

“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,¹ 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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1. STEPHEN FREY, *THE INSIDER* (1999) [hereinafter *THE INSIDER*].

lawsuits would be targeted at gambling facilities.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.³ Casino owners maintained that their industry was not the cause of gambling addiction.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]lausation would be very difficult to prove,"⁵ although

2. See, e.g., John W. Kindt, *The Costs of Addicted Gamblers: Should the States Initiate Mega-Lawsuits Similar to the Tobacco Cases?*, 22 MANAGERIAL & DEC. ECON. 17 (2001) [hereinafter *Mega-Lawsuits*]; Judy Dehaven & Kate Coscarelli, *Gambling Industry Likely Target for Next Big Suit*, HONOLULU STAR-BULL., June 25, 2002, at C6 [hereinafter *Gambling Likely Target*].

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

4. *Gambling Likely Target*, *supra* note 2, at C6.

5. *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 *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

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.

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]

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). 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.⁶

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,⁷ who could reveal any potential destruction of relevant documents or concomitant obstruction of justice, as in the tobacco cases.⁸ 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.⁹

With regard to progambling 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

affiliate of the National Council on Problem Gambling . . ." (emphasis added)). See also Testimony of Assoc. Prof. Howard Shaffer, Ph. D., Editor, *Journal of Gambling Studies* (official publication of the National Council on Problem Gambling), in *Boan et al. v. Collins Entertainment Co. et al.*, CA. No. 3:97-2136-17 (S.C. Dist. June 13, 2003) (cross-examination by plaintiff's counsel Lawrence E. Richter, Jr.).

6. *Gambling Likely Target*, *supra* note 2, at C6; Alisyn Camerota, *Tort Lawyers Target Gambling*, Fox News Channel Online, at <http://www.foxnews.com/story/0,2933,54083,00.html> (May 31, 2002).

7. See THE INSIDER, *supra* note 1. See generally John W. Kindt, *Subpoenaing Information from the Gambling Industry: Will the Discovery Process in Civil Lawsuits Reveal Hidden Violations Including the Racketeer Influenced and Corrupt Organizations Act?*, 82 OR. L. REV. 221 (2003) [hereinafter *Subpoenaing Discovery Reveal Hidden Violations*].

8. ROBIN REID BOSWELL, ASS'N OF TRIAL LAWYERS OF AM., OBTAINING THE CASINO'S INFORMATION II:1783 (2002) (annual convention reference materials).

9. Kurt Eichenwald & Floyd Norris, *Early Verdict on Audit: Procedures Ignored*, N.Y. TIMES, June 6, 2002, at C6; *The Fall of Andersen: Greed Tarnished Golden Reputation*, CHI. TRIB., Sept. 1, 2002, § 1, at 1. See also *The Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002: Hearing on H.R. 3763 Before the House Comm. on Fin. Serv.*, 107th Cong., 2d Sess. (2002) (statement of Michael G. Oxley, Chairman, Comm. on Fin. Serv.), available at <http://financialservices.house.gov/hearings.asp?formmode=detail&hearing=96>; *Plan Filed by Enron Leaves Little for Creditors*, NEWS-GAZETTE (Champaign, IL), July 11, 2003, at A1, A8 (reporting that bankrupt Enron's creditors will receive 14.4 to 18.3 cents on the dollar, while bankrupt WorldCom's creditors will receive 36 cents on the dollar).

stricken from the authority of the Commission.¹⁰ The legislative sponsors of the 1996-1999 Commission,¹¹ such as U.S. Senators Paul Simon (D-Ill.) and Richard Lugar (R-Ind.) as well as Charles Morin,¹² chair of the 1976-1977 U.S. Commission on the Review of the National Policy Toward Gambling,¹³ strongly opposed the lobbyists' efforts to strip the subpoena powers from the NGISC.¹⁴

Two types of subpoena powers were at issue: (1) subpoenas to testify (i.e., subpoenas *ad testificandum*),¹⁵ and (2) subpoenas to produce documents (i.e., subpoenas *duces tecum*).¹⁶ In the final legislation, the Commission's subpoena power to compel testimony from witnesses, such as company executives, was stripped.¹⁷ However, the Commission retained the power to subpoena documents.¹⁸

As the debate intensified over the extent of the Commission's subpoena powers, it became apparent that the progambling interests were steadfastly against permitting any process which would allow for the legal discovery of information.¹⁹ The major trade magazine for the gambling industry, *International Gaming and Wagering Business*,²⁰ 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."²¹

10. *State Involvement Sought in Gaming Study Bill*, INT'L GAMING & WAGERING BUS., May 1996, at 22 (trade magazine for the gambling industry) [hereinafter *Gaming Interference*]; Kenneth Pins, *Federal Study of Gambling's Effects Shelved*, DES MOINES REG., June 19, 1996 [hereinafter *Study Shelved*]; Warren Richey, *Anti-Gambling Activists Warn of Stacked Commission Deck*, CHRISTIAN SCI. MONITOR, Mar. 21, 1997, at 3 [hereinafter *Stacked Commission Deck*]; see also John W. Kindt, *Follow the Money: Gambling, Ethics, and Subpoenas*, 556 ANNALS AM. ACAD. POL. & SOC. SCI. 85 (1998) [hereinafter *Follow the Money*].

11. See *Study Shelved*, *supra* note 10.

12. Letter from Charles H. Morin, Chair, 1976 U.S. Comm'n on the Rev. of the Nat'l Policy toward Gambling, to Frank R. Wolf, Congressman (May 7, 1996) [hereinafter *Chair Charles Morin Letter*] (on file with Charles H. Morin).

13. COMM'N ON THE REV. OF THE NAT'L POLICY TOWARD GAMBLING, GAMBLING IN AMERICA, FINAL REPORT (1976) [hereinafter U.S. COMM'N GAMBLING].

14. Chair Charles Morin Letter, *supra* note 12; *Study Shelved*, *supra* note 10.

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

16. *Id.*

17. National Gambling Impact Study Commission Act, Pub. L. No. 104-169, 110 Stat. 1482 (1996); see *supra* notes 10-14 and accompanying text.

18. Pub. L. No. 104-169, 110 Stat. § 5(b).

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

20. *Gaming Interference*, *supra* note 10, at 22.

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.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.²³

These types of industry maneuvers to control information outraged the Congressional sponsors of the Commission.²⁴

During this timeframe, U.S. Representative John Ensign (R-Nev.), who had family in the gambling industry,²⁵ worked to eliminate the Commission's subpoena powers.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."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.

22. *Id.*

23. *Id.*

24. *Stacked Commission Deck, supra note 10; Study Shelved, supra note 10.*

25. *See Gaming Interference, supra note 10, at 22.*

26. *Id.*

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, "[ten] 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

28. See, e.g., Rex Buntain, *There's a Problem in the House*, INT'L GAMING & WAGERING BUS., July 1996, at 1 (trade magazine for the gambling industry); Matt Connor, *Gambling's Ball and Chain*, INT'L GAMING & WAGERING BUS., Oct. 1996, at 64 (trade magazine for the gambling industry); David Ferrell & Matea Gold, *Casino Industry Fights an Emerging Backlash*, L.A. TIMES, Dec. 14, 1998, at A1 [hereinafter *Casino Backlash*]; Damon Hodge, *Problem Gambling: Relocation of Gaming Center Praised*, LAS VEGAS REV. J., Nov. 4, 2000, at 30. See also *Mega-Lawsuits*, supra note 2, at 44-63, tbls. A1-A14.

29. 31 U.S.C. §§ 3729-33 (1983); see also Debt Collection Improvement Act of 1996, 28 C.F.R. § 85.3 (2001) (increasing the civil monetary awards).

30. 31 U.S.C. § 3729(a)(7).

31. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3.

32. THOMAS R. GRANDE & DAVIS LEVIN LIVINGSTON GRANDE, ASS'N OF TRIAL LAWYERS OF AM., *An Overview of the Federal False Claims Act* I:1179 (2002) (annual convention reference materials). See *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 722 F. Supp. 607, 609 (N.D. Cal. 1989).

33. BLACK'S LAW DICTIONARY 1262 (7th ed. 1999).

some specified public institution will receive.”³⁴ Between 1986 and 1999, over 3000 suits were filed using this cause of action—primarily in the health care industry.³⁵

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 RICO³⁶ and its parallel state legislation.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.³⁸

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.”³⁹

In private civil cases, several potential causes of action were identified: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).⁴¹ Obviously, other causes of action could be available depending on the factual scenarios.

34. *Id.*

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).

36. 18 U.S.C. §§ 1961-1968 (2002). *See generally* *Subpoenaing Discovery Reveal Hidden Violations*, *supra* note 7.

37. *See, e.g.*, IND. CODE ANN. § 35-45-6-2 (Michie 1998).

38. Stephanie S. Maniscalco, “*Self-Exclusion*” Program May Create Duty, MO. LAW. WKLY., Dec. 17, 2000, at 15 [hereinafter *Self-Exclusion*].

39. *Id.*

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).

41. *Id.*

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.”⁴² 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.⁴³

The 2002 Chair of the Casino Litigation Group of the American Trial Lawyers Association, D. Briggs Smith, cautioned plaintiffs’ attorneys to “protect the evidence.”⁴⁴ 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).⁴⁵ 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;⁴⁶ therefore, quick action by plaintiffs was imperative.⁴⁷ Furthermore, some tribal casinos required a filing within as little as ten days, or the right to a lawsuit was forfeited.⁴⁸

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. *Id.* 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.*

48. *Casino-Related Litigation*, *supra* note 42, at 17.

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

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).

50. See *Casino Backlash*, *supra* note 28, at A1; see also COLUM. JOURNALISM REV., *supra* note 49, at 36-38; John W. Kindt, *The Gambling Industry and Academic Research: Have Gambling Monies Tainted the Research Environment?*, 13 S. CAL. INTERDISC. L.J. 1 (2003) [hereinafter *Gambling Monies Tainted the Research*].

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.⁵⁵ 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,⁵⁶ have been criticized for leaving out basic and essential information necessary for academic corroboration.⁵⁷

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,”⁵⁸ the results would constitute a distorted view of the actual costs and benefits of legalized gambling⁵⁹—and often highlight just the benefits.⁶⁰

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.⁶¹ These are the “feeder markets” supplying the gambling activity with gamblers, such as in the case of a casino.⁶²

55. See generally, CED REPORT, *supra* note 51.

56. Howard J. Shaffer et al., Estimating the Prevalence of Disordered Gambling Behavior in the United States and Canada: A Meta-analysis, App. II (President and Fellows of Harvard College 1997) [hereinafter Harvard Addictions Meta-analysis]; Press Release, Harvard Medical School, Harvard Medical School Researchers Map Prevalence of Gambling Disorders in North America (Dec. 4, 1997) [hereinafter Harvard Division on Addictions Press Release]. From 0.84 percent in 1993 “the prevalence rate for 1994-1997 grew to 1.29 percent of the adult population.” *Id.*

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).

58. *Gambling on the Future*, THE ECONOMIST, June 26, 1999, at 27-28.

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).

61. For analyses involving feeder markets, see John W. Kindt, *Diminishing or Negating the Multiplier Effect: The Transfer of Consumer Dollars to Legalized Gambling: Should A Negative Socio-Economic “Crime Multiplier” Be Included in Gambling Cost/Benefit Analyses?*, 2003 MICH. ST. D.C.L. REV. 281, app. (2002) [hereinafter *Crime Multiplier*].

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.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).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."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)*⁶⁶ and *Economic Impacts of Casino Gaming in the United States: Micro Study (AGA/Andersen Micro Study)*.⁶⁷ The *AGA/Andersen Macro Study* found its way into the citations of the *Final Report*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),⁶⁹ (2) a limited (or even invalid) scope for review;⁷⁰ (3) the

63. *Id.*; Harrah's Entertainment, Inc., Harrah's Survey of Casino Entertainment (1996); see generally BEAR STEARNS & CO., N. AM. GAMING ALMANAC (July 2001) [hereinafter 2001 BEAR STEARNS ALMANAC].

64. See generally 2001 BEAR STEARNS ALMANAC, *supra* note 63.

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

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].

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].

68. NAT'L GAMBLING IMPACT STUDY COMM'N, FINAL REPORT (June 1999) [hereinafter NGISC FINAL REPORT]; see also NAT'L GAMBLING IMPACT STUDY COMM'N, EXECUTIVE SUMMARY (June 1999) [hereinafter NGISC EXEC. SUMMARY].

69. See Am. Gaming Ass'n/Andersen Macro Study, *supra* note 66 (only 49 footnotes).

appearance of pre-selected positives—geographic area and time-frames;⁷¹ and (4) little or no analysis involving socioeconomic costs in the acknowledged “feeder markets.”⁷²

Another well-known example is the Deloitte and Touche 1992 study supporting a casino complex for downtown Chicago and financed by progambling interests.⁷³ This 300-page study made virtually no acknowledgement of any socioeconomic costs in the feeder markets.⁷⁴ Similar criticisms of industry-generated studies were summarized by the University of Massachusetts researchers in the classic 1994 report,⁷⁵ funded in part by the Ford Foundation, which analyzed and compared several industry-generated reports with academic reports.⁷⁶

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.⁷⁷ 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*⁷⁸ made the suicides front page news.⁷⁹ 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.⁸⁰ 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.

77. Stephen Braun, *Lives Lost in a River of Debt*, L.A. TIMES, June 22, 1997, at A1, A14-15 [hereinafter *Lives Lost*].

78. *Id.*

79. *Id.*

80. Corporation Counsel for the City of Joliet, Illinois, Testimony before the National Gambling Impact Study Commission (May 20, 1998); *contra*, David Elsner, *Joliet Merchants Fail to Cash in on Gambling*, CHI. TRIB., Mar. 22, 1994, Metro Sec., at 1.

forced to issue coroner's subpoenas to two casinos.⁸¹ 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.⁸²

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"⁸³ and that the casino "company exploited Kimbrow's weakness."⁸⁴ "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."⁸⁵

81. *Lives Lost*, *supra* note 77, at A14-15.

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.

In Ottawa, Canada, during 2003 it was reported that "statistics indicate[d] 126 gambling addicts have killed themselves since 1999, an alarming increase from 27 such suicides recorded in the five years before that," and Canadian experts attributed this increase to the video lottery terminals in bars (which were legalized in 1994). *Gambling-Related Suicides Soar*, LAS VEGAS SUN, Oct. 3, 2003. Additionally, a 2003 "investigation by The Canadian Press found more than 10 percent of suicides in Alberta and more than six percent in Nova Scotia were linked to gambling in 2001," which prompted Canadian officials "to standardize the collection of [Canadian] suicide data related to gambling." Louise Elliott, *Former Copps Coliseum Exec to Sue Ontario*, Aug. 19, 2003, available at <http://cnews.canoe.ca/CNEWS/Canada/2003/08/19/164161-cp.html>.

For examples of how U.S. stories linking legalized gambling to increased suicides have been suppressed, see *Lives Lost*, *supra* note 77.

83. Bloomberg Bus. News, *Casinos May be Flush With Suits*, CHI. TRIB., Nov. 17, 1996, § 5, at 4 [hereinafter *Flush With Suits*].

84. *Id.*

85. *Id.*

Plaintiff's attorney, Tom Brockman, modeled his cause of action on an extrapolation of the dram shop laws.⁸⁶ 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.'"⁸⁷ 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."⁸⁸

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.*,⁸⁹ 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.⁹⁰ 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 \$175,000.⁹¹ As they interfaced with defendant Casino Aztar, the claims in the *Williams* complaint relating to RICO provided a partial blueprint for similar cases:⁹²

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. § 1341.⁹³

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.*

89. *Williams v. Aztar Indiana Gaming Corp.*, No. EV-01-75-C-Y/H (S.D. Ind. filed May 7, 2001).

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*].

93. 18 U.S.C. § 1341 (1994).

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.⁹⁴

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.⁹⁵ Along with any parallel state RICO statute, as in the state of Indiana,⁹⁶ other damages would probably be recoverable, such as punitive damages.⁹⁷

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.⁹⁸ Arguendo, this delay in protective legislation per se indicated the progambling 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 progambling lobbyists in individual states. For example, New Jersey, which was the second state to get casino gambling

94. Williams Complaint, *supra* note 92.

95. 18 U.S.C. §§ 1964(c) (2002).

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,

99. Diana Digges, *Stakes Rise in "Compulsive Gambling" Suits*, LAWYERS WKLY. USA, Nov. 26, 2001, at 16 [hereinafter *Stakes Rise*].

100. MO. ANN. STAT. § 313.813 (West 2001).

101. *Self-Exclusion*, *supra* note 38, at 15.

102. *Id.*

103. *Id.*

104. *Id.*

105. U.S. CONST. art. I, § 8, cl. 3.

106. *Self-Exclusion*, *supra* note 38, at 15.

receiving promotional material or using check-cashing privileges—the casino can be held liable if it doesn't abide by the agreement."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,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.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.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.¹¹¹

107. *Stakes Rise*, *supra* note 99, at 16.

108. *See Mega-Lawsuits*, *supra* note 2, at 25, Table 1.

109. *Self-Exclusion*, *supra* note 38, at 15.

110. *Stakes Rise*, *supra* note 99, at 16.

111. *Id.*

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.”¹¹²

A similar New Orleans “case testing self-exclusion principles”¹¹³ 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.”¹¹⁴ 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.*,¹¹⁵ the plaintiff’s claimed facts were illustrative of similar case scenarios.¹¹⁶

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.
3/27/98	Aztar sends its Cease Admission Letter to Williams.
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.

- 7/18/00 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*]
- 7/24/00 Williams’s last visit to Aztar
- 5/7/01 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.

119. CV-S-94-1226 (U.S. Dist. Ct. Nev. filed Jan. 8, 1998). See also Poulos v. Caesars World, Inc., CV-S-94-1126-LDG (RJJ) (U.S. Dist. Ct. Nev.) (base file); Ahern v. Caesars World, Inc., CV-S-94-1137-LDG (RJJ) (U.S. Dist. Ct. Nev.) (base file). See generally Opinion of Chief U.S. Dist. Judge Lloyd D. George on Defendants’ Motions to Dismiss, Poulos v. Caesars World, Inc., CV-S-94-1126-LDG (RJJ) (Nev. 1996) (requiring an amended complaint) (base file); Second Consolidated Amended Complaint and Jury Demand, Poulos v. Caesars World, Inc., Class Action, CV-S-94-1126-DAE (RJJ) (D. Nev. 1998) (base file) [hereinafter Poulos Second Complaint].

120. See Poulos Second Complaint, *supra* note 119.

121. David Strow, *Gamers Face Wider Fraud Lawsuit*, LAS VEGAS SUN, June 22, 1999, at C1 [hereinafter *Fraud Lawsuit*]. Order to Dismiss for Lack of Personal Jurisdiction, Poulos v. Caesars World, Inc., CV-S-94-1126-DAE (RJJ) Dec. 19, 1997 (U.S. Dist. Ct. Nev.); Order Granting in Part and Denying in Part Defendant’s Motion to Dismiss, Poulos v. Caesars World, Inc., CV-S-94-1126-DAE (RJJ), Dec. 19, 1997 (U.S. Dist. Ct. Nev.); Order Denying Cruise Ship Defendant’s Motion to Dismiss for Lack of Subject Matter Jurisdiction, Poulos v. Caesars World, Inc., CV-S-94-1126-DAE (RJJ), Dec. 19, 1997 (U.S.

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

Dist. Ct. Nev.); Order Denying Defendant's Motion for a Stay on Primary Jurisdiction and Abstention Grounds, *Poulos v. Caesars World, Inc.*, CV-S-94-1126-DAE (RJJ), Dec. 19, 1997 (U.S. Dist. Ct. Nev.); Order Denying Defendant Princess Hotel's Motion to Dismiss under The Act of State Doctrine, *Poulos v. Caesars World, Inc.*, CV-S-94-1126-DAE (RJJ), Dec. 19, 1997 (U.S. Dist. Ct. Nev.); Order (motion for class certification -991), *Poulos v. Caesars World, Inc.*, CV-S-94-1126-RLH (RJJ), June 26, 2002 (U.S. Dist. Ct. Nev.).

122. See *supra* note 119; Order Granting in Part and Denying in Part Defendants' Motion to Dismiss Pursuant to Rule 9(b) for Failure to Plead Fraud with Particularity and Denying Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) for Failure to State a Claim, *Poulos v. Caesars World, Inc.*, CV-S-94-1126-DAE (RJJ), Dec. 19, 1997 (U.S. Dist. Ct. Nev.) (base file).

123. *Fraud Lawsuit*, *supra* note 121.

124. *Id.* at C1-C2.

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.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.*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."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.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.¹²⁹ Basic statistics indicate that continued gambling can only lead to gambler's ruin.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

125. *Id.* at C1.

126. No. CV103-3190CC (C.C. Mo. filed May 12, 2003). This case blueprints several causes of action in these issue areas.

127. For statistical formulae 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*].

128. *See id.*

129. *See generally* HENRY R. LESIEUR, *THE CHASE: CAREER OF A COMPULSIVE GAMBLER* (1984) [hereinafter *THE CHASE*].

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*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.¹³² Therefore, early in the twenty-first century, individuals began challenging the state regulatory mechanisms via the judicial system.¹³³

In 2003 the leading-edge case of *Missouri ex rel. Small v. Ameristar Casino Kansas City, Inc.*¹³⁴ prompted questions involving fairness and an allegedly defective video gambling machine (VGM).¹³⁵ The lawsuit alleged that “the casino and the state commission knowingly allowed a defective slot machine to continue to operate.”¹³⁶ The machine at issue was manufactured by International Game Technology (IGT).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.”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

131. NGISC FINAL REPORT, *supra* note 68, at ch. 3, 1-28.

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.*

136. *Judge Orders Slot Machine Pulled from Ameristar Casino*, KANSAS CITY CHANNEL.COM (May 12, 2003), at <http://www.thekansascitychannel.com/news/2198782/detail.html> [hereinafter *Judge Orders Slot Machine Pulled*]; *see also* Temporary Restraining Order, State ex rel. Small v. Ameristar Casino Kan. City, Inc., No. CV103-3190CC (C.C. Mo. 2003).

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-Generation Slot Machine*, U.S.A. TODAY, May 20, 1996, at A1 [hereinafter *Gambling's "Holy 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, et al., U.S. Patent No. 5,779,545 (issued July 14, 1998).

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.¹⁴³

Allegations involving the extent to which the VGMs could be controlled by the operators of the VGMs were also raised in the *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 *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.¹⁴⁴

While none of the allegations in *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"¹⁴⁵ that drove the VGM. A summary of the court testimony supported Small's claims.¹⁴⁶

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.

143. *Small Relator Writ of Mandamus*, *supra* note 133, at 9.

144. *Id.* at 9-10.

145. Rick Alm, *Judge Puts Ameristar Slot Machine Back in Action*, KAN. CITY STAR, May 16, 2003, at C2.

146. *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.

151. Jeffrey C. Hallam, Comment, *Rolling the Dice: Should Intoxicated Gamblers Recover Their Losses?*, 85 NW. U. L. REV. 240, 241 (1990) [hereinafter *Intoxicated Gamblers Losses*]; Joseph T. Hallinan, *High Rollers: At Riverboat Casinos, the Free Drinks Come with a Tragic Toll*, WALL ST. J., at A1, A22 [hereinafter *Casinos Free Drinks Tragic Toll*].

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 Mr. Esworthy’s

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.

156. See Jim Esworthy, Remarks to the Illinois Gaming Board (Oct. 26, 1999) [hereinafter Jim Esworthy Presentation Stopping Casinos’ Alcohol Expansion Plan]; see also Jim Esworthy, *Don’t Permit 24-hour Casino Gambling*, NEWS-GAZETTE (Champaign, IL), Nov. 14, 1999, at B3.

157. Jim Esworthy Presentation Stopping Casinos’ Alcohol Expansion Plan, *supra* note 156.

158. *Id.*

159. See 625 ILL. COMP. STAT. ANN. 5/11-500 (West 2002), amended by P.A. 90-43, § 5 (1997) and P.A. 90-779, § 5 (1999) (driving while intoxicated, transporting alcoholic liquor,

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,

and reckless driving); 625 ILL. COMP. STAT. ANN. 5/11-501 (West 2002) (driving while under the influence of alcohol, other drug or drugs, intoxicating compound or compounds or any combination thereof).

160. Jim Esworthy Presentation Stopping Casinos' Alcohol Expansion Plan, *supra* note 156; see generally *Casinos Drop Request for 24-hour Gaming*, NEWS-GAZETTE (Champaign, IL), Dec. 8, 1999, at B2.

161. *Casinos Free Drinks Tragic Toll*, *supra* note 151, at A1.

162. *Flush With Suits*, *supra* note 83.

163. *Stakes Rise*, *supra* note 99, at 16.

164. 715 F. Supp. 644 (D.N.J. 1989).

165. *Id.* at 646.

a United States District Court in New Jersey held that the relevant point was “whether a gambler comprehends the consequences of continued protracted gambling”¹⁶⁶ and that “a casino has a duty to refrain from knowingly permitting an invitee to gamble where that patron is obviously and visibly intoxicated”¹⁶⁷ 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. Tose*¹⁷¹ 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 pro-gambling 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.

167. 715 F. Supp. at 655. For a subsequent precedent, see *Miller v. Zoby*, 595 A.2d 1104 (N.J. Super. Ct. App. Div. 1991), *cert. denied*, 606 A.2d 366 (1991).

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.

169. Laurence Arnold, *Telling of \$50M Losses, Ex-Eagles Owner Rocks Gambling Panel*, THE RECORD (N.J.), July 1, 1999, at L7; see *Flush With Suits*, *supra* note 83.

170. 819 F. Supp. 1312 (D.N.J. 1993).

171. 34 F.3d 1227 (3d Cir. 1994).

172. 876 F. Supp. 625 (D.N.J. 1994), *aff'd*, 70 F.3d 291 (3d Cir. 1995).

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.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.”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.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.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.¹⁷⁹

175. *Casino-Related Litigation*, *supra* note 42.

176. *Id.* at 24.

177. Ed Vogel, *Senate Approves Bill That Would Limit Hotel Liability*, LAS VEGAS REV. J., June 3, 1995, at A1, A3.

178. *Id.*

179. *See id.*

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.¹⁸⁰ According to Nevada State Senator Neal, who resisted pressure from his largest hotel client to "vote right,"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"¹⁸² He concluded, "That is corruption."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."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."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.¹⁸⁶ Carey Stein, the Chicago attorney representing the seven women, stated that the alleged sexual "harassment came from the employees' managers."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."¹⁸⁸

180. *Id.*

181. *Id.* at A1.

182. *Id.*

183. *Id.*; see also Memorandum from Michelle L. Erb, Research Assistant Nevada Legislative Counsel Bureau (Aug. 2, 1995), news attachments (on file with author).

184. *Casino-Related Litigation*, *supra* note 42, at 24 (quoting Joseph Kelly).

185. *Former Dealers, Waitresses sue 3 Floating Casinos for Sex Harassment*, ROCKFORD REGISTER STAR (Rockford, IL), July 18, 1998, at A5.

186. *Id.*

187. *Id.* (quoting Carey Stein).

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."¹⁸⁹ 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.¹⁹⁰

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.¹⁹¹

These types of sexual harrasment 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 1998.¹⁹² 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."¹⁹³ To qualify as a class action, plaintiffs had to identify "more than 25 such employees who allegedly suffered discrimination in discipline, promotions or terminations."¹⁹⁴ However, before proceeding on the class action basis, this case necessitated a determination of whether the casino was "liable for discriminatory practices."¹⁹⁵ If the casino could be found liable, the judge would decide whether the case could be certified as a class action suit.¹⁹⁶ 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.

189. *Complaint Cites Casino Surveillance Cameras*, BELLEVILLE NEWS-DEMOCRAT (Belleville, IL) (reprinted from *Philadelphia Inquirer*), Aug. 22, 2001, at A8.

190. *Id.*

191. *Id.*

192. Fred Faust, *Casino Bias Suit Granted Class-Action Status*, ST. LOUIS POST DISPATCH, Dec. 12, 1998, at OT33.

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 1997.¹⁹⁷ 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."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."¹⁹⁹ The Alton Belle had only reported seven other injuries to the Coast Guard.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.²⁰¹ The casino representatives claimed that they were "in compliance with federal law and that their vessels . . . [were] safe."²⁰² The Coast Guard had the authority retroactively to fine the casinos for the violations,²⁰³ but even \$25,000 fines were essentially meaningless because the average casino took in customer losses of over \$1 million per day.²⁰⁴

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.

198. *Coast Guard to Query Casino Owners*, *supra* note 197.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. See, e.g., ILLINOIS GAMING BOARD, MONTHLY RIVERBOAT CASINO REPORT (Jan. 2002). See generally John W. Kindt, *The Failure to Regulate the Gambling Industry Effectively: Incentives for Perpetual Non-Compliance*, 27 S. ILL. U. L.J. 221 (2003) [hereinafter *Gambling Industry Perpetual Non-Compliance*]; *Follow the Money*, *supra* note 10.

4. *Second Hand Smoke Litigation: "Nowhere to Hide"*²⁰⁵

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."²⁰⁶ 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.²⁰⁷

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."²⁰⁸ Furthermore, they claimed that "while the Empress had a ventilation system, it was not adequate to clear the boat of secondhand smoke."²⁰⁹ In addition to unspecified monetary damages, the employees wanted "the company to improve the poor air quality in the casino."²¹⁰ Because the casino was a riverboat, the employees used "the Jones Act,^[211] a federal law regulating working conditions for seamen and railway employees,"²¹² which allowed "seamen to seek damages for personal injuries from their employers."²¹³

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.²¹⁴ 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."²¹⁵ For three years, Young worked for the newspaper as a co-op advertising specialist.²¹⁶ In August 1998 she was asked to

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.*

211. 46 U.S.C. § 688 (1982). For an analysis of liability issues under the Jones Act, see Richard McLaughlin, *Floating Casinos, Personal Injury and Death Claims, and Admiralty Jurisdiction*, 64 MISS. L.J. 439 (1995).

212. *Haze Over Casino*, *supra* note 205.

213. 46 U.S.C. § 688.

214. See William Petroski, *Woman Objects to Ads, Is Fired*, DES MOINES REGISTER, Jan. 26, 1999, at M1.

215. *Id.*

216. *Id.*

assume more duties, which included "selling advertisements to churches and for the 'Go' entertainment page."²¹⁷ The conflict came with the "'Go' entertainment page, which feature[d] ads for casinos and taverns."²¹⁸ For religious reasons, she felt inclined not to promote gambling and alcoholic beverages.²¹⁹ When Young gave a "written statement from her church pastor that further explained her religious convictions"²²⁰ to the newspaper, "Young's boss refused to accommodate her, claiming that Young supported the sale of alcoholic beverages by dining in restaurants."²²¹ Represented by Davenport attorney Marlifa Greve, Young filed complaints with the Iowa Civil Rights Commission and the U.S. Equal Employment Opportunity Commission.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.²²³ In one example in 1995, a security guard in the Silver Star Casino was forced to escort a patron "waddling like a duck"²²⁴ out of the casino because the gambler had gotten "stuck to a toilet seat that had been smeared with glue."²²⁵ This situation resulted in the gambler being escorted out of the casino "with nothing more than a towel covering his predicament."²²⁶ This incident of humiliation and premises liability resulted in a \$50,000 lawsuit against Boyd Gaming Corporation filed on July 14, 1998.²²⁷ Premises liability could become almost a *pro forma* cause of action in various cases involving casinos, including cases involving the losses incurred by a gambler.²²⁸

217. *Id.* at M6.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *See, e.g., Gambler Sues After Toilet-Glue Incident*, ROCKFORD REGISTER STAR (Rockford, IL), July 18, 1998, at A9.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *See 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

1. Gambling Development Projects: The Essential “Comprehensive Gambling Impact Statement” Component to the “Environmental Impact Statement” or the “Environmental Assessment”

Economic development issues invariably interface with the environment, so the need for an environmental impact statement (EIS)²²⁹ under the National Environmental Policy Act (NEPA)²³⁰ 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.²³¹ 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.²³²

Too often during the 1990s, there was avoidance of meaningful EISs by federal agencies, such as the Bureau of Indian Affairs (BIA),²³³ analyzing tribal gambling proposals and the U.S. Corps of Engineers (COE),²³⁴ analyzing riverboat gambling proposals. Regarding gambling proposals, these federal agencies commonly opted to issue a “finding of no significant impact” (FONSI)²³⁵ 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.²³⁶

Furthermore, one recommendation contained in the *Final Report*²³⁷ of the 1996-1999 Commission concluded that a “comprehensive gambling

229. 42 U.S.C. § 4332(2)(c) (2000); 40 C.F.R. § 1501.4 (2002).

230. 42 U.S.C. §§ 4321-32 (2000).

231. See *Mega-Lawsuits*, *supra* note 2, at 25, Table 1.

232. See 42 U.S.C. § 4332(2)(c) (2000); 40 C.F.R. § 1508.11 (2002).

233. Often a fee-to-trust application was involved under the Indian Reorganization Act, 25 U.S.C. §§ 461-463 (2000).

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).

236. See 42 U.S.C. § 4332 (2000); 40 C.F.R. § 1508.9(a) (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.²³⁸ 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.²³⁹

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.²⁴⁰

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.

For a summary of increased addicted gambling, particularly as the youth rates are twice as large in the adult population, see John W. Kindt & Thomas Asmar, *College and Amateur Sports Gambling: Gambling Away Our Youth?*, 8 VILL. SPORTS & ENT. L.J. 221 (2002). For analyses of the increased bankruptcies caused by the spread of gambling, see John W. Kindt & John K. Palchak, *Legalized Gambling's Destabilization of U.S. Financial Institutions and the Banking Industry: Issues in Bankruptcy, Credit, and Social Norm Production*, 19 BANKR. DEV. J. 21 (2002). For analyses of the increased crime caused by the spread of gambling, see John W. Kindt, *Increased Crime and Legalizing Gambling Operations: The Impact on the Socio-Economics of Business and Government*, 30 CRIM. L. BULL. 538 (1994) [hereinafter *Increased Crime and Legalizing Gambling*]. For analyses of the increased taxes caused by the spread of gambling, see John W. Kindt, *Legalized Gambling Activities as Subsidized by Taxpayers*, 48 ARK. L. REV. 889 (1995). For a strategic overview of gambling issues as they interface with E-Business, see John W. Kindt & Stephen W. Joy, *Internet Gambling and the Destabilization of National and International Economies: Time for a Comprehensive Ban on Gambling Over the World Wide Web*, 80 DENV. U. L. REV. 111 (2002). Several of these analyses, published before the 1999 U.S. National Commission completed its report are referenced in the *Final Report*. NGISC FINAL REPORT, *supra* note 68, App. IV.

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),²⁴¹ 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*.²⁴² 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."²⁴³ The tribe's gambling interests then filed suit challenging the IGRA requirement of "gubernatorial concurrence," claiming it was unconstitutional.²⁴⁴

An amicus curiae brief opposing the tribal claims and supporting the Wisconsin governor was filed by twenty-one states.²⁴⁵ 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-

Annual Conference of the National Coalition Against Legalized Gambling, Baltimore, MD & Washington, DC, Sept. 25-26, 2003. The nine commissioners voted unanimously for a moratorium on the expansion of any type of gambling in the United States. Casino lobbyists were outraged by the vote, and they voiced objections to those commissioners who worked for the gambling industry. John W. Kindt, *U.S. National Security and the Strategic Economic Base: The Business/Economic Impacts of the Legalization of Gambling Activities*, 39 ST. LOUIS U. L.J. 567 (1995) (urging a moratorium on expanded gambling in 1995).

241. 25 U.S.C. §§ 2701-21 (2000) [hereinafter IGRA]. The IGRA was enacted to regulate tribal gambling after gambling interests won their test case and opened the door to widespread tribal gambling. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

242. 259 F. Supp. 2d 783 (W.D. Wis. 2003); see Opinion and Order, *Chippewa v. Wisconsin*, No. 02-C-0553-C (W.D. Wis. 2003) [hereinafter *Chippewa v. Wisconsin Opinion and Order*].

243. *Chippewa v. Wisconsin Opinion and Order*, *supra* note 242, at 5-6; see also IGRA, 25 U.S.C. § 2719(b)(1)(A) (2000).

244. *Chippewa v. Wisconsin Opinion and Order*, *supra* note 242.

245. See *id.* at 4.

ing community²⁴⁶ 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).²⁴⁷ 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*.²⁴⁸ While the shadow issue of "economic detriment," and the perceived need for a CGIS, pervade the arguments in *Chippewa*,²⁴⁹ the case was decided primarily on the gubernatorial nonconcurrence provision, and the court held that it was constitutional despite the tribal arguments.²⁵⁰

In a similar case, the EA prepared in February 2002 for the proposed Huron Band-Potawatomi casino in Calhoun County, Michigan,²⁵¹ 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.²⁵² Therefore, the FONSI issued July 31, 2002, by the Department of Interior should not have been issued on both procedural

246. *Id.* at 6. *Contra* John W. Kindt, *The Negative Impacts of Legalized Gambling on Businesses*, 4 U. MIAMI BUS. L.J. 93 (1994); John W. Kindt, *Legalized Gambling Activities: The Issues Involving Market Saturation*, 15 N. ILL. U. L. REV. 271 (1995); John W. Kindt, *Introducing Casino-Style Gambling into Pre-existing Economies: A Summary of Impacts on Tourism, Restaurants, Hotels, and Small Businesses*, 10 N. ARIZ. U. H. RESEARCH & RESOURCE CTR. 6 (1996).

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

248. WILLIAM THOMPSON ET AL., *THE ECONOMIC IMPACT OF NATIVE AMERICAN GAMING IN WISCONSIN* (Wis. Policy Research Inst. 1995) [hereinafter WIS. POLICY RESEARCH INST.].

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

250. *Id.* at 35.

251. EDAW, Inc., Environmental Assessment: Nottawaseppi Huron Band of Potawatomi Indians: Calhoun County Gaming Facility (Feb. 2002).

252. *The National Impact of Casino Gambling Proliferation: Hearing before the House Comm. on Small Business*, 103d Cong. 77-81 & nn.9, 12 (1994); John W. Kindt, *The Business-Economic Impacts of Licensed Casino Gambling in West Virginia: Short-Term Gain but Long-Term Pain*, 13 W. VA. U. PUB. AFF. REP. 22 (1996). For a summary of studies, see Earl L. Grinols & David B. Mustard, *Business Profitability versus Social Profitability: Evaluating Industries with Externalities, The Case of Casinos*, 22 MANAGERIAL & DEC. ECON. 143, 153 (2001) [hereinafter *The Case of Casinos*]; see Earl L. Grinols, et al. *Casinos and Crime* (1999) (unpublished draft on file with author, *forthcoming* as Earl L. Grinols & David B. Mustard, *The Curious Case of Casinos and Crime*, __ REV. ECON. & STAT. __ (2003); see also Earl L. Grinols & David B. Mustard, *Management & Information Issues for Industries with Externalities: The Case of Casino Gambling*, 22 MANAGERIAL & DEC. ECON. 1 (2001). For the definitive book in these issue areas, see EARL L. GRINOLS, *GAMBLING IN AMERICA: COSTS AND BENEFITS* (Cambridge Univ. Press 2004).

and substantive grounds.²⁵³ 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.²⁵⁴ However, the economic detriment issues and the perceived need for a CGIS still shadowed this case.

In 2003 in *TOMAC v. Norton*²⁵⁵ the United States District Court for the District of Columbia finally overruled a BIA's environmental assessment and concomitant FONSI.²⁵⁶ 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."²⁵⁷ The BIA was ordered to consider and analyze "secondary growth issues"²⁵⁸ 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."²⁵⁹ The case was remanded to the BIA to substantiate its conclusions and analysis regarding the secondary (feeder market) growth issues for the proposed casino.²⁶⁰

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 FONSI's exempting the projects from full-scale EIS requirements. The proposed gambling

253. Neal A. McCaleb, Assistant Secretary of Indian Affairs, U.S. Dep't Interior (July 31, 2002) (Proposed Nottawaseppi Huron Band of Potawatomi Indians Gaming Facility In Emmett Township, Michigan: Finding of No Significant Impact).

254. Complaint, *CETAC v. Norton*, No. 1:02CF01754-TPJ (D.D.C. 2002).

255. 240 F. Supp. 2d 45 (D.D.C. 2003); see also Memorandum & Order, *TOMAC v. Norton*, No. 01-0398 (JR) (D.D.C. 2003) [hereinafter *TOMAC v. Norton*, Memorandum & Order].

256. *TOMAC v. Norton*, Memorandum & Order, *supra* note 255, at 15.

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).

260. *TOMAC v. Norton*, Memorandum & Order, *supra* note 255, at 15-16.

riverboat project for Bridgeport in Harrison County had a fairly lengthy EA²⁶¹ 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 ratio²⁶² in the gambling facilities' self-identified feeder markets.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. 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.²⁶⁴ Despite being attacked by industry lobbyists, the academic studies, including the 1995 Wisconsin study,²⁶⁵ continued to cluster around the 3:1 ratio throughout the 1990s, and the ratio was reconfirmed in 2001²⁶⁶ and 2003.²⁶⁷ 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, FONSI, 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. 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-

261. See U.S. Corps of Engineers, Environmental Assessment, Statement of Findings (Col. Harry L. Spear) 1998; Press Release, U.S. Army Corps of Engineers, Corps of Engineers Issues Gaming Boat Permit (Feb. 10, 1998) (on file with Corps of Engineers).

262. *The Case of Casinos*, *supra* note 252, at 153.

263. See *Crime Multiplier*, *supra* note 61, app. See *supra* notes 61-64 and accompanying text.

264. See *supra* notes 61-64, 252 and accompanying text; see also *Crime Multiplier*, *supra* note 61, app.

265. WIS. POLICY RESEARCH INST., *supra* note 248.

266. *The Case of Casinos*, *supra* note 252, at 153.

267. See generally Earl L. Grinols, Comment, MANAGERIAL & DEC. ECON. (2003) (forthcoming). See *supra* notes 61-64, 252, and accompanying text.

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, progambling 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.

268. See John W. Kindt, *Would Re-Criminalizing U.S. Gambling Pump-Prime the Economy and Could U.S. Gambling Facilities Be Transformed into Educational and High-Tech Facilities?*, 8 STANFORD J. L., BUS. & FIN. 169 (2003) [hereinafter *Gambling Facilities Transformed into Educational Facilities*]; see also John W. Kindt & Anne E. C. Brynn, *Destructive Economic Policies in the Age of Terrorism: Government-Sanctioned Gambling as Encouraging Transboundary Economic Raiding and Destabilizing National and International Economies*, 16 TEMPLE INT'L & COMP. L.J. 243 (2002); John W. Kindt, *Internationally, The 21st Century Is No Time for the United States to be Gambling With the Economy: Taxpayers Subsidizing the Gambling Industry and the De Facto Elimination of All Casino Tax Revenues via the 2002 Economic Stimulus Act*, 29 OHIO N.U. L. REV. 363 (2003).

269. Amended Complaint, *Schulz, Phillips, & Becker v. Indiana*, No. 31C01-9610-CP--214 (C.C. Ind. 1998) [hereinafter *Schulz Complaint*].

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.

273. Memorandum from Indianapolis Attorney Richard A. Waples, to Pastor Webster Oglesby, *et al.*, “Re: *Schulz v. Indiana Gaming Commission*” (Dec. 12, 2000) (a public memorandum).

274. *Id.*; Order, *Schulz v. State*, No. 31A01-9907-CV-240 (C.C. Ind. 2000).

During the 1990s, South Carolina served as the most salient illustration of a state dominated and abused by progambling 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 progambling 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*].

276. See *South Carolina v. Blackmon*, 403 S.E.2d 660 (S.C. 1991).

277. *The Merger of Law and Politics in Gambling*, *supra* note 275, at 590-92.

278. See generally *id.*

279. Rhonda Cook, *U.S. Judge Halts Use of Poker Machines*, ATLANTA J.-CONST., June 26, 2002, at B1; Bill Ronki & Rhonda Cook, *Video Poker Loses Bet on Georgia High Court*, ATLANTA J.-CONST., May 29, 2002, at A1.

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

281. Paul J. Nyden, *Groups File Suit to Shut Down Video Gambling*, CHARLESTON GAZETTE (W. Va.), June 12, 2003, at A12 [hereinafter *Suit to Shut Down Video Gambling*].

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.²⁸³ As summarized in 1994²⁸⁴ and then subsequently reconfirmed in studies throughout the following years,²⁸⁵ the socioeconomic costs of new decriminalized gambling facilities clustered at costs of \$3 for every \$1 in benefits.²⁸⁶ 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,²⁸⁷ had more budget problems than those states with less gambling.²⁸⁸

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.”²⁸⁹ 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.’”²⁹⁰ As these issues and parallel cases were becoming more public during the beginning of the twenty-first century, the legal

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.

288. *Suit to Shut Down Video Gambling*, *supra* note 281, at A12. *See, e.g.*, John W. Kindt, *Time to Cut Better Deal with Casinos or Take Them Over*, CHI. SUN-TIMES, June 4, 2003, at 51.

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

A. *Recommendation for Uniformity: Federal Legislation Re-Establishing "An Act for the Better Preventing of Excessive and Deceitful Gaming," The 1710 Statute of Anne*²⁹¹

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.”²⁹⁹

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 1988,³⁰⁰ the common law still allowed the gambling loser to recover all monies lost gambling³⁰¹ if the action was brought within six months.³⁰² 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.³⁰³ 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.”³⁰⁴ 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.³⁰⁵ In South Carolina, however, legalized VGMs between 1991 and 2000³⁰⁶ 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.

301. See S.D. CODIFIED LAWS § 21-6-1 (Michie 1987); S.D. CODIFIED LAWS § 42-7B-47 (Michie 1991); S.D. CODIFIED LAWS § 53-9-2 (Michie 1990).

302. S.D. CODIFIED LAWS § 21-6-1.

303. S.D. CODIFIED LAWS § 42-7B-55 (Michie 1991).

304. MO. ANN. STAT. § 434.030 (West 1992).

305. See, e.g., *Casino-Related Litigation*, *supra* note 42, at 17.

306. The South Carolina Supreme Court upheld the referendum banning video gambling machines as of July 1, 2000, in *Joytime Distrib. & Amusement Co. v. State*, 528 S.E.2d 647 (S.C. 1999).

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 [addicted] 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.*

310. NGISC FINAL REPORT, *supra* note 68, at 4-1 *et seq.*; see NGISC EXEC. SUMMARY, *supra* note 68, at 16-18.

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?”³¹⁴

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 2004.³¹⁵ More importantly, gamb-

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—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).³¹⁶ With multi-million-dollar backing, the NCRG was funded almost exclusively by progambling interests³¹⁷ 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,

Thomas F. Swoik quit his job at the Illinois Gaming Board [and] began a part-time job representing gambling interests as executive director of the Illinois Casino Gaming Association.

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.

316. See, e.g., National Center for Responsible Gaming, Annual Report 3 (2002).

317. See *id.* at 4-5.

B. Recommendation for Scope: Federal Legislation Prohibiting Enforcement of Gambling Debts and Allowing Recovery of Losses Plus Gambling Debts Already Paid for Three Years

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.³²⁵

Finally the gaps in the state-by-state Statutes of Anne³²⁶ and the lack of uniformity called for federal intervention and legislation. This recommendation was reinforced by the interstate nature of the socioeconomic 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*.³²⁷

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

325. See, e.g., THE CHASE, *supra* note 129; ALCOHOL & DRUG ABUSE ADMIN., MD. DEP'T HEALTH & MENTAL HYGIENE, TASK FORCE ON GAMBLING ADDICTION IN MARYLAND (1990); see also DSM-IV, *supra* note 3, § 312.31, at 617-18.

326. See generally Joseph Kelly, *Caught in the Intersection Between Public Policy and Practicality: A Survey of the Legal Treatment of Gambling-Related Obligations in the United States*, 5 CHAPMAN L. REV. 87 (2002).

327. *Nat'l Gambling Impact & Policy Comm'n Act of 1995: Hearing on H.R. 497 before the House Comm. on the Judiciary*, 104th Cong. 519-20 (1995) (emphasis added) (footnotes omitted) (statement of Professor John Warren Kindt) [hereinafter Congressional Gambling Hearing 1995].

328. *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.³²⁹ 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,³³⁰ 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"³³¹ nor previously properly served.³³²

Finally, in December 2003, *Pappas* was appealed to the U.S. Supreme Court.³³³ The pivotal issue in *Pappas* was "whether casinos and topless clubs will be considered 'public use' as defined by the Fifth Amendment,³³⁴ to the United States Constitution."³³⁵ As in *Poulos*,³³⁶ which was filed in 1994, the 1993 *Pappas* case had been procedurally delayed for over ten years.³³⁷ 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."³³⁸ Prior

329. For an analysis of problematic litigation being fronted by tribal interests, see *Subpoenaing Discovery Reveal Hidden Violations*, *supra* note 7, at part VII.E ("Gambling Interests as Savors or Exploiters of Native American Sovereignty?").

330. Respondents' Answering Brief at 3, *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1 (Nev. filed Feb. 2, 2000) (No. 33812).

331. *Id.* at 8.

332. *Id.* at 7. See generally Craig Offman, *The 10 Most Corrupt Cities in America*, GEORGE, Mar. 1998, at 90 (including Las Vegas as one of the nation's most corrupt cities).

For advertisements attacking the casino interests of Steve Wynn, Bill Boyd, Jackie Gaughan, as well as Becky, Ted, and Jack Binion as those interests interfaced with *Pappas*, see *Eminent Domain or Eminent Thievery*, LAS VEGAS REV. J., May 20, 2003, at B3; *Eminent Domain Case Draws National Outrage*, LAS VEGAS REV. J., Apr. 1, 2003, at B3.

333. Letter from Harry Pappas to Tom Grey, Exec. Dir., Nat'l Coalition Against Legalized Gambling (Dec. 9, 2003) (detailing reasons *Pappas* was appealed) (public letter on file with author) [hereinafter *Pappas Summary*].

334. U.S. CONST. amend V.

335. *Pappas Summary*, *supra* note 333 (emphasis in original).

336. See *supra* note 119-25 and accompanying text.

337. See *supra* notes 330-33 and accompanying text.

338. U.S. CONST. amend. V.

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 Anne³⁴³ 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*

339. See Pappas Summary, *supra* note 333.

340. City of Las Vegas Downtown Redevelopment Agency v. Pappas, 76 P.3d 1 (Nev. 2003).

341. Pappas Summary, *supra* note 333.

342. *Id.*

343. See *supra* notes 318-26 and accompanying text.

344. *Id.*

345. For a background discussion of *Poulos*, see *supra* notes 119-25 and accompanying text.

346. For a background discussion of *Williams*, see *supra* notes 89-97 and 115-18 and accompanying text.

v. Aztar.³⁴⁷ 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 pathological gamblers (soon to be called "registered" or "self-excluded" gamblers).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

347. *Williams v. Aztar Ind. Gaming Corp.*, No. EV-01-75-C-TH, 2003 WL 1903369, at *7-8 (S.D. Ind. Mar. 5, 2003).

348. 320 F.3d 729 (7th Cir. 2003).

349. *Id.*

350. 2003 WL 1903369, at *7-8.

351. Brief of Appellant, *Williams v. Aztar Ind. Gaming Corp.* (7th Cir. filed May 19, 2003) (No. 03-1822) [hereinafter *Williams* Appellant Brief].

352. *Id.* at i.

353. Brief of Appellee, *Williams v. Aztar Ind. Gaming Corp.* (7th Cir. filed June 18, 2003) (No. 03-1822) [hereinafter *Aztar* Appellee Brief].

354. See Conference Committee Report, Engrossed H.B. 1740, 1st Sess., § 4, ch. 16, at 3-4 (2003) (codified as amended at IND. CODE §§ 4-22-2, 4-33-4) [hereinafter Conf. Comm. Rep. in Support of Duty to Pathological Gamblers]; Pub. L. No. 143-2003, § 2 (effective date July 1, 2003).

355. See Conf. Comm. Rep. in Support of Duty to Pathological Gamblers, *supra* note 354.

legislation via procedural maneuvers, or alternatively to grant de jure immunity to casino-style facilities for most torts.³⁵⁶

The legislature ultimately recognized and rejected Senator Lutz's attempts to add tort immunity provisions for casinos.³⁵⁷ Instead, the legislature added responsibilities, and arguably a duty,³⁵⁸ to casino-style gambling facilities to identify and exclude known pathological gamblers.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.³⁶⁰

Under the shadow of the district court's summary judgment in *Williams* on March 5, 2003,³⁶¹ and concurrent with the drafting and filing of the *Williams* appeal to the Seventh Circuit on May 19, 2003,³⁶² the Indiana legislature enacted legislation (to go into effect July 1, 2003) that was beneficial to the *Williams* appeal.³⁶³ This enacted legislation was obviously designed not only to assist the *Williams* scenario, but also to prevent or reduce similar future scenarios involving pathological gamblers.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 *Williams* appeal were raised by the Seventh Circuit during oral arguments.³⁶⁵ Instead, the court focused on RICO issues, which were subsequently reflected in the court's decision.³⁶⁶ Accordingly, the RICO issues raised by the court extended the discussion.

When rendering its decision in *Williams*, the Seventh Circuit expanded the RICO issues to a national scope.³⁶⁷ In *Poulos v. Caesars*

356. Compare *id.* with IND. CODE § 4-33-4-7 (2003).

357. IND. CODE § 4-33-4-7.

358. *Id.*

359. *Id.* §§ 4-33-4-7(a)(1), (b).

360. *Id.* § 4-33-4-7(a)(1) ("program established under the rules of the commission").

361. 2003 WL 1903369, at *7-8.

362. See *Williams* Appellant Brief, *supra* note 351.

363. See *supra* note 354-60 and accompanying text.

364. *Id.*

365. Oral Arguments, *Williams v. Aztar Ind. Gaming Corp.*, U.S. Seventh Circuit Court of Appeals, Chicago, IL, Oct. 22, 2003.

366. 351 F.3d 294 (7th Cir. 2003).

367. *Id.*

World, Inc.,³⁶⁸ 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.³⁶⁹ Aztar was also one of the defendants in *Poulos*.³⁷⁰ This case was filed by David Barrett of the New York City firm of Barrett, Gravante, Carpinello, and Stern, LLP.³⁷¹

In 1995 the district court in Florida transferred *Poulos* to the U.S. District Court for the District of Nevada.³⁷² 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”³⁷³ gambling facilities. In 1997 the Nevada U.S. District Court denied, in particular, defendants’ motion to dismiss for failure to state a claim,³⁷⁴ and multiple other motions by defendants to dismiss the case on various grounds were also generally denied.³⁷⁵ 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, 2003.³⁷⁶ The tenor of the decision appeared to be a design to chill any RICO cases involving gamblers losses being filed in the Seventh Circuit.³⁷⁷ 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

368. Case No. CV-S-94-1126-DAE (RJJ) (base file), 2002 WL 1991180 (D. Nev. June 25, 2002).

369. Poulos Second Complaint, *supra* note 119.

370. *Id.* at 12.

371. *Id.* at 1.

372. See *Fraud Lawsuit*, *supra* note 121.

373. Affidavit of John Warren Kindt, *Williams v. Aztar Ind. Gaming Corp.* (7th Cir. Dec. 17, 2003) (No. 03-1822). Poulos Second Complaint, *supra* note 119.

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,³⁷⁸ and then cited to two nongambling cases for support.³⁷⁹

In this pronouncement the court misinterpreted that: (1) generic sales “puffery” or “puffing” to the pathological (addicted) gambler was more parallel to psychological entrapment³⁸⁰ with Pavlovian aspects;³⁸¹ (2) a pathological gambler does not constitute a person of ordinary prudence and comprehension with regard to gambling;³⁸² (3) defendant casino allegedly caused or substantially contributed to plaintiff’s becoming a pathological gambler;³⁸³ (4) defendant casino allegedly knew that plaintiff was a pathological gambler,³⁸⁴ and (5) the very policy of enacting RICO was to bring cases such as *Williams* into the federal court system.³⁸⁵ 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*.³⁸⁶

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”).

380. See Professor Emeritus Calvin K. Claus, *Gambling Behavior: Enticement then Addiction*, Presentation Before the Illinois Gaming Board (May 3, 2000) [hereinafter Professor Claus] (on file with Illinois Gaming Board).

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.

A 1996 article in *USA Today* apparently concluded that gambling marketers were intrigued by the search to create gambling’s “Holy Grail” slot addictive game. *Gambling’s “Holy Grail” Slot Addictive Game*, *supra* note 139, at A1.

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.

386. 351 F.3d 294 (7th Cir. 2003). In 1994 American Medical Association Resolution 430 estimated the socio-medical costs of gambling at \$40 billion per year. Am. Med. Ass’n, House of Delegates Resolution 430 (A-94) (1994). Adjusted to 2003 dollars, the AMA’s

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.³⁸⁷ 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.³⁸⁸ The Pavlovian aspects of gambling were summarized as “[p]igeon, rat or human, gambling is addictive.”³⁸⁹

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].³⁹⁰

In this context, it was common knowledge that exhausted and oblivious gamblers constituted a continuing problem in gambling facilities, particularly casinos.³⁹¹

“Puffery” must be closely monitored so that it is not fake and misleading.³⁹² 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.³⁹³ 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.

In 2003 the Maine Medical Association publicly opposed the siting of a casino anywhere in the state. Maine Medical Ass'n, Public Health Comm., *Resolution Against Locating a Casino in Maine* (2003).

387. Professor Claus, *supra* note 380.

388. See C.B. FERSTER & B.F. SKINNER, *SCHEDULES OF REINFORCEMENT* (1957).

389. Burt Constable, *Pigeon, Rat or Human, Gambling is Addictive*, DAILY HERALD (Arlington Heights, IL), May 6, 2000, at 8.

390. *Id.*

391. *Id.* See generally B.F. Skinner, *Freedom at Last From the Burden of Taxation*, N.Y. TIMES, July 26, 1977, at 29 (ridiculing legalized gambling and its promoters).

392. Ivan L. Preston, *Puffery and Other “Loophole” Claims: How the Law’s “Don’t Ask, Don’t Tell” Policy Condone Fraudulent Falsity in Advertising*, 18 J.L. & COM. 49, 49 (1998) [hereinafter *Puffery and Other “Loophole” Claims*].

393. *Id.* See also Ivan L. Preston, *The Definition of Deceptiveness in Advertising and Other Commercial Speech*, 39 CATH. U. L. REV. 1035 (1990); Ivan L. Preston & Jef I. Richards, *Consumer Miscomprehension and Deceptive Advertising*, 68 B.U. L. REV. 431 (1988). For a complete analysis of these issues, see IVAN L. PRESTON, *THE GREAT AMERICAN BLOWUP: PUFFERY IN ADVERTISING AND SELLING* (U. Wis. Press 1996).

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.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)³⁹⁵ or secondarily the Massachusetts Gambling Screen (MAGS)³⁹⁶ or thirdly the National Opinion Research Center DSM³⁹⁷ Screen (NODS).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.³⁹⁹ By definition, pathological gamblers will gamble away all of their resources and then steal to continue.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.⁴⁰¹

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

394. References to issues involving deceptive advertising as it interfaces with regulation by the Federal Trade Commission provides some interesting insights. See generally Ivan L. Preston, *Extrinsic Evidence in Federal Trade Commission Deceptiveness Cases*, 3 COLUM. BUS. L. REV. 633 (1987); Dee Pridgen & Ivan L. Preston, *Enhancing the Flow of Information in the Marketplace: From Caveat Emptor to Virginia Pharmacy and Beyond at the Federal Trade Commission*, 14 GA. L. REV. 635 (1980); see also Ivan L. Preston, *The Federal Trade Commission's Identification of Implications as Constituting Deceptive Advertising*, 57 CINCINNATI L. REV. 1243 (1989); Ivan L. Preston & Jef I. Richards, *Consumer Miscomprehension as a Challenge to FTC Prosecutions of Deceptive Advertising*, 19 J. MARSHALL L. REV. 605 (1986).

395. See, e.g., Henry R. Lesieur & Sheila B. Blume, *The South Oaks Gambling Screen (SOGS): A New Instrument for Identification of Pathological Gamblers*, 144 AM. J. PSYCHIATRY, September 1987, at 1184-87. In the 1980 and 1990s, over two-thirds of all studies utilized the SOGS. See, e.g., Harvard Addictions Meta-Analysis, *supra* note 56, App. II.

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).

398. See Nat'l Opinion Res. Center et al., *Gambling Impact and Behavior Study: Report to the National Gambling Impact Study Commission* (1999).

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.⁴⁰²

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."⁴⁰⁴

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 [sic] 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.

404. S.C. Gwynne, *How Casinos Hook You: The Gambling Industry is Creating High-Tech Databases to Reel in Compulsive Players*, TIME, Nov. 17, 1997, at 68-69 [hereinafter *How Casinos Hook You*].

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 Disorders*⁴⁰⁹ 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.

408. Ronald J. Faber, *Money Changes Everything*, 35 AM. BEHAV. SCI. 809, 810, 814 (1992) (starting the linkages involving pathological gambling to money and referencing a 1989 study by gambling expert Durand Jacobs, Loma Linda Med. School); see also Gary A. Christenson, M.D., et al., *Compulsive Buying: Descriptive Characteristics and Psychiatric Comorbidity*, 55 J. CLINICAL PSYCHIATRY 5 (1994); Thomas C. O’Guinn & Ronald J. Faber, *Compulsive Buying: A Phenomenological Exploration*, 16 J. CONSUMER RES. 147 (1989).

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.⁴¹² 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.⁴¹³

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.⁴¹⁴ 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-entrap to take the money of a disadvantaged or financially mentally incompetent person (before some competitor gambling facility does so).⁴¹⁵

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.⁴¹⁶

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.⁴¹⁷ 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.⁴¹⁸

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

412. See, e.g., *id.*; *How Casinos Hook You*, *supra* note 404, at 68-69.

413. For a table by Professor Henry Lesieur, see *Mega-Lawsuits*, *supra* note 2, at 25.

414. See, e.g., *How Casinos Hook You*, *supra* note 404, at 68-69.

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 nonconformity 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. Pappas*⁴²² 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.

422. See, e.g., *Las Vegas Downtown Redevelopment Agency v. Pappas*, No. A327519 (13th Dist. Ct. Nev. 1996). For a summary of the abuses in this case, see Dana Berliner, *Government Theft: The Top 10 Abuses of Eminent Domain*, Castle Coalition (Mar. 2002), available at http://www.castlecoalition.org/top_10_abuses/; see also Order Granting Motion, Motion to Expedite the Briefing and Resolution of Appeal, *Las Vegas Downtown Redevelopment Agency v. Pappas* (Nev. Sup. Ct. 2002 (No. 39255)); Respondents' Brief at 3 (No. 33812) (attorneys for respondents, A. Grant Gerber & Assoc., Elko, NV).

423. See, e.g., Dave Newbart, *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,”⁴²⁴ 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.⁴²⁵ Independent analysts in the twenty-first century needed to follow the money to recognize the “gold fever” mesmerizing many decisionmakers dealing with legalized gambling.⁴²⁶ Once under oath in legal discovery

proposed Rosemont casino.” *Id.*; see Tim Novak, *Mob Ties Sink Rosemont Casino*, CHI. SUN-TIMES, Jan. 31, 2001, at 1; see also Michael Higgins & Douglas Holt, *Gaming Board Rejects Rosemont Casino Bid*, CHI. TRIB., Jan. 31, 2001, § 1, at 1.

424. For examples of regulatory problems, see Brett Pulley, *The Spinning Door: A Special Report; Regulators Find Easy Path to Gambling Industry Jobs*, N.Y. TIMES, Oct. 28, 1998, at A1.

425. *Id.*; see *supra* note 49 and accompanying text. See also *When Gambling Comes to Town*, *supra* note 49, at 36-38; *Casino Backlash*, *supra* note 28, at A1. See generally Loretta Tofani, *Gambling Industry Seeks a Winning Image*, PHILA. INQUIRER, July 6, 1998, at A1; David L. Wheeler, *A Surge of Research on Gambling is Financed in Part by the Industry Itself*, CHRON. HIGHER EDUC., Mar. 5, 1999, at A17, A18. Several articles in the *L.A. Times* ran each day beginning the week of December 13, 1998. See, e.g., *Casino Backlash*, *supra* note 28; Matea Gold, *Treatment Options Scarce for Gamblers*, L.A. TIMES, Dec. 15, 1998, at A1; April Lynch, *All Bets Are Off*, MOTHER JONES, July/Aug. 1997, at 38-39; April Lynch, *Heavy Betting*, MOTHER JONES, July/Aug. 1997, at 40-41.

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.

For examples of the Indiana Legislature's response to public pressure to enact a common-law duty by casinos to pathological gamblers as generated by *Williams*, see Statement of Walter Schulz, Indiana Coalition Against Legalized Gambling, before the Indiana Gaming Commission, Sept. 12, 2003; Lesley Stedman Weidenbener, *Tougher Gambler Ban Program Urged: Indiana Casinos Should Monitor Excessive Losses, Lobbyist Insists*, COURIER-J. (Louisville, KY), Oct. 25, 2003; Lesley Stedman, *Self-Imposed Bans On Gamblers Studied: All 10 Casinos in the State Will Share Lists*, COURIER-J. (Louisville, KY), July 12, 2003; Editorial, *Gamblers Beware: It's Still Your Fault*, INDIANAPOLIS STAR, Mar. 12, 2003; Russ Pulliam, *The Gambling Industry, Like Tobacco, Could End Up Liable*, INDIANAPOLIS STAR, Mar. 2, 2003.