entrapment of the pathological gambler (who receives the marketing and loses his entire financial assets).

These were the issues in Williams, which the Seventh Circuit Court of Appeals apparently misunderstood on oral argument. The court merely delimited the gambling facility’s marketing as “puffing” and cited to two nongambling cases for support.406

As has been recognized by the common law for hundreds of years and as exemplified by the 1710 Statute of Anne to prohibit “Excessive and Deceitful Gaming”407 via treble damages, gambling involves allurement and the entrapment of vulnerable gamblers.

Professor Ronald J. Faber’s 1992 article title summarizes the marketing difference: “Money Changes Everything.”408 In modern times, the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders409 removes most ambiguities and delimits that the “pathological gambler,” like an alcoholic, can basically only resist via psychological help such as provided by Gamblers Anonymous (modeled on Alcoholics Anonymous).410

The pathological gambler cannot disassociate from most direct gambling marketing. This scenario has been compared to a bar owner knocking on a known alcoholic’s door and throwing alcohol in the alcoholic’s face—with the “intent” of getting the alcoholic back in the bar spending money. Numerous academic publications point to the special problems of marketing, as they could interface with the gambling addict.411

406. See supra notes 378-79 and accompanying text.
407. See discussion supra notes 318-26 and accompanying text.
409. DSM-IV, supra note 3.
410. Id.
411. See, e.g., supra notes 3, 60, 380, 404, 408 and accompanying text.
There is no such marketing as “puffing” to a pathological (addicted) gambler. The marketing to a known pathological gambler is purposely designed to lure if not entrap the pathological gambler—and to re-lure or entrap the recovering pathological gambler. Gambling facilities cannot claim that they are unaware that 26.5 percent to 55 percent of their “win” comes from pathological and problem gamblers—allegedly the cream market percentage.

The legal discovery of the marketing techniques utilized by gambling facilities, as was occurring in Poulos, should provide the direct link of intent to market to the cream market for gambling facilities. In Williams there should have been similar discovery opportunities. It can be convincingly argued that intentional marketing to known pathological gamblers can easily qualify as intent to re-lure or re-entrapping the money of a disadvantaged or financially mentally incompetent person (before some competitor gambling facility does so).

This scenario satisfies the tests for mail fraud to establish RICO violations, as were suggested by the Seventh Circuit’s ruling in Williams. However, by comparison, in Poulos, establishing such a nexus was apparently not required by the Nevada District Court when it dismissed defendants’ challenges to plaintiffs’ RICO claims.

Furthermore, the policies behind enacting RICO included initiating and promulgating such protections for pathological gamblers—similar to the legislative policies that supported and encouraged the Civil Rights Movement and antitrust protections. As enumerated by Notre Dame Law Professor Robert Blakey, one of the principal authors of RICO:

Similarly, when elements opposed to RICO suggest that its subject matter be enforced only or mainly criminally, they really mean that it be enforced inadequately or not at all . . . . When civil rights legislation was under consideration in the 1960s, many critics emphasized states’ rights, which were then, at least for some, only a smokescreen behind which to hide a rotten system of segregation. Criticism of RICO based on federalism also looks like a smoke screen behind which the swindlers and others seek to hide.

The federal and state judiciaries will eventually be persuaded by such policies and incorporate them more pervasively into the common law.

413. For a table by Professor Henry Lesieur, see Mega-Lawsuits, supra note 2, at 25.
415. Id.
416. See, e.g., supra note 122 and accompanying text.
417. Myths to Rewrite RICO, supra note 385, at 924.
418. Id.
The most socially-conscious judiciary responding to litigating counsel will be the vanguard. For example, the counsel in Williams had a bona fide right, even a responsibility, to ask the Seventh Circuit to reconsider its earlier decisions.419

VII. Conclusion

A. The Typical Casino Brings in Over $1 Million Each Day in Customer Losses: Scofflaw Gambling Interests Thereby Dominate and Control the Legal and Political Systems

By 2002, each day of a casino’s nonoperation constituted an opportunity cost of $1 million.420 All laws, regulations, fines, and penalties in noncomformity with gambling interests could be ignored because the consequences were never more than $1 million per day.421 For example, regulatory fines were typically only a few thousand dollars, and lawsuits could be settled for “undisclosed amounts” less than $1 million per day.

In an Alice in Wonderland juxtaposition, what was illegal before the legalization of casinos becomes legal. Gambling interests de facto make the laws by monetarily dominating the legal and political processes. For example, the seizure of someone else’s land by casino interests does not stop the building processes, and any resulting legal action becomes merely a cost of doing business, as exemplified by the Las Vegas Downtown Redevelopment Agency v. Pappas422 case in Nevada, lasting from 1994 to 2004. With an income of over $1 million per day, casino interests seemingly do not care if they win, lose, or settle any given lawsuit. For example in Rosemont, Illinois, elements of the casino construction were initiated and continued despite the violation of Illinois regulations and the nonapproval of the Illinois Gaming Board.423

419. See supra notes 348-53 and accompanying text.
420. See supra note 204 and accompanying text.
421. See generally Gambling Industry Perpetual Non-Compliance, supra note 204.
423. See, e.g., Dave Newhart, Rosemont Mayor Looks at Options for Casino, CHI. SUN-TIMES, May 4, 2000, at 4. “The casino project is tied up in court in a dispute over where the casino should be located. But Rosemont already has begun to build a $42 million parking garage and is sending the bills to Emerald Casino, operators of the
The socioeconomic history of legalized gambling revealed that these types of problems, compounded by corrupt governmental decisionmaking, were inherent impacts of government-sanctioned gambling. In common-law countries in particular, the court systems promised the public some relief from “excessive and deceitful gaming.”

With decriminalized gambling spreading throughout the United States and the world, the solutions appeared to be predicated upon large punitive damage awards and treble damages. As gambling facilities earned millions of dollars per day and as accounting and regulatory systems historically degenerated into ineffective “window dressings,” the last solutions to restrain the progambling interests were the specters of large punitive damage awards and treble damages. Probably one of the first, if not the first, instances of treble damages was legislation in 1710 with the Statute of Anne. Treble damages, like the punitive damages which developed later, were designed to punish and deter inappropriate behaviors. In the twenty-first century, U.S. gambling facilities were vulnerable to mega-damages predicated on mega-lawsuits.

B. “Follow the Money” as the Threshold Test of Credibility in Gambling Issues: Directly Ask Whether the Person Interviewed Has or Expects to Directly or Indirectly Benefit Financially from the Gambling Industry

The socioeconomic history of legalized gambling has demonstrated that gambling monies have invalidated decisionmaking in multiple areas. Independent analysts in the twenty-first century needed to follow the money to recognize the “gold fever” mesmerizing many decisionmakers dealing with legalized gambling. Once under oath in legal discovery

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426. See, e.g., supra note 49 and accompanying text.
and thereafter sworn in court, U.S. gambling interests knew they would be disadvantaged regarding plaintiffs' claims.427

427. In Williams, for example, sworn expert testimony would have been revealing. By comparison, in 2000 the senior vice president of marketing for Harrah's casinos, Rich Mirman, summarized the marketing philosophy and techniques utilized by his company. Once the new gamblers come out of the introductory program of marketing and gathering information from them, Mirman explains “our ‘Pavlovian’ marketing takes over. Here we have a mathematical model that tells us what appeals to specific gamblers based on data tracking their previous behavior at our properties. Our computer is programmed to spit out behavior modification reports that target customers ....” ROBERT L. SHOOK, JACKPOT!: HARRAH'S WINNING SECRETS FOR CUSTOMER LOYALTY 231, 310 (John Wiley & Sons. Pub. 2003) (section titled “A Pavlovian Approach to Marketing”).

Unlike some other gambling facilities, Mirman indicated that on Harrah's player's cards, “we don’t have any income or credit information (unless they [the gamblers] specifically sign up for credit).” Id. at 232.

However, any gambler who seeks credit for continued gambling has automatically fulfilled one (and perhaps three) of the ten diagnostic criteria established by the American Psychiatric Association for a “pathological gambler” (as well as for a “problem gambler”). DSM-IV, supra note 3, at 615-18. Furthermore, satisfying just this one criterion almost automatically satisfies the diagnostic criteria for an “at-risk” gambler pursuant to the U.S. National Research Council and the U.S. National Gambling Commission. NGISC FINAL REPORT, supra note 68, at 4-2, 4-6.

Accordingly, gambling facilities monitoring, assisting, or granting any gambler credit over $100 have constructive knowledge that the gambler has: (1) automatically satisfied the diagnostic criteria for an “at-risk” gambler, (2) probably satisfies the diagnostic criteria for a “problem gambler” (i.e., satisfies 3 or 4 criteria), and (3) could easily satisfy the diagnostic criteria for a “pathological (addicted) gambler” (i.e., satisfies 5 or more criteria). Theoretically, any gambling facility granting credit (particularly over $200) to a gambler has actual or constructive knowledge that the gambler is problematic. See supra notes 395-419 and accompanying text.