Emory Law Journal

Volume 73 | Issue 1

2023

Jackpot! The Gambler's Chance to Win Big Through RICO: The Definitive Argument of Liability Against the Gambling Industry

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JACKPOT! THE GAMBLER'S CHANCE TO WIN BIG THROUGH RICO: THE DEFINITIVE ARGUMENT OF LIABILITY AGAINST THE GAMBLING INDUSTRY

ABSTRACT

Compulsive gamblers and their family members have had a long, unsuccessful history of lawsuits against the gambling industry in the United States. With the emergence of online gambling and sports betting, the gambling industry is becoming less and less regulated, preying on compulsive gamblers and nurturing their addiction for profit. Although gambling is diagnosed as a legitimate addiction disorder in medicine, the law has been slow and even reluctant to recognize and grant legal protection to addicted gambler plaintiffs. However, the recent wave of litigation brought against a similar addiction-for-profit industry, the opioid industry, seems to suggest there is an alternative solution for compulsive gambler plaintiffs to seek relief for the gambling industry's fraudulent and deceptive practices.

This Comment argues that compulsive gamblers should allege that the gambling industry used the United States mail system to defraud them in violation of the civil Racketeer Influenced and Corrupt Organizations Act (RICO). First, this Comment highlights the deceptive practices of the gambling industry and explains why it has continued to profit without any legal accountability thus far. Through the mutually beneficial relationship between the state governments and the casinos, state governments can receive a cut of revenue generated each year and even hold proprietary interests in the casino machines' software. In return, casinos are able to run their businesses with minimal regulations and legal immunity from self-exclusion programs.

Next, this Comment breaks new ground by arguing that compulsive gamblers can leverage recent RICO litigation against opioid pharmaceutical companies in their own RICO claims. Compulsive gamblers bringing civil RICO claims against gambling companies can make comparisons between the opioid industry's fraudulent industry-wide tactics and the gambling industry's practices.

Finally, this Comment highlights the new boom of sports betting after its legalization in 2018. Following the establishment of a new gambling industry, the timing is perfect for compulsive gambler plaintiffs to pursue legal

accountability in the courts. Furthermore, the hidden tool of internal discovery documents released to the public will aid compulsive gamblers in fighting for legal recourse and government regulatory action to stop the manipulations of the gambling industry.

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INTRODUCTION

As a young attorney, Arelia Margarita Taveras established a successful career helping others. Her firm represented victims and their families affected by the American Airlines Flight 587 plane crash in November of 2001, and in her own time, she wrote a book to help women navigate child support in the court systems.[1] In 2000, she was named one of "21 New Yorkers to Watch in the 21st Century" by New York Daily News.[2]

However, by the end of 2004, she was spending days in Atlantic City's Resorts Casino Hotel, neither eating nor sleeping and cleaning her teeth with disposable wipes so she wouldn't have to leave the blackjack table.[3] At the height of her addiction, Taveras was gambling five days a week and losing an average of $5,000 an hour.[4] During a five-day gambling stint in June of 2005, she recounted surviving on nothing but orange juice in plastic cups and Snickers bars provided by casino staff.[5] Eventually, her gambling habits came to a head. In March 2009, Taveras pled guilty to stealing $130,000 from her clients' escrow accounts and was eventually sentenced to three to nine years in prison.[6] Taveras was disbarred, lost her law practice, her apartment, and her parents' home.[7] Her total losses amounted to nearly $1 million in five years between 2000 and 2005.[8]

But Taveras argued that the casinos had some responsibility.[9] In 2008, Taveras filed a lawsuit against multiple casino resorts, including Resorts Casino Hotel (Resorts Casino) and Bally's Park Place (Bally's).[10] She claimed the casinos nurtured her gambling addiction by encouraging her with "casino event promotions, gambling tournament invitations, promotions for free televisions,

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1 Wayne Parry, *Compulsive Gambler Chases $20M Long-shot Suit Against Casinos*, AM. POL'Y ROUNDTABLE (July 23, 2018), https://aproundtable.org/gambling-ruins-lives/compulsive-gambler-chases-20m-long-shot-suit-against-casinos/. The book is titled *The Gangsta Girls' Guide to Child Supports*, a guidebook for women with "deadbeat dads" to receive child support with the court systems. *Id.*

2 *Id.*

3 *Id.*

4 Taveras v. Resorts Int'l Hotel, Inc., No. 07-4555, 2008 WL 4372791, at *1 (D.N.J. Sept. 19, 2008).

5 Parry, *supra* note 1.

6 *Gambler Who Sued Casinos Jailed for Theft*, NBC N.Y. (Mar. 27, 2009, 1:45 PM), https://www.nbcnewyork.com/news/local/gambler-who-sued-casinos-jailed-for-theft/1912671/; Nathan Duke, *Corona Lawyer Taveras Gets Prison in $130K Scam*, QNS (May 4, 2009), https://qns.com/2009/05/corona-lawyer-taveras-gets-prison-in-130k-scam/.

7 Parry, *supra* note 1.

8 *Id.* Most of her spending was between the later part of 2004 and 2005. *Taveras*, 2008 U.S. Dist. LEXIS 71670, at *4. Taveras spent $850,000 in Atlantic city in those two years. Parry, *supra* note 1.

9 *See Taveras*, 2008 WL 4372791, at *2.

10 *Id.*

as well as free limousine rides, hotel rooms, food, entertainment, and gift coupons."[11] Taveras had a "host" at Resorts Casino, a liaison from the casino who gave her regular calls to promote casino specials and to schedule hotel rooms and transportation for her.[12] She also alleged that Bally's created a police-manned separation between her and her parents, threatening to arrest her parents if they tried to take her away from the casino.[13] In her suit, Taveras alleged twelve causes of action, grouped into three categories: tort claims (including Negligence, Breach of Common Law Duty of Care, Intentional Infliction of Emotional Distress, and Strict Liability), contract claims (including Breach of the Implied Covenant of Good Faith and Fair Dealing), and claims of statutory violations (including RICO).[14] The court, however, dismissed Taveras's pleading for failure to state a claim.[15]

Taveras is not the only compulsive gambler plaintiff who failed in her attempt to get relief from the gambling industry. In *Jackson v. Boehringer Ingelheim Pharms*, the plaintiff alleged two claims against the casino defendant: failure to warn and loss of consortium.[16] The court dismissed the action, finding it "unreasonable that Missouri would impose these duties upon casinos."[17] In *Harrah's Atl. City Operating Co. v. Dangelico*, a casino sued a compulsive gambler defendant on the grounds of debt collection, and as an affirmative defense, the defendant argued that the casino "should not have extended him credit in the first place because he [was] a compulsive gambler."[18] The court, however, dismissed the defendant's affirmative defense, stating it was "not prepared to recognize a duty that [the casino] owed defendant to deny him

[11] *Id.*

[12] Arelia Taveras, Taxation by Exploitation, Remarks at the Stop Predatory Gambling Conference (Sept. 2008), https://stoppredatorygambling.org/wp-content/uploads/2012/12/Arelia-Taveras-Speech-titled-Taxation-By-Exploitation1.pdf.

[13] *Id.*

[14] *Taveras*, 2008 WL 4372791, at *3. Taveras also claimed Intentional and Reckless Disregard for Plaintiff's Safety, Respondeat Superior, Negligent and Intentional Infliction of Emotional Distress, breaches of Unjust Enrichment, and violations of the Bank Secrecy Act and IRS regulations regarding the obligation to report cash transactions in excess of $10,000. *Id*.

[15] *Id.* at *8–9.

[16] Jackson v. Boehringer Ingelheim Pharms., No. 06-0969-CV-W-DW, 2007 U.S. Dist. LEXIS 111784, at *3–4 (W.D. Mo. Mar. 16, 2007). The plaintiffs argued that the casino defendants failed to warn plaintiff "of the dangers of gambling" and "failed to warn customers of the 'near miss' programming installed on its slot machines." *Id.* at *4.

[17] *Id.* at *6.

[18] Harrah's Atl. City Operating Co. v. Dangelico, No. A-2158-17T3, 2019 WL 1869008, at *1 (N.J. Super. Apr. 26, 2019). The casino plaintiff lent the defendant $160,000, which the defendant failed to pay back. *Id.* The plaintiff commenced this action to seek judgment against the defendant. *Id.*

credit."[19] The message from the courts is clear: they are unwilling to impose any liability onto the gambling industry.

The courts' unwillingness to hold casinos liable is irresponsible because the social cost of compulsive gambling is high. In 2018, a study showed suicide rates were about fifteen times greater for individuals aged twenty to seventy-four with compulsive gambling disorder.[20] For individuals under twenty years old, the suicide rates were about nineteen times greater, and for those over seventy-four, the rates were about ten times greater.[21] Even compared to other addictions, compulsive gambling disorder has one of the highest suicide rates.[22]

This problem is nationwide. The National Council on Problem Gambling estimates that two million adults in the U.S. meet the criteria for gambling disorder, and another four to six million people struggle with problem gambling.[23] The addiction affects not only the individual but their family life.[24] Lifetime divorce rates for compulsive gamblers are 53.5%, as compared to 18.2% for non-gamblers.[25] High divorce rates are not surprising, considering compulsive gamblers incur serious financial risk, including "huge credit-card debts, second or even third mortgages, illegal loans, formal and/or informal loans, loss of rent, or mortgage funds, resulting in homelessness or eviction or misuse of irreplaceable retirement funds or savings."[26] In addition, physical and verbal abuse is more frequent in couples where one member is a compulsive gambler.[27] Studies also show that children of compulsive gamblers were at much greater risk for "health-threatening behaviors," such as drug abuse, educational difficulties, and emotional disorders.[28]

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19 *Id.* at *2.

20 Anna Karlsson & Anders Håkansson, *Gambling Disorder, Increased Mortality, Suicidality, and Associated Comorbidity: A Longitudinal Nationwide Register Study*, 7 J. BEHAV. ADDICTIONS 1091, 1093 (2018). Conducted in Sweden, this was the first longitudinal nationwide study on suicide and compulsive gambling disorder ever done. *Id.* at 1095. A total of 2,099 individuals were included, ranging from eighteen to eighty-three years old. *Id* at 1093. Seventy-seven percent were men, and all participants were followed for an average of 4.7 years. *Id.*

21 *Id.*

22 Colleen Jones, *The Impacts of Problem Gambling*, BEHAV. HEALTH NEWS, (Oct. 1, 2020), https://www.behavioralhealthnews.org/the-impacts-of-problem-gambling/.

23 *FAQ*, NAT'L COUNCIL PROBLEM GAMBLING, https://www.ncpgambling.org/help-treatment/faq/ (last visited Aug. 26, 2023).

24 *See infra* notes 25–28.

25 Martha C. Shaw et al., *The Effect of Pathological Gambling on Families, Marriages, and Children*, 12 CNS SPECTRUMS 615, 618 (2007).

26 *Id.*

27 *Id.*

28 *Id.* at 620.

This Comment argues that compulsive gamblers should bring civil RICO suits against gambling companies. Because RICO protects citizens against racketeering activity from criminal enterprises, compulsive gamblers can argue that these companies engaged in mail fraud by mailing fraudulent advertisements to them for monetary gain.[29] Despite the court's holding in *Taveras v. Resorts Int'l Hotel, Inc.*,[30] compulsive gamblers can still successfully argue that casinos have violated RICO by committing racketeering predicated on mail fraud.

Part I of this Comment takes a deep dive into the casino industry by looking at how the mechanics of casino machines and the casino's marketing and advertising schemes nurture addictive gambling behaviors in their patrons. Section A exposes how virtual reel mapping technology, found in all modern slot machines in casinos, creates winning misrepresentations that promote continuous play from its patron. Section B explains the credit loaning and ATM functions that allow patrons to spend recklessly, and section C details the exploitative nature of casino player tracking and targeted advertising.

Part II evaluates reasons why the gambling industry has been protected by the law, including the industry's mutually beneficial economic relationship with the states, discussed in section A, and its powerful lobbying efforts to encourage favorable state legislation and liability protection from compulsive gambler plaintiffs, discussed in section B. Lastly, section C criticizes self-exclusion programs—programs set in place by legislation with the outward purpose of protecting compulsive gamblers that, in practice, serve to shift all liability away from the casinos.

Part III introduces the opioid industry and the recent increase in RICO cases predicated on mail fraud brought against the industry. Section A examines the shared characteristics of the opioid industry and the gambling industry, notably that both industries profit off of and nurture the addictions of their consumers. Section B lays out the elements of a RICO claim predicated on mail fraud and discusses successful criminal RICO prosecutions and civil RICO suits brought against the opioid industry. Section C explains why consumers have had success pursuing civil RICO claims against opioid producers. This section also details the opioid industry's practices, such as targeted marketing schemes and influential lobbying power in state legislation.

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[29] *Racketeer Influenced and Corrupt Organizations Act (RICO)*, NOLO, https://www.nolo.com/legal-encyclopedia/content/rico-act.html (last visited Aug. 26, 2023).

[30] Taveras v. Resorts Int'l Hotel, Inc., No. 07-4555, 2008 WL 4372791 (D.N.J. Sept. 19, 2008).

Part IV explains how compulsive gamblers can pursue civil RICO claims against the gambling industry by arguing in sections A and B that past dismissed RICO cases against the gambling industry should not be considered binding precedent. Section C lays out how gamblers can prove each element of civil RICO and use the strategy of comparing the opioid industry to the gambling industry.

Lastly, Part V looks at the future of the casino industry, including how the sports betting boom and the public's ability to obtain discovery documents could create a new wave of legal accountability for the gambling industry. Sports betting, a new branch of the gambling industry, is already drawing public attention to the industry's deceptive practices. Section A argues that the unregulated nature of sports betting makes the compulsive gambler plaintiff's RICO claim stronger, and section B discusses the tool of discovery documents and how it can propel a wave of legal recourse and regulation against the gambling industry.

I. MANUFACTURING ADDICTION THROUGH CASINO DESIGN

RICO protects consumers against commercial fraud, bribery, and corruption by enterprises and corporations.[31] To establish that the casino industry violated RICO, this Part takes a deep dive into the different mechanics of casino machines and industry-wide marketing tactics that nurture addictive gambling behaviors in a fraudulent way. Section A focuses on the architectural design of the casino machine, specifically analyzing how virtual reel mapping technology has enabled casinos to profit tremendously off misrepresentations made by the slot machines to the player. Section B draws attention to methods used by casinos to increase and nurture patron spending, such as reckless loaning and limitless ATM withdrawals. Lastly, section C evaluates how casinos track player data and exploit that data to extend the patron's time at the machine and increase the patron's spending at the machine.

A. Virtual Reel Mapping and the Art of the "Near Miss"

Casinos are intentionally and carefully designed with two goals in mind: (1) extending the gambler's time spent at the machine and (2) increasing the total

[31] 18 U.S.C. § 1962(c); *Racketeering and RICO Violations*, JUSTIA, https://www.justia.com/criminal/offenses/white-collar-crimes/racketeering-rico/(last visited Aug. 23, 2023).

amount of money spent at the machine.[32] Technological advances have played a large role in casinos' ability to achieve these two goals.[33] One of the most revolutionary innovations in the gambling industry is "virtual reel mapping," invented in 1982.[34]

Virtual reel mapping gives designers control of the odds of the game independently from the mechanics of the machine's actual reels through code, allowing game manufacturers to distort chance and precisely manipulate game outcomes.[35] Where a mechanical slot machine had physical winning odds based on the amount of stops, electronic machines are now embedded with virtual reels of more than 512 virtual stops, making the odds of a jackpot as rare as one in 137 million.[36]

In addition to distorting the odds, virtual reel mapping created the phenomenon of the "near miss" effect.[37] Using virtual reels, designers code the machines so that the reels disproportionately stop at points directly above or below the winning symbols on the physical reels.[38] Known as "clustering," this technique creates an effect where the player sees himself "not constantly losing but constantly nearly winning."[39] Multiple studies have shown that near misses lead to increased persistence in gambling.[40]

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32 *See* NATASHA DOW SCHÜLL, ADDICTION BY DESIGN: MACHINE GAMBLING IN LAS VEGAS 52 (Fred Appel ed., 2012).

33 *Id.* at 62.

34 John Rosengren, *How Casinos Enable Gambling Addicts*, THE ATLANTIC (Dec. 2016), https://www.theatlantic.com/magazine/archive/2016/12/losing-it-all/505814/.

35 *See* SCHÜLL, *supra* note 32, at 86–87.

36 *Id.* at 87. To illustrate the odds of a physical machine based on the number of stops, consider the following example: if a machine has 22 stops, that means that the maximum number of combinations, with three reels, would be 22 to the power of 3, or 10,648. *Id.* at 86. That means that the odds of hitting a jackpot on a machine, considering one jackpot symbol per reel, would be 1 in 10,648. *Id.* Therefore, a $1 machine cannot offer a jackpot greater than $10,648 or the casino would risk losing money. *Id.*

37 Rosengren, *supra* note 34.

38 SCHÜLL, *supra* note 32, at 92.

39 Kevin A. Harrigan, *Slot Machines: Pursuing Responsible Gaming Practices for Virtual Reels and Near Misses*, 7 INT'L J. MENTAL HEALTH & ADDICTION 68, 74, 79 (2009).

40 Denis Côté et al., *Near Wins Prolong Gambling on a Video Lottery Terminal*, 19 J. GAMBLING STUD. 433, 437 (2003). In one particular study, researchers found that the specific non-winning combination of X-X-O increased play persistence, even when the monetary reward was constant. *Id.* Another study found that near win combinations "caused gamblers to continue playing in the expectation that a win is imminent." ALEX BLASZCZYNSKI ET AL., THE ASSESSMENT OF THE IMPACT OF THE RECONFIGURATION ON ELECTRONIC GAMING MACHINES AS HARM MINIMISATION STRATEGIES FOR PROBLEM GAMBLING 84 (2001); *see also* Lloyd H. Strickland & Frederic W. Grote, *Temporal Presentation of Winning Symbols and Slot-Machine Playing*, 74 J. EXPERIMENTAL PSYCH. 10, 12 (1967); Jeffrey I. Kassinove & Michell L. Schare, *Effects of the "Near Miss" and the "Big Win" on Persistence at Slot Machine Gambling*, 15 PSYCH. ADDICTIVE BEHAV. 155, 157 (2001).

Not only are the odds of winning now distorted and decreased a hundred-fold from what a mechanical slot machine would provide, but gaming manufacturers are intentionally designing their electronic slot machines to imitate a mechanical machine in order to preserve that illusion.[41]

Gaming companies, for example, intentionally furnish the handles of their slot machines "with springs and weights to simulate the feel of the original item."[42] Further, game designers code features into the slot machines, such as a "STOP" or "SPIN AGAIN" button, which allow players to prematurely stop the spinning of the reels before its automatic end.[43] These functions intentionally portray a false feeling of control to the player, as outcomes are already determined right at the press of the first "SPIN" button.[44] The architectural design and presentation of the electronic slot machine advertise to the patron that "a mechanism is being actuated in direct response to their actions," when in reality, it is computing "a physical functionality and degree of user control that no longer exist[s]."[45]

The fraudulent nature of virtual reel mapping and its coding and design manipulations have not been lost on the gambling industry. The industry recognizes the deceptive quality of virtual reel mapping and its particular role in generating profits from compulsive gamblers.[46] In the Nevada Gaming Commission Hearings in 1988 and 1989, Alan Maiss, President of Bally Distributing of Nevada, testified that "from a visual standpoint, [the virtual reel] is misleading to the slot machine player."[47] Ray Pike, legal counsel for IGT, also raised concerns that "there is a deception involved with this kind of machine," referring specifically to near misses.[48] "I think it is false advertising."[49]

Even though the casino industry recognizes the machine's fraudulent nature, it turns a blind eye to the severe consequences these misrepresentations have on its addicted patrons. Those in the industry even attempt to discredit others that employ the same methods to be the sole profiters.[50] In 1988, a set of legal hearings took place where a Japanese gambling company called Universal

41 SCHÜLL, *supra* note 32, at 82–83.
42 *Id.* at 83.
43 *Id.* at 83–84.
44 *See id.* at 84.
45 *Id.* at 83.
46 *See infra* notes 47–49.
47 Harrigan, *supra* note 39, at 71.
48 *Id.* at 72.
49 *Id.*
50 *See* SCHÜLL, *supra* note 32, at 93.

testified before the Nevada Gaming Control Board.[51] The issue was whether Universal's slot machine programming—using "secondary decisions" to create near miss effects—was fraudulent to casino patrons.[52] The "secondary decision" method called for the machine to first determine whether the outcome was a win or a loss.[53] If a loss, it would then choose from a set of losing displays and would frequently display near misses as their losing combinations.[54] The Board banned "secondary decisions," and the Regulations of the Nevada Gaming Commission and State Gaming Control Board were rewritten to reflect this ban, stating: "The gaming device must not make a variable secondary decision which affects the result shown to the player."[55]

The regulations did not ban or even mention near miss outcomes caused by clustering.[56] The Board recognized the harm that displaying near misses have on casino patrons, and they also acknowledged the deceptive quality of virtual reel mapping. It is as if "the commissioners found a way to simultaneously legitimize and legislate against—or *appear* to legislate against—a set of misleading industry design tactics that had flourished under their watch, and that had contributed substantially to the larger economic flourishing of the industry."[57] Hypocritically, the gambling commissions denounced the coding mechanism of "secondary decisions" by the Japanese, while affirming the legitimacy of clustering used by the Americans, even though both produce the *same* fraudulent near miss effect for the patron.[58]

B. Reckless Loaning and Limitless Spending at the ATM

Although casinos have seen tremendous revenue through virtual reel mapping in their machines, they also profit from addicted gamblers by recklessly enticing the patron with limitless funds and easy access to ATM machines. One unique tactic used by the casino industry is marker signing.[59] To keep patrons spending money on the casino floor, casinos commonly grant credit in the form

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[51] *Id.*

[52] Harrigan, *supra* note 39, at 73.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 73–75.

[56] *Id.* at 75; *see* SCHÜLL, *supra* note 32, at 93.

[57] SCHÜLL, *supra* note 32, at 94.

[58] *Id.* at 93–94. Critics have been quick to label this as simply a ploy "to protect American gaming companies against foreign competition." *Id*. at 94.

[59] *See* Liz Benston, *Casinos Burned by Gamblers Who Skip Out on Markers*, LAS VEGAS SUN (Jan. 30, 2011, 2:00 AM), https://lasvegassun.com/news/2011/jan/30/taking-casinos-ride/.

of an interest-free loan, called markers.[60] With no additional background checks, casinos are eager to extend additional lines of credit to their patrons with just a nod from the casino host.[61] At any time, the biggest casinos have hundreds of unpaid markers, which can amount to millions of dollars per year.[62] Nevertheless, this is an unusual risk in the business world that casinos are willing to take.[63] As a key marketing tool, markers make up as much as forty percent of the wagering amount at casinos, and casinos have incentives to encourage gamblers to lose more money and make a profit against the credit lost.[64] Even when the casino "knew the gambler owed money at other Las Vegas resorts," they turn a blind eye and extend up to "hundreds of thousands, even millions' worth of credit."[65]

Another casino method to increase spending is player loyalty programs.[66] If patrons sign up for the player loyalty programs, they are given player cards onto which they can transfer any wins and replenish any funds.[67] In addition, gamblers are able to connect their credit card, debit card, and checking account information to their casino player cards for easy access to funds for gambling.[68] With the emergence of ticket-in/ticket-out (TITO) technology in 1999, casinos were able to minimize the time away from the machines, and maximize the money spent by gamblers "paying out credits in the form of bar-coded slips of paper printed instantly at the machine, redeemable at self-service kiosks or immediately reusable at another machine."[69] TITO increased the overall play time by twenty percent, cementing its place as a part of most casino machines.[70]

Casinos also feature ATM kiosks that include debt and cash advance functions, which allow players to bypass their daily withdrawal limits and obtain as much cash as they desire.[71] A Bank of America representative even testified that when casino patrons hit their ATM limit, "[the bank's] system will allow

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60 *Id*.
61 *Id.*
62 *Id.*
63 *Id.*
64 *Id.*
65 *Id.*; *Las Vegas Criminal Defense Lawyers, Criminal Defense Attorneys Las Vegas NV*, GREG KNAPP CRIM. DEF., https://www.gregknappcriminaldefense.com/ (last visited Aug. 26, 2023).
66 SCHÜLL, *supra* note 32, at 69.
67 *Id.*
68 *Id.*
69 *Id.* TITO also benefitted casinos by reducing the labor costs needed for change handlers and stocking coins. *Id.* at 69–70.
70 *Id.* at 69.
71 *Id.* at 70.

[patrons] to access their credit card without a PIN to receive additional cash."[72] This system furthers the casino's ultimate goal to get the ATMs as close to casino machines as possible, so that gamblers can replenish their funds without pausing their play.[73]

Whether ATM functions can actually be coded into casino machines is governed by state law.[74] While Nevada law prohibits merging ATM functions into casino machines,[75] other state jurisdictions allow it, and companies have continued to develop technologies that merge ATM functions and casino machines.[76] For instance, Global Cash Access designed a financial access system, compatible with TITO, called the Ticket-Out Debit Device ("TODD").[77] TODD allows gamblers to access their funds without leaving their seats by mounting a small terminal on the slot machine through which gamblers can swipe their debit cards and transfer money directly into the machine.[78] Unlike typical ATM machines, "there is no limit as long as funds are available."[79]

The casino industry continues to innovate new gaming systems and functions designed to entice patrons to spend past their limits.[80] Most alarming, casinos are willing to push the bounds of legal limits by placing ATM functions as close to the slot machine as they can.[81] Moreover, casinos recklessly give out lines of credit to patrons to spend, even when they are aware of outstanding debt in the patron's credit history.[82] Casinos have no fear absorbing debt from their patrons

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72 *Id.*

73 *Id.* at 71.

74 *See id.* at 71–72.

75 *Id.* at 71; 41 Nev. Rev. Stat. Ann. § 463.3557; 41 Nev. Rev. Stat. Ann. § 463.016425 (defining "interactive gaming").

76 SCHÜLL, *supra* note 32, at 72. Hyosung America launched ATM kiosks with "immersive touchscreens" and offering benefits, including the ability to make cryptocurrency purchases, TITO functions, and barcode scanners. *Irving-Based Hyosung America Launches ATMs for the Future in Cash, Crypto, Gaming, and More*, DALLAS INNOVATES (July 21, 2022), https://dallasinnovates.com/irving-based-hyosung-america-launches-new-atms-for-cash-crypto-gaming-and-more/. These machines allow for multiple modes of withdrawing funds with gives players flexibility and more availability to their different funds. *Id.* PlayOn Devices, which debuted in November 2019, is a tabletop ATM that pays out casino chips instead of currency. Michael Kaplan, *These "Tabletop ATMs" Could Spell Disaster for Gamblers*, N.Y. POST (Nov. 21, 2019, 8:06 PM), https://nypost.com/2019/11/21/these-tabletop-atms-could-spell-disaster-for-gamblers/.

77 SCHÜLL, *supra* note 32, at 72.

78 *Id.*

79 *Id.*

80 *See supra* Parts I.A–B.

81 *See supra* Part I.B.

82 *See supra* notes 71–73 and accompanying text.

because any money lost by the patron from the spending of credit profits the casino in the aggregate.[83]

C. Exploitation of Player Tracking Data

Casinos not only design gambling machines and nurture reckless spending by patrons to maximize profits, but also employ aggressive tracking and marketing tactics to ensure that gamblers stay at the casino longer and spend more money. Specifically, casinos manipulate gambler spending and addictive tendencies through player tracking.[84] With the rise of player loyalty programs and distributions of personalized player loyalty cards, casinos quickly discovered that these loyalty programs "were not only a way to gather a wealth of data . . . but were also a way to incentive [] continued patronage . . . ."[85] Through each swipe of the loyalty cards, a casino's database is now able to record "the value of each bet [gamblers] made, their wins and losses, the rate at which they pushed slot machines play buttons, when they took breaks, and what drinks and meals they purchased."[86]

From the vast collection of data, casinos now focus less on how much money a gambler spends in one sitting, but how much money a gambler spends over time.[87] Casinos have the ability to track the location of the player, showing how many trips were made to the casino within a period of time, what days and times the player went, which sections of the casinos the player frequented, and even the gambling preferences of the player's spouse.[88] When gamblers use their cards elsewhere, casinos are now able to follow a gambler outside of the casino, tracking their whereabouts at the local "taverns, supermarkets, pharmacies, and convenience stores."[89] Using the data collected, casinos create personalized and detailed profiles for each patron, allowing casinos to calculate how much money a patron is likely to lose in the casino over their lifetime and market specifically to their biggest spenders.[90]

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83 *See supra* notes 63–65 and accompanying text.
84 SCHÜLL, *supra* note 32, at 144.
85 *Id.*
86 *Id.*
87 *See id.*
88 *Id.* at 147.
89 *Id.* at 146.
90 *See id.* at 147, 154. For example, Harrah's Casino uses the most advanced system in the industry, scoring patrons on whether they are profitable or not through measures such as how recently they last visited, how often they visit the casino, and how much they spend. *Id.* at 153.

Casinos even use algorithms to determine a player's personalized "pain point."[91] A pain point is the threshold point up until which a player can lose in a game and still feel satisfied.[92] When the software notes that a gambler is approaching his or her pain point, it signals to the casino to dispatch a casino employee, called a "Luck Ambassador," to reward the gambler with gifts such as meal coupons and gambling vouchers.[93] This process illustrates why casinos value the player loyalty program and why collecting personalized data on each patron is so vital—casinos can use these personalized profiles to target their marketing schemes and coerce gamblers back into the game.

Because the casino now has data on the frequency and times that patrons usually enter the premises, they can also now note whenever a patron deviates from that schedule.[94] A gambler who is "overdue" for a trip to the casino gets mailed an advertisement, followed by a phone call, to "motivate" them again.[95] Further, a gambler who has a high "predicted lifetime value" score (measured by how much the player likely to lose to the casino over his or her lifetime) will receive special treatment from the casino, "including quicker responses from telephone systems that are programmed to bounce incoming phone numbers off a customer database and place callers in the queue according to their value tier."[96] Casinos name the biggest spenders "whales," who then become the most sought-after repeat customers.[97] Casinos market aggressively to their "whales," offering customized perks, VIP treatment, personal casino employees, and off-limit machines that are offered first for the "whale" to play.[98]

Casinos not only target "whales," but are also known for targeting older adults because "they fill the floors during off-peak hours."[99] Casinos employ especially aggressive marketing onto the elderly, providing free daytime entertainment such as polka dancing and magic shows, complimentary shuttles to and from the casino and senior centers, and even adult diapers and diabetic needle disposals in the bathrooms.[100] "Third of the month" clubs are also a common marketing tactic in casinos, where the casinos provide the elderly with

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91 *Id*. at 154.
92 *Id.*
93 *Id.*
94 *Id.* at 153–54.
95 *Id.* at 154.
96 *Id.*
97 Rosengren, *supra* note 34.
98 *Id.*
99 John Rosengren, *The Casino Trap*, AARP (Oct. 2016), https://www.aarp.org/money/scams-fraud/info-2016/casino-traps-older-patrons.html.
100 *Id.*

free trips and housing and invite them to gamble away their newly received Social Security checks.[101]

Casino employees are also encouraged to market aggressively, often receiving bonuses tied to the amount casino patrons spend past their expected losses.[102] Casino employees are motivated to befriend "whales" and lure them with perks such as complimentary food and drinks, limo service, golf excursions, and five-star hotel suites.[103] If a customer has not signed up to be a part of the casino's player loyalty program, software systems flag that individual, and casino representatives are quickly dispatched to persuade the patron to sign up.[104]

In Bally's, a biometric recognition system is used so that if a player interacts with a gambling machine without a player card, then a camera on the machine "captures the player's image and stores it along with their game play."[105] Even without knowing their name, the casino can create a profile for the anonymous patron and track his or her movements and gambling tendencies, which then can be used to personalize the marketing as a way of convincing the patron to join the loyalty program.[106] The casino will not lose any opportunity to collect data from the patron.[107]

The gambling industry is aggressive in its efforts to maximize profits from compulsive gamblers. The industry is holistic in its endeavors, targeting the mechanics of its machines, offering seemingly limitless spending opportunities, and exploiting player data to engage with and advertise to patrons at their most vulnerable. Although the industry's deceptive schemes are known, it continues boldly, because strong regulatory action is absent in the law.[108] The casino industry is a powerful financial institution, and states protect the industry through legislation, making the casinos virtually untouchable from any liability in the courts.[109]

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101 *Id.*
102 *Id.*
103 Rosengren, *supra* note 34.
104 SCHÜLL, *supra* note 32, at 152.
105 *Id.* at 153.
106 *Id.* at 152.
107 *See id.*
108 *See infra* Part II.
109 *See infra* Part II.

II. LEGAL PROTECTION IN THE NAME OF ECONOMIC PROSPERITY

Although casinos engage in fraud to profit off of patrons, there has not been any strong state regulatory action set in place or any recourse available in the courts for the exploited compulsive gambler. This Part explains the mutually beneficial relationship between the law and the casino industry and the mechanisms by which the law continues to protect casinos from liability. Section A brings to light the economic relationship between states and the casino industry and discusses how much states profit off a thriving gambling market. Section B explains the lobbying efforts by the casino industry to keep the government in the dark about its design and marketing tactics, and section C concludes by recognizing the legislation put in place to shift liability away from the casinos through self-exclusion programs.

A. How the State Profits from the Casino

Many states have a strong interest in growing and fostering the gambling industry for the benefit of their respective state economies. As an industry, casinos have seen an increase in revenue and profits made in recent years.[110] The American Gaming Association reports that in 2019, the Las Vegas strip alone generated $6.59 billion in revenue.[111] High revenue-generating industries such as the gambling industry are desirable for states, as local governments collect tax on them.[112] In 2020, it was reported that state and local governments collected roughly $30 billion in tax from the gambling industry.[113] Unsurprisingly, most states endorse and advance state-approved gambling and are hesitant to interrupt this vital source of taxation revenue.[114]

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[110] *See State of the States 2020*, AM. GAMING ASS'N (June 3, 2020), https://www.americangaming.org/resources/state-of-the-states-2020/.

[111] *Id.* In Massachusetts, there was a 163.13% increase in revenue, from $273 million in 2018 to $718 million in 2019. *Id.*

[112] *See Lotteries, Casinos, Sports Betting, and Other Types of State-Sanctioned Gambling*, URB. INST., https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/lotteries-casinos-sports-betting-and-other-types-state-sanctioned-gambling (last visited Aug. 26, 2023). Lumped in as a "sin tax," governments collect a share of the revenue generated by casinos by taxing whatever the casinos collect after paying out winning wagers. *Id*. These state taxes can range widely, with Nevada taxing at less than 7% and Pennsylvania taxing at more than 50%. Stephanie Simon, *(State) House Rules in Kansas Casino*, WALL ST. J. (Feb. 4, 2010, 12:01 AM), https://www.wsj.com/articles/SB10001424052748703338504575041433293903748. States such as Michigan, Louisiana, and Colorado fall in the middle, taxing casinos at a rate of 20%. *Id.*

[113] *Lotteries, Casinos, Sports Betting, and Other Types of State-Sanctioned Gambling*, *supra* note 112.

[114] *Id.*

But that's not where the relationship between states and gambling ends. The state of Oklahoma collects roughly $139 million in exclusivity fees from casinos in exchange for a monopoly on the industry in that state.[115] The state of West Virginia holds a proprietary interest in the slot machines' software.[116] The state of Kansas even *owns* a casino.[117]

The first state to do so, Kansas owns Boot Hill Casino & Resort and everything inside, including the slot machines, blackjack tables, and the chips.[118] Projected to bring in $40 million in revenue a year, Kansas law specifies that the state treasury will pocket twenty-seven percent of gross gambling revenue.[119] And, because Kansas owns the casino, state officials can monitor a gambler's actions minute-by-minute and also dictate to the casino how high the payout amounts should be on their slot machines.[120]

State governments also seek revenue from tribal casinos.[121] Making up forty-five percent of all gaming revenue in the U.S., the tribal casino sector is an extremely attractive industry for state governments.[122] Although the Indian Gaming Regulatory Act of 1988 prohibits states from taxing tribal casino profits or enforcing a sales tax on casino purchases, states have found other ways to monetize revenues generated from tribal casinos.[123] States leverage regional monopolies and other gambling privileges in exchange for "revenues skimmed off the top of casino profits—as much as 30 to 40 percent in some places."[124] It was even reported that $15 billion of revenue share was paid to federal, state,

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115 Jonathan Small, *Problem Gambling Must Be Part of Compact Debate*, TIMES REC. (Jan. 3, 2020, 11:01 PM), https://www.swtimes.com/story/opinion/columns/2020/01/04/problem-gambling-must-be-part/1960742007/.

116 W. VA. CODE § 29-22A-2(b) ("The Legislature further finds and declares that the state can control, own and operate a video lottery by possessing a proprietary interest in the main logic boards, all erasable, programmable read-only memory chips used in any video lottery equipment or games, and software consisting of computer programs, documentation and other related materials necessary for the video lottery system to be operated.").

117 Simon, *supra* note 112.

118 *Id.*

119 *Id.*

120 *Id.*

121 *The Economic Impact of Tribal Gaming: A State-By-State Analysis*, AM. GAMING ASS'N (Nov. 8, 2018), https://www.americangaming.org/resources/the-economic-impact-of-tribal-gaming-a-state-by-state-analysis-2/.

122 *Id.*

123 *See* Quintin Ellison, *Extortion or Fair Share? State Wants Cut of Casino Revenue in Exchange for Live Dealers*, SMOKEY MOUNTAIN NEWS (Sept. 7, 2011), https://www.smokymountainnews.com/archives/item/4965-extortion-or-fair-share?-state-wants-cut-of-casino-revenue-in-exchange-for-live-dealers.

124 Rosengren, *supra* note 34.

and local governments in 2016.[125] The government has major economic incentives to grow and sustain the gambling industry, while capitalizing on its gross revenue.

B. The Ruthless Lobby of the Gambling Industry

As discussed, the relationship between state and local governments and the gambling industry is a mutually beneficial one. While the state profits from taxing casino revenue and ensuring monopolies in the industry,[126] the gambling industry profits from the state in a different way: legislative power from lobbying.

It is no secret that the gambling industry lobby has great political power. The National Director of Stop Predatory Gambling, Les Bernal, opines that "[p]redatory gambling interests are now the most powerful lobby in the country on the state level because [the] government is a partner with them."[127] According to a report by the National Institute on Money in State Politics, gambling advocates raised more than $167 million in 2008 for nine states deciding on gambling measures.[128] In the year 2022 alone, $35 million has been reported to be raised by gambling lobbies.[129]

Proponents of gambling argue that the revenue generated from the gambling industry benefits local groups and initiatives. For example, the American Gaming Association, one of the largest lobbyists for gambling, promotes on its website that the gambling industry "benefit[s] the states and communities in which casinos operate by funding education initiatives, health insurance programs, infrastructure and economic development projects, responsible gaming programs, and more."[130] However, the damage that minimally regulated gambling inflicts on communities outweighs these modest social benefits. Earl Grinols, an economist at Baylor University, estimated that for each dollar from the gambling industry that profits a local community, the community suffers a three-dollar loss in social costs, whether from increased crime, declining

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125 MEISTER ECONOMIC CONSULTING & AM. GAMING ASS'N, THE ECONOMIC IMPACT OF TRIBAL GAMING: A STATE-BY-STATE ANALYSIS (2018), https://www.americangaming.org/wp-content/uploads/2018/11/Economic-Impact-of-Tribal-Gaming-Two-Pager-11.5.18.pdf.

126 *See supra* Part II.A.

127 Rosengren, *supra* note 34.

128 *Id.*

129 *Lobbying*, OPEN SECRETS (2022), https://www.opensecrets.org/industries/lobbying.php?cycle=All&ind=n07.

130 *State of the States 2020*, *supra* note 111.

productivity, or more money spent on welfare services such as unemployment payments.[131]

There have already been reports of political fraternization between legislators and the casino industry.[132] In August 2022, former Indiana State Senator Darryl Waltz pled guilty to illegally accepting campaign contributions from an Indiana-based casino company, New Centaur LLC.[133] As former Indiana House Speaker John Gregg noted, the gambling lobbyists had "unbelievable power . . . [a]nytime I told them no, they'd go to the governor, they'd go to the Senate, they'd go to other members in the leadership, they'd go to the minority . . . [t]hey were just absolutely everywhere."[134]

C. Self-Exclusion Programs and its Shortcomings

Because gambling lobbyists are "literally going out and buying the political process," state legislatures and regulators have an incentive to write favorable legislation and protect casinos from liability, especially from compulsive gambling lawsuits.[135] The way that state legislatures protect casinos is through the implementation of self-exclusion programs.[136] Enacted in most states and administered by state gaming boards or commissions, self-exclusion programs are a means by which "a patron petitions to be physically removed from the casino if he is discovered on the premises."[137] To request self-exclusion,

> a patron will have to appear in person in any office of the state gaming board or commission, which is also located on the premises of each gaming facility in the state. The patron must provide information about his age, appearance, address, social security number, and his picture will be taken and placed in the security office of the facility . . . . The patron then must sign a state-designed form that summarizes terms and conditions of the program.[138]

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131 Rosengren, *supra* note 34.

132 *See* Russ Pulliam, *Pulliam: Gambling opponents told us this would happen. We should have listened.*, INDYSTAR (Nov. 3, 2021, 12:00 PM), https://www.indystar.com/story/opinion/2021/11/03/pulliam-indiana-gambling-industry-lobbying-despite-state-ban/8526880002/.

133 *Former Indiana State Senator and an Indianapolis Casino Executive Sentenced to Federal Prison for Criminal Election Finance Schemes*, U.S. DEP'T OF JUST. (Aug. 17, 2022), https://www.justice.gov/usao-sdin/pr/former-indiana-state-senator-and-indianapolis-casino-executive-sentenced-federal-prison.

134 Pulliam, *supra* note 132.

135 Rosengren, *supra* note 34.

136 Irina Slavina, Note, *Don't Bet on it: Casinos' Contractual Duty to Stop Compulsive Gamblers from Gambling*, 85 CHI.-KENT L. REV. 369, 371–72 (2010).

137 *Id.*

138 *Id.*

Although they vary slightly by state, every state's self-exclusion regulation also contains a section that discharges any liability associated with the state and casino's obligation to administer the self-exclusion program.[139] When the gambler applies to be a part of the self-exclusion program, the gambler agrees to bear sole responsibility for all gambling actions and waives any and all possible liability against the casino and the state.[140]

Courts have interpreted these liability exemption regulations as liability protection from all common law duty of care suits brought by the compulsive gambler. They have held that because the casinos have self-exclusion programs, casinos have no duty to recognize and take responsibility for compulsive gambling.[141]

Kelly Thompson, a compulsive gambler and former employee at Langston Hughes Academy Charter School, embezzled approximately $667,000 from the school to fund her gambling.[142] The school sued Jazz Casino Company, arguing that the casino "substantially participated in and facilitate[d] the gambling obsession of Thompson, and, at times . . . materially assisted, encouraged, and otherwise aided and abetted Thompson in the gambling obsession that led to Thompson's theft."[143] Nonetheless, the Fourth Circuit ruled in favor of Jazz Casino, holding that the Louisiana legislature does not impose any duty on casino operators to identify compulsive gamblers.[144]

Similarly, in *Caesars Riverboat Casino*, the casino knew of Genevieve Kephart's gambling addiction but still provided her with free transportation, hotel, food, alcohol, and six counter checks, which ultimately led to her losing $125,000 in one night.[145] The Indiana Supreme Court refused to impose liability on the casino, holding that Indiana legislature does not impose any common law

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139 *Id.* at 373–74.

140 *See, e.g.*, IOWA RACING & GAMING COMM'N, VOLUNTARY SELF-EXCLUSION MAIL-IN ENROLLMENT (last revised Sept. 2022), https://irgc.iowa.gov/media/34/download?inline=. Section 3(c) of the form states, "I understand the ultimate responsibility to abstain from wagering with, or accessing gaming floors or wagering areas of all licensed entities, current and future, is mine alone." *Id.* Section 3(g) of the form states, "I understand pursuant to Iowa law, the state and any licensees shall not be liable to any person for any claim which may arise out of any act or omission relating to the enrollment process for self-exclusion, or maintenance, or enforcement of the self-exclusion program." *Id.*

141 *See, e.g.*, NOLA 180 v. Harrah's Operating Co., 94 So. 3d 886, 889 (4th Cir. 2012); Caesars Riverboat Casino, LLC v. Kephart, 934 N.E.2d 1120, 1124 (2010).

142 *NOLA 180*, 94 So. 3d at 887.

143 *Id.*

144 *Id.* at 889; *see also* 27 La. R.S. § 27:27.1(H).

145 *Caesars Riverboat Casino*, 934 N.E.2d at 1122.

claim held by casino patrons for "damages resulting from enticing patrons to gamble and lose money at casino establishments."[146]

Courts interpret self-exclusion programs to be the only means by which casinos can be held liable by compulsive gamblers.[147] These courts seem to blindly believe that self-exclusion programs are sufficient as a liability measure to help combat compulsive gambling and, therefore, are unwilling to impose any common law duty onto the casinos beyond the scope of the self-exclusion programs. Courts seem ignorant that self-exclusion programs are a byproduct of the mutually beneficial economic relationship between states and casinos. These programs do not effectively prevent compulsive gambling and are not an adequate substitute for civil liability.

There are two main reasons why self-exclusion programs are insufficient as a preventative gambling addiction measure: (1) casinos have no legal duty to enforce self-exclusion programs, and (2) casinos have no monetary incentive to protect the compulsive gambler.

First, as *Merrill v. Trump Indiana, Inc.* shows, courts lack an interest in actually enforcing a casino's legal duty in self-exclusion programs.[148] In *Merrill*, the plaintiff sued the casino for allowing him to enter the casino grounds and gamble even though he placed himself on the Indiana voluntary self-exclusion list.[149] The court found no duty on behalf of the casino to *actually ensure that the plaintiff would be excluded.*[150] Looking to Indiana's legislation, the lower court stated in a slip opinion that because "Indiana legislature has procured such comprehensive statutes and regulations to create and control the riverboat gaming industry, which do not include the duty in question,[] public policy would not favor imposing a duty on the casino to evict a known compulsive gambler."[151]

Second, there is no monetary incentive for casinos to enforce self-exclusion programs. There is a lot of profit to be gained from compulsive gamblers, and casinos use many tactics to nurture addictive behavior.[152] Casinos seem reluctant to keep people away from casino grounds and hold those on the self-exclusion

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146 *Id.* at 1124; *see also* 68 IND. ADMIN. CODE § 6-3-4.
147 *See supra* Part II.C.
148 Merrill v. Trump Ind., 320 F.3d 729 (7th Cir. 2003).
149 *Id.* at 730–31.
150 Davis S. Vaughn, *Dealing a Duty: Why Casino Markers Should Establish a Legal Duty of Care to Patrons*, 19 TEX. REV. ENT. & SPORTS L. 1, 8 (2018).
151 Merrill v. Trump Indiana, Inc., No.2:99–CV–292, 2002 WL 1307304, at *5 (N.D. Ind. May 9, 2002).
152 *See supra* Part I.

program list accountable. While there are fines if casinos do not comply with the implementation of self-exclusion programs, these fees often pale in comparison to the revenue generated from compulsive.[153] Therefore, casinos feel extremely comfortable allowing self-excluded patrons inside casinos, knowing whatever monetary consequence will be paid out by the gambler's losses.[154]

Ultimately, self-exclusion programs don't work as a state-enacted initiative because no actual legal or monetary consequence is attached to a casino's failure to uphold these programs.[155] Further, courts view self-exclusion programs as substantial proof that the casino industry is heavily regulated. They are blind to the intimate economic relationship between state governments and the gambling industry, and they are ignorant of the powerful grip the gambling lobby has on state legislature. As a result, the social cost of gambling paid on behalf of communities continues to grow higher.

The liability protection afforded by the courts to self-exclusion programs should not deter compulsive gambler plaintiffs from fighting for legal accountability from the casinos. The emergence of lawsuits in a neighboring industry suggests compulsive gambler plaintiffs might have a new solution to hold casinos accountable for their fraudulent and coercive schemes.[156]

III. RICO SUCCESS IN OPIOID LITIGATION GIVES STRENGTH TO CLAIMS AGAINST CASINOS

Although the courts have yet to rule against the gambling industry in the private RICO claims brought against it, other addiction-for-profit industries have suffered from the legal consequences of their fraudulent methods. Looking to the recent RICO claims brought against the opioid industry, this Part explains the recent wave of litigation against the opioid industry, specifically analyzing the success of RICO claims brought against pharmaceutical companies. Section A introduces the opioid industry and the societal outcry that encouraged plaintiffs to bring RICO claims against the industry. Section B describes the elements of a RICO claim and highlights successful RICO claims brought against the opioid industry. Lastly, section C examines the opioid industry's targeted advertising tactics and relationship with state legislatures and argues that both played a role in plaintiffs' RICO success.

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[153] Vaughn, *supra* note 150, at 8.
[154] *Id.*
[155] *See supra* note 145–51.
[156] *See infra* Part III.

A. *The Legal and Social Uprising Against the Opioid Industry*

The casino industry's business model, aggressive marketing tactics, and political influence closely resemble another industry currently under intense public scrutiny: the opioid pain medication industry. The casino industry and the opioid industry generate profit through a similar model.[157] Both industries introduce addictive products, and "[t]hrough investments in research and development," continually repolish and repackage their products to "emphasize and amplify addiction as a design element in order to increase profits."[158] Selling an addictive product by nature, both industries specifically target consumers prone to addiction and further these addictive behaviors to maximize profitability.[159] However, although the gambling industry has been under the radar, the opioid industry is currently on fire.[160]

In 2017, the U.S. Department of Health & Human Services (HSS) declared the opioid crisis a public health emergency.[161] The opioid epidemic has left an enormous social cost on American communities.[162] The Centers for Disease Control and Prevention (CDC) reported that the U.S. economic cost of opioid use disorder was $471 billion, and the fatal opioid overdoses cost the U.S. $550 billion in 2017.[163] Approximately 47,000 people in the U.S. died from overdoses involving opioids, and around 2 million people met the opioid use disorder diagnostic criteria in 2017.[164] Individual state counties were especially hit by the cost of the opioid crisis. Representatives of Monroe County, Michigan testified that they had "to make large, unplanned-for expenditures in order to protect the health and welfare of its community, 'costing millions in health insurance, treatment services, autopsies, emergency room visits, medical care, treatment for related illnesses and accidents, payments for fraudulent or medical unnecessary prescriptions and lost productivity.'"[165]

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157 Mark A. Gottlieb et al., *Casinos: An Addiction Industry in the Mold of Tobacco and Opioid Drugs*, 21 U. ILL. L. REV. 1711, 1711 (2021).

158 *Id.*

159 *See id.*

160 *See infra* Part III.B.

161 *Opioid Facts and Statistics*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Dec. 26, 2022), https://www.hhs.gov/opioids/statistics/index.html.

162 Feijun Luo et al., *State-Level Economic Costs of Opioid Use Disorder and Fatal Opioid Overdose — United States, 2017*, 70(15) CTRS. DISEASE CONTROL & PREVENTION: MORBIDITY & MORTALITY WKLY REP. 541, 541 (2021), https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7015-H.pdf.

163 *Id.*

164 *Id.*

165 *In re* Nat'l Prescription Opiate Litig., 458 F. Supp. 3d 665, 675 (N.D. Ohio 2020).

One of the most high-profile lawsuits to arise was the action brought against opioid manufacturer Purdue Pharma LP. Purdue Pharma was charged with engaging in a conspiracy to defraud the United States and violating the Federal Anti-Kickback Statute and, ultimately, pled guilty on November 24, 2020.[166] Purdue Pharma admitted that from May 2007 to at least March 2017, it "marketed and sold its dangerous opioid products to healthcare providers, even though it had reason to believe those providers were diverting them to abusers."[167]

Even now, pharmaceutical giants continue to pay settlements in relation to opioid lawsuits.[168] In November 2022, Walmart agreed to pay $3.1 billion in settlement fees to resolve thousands of lawsuits stemming from its involvement with the opioid crisis.[169] Other pharmaceutical retailers, such as Walgreens and CVS, are expected to pay out $4 billion to state and local governments over the next ten to fifteen years.[170] This wave of litigation started an increase in accountability and recourse against the opioid industry.

B. RICO Knocks Down the Opioid Industry

Although litigation has only commenced within the past couple of years, plaintiffs who have brought suits on behalf of those who are addicted, those who have overdosed, and those who have died from opioid medication have already seen promising success in the courts, especially through RICO claims.[171] Originally designed to combat organized crime in the United States, RICO is a federal statute that offers criminal and civil penalties for "racketeering activity performed as part of an ongoing criminal enterprise."[172] To argue a violation of RICO, the plaintiff must prove four things: "(i) a defendant performed two or

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166 *Opioid Manufacturer Purdue Pharma Pleads Guilty to Fraud and Kickback Conspiracies*, U.S. DEP'T OF JUST. (Nov. 24, 2020), https://www.justice.gov/opa/pr/opioid-manufacturer-purdue-pharma-pleads-guilty-fraud-and-kickback-conspiracies. The Federal Anti-Kickback Statute prohibits the offering of value, such as gifts or incentives, to induce referral of business from a federal healthcare program. *Texas Legal Counsel for Stark Law, Anti-Kickback Statute, and Texas Patient Solicitation Act*, MORA HEALTHCARE L., https://www.morahealthcarelaw.com/healthcare-law/stark-law-anti-kickback-statute-and-texas-patient-solicitation-act/ (last visited Aug. 26, 2023); *see* 42 U.S.C. § 1320a-7b.

167 *Opioid Manufacturer Purdue Pharma Pleads Guilty to Fraud and Kickback Conspiracies*, *supra* note 166.

168 Jan Hoffman, *Walmart Agrees to Pay $3.1 Billion to Settle Opioid Lawsuits*, N.Y. TIMES (Nov. 15, 2022), https://www.nytimes.com/2022/11/15/health/walmart-opioids-settlement.html.

169 *Id.*

170 *Id.*

171 *See, e.g.*, *In re* Nat'l Prescription Opiate Litig., 458 F. Supp. 3d 665, 674 (N.D. Ohio 2020).

172 *Racketeer Influenced and Corrupt Organizations Act (RICO)*, *supra* note 29; *see* 18 U.S.C. § 1962(c).

more acts, (ii) those activities together formed a pattern of racketeering activity, (iii) the defendant benefitted from or participated in an enterprise, and (iv) the activities of that enterprise affected interstate commerce."[173] When arguing that the defendant is committing the predicate act of mail fraud, which is a form of racketeering under the second element (most popularly argued in both opioid and gambling litigation), three elements must be proven: "(i) the defendant's participation in a scheme to defraud; (ii) defendant's commission of the act with intent to defraud; and (iii) use of the mails in furtherance of the fraudulent scheme."[174]

The elements are the same for both criminal and civil RICO cases; however, there are three main differences. First, civil and criminal cases call for different standards of proof.[175] In a civil case, a preponderance of the evidence is required as the standard of proof, while in a criminal case, the defendant can only be convicted by proof beyond a reasonable doubt.[176] Second, since a civil case demands a lower standard of proof, the requirement of causation in a civil RICO case is also distinguishable. The Supreme Court has held that the plaintiff must prove both proximate and but-for causation.[177] But-for causation requires the plaintiff to show how the plaintiff's injury would not have occurred but for the defendant's actions, and proximate causation requires the plaintiff to prove a direct relationship between the defendant's actions and the plaintiff's injury.[178]

Third, RICO sets specific statutes of limitation for the plaintiff.[179] The civil RICO statute requires a case to be brought "within four years from the date when the injury occurred or should have been discovered," while the criminal RICO statute has a statute of limitations of five years.[180]

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[173] Shannon Porterfield, *Litigating Opioid Addiction as Organized Crime: An Analysis of Proximate Cause and Pharmaceutical Misrepresentation Under RICO*, 11 WAKE FOREST L. REV. 93, 97 (2021). The interstate commerce threshold is a low one, as courts routinely find that most, if not all, economic behavior impacts interstate commerce. *Id.*

[174] United States v. Walker, 9 F.3d 1245, 1249 (7th Cir. 1993).

[175] *See Differences in Civil, Criminal RICO Allegations*, FED. CRIM. PRAC. GRP. PRICE BENOWITZ LLP, https://whitecollarattorney.net/rico/differences-civil-criminal-rico-allegations/ (describing the standard of proof in a civil action).

[176] *Id.*

[177] Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharma., 943 F.3d 1243, 1244 (9th Cir. 2019).

[178] Porterfield, *supra* note 173, at 98.

[179] *See, e.g.*, *Differences in Civil, Criminal RICO Allegations*, *supra* note 175.

[180] *Id.*

Prosecutors have succeeded with criminal RICO claims brought against opioid pharmaceutical companies.[181] On June 5, 2019, opioid manufacturer Insys Therapeutics pled guilty to five counts of mail fraud and agreed to pay $225 million as a global resolution settlement.[182] Many consider this settlement the "first successful prosecution of top pharmaceutical executives for crimes related to the illicit marketing and prescribing of opioids."[183]

It was revealed that executives hosted speaker lunches disguised as bribes to "high-prescribing physicians."[184] Defendants also utilized pharmacy data to identify these high-prescribing physicians and targeted them specifically in order to intentionally increase the dosage and number of prescriptions of the opioid medication.[185] Although a criminal RICO case, this ruling paved the way as "the beginning of a new era in civil litigation to hold executives responsible for their role in the opioid epidemic."[186]

Encouraged by successful criminal prosecutions of pharmaceutical companies for their role in creating the opioid crisis, private individuals and government plaintiffs have brought civil litigation against these companies.[187] Broward County, Florida sued Purdue Pharma, alleging that it fueled the opioid crisis "through a massive marketing campaign premised on false and incomplete information which engineered a dramatic shift in how and when opioids were prescribed by the medical community and used by patients."[188] Broward County also alleged that Purdue Pharma failed to implement "effective controls" over their products and instead "actively sought to evade such controls."[189] This case was a part of a large group of lawsuits all alleging the same claim and relief, so the courts consolidated the case in multidistrict litigation.[190] Defendants filed for

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181 *Opioid Manufacturer Insys Therapeutics Agrees to Enter $225 Million Global Resolution of Criminal and Civil Investigations*, U.S. DEP'T OF JUST. (June 5, 2019), https://www.justice.gov/opa/pr/opioid-manufacturer-insys-therapeutics-agrees-enter-225-million-global-resolution-criminal.

182 *Id.*

183 *Id.*; *Founder and Four Executives of Insys Therapeutics Convicted of Racketeering Conspiracy*, U.S. ATTY'S OFF., DIST.OF MASS. (May 2, 2019), https://www.justice.gov/usao-ma/pr/founder-and-four-executives-insys-therapeutics-convicted-racketeering-conspiracy.

184 Porterfield, *supra* note 173, at 100.

185 *Founder and Four Executives of Insys Therapeutics Convicted of Racketeering Conspiracy*, *supra* note 183.

186 Porterfield, *supra* note 173, at 100.

187 *See, e.g.*, *In re* Nat'l Prescription Opiate Litig., 458 F. Supp. 3d 665, 674 (N.D. Ohio 2020).

188 *Id.*

189 *Id.*

190 *See id.* at 685 (describing the case as an "MDL"). The opioid multidistrict litigation cases were known as the Track One Cases. *See* Melissa D. Berry, *Opioid Litigation–Hundreds of Cases Consolidated: Here's What*

a motion to dismiss, arguing that plaintiffs failed to state a claim because there were intervening unlawful acts from doctors and pharmacies that broke any causal connection between defendants' actions and plaintiffs' injuries.[191] The court ruled against the defendants, finding the dismissal of the RICO claims to be inappropriate.[192]

To date, no court has ruled on a RICO case in civil court because cases are being settled before they go to trial.[193] For example, the Track One Cases were settled on the eve of trial, with opioid manufacturer defendants paying $260 million in order to avert the first federal trial on the opioid crisis.[194] Courts are even encouraging settlements in these civil suits, stating, "[h]ere, a settlement is especially important as it would expedite relief to communities so they can better address this devastating national health crisis."[195] Opioid manufacturers have moved to settle civil RICO cases before they go to trial which has prevented courts from setting negative precedent against them. Nonetheless, a successful criminal RICO conviction against Insys Therapeutics paves the way for plaintiffs to keep pursuing relief from civil RICO.

C. The Opioid Industry Littered with Fraud, Influence, and Corruption

Evidence and arguments presented in successful criminal and civil RICO cases highlight the lengths that opioid pharmaceutical companies will go to profit from opioid sales at the cost of millions addicted. Plaintiffs have successfully argued to the courts that these industry-wide practices are not mere advertisement and ordinary marketing, but instead are acts of fraudulent deceit and harmful encouragement, worthy of legal accountability and relief for those negatively affected.[196] This effort has brought the opioid industry's three main modes of profitability to light: (1) donations to academic institutions, (2) gifts to healthcare employees, and (3) political power.

You Should Know, THOMSON REUTERS (Sept. 28, 2018), https://www.thomsonreuters.com/en-us/posts/investigation-fraud-and-risk/opioid-litigation-consolidated/.

[191] *In re* Nat'l Prescription Opiate Litig., 458 F. Supp. 3d at 687.

[192] *Id.*

[193] Julie Carr Smyth & Geoff Mulvihill, *$260 Million Deal Averts 1st Federal Trial on Opioid Crisis*, AP NEWS (Oct. 21, 2019), https://apnews.com/article/lawsuits-us-news-ap-top-news-opioids-health-c428bb2ba4cd4cc6a59f8dbe79e18d9f.

[194] *Id.*

[195] *In re* Nat'l Prescription Opiate Litig., 332 F.R.D. 532, 536 (N.D. Ohio 2019).

[196] *See, e.g.*, *Opioid Manufacturer Insys Therapeutics Agrees to Enter $225 Million Global Resolution of Criminal and Civil Investigations*, *supra* note 181.

Purdue Pharma has donated to several academic institutions and universities since its inception.[197] Purdue Pharma had a significant interest in creating and maintaining relationships with academic institutions, especially because these relationships were gateway opportunities to "influence research, curricula, speaker series, and other events."[198] Purdue Pharma saw the relationship as an opportunity to change and influence the narrative in the medical field on opioid pain medications.[199] For this reason, in 2002, Purdue Pharma donated $3 million to the Massachusetts General Hospital pain center, which was renamed the "MGH Purdue Pharma Pain Center."[200] Since 2013, at least two dozen universities have received donations from the Sackler family, the founders and owners of Purdue Pharma, ranging from $25,000 to more than $10 million.[201] In total, it is estimated that at least $60 million has been donated to universities and other academic institutions worldwide over the last five years.[202]

In addition to donating to academic institutions, pharmaceutical companies also influenced on a grassroots level.[203] It was reported that between 2014 and 2015, approximately one in seven physicians in the country received "opioid-related gifts" from opioid pharmaceutical companies.[204] Between that time, it was also reported that for every hundred Americans, physicians gave more than seventy opioid prescriptions each year.[205] It was also revealed that Purdue Pharma analyzed physician prescriber data to specifically target individual physicians with gifts and advertising who were more likely to increase writing opioid prescriptions for non-cancerous chronic pain.[206] Purdue Pharma also regularly hosted all-expenses-paid conferences at luxury resorts with about 5,000 doctors, nurses, pharmacists, and other medical personnel in attendance.[207] The Attorney General of Massachusetts reported that "doctors who met with Purdue Pharma drug reps were *ten times* more likely to have

197 Jonathan H. Marks, *Lessons from Corporate Influence in the Opioid Epidemic: Toward a Norm of Separation*, 17 J. BIOETHICAL INQUIRY 173, 176 (2020).
198 *Id.*
199 *See Top Universities in US and UK Took Millions from Sackler Family*, THE GUARDIAN (Oct. 4, 2019), https://www.theguardian.com/us-news/2019/oct/04/universities-sackler-family-donations-opioids.
200 *Id.*
201 *Top Universities in US and UK Took Millions from Sackler Family*, *supra* note 201.
202 *Id.*
203 *See* Marks, *supra* note 197, at 175.
204 *Id.*
205 *Id.*
206 Gottlieb, *supra* note 157, at 1717–18.
207 *Id.* at 1718.

prescribed opioids to patients who later died of an overdose than physicians who prescribed opioids without having met the company's drug reps."[208]

The opioid industry had a large incentive to build relationships and to gain influence within the federal and local government. It accomplished this both indirectly and directly.[209] In addition to academic institutions, the opioid pharmaceutical companies were generous with donations to patient advocacy organizations, professional associations, and other civil society groups.[210] A U.S. Senate report revealed that over $9 million was given from the opioid industry to fourteen patient advocacy and health professional organizations from 2012 to 2017.[211] Not surprisingly, Purdue Pharma and Insys were named the most generous donors so far, gifting more than $4 million themselves.[212]

These pharmaceuticals were not simply philanthropic, however. These corporations gave out "charitable grants" in a strategic fashion to several non-profit organizations so that they could represent the industry's interests favorably in policymaking processes.[213] When the CDC distributed draft guidelines suggesting stricter opioid prescription regulations in 2016, organizations that received opioid industry donations showed significantly higher opposition to the CDC's draft guidelines than other organizations.[214] The industry was even caught seemingly funding the National Academies of Sciences, Engineering and Medicine (NASEM), an NGO with the express purpose of advising the U.S. federal government on public health policies.[215] A report revealed that since 2008, NASEM had received at least $14 million in donations from the Sackler family.[216] The advisors on the board also had conflicts of interest because they themselves also had ties and had been given donations from the opioid industry.[217]

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208 Marks, *supra* note 197, at 175.

209 *See, e.g.*, *id.* at 177; Tim Schwab, US Opioid Prescribing: The Federal Government Advisers with Recent Ties to Big Pharma, 366 BRITISH MED. J. 1, 1 (2019).

210 Marks, *supra* note 197, at 177.

211 *Id.*

212 *Id.*

213 *Id.*

214 *Id.*

215 *Id.* at 178; Tim Schwab, *US Opioid Prescribing: The Federal Government Advisers with Recent Ties to Big Pharma*, 366 BRITISH MED. J. 1, 1 (2019).

216 Schwab, *supra* note 215, at 1.

217 *Id.* at 1–2.

The opioid industry sought influence within the policymaking process directly.[218] Between 2006 and 2015, opioid pharmaceutical companies spent $880 million on lobbying efforts and campaign contributions, employing 1,350 lobbyists per year across all state capitals and extinguishing the $4 million spent by opioid regulatory lobbying groups.[219] Unlike casinos, which are legally prohibited from donating to campaigns in some states,[220] the opioid industry contributed to 7,100 political candidates in state-level offices with no legal restrictions.[221] Reports show in the U.S. 2016 election cycle, almost ninety percent of House committee members and two-thirds of Senate committee members received funds from Political Action Committees associated with groups "under investigation by state and federal officials for exacerbating the opioid crisis."[222]

Plaintiffs have highlighted these three modes of profitability to argue that the opioid industry is deceptively advertising and encouraging healthcare workers and other influential institutions at great social cost and with no immediate regulatory consequence because of its political power. By convicting opioid pharmaceutical companies for violating RICO, courts have set the precedent that these gifts, donations, and incentives are all means by which an industry may be held liable for profiting off of their consumers' addictions. Because the methods of deceptive marketing used by the opioid industry and the gambling industry are similar, RICO offers a solid path for a compulsive gambler plaintiff to hold the gambling industry liable.

IV. THE GAMBLER'S CASE FOR RICO

Now that the courts have brought the opioid industry's corruption and government coercion to light, compulsive gambler plaintiffs can look to RICO litigation brought against the opioid industry while making their own RICO claims. This Part makes the case for a successful RICO claim on behalf of the compulsive gambler against the gambling industry. Section A looks at past failed RICO claims brought against the casinos. Section B analyzes why these cases failed and makes the case for why they do not shut the door for future RICO claims made by future compulsive gamblers. Lastly, section C argues that

[218] Marks, *supra* note 197, at 178.

[219] *Id.*

[220] Mary M. Janicki, *Political Contributions and Gambling Interests*, CONN. GEN. ASSEMBLY OFF. OF LEGIS. RSCH. (Jan. 13, 1994), https://cga.ct.gov/PS94/rpt%5Colr%5Chtm/94-R-0166.htm.

[221] *Id.*

[222] *Id.*

compulsive gamblers have a successful claim under the civil RICO statute by proving each element and drawing comparisons to the opioid industry.

A. The Gambling Industry's History with RICO

The opioid industry is not the only one to defend against claims brought under RICO. A few compulsive gambling plaintiffs have also alleged that casinos violated RICO, albeit with no success.[223]

There are two main cases of RICO brought against the gambling industry.[224] The first is a class action suit, *Poulos v. Caesars World Inc.*, in which plaintiffs alleged that casinos engaged in "a course of fraudulent and misleading acts and omissions intended to induce people to play . . . electronic slot machines based on a false belief concerning how those machines actually operate, as well as the extent to which there is actually an opportunity to win on any given play."[225] The court dismissed the suit for failure to state a claim.[226] Specifically, the plaintiffs failed to prove causation.[227] The court explained, "[t]his is not a case in which there is an obvious link between the alleged misconduct and harm. Rather, linking the Casinos' alleged misrepresentations to plaintiffs' losses requires forging a chain of inferences that, viewed together, amount to individualized reliance."[228]

In the second case, *Williams v. Aztar Ind. Gaming Corp.*, the plaintiff alleged that the defendant casino intentionally mailed the plaintiff promotional misrepresentations in an effort to defraud the plaintiff of his money.[229] The court rejected the plaintiff's RICO claim, stating that the plaintiff failed to show how these casino advertisements "constitute the predicate act of mail fraud."[230] The court did not recognize the advertisements to be fraudulent in the form of "false statements or material misrepresentations."[231] Instead, the court held that "it is clear that they are nothing more than sales puffery on which no person of ordinary prudence and comprehension would rely."[232]

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[223] *See, e.g.*, Poulos v. Caesars World, 379 F.3d 654, 659 (9th Cir. 2004); Williams v. Aztar Ind. Gaming Corp., 351 F.3d 294, 297 (7th Cir. 2003).
[224] *See Poulos*, 379 F.3d; *Williams*, 351 F.3d.
[225] *Poulos*, 379 F.3d at 659.
[226] *See id.* at 666 (explaining that a civil RICO claimant must allege proximate cause).
[227] *Id.* at 665.
[228] *Id.*
[229] *Williams*, 351 F.3d at 297.
[230] *Id.* at 298–99.
[231] *Id.* at 299.
[232] *Id.*

B. *Casinos Advertise Beyond "Sales Puffery"*

Although the *Poulos* and *Williams* courts previously ruled that the gambling industry's practices do not rise to the level of a RICO violation, the courts' decisions in these two cases are misguided and do not preclude a future compulsive gambler plaintiff from successfully litigating a RICO claim. In *Poulos v. Caesars World Inc.*, the court dismissed the plaintiffs' RICO action because the court failed to see a legitimate link between the industry's misleading advertisements of slot machines and the crippling gambling addiction of the class action plaintiffs.[233]

In this case, however, the court merely criticized the showing of causation between the defendant's actions and *these* plaintiffs. The court explains that "gambling is not a context in which we can assume that potential class members are always similarly situated."[234] Rather, the court recommends that "to prove proximate causation *in this case*, an individualized showing of reliance is required."[235] The court was hesitant to hold the casino defendant liable for fraud against these plaintiffs; yet, the court did not negate the possibility of a legitimate proximate cause relationship between the deceptive advertisements of the gambling industry and the addictive harms suffered by compulsive gamblers. Therefore, the court's dismissal of RICO is particular to this case, where the causation element was not satisfied in a class action suit. The individual compulsive gambler plaintiff's case for RICO is not foreclosed here.

The second case calls for closer analysis. In *Williams v. Aztar Ind. Gaming Corp.*, the court held that deceptive marketing by the casino did not meet the standard of a RICO violation because it is nothing more than mere "sales puffery."[236] There are two problems with the court's ruling here. First, casinos do not just market false statements that are purely "sales puffery." The court, in making that distinction, cited two non-gambling cases as precedent, conflating the gambling industry with other dissimilar consumer markets.[237]

233 *Poulos*, 379 F.3d at 665.
234 *Id.*
235 *Id.* at 666.
236 *Williams*, 351 F.3d at 299.
237 *Id.*; *see* Assocs. in Adolescent Psychiatry, S.C. v. Home Life Ins. Co., 941 F.2d 561, 570 (7th Cir. 1991) (holding that slanted advertisements guaranteeing "rates of return equal to the highest in the market" for an annuity plan are puffery); Reynolds v. East Dyer Dev. Co., 882 F.2d 1249, 1252 (7th Cir. 1989) (holding that a home contractor's misstated assurances about a home's soil conditions did not rise to the standard of fraud).

As established in Part I, the gambling industry does not simply advertise in an exaggerated way to increase profits.[238] Rather, the industry preys on compulsive gamblers and uses targeted tactics to nurture addictive gambling behaviors in its patrons.[239] By relying on non-gambling cases, the court undermined the severity of fraud these false statements represented by labeling them as "sales puffery."

Second, compulsive gamblers are not persons of "ordinary prudence and comprehension." Advertising to the casual gambler can be just harmless advertising. However, advertising to pathological gamblers "generates definite self-destructive and community-destructive behavior."[240] It could be a defense if casinos were unaware of the impact their advertisements had on compulsive gamblers. But that is not the case–-casinos conduct surveillance on their patrons and flag players who are losing the most amount of money and spending the longest in the casinos.[241] Because casino marketing to compulsive gamblers is not mere "sales puffery," and the court's reasoning was incorrect in defining it as such, the court erred in dismissing the plaintiff's RICO lawsuit.

Despite these cases, the compulsive gambler plaintiff can make a successful RICO claim against the gambling industry, especially through the comparison of the recent RICO litigation against the opioid industry.

C. The Conclusive Case of RICO Against the Gambling Industry

The compulsive gambler should allege a RICO claim against the gambling industry. Recall that a RICO claim requires the compulsive gambler plaintiff to prove four elements: (1) the defendant performed two or more acts, (2) those activities together formed a pattern of racketeering activity, (3) the defendant benefitted from or participated in an enterprise, and (4) the activities of that enterprise affected interstate commerce.[242] This Comment posits that compulsive gambler plaintiffs can, indeed, satisfy all four elements.

First, casinos certainly performed two or more acts—industry-wide practices are in question here. Second, the industry-wide practices formed together do act

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[238] *See supra* Part I.

[239] *Id.*

[240] John Warren Kindt, *"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?*, 55 MERCER L. REV. 529, 587 (2004).

[241] *Id*. at 590 ("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.").

[242] *See* Porterfield, *supra* 173.

as a pattern of racketeering activity. Third, the gambling industry has economically benefitted from these fraudulent practices, with casinos generating billions of dollars each year.[243] Fourth, the activities of casinos affect interstate commerce because the industry is nationwide.

In a RICO conviction predicated on mail fraud, the plaintiff needs to prove the three elements of mail fraud: (i) the defendant's participation in a scheme to defraud, (ii) the defendant's commission of the act with intent to defraud, and (iii) use of the mails in furtherance of the fraudulent scheme.[244] Here, there is undeniable participation from the casino and their involvement in nurturing misrepresentations specifically onto the most vulnerable. The gambling industry manufactures, designs, and markets their slot machines.[245] They even deploy their own floor employees to target big spenders and keep them at the machines by offering free alcohol and other incentives.[246]

Second, the industry's intent to defraud manifests itself in many ways, namely the design and code of their gambling machines, to misrepresent outcomes and a player's odds of winning.[247] With the technological innovations of virtual reel mapping, casinos now have complete control of the outcomes of the game, and are able to manipulate the winnings, or losings, from a player.[248] Gaming manufacturers intentionally conceal the nature of the electronic slot machine by designing them as mechanical machines.[249] Embedding features that allow the player to prematurely stop the spin or spin again gives the player a false sense of control over their chances of winning, even though the outcome has been decided since the very first spin.[250]

Moreover, slot machines are intentionally coded to cause near misses through the "clustering" technique, manipulating the outcome of what players see and profiting off their psychological desire to win.[251] And, although state gaming commissions have already found some near miss configurations to be fraudulent and therefore illegal, they have stayed silent on the clustering

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243 *See supra* notes 110–13 and accompanying text.
244 *See* United States v. Walker, 9 F.3d 1245, 1249 (7th Cir. 1993).
245 *See supra* Part I.A.
246 *See supra* note 103 and accompanying text.
247 *See supra* notes 35–45 and accompanying text.
248 *See supra* notes 35–39 and accompanying text.
249 *See supra* notes 41–42 and accompanying text.
250 *See supra* notes 43–45 and accompanying text.
251 *See supra* notes 37–40 and accompanying text.

technique used nationwide in all American casinos, even though they produce the same outcome for gamblers.[252]

Third, casinos actively market these slot machines through mail advertisements to patrons.[253] The casinos market their slot machines vigorously to players who have lost the most money, all the while lending them more funds and gifts to encourage them to play.[254] Because casinos have access to player data, they are able to strategically deliver advertisements when players are noticeably absent for a period, and they are able to offer free gifts specific to each player, encouraging players back into the casinos at a higher rate of success.[255]

The argument that the gambling industry violates RICO is strengthened by the success of RICO claims brought against the opioid industry.[256] Courts have found opioid pharmaceutical companies guilty of violating the criminal RICO statute in part because the industry has nurtured the opioid epidemic through gifts and bribery.[257] Investigations found opioid manufacturers guilty of using medical data to specifically target physicians with high rates of prescribing their opioid products.[258] Similarly, casinos use patron data to advertise a personalized gambling experience, witnessing in real time when gamblers are losing, what their favorite casino games are, and how long they are staying at each machine.[259] Using that data, casinos encourage their employees with bonuses if they get a patron to spend past their normal spending range.[260] While in *In re Nat'l Prescription Opiate Litig.*, the opioid pharmaceutical defendants were successful in arguing the plaintiffs failed to prove causation because of intervening unlawful acts of doctors and nurses, casino defendants don't even have that defense, because they incentivize their *own employees* to nurture addictive gambling habits onto patrons.[261]

There is also an immediate social cost that must be addressed. The reason for the recent wave of litigation brought against the opioid industry is the public

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252 *See supra* notes 50–57 and accompanying text.
253 *See supra* Part I.C.
254 *See supra* Part I.C.
255 *See supra* Part I.C.
256 *See supra* Part II.C.
257 *See supra* notes 181–86 and accompanying text.
258 *See supra* note 185 and accompanying text.
259 *See supra* Part I.C.
260 *See supra* note 102 and accompanying text.
261 *Compare supra* note 191 and accompanying text, *with supra* note 102 and accompanying text.

outcry from communities around the country.[262] The opioid epidemic has cost counties billions of dollars in medical costs and health insurance and has diminished workplace productivity.[263] State Attorney Generals around the nation have filed lawsuits against large opioid pharmaceuticals, hoping to get restitution.[264]

Although not as prominently known, the social cost of compulsive gambling is also high. The *first* nationwide study on suicide and compulsive gambling disorder was released in 2018, where alarming studies reported suicide rates were about fifteen times greater for compulsive gamblers as compared to the general public.[265] Studies estimate that 2 million adults meet the criteria for compulsive gambling disorder.[266]

The social cost of compulsive gambling continues to grow as the gambling industry manufactures new technologies and pushes the legal limits of what is allowed.[267] Despite Nevada's recent prohibition of ATM functions on gambling machines, gaming manufacturers have continued to develop technologies aiming to get ATM functions as close to the gambling machine as possible.[268] With new tabletop ATM machines debuting in casinos during the past couple of years, the distance between ATM machines and gambling machines has shrunk smaller and smaller, increasing irresponsible spending and depleting the funds of compulsive gamblers.[269] To counteract these efforts, courts should act as arbiters and protect gamblers from further exploitation. Just as plaintiffs are now using the courts as a tool to seek justice from the opioid industry profiting from their addictive customers, compulsive gambler plaintiffs should have the ability to seek legal accountability through litigating a RICO claim.

V. A NEW CATALYST FOR CHANGE: SPORTS BETTING

Traditionally, brick and mortar casinos are the face of the gambling industry.[270] However, in the 21st century, the gambling industry has seen

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262 *See supra* note 152-56 and accompanying text.

263 *See supra* Part III.A.

264 *See In re* Nat'l Prescription Opiate Litig., 458 F. Supp. 3d 665, 673–74 (N.D. Ohio 2020) (listing the lawsuits consolidated in different state counties).

265 *See supra* notes 20–22 and accompanying text.

266 *See supra* notes 23.

267 *See supra* Part I.B.

268 *See supra* notes 75–78 and accompanying text.

269 *See supra* note 75–76 and accompanying text.

270 *Cf.* Nicholas Reimann, *Casinos Raked In Record-Shattering $60 Billion in Revenue Last Year*, FORBES (Feb. 15, 2023, 02:42 PM), https://www.forbes.com/sites/nicholasreimann/2023/02/15/casinos-raked-in-record-

tremendous expansion and profitability with online forums.[271] Most recently, the gambling industry has seen the rise of sports betting platforms.[272] This Part introduces sports betting and argues that this new branch of the gambling industry supports an even stronger RICO claim for the compulsive gambler. Section A discusses corruptive practices in the sports betting space that already have a resemblance to the opioid and casino industries. Finally, Section B reveals a hidden tool of discovery that, if unlocked by plaintiffs in a civil RICO suit may change the course of legal accountability for the gambling industry.

A. The Boom of Sports Betting

Four years ago, sports betting was illegal under federal law.[273] Now, many podcasts, TV channels, and sports websites bombard its consumers with sports betting advertisements.[274] Sports betting companies have even made their way into universities, paying at least eight universities to allow them to promote gambling on campus.[275] As one can imagine, lobbying efforts to legalize sports betting in all states have been relentless.[276] Labeled as the "fastest expansion of legalized gambling in American history," thirty-one states and Washington D.C. currently permit sports gambling—both online and in person.[277] Like the lobbyists for the opioid and casino gambling industries, sports betting lobbyists have showered state legislatures with "money, gifts, and visits from sports luminaries and at times us[ed] deceptive arguments to extract generous tax breaks and other concessions."[278]

shattering-60-billion-in-revenue-last-year/?sh=f7e00fb70839 (stating that slot machines and table games, found in casinos, generated over half of the total revenue, whereas sports betting and online betting came in third and fourth, respectively).

271 *See* THE HISTORY OF ONLINE GAMBLING, IDOLOGY, https://visual.ly/community/Infographics/gaming/history-online-gambling (last visited Aug. 2, 2023). 2003 to 2006 was named the "Poker Boom" due to the rise in online poker players. *Id.*

272 David Enrich, *Key Findings from The Times' Investigation of Sports Betting*, N.Y. TIMES (Nov. 20, 2022), https://www.nytimes.com/2022/11/20/business/sports-betting-investigation.html.

273 *Id.* The Supreme Court held the Professional and Amateur Sports Protection Act, which prohibited state-sanctioned sports gambling, violated the anticommandeering doctrine under the 10th Amendment of the Constitution. Murphy v. NCAA, 138 S. Ct. 1461, 1481 (2018).

274 Enrich, *supra* note 272.

275 *Id.* PointsBet, a sports betting company, made a deal with the University of Colorado Boulder to pay the university $30 fee every time someone downloads the PointsBet app and used a special promotional code. *Id.*

276 Eric Lipton & Kenneth P. Vogel, *Cigars, Booze, Money: How a Lobbying Blitz Made Sports Betting Ubiquitous*, N.Y. TIMES (Nov. 20, 2022), https://www.nytimes.com/2022/11/20/business/sports-betting-lobbying-kansas.html.

277 *Id.*

278 *Id.*

Concerningly, the federal and state governments do not currently regulate sports betting.[279] A survey by the New York Times reported that "enforcement of rules have been haphazard, that punishments have tended to be light or nonexistent and that regulators are counting on the industry to police itself."[280] Since the industry is so new and has expanded so fast in the past four years, there is a concern that the unfiltered accessibility and lack of accountability in the industry will increase addictive compulsive gambling behavior tenfold.[281] Most alarming is the lack of regulation regarding sports betting advertising. Set in place for the casino gambling industry already is The Communications Act of 1934, a federal law prohibiting the broadcast advertising of gambling activities.[282] However, no such regulation specifically exists for sports betting advertising. And compulsive gamblers are paying the price. Reports have shown an "increase in inquiries to the National Problem Gambling Helpline Network, which received 270,000 calls, texts and chats last year—a forty-five percent jump over the prior year."[283]

With incentivized and deceptive means of lobbying that closely resemble that of the opioid and gambling industry, the new spotlight of sports betting and its addition of evidence to the industry's fraudulent practices strengthens the compulsive gambler plaintiff's case of a RICO claim. While courts recognize no liability for the casinos due to self-exclusion programs set into place by legislation,[284] there is no regulation for sports betting either at the state or federal level, making it easier for courts to recognize harm to the plaintiff and liability for the industry. Most importantly, because the rise of sports betting has garnered more attention to the gambling industry, there is hope that public support for legal action and accountability against the gambling industry will encourage a wave of litigation similar to that of the opioid industry.

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[279] Enrich, *supra* note 272.

[280] *Id.*

[281] Alex Weldon, *The Complex Reality Behind Rising Problem Gambling Calls*, PLAYUSA (Mar. 12, 2023), https://www.playusa.com/complex-reality-behind-rising-problem-gambling-calls/ (stating that the number of calls to addiction helplines specifically concerning sports betting or online gambling have increased more than tenfold, which may reflect a rise in gambling addiction rates).

[282] *See* 18 U.S.C. §§ 1304, 1307.

[283] Joe Hernandez, *Sports Betting Ads Are Everywhere. Some Worry Gamblers Will Pay a Steep Price*, NPR (June 18, 2022, 5:00 AM), https://www.npr.org/2022/06/18/1104952410/sports-betting-ads-sports-gambling.

[284] *See supra* Part II.C.

B. *The Solution Depends on Discovery*

This Comment argues that individual compulsive gambler plaintiffs will succeed in claims they bring against the gambling industry under the civil RICO statute. However, to regulate the gambling industry nationally, many plaintiffs will need to bring many claims against the industry. While this seems like a big feat, there is a hidden tool available to those looking to challenge the gambling industry that helped litigators disrupt the opioid industry with mass litigation: the public release of discovery documents.[285] Internal discovery documents and whistleblowers detailing industry-wide practices are vital to the fight for accountability for the gambling industry.[286]

The recent wave of litigation and public policy advocation against the opioid industry grew in part and benefitted tremendously from discovery documents released to the public.[287] Many internal documents and depositions, including that of Purdue Pharma's former president Richard Sackler, have been unsealed in accordance with orders issued by state judges.[288] These documents detailed the deceptive marketing strategies of pharmaceutical companies and other industry-wide practices and aided in the revolution to "hold institutions and individuals accountable" for the high social cost paid by communities all over the country.[289]

Another parallel industry profiting from addictive substances, the tobacco industry, saw the release of discovery documents to the public as an aid to advocate for legal accountability and industry regulation amidst severe social cost.[290] After over forty years of the tobacco industry winning every personal injury lawsuit, the industry saw increased litigation and Congressional hearings in 1994 when internal documents and whistleblowers leaked detailed and malicious industry-wide practices.[291] While it took four decades for the tobacco industry to get access to significant internal documents in discovery, the opioid industry saw a much faster turnaround, with similar materials being produced and released to the public in far less time than the tobacco industry.[292]

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285 *See* Gottlieb, *supra* note 157, at 1727.

286 *Id.*

287 *Id.*

288 David Armstrong, *Kentucky Judge Orders Release of Secret OxyContin Records Sought by STAT*, STAT (May 11, 2016) https://www.statnews.com/2016/05/11/oxycontin-records-sought-stat-ordered-unsealed-kentucky-judge/.

289 *Id.*

290 Gottlieb, *supra* note 157, at 1722, 1726.

291 *Id.*

292 *Id.* at 1727.

Many predicted that the gambling industry would also see an increase in litigation in the early 2000's.[293] However, the trend of "Mega-Lawsuits" never made its way to the gambling industry and no lawsuit was able to produce a paramount of discovery documents great enough to stir public and political interest.[294]

With the rise of sports betting in the U.S., a new spotlight is now again directed at the gambling industry and its practices.[295] As stated above, people have begun reporting on the political power abused by the sports betting lobby and the severe rise in addicted gamblers from sports betting alone.[296] The state and federal governments offer even less regulation to sports betting than to brick and mortar casinos due to the novel and online medium of sports betting.[297]

Therefore, plaintiffs should keep fighting for legal protection against the gambling industry. Lawsuits brought by individuals, specifically compulsive gambler plaintiffs, will be at the forefront of this battle. These suits will pave the way for both the release of discovery documents and future lawsuits from class-action plaintiffs and state attorney generals.[298] Only this way can the gambling industry start being regulated by legislation and give overdue recourse to its addicted consumers. Only this way can the gambling industry be held accountable by the law.

CONCLUSION

Compulsive gambling disorder, although categorized legitimately as a substance addiction, has not been recognized as a protected class in the legal system. Although society bears a heavy cost shouldering the aftermath of these addictions, the law continues to protect the gambling industry from any liability for their manipulative marketing schemes and fraudulent representations of casino machines. State legislatures are hesitant to impose strict regulatory action on the gambling industry, as states and casinos have realized a mutually beneficial relationship at the severe cost of local communities and families. Compulsive gambler plaintiffs are unable to seek relief from the courts, as courts

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[293] John Warren 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, 224–25 (2003).

[294] *See id.*; Gottlieb, *supra* note 157, at 1727.

[295] *See supra* Part V.A.

[296] *See supra* notes 278–81 and accompanying text.

[297] *See supra* notes 280–81 and accompanying text.

[298] *See* Kindt, *supra* note 293, at 231.

are blind to the weaknesses and incapacities of the self-exclusion programs already set in place—programs instituted by the very same state legislatures that profit off of revenue generated predominantly by compulsive gamblers.

Compulsive gamblers have a potential solution in sight: the Racketeer Influenced and Corrupt Organizations Act. Plaintiffs have had success in convicting opioid pharmaceutical companies and holding them accountable for their exploitative schemes of addicted consumers under both criminal and civil RICO. By comparing the opioid industry to the gambling industry, this Comment argues that compulsive gambler plaintiffs also have the ability to seek successful legal recourse under RICO.

In the wake of the sports betting boom, all eyes are once again on the gambling industry. Critics are concerned that the lack of federal and state regulation and the accessibility of sports betting will increase the number of addicted gamblers tenfold. There is a particular opportunity right now for compulsive gambler plaintiffs to fight the gambling industry in the courts using RICO and obtaining discovery documents. If successful, compulsive gambler plaintiffs will not only disrupt the power of the gambling industry but also bring the country toward further policy and legislation efforts.

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* Notes and Comments Editor, *Emory Law Journal*, Volume 73; Emory University School of Law, J.D., 2024; The University of Texas at Austin, B.A., 2020. In sincere gratitude, I want to thank my faculty advisor, Professor Karen B. Cooper, whose mentorship and guidance laid the foundation for my legal writing. To the remarkable Emory Law Journal staff, particularly Celia Golod and Danielle Bimston Shapiro – I am forever in debt for your tireless commitment to my work. Lastly, to my cherished family and friends, thank you for your unwavering support and love. To Yaohui and Tianbing, my parents and biggest cheerleaders, I dedicate this to you.