



GAMBLING AND THE LAW^{®1}:

The Role of Credit in the Third Wave of Legal Gambling

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The Third Wave of Legal Gambling

We are in what I have labeled “the third wave of legal gambling.”³ For the third time in American history legalized gambling is sweeping the nation. The prior two waves crashed down in scandal and complete prohibition.

At the end of 1998 at least 25 states and three territories of the United States have legalized casino gaming. Twelve or more state lotteries are in the quasi-casino business with video lottery terminals (“VLTs”) and keno. Every state except Utah, Tennessee⁴ and Hawaii has some form of commercial gambling; and bills are pending in the Hawaii Legislature to legalize casinos on the island of Hawaii, if local residents approve.⁵

¹ GAMBLING AND THE LAW[®] is a federally registered trademark of Professor I. Nelson Rose, Whittier Law School, Costa Mesa, California.

² J.D. Harvard Law School 1979, Professor of Law, Whittier Law School, Costa Mesa, California. The author is recognized as a leading authority on gambling law and is an internationally known public speaker and consultant to governments and industry.

³ ROSE, I. NELSON, *GAMBLING AND THE LAW 1* (1986); Rose, I. Nelson, *The Legalization and Control of Casino Gambling*, *Fordham Urban L. J.* 245 (1979-80).

⁴ Tennessee had legalized horse racing, but the statute contained a sunset clause, causing it to expire by its own terms before a track could be licensed or built. The House of Representatives voted 64-30 for a November 1998 referendum calling for a constitutional convention to repeal the state’s lottery prohibition. Locker, Richard, *House Approves Lottery Convention Vote Senate Success Linked to Annexation Issue*, *The Commercial Appeal* (Memphis, TN) at B1 (April 16, 1998).

⁵ On February 28, 1997, Hawaii’s House of Representatives’ Finance Committee approved the proposal by a vote of 11-6. The Hawaii Legislature has had so many proposals to legalized gambling that it is considering a Senate Concurrent Resolution, No. 93 (1997), which would declare a moratorium “on the introduction and consideration of proposed legislation to legalize any form of gambling in Hawaii prior to the regular session of 2000 by which time the report

Every year Americans spend about \$9 billion at the nation's 25,000 movie theaters. This includes all ticket sales (\$6.4 billion in 1997), plus popcorn, sodas and confectioneries.⁶ A little more, about \$9.9 billion in 1997, is spent on compact discs; include all forms of prerecorded music, and the total is still less than \$13 billion (actually only \$12.2 billion in 1997).⁷

By comparison, in fiscal year 1997, lotteries operating in 37 states, the District of Columbia and three U.S. possessions,⁸ sold more than \$46 billion in lottery tickets.⁹ Add in parimutuel betting on horses, dogs and jai-alai; total "action" in casinos and on slot machines; wagers on sports; bets made in licensed card rooms; and expenditures before prize payments in charity gaming and Indian bingo, and the total amount bet legally in the United States is estimated to be well over half-a-trillion dollars: \$638.6 billion.¹⁰ Looking just at revenue, Americans spent more money on gambling, \$50.9 billion, than they did on all live events, concerts, plays, all movie theaters, all spectator sports, and all forms of recorded music -- combined." It may say something about us as a nation, or it may just be that Baby Boomers' children are growing up, but in 1994, for

of the National Gambling Impact Study Commission will be available. "

⁶ Caruso, Monica, **Movie Industry Leader Celebrates Strong Year, Warns of Rising Costs**, The Las Vegas Review-Journal 1D (Mar. 11, 1998); **Gambling Big: Hollywood Ponders a Year of Surprise Winners & Losers**, Washington Post, at Style, p. c01 (Jan. 3, 1995).

⁷ **Weekday Trader: Slow Business -2: Movie Costs Cause Concern**, Dow Jones News Service at 20:04:00 (May 27, 1998); 1994 **Southern Economic Survey -The Urban South**, Atlanta Constitution, at Business p. R/11 (Ap. 17, 1994).

⁸ Puerto Rico, Virgin Islands and the Northern Mariana Islands.

⁹ Christiansen, Eugene Martin, **The United States Gross Annual Wager: 1997**, International Gaming & Wagering Business, Aug. 1998 at 29.

¹⁰ Id. at 3. However, this number, called the "handle," is inflated, because it includes all wagers: If a player bets \$25 and wins and then \$25 and loses, a total of \$50 has been wagered, even though no money has changed hands. A more accurate number for making comparisons with other industries is the gross revenue or "win," i.e. the amount players lose. Since this is money left behind by customers after the gambling transaction, it corresponds nicely with gross revenue or sales from other retail businesses.

¹¹ Id. at 9 and 17.

the first time, adults in America spent more money on their gambling games than they did on toys for their children.¹²

It is not just the money, but rather the general availability of gambling that is the real story. For players, this looks like an unmixed blessing. With only a little effort, gamblers can find any type of game or bet they want. And since these wagers are legal, and usually heavily regulated, they know that the game is honest, they will be paid if they win and will not be robbed on the way to the car, and they will not be arrested for simply making a bet.

For legal gambling operations, the blessing is definitely mixed. New games introduce new players to gambling, but competition for the gambling dollar is fierce. As Arnie Wexler, former Executive Director of the New Jersey Council on Compulsive Gambling, put it, "The gambling dollar is like a rubber band: it cannot be stretched forever." Another analogy may be more appropriate: The legal gambling dollar is like a child's rubber balloon. The more available gambling is, the more people will gamble; however, players can only lose their gambling dollar once, and if the balloon expands too far, it will burst.

We really do not know where players are getting the money to wager on the new forms of gambling. A small, but significant, portion is money that would have otherwise been spent on long-established operations, like racetracks. Most people appear to not treat gambling money as merely part of their entertainment budget. The amounts spent on movies and beer are about as they were before the current gambling boom. So where is the money coming from? The Texas Lottery, for example, sold nearly \$4 billion in tickets last year, and kept half. Two billion dollars was spent that had to come from somewhere.¹³

¹² Total sales of durable toys & goods was \$39.0 billion compared to the \$39.9 billion in gross revenue for gambling. Christiansen, Eugene Martin & William E. Cummings, *The United States Gross Annual Wager*, International Gaming & Wagering Business 29 (Aug. 1, 1995).

¹³ This is a separate question from the more common and complex concern of whether legal gambling has a positive or negative impact on a society, comparing such factors as jobs created versus work-time lost by problem gamblers.

What does the spread of gambling means for the future? It is important to remember that the prior two gambling waves ended with nationwide prohibitions on virtually all forms of gaming. Is the current boom headed toward the same bust?

The Role of Credit

Casinos will tell you that credit is the lifeblood of any business, and they must make credit available to customers if they are to stay competitive. At the same time, our experience on the Delaware Council Helpline verifies that credit card debt is the single largest way in which compulsive gamblers get into financial difficulty. This in turn is related to the insane ease with which most of us can obtain far more credit than we could possibly repay if we indeed utilized it all.¹⁴

The latest available statistics¹⁵ show that the twelve casinos in Atlantic City issued approximately \$2.13 billion in "counter checks" -- credit markers -- to players in 1997. This is a slight increase from the \$1.954 billion in markets issued in 1996. This means in just this one jurisdiction and for just this one form of legal gambling, players borrow about \$2 billion each year from the casinos they are betting against. This does not include personal checks¹⁶ written directly to the casinos or to others, or, most importantly, patrons' use of credit cards or other forms of credit used to get cash to gamble.

A credit marker is issued by the casino to keep track of chips given to players on credit. Casinos are typically required to verify a player's credit-worthiness before

¹⁴ Pertzoff, Elizabeth, *National Gambling Impact Study Commission: Costs, Crime, & Responsibility*, 16 Delaware Council on Gambling Problems, Inc. Newsletter no. 2 at p. 3 (Sept./O&. 1998).

¹⁵ All figures are from Casino Chronicle.

¹⁶ Although personal checks might technically be called a form of short term credit, because players have an interest-free loan for the time it takes the check to clear, this should not be considered an extension of credit, because the recipient believes and civil and criminal laws require that the player have sufficient funds on deposit to cover the check. A casino should be considered to be extending credit if it gives a player gaming chips in the amount of a check, with the agreement that it will not cash the check immediately, or when the casino knows the check is post-dated, i.e. bearing a future date.

extending credit.¹⁷ The player signs the marker, which looks like a bank check, and receives playing chips in the amount of the marker. If the player has enough chips at the end of his game he can redeem the marker. If the player loses, or doesn't want to cancel the loan, the marker will be deposited in the casino's bank for collection from the player's bank, just like any other check.*

Why would anyone with enough chips not redeem a marker? The player has received a short term, interest free loan, often for several thousand dollars. The loan is open-ended, the money is the player's until the casino can collect. This practice may be illegal, as a fraud on the casino. Casino regulators regulate credit and especially watch for markers that are not promptly redeemed, because they fear casino insiders could use this as a form of skimming; in a few cases multi-thousand dollar markers have been issued to individuals whose home addresses turned out to be vacant lots. Further, in most jurisdictions, gambling debts, including credit extended by licensed casinos, are legally unenforceable and cannot be collected through the court system. Laws differ from state to state and practices differ among casinos, but there is obviously going to be tremendous pressure to have patrons redeem their markers before leaving the casino.

Of the approximately \$2.13 billion issued in credit markers in 1997, \$1,586,826,000 was redeemed prior to deposit. The casinos thus acted as lenders for short term loans of over a billion and one-half dollars for the duration of the players' visit. Most patrons were able to pay off most of their loans by the end of their trips and the markers were canceled as paid in full.

For some players, however, luck was not as kind. When a player cannot pay, or chooses not to, the casino has to try to collect. Markers issued in 1997 totaling \$543,174,000 remained unpaid after the players had left the casinos. Most of this money was recovered through the normal procedure of depositing the markers for collection through the banking system: the casinos collected \$424,400,000 from the players' banks in this way. Meaning, \$118,774,000 "bounced." However, the casinos

¹⁷ See, e.g., Nev. Gaming Cornm'n. Reg. 6.120, which also requires casinos to examine players' identifications before cashing checks.

¹⁸ Jurisdictions vary on whether markers and checks must be deposited immediately, or may be held to allow players to pay off the debt with other funds. In England, casinos were required to deposit all checks, even if the player won and wanted to redeem. Gaming Act, 1968, c.65, §16. The theory was that players would be embarrassed to write many checks in one night, because their bankers would know.

expect to collect most of this money eventually. They have made provisions of only \$27.7 million for uncollectable patron checks. So, of over \$2 billion lent, only 1.3 % will not be repaid.

Casinos have been criticized for being too lenient in their granting of credit. This criticism may be justified on public policy grounds, if it is true that they are encouraging excessive gambling. But the small amount of uncollectable accounts show that, from a business and economic point of view, casinos are not too lax in their credit standards.

The anecdotal evidence, including reports from state councils on problem gambling, indicates that the real trouble is credit cards. Unfortunately, unlike casino-issued credit, which often must be reported to state regulators, there does not appear to be any reliable source for even making a "guesstimate" as to how much money gamblers are borrowing from other sources. Probably the most important numbers to discover would be the amounts of cash obtained by patrons from cashiers and Automatic Teller Machines ("ATMs") on the casino floor, and how much of that credit is not repaid.

Credit for gambling is also extended in other forms. Casino regulators in the United Kingdom, which strictly prohibited all extensions of credit, revoked a casino's license because the casino held patrons' personal checks for long periods of time and allowed patrons to write new personal checks to consolidate older checks.¹⁹ Compulsive gamblers are notorious for being able to obtain loans from their family, friends and co-workers, as well as mortgaging their homes, kiting checks and pawning personal property. These would all appear to be credit transactions, although they might be difficult to quantify; the same debt could easily be counted more than once.

A more technical problem arises with the growing use of debit cards. If the debit card is issued by a bank that has given the patron over-draft protection, is it now a credit card?

The different forms of gambling should be looked at for their relevant statutes, regulations and practices. Many operators, such as state lotteries, charity bingo halls and tracks and other parimutuel wagering outlets, do not allow tickets to be purchased on credit. A state lottery would probably allow the use of a debit card to buy tickets and no form of gambling asks whether players have borrowed money from someone else.

¹⁹ Lownes, Victor, **THE DAY THE BUNNY DIED** 163 (1983) (Playboy's London casinos).

Practices should also be traced over time and some effort made to at least point to factors causing shifts in behavior. For example, it appears that the use of credit cards to obtain cash for gambling has increased greatly. If this is true, is it due to the proliferation of ATMs at legal gaming establishments or the relaxation of standards for obtaining credit cards? Who uses the various forms of credit available -- and why?

The different forms loans can take should be examined separately. ATMs on casino floors, which dispense cash upon insertion of a credit card, raise a number of issues. The fees charged for these transactions are extraordinarily high, as are the interest rates on these short-term loans. Does it change the character of the loan if the casino receives a portion of those fees? Should there be restrictions as to location, fees, number of cash advances available per day, amount of cash obtainable, etc? ATMs have limits, but operators have figured out ways to allow patrons to exceed those limits to obtain more cash at one time.

Should there be a cooling off period between the obtaining of credit and making a wager? The New Jersey Casino Control Commission ran into opposition from both outside and inside the casino industry when it changed its regulations to allow patrons to use credit cards at slot machines and table games. If ATMs are located off the casino floor, a patron would have more time to reconsider getting a cash advance. ATMs only dispense cash, they do not accept cash deposits; so, unlike casino credit markers, there is no easy way for winning players to immediately pay back an ATM cash advance. In fact, if a player wants to set aside large amounts of cash he has to obtain a safe deposit box or deposit the money with the casino cashier.

The arguments in favor of allowing gambling on credit should be investigated. Would the elimination of credit result in patrons more often carrying large amounts of cash and therefore creating a greater danger of robbery and other crimes? Would amounts gambled, and thus operators' profits, be reduced?

There is great debate as to how much players, particularly compulsive gamblers, are in debt. I believe efforts should be made not only to find out the dollar amounts but also how large a player's debt is as a percentage of his net income or net worth. A player who owes \$50,000 to casinos or on his credit card is not in trouble if he has \$10 million in assets; but, he is if he has no assets and makes \$20,000 a year.

There are many side issues as well. For example, credit is one of the easiest ways for casino insiders to skim funds. If a casino lends \$40,000 to a person, whose home address turns out to be an empty lot, both the casino's owners and the state's tax

collectors have been cheated. Present safeguards appear to be adequate to prevent employees from using fraudulent credit applications to skim money from casinos. But these safeguards include sharing of credit information, which raises questions of invasion of privacy.

Legal Issues

Up until a few years ago the question of whether gambling debts are collectable could be answered quite simply: No, gambling debts were unenforceable. An agreement that involved gambling would not be enforced in a court of law.

The law on gambling debts had been fairly well settled since 1710 when Queen Anne of England signed the Statute of Anne.²⁰ This 288 year-old English statute is of great importance to legal gaming in modern America because the Statute of Anne is part of the common law of every state.²¹ The Nevada Supreme Court, for example, stated in 1950 that "Most portions of the Statute of Anne are in force which are applicable to our conditions and not in conflict with statutory law."²² State legislators can change the common law by passing an Act signed by the Governor, but very few states have so acted. In fact, it was only within the last two decades that the Nevada Legislature

²⁰ The first section of the Statute of Anne, 9 Anne, c.14, 4 Bac.Abr. p.456, reads:
All notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever given, granted, drawn or entered into, or executed by any person or persons whatsoever, where the whole, or any part of the consideration of such conveyances or securities shall be for any money, or other valuable thing whatsoever, won by gaming, or playing at cards, dice, tables, tennis, bowls or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced at the time and place of such play, to any person or persons so gaming or betting as aforesaid, or that shall, during such play, so play or bet, shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever.

²¹ Nevada, for example, explicitly adopted the common law of England in 1861: "The common law of England, so far as it is not repugnant to, **or** in conflict with the Constitution and laws of the United States, or the Constiitution and laws of this state, shall be the rules of decision in all the courts of this state." N.R.S. 1.080.

²² **West Indies, Inc. v. First Nat. Bank of Nevada**, 67 Nev. 13, 214 P.2d 144, 152 (1950).

repealed, in part, that portion of the Statute of Anne that made gambling debts uncollectable.

Wealth in England in 1710 was based on ownership of land and gambling was disrupting the country's society by causing large transfers out of the hands of the aristocracy. The Statute of Anne was designed to attack gambling and protect wealthy landowners by prohibiting winners from using the courts to collect gambling debts. Securities and notes given in payment of a gambling loss and IOUs became worthless; this benefited the landed gentry who had to gamble on credit. The Statute of Anne was thus passed to protect the landed gentry from the consequences of their own folly.

The Statute was broad in its scope and in its effect on the law; it made all gambling contracts unenforceable in all common law jurisdictions, meaning in every court in every part of the United States. For almost 300 years the Statute of Anne has been enthusiastically accepted by the courts of the United States. Gambling debts, in fact all contracts having anything to do with gambling, are not only void, but are seen as somehow unclean, and the courts will not sully their hands by even considering the merits of the claims. A gambling debt is treated exactly the same as a contract for prostitution; a court will "leave the parties where it finds them" and will automatically dismiss every claim.

Many lawmakers in Puritan times wanted to go on record as being against gambling and to make it clear that this law still applied. Although it was probably unnecessary, colonial and early state legislatures passed laws encompassing the anti-gambling provisions of the Statute of Anne, including making gambling debts uncollectable and allowing losers, or anyone else, to sue the winners and get triple the money back. Some states, for example, South Carolina, Missouri, Arizona and South Dakota, still have laws on their books allowing losers, or even non-players, to sue winners, to get back money lost gambling. If law-makers have not been careful in drafting enabling legislation and tribal/state compacts, these archaic statutes can cause problems for operators of legal gaming.

Thus the law of gambling debts stood for almost three centuries: illegal bets, from a debt owed to a bookie to a check written at a friendly poker game, are void and unenforceable. But so were legal bets under the Statute of Anne.

If a player stopped payment on a check to a Nevada casino, the casino could not use the court system to collect.²³ And since debts can run both ways, players who thought they were owed money by a casino were consistently thrown out of court.²⁴ Gambling debts were simply not legally collectable, whether the claim was based on a player's marker or a winning bet at a licensed casino. But just because the casinos could not sue and obtain a judgment through the court system did not mean they could not collect through the banking system, if nobody objected. This is the reason markers are made out like checks; the casinos try to push the IOUs through the bettor's bank as fast as possible when the gambler acts in a suspicious manner. If the bettor can stop payment on his check or has insufficient funds, the casino used to be out of luck, and still is, in many jurisdictions.

The Nevada casinos were actually not as unhappy as one might imagine about this situation. Most players' checks and markers were good; they could be cashed immediately. The great majority of those checks that bounced were also eventually made good, without the casino having to resort to the court system. A few phone calls and threats, not necessarily threats of physical violence but threats to cut off the player from gambling, normally resulted in a settlement, often in the form of a promissory note with payments spread out over time. The promissory note was no more enforceable than the original checks, but could be turned into a court judgment quickly, and most people tend to pay off legal-looking documents.

The main reason the Nevada casinos did not care about the enforceability of their markers was that they actually received a tax benefit from the Statute of Anne. A business that is on the accrual basis, as are most large companies, has to report as income money owed by its customers. The business can put aside some small percentage for bad debts, but it normally has to pay taxes on its accounts receivable, even before it sees a penny in cash. However, if the accounts receivable are not enforceable in a court of law they do not have to be reported as income. Casinos could, and did, have millions of dollars in markers outstanding, but did not have to report any of these IOUs as income, and did not have to pay income taxes on any of them, until the money was actually received.

²³ *Evans v. Cook*, 11 Nev. 69 (1876). Debts incurred or checks for gambling purposes are void and unenforceable in Nevada, and no actions lie for the collection of money won in gambling, ***Sandler v. District Court*, 96 Nev. 622, 614 P. 2d 10 (1980); *Sea Air Support, Inc. v. Herrmann*, 96 Nev. 574, 613 P. 2d 413 (1980).**

²⁴ ***Corbin v. O'Keefe*, 87 Nev. 189, 484 P.2d 565 (1979).**

When many Nevada casinos had ties to the underworld and debt collection practices were cruder, the casinos did not care much that they were barred from the court system. Even legitimate operators in the 1940's and 1950's were legally allowed to use strong arm tactics that are forbidden today. After the early casino operators sold out to publicly traded corporations and legal gambling became a legitimate corporate business, the MBAs and CPAs could live with the Statute of Anne. Corporate casino management was collecting most of their debts anyway, and the whole system gave them tax advantages. However, when Atlantic City opened and competition for the first time started to eat into the Nevada casino profits, casino executives finally began to worry about their uncollectable gambling debts. A court decision holding Nevada casinos had to report outstanding markers as income,²⁵ because most were eventually collected, led to casinos asking the legislature to make their debts legally enforceable.

In 1983 the Nevada Legislature changed the law to allow casinos the right to collect, under certain circumstances, through the court system. Players, on the other hand, still cannot use the courts, although they were given some administrative remedies and limited judicial review.

It is important to note that these changes in the law on the collectability of gambling debts did not change the common law of Nevada. Gambling is still against the public policy of that state; there are simply some special limited exceptions now to the common law prohibitions on gambling debt actions. Although the Nevada Legislature has legalized gambling and stated that the "gaming industry is vitally important to the economy of the state and the general welfare of the inhabitants,"²⁶ the Nevada Supreme Court has only recently begun to soften its rulings that casinos are, in some ways, not completely legitimate. The Court has consistently held that a gambling license is simply a license that protects the casino from being arrested for gambling; the license does not give the casino the rights of "a useful trade." "As before noted, gaming is a privilege conferred by the state and does not carry with it the rights inherent in useful trades and occupations."²⁷ "The law makes a distinction between liquor and gambling industries

²⁵ *Flamingo Resort, Inc. v. United States*, 485 F.Supp. 926 (D.Nev. 1980), aff'd. 664 F.2d 1387 (9th Cir. 1982).

²⁶ N.R.S. 463 et seq.

²⁷ *State v. Rosenthal*, 93 Nev. 36, 559 P.2d 830, 835; accord, *Staexrel. Grimes v. Board*, 53 Nev. 364, 372, 1 P.2d 570, 572 (1931), and *Dunn v. Tax Comm'n.*, 67 Nev. 173, 187, 216 P.2d 985 (1950).

and useful trades.” “[T]he licensing of gambling is merely permissive, and serves to give immunity from criminal prosecution and nothing more.”²⁸

Assembly Bill 536 and Senate Bill 335 in 1983 added some exceptions to the common law, but there is nothing in these statutes to indicate that the Nevada Legislature meant to overturn the Statute of Anne. In fact, the Legislature was careful to state that gambling debts are not collectable, except as spelled out in these new laws.²⁹

The procedures for collection of a gambling debt have been codified: N.R.S. 463.361 - 463.3669 spell out the administrative procedures available to players; while N.R.S. 463.368 creates a new cause of action and procedure for casinos to follow. The statutes and regulations³⁰ set forth the procedures that must be followed. For a casino, the most important limitation is that the gaming debt must be represented by a written credit instrument.

Nevada has taken a unique approach to the issue of compulsive gambling. The Nevada Legislature is probably the only legislative body in the country to adopt a provision like this, found in the state’s gaming debt statutes:

A patron’s claim of having a mental or behavioral disorder involving gambling:

(a) Is not a defense in any action by a [casino] licensee or a person acting on behalf of a licensee to enforce a credit instrument or the debt that the credit instrument represents.

(b) Is not a valid counterclaim to such an action.³¹

Nevada is not the only place you can gamble legally. Some legislatures have chosen to modify the Statute of Anne in other ways.

²⁸ *West Indies, inc. v. First Nat. Bank of Nevada*, 67 Nev. 13, 214 P.2d 144, 149, 154 (1950).

²⁹ N.R.S. 463.361(1).

³⁰ Nev. Gaming Comm’n. Reg. 5.140, for example, puts limits on which individuals may collect gaming credit on a casino’s behalf.

³¹ N.R.S. 463.368(6).

There always were a few exceptions to the general rule against collectability of gambling debts. One way to get around the common law is to say the Statute of Anne does not apply. Disputes over state lottery winnings are being heard by courts, even those these are technically suits involving gambling debts. In some states the state legislatures have required track operators to pay off winning horse racing tickets, bought at the track, since the tracks are given licenses by the state. In other states, courts have held that tracks must pay off winners on the grounds that the tracks are not gambling with the players, only acting as stakeholders for the parimutuel bettors. Louisiana enforces bets and gambling contracts that promoted horse racing, shooting matches, and foot races, on the theory that these were not gambling but necessary "skills of war" vital to military preparedness.

Some foreign jurisdictions, such as the Bahamas, have made gambling contracts enforceable. And Puerto Rico, which is part of the United States, has made casino debts collectable, with a slight catch. The laws of Puerto Rico make a gambler liable for his losses. But the gambler has an out. The law states that a judge "may either not admit the claim when the sum which was wagered in the game or bet is excessive, or may reduce the obligation to the amount it may exceed the customs of a good father of a family." Therefore, if a big loser can prove that his gambling debts are more than those of a "good father of a family" he should be able to get the excess kicked out.

During hearings held prior to the legalization of casinos in Atlantic City, it appeared that the New Jersey Legislature would prohibit casino credit. However, casino operators argued that credit was necessary for casinos to make a profit and for the safety of their patrons, who otherwise would be carrying large amounts of cash. A legislative compromise allowed casinos to issue credit under a detailed system mandating every step of the procedure. The system has since been considerably weakened. The most dramatic example is the recent decision by the New Jersey Casino Control Commission, not the Legislature, to allow credit cards to be accepted at slot machines and gaming tables.

Non-gaming states are constantly being faced with the question of what to do about out-of-state gaming debts. If the lender has taken that claim to court and obtained a judgment, even a default judgment, all other courts of our federal system are required to give that judgment full faith and credit.³² If judgment has not been obtained, the

³² A judgment from a sister federal or state court must be given full faith and credit even if the underlying gambling debt would have been unenforceable. *Fauntleroy v. Lum*, 210 U.S. 230 (1908)

claim is still supposed to be enforced under the doctrine of comity, the notion that states should respect each others laws. But the states have an out; it is constitutional for the courts of one state to refuse to enforce any cause of action created by the laws of a sister state, if that cause of action violates a strong public policy of the forum state.³³

It is hard to imagine how the law of one state can be against the public policy of another state, until you look at gambling laws. With the spread of lotteries and other signs of the third wave of legalized gambling throughout the United States, it is getting more and more difficult for a state to claim that all forms of gambling are opposed by public policy. Public policy is, after all, only a shorthand way of saying, “What the people of this state want.” And the people everywhere more and more want legal gambling.

Legal Questions

- ▶ Should gambling debts be universally collectable? Under the common law, ever since the Statute of Anne of 1710, a loan to enable a person to gamble has not been enforceable in a court of law. Statutes have been passed, in some cases, allowing licensed casinos to sue. But even here, questions remain about their enforceability in other states, and whether the statutes should be strictly construed so that even the slightest departure from the terms of the statute would render the debt uncollectable. Other loans made to enable the borrower to gamble, including cash advances on credit cards at casino ATMs, are technically unenforceable in virtually every state.³⁴
- ▶ Collectability is often tied to the public policy of the jurisdiction. Has the proliferation of gambling, especially state-run operations, indicated a change in public policy toward all legal gambling? Florida courts have consistently ruled that the extensive gambling in that state merely indicates a policy shift in favor of spectator and tourist forms of gambling, not casino gaming. Other courts have drawn a distinction between loans made by the casino itself, which enable the patron to make wagers against the casino, from loans made by a third party. Similarly, if the state has adopted laws allowing the extension of credit by

³³ ***Hughes v. Fetter*, 341 U.S. 609 (1951).**

³⁴ ***See, Connecticut National Bank of Hartford v. Kommit*, 31 Mass.App.Ct. 348, 577 N.E.2d 639 (1991).**

casinos, does it indicate that a policy decision has been made in favor of gambling on credit? If so, a casino that strictly abides by the statute and regulations can not only collect, but is immune from suit for wrongful extension of credit. In Virginia and Mississippi, courts recently dismissed lawsuits for infliction of emotional distress, including a case where a bankrupt gambler committed suicide.³⁵

- ▶ Are there defenses to actions brought by lenders? Under the common law, a lender cannot take advantage of a person it knows is incompetent. What does this mean for casinos and compulsive gamblers? Does the situation change if a player, or the player's spouse or doctor, asks the gambling establishment to put the player's name on a list of compulsive gamblers to be excluded from the gambling establishment?
- ▶ Are issues involving gambling and credit arising in federal bankruptcy courts to be decided under state or federal law? For example, bankruptcy courts have looked to state law to see if the state has a public policy against gambling, making a gambling debt unenforceable. But they have looked to federal law on the issue of whether a debt is non-dischargeable due to fraud: A compulsive gambler who borrowed \$8,200 on her credit cards in two days at Tunica casinos money was held not to have committed credit card fraud, because she was under the delusion that she would be able to win enough to pay back the loan. The result is the loans were discharged.

Recommendation

My recommendation is that an organization like the National Research Council of the National Academy of Sciences be funded to do a long-term study of issues involving gambling and credit. At the very least, an organization with an adequate budget and no short-term time limit can compile figures that are publicly available. We cannot begin to make intelligent policy decisions until we know the facts.

Submitted,

I. Nelson Rose
Professor of Law

³⁵ *Shamburger v. Grand Casino of Mississippi, Inc.*, Civ. Action No. 1:97CV46RG (D.C.S.D.MS. Aug. 6, 1998).

Professor I. Nelson Rose

Professor I. Nelson Rose is an internationally known public speaker, writer and scholar and is recognized as one of the world's leading authorities on gambling law. He is the author of over 200 books, articles and chapters on the subject. He is best known for his internationally syndicated column, "Gambling and the Law?" His most recent book, released in 1998, is a collection of columns and analysis on *Blackjack and the Law*. Other published works include: "Underage Gambling and the Law" in Shaffer (ed.) *Youth Gambling: From Policy to Practice* (to be published in 1999); "The Future of Casino Gambling" Hashimoto, Kline and Fenich (eds.) *Casino Management for the 90's* (1998); "Internet Gambling and International Police Power" *Gaming Law Review* vol.2, no.2 (April 1998); "Gambling and the Law®: Endless Fields of Dreams" Cozic & Winters (eds.) *Gambling* (1996); "Gambling and the Law®: Update 1993" *Hastings Communications and Entertainment Law Journal* vol. 15, no. 1 (Fall 1992); "The Future of Indian Gaming" *Journal of Gambling Studies* vol.8, no.4 (Fall 1992); "The Rise and Fall of the Third Wave: Gambling Will Be Outlawed in Forty Years" Eadington (ed.) *Gambling and Public Policy: International Perspectives* (1991); "Special Defense - Compulsive Gambling" *Casino Credit and Collection Law* (1989); "The Impact of American Laws on Foreign Legal Gambling" *Journal of International & Comparative Law* vol.8, no. 1 (Winter 1986); and "The Legalization and Control of Casino Gambling" *Fordham Urban Law Journal* vol.8, p.245 (Winter 1980). He is on the Editorial Boards of Harvard University's *Journal of Gambling Studies* and the *Gaming Law Journal*. He wrote the lead article and co-edited a special issue of the *Journal of Gambling Behavior* devoted entirely to compulsive gambling and the law (vol.4, no.4, Winter 1988). Professor Rose's years of research and writing in this field led to his landmark 1986 book, *Gambling and the Law®*, the first comprehensive book ever written on the subject.

Professor Rose received his B.A. degree from U.C.L.A. in 1973 and his J.D. degree in 1979 from Harvard Law School. Following an active litigation practice in Hawaii, he joined the faculty of Whittier Law School in California in 1983. He is a tenured full Professor of Law and teaches one of the first law school classes in the nation on gambling law. He has been admitted to practice in California, Hawaii and federal courts, including the United States Supreme Court, and is a member of the American Bar Association's Gaming Law Committee and the International Association of Gaming Attorneys. In Fall 1993 and Spring 1994 Professor Rose was the first Visiting Scholar at the University of Nevada, Reno, Institute for the Study of Gambling and Commercial Gaming.

With the rising interest in gambling throughout the world, Professor Rose has been called upon to discuss gambling and the law before such diverse groups as the National Conference of State Legislatures, Congress of State Lotteries of Europe, National Academy of Sciences, United States Conference of Mayors, Federal Reserve Bank, Law Enforcement Intelligence Unit, North American Association of State and Provincial Lotteries, National Council on Compulsive Gambling, and International Conferences on Gambling and Risk Taking. He has presented scholarly papers on gambling in Nevada, New Jersey, Puerto Rico, the Bahamas, England, Austria, Portugal, Ireland, Argentina, Australia and the Czech Republic.

A consultant to governments and industry on gambling issues, Professor Rose has testified as an expert witness in both civil and criminal cases and has acted as a consultant to major law firms, licensed casinos, international corporations, players, Indian tribes, and local, state and national governments, including California, Florida, New Jersey, New Mexico, Texas, Washington, Ontario, Windsor, and the federal government of Canada.