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## A New Leader in the World of Legalized Gambling: What the Illinois General Assembly Should do to Protect Pathological Gamblers from the Rapidly Expanding Industry

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# A New Leader in the World of Legalized Gambling: What the Illinois General Assembly Should do to Protect Pathological Gamblers from the Rapidly Expanding Industry

I. INTRODUCTION .....	439
II. HISTORICAL CONTEXTS OF PROBLEM GAMBLING AND INDUSTRY EXPANSION .....	443
A. THE SOCIAL IMPACTS OF LEGALIZED GAMBLING .....	443
B. THE DECRIMINALIZATION OF GAMBLING IN ILLINOIS .....	445
1. <i>The Illinois Video Gaming Act</i> .....	445
2. <i>Illinois Senate Bill 744</i> .....	446
3. <i>The Illinois Loss Recovery Act</i> .....	447
III. INEFFECTIVE THEORIES OF LIABILITY .....	449
A. NEW JERSEY JURISPRUDENCE.....	450
B. THEORIES OF RECOVERY IN ILLINOIS .....	452
1. <i>The Illinois Dram Shop Act</i> .....	452
2. <i>The Illinois Loss Recovery Act</i> .....	454
3. <i>Common Law Contract Theory</i> .....	455
C. NO REMEDY IN ILLINOIS .....	456
IV. EXPANDING LIABILITY WITH THE EXPANSION OF POTENTIAL HARM.....	457
A. THE CASE FOR SELF-EXCLUSION.....	458
1. <i>Merrill v. Trump Indiana, Inc.</i> .....	459
2. <i>Reasonableness of Duty to Self-excluded Patrons</i> .....	461
B. DISTINGUISHING WHEN A DUTY IS OWED .....	463
V. CONCLUSION .....	465

## I. INTRODUCTION

State legislatures are becoming increasingly dependent on legalized gambling revenues.<sup>1</sup> In the past twenty-five years, the number of states that

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1. See Derrick Z. Jackson, *Gambling on Gaming Revenues*, B. GLOBE, Sept. 19, 2007, [http://www.boston.com/news/local/massachusetts/articles/2007/09/19/gambling\\_on\\_gaming\\_revenues/](http://www.boston.com/news/local/massachusetts/articles/2007/09/19/gambling_on_gaming_revenues/) (last visited Jan. 10, 2011).

have some form of legalized gambling increased from three to forty-eight, Hawaii and Utah being the only two holdouts.<sup>2</sup> The American Gaming Association (AGA) reported that, in 2007, gambling was over a \$92 billion industry,<sup>3</sup> which is more than the combined net income of the top three U.S. oil companies in that same year.<sup>4</sup> While the revenue benefits to U.S. governments are undoubtedly well-recognized,<sup>5</sup> the adverse social impacts associated with this type of revenue generation are becoming increasingly self-evident.<sup>6</sup> The National Gambling Impact Study Commission (NGISC or “the Commission”), which was designated by Congress in 1996 to study the social and economic impacts of legalized gambling,<sup>7</sup> reported that “families of pathological gamblers suffer from a variety of financial, physical, and emotional problems, including divorce, domestic violence, child abuse and neglect, and a range of problems stemming from the severe financial hardship that commonly results from problem and pathological gambling.”<sup>8</sup> Despite the Commission’s recommendation of a “pause in the expansion of gambling,”<sup>9</sup> states continue to legalize gambling at alarming rates.<sup>10</sup>

The high revenue generated by legalized forms of gambling comes at the price of endangering the problem (i.e., pathological) gambler and his or

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2. Kevin Peterson, *48 States Ranking in Gambling Proceeds*, STATELINE.ORG, May 23, 2006, <http://www.stateline.org/live/details/story?contentId=114503> (last visited Jan. 10, 2011).

3. Am. Gaming Ass’n, *Gambling Revenue: Current-Year data*, [http://www.americangaming.org/Industry/factsheets/statistics\\_detail.cfv?id=7](http://www.americangaming.org/Industry/factsheets/statistics_detail.cfv?id=7) (last visited Jan. 10, 2011) [hereinafter Am. Gaming Ass’n]. The AGA reported that in 2007, the combined gross gambling revenue (the total amount wagered minus the winnings returned to the gambler) for card rooms, commercial casinos, Indian casinos, legal bookmaking, lotteries, pari-mutuel wagering, charitable games and bingo was \$92.27 billion. *Id.*

4. See Robert Pirog, *Oil Industry Profit Review 2007*, CRS REPORT FOR CONGRESS, Apr. 4, 2008, at 2, <http://fpc.state.gov/documents/organization/103679.pdf> (reporting that Exxon Mobile, BP, and Chevron had a total net income of just over \$76.5 billion in 2007).

5. See, e.g., Am. Gaming Ass’n, *supra* note 3.

6. See Nat’l Gambling Impact Study Comm’n Final Report, at 4-1, available at <http://govinfo.library.unt.edu/ngisc/reports/fullrpt.html> (reporting that in 1997, there were 7.5 million American adult pathological or problem gamblers. This did not include the 7.9 million American adolescent pathological or problem gamblers in the same year) [hereinafter NGISC Final Report].

7. See Letter from Kay C. James, Chairman NGISC, to the President, Congress, Governors, and Tribal Leaders (June 18, 1999) (on file with author), available at <http://govinfo.library.unt.edu/ngisc/reports/intro.pdf> [hereinafter Letter from Kay C. James].

8. NGISC Final Report, *supra* note 6, at 4-13 (citing NATIONAL RESEARCH COUNCIL, PATHOLOGICAL GAMBLING: A CRITICAL REVIEW 5-2 (National Academy Press 1999)) (citation omitted).

9. Letter from Kay C. James, *supra* note 7.

10. See, e.g., 230 ILL. COMP. STAT. 5/1-40/85 (2008). Chapter 230 covers Illinois gaming legislation. *Id.* It begins with the earliest legislation in 1975, entitled the Illinois Horse Racing Act, and extends through the most recent legislation in 2009, entitled the Illinois Video Gaming Act. *Id.*

her family, not to mention the surrounding community and economy.<sup>11</sup> Moreover, most gambling legislation does not afford the pathological gambler any recourse against a casino, for example, when that gambler loses money due to his or her addiction.<sup>12</sup> Claims against casinos for recovery of gambling losses, however, have been made under traditional negligence theories in the past.<sup>13</sup> These unsuccessful attempts to get the judiciary to stretch common law negligence principles to encompass recovery of gambling losses is the only way in which the pathological gambler may be directly protected.<sup>14</sup> Courts have been unwilling to accept these types of arguments due to the lack of legislative intent in the highly-regulated area of legalized gambling.<sup>15</sup>

To fully understand the effect that legalized gambling has on the pathological gambler, imagine a situation in which an Atlantic City casino provides Willy Wagers, one of its patrons, with a complimentary room, free drinks, and other perks for a full month while he is in town, but only under the condition that he gambles every day. After a while, Willy finds himself ill due to all the free alcohol and late nights at the blackjack table, but continues to gamble after casino employees remind him of their agreement. After Willy loses most of his money, the casino agrees to fly him back to his New York City bank in a helicopter, so he can retrieve a large sum from his savings account. Willy's family hears of this, and immediately go to the casino to try to prevent it from letting him gamble and explaining that Willy is a "pathological gambler." Willy realizes that he has a gambling problem and enrolls in a state-run "self-exclusion" program, which indicates to all

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11. See NGISC Final Report, *supra* note 6, at 4-1, 7-1.

12. See *infra* notes 79-160 and accompanying text.

13. See *Hakimoglu v. Trump Taj Mahal Assocs.*, 70 F.3d 291 (3d Cir. 1995); *GNOG Corp. v. Aboud*, 715 F. Supp. 644, 655 (D.N.J. 1989); see also *infra* notes 93-119 and accompanying text. In some cases, pathological gamblers have become indebted to a casino and named as a defendant in a lawsuit by the casino seeking payment of the debt. See, e.g., *Greate Bay Hotel & Casino v. Tose*, 34 F.3d 1227, 1228 (3d Cir. 1994).

14. See generally Jeffrey C. Hallam, Comment, *Rolling The Dice: Should Intoxicated Gamblers Recover Their Losses?*, 85 NW. U. L. REV. 240 (1990). Illinois offers other forms of protection to people who may have a gambling problem. Am. Gaming Ass'n, *Responsible Gaming Statutes and Regulations*, at ii (3d ed. 2008), [http://www.americangaming.org/assets/files/Statutes\\_and\\_Regs\\_FINAL\\_022009.pdf](http://www.americangaming.org/assets/files/Statutes_and_Regs_FINAL_022009.pdf) [hereinafter *Responsible Gaming Statutes and Regulations*]. For example, the state provides a 1-800 help line number, employee training regarding problem gambling, public awareness, and, most significantly, a self-exclusion program. See *id.*; see also *infra* notes 165-78 and accompanying text. The current protection offered in Illinois, however, is discredited when compared to other states that utilize additional forms of protection like advertising restrictions, alcohol service restrictions, credit restrictions, limited stakes, marketing, and problem gambling treatment funding. See *Responsible Gaming Statutes and Regulations*, at ii.

15. See, e.g., *Hakimoglu*, 70 F.3d at 293; see also *infra* notes 79-119 and accompanying text.

the casinos in his state that he has a gambling problem and wishes to be evicted should he ever enter a casino. Despite his efforts to rid himself of his destructive habits, Willy caves into the pressure to gamble once again and enters a casino to start gambling. The casino, enjoying all the money Willy is wagering, decides to ignore the family and Willy's wishes and allows him to gamble anyway. After more losses, Willy finds himself out of money, in debt to the casino, and a defendant in a lawsuit by the casino to recover his debt.

The hypothetical set out above touches on some of the shocking facts you will find in current jurisprudence that has dealt with the intoxicated gambler defense,<sup>16</sup> and the result is that Willy will not have a claim or defense against the casino.<sup>17</sup> Most courts have agreed that legalized gambling is too highly regulated to proffer any sort of legislative intent regarding private causes-of-action against casinos for recovery of gambling debt, in any situation, when the legislation itself is silent on the issue.<sup>18</sup> This situation leaves the pathological gambler little recourse against a casino when their conduct is as extreme as in the above example.<sup>19</sup>

Illinois may be the new leader in American gambling as it continues its trend of decriminalizing gambling to raise money to revive its economy. This Comment argues that the Illinois General Assembly has been, and continues to be, careless with regard to protecting pathological gamblers from the increasingly dangerous policy of legalized gambling. Part II of this Comment resurfaces some of the adverse social impacts that legalized gambling has on the pathological gambler, and maintains that pathological gamblers must be afforded statutory protection. Part II looks to Illinois, a jurisdiction that is arguably decriminalizing gambling more rapidly than any other state, while offering little protection to pathological gamblers.

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

Plaintiff alleges that certain casino employees "refused to permit [her] family members from taking her home" . . . and continued to allow her to gamble in spite of clear indications that she was a compulsive gambler, confirmed by information about her condition provided to casino employees by her brother.

*Id.* (citation omitted). See also *GNOC Corp. v. Aboud*, 715 F. Supp. 644, 646-48 (D.N.J. 1989) ("[The vice president of Golden Nugget] authorized the Golden Nugget to provide and pay for Mr. Aboud to be flown by helicopter to his bank in Queens, New York . . . so that Mr. Aboud could withdraw more money and bring it back to Atlantic City."); see also *Merrill v. Trump Indiana, Inc.*, 320 F.3d 729, 731 (7th Cir. 2003) ("[I]t is undisputed that Merrill himself, in 1996, wrote to the casino asking that he be evicted from it if he ever showed up to gamble.").

17. See, e.g., *Hakimoglu*, 70 F.3d at 294.

18. See *infra* notes 93-119 and accompanying text.

19. See generally *Hallam*, *supra* note 14, at 254.

Part III of this Comment addresses what theories of liability could potentially be available to the pathological gambler in Illinois. Part III relies on New Jersey, a jurisdiction well-familiarized with legalized gambling, to address dram shop liability, the typical recourse problem-gamblers have sought in the past for protection against casinos, and why that form of protection has failed. Part III also argues that the Illinois Dram Shop Act, like that of New Jersey, is not a source of support for pathological gamblers, and similarly, argues that other theories of liability are inadequate. Finally, Part IV argues that in order to minimize the social impacts of legalized gambling, the Illinois General Assembly should amend (and thereby revive) the Illinois Loss Recovery Act and impose a duty of care on casinos to protect pathological gamblers from harming their economy. Part IV distinguishes between three types of gamblers, discusses which type of gambler should be afforded protection, and in what circumstances a duty of care should arise. Part V of this Comment concludes that the Illinois General Assembly must be the governmental branch to initiate the changes, because the judiciary's hands are tied in regards to these matters.

## II. HISTORICAL CONTEXTS OF PROBLEM GAMBLING AND INDUSTRY EXPANSION

### A. THE SOCIAL IMPACTS OF LEGALIZED GAMBLING<sup>20</sup>

Pathological (or “compulsive”) gambling has been defined as “the uncontrollable urge to keep gambling despite the toll it takes on your life.”<sup>21</sup> As states are becoming more dependent on gambling revenue, the risks, costs, and effects of pathological gambling are increasing substantially.<sup>22</sup> The National Gambling Impact Study Commission was designated by Congress to “conduct a comprehensive legal and factual study of the social and

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20. While this section only contains a small sample of information on the social effects of gambling, a complete analysis is available in John Warren Kindt, UNITED STATES INTERNATIONAL GAMBLING REPORT SERIES, Research Editors Doctoral Directorate (REDD) on Gambling (William S. Hein & Co., 2008). This collection takes a comprehensive look at many issues regarding legalized gambling. *Id.* In this collection, Professor John Warren Kindt republished many government documents and academic source materials pertaining to pathological gambling. *Id.*

21. Mayo Clinic Staff, Diseases and Conditions, *Compulsive Gambling: Definition*, MAYOCLINIC.COM, <http://www.mayoclinic.com/health/compulsive-gambling/DS00443> (last visited Jan. 10, 2011). The American Psychiatric Association stated that pathological gamblers “may be preoccupied with gambling (e.g., reliving past gambling experiences, planning the next gambling venture, or thinking of ways to get money with which to gamble).” AMERICAN PSYCHIATRIC ASSOCIATION, DSM-IV: DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 616 (4th ed. 1994).

22. NGISC Final Report, *supra* note 6, at 4-19.

economic impacts of gambling in the United States . . . .”<sup>23</sup> The NGISC Final Report revealed that in 1997, there were “7.5 million American adult problem and pathological gamblers . . . [and] 7.9 million American adolescent problem and pathological gamblers.”<sup>24</sup> Most communities report[ed] that “the number of problem and pathological gamblers increased after the introduction of nearby casino gambling.”<sup>25</sup>

When assessing the cost of pathological gambling, the National Research Council reported that “[a]s access to money becomes more limited, gamblers often resort to crime in order to pay debts, appease bookies, maintain appearances, and garner more money to gamble.”<sup>26</sup> The same study reported that “one-fourth to one-third of gamblers in treatment in Gamblers Anonymous reported the loss of their jobs due to gambling.”<sup>27</sup> Pathological gambling has also been linked to bankruptcy, embezzlement, and theft.<sup>28</sup> Furthermore, the NGISC Final Report concluded that the “gambling industry, government, foundations, and other sources of funding should step forward with long-term, sustained support.”<sup>29</sup> Significantly, the Commission determined that the number of pathological gamblers will likely increase with the introduction of additional gambling opportunities.<sup>30</sup>

With all of the academic studies, reports, statistics, and other information regarding the social effects of legalized gambling, state legislatures and smaller governments are thinking twice about gambling legislation to generate revenue.<sup>31</sup> The persons most directly affected by gambling decrimina-

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23. 18 U.S.C. § 1955 sec. 4(a)(1) (2008).

24. NGISC Final Report, *supra* note 6, at 4-1.

25. *Id.* at 4-4.

26. NATIONAL RESEARCH COUNCIL, *PATHOLOGICAL GAMBLING: A CRITICAL REVIEW* 160 (National Academy Press 1999) (citation omitted).

27. *Id.* at 161 (citation omitted) (emphasis added).

28. *See* NGISC Final Report, *supra* note 6, at 4-13, 4-15.

29. *Id.* at 4-19.

30. *Id.*

31. *See, e.g., DuPage Becomes First County in Illinois to Ban Video Gambling Machines*, [DUPAGECO.ORG](http://www.dupageco.org/pressDetail.cfm?doc_id=4190) (Aug. 11, 2009), available at [http://www.dupageco.org/pressDetail.cfm?doc\\_id=4190](http://www.dupageco.org/pressDetail.cfm?doc_id=4190). For example, DuPage County decided to not incorporate the Illinois Video Gaming Act because of the social ills that it would create, and attacked the Illinois General Assembly for passing the bill without considering the consequences. *Id.* (“The state passed this bill without weighing the consequences, without an implementation plan or budget, and without reliable revenue estimates. The legislation is reckless at best, making it incumbent on County and Municipal governments to stand up and say ‘no.’”); *see also* John Pastuovic, *Illinois Gaming Board Warned that Video Gambling Machines will Create Uncontrollable Situation*, CHI. CRIME COMM’N, Aug. 25, 2009, available at [https://www.chicagocrimecommission.org/util/Press/FinalIllinoisGamingBoardVideoGamblingRelease\\_2\\_.pdf](https://www.chicagocrimecommission.org/util/Press/FinalIllinoisGamingBoardVideoGamblingRelease_2_.pdf) [hereinafter *Video Gambling Machines will Create Uncontrollable Situation*].



lization, however, are the pathological gamblers themselves.<sup>32</sup> A moratorium on gambling expansion, as recommended by the Commission, will not protect that person when other forms of gambling are still utilized in the state.<sup>33</sup> With increases in decriminalized gambling in Illinois, what protection is offered to the pathological gambler?

## B. THE DECRIMINALIZATION OF GAMBLING IN ILLINOIS

Gambling in Illinois has expanded,<sup>34</sup> and continues to expand,<sup>35</sup> while pathological gamblers are afforded even less protection than ever.<sup>36</sup>

### 1. *The Illinois Video Gaming Act*

In July of 2009, the new Illinois governor, Patrick Quinn, signed into law H.B. 255, which created the Illinois Video Gaming Act.<sup>37</sup> This new law allows for certain bars and restaurants anywhere in the state to have video gambling machines (VGMs) in their establishments.<sup>38</sup> The VGMs allow patrons to play casino-style games like blackjack, line-up, and video poker without having to go a licensed casino.<sup>39</sup> The stated purpose of the law was to raise money for the Illinois Capital Construction Program.<sup>40</sup>

Senator Jon Kyl (R-AZ) stated that VGM gaming was the “crack-cocaine” of the gambling industry,<sup>41</sup> because that form of gambling caused players to bottom out more quickly than traditional forms of gambling.<sup>42</sup> Now that traditional forms of gambling—such as casinos, racetracks, and

32. See, e.g., NGISC Final Report, *supra* note 6, at 4-4 (“[T]he presence of a gambling facility within 50 miles roughly doubles the prevalence of problem and pathological gamblers.”).

33. See *id.* at 4-19 (indicating that the prevalence of problem gambling rises and falls with the opportunity to gamble).

34. See discussion *infra* Part II.B.1.

35. See discussion *infra* Part II.B.2.

36. See discussion *infra* Part II.B.3.

37. H.B. 255, 96th Gen. Assem., Reg. Sess. (Ill. 2009); Act effective July 13, 2009, Pub. Act 96-34 (codified at 230 ILCS 40/1-40/85 (2010)); Illinois Liquor Control Commission News, *Q&A on the Video Gaming Act*, Vol. 30, at 1 (2009), <http://www.state.il.us/lcc/DOCS/Fall09web.pdf> (last visited Jan. 10, 2011) [hereinafter Illinois Liquor Control Commission News].

38. Illinois Liquor Control Commission News, *supra* note 37, at 1.

39. See Marcus Webb, *Illinois Gov. Signs Video Lottery Bill into Law*, 49 VENDING TIMES, No. 7, July 2009.

40. Illinois Liquor Control Commission News, *supra* note 37, at 1.

41. Press Release from Senator Jon Kyl, *Not a Safe Bet* (Aug. 17, 2001) (on file with author); see also, Bennett Liebman, *Not All That It's Cracked Up To Be*, GOV'T L. CTR. OF ALBANY L. SCH., 2 (Aug. 16, 2004), available at [http://www.governmentlaw.org/files/crack\\_cocaine.pdf](http://www.governmentlaw.org/files/crack_cocaine.pdf) [hereinafter Bennett Liebman].

42. Bennett Liebman, *supra* note 41, at 1.



sports betting—are already legal in many states, some are turning to VGMS to generate even more gambling revenue.<sup>43</sup> The social problems that this type of gambling creates, however, are starting to catch the ears of government leaders.<sup>44</sup> The Illinois Gaming Board met to attack the new Illinois Video Gaming Act<sup>45</sup> and stated that “any short-term revenue gains [from the Act] would be far exceeded by the long-term cost to society.”<sup>46</sup>

## 2. *Illinois Senate Bill 744*<sup>47</sup>

The Illinois General Assembly is seeking to expand the decriminalization of gambling by making Illinois “the largest revenue-producing gaming state in America,”<sup>48</sup> surpassing both Nevada and New Jersey as “the number one gaming-dependent State”<sup>49</sup> in the nation. Senate Bill 744, which is currently engrossed in the House,<sup>50</sup> allows for three land-based casinos to be constructed in Northern Illinois (one of which will be in Chicago), as well as slot-machines at race-tracks.<sup>51</sup> The idea of bringing land-based casinos to America’s third-largest city is not new to Illinois,<sup>52</sup> but the previous legislation failed to become law.<sup>53</sup> Illinois’ current attempt to pass land-

43. See, e.g., 230 ILL. COMP. STAT. 40/1-40/85 (2010).

44. See *Video Gambling Machines will Create Uncontrollable Situation*, *supra* note 31.

45. 230 ILL. COMP. STAT. 40/1-40/85 (2010).

46. *Video Gambling Machines will Create Uncontrollable Situation*, *supra* note 31. The Board also concluded that “communities can expect to experience an increase in crime and a rise in other social ills connected with this type of gambling expansion . . .” *Id.*

47. S.B. 744, 96th Gen. Assem., Reg. Sess. (Ill. 2009). At the time this article was written, S.B. 744 was engrossed in the House of Representatives. Since then, the bill has passed, but after several amendments, it only made small changes to Illinois gambling laws. See Acr effective Aug. 23, 2010, Pub. Act 96-1479. The Illinois Senate recently passed Senate Bill 737, however, which would permit five new casinos in Illinois (one in Chicago, two in the Chicago suburbs, one in Rockford near the Wisconsin border, and one in Danville located near the Indiana border). Kevin McDermott, *Illinois Gambling-Expansion Bill Advances*, STLtoday.com, [http://www.stltoday.com/news/local/govt-and-politics/political-fix/article\\_8b873230-191c-11e0-82b5-00127992bc8b.html](http://www.stltoday.com/news/local/govt-and-politics/political-fix/article_8b873230-191c-11e0-82b5-00127992bc8b.html). Senate Bill 737, therefore, should be referenced anytime this article refers to Senate Bill 744.

48. Sen. Deb. on S.B. 744, 96th Gen. Assem., 33 (May 22, 2009) (Statement of Sen. Dillard), available at <http://www.ilga.gov/senate/transcripts/strans96/09600055.pdf>; see *supra* note 47.

49. Sen. Deb. on S.B. 744, 96th Gen. Assem., 33 (May 22, 2009) (Statement of Sen. Dillard), available at <http://www.ilga.gov/senate/transcripts/strans96/09600055.pdf>; see *supra* note 47.

50. S.B. 744, 96th Gen. Assem., Reg. Sess. (Ill. 2009); see *supra* note 47.

51. *Id.*

52. See H.B. 4939, 94th Gen. Assem., Reg. Sess. (Ill. 2006); see also S.B. 0019, 94th Gen. Assem., Reg. Sess. (Ill. 2005).

53. See H.B. 4939, 94th Gen. Assem., Reg. Sess. (Ill. 2006); see also S.B. 0019, 94th Gen. Assem., Reg. Sess. (Ill. 2005).

based casino legislation focuses on stealing gaming business from neighboring jurisdictions,<sup>54</sup> which have “declared war” on Illinois by constructing casinos that border the state.<sup>55</sup> The growth in tourism dollars is expected to spur economic growth in one of the worst economic crises Illinois has ever seen.<sup>56</sup>

### 3. *The Illinois Loss Recovery Act*

Like most states, Illinois initially prohibited almost all forms of gambling.<sup>57</sup> The Illinois Loss Recovery Act was enacted to protect its citizens from the adverse effects of organized crime, which was thought to be inextricably linked to professional gambling activities.<sup>58</sup> This act criminalized most forms of gambling<sup>59</sup> and allowed patrons of illegal gambling activities (not exempted under the act) to recover their losses from the bet-taker in a civil cause-of-action.<sup>60</sup>

In *Moushon v. AAA Amusement, Inc.*, Gloria Moushon lost a total of \$1,989 at the defendant’s tavern to video gaming machines that operated in that tavern.<sup>61</sup> Gloria exhibited typical pathological gambling behavior—she lost her money over a five month period at defendant’s tavern, while playing VGMs “four to six days [per week] for approximately four hours at a time . . . .”<sup>62</sup> Whenever she won the game, she would “put . . . [her winnings] back in the machine and keep playing . . . .”<sup>63</sup> Gloria filed suit in 1994 against both the tavern owner and the corporation that provided the

54. See Sen. Deb. on S.B. 744, 96th Gen. Assem., 34 (May 22, 2009), available at <http://www.ilga.gov/senate/transcripts/strans96/09600055.pdf>; see *supra* note 47.

55. *Id.* The bill proposes putting one land-based casino in Winnebago County, one casino in Lake County, and one in the City of Chicago. *Id.* at 32. The legislation would also allow the current riverboat casinos to become land-based if they desire. *Id.* The bill was introduced after legislators recognized that Illinois’ five bordering states had placed casinos just past the Illinois border to “attract Illinois taxpayers . . . to leave Illinois and go to our surrounding states.” *Id.* at 34 (statement of Senator Syverson).

56. *Id.* at 35.

57. See, e.g., Illinois Loss Recovery Act, 720 ILL. COMP. STAT. 5/28 (2008).

58. See Illinois Loss Recovery Act, 720 ILL. COMP. STAT. 5/28-1.1(a) (2009) (stating that the purpose of the statute is “to restrain persons from engaging in the business of gambling for profit in this State,” after “[r]ecognizing the close relationship between professional gambling and other organized crime . . .”).

59. Illinois Loss Recovery Act, 720 ILL. COMP. STAT. 5/28-1.1(a) (2008). Not all forms of gambling were criminalized in the Act. See *id.* For example, cash prizes for bingo games, lotteries, raffles, charitable games, and legislatively authorized pari-mutuel betting were exempted from criminal prosecution under the act. *Id.*

60. 720 ILL. COMP. STAT. 5/28-8(a) (2008).

61. *Moushon v. AAA Amusement, Inc.*, 641 N.E.2d 1201, 1205 (Ill. App. Ct. 1994).

62. *Id.*

63. *Id.*

video gaming machines<sup>64</sup> to recover her losses under the Illinois Loss Recovery Act.<sup>65</sup> Her case went to trial, and the jury awarded Gloria \$1,252 in damages.<sup>66</sup>

*Moushon* is an ideal example of an Illinois citizen who was afforded the protection that the Illinois Loss Recovery Act intended to create: protection from the adverse effects of gambling.<sup>67</sup> If a similar claim was filed today, however, the pathological gambler would be afforded no statutory protection whatsoever, because this form of gambling was decriminalized via the Video Gaming Act.<sup>68</sup> This act not only made it legal for certain establishments to operate mini-casinos,<sup>69</sup> but also repealed citizens' right to sue an establishment for these types of losses.<sup>70</sup> Today, given Moushon's pathological gambling behavior and lack of mitigation on the part of the defendant tavern owner, Moushon could theoretically sue under an Illinois dram shop negligence theory similar to the claims filed in New Jersey.<sup>71</sup> This claim would most likely fail, however, due to the familiar lack of legislative intent reasoning applied by New Jersey courts, because the Illinois gaming industry is "highly regulated."<sup>72</sup>

This trend of gambling decriminalization is nothing new to Illinois.<sup>73</sup> The Illinois Loss Recovery Act, which once acted as an impenetrable shield that completely protected Illinois citizens from all forms of gambling,<sup>74</sup> is now riddled with gaping exemptions that expose citizens to the effects of

64. *Id.* at 1202. The two defendants in the case "had an oral agreement to split evenly any proceeds from [the video gaming] machines." *Id.* at 1205.

65. *See id.* at 1202.

66. *Id.*

67. *See* Illinois Loss Recovery Act, 720 ILL. COMP. STAT. 5/28-1.1(a) (2009) (stating that the purpose of the statute is to "restrain persons from engaging in the business of gambling for profit in this State," after "[r]ecognizing the close relationship between professional gambling and other organized crime . . .").

68. 720 ILL. COMP. STAT. 5/28-1(b)(12) (2010).

69. *See* Video Gaming Act, 230 ILL. COMP. STAT. 40/1 (2010).

70. *See* 720 ILL. COMP. STAT. 5/28-8 (2008). Section 28-1 of the Loss Recovery Act was amended by the Illinois Video Gaming Act, and created an exception to those who may be "convicted of gambling." *Id.* No such amendment was made to section 28-8 (which allows for gamblers to sue bet-takers to recover their losses), but the effect of the amendment to section 28-1 takes establishments providing VGMs out of the definition of gamblers, thereby taking away citizens' right to recover because these establishments are not "gambling" as defined by the statute. *See Moushon*, 641 N.E.2d at 1202 (stating that the law "provides a cause of action for treble damages to the loser of certain *illegal* bets against the winner of the bets.") (emphasis added).

71. *See infra* notes 93-119 and accompanying text for a discussion on dram shop liability in New Jersey.

72. *See infra* notes 155-64 and accompanying text.

73. *See supra* note 10 and accompanying text.

74. 720 ILL. COMP. STAT. 5/28-1 (2010). Not all forms of gambling were illegal when the act was first codified. *See* Illinois Loss Recovery Act, *supra* note 59.

legalized gambling.<sup>75</sup> Since 1974, the Illinois General Assembly has exempted different forms of gambling, including the Illinois Lottery Law<sup>76</sup> and the Riverboat Gambling Act,<sup>77</sup> which have created the largest hole in the citizens' shield and threatens to further increase in size.<sup>78</sup>

### III. INEFFECTIVE THEORIES OF LIABILITY

The NGISC Final Report recognized that "the presence of a gambling facility within 50 miles roughly doubles the prevalence of problem and pathological gamblers."<sup>79</sup> Accordingly, new casinos mean new pathological gamblers who may decide to bring claims against casinos for recovery of their losses. But what legal theory offers them protection? Common law dram shop negligence theories have been claimed to offer protection, but problems with legislative intent have extinguished the claims of pathological gamblers.<sup>80</sup>

Issues regarding dram shop liability in the context of casino gambling are always the same: Whether casino patrons can recover gambling debts when the casino continues to allow those patrons to gamble after they are visibly intoxicated?<sup>81</sup> This theory, however, is somewhat of a hybrid form of the typical dram shop cause-of-action,<sup>82</sup> where a tavern patron is served passed the point of visible intoxication and consequently causes injury to a third party.<sup>83</sup> That third party may then have a claim against the tavern under the common law principles of dram shop liability for not subscribing to its duty to refrain from serving alcohol to visibly intoxicated persons.<sup>84</sup> This theory requires a third party to bring the action, rather than the intoxicated

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75. *Id.* § 28-1(b)(1)-(12).

76. *See* Illinois Lottery Law, 20 ILL. COMP. STAT. 1605/1-1605/28 (2008); Riverboat Gambling Act, 230 ILL. COMP. STAT. 10/1-10/24 (2008); Video Gaming Act, 230 ILL. COMP. STAT. 40/1-40/85 (2010).

77. Illinois Riverboat Gambling Act, 230 ILL. COMP. STAT. 10/1-10/24 (2008).

78. *See* discussion *infra* notes 133-60 and accompanying text.

79. *See* NGICS Final Report, *supra* note 6, at 4-4.

80. *See infra* notes 93-119 and accompanying text.

81. *See, e.g.,* *Hakimoglu v. Trump Taj Mahal Assocs.*, 70 F.3d 291 (3d Cir. 1995).

82. *See* *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 378 (Minn. 2008) (implying that a typical dram shop cause of action involves injuries to a third-person after a dram shop over serves a patron and that patron gets into a bar fight or a drunk driving accident).

83. *See* *Lopez v. Maez*, 651 P.2d 1269, 1272 (N.M. 1982). A typical dram shop statute states, "[e]very person who is injured in person or property by any intoxicated person, has a right of action in his own name, severally or jointly, against any person who by selling or giving alcoholic liquor, causes the intoxication of such person." Ill. Rev. Stat. ch. 43, § 135 (1979).

84. *See Lopez*, 651 P.2d at 1275.

patron who injures himself.<sup>85</sup> Some jurisdictions, however, hold that a third party need not be involved—the patron may leave the tavern and sustain injuries to himself and still have a cause of action against the tavern.<sup>86</sup> As one court put it, dram shop laws exist “to protect incompetents against their own incompetency.”<sup>87</sup> In this regard, some courts will entertain dram shop claims even though no one suffered injury other than the gambler himself.<sup>88</sup> One constant that usually appears in most dram shop cases, however, besides visible intoxication, is personal injury or destruction of property.<sup>89</sup> Because of this, intoxicated gamblers at casinos find it difficult to recover for their purely economic injuries.<sup>90</sup>

#### A. NEW JERSEY JURISPRUDENCE

The federal courts in the Third Circuit have had the challenge of determining how the New Jersey Supreme Court would rule on issues regarding recovery of gambling losses under New Jersey principles of common law dram shop liability.<sup>91</sup> Although the federal district’s holding in *GNOC Corp. v. Aboud* allowed recovery for such losses,<sup>92</sup> the Third Circuit took the opposite position and determined that the New Jersey Supreme Court would not recognize such claims.<sup>93</sup>

In *GNOC Corp.*, Aboud was sued for the collection of a twenty-eight thousand dollar gambling debt by GNOC. He counterclaimed and sought two hundred and fifty thousand dollars for gambling losses he sustained while at plaintiff’s casino.<sup>94</sup> Aboud claimed that GNOC breached its duty of care when it allowed him to continue to gamble after he was visibly intox-

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85. See, e.g., *Allen v. County of Westchester*, 109 A.D.2d 475, 480 (N.Y. App. Div. 1985) (stating that to permit recovery for plaintiff’s injuries after drinking would allow him “to benefit by his or her own wrongful act.”) (quoting *Buntin v. Hutton*, 1917 WL 2452 at \*3 (Ill. App. Ct., 1917)).

86. *Soronen v. Olde Milford Inn, Inc.*, 218 A.2d 630, 636 (N.J. 1966) (“[A] tavern keeper may with equal reason be held civilly accountable for injuries which proximately result to the patron himself.”).

87. *Galvin v. Jennings*, 289 F.2d 15, 17-18 (3d Cir. 1961).

88. See, e.g., *Hakimoglu v. Trump Taj Mahal Assocs.*, 70 F.3d 291, 293 (3d Cir. 1995).

89. See *Hallam*, *supra* note 14, at 254 (“The general rule in tort law is that a plaintiff may not recover pure economic loss that is unaccompanied by personal injury or physical destruction of property.”).

90. See, e.g., *Hakimoglu*, 70 F.3d at 294 (citing *Hakimoglu v. Trump Taj Mahal Assocs.*, 876 F. Supp. 625, 637 (D.N.J. 1994)).

91. See *GNOC Corp. v. Aboud*, 715 F. Supp. 644, 652 (D.N.J. 1989); *Hakimoglu*, 70 F.3d at 628; *Greate Bay Hotel & Casino v. Tose*, 34 F.3d 1227, 1230 (3d Cir. 1994).

92. *GNOC Corp.*, 715 F. Supp. at 655.

93. *Hakimoglu*, 70 F.3d at 293; *Tose*, 34 F.3d at 1234.

94. *GNOC Corp.*, 715 F. Supp. at 646.

icated.<sup>95</sup> The District Court for the District of New Jersey ruled that “[a] casino has a duty to refrain from knowingly permitting an invitee to gamble where that patron is obviously and visibly intoxicated . . . .”<sup>96</sup> The court recognized that the holding was “novel” in that it was a “logical extension” to a typical dram shop cause of action.<sup>97</sup> The court determined that the New Jersey Supreme Court would rule in the same manner because Aboud’s injuries were foreseeable to the casino (i.e., proximate causation).<sup>98</sup> Because questions of foreseeability should be applied in a “flexible” manner,<sup>99</sup> the court concluded that the facts, though unique, did not stray far enough away from a typical dram shop case to grant GNOC’s motion for partial summary judgment.<sup>100</sup>

The *GNOC Corp.* court’s determination, however, was later discredited in *Hakimoglu v. Trump Taj Mahal Associates*.<sup>101</sup> Though the facts of *Hakimoglu* were similar,<sup>102</sup> the Third Circuit Court of Appeals concluded that the New Jersey Supreme Court was unlikely to rule in favor of the gambler in these situations.<sup>103</sup> The court first reasoned that because the gambling arena is highly regulated by the New Jersey Casino Control Act, there is no private cause-of-action absent legislative intent.<sup>104</sup> The “lack of legislative intent” reasoning was again applied by the same circuit in *Grete Bay Hotel & Casino v. Tose*.<sup>105</sup> Again, the court reasoned that because the gambling industry is so well regulated, legislative intent could not be inferred absent any explicit language to the contrary.<sup>106</sup>

95. *See id.* at 651.

96. *Id.* at 655.

97. *Id.*

98. *Id.* at 652.

99. *GNOC Corp.*, 715 F. Supp. at 653.

100. *Id.* at 655-56.

101. *Hakimoglu v. Trump Taj Mahal Assocs.*, 70 F.3d 291, 293 (3d Cir. 1995).

102. *See id.* at 292.

[Plaintiff] alleged that the defendants had “intentionally and maliciously enticed him” to gamble at the casinos on numerous occasions by providing him with free alcoholic beverages and other amenities; that while he gambled he was served free alcoholic beverages until he became intoxicated; that after he became “visibly and obviously intoxicated” the defendants “invited and permitted him to continue to gamble in that condition” for lengthy periods; and that he consequently incurred “substantial gambling losses.”

*Id.*

103. *Id.* at 294.

104. *Id.* at 293 (citing *Hakimoglu v. Trump Taj Mahal Assocs.*, 876 F. Supp. 625, 633 (D.N.J. 1994)).

105. *Grete Bay Hotel & Casino v. Tose*, 34 F.3d 1227, 1231-32 (3d Cir. 1994).

106. *Id.*

In *Taveras v. Resorts International Hotel, Inc.*,<sup>107</sup> a case with similar facts to the above cases, the plaintiff argued for the first time that she should be able to recover gambling losses even though she was not “visibly intoxicated.”<sup>108</sup> Taveras’s claim was two-fold: she claimed the casino should have a duty to prevent intoxicated gamblers from over-gambling,<sup>109</sup> and she asked the court to “go even further, [and] impos[e] upon casinos a duty to stop *sober* casino patrons who are gambling too much.”<sup>110</sup> The District Court for the District of New Jersey followed the reasoning in *Hakimoglu* and *Tose* for the “visibly intoxicated” portion of the claim,<sup>111</sup> but flat-out rejected her claim seeking damages for her gambling losses even when she was not visibly intoxicated.<sup>112</sup> The court reasoned that to allow such claims would, in effect, create a slippery-slope,<sup>113</sup> and theorized that if the plaintiff’s reasoning was adopted, it “would impose a duty on shopping malls and credit-card companies to identify and exclude compulsive shoppers.”<sup>114</sup>

*Taveras* is the most recent case that failed to stretch common law dram shop liability to recover gambling losses by a visibly intoxicated gambler (as well as sober gamblers), and again, the court based its reasoning on the lack of legislative intent to provide such relief.<sup>115</sup> Together, these cases show that pathological gamblers are not protected due to the language of the statutes decriminalizing the gambling activities.<sup>116</sup> Each court implied that protection of the pathological gambler is better taken up with the state legislatures, rather than the judiciary.<sup>117</sup>

## B. THEORIES OF RECOVERY IN ILLINOIS

### 1. *The Illinois Dram Shop Act*

Unlike New Jersey jurisprudence,<sup>118</sup> Illinois courts have determined that the Illinois Dram Shop Act is the exclusive remedy for drinking related

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

108. *Id.* at \*4.

109. *Id.*

110. *Id.* (emphasis added).

111. *Id.* at \*3-4.

112. *Taveras*, 2008 WL 4372791, at \*4.

113. *Id.* (stating that these types of claims, if allowed, would have “no limit”).

114. *Id.*

115. *Id.*

116. *See, e.g., Hakimoglu v. Trump Taj Mahal Assocs.*, 70 F.3d 291, 293 (3d Cir. 1995); *see also Taveras*, 2008 WL 4372791, at \*3-4.

117. *See, e.g., Hakimoglu*, 70 F.3d at 293; *see also Taveras*, 2008 WL 4372791, at \*3-4.

118. *See supra* notes 93-119 and accompanying text.



injuries when a dram shop is involved.<sup>119</sup> In this respect, if a casino patron were to sue an Illinois casino to recover gambling losses incurred while he was intoxicated, he would fail, because the Act provides that “[e]very person who is injured within this State . . . by any intoxicated person has a right of action . . . against any person, licensed . . . to sell alcoholic liquor, who, by selling or giving alcoholic liquor . . . causes the intoxication of such person.”<sup>120</sup> Because this act is the exclusive remedy under Illinois law, an injury to a third party is required, and the intoxicated gambler would have no claim against a casino in his own name.<sup>121</sup>

As originally enacted, the Illinois Dram Shop Act would provide a narrow scope of relief for certain pathological gamblers to recover their losses through a third party.<sup>122</sup> Though the intoxicated gambler would be unsuccessful in his or her own claim, a “husband, wife, child, parent, guardian, employer or other person”<sup>123</sup> could theoretically sue under his or her own name due to the negligent sale of liquor to the intoxicated gambler for loss in “means of support.”<sup>124</sup> In *Nagle v. Keller*, for example, the defendant tavern owner caused the decedent to be “habitually intoxicated” by selling and giving him liquor, which in turn caused him to neglect his business; and thereby rendered him unable to provide for his sister, who was dependent on him for support.<sup>125</sup> The sister’s claim under the previous Dram Shop Act was upheld, and she recovered damages in connection with losing her means of support.<sup>126</sup> An analogous gambling scenario could involve a wife of a pathological gambler who became visibly intoxicated at an Illinois casino and gambled away his wife’s means of support. The wife may then have a claim against the casino for damages equal to the means of support lost at the casino by her husband.<sup>127</sup> In theory, the pathological gambler was

119. *Cunningham v. Brown*, 174 N.E.2d 153, 156 (Ill. 1961) (“The historical background of the [Dram Shop] act seems to disclaim any notion that it was intended to complement a common-law remedy against the tavern owners and operators.”).

120. Illinois Dram Shop Act, 235 ILL. COMP. STAT. 5/6-21 (2008).

121. See Ill. Rev. Stat. ch. 43, § 135 (1979).

122. See the Illinois Dram Shop Act prior to amendments at 235 ILL. COMP. STAT. 5/6-21 (West 2008). The current version of the law only provides relief resulting in destruction of property or personal injury to a third party. *Id.* Presumably, this would preclude third parties from suing for loss in means of support. *Id.*

123. *Id.*

124. See *id.*

125. *Nagle v. Keller*, 86 N.E. 694, 694-95 (Ill. 1908).

126. *Id.*

127. See, e.g., *id.* The same reasoning in *Nagle* could theoretically be applied in this scenario. If she could prove that the money lost by her husband was her “means of support,” and that the money was lost due to the casino “caus[ing] . . . [her husband’s] intoxication,” her claim would be upheld. See *id.* This line of reasoning would conceivably provide a wide scope of relief to different third parties. For example, if a situation similar to the one found in *Taveras* was presented to an Illinois court, the employer of the gambler could sue for

afforded some protection through the original Illinois Dram Shop Act, but three rather extreme elements must have been shown. The pathological gambler must: (1) have become visibly intoxicated through the negligent sale or furnishing of alcohol by the casino;<sup>128</sup> (2) have shown that the money gambled was intended for the supporting another;<sup>129</sup> and, (3) have the third party he or she was supporting bring the suit against the casino.<sup>130</sup> This narrow scope of relief under the previous Dram Shop Act could theoretically offer exclusive protection to a limited class of individuals. This legal theory, however, is tenuous and does not adequately address the problem of pathological gambling.

## 2. *The Illinois Loss Recovery Act*

Today, to recover losses from a casino in his or her own name, without elements of intoxication or third-party means of support, a pathological gambler in Illinois may look to the Loss Recovery Act.<sup>131</sup> This type of claim, similar to that in *Taveras*,<sup>132</sup> could succeed under the act as originally enacted. The act has, however, been amended to create exemptions for gambling establishments that operate under the Illinois Riverboat Gaming Act,<sup>133</sup> the Illinois Video Gaming Act,<sup>134</sup> and others.<sup>135</sup> Moreover, Senate Bill 744, if passed, would create another exemption from the Loss Recov-

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gambling losses, if it was found that the pathological gambler used the funds of the employer. *Compare* *Taveras v. Resorts Int'l Hotel, Inc.*, No. 07-4555 (RMB), 2008 WL 4372791 at \*1 (D.N.J. Sept. 19, 2008) (stating that the gambler *Taveras* resorted to stealing escrow money from her clients as she continued to lose money to the casino), *with Nagle*, 86 N.E. at 695 ("The statute gives a cause of action to any person who shall be injured in person, property, or means of support, either by an intoxicated person or in consequence of the intoxication of any person, against the person causing such intoxication.").

128. *See* Illinois Dram Shop Act, 235 ILL. COMP. STAT. 5/6-21 (2008).

129. *See id.* (requiring that the third party be injured in "means of support").

130. *See id.*

131. Illinois Loss Recovery Act, 720 ILL. COMP. STAT. 5/28 (2008). This statute allows for a private cause of action against anyone who illegally takes bets. *Id.* Originally, almost all forms of gambling were considered illegal, and anyone who lost an illegal bet could sue the bet-taker and recover their losses. *Id.* Over time, however, this statute was amended to create exceptions to what type of gambling is illegal as the decriminalization of gambling grew in Illinois. *See id.*

132. *See Taveras*, 2008 WL 4372791. One claim in *Taveras* was for the recovery of gambling losses independent of visible intoxication. *Id.* The plaintiff argued that a duty of care was owed, but the court rejected this argument and held for the defendant. *Id.*

133. *See* 720 ILL. COMP. STAT. 5/28-1(b)(11) (2008); *see also supra* note 70.

134. *See* 5/28-1(b)(12).

135. 720 ILL. COMP. STAT. 5/28-1(b) creates a list of exemptions from the provisions in 720 ILL. COMP. STAT. 5/28-1(a), which defines different scenarios of illegal gambling behavior. *Compare* 5/28-1(b), *with* 5/28-1(a). Currently there are twelve types of gambling activities exempt from 720 ILL. COMP. STAT. 5/28-1(a) (2008).

ery Act for casinos legally operating under the new law, which would change the Riverboat Gaming Act to the “Illinois Casino Act.”<sup>136</sup>

### 3. *Common Law Contract Theory*

The final remedy an Illinois pathological gambler may seek to recover his or her losses is under a traditional common law contract theory.<sup>137</sup> The two New Jersey cases previously discussed<sup>138</sup> had breach-of-contract claims against the casinos in addition to dram shop tort liability claims.<sup>139</sup> Thus, an intoxicated gambler could potentially argue that his obvious intoxication voided the gambling contract—that is, if one existed in the first place.<sup>140</sup> Federal courts in New Jersey, however, rejected contractual arguments because “there is no mutuality” between the patron and the casino.<sup>141</sup> The district court in *GNOC Corp.* did not dismiss the breach of contract claim against the casino, because determining whether the casino knew “the drunk lack[ed] the capacity to understand or control his acts” was a question of fact.<sup>142</sup>

Breach-of-contract theories require two assumptions: (1) that each bet placed by the casino patron constituted a formation of a contract; and, (2) that the casino knew the intoxicated gambler lacked the capacity to enter into a contract.<sup>143</sup> The argument that each bet constitutes a formation of a contract would be an uphill battle for the casino patron.<sup>144</sup> The relationship between the two parties may not be sufficient to establish definite terms of the contract,<sup>145</sup> and the high extent of regulation by the respective adminis-

136. See S.B. 744, 96th Gen. Assem., Reg. Sess. (Ill. 2009); see *supra* note 47.

137. See Hallam, *supra* note 14, at 257-59.

138. See *supra* notes 93-119 and accompanying text.

139. *Taveras v. Resorts Int’l Hotel, Inc.*, No. 07-4555 (RMB), 2008 WL 4372791, at \*6 (D.N.J. Sept. 19, 2008) (breach of the implied covenant of good faith and fair dealing and also a claim for unjust enrichment); *GNOC Corp. v. Aboud*, 715 F. Supp. 644, 646 (D.N.J. 1989) (breach of contract).

140. *Hakimoglu v. Trump Taj Mahal Assocs.*, 70 F.3d 291, 295 n.4 (D.N.J. 1995) (Becker, J., dissenting) (“In addition to the tort theory Hakimoglu has pursued, a gambler in his position may have a claim in contract. The gambler’s obvious intoxication, one might argue, voided the gambling contract.”).

141. *Id.* (citing *Taveras*, No. 07-4555 (RMB), 2008 WL 4372791, at \*6 n.8).

142. *GNOC Corp.*, 715 F. Supp. at 654.

143. See, e.g., *Taveras*, 2008 WL 4372791, at \*6 n.8 (“[T]he patron does not negotiate the terms of his relationship with the casino, nor can the patron or casino vary the rules of the game, the odds, or the payoffs, as those [elements are regulated through the Casino Control Commission].”).

144. See, e.g., *id.*

145. See Hallam, *supra* note 14, at 258 n.139. Hallam argues that the relationship between the patron and casino is not definite enough, seeing as courts have rejected relationships that are far more definite than the casino-patron relationship. *Id.*

trative agency may terminate any argument that common law contract formation principles still apply.<sup>146</sup>

Assuming, *arguendo*, that a contractual relationship did exist, to succeed on his claim for recovery of gambling losses, an intoxicated gambler in Illinois would have to prove that “[his] drunkenness . . . drowned [his] reason, memory, and judgment, and . . . impaired [his] mental faculties to such an extent as to render [him] *non compos mentis* for the time being,”<sup>147</sup> or that he was incapable of understanding the nature of the transaction.<sup>148</sup> Additionally, if the patron did not become intoxicated at the casino, his incapacitation claim would fail if the casino could prove that the patron “knew what he or she was doing at the time and intoxication had not drowned out reason or understanding.”<sup>149</sup> New Jersey jurisprudence differs in this respect because “the manner by which the gambler became intoxicated is irrelevant . . . because a contract theory would focus on the fact that the gambler was patently intoxicated.”<sup>150</sup> Moreover, voidable contract claims in New Jersey are more favorable to casino patrons than Illinois, because an Illinois casino would have to aid or procure the patrons drunkenness in some way.<sup>151</sup> Proving this element may not be difficult under current Illinois gambling legislation, as there are no restrictions in place regarding the extent of alcohol consumption by gamblers at a casino.<sup>152</sup> If the intoxicated patron could prove these elements, each bet would thereby be voidable, and he would be entitled to recover his losses. It is highly unlikely, however, that a plaintiff will be able to show that a contractual relationship existed in the first place, and this analysis would therefore have no relevance.

### C. NO REMEDY IN ILLINOIS

Moreover, the pathological gambler has no statutorily created protection to recover his or her gambling losses, whether the claim falls under the

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146. See, e.g., *Taveras*, 2008 WL 4372791, at \*6 n.8.

147. *Martin v. Harsh*, 83 N.E. 164, 165 (Ill. 1907).

148. See generally *Menkins v. Lightner*, 18 Ill. 282 (Ill. 1857).

149. Romualdo P. Eclavea et al., *Physical or Mental Condition-Intoxication or Drug Use*, in 12 ILL. L. & PRAC. § 61 (Thomas Reuters 2010).

150. See *Hallam*, *supra* note 14, at 257. *Hallam* discusses two hypothetical situations for recovery of gambling losses by an intoxicated person: (1) the patron entering a casino sober, and then drinking and gambling; and (2) the patron entering a casino already intoxicated and then gambling. *Id.* at 252. *Hallam* claims that it is possible for a patron to have a voidable contract claim in either situation. *Id.* at 257. Under Illinois law, however, in order for a patron to recover under the latter hypothetical, he would need to prove that the casino “aided or procured his drunkenness,” which would seemingly eliminate the possibility of recovery under latter situation. *Bates v. Ball*, 72 Ill. 108, 110 (1874).

151. See *Bates*, 72 Ill. at 110.

152. See *Responsible Gaming Statutes and Regulations*, *supra* note 14, at ii.

Illinois Dram-Shop Act,<sup>153</sup> through illegal bet-taking under the Illinois Loss Recovery Act,<sup>154</sup> or from a common law contract approach.<sup>155</sup> Under the Illinois Dram Shop Act, a patron would not be able to sue under his own name because the act requires destruction of property or personal injury to a third party.<sup>156</sup> Additionally, the same patron would not be able to sue under the Illinois Loss Recovery Act because the relevant section has been amended to create exemptions from new gambling legislation.<sup>157</sup> Finally, the common law contract approach is inadequate because of issues relating to the relationship between the parties and whether a contract is formed after each bet placed by the casino patron.<sup>158</sup> Therefore, to adequately protect the growing class of pathological gamblers, the Illinois General Assembly needs to incorporate legislation intended to protect the pathological gambler that is proportionate to the problems that decriminalized gambling creates.

#### IV. EXPANDING LIABILITY WITH THE EXPANSION OF POTENTIAL HARM

Margarita Taveras asked a District Court in the Third Circuit to place a duty of care on a casino independent of the element of visible intoxication.<sup>159</sup> Her request was unprecedented and, unsurprisingly, rejected by that court because her theory would have “no limit.”<sup>160</sup> The slippery-slope reasoning given by the court also analogized pathological gambling to compulsive shopping, which is a psychiatric disorder as defined by the American Journal of Psychiatry.<sup>161</sup> But is that comparison accurate? Would placing a duty of care on casinos to identify and prevent pathological gamblers from gambling be too burdensome, and eventually lead to a situation where, for example, a clothing store was obligated to identify compulsive shoppers and prevent them from shopping? Professor I. Nelson Rose, a leading authority on gambling law, posed the question this way: “Are suits by compulsive gamblers like the obese plaintiff who tried to sue McDonalds? Or are casinos taking advantage of people who are mentally ill?”<sup>162</sup> To sort

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153. See discussion *supra* Part II.B.1.

154. See discussion *supra* Part II.B.2.

155. See discussion *supra* Part II.B.3.

156. See discussion *supra* Part II.B.1.

157. See discussion *supra* Part II.B.2.

158. See discussion *supra* Part II.B.3.

159. Taveras v. Resorts Int’l Hotel, Inc., 2008 WL 4372791, at \*4 (D.N.J. Sept. 19, 2008).

160. *Id.*

161. *Id.* at 4 n.6 (citing M. Lejoyeux et al., *Phenomenology and Psychopathology of Uncontrolled Buying*, in 153 AM. J. PSYCHIATRY 1524 (1996)).

162. I. Nelson Rose, *Compulsive Gamblers Lose Again, In Court*, GAMING GURU, June 2, 2003, <http://rose.casinocitytimes.com/articles/6064.html> (last visited Mar 15, 2011).

through the questions of if and when a duty should be owed to the casino patron, this Comment distinguishes between three different types of gamblers: (1) those gamblers who are so certain of their problem and so dedicated to preventing themselves from gambling that they have enrolled themselves in a self-exclusion program; (2) those gamblers who demonstrate pathological gambling behavior but are not enrolled in a self-exclusion program; and, (3) those gamblers who are responsible and do not show any indication that they have a problem with gambling.

#### A. THE CASE FOR SELF-EXCLUSION

The pathological gambling problem has not been completely ignored in Illinois.<sup>163</sup> A portion of all tax dollars received from licensed gaming establishments are allocated to prevent pathological gambling.<sup>164</sup> For example, signs describing the dangers of gambling must be posted in certain areas of a casino.<sup>165</sup> Additionally, Illinois allocates money for employee training, 800 numbers, and public awareness for pathological gambling.<sup>166</sup>

Perhaps the most direct way in which Illinois seeks to protect pathological gamblers is through its voluntary self-exclusion program,<sup>167</sup> which allows people to issue a written statement to a casino, admit that they are a problem gambler and that they wish to be evicted from the casino if they ever show up to gamble.<sup>168</sup> That document is then shared with all the casinos within the state.<sup>169</sup> Any patron that has banned himself or herself from a casino and is found gambling in a casino is subject to arrest, and all of his or her winnings must be donated to a problem gambling charitable organization.<sup>170</sup> This form of protection was originally utilized by Missouri in 1996, and many states, including Illinois, have adopted this type of legislative protection.<sup>171</sup>

The self-exclusion program is unique in that it statutorily creates a duty on the part of the casino to prevent the self-excluded gambler from gambling.<sup>172</sup> Basically, the casino will utilize all of its tools to identify the self-

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163. See *Responsible Gaming Statutes and Regulations*, *supra* note 14, at 8-14.

164. See *id.*

165. See *id.* at ii.

166. *Id.*

167. ILL. ADMIN. CODE tit. 86, § 3000.710 (2007).

168. *Id.* § 3000.745.

169. *Id.* § 3000.760.

170. *Id.* § 3000.756.

171. Am. Gaming Ass'n, *Self-Exclusion 101*, RESPONSIBLE GAMING Q., Winter 2003.

172. ILL. ADMIN. CODE tit. 86, § 3000.770 (2007). In part, the statute states:

No licensee shall knowingly allow any person placed on the Self-Exclusion List pursuant to Section 3000.750 to enter the area within the admission turnstiles of, or engage in gambling

excluded gambler, such as photographs, surveillance cameras, player's cards, and so on.<sup>173</sup> Once the gambler is identified by the casino, it must remove him or her immediately, take the self-excluded patron's chips, and refuse to pay out that patron's winnings.<sup>174</sup> The duty owed, however, is not to the self-excluded patrons themselves, but rather to the Illinois Gaming Board.<sup>175</sup> In effect, breach of this duty will subject the casino to sanctions by the Illinois Gaming Board, but the problem gambler is not afforded any private cause of action against the casino.<sup>176</sup>

1. *Merrill v. Trump Indiana, Inc.*

Self-exclusion statutes generally create a duty only from the casino to the administrative agency regulating the industry. In *Merrill v. Trump Indiana, Inc.*,<sup>177</sup> however, a federal district court in Indiana was asked to determine whether a casino owed a duty to the self-excluded patron himself under Indiana law.<sup>178</sup> Mark Merrill was a self-proclaimed problem gambler; and in 1996, he wrote to the defendant casino asking to be evicted if he were to ever show up to gamble.<sup>179</sup> Two years later, Merrill "relapsed" and went to defendant's casino and started gambling once again.<sup>180</sup> Merrill then sued the casino, and claimed that it owed him a statutorily created duty of care to evict him upon his entrance into the casino, and that the casino breached that duty when it failed to do so.<sup>181</sup> The statutory construction of Indiana's self-exclusion program is similar to that of Illinois,<sup>182</sup> and the

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at, the riverboat gaming operation. The riverboat gaming operation shall cause the name and address of any person on the Self-Exclusion List to be flagged on all mailing, marketing or promotional lists or databases, except as provided in this Part. No licensee shall knowingly send marketing or promotional materials to any person placed on the Self-Exclusion List.

*Id.* § 3000.770.

173. See discussion *infra* notes 196-201 and accompanying text.

174. ILL. ADMIN. CODE tit. 86, § 3000.770 (2007).

175. *Id.*

176. See, e.g., *Merrill v. Trump Indiana, Inc.*, 320 F.3d 729 (7th Cir. 2003).

177. *Id.*

178. *Id.*

179. *Id.* at 730-31.

180. *Id.* at 731.

181. *Id.*

182. Compare ILL. ADMIN. CODE tit. 86, § 3000.701 (2007) ("It shall be the duty of the holder of an owner's license and of its employees to exclude or eject from a riverboat gaming operation any excluded person when such holder or employee knows or reasonably should know of the presence of such excluded person."), and ILL. ADMIN. CODE tit. 86, § 3000.770 (2007) ("A licensee must immediately notify a *Board agent* upon making a determination that a person listed on the Self-Exclusion List has entered the area within the admission turnstiles of a riverboat gaming operation and remove the person from the riverboat



court concluded that the regulation in question did not provide for a private cause of action.<sup>183</sup> Once again, a federal district court, applying state law, had to determine how the high court of that state would rule on an issue — and determined that because gaming is such a highly regulated industry, no private-cause-of action would be allowed absent legislative intent.<sup>184</sup> The court recognized that “Trump’s obligation to follow regulations promulgated by the Indiana Gaming Commission does not automatically translate into a duty of care owed to compulsive gamblers. At most, the rules impose upon Trump a duty to the state through the gaming commission, not to a self-requesting evictee.”<sup>185</sup> Merrill also argued that the casino owed him a common law duty of care, but that argument was rejected by the court after it alluded to Indiana dram shop liability absent injury to third persons.<sup>186</sup>

It is not surprising that the *Merrill* court found that there was no duty owed by the casino to the self-excluded patron himself, especially when compared to cases like *Hokomoglu* and *Taveras*.<sup>187</sup> The *Merrill* court, al-

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gaming operation.”) (emphasis added), with 68 IND. ADMIN. CODE 6-1-1, 6-3-4 (2005) (stating that “[a] riverboat licensee or operating agent shall be subject to disciplinary action [by the Indiana Gaming Commission] for failure to comply with the requirements of this section . . . .” and that “[a] casino licensee or operating agent must evict any excluded person from its gaming area if the casino licensee or operating agent knows or reasonably should know that the person is an excluded person.”), and *Merrill*, 320 F.3d at 732 (“Trump’s obligation to follow regulations promulgated by the Indiana Gaming Commission does not automatically translate into a duty of care owed to compulsive gamblers. At most, the rules impose upon Trump a duty to the state through the gaming commission, not to a self-requesting evictee.”).

183. *Merrill*, 320 F.3d at 732.

184. *Id.*

185. *Id.* at 732.

186. *Id.* at 733. The court’s reasoning for denying that a common law duty of care existed came after an analysis regarding a typical dram shop cause of action. *Id.* In Indiana, a tavern owner will only be held liable for injuries sustained in connection with negligent sale of alcohol if the injuries are to a third person, rather than injuries to the tavern patron himself. *Id.* (citing *Davis v. Stinson*, 508 N.E.2d 65, 68 (Ind. App. Ct. 1987)). Because Indiana does not provide protection for drunk drivers who injure themselves, the court reasoned that the Indiana Supreme Court would not allow compulsive gamblers to recover their own economic losses. *Merrill*, 320 F.3d at 733.

187. Compare *id.* at 733 (“Trump’s obligation to follow regulations promulgated by the Indiana Gaming Commission does not automatically translate into a duty of care owed to compulsive gamblers. At most, the rules impose upon Trump a duty to the state through the gaming commission, not to a self-requesting evictee.”), with *Hakimoglu v. Trump Taj Mahal Assocs.*, 70 F.3d 291, 293 (3d Cir. 1995) (“Extending common law dram-shop liability into an area so fully regulated, without a glimmer of legislative intent, is not a predictable extension of common law tort principles, and has not been foreshadowed by the New Jersey courts.”) (citing *Hakimoglu v. Trump Taj Mahal Assocs.*, 876 F. Supp. 625, 633 (D.N.J. 1994)), and *Taveras v. Resorts Int’l Hotel, Inc.*, 2008 WL 4372791, at \*4 n.5 (D.N.J. Sept. 19, 2008) (“Notably, while patrons may voluntarily place their names on lists of persons to be excluded from casinos, state law expressly absolves casinos from liability for failure to exclude these self-identified persons from gambling.” (citing N.J. STAT. ANN. § 5:12-71.2(c) (West 2009))).

though it dealt with a slightly different situation involving a self-exclusion program and not with the element of alcohol, looked to the way in which the gaming industry is regulated in the state and found that there could be no duty to the patron absent legislative intent.<sup>188</sup> Indiana gaming regulations, like those governing the Illinois gaming industry, do not impose a duty on the casino to the self-excluded patron, but only a duty to the administrative agency that oversees the industry.<sup>189</sup> But would imposing a duty to the self-excluded patrons be too burdensome on the casinos? Are casinos in the best position to exclude self-proclaimed problem gamblers?

## 2. Reasonableness of Duty to Self-excluded Patrons

The case of Mark Merrill demonstrates a perfect example of inadequate measures taken by a state to protect pathological gamblers. Before his actual run-in with the casino, Merrill enrolled himself in a clinic for problem gamblers in Illinois.<sup>190</sup> That clinic then wrote to certain casinos and asked them to remove Merrill should he ever show up to gamble.<sup>191</sup> Finally, Merrill wrote the casino himself and asked to be removed if he ever entered the casino, perhaps for the purpose of protecting himself in case he relapsed.<sup>192</sup> The steps Merrill took to alleviate himself from the adverse impacts of legalized gambling exemplify his status as a citizen fearful of the potential harm that might occur directly to him through state action of decriminalized gambling. Trump Indiana, Inc. at least should have known that Merrill was on its eviction list. When it failed to evict him, it was only subject to sanctions by the Indiana Gaming Commission and Merrill was left with no remedy.<sup>193</sup> Interestingly, if an Illinois casino fails to evict a self-excluded gambler, the patron will either lose money, while gambling (al-

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188. *Merrill*, 320 F.3d at 732.

189. *See id.*; *see also* ILL. ADMIN. CODE tit. 86, § 3000.770 (2007).

190. *Merrill*, 320 F.3d at 731.

191. *Id.*

192. *Id.*

193. *Id.* at 733. The court compared Merrill's claim to that of a typical dram shop case where a tavern patron drank to the point of visible intoxication at a bar, drove home, and sustained injuries to himself. *Id.* The court concluded that Indiana law does not allow liability to tavern owners in this type of situation because of the absence of injury to a third party by the drunk driver. *Id.* For a discussion on the court's comparison of casino's dram shop and self-exclusion liability, see Justin E. Bauer, Comment, *Self-Exclusion and the Compulsive Gambler: The House Shouldn't Always Win*, 27 N. ILL. U. L. REV. 63, 79-82 (2006). Bauer highlights that this type of comparison fails in two respects: proximate causation and foreseeability. *Id.* at 80-81. Bauer also argues that, in Indiana, it is in the best interest for the casino to not evict a self-excluded gambler because the winnings that the patron receives will be forfeited to the Gaming Commission by the casino, and "the more money the commission receives as remitted funds, the more lenient that commission may be when enforcing sanctions on the casino in violation of the self-exclusion regulations." *Id.* at 72.

lowing the casino to benefit), or the patron will win money while gambling (allowing the casino to take back the money and donate it to the patron's charitable organization).<sup>194</sup>

Some may argue that imposing a duty on casinos to self-excluded patrons imposes too high of a burden on casinos.<sup>195</sup> Given the advanced technological improvements in surveillance and the application of those improvements to casino gaming, however, requiring casinos to exclude compulsive gamblers is not an unreasonable request.<sup>196</sup> Today, surveillance equipment is used to recognize gamblers as they enter and leave the casino via face-recognition technology.<sup>197</sup> One source reported that there are "thousands of surveillance cameras and devices in each casino [that] capture virtually every chip, slot machine, employee, customer, and area of the gambling facility (including elevators and hotel facilities)."<sup>198</sup> Casinos have also utilized another way of tracking gamblers entering their casino through the use of "player's cards," which allow the casino to compile data regarding how much they are spending and on what machines.<sup>199</sup>

Casinos have no problem spending large quantities of money to protect themselves from cheaters that illegally cut into their profits. Some of the money is allocated by casinos to collect data regarding which machines are being played by what type of players.<sup>200</sup> Imposing a duty on casinos to recognize and evict self-excluded gamblers is a reasonable extension of the use of their already state-of-the-art technology, and doing so would have the effect of offering greater protection to self-excluded gamblers. People, like Mark Merrill, need this increase in protection to assist them in mitigat-

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194. See ILL. ADMIN. CODE tit. 86, § 3000.770 (2007).

195. See Bauer, *supra* note 193, at 82 (citing Joy Wolfe, Comment, *Casinos and the Compulsive Gambler: Is There a Duty to Monitor the Gambler's Wagers?*, 64 MISS. L.J. 687, 693 (1995)).

196. See 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, 544 (2004). For a more comprehensive discussion on a casino's ability to recognize and evict self-excluded gamblers using advanced technology, see Bauer, *supra* note 193, at 82-84.

197. See Bauer, *supra* note 193, at 82.

198. Diana Digges, *Casino-Related Litigation on the Rise*, LAW. WKLY. USA, Nov. 26, 2001, at 17.

199. See Bauer, *supra* note 194, at 83 (citing S.C. Gwynne, *The Gambling Industry is Creating High-Tech Databases to Reel in Compulsive Players*, TIME, Nov. 17, 1997, at 69).

200. See generally *id.* at 82-84. Bauer argues that casinos do have the ability to identify and remove self-excluded gamblers. *Id.* He suggests that the problem with a casino's ability to exclude these gamblers is easily solved by requiring "casino personnel to check the identification card of every person who enters the casino to determine if they are on the self-exclusion list." *Id.* at 84. The argument is supported by the fact that Illinois recently created a program "that will require all riverboat casinos in the state to check the identification cards of all patrons who appear to be under the age of 30." *Id.* (citing Chris Fusco, *Illinois Casinos to Check IDs for Addicts*, CHI. SUN-TIMES, June 23, 2006, at 18).

ing the temptations of their increasingly-recognized disorder of pathological gambling.

#### B. DISTINGUISHING WHEN A DUTY IS OWED

Self-exclusion programs are unique in that they give written statewide notice to casinos of self-proclaimed problem gamblers.<sup>201</sup> A self-excluded gambler is one who takes advantage of the most direct and effective form of protection offered by the state of Illinois. Enrollment in the program is an indication of the highest degree that each person has a self-proclaimed problem with gambling and that each person is taking substantial steps in order to be protected. Imposing a duty of care by the casino to the self-excluded patron is a logical extension that offers adequate protection to problem gamblers enrolled in the program. The truth of the matter is, however, that not all problem gamblers are on the self-exclusion list and determining whether a duty is owed to this class of gamblers is a different issue.

It would without a doubt be a difficult task for a casino to distinguish who among their patrons is gambling responsibly while enjoying the thrills of a casino, and who is gambling away their entire paycheck in the hopes of achieving massive wealth in a pathological manner. Identifying pathological gamblers, however, is not as difficult as it once was, with many well disseminated academic studies and reports on the disorder now available.<sup>202</sup> The National Council on Problem Gambling has identified certain characteristics that problem gamblers demonstrate, like “increasing preoccupation with gambling, a need to bet more money more frequently, restlessness or irritability when attempting to stop, ‘chasing’ losses, and loss of control manifested by continuation of the gambling behavior in spite of mounting, serious, negative consequences.”<sup>203</sup> In fact, the NGISC Final Report recommended that states who choose to legalize gambling should “[c]ontract with a state-recognized gambling treatment professional to train management and staff to develop strategies for recognizing and addressing customers whose gambling behavior may strongly suggest they may be experiencing serious to severe difficulties.”<sup>204</sup>

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201. ILL. ADMIN. CODE tit. 86, § 3000.710 (2007) (“The Board shall maintain a list of persons to be ejected or excluded from a riverboat gaming operation. This list shall be known as the Board Exclusion List. The list shall be distributed to each riverboat gaming operation, which shall acknowledge receipt of the list in writing.”).

202. See, e.g., Kindt, *supra* note 196; Bauer, *supra* note 194; Hallam, *supra* note 14.

203. Nat’l Council Problem Gambling, *What is Problem Gambling?*, <http://www.ncpgambling.org/i4a/pages/index.cfm?pageid=1> (last visited Jan. 10, 2010).

204. NGISC Final Report, *supra* note 6, at 4-19. Additionally, the Commission recommended that “[u]nder a state ‘hold harmless’ statute, [casinos should] refuse service to any customer whose gambling behavior convincingly exhibits indications of problem or pathological gambling.” *Id.*

When the plethora of information regarding problem gambling is combined with the NGISC Final Report recommendations, it is not unreasonable to suggest that casinos should owe a duty to prevent their patrons from continuing to gamble after indications of problem gambling are recognized (or reasonably should have been recognized) by the casino. This is particularly true when there is malicious conduct on the part of the casino to induce the vulnerable gambler into gambling even more. For example, in *Taveras*, the plaintiff alleged that “casino employees ‘refused to permit [her] family members from taking her home,’ and continued to allow her to gamble in spite of clear indications that she was a compulsive gambler, confirmed by information about her condition provided to casino employees by her brother.”<sup>205</sup> Similarly, in *GNOC Corp.*, Aboud ran out of money at the casino, and the casino then flew him “by helicopter to his bank in Queens, New York . . . so that [he] could withdraw more money and bring it back to Atlantic City.”<sup>206</sup> These situations exemplify pathological gamblers exhibiting clear indications of their disorder to the casinos, while casinos escape any sort of liability.

The third class of gamblers, those who gamble responsibly, would undoubtedly be found in the courtroom in an attempt to recover their losses (or as I. Nelson Rose would put it, would be found suing McDonald’s due to their obesity),<sup>207</sup> if this type of duty was imposed on casinos to gamblers not on the self-exclusion list. In order to prevent this flood-of-claims problem, the statutory construction of the duty in these situations should not only require knowledge that a gambler is exhibiting pathological tendencies toward gambling, but also some sort of malice on the part of the casino as demonstrated in *Taveras* and *GNOC Corp.* Malicious conduct, for example, would include a casino recognizing a patron on its self-exclusion list but failing to evict that patron. This would accelerate the goals of the self-exclusion law and force casinos to adhere to its purpose. Non-self-excluded gamblers, who do in fact exhibit pathological gambling behavior, would be able to succeed on a claim against the casino, if that gambler can show malicious conduct by the casino similar to the extreme casino behavior found in *Taveras* and *GNOC Corp.* Without allegations that the casino maliciously furthered the casino patron’s problem (which would not include simply allowing that patron to continue to gamble, or continuing to serve that patron drinks), frivolous claims would not survive the pleadings stage.

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

206. *GNOC Corp. v. Aboud*, 715 F. Supp. 644, 647 (D.N.J. 1989).

207. I. Nelson Rose, *Compulsive Gamblers Lose Again, In Court*, GAMING GURU (June 2, 2003), <http://rose.casinocitytimes.com/articles/6064.html>.

## V. CONCLUSION

Several authorities have analyzed situations in which pathological gamblers may recover their losses and have looked to whether the courts were accurate in making their determinations.<sup>208</sup> Courts that have dealt with this issue, however, which have mainly been federal courts applying state law and predicting how the high court in that state would rule, have consistently held that the gaming industry is too highly regulated to infer any sort of legislative intent supporting a private cause-of-action.<sup>209</sup> Legalized gambling in Illinois is no different in this regard from gaming in New Jersey or Indiana. The Illinois Gaming Board oversees the industry and, indeed, gambling in Illinois is highly regulated. Additionally, there currently is no remedy for pathological gamblers to recover from casinos losses that were incurred because of their disorder. Future plaintiffs will no doubt end up in federal court under diversity jurisdiction, and federal districts will be forced to conclude that imposing a duty on casinos to compulsive gamblers must be a decision made by the Illinois General Assembly (i.e., the Illinois Gaming Board). For this reason, inaction on the part of the Illinois General Assembly will have the effect of mandating a law stating that pathological gamblers cannot recover their losses from casinos in any circumstances. This type of law is unjust and in conflict with the increasingly recognized disorder of pathological gambling.

With Illinois' rapid decriminalization of gambling, and its potential to be the number one gaming-dependent state in the United States, the Illinois General Assembly should revive the Illinois Loss Recovery Act and include a private cause-of-action for casino patrons against casinos. If allowed, casinos would adjust their current policies toward pathological gambling and, in the process, curtail the negative societal effects that legalized gambling has on the public. Overall, this type of legislation would have the impact of allowing the high revenues generated by legalized gambling, while minimizing the harm that it creates.

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208. See generally Bauer, *supra* note 193, at 82; see also Hallam, *supra* note 14, at 257.

209. See *supra* notes 93-119 and accompanying text.

\* J.D. Candidate, May 2011, Northern Illinois University College of Law; B.A., University of Illinois at Urbana-Champaign, 2008. First and foremost, I would like to thank my family for their love and support throughout twenty long years of education. Without the mentorship of my father, William C. Dowd, a licensed Illinois Attorney for over 30 years, many of my accomplishments in law school would not have been possible. I would also like to express my gratitude to Professor John Warren Kindt of the University of Illinois for his dedication to the important issue of legalized gambling. Lastly, I would like to sincerely

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