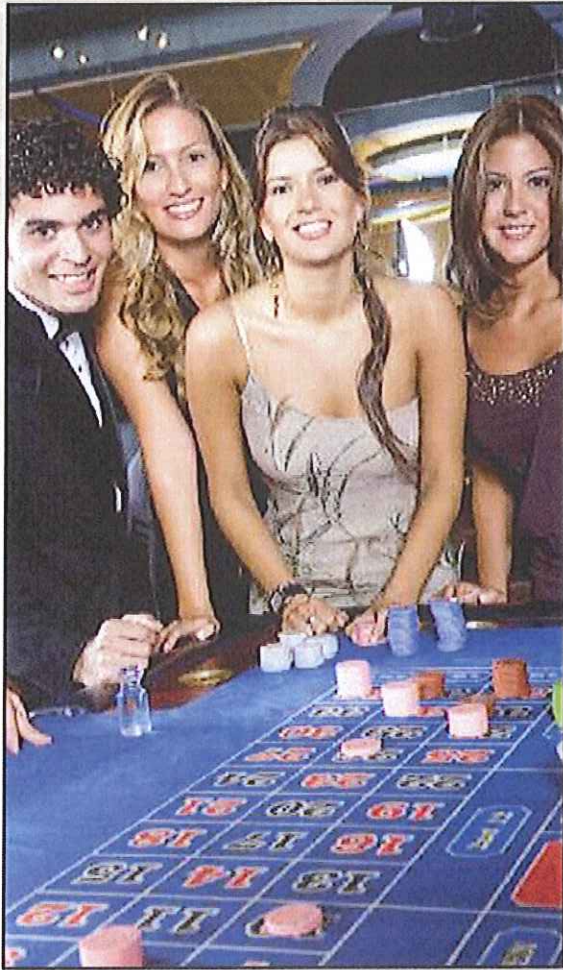


PLAYING THE ODDS: SHOULD COMPULSIVE GAMBLERS HAVE AN ADVANTAGE?

By Quin Breland, Tara Ellis and Chris Wansley



Most people are familiar with the biblical story of Cain and Abel, wherein Cain tried to deny that he had any responsibility for caring for his brother. Particularly in light of our nation's current economic struggles, we are constantly confronted with the question of whether we are responsible for the plight of others.

In the context of the compulsive gambler, there has been a movement to compel casinos to be their "brothers' keepers." Recent years have seen an increasing trend of problem gamblers and their spouses suing casinos, claiming that casinos owe a duty of care to protect, prevent and stop a problem gambler from entering the casino premises and losing money. Some have argued that the economic downturn would create more problem gamblers, while others, such as the American Gaming Association, have maintained that problem gambling trends have remained constant in both good and bad economic times.¹ Regardless, with tens of millions of gamblers in the United States and possibly millions of problem gamblers, it is foreseeable that casinos will continue to see problem gamblers seek to hold casinos liable for their losses and other alleged economic and emotional damages resulting from their addictions.

Fortunately for casinos, courts that have tackled the issue of whether a problem gambler may maintain a cause of action against a casino for an alleged breach of duty of care have concluded that casinos owe no such duty. In just the last two years, courts in several jurisdictions addressed such claims. For example, in *Caesars Riverboat Casino, LLC v. Kephart*,² a casino brought an action against a patron for failing to provide funds to cover checks written to the casino in the amount of \$125,000 for one evening of gambling. The patron counterclaimed, alleging that the casino took advantage of her pathological gambling condition to unjustly enrich itself.³ The court, in holding that the casino owed no duty of care to the patron, compared the enticements of a casino to a compulsive gambler to those

offered a compulsive shopper by a department store.⁴ The court noted that department stores have no duty to refuse to sell products to a known compulsive shopper, even if the shopper becomes indebted to the store's own or a third party credit card company for the purchase.⁵ Further, the court reasoned, the risk of injury was foreseeable by the casino patron:

[I]t is common knowledge that more money is lost than is won by patrons at any casino. Common sense tells a reasonable person and all gamblers, compulsive or otherwise, that "the house usually wins." It is also foreseeable that marketing by the casino may lead an individual to gamble and lose at the casino While Kephart lost the money she wagered, it is an injury that she chose to risk incurring. She wagered her money to purchase a chance to win even more. Indeed, it is extremely unlikely that she would have brought suit had she won her wagers.⁶

The court also concluded that a casino operator does not act in a reckless manner by marketing to individuals it knows to be compulsive gamblers.⁷ Note, however, that the casino was not without reproach by the court, as the court indicated that the casino's actions in allowing the plaintiff to write six checks totaling \$125,000 were "extremely concerning" and

should be examined by the state regulatory agency.⁸ An appeal by the plaintiff to the Indiana Supreme Court is currently pending. Oral argument was held in November 2009 and the parties are awaiting a final decision by the Indiana Supreme Court.

The United States District Courts for the Eastern District of Louisiana and for the District of New Jersey held likewise under similar facts. In *Taveras v. Resorts International Hotel, Inc.*,⁹ the New Jersey federal court dismissed a casino patron's claims against a number of casinos where the patron alleged that the casinos facilitated her gambling addiction and induced her, through event promotions, free hotel rooms, food and gift coupons, to lose money. The patron, a former attorney, even claimed the casinos caused her disbarment for gambling away client funds.¹⁰ In declining to impose a dram-shop type duty on casinos to identify and exclude problem gamblers, the court based its decision in large part on the New Jersey Legislature's deliberate decision not to impose such a duty and the slippery slope that would be created by imposing such a duty.¹¹

Likewise, in *Sherman v. Harrah's New Orleans Casino*,¹² the patron allegedly lost over \$1 million gambling over a four-year period and claimed that the casino was negligent in continuing to allow him to gamble, extending credit lines and providing complimentary alcoholic beverages to him.

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The court found that no duty of care existed under Louisiana gaming statutes, Louisiana common law or the casino's internal compulsive gambling program. The court found that the Louisiana gaming law statutes relied upon by the patron were meant to mandate that a casino implement certain procedures relative to problem gamblers, not to require a casino or its employees to identify problem gamblers or to imply a private right of action against casinos.¹³

Despite the legal precedent that insulates a casino from liability for the actions of compulsive gamblers, casino operators must be mindful of the potential for these types of claims. In particular, casinos should take care to follow all steps prescribed by state laws and regulatory agencies to identify self-excluded gamblers on their premises. The majority of gaming jurisdictions, either through state legislatures or state regulatory agencies, have instituted self-exclusion programs whereby a patron requests to be physically removed from a casino if he or she attempts to enter the premises. In both the *Kephart* and *Sherman* cases, the patrons had not availed themselves of self-exclusion programs. It is conceivable that a patron may have a more viable claim against a casino if he or she was on the self-exclusion list but nevertheless was allowed to gamble and incur significant losses. Further, this scenario provides problem gamblers with new theories of liability to pursue against casinos. For example, the gambler could argue that a self-exclusion form constitutes an enforceable contract that is breached by the casino if the patrons are not prevented from gambling, particularly if the self-exclusion program is casino-based rather than state-administered. On the other hand, most self-exclusion statements contain a waiver of liability by the self-excluded patron, which may or may not be upheld by a court depending on whether a court deems the self-exclusion form a valid contract.

A recent case highlighted the importance of monitoring casino employees' behavior toward high-rolling gamblers. In fact, many observers believed that this case—that of Terrance "Terry" Watanabe—had the potential to alter the legal mindset regarding a casino's duty toward compulsive gamblers.¹⁴ Watanabe is infamous for losing nearly \$127 million at two Harrah's casinos in a one-year period.¹⁵ When he failed to repay approximately \$14 million in markers, Harrah's pressed criminal charges against Watanabe, who was then indicted for theft. Subsequently, Watanabe sued Harrah's, alleging facts that would make any general counsel cringe. He alleged that the casino staff plied him with vodka and prescription pain medications as part of a plan to keep him gambling, and former Harrah's employees said their managers told them to allow Watanabe to continue betting even though he was visibly intoxicated. Watanabe's compulsion had not gone unnoticed in Las Vegas, as Steve Wynn had previously banned Watanabe from his casinos, deeming him a compulsive gambler and alcoholic.

Due to the unsavory facts alleged by Watanabe, many experts pegged this case as the one that would test the legal precedent in compulsive gambling cases, especially since

providing prescription medication to third parties is an unlawful act in any situation. Troublesome legal precedent could arise if a court concluded that the mere act of providing complimentary alcohol to patrons created a duty on casinos to monitor the gambling activities of its intoxicated patrons. However, in July 2010, Harrah's persuaded the Las Vegas-area prosecutors to drop the criminal charges against Watanabe and both sides entered into confidential arbitration regarding the pending lawsuits.¹⁶

Although the legal precedent lies in favor of the casinos, the court decisions are not numerous, and, in the reported decisions that exist, there has been at least one hearty dissent. In *Kephart*, the dissenting Judge Crone wrote:

If the legislature believes that casinos are free to exploit the most vulnerable among us for economic and tax gain, then they should explicitly indicate that is the public policy of our state. In the absence of such a declaration, I believe that the common law affords some minimum level of protection.

But for now, at least, the advantage is clearly still with the house.

- 1 JoNel Aleccia, "Problem Gambling May Rise as Economy Falls" (Jan. 30, 2009), available at www.msnbc.msn.com/id/28921476/.
- 2 903 N.E.2d 117 (Ind. Ct. App. 2009), vacated and transferred to Indiana Supreme Court, *Caesars Rhythmic v. Kephart*, 919 N.E.2d 552 (Table) (Ind. Sept. 11, 2009). The appeal is currently pending in the Indiana Supreme Court.
- 3 *Id.* at 120.
- 4 *Id.* at 122.
- 5 *Id.*
- 6 *Id.* at 125.
- 7 *Id.*
- 8 *Id.* at 127.
- 9 2008 WL 4372791 (D.N.J. 2008).
- 10 *Id.* at * 1.
- 11 *Id.* at * 5.
- 12 Civil Action No. 2:06-cv-02379 (E.D. La.), Order and Reasons dated Feb. 12, 2008 (Document 148).
- 13 *Id.* at 13.
- 14 *Watanabe v. Harrah's Entertainment Inc. et al.*, No. A-09-603929-B (Nev. Dist. Ct., Clark County Nov. 19, 2009).
- 15 Alexandra Berzon, "The Gambler Who Blew \$127 Million," *The Wall Street Journal*, Dec. 5, 2009, online.wsj.com/article/NA_WSJ_PUB5B125996714714577317.html.
- 16 Alexandra Berzon, "Casino, Gambler Who Lost \$127 Million Reach Settlement," *The Wall Street Journal*, July 8, 2010, online.wsj.com/article/NA_WSJ_PUB5B10001424052748704111704575355381461183578.html; and Robynn Tysver, "Did Harrah's Come Out the Winner?," *Omaha World-Herald*, July 9, 2010, www.omaha.com/article/20100708/NEWS97/1007097940.

Quin Breland, Tara Ellis and Chris Wansley are attorneys at Balch & Bingham LLP, a Southeast regional law firm with offices in Alabama, Georgia, Mississippi and Washington, D.C. They practice gaming law in the firm's Jackson, Miss., office with Scott Andress. Breland can be reached at qbreland@balch.com, Ellis can be reached at tellis@balch.com, and Wansley can be reached at cwansley@balch.com.