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**THE TECHNOLOGICAL AND BUSINESS EVOLUTION OF  
MACHINE-BASED GAMBLING IN AMERICA**

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<sup>†</sup> Darren Prum, Assistant Professor, Florida State University. To my mentor Shannon Bybee, your teachings on gaming law continues to the next generation of students.

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*“The gaming industry is becoming increasingly marked by two phenomena: change and the speed with which it is occurring. That’s good for keynote speakers because there is always something new to talk about. But it is an additional strain for those who manage change.”*<sup>1</sup>

## I. INTRODUCTION.

Across the nation, many jurisdictions have found machine-based gaming as a means to generate revenue without raising taxes.<sup>2</sup> As the largest recipient of gaming tax revenue, the Commonwealth of Pennsylvania received \$1.456 billion in 2011, followed by Nevada at \$865.25 million, and Indiana at \$846.37 million.<sup>3</sup> Both Pennsylvania and Indiana allow machine-based gaming at their horse race tracks, while Nevada does not.<sup>4</sup> These sizable sources of tax revenue demonstrate the robustness of the machine-based gaming market and support the motivations for the operators and manufacturers of these devices to entice new players and to keep existing ones captive through innovative products that press the permissible legal and ethical limits.

Consequently, there are around 850,000 slot machines operating in the United States, twice the number of automated teller machines (ATMs).<sup>5</sup> Slot machines, on average, take up seventy percent of the casino floor, with wagers varying from a couple pennies to one hundred dollars per spin of the reel.<sup>6</sup> This large dedication of resources to machine-based gaming and its expansion to racetracks and other venues across the country provides evidence of the importance placed on this activity within the gaming industry.

Meanwhile, every day people put their money into gambling

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<sup>1</sup> Shannon L. Bybee, Professor, Keynote Speech at the 23rd Annual National Gaming Conference, Nevada Society of CPAs (May 17, 2001), *in* EVIDENCE OF A SERENDIPITOUS CAREER IN GAMING 110 (2003).

<sup>2</sup> SHANNON L. BYBEE, EVIDENCE OF A SERENDIPITOUS CAREER IN GAMING 124 (2003).

<sup>3</sup> See Am. Gaming Ass’n., 2012 STATE OF THE STATES: THE AGA SURVEY OF CASINO ENTERTAINMENT 6 (2012) *available at* [http://www.americangaming.org/sites/default/files/uploads/docs/sos/aga\\_sos\\_2012\\_web.pdf](http://www.americangaming.org/sites/default/files/uploads/docs/sos/aga_sos_2012_web.pdf) [hereinafter AGA Survey].

<sup>4</sup> *Id.* at 14.

<sup>5</sup> *Slot Machines: The Big Gamble*, CBSNEWS (Jan. 7, 2011), [http://www.cbsnews.com/8301-18560\\_162-7223329.html](http://www.cbsnews.com/8301-18560_162-7223329.html).

<sup>6</sup> David Stewart, *Demystifying Slot Machines and Their Impact in the United States* 3, *in* AMERICAN GAMING ASSOCIATION WHITE PAPERS (2010), *available at* [http://www.americangaming.org/sites/default/files/uploads/docs/whitepapers/demystifying\\_slot\\_machines\\_and\\_their\\_impact.pdf](http://www.americangaming.org/sites/default/files/uploads/docs/whitepapers/demystifying_slot_machines_and_their_impact.pdf).

devices and see a spinning reel which shows that they came so close to winning, when in reality a computer chip on the inside of the device determines that the player was nowhere close to hitting the jackpot.<sup>7</sup> In fact, a slot machine may select its outcome in a variety of different ways.<sup>8</sup> For instance, modern slot machines use a random number generator to select an outcome, while a video lottery terminal disperses results similar to that of a lottery.<sup>9</sup>

Moreover, the Indian Gaming Regulatory Act (IGRA) created a framework in which Native Americans could offer gaming on their reservations.<sup>10</sup> The loosely written legislation resulted in some of the largest casinos in the world,<sup>11</sup> but some states limited these facilities to offering only games like bingo and pull-tabs. In response, many game manufacturers developed devices that aid in the game of bingo while maintaining the outward appearance of a slot machine.<sup>12</sup> As a result, players do not know which type of game they are playing and that one type of machine may have a larger payout than the other.<sup>13</sup>

In addition, the history of gaming in the United States contains many dark chapters of scandals and cheating;<sup>14</sup> thus, the industry's regulatory environment remains a key aspect to its long-term survival and the retention of public confidence.<sup>15</sup> As technology continues to advance, each jurisdiction must evaluate its statutes and regulations to ensure a modern, safe, and fair gaming environment, but a wide range of interested parties can always disguise important issues that need attention. However, a private party action in the courts may also occur against a casino operator and machine manufacturer to sound the alarm on questionable practices that need further scrutiny by regulators to ensure a fair opportunity for the players to win and to retain public confidence.

With this situation at hand, this article explores the seemingly questionable practices across the country of offering machine-based

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<sup>7</sup> *Id.* at 13. Usually slot machine manufacturers and regulators place a ceiling of how often the top jackpot symbol can appear, typically around a 6:1 ratio. *Id.*

<sup>8</sup> See I. Nelson Rose, *Technically Not Slot Machines*, 8 GAMING L. REV. 225 (2004) [hereinafter Rose 1].

<sup>9</sup> Basil Nestor, *How Do Video Lottery Terminals (VLTs) Compare to Slots?*, READY BET GO!, <http://www.readybetgo.com/slots/strategy/vlts-versus-slots-2207.html> (last visited Feb. 4, 2014) [hereinafter Nestor].

<sup>10</sup> See Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 STAT. 2467 (1988).

<sup>11</sup> See Virginia W. Boylan, *Reflections on IGRA 20 Years After Enactment*, 42 ARIZ. ST. L.J. 1, 3 (2010).

<sup>12</sup> See Rose 1, *supra* note 8.

<sup>13</sup> See Nestor, *supra* note 9.

<sup>14</sup> See *infra* Section II.

<sup>15</sup> See BYBEE, *supra* note 2, at 125.

gaming to the public and whether a civil lawsuit could remedy some of the policy shortcomings that now exist due to the patchwork of regulations and statutes that developed over time and as a result of technological advancements. To this end, we begin by tracing the historical roots of gambling in the United States in Section I. We revisit Professors I. Nelson Rose and John Rosecrance's assertion that the nation is currently in the midst of a third gaming cycle and consider the policy decision to bring this activity to the Native American Indian Reservations.

In Section II, we discuss the evolution of machine-based gaming across the country. We look at the invention and technological progression of slot machines in addition to the legal hurdles and challenges along the way. Then, we explore the various strategies employed by those participants that face various types of barriers to offering slot machines. This includes financing methods like players' pools as well as Class II devices and video lottery terminals.

Based on the jurisdictions that allow gaming and the permissible machines, we turn to the different types of facilities that offer these devices in Section III. In this evaluation, we consider two types of allowable machines available in some representational jurisdictions that permit Casino Gaming: Native American Gaming and Racinos.

Given the patchwork of approaches by the various jurisdictions in regulating the industry, we consider the applicability of a civil remedy against the operators and manufacturers in Section IV for those practices considered questionable. We evaluate the strength of claims using the intentional tort of deceit and the unintentional tort of negligent misrepresentation, followed by an analysis of prior court precedent on these types of claims and those in other areas of gaming law.

Finally, we provide policy recommendations and offer solutions to resolve this issue in Section V, based on what we see as reluctance by the courts to get involved. Since gaming can be prohibited should the public lose its trust and confidence in the industry, we explore solutions for operators and manufacturers, as well as for regulators and legislators, in order to alleviate and mitigate those practices that need more transparency.

## II. HISTORICAL ROOTS OF GAMBLING IN THE UNITED STATES

Gambling is an evolving industry, with new forms and variations of it becoming increasingly legal over time.<sup>16</sup> When considering the

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<sup>16</sup> G. Robert Blakey, *Gaming, Lotteries, and Wagering: The Pre-Revolutionary Roots of the Law of Gambling*, 16 RUTGERS L.J. 211, 212 (1985).

history of gambling in the United States, Professors I. Nelson Rose and John Rosecrance assert that the gaming industry previously completed two long-term growth cycles and now rests in the midst of a third period of expansion.<sup>17</sup> The first wave began before the founding of the United States and existed until the election of Andrew Jackson as president. The second wave started with the Civil War and continued with the expansion into the western portions of the country. The third wave began in response to the Great Depression and opposition to raising revenue through increased taxes.<sup>18</sup>

Whether legal or not, many people will continue to gamble regardless of its legal status.<sup>19</sup> One commentator explained that the abundance of cheating by those involved in gambling activity served as the main factor for making it illegal, but this memory is often short lived, and it has been legalized once again.<sup>20</sup> Consequently, the history of gambling in the United States provides an insight into how the various jurisdictions created a patchwork of approaches to allow the different types of machine-based gaming and the various methods for determining an outcome.

### A. The Three Waves of Gambling

Due to the absence of a central government, the English introduced gambling to the colonies before the nation's founding as a method to fund infrastructure needs.<sup>21</sup> King James I directed the Virginia Company of London to generate funds that would benefit and support the settlement in Jamestown based on lotteries conducted across England in 1612.<sup>22</sup> By 1624, the Virginia Company saw its charter revoked because many in England realized that the colonies received the benefits from their ticket purchases, which weakened their economy.<sup>23</sup>

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<sup>17</sup> See I. Nelson Rose, *The Rise and Fall of the Third Wave: Gambling Will Be Outlawed in Forty Years*, in *GAMBLING AND PUBLIC POLICY: INTERNATIONAL PERSPECTIVES* 65, 74-75 (William R. Eadington & Judy A. Cornelius eds., 1991) [hereinafter Rose 2]; JOHN ROSECRANCE, *GAMBLING WITHOUT GUILT: THE LEGITIMATION OF AN AMERICAN PASTIME* (1988).

<sup>18</sup> See Rose 2, *supra* note 17; ROSECRANCE, *supra* note 17.

<sup>19</sup> See Blakey, *supra* note 16.

<sup>20</sup> See Roger Dunstan, *History of Gambling in the United States*, in *GAMBLING IN CALIFORNIA* (1997), <http://www.library.ca.gov/crb/97/03/97003a.pdf> [hereinafter Dunstan 1].

<sup>21</sup> Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 24 (1992) [hereinafter Rychlak 1].

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* Professor Rychlak further explains that many people in England during  
*continued . . .*

In response, “each of the thirteen colonies established lotteries.”<sup>24</sup> For example, New York became home to the first racetrack in 1665.<sup>25</sup> Massachusetts conducted one of the first successful lotteries and other colonies followed suit,<sup>26</sup> but many jurisdictions prohibited gambling and related equipment.<sup>27</sup> The colonies ultimately approved more than 158 different lotteries before the conclusion of this cycle, with the proceeds financing the country’s needs by constructing roads and bridges, schools, municipal buildings, and much more.<sup>28</sup> Ironically, a national lottery produced funds to help pay for the war against England since the authority to tax had not been established.<sup>29</sup>

Professor Thompson estimates that between 1790 and 1860, 24 of the 33 states used lotteries to generate revenue.<sup>30</sup> Thompson further explains that by 1831, eight states operated 420 lotteries that sold an estimated \$66 million in tickets, which was five times the amount of the federal budget.<sup>31</sup> In the end, the fund raising that occurred through this method benefited more than 47 colleges, 300 schools, and 200 religious groups.<sup>32</sup>

Moreover, private lotteries existed in the beginning, but they posed many issues.<sup>33</sup> These lotteries offered fraudulently rigged games,

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this time period saw their participation in the lottery as part of their civic duty. *Id.* at n. 82. This caused much consternation amongst the English gentry because the crown, and not parliament, authorized such a lottery. *Id.* at n. 81.

<sup>24</sup> Anthony N. Cabot et al., *Alex Rodriguez, A Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance*, 57 DRAKE L. REV. 383, 386 (2009) [hereinafter Cabot 1].

<sup>25</sup> Joan S. Howland, *Let’s Not “Spit the Bit” In Defense of “The Law of the Horse”*: *The Historical and Legal Development of American Thoroughbred Racing*, 14 MARQ. SPORTS L. REV. 473, 484 (2004).

<sup>26</sup> See Blakey, *supra* note 15, at 242.

<sup>27</sup> I. Nelson Rose, *Gambling and the Law: The Third Wave of Legal Gambling*, 17 VILL. SPORTS & ENT. L.J. 361, 368 (2010) [hereinafter Rose 3]. For example, the Massachusetts Bay Colony refused to allow a person to possess cards, dice, or gambling tables inside or outside of the home. *Id.*

<sup>28</sup> See Rychlak 1, *supra* note 21, at 25 n. 83. These projects included “the fortification of New York City and Philadelphia, the construction of roads, hospitals, lighthouses and jails, the promotion of literature, the improvement of navigation on rivers, the development of industry, and even the construction of churches.” *Id.* at 25. Many universities became the beneficiary of these funds including Harvard, Yale, Columbia (formerly known as Kings College), Dartmouth, Princeton, Rutgers, Brown (formerly known as Rhode Island College), the University of Pennsylvania, the University of North Carolina, and the University of Michigan. *Id.*

<sup>29</sup> See Cabot 1, *supra* note 24, at 386.

<sup>30</sup> WILLIAM N. THOMPSON, *LEGALIZED GAMBLING: A REFERENCE HANDBOOK* 8 (1st ed. 1994) [hereinafter Thompson 1].

<sup>31</sup> *Id.*

<sup>32</sup> See Rychlak 1, *supra* note 21, at 26.

<sup>33</sup> *Id.*

abysmal odds, or situations where a winner was not selected.<sup>34</sup> The operators of private lotteries also regularly criticized the public lotteries as posing an unfair competition.<sup>35</sup>

In response, the colonies chose to eliminate their critics by making the private and for-profit lotteries illegal.<sup>36</sup> This action shaped public policy in two ways. First, it redirected all of the money associated with lotteries to public needs.<sup>37</sup> Second, it allowed the lottery to function as a voluntary tax for funding public works projects, while returning a small portion of the collected money to those lucky enough to select the right outcome.<sup>38</sup> The colonial governments developed a finely tuned policy that linked the negative aspects connected with a lottery to private operators and not those conducted publicly,<sup>39</sup> which helped curb opposition to the activity.

In the eighteenth century, New York acknowledged the severity of gambling and the toll it was taking on its citizens.<sup>40</sup> In reaction, the state passed ineffective laws attempting to regulate gambling and lotteries.<sup>41</sup> However, support eroded for this method of fundraising as the United States expanded geographically and the lotteries grew from their small and local footprint that had instilled a sense of communal good in helping develop the fledgling country, to large-scale money making operations that spanned across state lines by the early nineteenth century.<sup>42</sup>

President Andrew Jackson, a gambling man himself, started to attack and destroy the gaming industry because of the infamous corruption cases of the time.<sup>43</sup> In response to the surge in fraudulent activities associated with the lotteries and the ensuing loss of public support, a majority of states united to prohibit lotteries and stop the selling of tickets by private parties.<sup>44</sup>

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<sup>34</sup> See Rose 3, *supra* note 27, at 369.

<sup>35</sup> See Rychlak 1, *supra* note 21, at 26.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 26-27.

<sup>40</sup> See Blakey, *supra* note 16, at 246-47.

<sup>41</sup> *Id.*

<sup>42</sup> See Cabot 1, *supra* note 24, at 387.

<sup>43</sup> See Rose 3, *supra* note 27. After the Revolutionary War, many entrepreneurs turned to lotteries as a business. See Rychlak 1, *supra* note 21, at 30. These entrepreneurs created ticket brokerages to promote the lotteries by purchasing tickets in bulk for reduced prices and then sold them using different financing schemes like installment plans, fractional ownership, and for games available in other states. *Id.*

<sup>44</sup> See THOMPSON 1, *supra* note 30, at 6. Pennsylvania preceded Massachusetts when both states prohibited lotteries in 1833. See Cabot 1, *supra* note 24, at 387-88. Some states outlawed lotteries by statute, while others were required to embed such

*continued . . .*

With the need for funds to finance the Civil War, followed by the reconstruction of the South, as well as the ongoing expansion into the western part of the United States, gambling and lotteries returned as a revenue source to begin the second cycle.<sup>45</sup> State-licensed lotteries were an easy way for southern states to generate much-needed revenue during wartime.<sup>46</sup> During Reconstruction, those persons overseeing the southern states changed the statutes in order to legalize lotteries for projects that benefited the public, which included the creation of the University of Mississippi.<sup>47</sup> Elsewhere, wealthy plantation owners gambled in private card games along the southern portion of the Mississippi River when traveling by boat.<sup>48</sup>

In the prairies and western towns, gambling naturally developed with the arrival of the railroad and the discovery of gold and other minerals.<sup>49</sup> Ubiquitous with western and mountain towns, gambling saloons and establishments appeared far and wide regardless of their legal status.<sup>50</sup> In jurisdictions with a prohibition, law enforcement often chose to overlook gambling activities because of the prevalence of play across the numerous frontier locales and the difficulty in gaining compliance with the statutes amongst the general public.<sup>51</sup> In other jurisdictions, the government licensed the gambling establishments in order to collect revenue and avert the enforcement issues (or lack thereof) that frequently occur under prohibition

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prohibitions into their newly drafted constitutions. WILLIAM N. THOMPSON, *GAMBLING IN AMERICA: AN ENCYCLOPEDIA OF HISTORY, ISSUES, AND SOCIETY* 227 (2001). Over time, the original meanings lost effect or became distorted to incorporate other forms of gambling into a more contemporary definition. *See* Rose 3, *supra* note 27. As seen in later years, the inclusion of such provisions into a state constitution created a whole host of obstacles for proponents of bingo, pari-mutuel wagering and casinos, since most states require the voters to make such amendments. *Id.*

<sup>45</sup> *See* Rose 3, *supra* note 27.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 370.

<sup>48</sup> Lorenzo D. Creighton & Sean M. McGuinness, *The Implementation of Excursion Boat Gambling in Iowa*, in *GAMBLING AND PUBLIC POLICY: INTERNATIONAL PERSPECTIVES* 233, 234 (William R. Eadington & Judy A. Cornelius eds., 1991). Contrary to modern day riverboat casinos, the boat's operator did not get involved in the gambling activities. *Id.*

<sup>49</sup> *See, e.g.,* Darren A. Prum & Shannon L. Bybee, *Commercial Casino Gaming in the United States: A Jurisdictional Analysis of Gaming Taxes, Licenses, and Fees*, 4 *GAMING RES. & REV. J.* 17, 30 (1999) (South Dakota joined the union in 1889; but, the origins of gambling in this state date back to the arrival of the railroad in 1873 and subsequent finding of gold in the Black Hills the next year).

<sup>50</sup> *See* Rose 3, *supra* note 27, at 370.

<sup>51</sup> *Id.* at 370-71.

situations.<sup>52</sup>

As a precondition for statehood, many western states prohibited gambling in order to gain admission into the Union.<sup>53</sup> Some states like California took specific actions and prohibited games that required the operator or owner to finance in 1860, which remains intact today.<sup>54</sup> In other instances, these prohibitions occurred over a very short period.<sup>55</sup> For example, widespread gambling occurred unlawfully in Nevada mining towns during its territorial days and even after statehood in 1864; yet, five years later, the state legislature removed the prohibition in spite of the governor's veto.<sup>56</sup>

Interestingly, wagering on horse races faced little opposition because a bettor needed to be physically present at the racetrack.<sup>57</sup> A combination of technology and scandals, along with a resurgence of conservative religious values, paved the way for the passage of statutes that prohibited the transmission of gambling information, as well as horse racing, between 1880 and 1915.<sup>58</sup>

Likewise, the closing of the notorious Louisiana Lottery signaled the end of lotteries within the second wave of gambling. Known as "The Serpent," the lottery gained such influence around the country that many people accepted a winning ticket as equivalent to a certified check.<sup>59</sup> The Louisiana Lottery sold tickets nationwide through the postal service, which brought tremendous amounts of revenue to the state from outside its borders; however, the lottery also became notorious for its influence on lawmakers, financial institutions, and the media.<sup>60</sup> Other states reacted to this conspiracy by not allowing their

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<sup>52</sup> *Id.* The gold rush in California provides an example of such an approach where numerous licensed casinos dominated many northern towns from the San Francisco Bay to the Sierra Nevada Mountains after the discovery of gold in Sutter's Mill. *Id.* at 370.

<sup>53</sup> *Id.* at 373. For example, all of the casinos in the territories of New Mexico and Arizona needed to close prior to receiving statehood. *Id.*

<sup>54</sup> See Dunstan 1, *supra* note 20.

<sup>55</sup> See, e.g., Prum & Bybee, *supra* note 49, at 26.

<sup>56</sup> *Id.*

<sup>57</sup> See Rose 3, *supra* note 27, at 371.

<sup>58</sup> See generally, *id.* at 371-72; Howland, *supra* note 24, at 495-96. According to Professor Rose, attitudes changed when the telegraph, telephone and totalizer enabled off track betting in other locations in the late nineteenth century. See Rose 3, *supra* note 26, at 371. As a result of these off track betting locations, many jurisdictions passed statutes that prohibited the transmission of gambling information. *Id.* at 372.

<sup>59</sup> Darren A. Prum, *Lottery Tickets Sold After the Featured Prize is Claimed: Will the Courts Force the Practice to be Stopped?*, 13 GAMING L. REV. & ECON. 286, 289 (2009).

<sup>60</sup> *Id.* The Louisiana Lottery had problems with transparency and integrity from the very beginning; since two former Confederate generals provided cover for the  
*continued . . .*

residents to buy tickets; meanwhile, Congress made illegal the use of the mail to send any ticket or lottery paraphernalia in 1890.<sup>61</sup> Before the end of the nineteenth century, nearly every state made lotteries illegal through a constitutional amendment or by statute, and Louisiana completely prohibited lotteries in 1895.<sup>62</sup>

As a result, most types of gambling became illegal in the United States by 1910, when a public surge in Victorian morality, scandals, and the perceived belief of respectability from gambling's absence spread across the country.<sup>63</sup> The country essentially eliminated legalized gambling;<sup>64</sup> however, the ban did not put a stop to the activity because it merely moved underground.<sup>65</sup>

Over time, the need to generate revenue in lieu of the unpopular option of raising taxes led to the third wave of gambling that the United States has today.<sup>66</sup> Exacerbated by the stock market crash and the subsequent Great Depression, gaming once again became an acceptable approach to stimulate the economy.<sup>67</sup> Massachusetts allowed charitable bingo to help organizations raise money in 1931, followed by 11 other states over the next 20 years.<sup>68</sup>

Moreover, Nevada legalized the majority of types of gambling in 1931 in order to create employment opportunities and revenue for the state.<sup>69</sup> In addition, the public perception, along with that of the state legislature, held that due to the widespread infiltration of illegal gambling operations in the community, law enforcement efforts could not effectively succeed due to corruption issues; so, the legalization

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New York gambling syndicate that operated and managed the lottery. *Id.* The lottery received ninety percent of its revenue from outside the state with annual profits estimated at \$13 million but only awarded winners \$3 million each year. *Id.* Because such large amounts funds made its way to Louisiana, the operators embarked on a scheme that donated heavily to many different state projects, which allowed it to exert significant influence upon those entrusted to safeguard the public. *Id.*

<sup>61</sup> See Rose 3, *supra* note 27, at 372.

<sup>62</sup> See Prum, *supra* note 59, at 288.

<sup>63</sup> See Rose 3, *supra* note 27, at 373. The Nevada Legislature took a series of actions to rid the state of gambling between 1909 to 1915. *W. Indies, Inc. v. First Nat. Bank of Nev.*, 214 P.2d 144, 146 (Nev. 1950). In addition, the only racetracks that remained as of 1910 were located in Maryland, Kentucky, and New York; but later that year, New York closed its facilities as well. See Rose 3, *supra* note 26 at 373.

<sup>64</sup> See *supra* text accompanying note 62.

<sup>65</sup> See Dunstan 1, *supra* note 20, at II-6.

<sup>66</sup> See BYBEE, *supra* note 2, at 126.

<sup>67</sup> *Id.*

<sup>68</sup> See Dunstan 1, *supra* note 20, at II-7.

<sup>69</sup> *Id.* at 27.

and licensing of the activity provided a better alternative.<sup>70</sup>

Meanwhile, horse racing received a boost to its image when Man o' War claimed victory in his first twenty-one races between 1919 and 1920, all while achieving great popularity amongst the public.<sup>71</sup> About the same timeframe, Colonel Matt J. Winn introduced the 1870s French concept of pari-mutuel wagering to Churchill Downs in Kentucky.<sup>72</sup> In an important legal decision between Louisville's Mayor, James Grinstead, and Colonel Winn to ascertain whether Section 1961 of the Kentucky Statutes applied, the Kentucky Court of Appeals found that although the statutes of the time prohibited the use of "any machine or contrivance used in betting whereby money or other thing may be won or lost, . . . the Legislature intended that the selling of combination or French pools on any regular race track during the races thereon should not be illegal."<sup>73</sup> Consequently, nearly every state legalized pari-mutuel betting by the end of the 1930s.<sup>74</sup>

Finding itself in a similar predicament to Nevada's economic woes and with the inability to institute an income tax, Florida also turned to legalizing pari-mutuel betting, as well as allowing its counties to make their own decisions on slot machines.<sup>75</sup> In outlining Florida's shifting public policy of the time, the Florida Supreme Court referred to the state's experience in a later opinion on an illegal slot machine and stated:

Within two years the operation of slot machines in Florida had become so obnoxious to the citizens of this State that the people of a great majority of the counties

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<sup>70</sup> Anthony N. Cabot & Richard J. Schuetz, *An Economic View of the Nevada Gaming Licensing Process*, in *GAMBLING & PUBLIC POLICY: INTERNATIONAL PERSPECTIVES* 123, 126 (William R. Eadington & Judy A. Cornelius eds., 1991).

<sup>71</sup> Howland, *supra* note 25, at 497-98.

<sup>72</sup> *Id.* at 496-97. French perfumer Pierre Oller developed the concept of Pari-Mutuel wagering. He based his system upon the awarding of prizes whereby the participants place bets on a given horse and the total money collected creates one large pool. A winner receives an amount of money that corresponds with the total number of bets made for a given horse. This method effectively reduces the odds and payout on a horse that sees more bets in the event that it wins and the opposite for those that sees less wagers. *Id.*

<sup>73</sup> *Grinstead v. Kirby*, 110 S.W. 247, 248 (Ky. Ct. App. 1908).

<sup>74</sup> Howland, *supra* note 25, at 498.

<sup>75</sup> See Ronald J. Rychlak, *Video Gambling Devices*, 37 *UCLA L. REV.* 555, 562 (1990) [hereinafter Rychlak 2] (explaining that beyond facing the economic woes of the Great Depression, Florida was still trying to recover from the two major hurricanes of 1928 that struck the Miami – Fort Lauderdale part of the state); Act of 1931, ch. 14,832 (No.194), 1931 Fla. Laws 679-90 (covering dog and horse racing); Act of 1935, ch. 17,074 (No. 303), 1935 Fla. Laws 684-88 (vol. 1) (covering jai alai); Act of June 10, 1935, ch. 17,257 (No. 486), 1935 Fla. Laws 1085-89 (vol. 1).

in the State had voted overwhelmingly to prohibit the operation of all slot machine devices licensed under the 1935 Act being operated thereafter in their respective counties, and a great majority of the members of the legislature of 1937 were pledged to their constituency to enact laws which would abolish the operation of slot machines in Florida.<sup>76</sup>

Consequently, those members of the legislature prevailed and prohibited slot machines in 1937, but left the pari-mutuel betting untouched.<sup>77</sup>

Similarly, Maryland turned to slot machines to generate revenue for the state in 1943.<sup>78</sup> However, the expected revenue never materialized, while an excess of greed and corruption filled the state.<sup>79</sup> Twenty years later, the Maryland legislature succumbed to the pressures of anti-gambling advocates to pass legislation that phased out slot machines over a five-year timeframe.<sup>80</sup>

In 1964, New Hampshire started a lottery, while New York followed suit three years later.<sup>81</sup> The resurgence of lotteries occurred mainly because of the opposition to tax increases by the voters.<sup>82</sup> New Jersey started the first successful modern lottery in 1971, which ran on the concept of offering a low ticket cost with frequent drawing of numbers, accompanied by a higher percentage return to the players and convenient locations to play.<sup>83</sup> Subsequently, a majority of states embraced the strategy, which generated much needed state revenue, while avoiding a debate about the need to raise taxes.<sup>84</sup>

As seen with the popularity of lotteries, the activity of gambling did not make a full comeback until after World War II and the rise of a booming economy.<sup>85</sup> In 1978, casino-style gambling received approval by the voters in New Jersey.<sup>86</sup> Based on this result, New

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<sup>76</sup> *Eccles v. Stone*, 183 So. 628, 631 (Fla. 1938).

<sup>77</sup> See Rychlak 2, *supra* note 75; see also Act of May 29, 1937, ch. 18,143 (No. 437), 1937 Fla. Laws 909-12 (vol. 1).

<sup>78</sup> See Act of May 6, 1943, ch. 321, 1943 Md. Laws 348-49.

<sup>79</sup> Rychlak 2, *supra* note 75, at 562-63.

<sup>80</sup> 1963 Md. Laws 1346-47.

<sup>81</sup> Dunstan 1, *supra* note 20, at II-9. Although many people played illegal lotteries nationwide, no state or federal government sponsored lotteries operated from 1894 to 1964. See *id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> See *id.* There were several attempts to create a national lottery but Congress failed to pass them. *Id.*

<sup>85</sup> See, e.g., *id.*

<sup>86</sup> See *id.*

Jersey enacted Assembly Bill 2366 on April 18, 1977 in order to create a regulatory structure to oversee the industry.<sup>87</sup> This decision to legalize casino gambling within the state occurred as a public policy tool to help turn Atlantic City into a popular tourist destination, as well as generate revenue for the benefit of the elderly and handicapped.<sup>88</sup>

Noticing the success of Nevada and New Jersey, as well as that of the many state-run lotteries, another set of jurisdictions turned to gaming as a means to generate revenue without raising taxes.<sup>89</sup> South Dakota passed laws allowing limited-stakes casino gambling in the mining town of Deadwood in 1989.<sup>90</sup> Similar to New Jersey, Deadwood had a dying economy with failing businesses before the initiation of gaming.<sup>91</sup> Although Deadwood was the third location to legalize gambling, today it is in fierce competition with the surrounding states that now permit gaming.<sup>92</sup> In the year following South Dakota's legalization of gaming, Colorado legalized the same limited-stakes gambling in the mining towns of Cripple Creek, Black Hawk, and Central City.<sup>93</sup>

As gambling was changing in the West, riverboat gambling made a comeback in the late 1980s through the 1990s.<sup>94</sup> Illinois and Iowa legalized this form of gambling in 1989 and 1990.<sup>95</sup> The games allowed on the boats are dependent upon the laws of that state.<sup>96</sup> Sequentially, Missouri, Indiana, Louisiana, and Mississippi all legalized forms of riverboat gaming shortly after so that they would not lose possible revenue to their neighbors.<sup>97</sup> Most riverboats allow

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<sup>87</sup> New Jersey Casino Control Act, N.J. STAT. ANN. § 5:12-1 (West 2012).

<sup>88</sup> *Id.*

<sup>89</sup> See BYBEE, *supra* note 2, at 124.

<sup>90</sup> Prum & Bybee, *supra* note 49, at 30.

<sup>91</sup> Chet Brokaw, *Gambling Brought Deadwood, S.D., Back to Life*, USA TODAY (Nov. 11, 2009, 5:00 PM), [http://usatoday30.usatoday.com/travel/destinations/2009-11-11-deadwood-gambling\\_N.htm](http://usatoday30.usatoday.com/travel/destinations/2009-11-11-deadwood-gambling_N.htm).

<sup>92</sup> *Id.*

<sup>93</sup> Prum & Bybee, *supra* note 49, at 18.

<sup>94</sup> See generally Prum & Bybee, *supra* note 49.

<sup>95</sup> *Id.* at 20-22.

<sup>96</sup> See generally *id.* (examining the laws applicable to casino gambling in the United States, including riverboat gaming where legal).

<sup>97</sup> *Id.* at 21-25. Interestingly, the States of Illinois and Iowa require the vessels in their jurisdiction to bear a resemblance to the nineteenth century riverboats described in the period writings by Mark Twain in an effort to bring to mind a bygone era. See Creighton & McGuinness, *supra* note 48, at 234. However, the historical roots of gambling along the Mississippi River occurred mainly between passengers in card games and not in a casino atmosphere as well as in the southern part of the delta and not in the tributaries. *Id.* Moreover, the prohibition of gambling in Louisiana followed by its reauthorization also created some unique legal twists when the state revisited the issue. When Louisiana decided to prohibit the

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casino-type games such as slots, card games, and roulette.<sup>98</sup>

As a result of the expansion in many different types of gaming and the aging of its fan base, the rise in popularity from other spectator sports, and the competition brought forth by technological advancements like the Internet, the racing industry began to see the need to take action.<sup>99</sup> One response to such threats to the racing industry contemplated a facility that augmented the existing racetrack and its pari-mutuel operations with casino-based gambling, which became known as racinos.<sup>100</sup> West Virginia introduced machine-based gambling to their racetrack in the small town of Chester.<sup>101</sup> The addition of these machines attracted not only West Virginians, but also natives of Pennsylvania and Ohio.<sup>102</sup> To date, 14 states permit racetrack casinos,<sup>103</sup> offering some of the largest sources of revenue for the governments that allow their existence.<sup>104</sup>

Accordingly, these modern operations reinforce the current belief that gaming operates as a business and its legalization serves to

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activity within its jurisdiction during the late nineteenth century, the state made gambling “as a business” illegal but failed to supply a definition. Bob Ciaffone, *A Comparative Study of State Laws on Social Gambling*, in *GAMBLING & PUBLIC POLICY: INTERNATIONAL PERSPECTIVES* 183, 187 (William R. Eadington & Judy A. Cornelius eds., 1991). In addition, the Louisiana Constitution expressly states that “Gambling shall be defined by and suppressed by the legislature;” so the casinos receive consideration as gaming establishments. LA. CONST. art. XII, § 6(B) (2013).

<sup>98</sup> See generally Prum & Bybee, *supra* note 49 (noting the laws applicable to slot machines, card games and roulette amongst the States where riverboat gaming is legal).

<sup>99</sup> See Howland, *supra* note 25, at 504.

<sup>100</sup> Richard Thalheimer, *The Evolution of Racinos*, 9 GLOBAL GAMING BUS. (Apr. 2, 2010), available at <http://ggbmagazine.com/issue/vol-9-no-4-april-2010/article/the-evolution-of-racinos>.

<sup>101</sup> Francis X. Clines, *Track and Casino Turn a Rust Belt Town Green*, N.Y. TIMES, Mar. 3, 2002, <http://www.nytimes.com/2002/03/03/us/chester-journal-track-and-casino-turn-a-rust-belt-town-green.html>.

<sup>102</sup> *Id.*

<sup>103</sup> *Types of Gaming by State*, AM. GAMING ASS’N., <http://www.americangaming.org/industry-resources/research/fact-sheets/states-gaming> (last visited Feb. 4, 2014). Those states include Delaware, Florida, Indiana, Iowa, Louisiana, Maine, Maryland, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, and West Virginia. *Id.* Atlantic City casinos tried to prevent the introduction of machine-based gambling from its own state along with the surrounding jurisdictions. See also Terry Golway, *Racino. Get to Know the Word.*, N.Y. TIMES, Aug. 15, 2004, <http://www.nytimes.com/2004/08/15/nyregion/racino-get-to-know-the-word.html?pagewanted=all&src=pm>. Casino operators in Atlantic City offered race tracks \$86 million dollars over four years for their agreement to not seek machine-based gambling at their facilities. *Id.*

<sup>104</sup> See generally AGA Survey, *supra* note 3.

augment public policy goals that would not normally receive funding by the taxpayers, while regulating the operators to keep the criminal elements out.<sup>105</sup> Thus, every state except Utah and Hawaii maintains some form of legalized gambling;<sup>106</sup> yet, due to the lingering legislation that occurred in each of the earlier cycles, numerous loopholes and misnomers for many of the fundamental terms exist due to the patchwork and cyclical nature whereby the activity has become inconsistently authorized and prohibited throughout our country's history.

### B. Gambling on Native American Reservations

Although England brought over the concept of lotteries, the Native Americans also had forms of gaming that originated through their own unique culture.<sup>107</sup> The main focus of their activities derived from games of skill or athletic events in which wagers occurred.<sup>108</sup> However, the tribes sought out high-stakes bingo as a source of revenue in the late 1970s and early 1980s in response to a continual decrease in federal funding and limited or minimal economic development opportunities.<sup>109</sup> In 1975, New York's Oneida Tribe started to run bingo parlors, followed by Florida's Seminole Tribe in 1979.<sup>110</sup>

Presented as a model of success by the Reagan administration, the Seminoles entered the gaming industry through their investment in bingo parlors that eventually turned into a \$2.7 million annual operation by 1982.<sup>111</sup> Many in the Reagan administration viewed this example as a template to further promote a policy that allowed many other tribes around the country to gain self-sufficiency on their reservation through the establishment of gaming and entertainment facilities.<sup>111</sup>

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<sup>105</sup> See BYBEE, *supra* note 2, at 126.

<sup>106</sup> See Dunstan 1, *supra* note 20, at I-2.

<sup>107</sup> See Blakey, *supra* note 16, at 232.

<sup>108</sup> Brian Sodoma, *Indian Gaming Finds Stride as Growing National Industry*, LAS VEGAS REV.-J. (Apr. 21, 2013, 2:03 AM), <http://www.reviewjournal.com/jobs/indian-gaming-finds-stride-growing-national-industry>.

<sup>109</sup> Amy Head, *The Death of the New Buffalo: The Fifth Circuit Slays Indian Gaming in Texas*, 34 TEX. TECH L. REV. 377, 385 (2003).

<sup>110</sup> Kevin J. Worthen & Wayne R. Farnsworth, *Who Will Control the Future of Indian Gaming? "A Few Pages of History Are Worth a Volume of Logic*, 1996 BYU L. REV. 407, 434.

<sup>111</sup> See Head, *supra* note 109, at 385.

<sup>111</sup> *Id.*

As a result, other tribes started gaming enterprises to assist and replace shrinking government funds.<sup>112</sup> However, conflict arose when it became unclear whether the states or the federal government maintained jurisdiction in taxing or sharing the revenue from the tribes' operations.<sup>113</sup>

The first major conflict over Indian gaming occurred in Florida over high-stakes bingo games conducted by the Seminole tribe.<sup>114</sup> Under Florida Statute Section 849.093, bingo could lawfully occur within specific parameters for nonprofit purposes.<sup>115</sup> According to the sheriff of Broward County, the Seminole tribe intended to operate a high-stakes bingo facility that did not comply with the legal requirements.<sup>116</sup> The sheriff threatened to shut down the operation of the games and make arrests pursuant to Public Law 280, which permitted states to exercise civil and criminal jurisdiction over a tribe; so, the Seminoles sought injunctive relief from the courts.<sup>117</sup>

In deciding the case, the Fifth Circuit inquired into whether the State of Florida prohibited bingo, or simply regulated it.<sup>118</sup> The court found that the state merely regulated the activity instead of prohibiting it, which meant that bingo became a civil issue rather than a criminal one.<sup>119</sup>

As a consequence of the policy to encourage self-reliance on reservations and the precedent set by the decision in the Fifth Circuit, over 100 tribes operated legal bingo games by 1988.<sup>120</sup> The tribes were persistent in wanting to expand their gaming and revenues by incorporating other casino games.<sup>121</sup> Congress supported their interest because living conditions were extremely poor on reservations in comparison with the rest of the country.<sup>122</sup>

Many sources, including states, law enforcement, and the government, had concerns about allowing more forms of gambling on

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310 (5th Cir. 1981).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 313.

<sup>119</sup> *Id.* at 314.

<sup>120</sup> Roger Dunstan, *Indian Gaming*, in *GAMBLING IN CALIFORNIA* CRB-97-003 (1997), available at <http://www.library.ca.gov/crb/97/03/Chapt4.html> [hereinafter Dunstan 2].

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

the tribes' land and its repercussions.<sup>123</sup> The states claimed that they needed the authority over tribes to prevent organized crime, when in reality, they were concerned about their own potential loss of revenue from taxation.<sup>124</sup> Senator McCain countered the states' trepidations about the possibility of organized crime when he pointed out that in fifteen years of gaming on Indian reservations there had not been one proven case of this type of illegality.<sup>125</sup> Consequently, any activity that the government allowed was permissible for Indian reservations.<sup>126</sup>

This conflict continued to simmer until the Supreme Court agreed to hear the 1987 case of *California v. Cabazon Band of Mission Indians*, which settled some of the issues.<sup>127</sup> The issue presented to the Court focused on the fact that the tribe conducted a card game and maintained a bingo casino that did not comply with state law; but, California already legalized a state operated lottery in an election in November of 1984.<sup>128</sup>

After considering the various sovereignty and state public policy issues, the Court held that the California government did not possess the authority to stop the Cabazon tribe from playing bingo on its land.<sup>129</sup> The Court further permitted a tribe to operate games of the same style allowed upon nontribal lands within the state and determined that California had almost no power to regulate gambling occurring within tribal territory.<sup>130</sup>

To confront the uncertainty left after this decision, Congress passed the Indian Gaming Regulatory Act (IGRA).<sup>131</sup> On October 17, 1988, Ronald Reagan signed IGRA with the intent of permitting bingo halls and other small gaming operations.<sup>132</sup> IGRA helped make Indian reservations more self-sufficient while providing infrastructure, schools, and health care for the community and members of the

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<sup>123</sup> *Id.*

<sup>124</sup> Sidney M. Wolf, *Killing the New Buffalo: State Eleventh Amendment Defense to Enforcement of IGRA Indian Gaming Compacts*, 47 WASH. U. J. URB. & CONTEMP. L. 51, 54 n.24 (1995).

<sup>125</sup> See Worthen & Farnsworth, *supra* note 110, at 436.

<sup>126</sup> National Indian Gaming Association, *Indian Gaming Regulatory Act History & Facts*, <http://www.indiangaming.org/info/pr/presskit/STATES.pdf> (last visited Jan. 29, 2014).

<sup>127</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

<sup>128</sup> *Id.* at 204-05, 211.

<sup>129</sup> *Id.* at 221-22.

<sup>130</sup> *Id.* at 220-21.

<sup>131</sup> Indian Gaming Regulatory Act, Pub. L. No. 100-497 (1988) (codified in scattered sections of 25 U.S.C.).

<sup>132</sup> See Boylan, *supra* note 11, at 2.

tribe.<sup>133</sup> The law creates three separate categories, called “classes,” that allow for varying degrees of approval, oversight, and games on the lands held in trust for the Indians.<sup>134</sup>

Class I gaming is under the complete control of the tribes.<sup>135</sup> It includes gambling for very small prizes and games associated with tribal ceremonies.<sup>136</sup> Rodeos, horse races and other games are considered acceptable in this category.<sup>137</sup>

Class II gaming is limited to non-electronic games including card games, lottery-style games, and bingo.<sup>138</sup> These games are only legal on the reservations if a state allows a form of the game, or does not exclusively prohibit it.<sup>139</sup> The tribes must create an ordinance approved by the Chairman of the National Indian Gaming Commission to conduct this type of gaming.<sup>140</sup> These games are primarily under the tribe’s control, but the National Indian Gaming Commission is permitted to oversee them.<sup>141</sup>

Class III gaming is negotiated between the state and the tribe and includes casino-type games.<sup>142</sup> If the tribe had Class III gaming before IGRA was passed, it is permitted to continue those forms of gambling without negotiations.<sup>143</sup> There are three requirements for this class of gambling to occur.<sup>144</sup> First, the state must allow the same form of gaming.<sup>145</sup> Second, the tribe must pass an ordinance authorizing the gaming that will occur.<sup>146</sup> Lastly, the gambling must comply with the agreed upon terms.<sup>147</sup> States are required to act in good faith when constructing a compact.<sup>148</sup>

Hence, as gambling expanded amongst the states, the combination of court cases and IGRA allowed many tribes to offer gambling, which increased its footprint and accessibility to the general public. Thus,

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<sup>133</sup> 25 U.S.C. § 2701(4) (2012).

<sup>134</sup> See accompanying text, *supra* notes 90-104.

<sup>135</sup> 25 U.S.C. § 2710(a)(1) (2012).

<sup>136</sup> 25 U.S.C. § 2703(6) (2012).

<sup>137</sup> Justin Neel Baucom, *Bringing Down the House: As States Attempt to Curtail Indian Gaming, Have We Forgotten the Foundational Principles of Tribal Sovereignty*, 30 AM. INDIAN L. REV. 423, 428 (2005/2006).

<sup>138</sup> 25 U.S.C. § 2703(7) (2012).

<sup>139</sup> 25 U.S.C. § 2710(b)(1)(A) (2012).

<sup>140</sup> 25 U.S.C. § 2710(b)(1)(B) (2012).

<sup>141</sup> See *Dunstan 2*, *supra* note 120.

<sup>142</sup> 25 U.S.C. § 2710(d) (2012).

<sup>143</sup> 25 U.S.C. § 2710(d)(6) (2012).

<sup>144</sup> 25 U.S.C. § 2710(d)(1) (2012).

<sup>145</sup> 25 U.S.C. § 2710(d)(1)(B) (2012).

<sup>146</sup> 25 U.S.C. § 2710(d)(1)(A) (2012).

<sup>147</sup> 25 U.S.C. § 2710(d)(1)(C) (2012).

<sup>148</sup> 25 U.S.C. § 2710(d)(3)(A) (2012).

gaming has a deep history in our country with many peculiarities due to the multiple cycles and battles for power along the way.

### III. MACHINE-BASED GAMING

Today, a player may encounter several different types of gambling machines that may render the same outward appearance,<sup>149</sup> yet, the inner workings reveal significant differences.<sup>150</sup> Advances in technology, coupled with the patchwork of legal definitions associated with many of the games, allow the manufacturers to blur the lines of distinction by circumventing specific prohibitions, while complying with those forms accepted by a given jurisdiction.<sup>151</sup> Professor Rose explained, “[n]ecessity, more than technology, is the mother of these inventions.”<sup>152</sup>

In considering these different types of machines, the player may not maintain the requisite knowledge, nor receive the proper notifications, to distinguish between the games offered for play and the games’ corresponding odds for determining an outcome. Therefore, the evolution, technology, and types of machines require an evaluation in order to better understand the issues involved with modern casino offerings.

#### A. Slot Machines

Influenced by vending machines, San Francisco inventor Charles Fey developed the first slot machine in 1887.<sup>153</sup> He used three reels that included different symbols because of the prevalence of illiteracy at the time.<sup>154</sup> Mr. Fey called the machine the “Liberty Bell” after one of the symbols used in the reels.<sup>155</sup>

When a player placed a nickel in a slot and pulled the handle, the reels would spin and determine an outcome.<sup>156</sup> Depending on the result, the player would either lose the nickel or win between ten cents

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<sup>149</sup> See Nestor, *supra* note 9.

<sup>150</sup> Rose 1, *supra* note 8, at 225-26.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 225.

<sup>153</sup> See Rychlak 2, *supra* note 75, at 559.

<sup>154</sup> I. NELSON ROSE, GAMBLING AND THE LAW 83 (1986) [hereinafter Rose 4]. The reels included symbols of hearts, diamonds, spades, bells, horseshoes, and a star. See Rychlak 2, *supra* note 75, at 559.

<sup>155</sup> *What is a Slot Machine?*, ONLINE CASINOS, <http://www.onlinecasinos.info/slot-or-slots-machines.html#.UUty0ldUHCZ> (last visited Jan. 29, 2014) [hereinafter Slot Machine].

<sup>156</sup> See Rychlak 2, *supra* note 75, at 559.

to one dollar.<sup>157</sup> Fey continued to perfect his machine and made it so each reel had ten different stops.<sup>158</sup> The chance of hitting the jackpot on this machine was one in 1000.<sup>159</sup> The machine used the element of chance to determine the outcome in which a player received a cash prize.<sup>160</sup> Eventually, the general public called the machines “one-armed bandits,”<sup>161</sup> and they grew in popularity so that players could find them in every city throughout the country by 1910.<sup>162</sup>

Some jurisdictions did not like the presence of slot machines, so they passed laws prohibiting them.<sup>163</sup> These actions appear to coincide with the public sentiment of the time, in which Victorian morality and scandals led to a perceived belief that eliminating all aspects of gambling would demonstrate respectability.<sup>164</sup> In response, a cat and mouse game erupted between policymakers and game manufacturers concerning the production of games for amusement and those used for gambling.<sup>165</sup>

Initially, the manufacturers replaced the slot’s payout in coins with different types of prizes like candies, cigars, war ration tokens, and drinks, while claiming that this constituted a vending machine.<sup>166</sup> Thereafter, the player could receive cash upon selling the prize back to the store in an independent transaction.<sup>167</sup>

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<sup>157</sup> *Id.*

<sup>158</sup> *Slots History*, NETBET.ORG, <http://www.netbet.org/slots-history.html> (last visited Feb. 10, 2014) [hereinafter Netbet].

<sup>159</sup> *Id.* The jackpot calculates by multiplying ten reel stops by the same number of reels. Thus,  $10 \times 10 \times 10 = 1,000$ .

<sup>160</sup> See Rychlak 2, *supra* note 75, at 559.

<sup>161</sup> *Id.* Slot machines received the name “one-armed bandit,” which maintains controversial origins. *Compare* Slot Machine, *supra* note 155 (asserting that the term properly described two of the slot machines characteristics; the original appearance of the machine had one lever that stuck out to spin the reels, which appeared like an arm; it also tended to take the money of the player like a robber), *with* Netbet, *supra* note 158 (maintaining that the name comes from thieves that would manipulate the pulley and gears to beat the machine).

<sup>162</sup> See Slot Machine, *supra* note 155. Competitors to Mr. Fey emerged after his company, which manufactured slot machines in San Francisco was destroyed by the earthquake and subsequent fire of 1906. See Netbet, *supra* note 158. Sittman and Pitt developed their machine in 1891 based on poker with “5 drum-like images containing all the figures and symbols of the cards” followed by Herbert Mills who developed and sold the “Operator Bell” slot machine in 1907. See Slot Machine, *supra* note 155.

<sup>163</sup> See Rychlak 2, *supra* note 75, at 559-60.

<sup>164</sup> See Rose 3, *supra* note 27, at 373.

<sup>165</sup> See Rychlak 2, *supra* note 75, at 560-61.

<sup>166</sup> See generally Netbet, *supra* note 158. See, e.g., *Ex parte Williams*, 87 P. 565, 565 (Cal. Ct. App. 1906).

<sup>167</sup> See Netbet, *supra* note 158. Today, this style of gaming, in which a player sells their prize for cash, occurs every day in Japanese Pachinko Parlors as a leisure  
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After policymakers cast a broader net, later methods to circumvent the prohibitions included the new approach that the machines provided some type of advertisement in conjunction with amusement.<sup>168</sup> The machines would accept a coin and dispense a candy, mint, or cigar, along with a varying number of tokens based on the outcome determined by the spinning of the reels.<sup>169</sup> The player could insert the tokens back into another part of the machine to receive a fortune or in some cases an outcome to a simulated pencil and paper game outside of the device.<sup>170</sup>

While jurisdictions were alternately eradicating or legalizing slot machines, the solely mechanical device marked a large step in the slot machine evolution when Bally created the first electromechanical version called the Money Honey in 1963.<sup>171</sup> This machine held 500

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activity because the country prohibits commercial gambling. Ko Hirano and Kiyomi Takahashi, *Trends of Japan's Giant Leisure Industry: Pachinko*, 7 GAMING RES. & REV. J. 55 (2003). In Pachinko, players use skill to guide steel balls down a course attempting to influence the outcome. *Id.* at 56. Whatever balls are left over are taken to a machine that prints out a receipt that can be redeemed for a small prize at the parlor. *Id.* The prize then can be taken to another shop where the gift is exchanged for cash. *Id.*

<sup>168</sup> Robert J. Hand, *Pinball Machines Which Award Free Games as Gambling Devices*, 11 WYO. L.J. 163, 164 (1957).

<sup>169</sup> See, e.g., *Painter v. State*, 45 S.W.2d 46, 46 (Tenn. 1932).

<sup>170</sup> See, e.g., *id.*; *Davies v. Mills Novelty Co.*, 70 F.2d 424 (8th Cir. 1934); *Mills Novelty Co. v. Farrell*, 64 F.2d 476 (2d Cir. 1933). One slot manufacturer offered a pencil and paper game called baseball. *Painter*, 45 S.W.2d at 46. In a case considering whether such a machine allowed gambling, the Tennessee Supreme Court documented the workings of the device in its opinion when it wrote, “[t]he machine here involved is a mint-vending machine, which, in addition to delivering a package of mints for the customer's coin, may emit the checks or chips described in the indictment. The number of such checks the customer will receive for each coin deposited, if any, is controlled by the interior mechanism of the machine, and varies from two to twenty. Each operation results in the appearance of a combination of symbols which, by reference to a printed legend on the front of the machine, represents one of the familiar plays of the game of baseball, a base hit, a base on balls, a home run, an out, etc. Continued operation by two customers would enable them to play an imaginary game of baseball as opponents. A demonstration before the jury presented the Attorney General and a witness, operating the machine alternately, as opposing teams. A picture of a baseball field on the machine is equipped with an indicator to enable the player to record the cumulative result of his successive plays. This result is not entirely controlled by the mechanism, it being possible for a frequent operator to develop skill in the play.” *Id.*

<sup>171</sup> George C. Fenich, *A Chronology of (Legal) Gaming in the U.S.*, 3 GAMING RES. & REV. J. 65, 71 (1996). This development led to the demise of mechanical slot machines, with the last one produced in 1979 by the Mills-Jennings Company for a U.S. Navy base in Greenland. *Id.* Professor Rychlak attributes the idea to incorporate electromechanical mechanisms to the popularity of the pinball machine. See Rychlak 2, *supra* note 75, at 563-66. He points out a version of the popular

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coins and had the ability to automatically pay a player without the assistance of a floor attendant.<sup>172</sup> Big Bertha and later the Super Big Bertha were two of the most popular electromechanical machines.<sup>173</sup> Super Big Bertha had eight reels with twenty different pictures, which made the chances of hitting the jackpot at one in 25.6 billion.<sup>174</sup>

As technology continued to advance with the rise of personal computers, slot machine manufacturers followed suit by modernizing how the devices select an outcome.<sup>175</sup> Given that the mechanical and electromechanical versions experienced limitations on the calculation of results and other additional features because of the reel stops, the personal computer chip revolutionized the slot machine in that the manufacturer could now rely upon a random number generator to determine the outcome, which allows for a more sophisticated payout table and the linking of machines for combined jackpots.

Consequently, this change made the reels nothing more than a display item because the microchip constantly generates a number that corresponds to a symbol on the various reels.<sup>176</sup> The input occurs from the player either pulling the lever or pressing a button, which tells the computer program to use generated outcome at time of play, spin the reels to display a result, and provide an electronic credit if appropriate.<sup>177</sup> The outcome depends upon the number most recently generated by the machine and not by the amount of times that machine has been played or the position of the reels.<sup>178</sup> The actual result displayed by the reels only occurs for the entertainment value and plays no role in determining the outcome of the wager.<sup>179</sup>

Adding confusion to the issue, modern slot machines maintain similar appearances to those from the past with three or more reels that align to produce an outcome.<sup>180</sup> The payout for this machine is mathematically calculated and does not depend on the last time it paid out.<sup>181</sup> Because of the electronic capabilities, these machines have

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amusement machine whereby a player can receive payments from the operator for all of the “free replays” earned during a given session. *Id.*

<sup>172</sup> Slot Machine, *supra* note 155.

<sup>173</sup> See Netbet, *supra* note 158.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Random Number Generator (RNG) - Slot Machines*, ONLINE CASINO LISTINGS, <http://www.onlinecasinolist.org/casino-articles-91> [hereinafter RNG].

<sup>177</sup> *Id.*

<sup>178</sup> See Netbet, *supra* note 158.

<sup>179</sup> *Id.*

<sup>180</sup> Nigel Turner & Roger Horbay, *How Do Slot Machines and Other Electronic Gambling Machines Actually Work?*, J. GAMBLING ISSUES 11 (2004), <http://jgi.camh.net/doi/full/10.4309/jgi.2004.11.21>.

<sup>181</sup> *Id.* In reality, this means that a player maintains nearly the exact same  
*continued . . .*

bonus payouts worked into their mechanics, as opposed to the old machines that would have a separate reel or some other additionally attached device.<sup>182</sup>

In addition, the modern slot machines can differ on how they payout because the industry differentiates between flat tops and progressives.<sup>183</sup> A flat top device advertises its predetermined pay tables somewhere on the machine like on the face or the belly glass.<sup>184</sup> A progressive slot machine contains an extra display that states the current value of the jackpot, which accumulates and grows by a percentage of the amount played on all of the connected devices.<sup>185</sup>

Furthermore, the look of a slot machine now transcends the video game era as well. Some slot machines maintain the traditional appearance, but many use video screens with animated reels instead.<sup>186</sup> The video slot machines provide a platform with considerable flexibility because the player can wager on numerous reels at one time and can have a longer experience with the possibility of bonus rounds.<sup>187</sup> By including the newest in high-definition screens and upgraded speakers, the manufacturers believe a players' engagement on the device will last longer and attract larger numbers of spectators.<sup>188</sup>

Applying the latest advances in computer technology to the slot machines, the networking of these devices now occurs regularly.<sup>189</sup> Originally, regulators only allowed a casino to monitor the performance of a slot machine, which meant that the information only flowed one way.<sup>190</sup> If a casino wished to modify the machine, it needed to replace the computer chip and modify any applicable signage, which could take at least one day to execute depending on the

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opportunity to win after the machine selects an outcome, whereas a mechanical device inherits a bias to its existing result when the next play occurs. *See* RNG, *supra* note 176.

<sup>182</sup> Turner & Horbay, *supra* note 180.

<sup>183</sup> *See* Netbet, *supra* note 158.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Matt Richtel, *From the Back Office, a Casino Can Change the Slot Machine in Seconds*, N.Y. TIMES, Apr. 12, 2006, available at [http://www.nytimes.com/2006/04/12/technology/12casino.html?pagewanted=print&\\_r=0](http://www.nytimes.com/2006/04/12/technology/12casino.html?pagewanted=print&_r=0).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *See, e.g.*, NEV. STATE GAMING CONTROL BD., TECHNICAL STANDARDS FOR GAMING DEVICES AND ASSOCIATED EQUIPMENT, Standard 1, 1.062, 1.066 (2011), available at <http://gaming.nv.gov/modules/showdocument.aspx?documentid=2919> [hereinafter TECHNICAL STANDARDS].

<sup>190</sup> *See* Richtel, *supra* note 186.

availability of parts.<sup>191</sup>

Today, regulators allow two-way communication between a server and the slot machines.<sup>192</sup> This change allows a casino to reprogram a given slot machine or a bank of devices at any time, although the regulations of a given jurisdiction may create some limitations.<sup>193</sup> Moreover, this interconnectivity also allows the slot machine manufactures to design games that adapt to an individual player or group in order to create a shared experience, like one on a craps table, but without affecting each other's outcome.<sup>194</sup>

Beyond the game itself, casinos can track and control wagers as well.<sup>195</sup> They can count the amount of coins coming in, the amount of coins kept by the house, the amount of coins going out, the number of times a player uses the machine, and the number of jackpots awarded, and receive this information at its centralized computer system.<sup>196</sup> With access to this information from each machine, the management of a casino can graphically recognize machine preferences and their locations on the floor, as well as tailor their reward system to keep a player active for a longer time and satisfied with the experience.<sup>197</sup>

As a result, modern slot machines now rely heavily on electronics, computer programming, and connectivity to deliver a game that attracts, interests, and keeps the attention of a player, whereas the original invention provided a basic mechanical device that offered the possibility of a return for a simple wager based on its outward

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<sup>191</sup> *Id.*

<sup>192</sup> *See, e.g.*, TECHNICAL STANDARDS, *supra* note 189.

<sup>193</sup> *See* Richtel, *supra* note 186. While it might seem the case that a casino can randomly alter the program and payout table on a machine at its sole discretion, regulators in some states maintain limitations to protect the player. *See, e.g.*, TECHNICAL STANDARDS, *supra* note 189, at Standard 1.140. For example, Nevada requires that the machine remain dormant for the four minutes before and after the software modification occurs, and must indicate to players that a change is occurring. *Id.*

<sup>194</sup> Richtel, *supra* note 186.

<sup>195</sup> Leslie E. Cummings & Kathleen P. Brewer, *An Evolutionary View of the Critical Functions of Slot Machine Technology*, 1 GAMING RES. & REV. J. 67, 70 (1994).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 71-72. The casino can also track a player by enrolling the person in a rewards program that includes a plastic identification card with a magnetic strip or bar code to alert a machine of their presence. *Id.* at 76. This tracking feature allows the casino to tell what machines, and how much money the player likes to spend on average. *Id.* at 76-77. With this information, the casino can tailor their reward system to give out awards based on the typical type of play. *Id.* at 77. The casino can also gather pertinent information from this reporting to assist in its management, which includes such information as games played per minute, how long the player gambles, and number of visits to the casino. *Id.*

appearance. Thus, slot machine manufacturers maintain a long history of tailoring their devices to respond to changes in the gaming environment that may occur from statutes or regulations that attempt to limit their existence, or from advances in technology that allow for more sophistication in the delivery of their product to casinos and players.

## **B. Players' Pools, Bingo Machines, and Video Lottery Terminals**

With the expansion of gaming into jurisdictions that chose not to license full-fledged casino-style activities, an opportunity opened up for the slot machine manufacturers if they could adapt their machines and find legal solutions to some of the barriers. The slot manufacturers faced several obstacles like the prohibition for owners and operators to finance games in a given jurisdiction or the lack of consent from a state to allow Class III gaming on an Indian Reservation. To overcome these impediments, the slot machine manufacturers turned to players' pools, bingo, and video lottery terminals for their solutions.

### *1. Players' Pools*

In jurisdictions that prohibit an owner or operator from financing an establishment's games, but allow other types of gambling such as poker, the "players' pool" exists.<sup>198</sup> The players create a common pot, or "pool," of money in which all participants compete to win.<sup>199</sup> Neither the players nor the establishment that furnishes the facilities owns the pool of money or maintains a direct financial interest in it.<sup>200</sup> As a result, these "players' pools" and their relationship to their players lead some to assert that they create a trust, with the unnamed winners as the beneficiaries and either the operator or owner of the facility serving as the trustee.<sup>201</sup>

In the case of Native American tribal casinos, the laws and public policy of a given state may require an alternative to a house banked

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<sup>198</sup> Charles Carlaw & E. J. Egghart, *Players' Pool Slot Gaming: Fact and Fantasy*, 5 GAMING RES. & REV. J. 33, 33-34 (2000).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* While not part of this examination, the tribal operator and sponsoring tribe offer their services for a fee. *Id.* This fee comes in the form of a predetermined "rake" or fixed rental charge. *Id.* The "rake" is the fee charged the "players' pool" and deducted from the money kept in trust. *Id.* In many cases, the "rake" closely mirrors the theoretical win from the gaming machine minus a small percentage to ensure that the "players' pool" grows a little larger than the theoretical hold. *Id.*

game in order to offer slot machines.<sup>202</sup> A tribal operator or the sponsoring tribe may establish the “players’ pool” trust to receive the proceeds from the slot machines.<sup>203</sup> As a slot machine generates revenue, the “players’ pool” trust receives the money for payments to the eventual winners.<sup>204</sup>

Of course, the trustee will maintain a fiduciary duty to pay the winners from the available pool of money pursuant to the rules of the trust.<sup>205</sup> However, the player may unwittingly take a risk in this type of situation in the event of insolvency.<sup>206</sup> Neither the sponsoring tribe nor the tribal operator can make good on the payout should the “players’ pool” lack the funds to pay a winner because it would change the nature of the arrangement to either an illegally banked game under state law, or an unapproved Class III casino under IGRA.<sup>207</sup> Consequently, a tribal operator and sponsoring tribe maintains an incentive to keep the fund solvent or risk a high profile embarrassment that could hurt the existence of its operation.<sup>208</sup>

Accordingly, the “players’ pool” offers the tribal operators and the sponsoring tribes a unique solution that circumvents the specific obstacles to providing slot machines in jurisdictions that do not directly approve them.

## 2. *Class II Machines*

With the inclusion of Pull-tabs and Bingo as Class II gaming under IGRA, an opportunity for slot machine manufacturers occurred that nobody anticipated.<sup>209</sup> Under IGRA, Class II gaming allows an operator to use “technological” aids when playing a pull-tab or

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<sup>202</sup> *Id.* As part of California’s past legislative efforts to prohibit gambling within the jurisdiction, the state makes it illegal for an operator or owner of an establishment to financially back the games at their facilities, so a Native American tribal casino must find an alternative solution for any slot machines or table games it offers to players. CAL. PENAL CODE § 330.11 (West).

<sup>203</sup> Carlsaw & Egghart, *supra* note 198, at 34.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* Usually, the governing law and the rules of the trust only permit the trustee to release funds for the payment of winners, machine maintenance, and promotional prizes when an excess occurs; otherwise, the general operating expenses, such as advertising and machine maintenance, may not be allocated to the “players’ pool.” *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *See id.*

<sup>208</sup> *See id.*

<sup>209</sup> *See* John Wilson, *Class II: In a Class by Itself*, CASINO ENTER. MGMT. (July 1, 2010), <http://www.casinoenterprisemanagement.com/articles/july-2010/class-ii-class-itself>.

Bingo,<sup>210</sup> but raises the level to Class III in situations where facsimiles occur.<sup>211</sup> To this end, a “technological” aid may include an electronic touch pad configured for use as a single or multiple bingo cards, whereas a facsimile means an exact copy of something like a slot machine.<sup>212</sup>

When considering a Class II device, the outward appearance looks and sounds like a slot machine; but, the inner workings of the game must fit within the permissible definitions of a pull-tab or bingo under IGRA.<sup>213</sup> Upon further examination of the exterior of the device, there will usually be a disclaimer that states the spinning reels provide amusement only, which means that a player receives no information as to how the outcome gets determined and the machine’s display only provides an animation of the result.<sup>214</sup>

In a pull-tab game, a player peels off the top layer of a two-ply card to reveal symbols and patterns similar to tic-tac-toe.<sup>215</sup> Depending on the pattern of the symbols revealed in the particular pull-tab, a player might win a prize.<sup>216</sup> The operator of the pull-tab generally predetermines the outcome for each card with a fixed number of winners and losers when it creates a large pool of 1,200 to 100,000 pieces for sale in a bingo hall.<sup>217</sup>

An early attempt to use the pull-tab system as the basis for a Class II device ran into difficulties when introduced for play.<sup>218</sup> The D.C. Circuit upheld a lower court’s finding that the machine merely replicated the paper version, which made it a facsimile under IGRA.<sup>219</sup> The court’s decision to classify the device’s operation as a facsimile no longer allowed it to fit within the definition of a Class II machine, and now required any device operator to comply with the Class III requirements.<sup>220</sup> Likewise, the Ninth Circuit found that a terminal with a printer that connects to a central computer also constituted a

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<sup>210</sup> 25 U.S.C. § 2703 (7)(A)(i) (2012).

<sup>211</sup> 25 U.S.C. § 2703 (7)(B)(ii) (2012).

<sup>212</sup> *See* Wilson, *supra* note 209. The use of a “technological” aid in Bingo would assist in facilitating the game by rendering the use of ink daubers unnecessary, allow for more cards, as well as streamline the operation of the game, both on the players’ side and with the accounting and audit side.

<sup>213</sup> *See* Rose 1, *supra* note 8.

<sup>214</sup> *See* Wilson, *supra* note 209.

<sup>215</sup> *Diamond Game Enter., Inc. v. Reno*, 230 F.3d 365, 367 (D.C. Cir. 2000).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *See, e.g., Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 541-42 (9th Cir. 1994); *Cabazon Band Mission Indians v. NIGC*, 14 F.3d 633 (D.C. Cir. 1994).

<sup>219</sup> *Cabazon Band Mission Indians v. NIGC*, 14 F.3d 633 (D.C. Cir. 1994).

<sup>220</sup> *Id.*

facsimile of a pull-tab.<sup>221</sup>

In 2000, the D.C. Circuit Court of Appeals examined a different machine-based on a pull-tab game to assess its qualifications as a Class II aid.<sup>222</sup> In this opinion, the court concluded that the device performed as an electronic aid and was permissible under Class II of IGRA.<sup>223</sup> Following this decision on pull-tabs, and conducting its own investigation of applicable precedent and expert testimony, the Nebraska Federal District Court also concurred that the same pull-tab machine fit within the aid category of IGRA's Class II gaming.<sup>224</sup>

While many variations of the game of bingo occur, the primary method uses cards with a 25 square grid consisting of unique number combinations, such that each player tries to be the first to complete the winning pattern based on a random drawing of the numbers.<sup>225</sup> In order to qualify as a Class II device as part of an intricate game of bingo, many of the machine-based systems require that the games be played in the same location.<sup>226</sup> Each device uses its own bingo card and receives the result from a central server that draws the balls during the game; in other words, the machine is useless without the interconnectivity and attachment to a central computer.<sup>227</sup> This means that the server conducts a computer-generated game with virtual cards, draws, and balls in order to assist the player.<sup>228</sup>

Given that manufacturers can calculate the specific probability of different reel stop combinations on a slot machine, such as two oranges and a cherry, a bingo card can have the exact same corresponding odds for a given pattern based on the many factors in the setup of the game, such as the number of balls drawn.<sup>229</sup> The pay tables can more or less correspond between the two methods; but, the game still relies on the virtual bingo game to occur in order to determine an outcome.<sup>230</sup> This allows the Class II device to display an outcome with spinning reels that corresponds with a given bingo card

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<sup>221</sup> *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 541-43 (9th Cir. 1994).

<sup>222</sup> *Diamond Game Enter., Inc. v. Reno*, 230 F.3d 365, 370 (D.C. Cir. 2000).

<sup>223</sup> *Id.* at 371.

<sup>224</sup> *United States v. Santee Sioux Tribe of Neb.*, 174 F. Supp. 2d 1001 (D. Neb. 2001).

<sup>225</sup> Ashlee Hightower, *B-I-N-G-O - Not Your Grandmother's Church Hall Social: A Look at the Evolution of Bingo and Why Alabama Should Get in on the Game*, 41 CUMB. L. REV. 79, 86 (2011).

<sup>226</sup> 25 U.S.C. § 2703(7)(A)(i)(III) (2012).

<sup>227</sup> Hightower, *supra* note 225, at 88-89.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

and game.<sup>231</sup>

On some machines, the manufacturer allows a player to turn off the video representation of the spinning reels in order to view the actual bingo game as it progresses.<sup>232</sup> The machine will display the bingo card and assist the player by marking the appropriate space based on the virtual draw.<sup>234</sup>

While controversial, the courts seem to support this approach despite several legal challenges.<sup>235</sup> Two different circuit courts of appeals examined a specific bingo machine to determine whether the device functioned as an electronic aid or facsimile.<sup>236</sup> Both courts upheld the machine as an aid within the meaning of the applicable laws and permitted it under Class II of IGRA.<sup>237</sup>

Thus, the manufacturers and tribes developed an intricate set of aids to give the outward appearance of a slot machine to a player, while providing a sophisticated device that uses interconnectivity to create a broad platform for bingo games within the constructs of Class II gaming under IGRA.

### 3. *Video Lottery Terminals*

A video lottery terminal (VLT) is another type of device that, depending on the jurisdiction, appears to be a slot machine but is actually much different.<sup>238</sup> Starting in the 1980s, VLT's offered a type of multi-game video slot for small lottery retailers; but, today the term encompasses a larger description.<sup>239</sup> Varying by jurisdiction, a VLT may describe a traditional slot machine or a device that requires a connection to a server in order to display its outcome.<sup>240</sup>

For those machines that use a central server to determine an outcome, the operators follow two different approaches.<sup>241</sup> One

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<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *See, e.g.,* United States v. 103 Elec. Gambling Devices, 223 F.3d 1091 (9th Cir. 2000); United States v. 162 MegaMania Gambling Devices, 231 F.3d 713 (10th Cir. 2000).

<sup>236</sup> *See 103 Elec. Gambling*, 223 F.3d at 1099; *MegaMania Gambling*, 231 F.3d at 720.

<sup>237</sup> *See 103 Elec. Gambling*, 223 F.3d at 1103; *MegaMania Gambling*, 231 F.3d at 726.

<sup>238</sup> *See* Turner & Horbay, *supra* note 180.

<sup>239</sup> Frank Legato, *VLT Boom*, GLOBAL GAMING BUSINESS, Apr. 26, 2012, available at <http://ggbmagazine.com/issue/vol-11-no-5-may-2012/article/vlt-boom> [Hereinafter Legato 1].

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

approach, called the “central determinant,” requires the VLT to contact the server to receive the next “lottery ticket” in a virtual stack at the central location.<sup>242</sup> The displayed result on the machine reflects the outcome of the virtual ticket the VLT received from the server and each successive play repeats the process.<sup>243</sup> In the other method, the VLT displays the outcome it receives from the random number generator located within the server that responds like a large slot machine for all the devices connected to it.<sup>244</sup>

Hence, the appearance of a slot machine is no longer as critical as it once was.<sup>245</sup> The inner workings of the machine and making it legal for each state’s criteria are now the top priority.<sup>246</sup> Indian tribes use the inner workings of machines so that they are acceptable as Class II or lottery devices, while to the player they appear no different than a typical slot machine.<sup>247</sup> However, in some jurisdictions, a VLT may in fact be a slot machine.<sup>248</sup> Due to technological advancements, what you see on the outside can be misleading to what is on the inside or public perception.<sup>249</sup>

Over the history of slot machines, the cat and mouse game that started long ago in the early days of amusement and advertising devices continues to the modern use of “players’ pools,” bingo aids, and lottery terminals. Because of these new advancements in technology, the laws regulating these games need to parallel these changes.<sup>250</sup> Thus, long-standing regulatory approaches became futile since older devices shaped their design and the manufacturers found different ways to deliver the same experience to the player.<sup>251</sup>

#### IV. APPROACHES TO THE DIFFERENT TYPES OF GAMING

In order to place a machine based gaming device into service, manufacturers must gain certification from authorized laboratories that verify the integrity of the game pursuant to a given jurisdiction’s requirements.<sup>252</sup> During this process, the manufacturer must explain the pertinent components of the machine including how the outcome is

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<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *See* Rose 1, *supra* note 8, at 225.

<sup>246</sup> *Id.*

<sup>247</sup> *See id.*

<sup>248</sup> *See id.*

<sup>249</sup> *See id.* at 226.

<sup>250</sup> *See* Rose 3, *supra* note 27, at 388.

<sup>251</sup> *See* Rychlak 2, *supra* note 75, at 559-60.

<sup>252</sup> *See* BYBEE, *supra* note 2, at 152.

determined in order to receive certification.<sup>253</sup> As previously discussed, the slot machine manufacturers must comply with laws and regulations in each state, but have found ways to circumvent the rules. As a result, each jurisdiction and type of gaming facility permits different machines based on its own approach and definitions.<sup>254</sup>

### A. Casino Gaming

With generally the most permissive approach to machine-based gaming, traditional casinos tend to offer the broadest assortment of devices with arguably the most truthful relationship between outward appearance and outcome determination. For example, the state of Nevada allows its casinos to offer machine-based gaming, which includes slots, keno, and bingo but prohibits a state lottery.<sup>255</sup> Likewise, New Jersey permits casinos in Atlantic City and conducts a state lottery but does not allow VLTs.<sup>256</sup> This means that each slot machine in Nevada and New Jersey casinos independently determines its own outcome but may be linked for the payout of a larger jackpot, such as a progressive, and does not need to provide animation on bingo and keno devices.

In Illinois, the state permits the riverboats to offer slot machines,<sup>257</sup> but not to maintain a lottery,<sup>258</sup> and allows bars and taverns to offer VLTs in their facility.<sup>259</sup> The statutes use an expansive definition for

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<sup>253</sup> See generally GAMING LABORATORIES INTERNATIONAL, EVALUATION AND CERTIFICATION GUIDE (2013), <http://www.gaminglabs.com/downloads/GLI%20and%20Certification%20Guide%2019-Jun-2012.pdf>.

<sup>254</sup> See BYBEE, *supra* note 2, at 152.

<sup>255</sup> NEV. CONST. art. 4, § 24.

<sup>256</sup> N.J. STAT. ANN. § 5:9-7.1 (2013). Of course, Atlantic City casinos prevented the introduction of video lottery terminals from its own state along with the surrounding jurisdictions. Terry Golway, *Racino. Get to know the Word.*, N.Y. TIMES, Aug. 15, 2004. Casino operators in Atlantic City offered race tracks \$86 million dollars over four years for their agreement to compliance in not bringing in slots. *Id.*

<sup>257</sup> 230 ILL. COMP. STAT. 10/11 (West 2013).

<sup>258</sup> 230 ILL. COMP. STAT. 10/3 (West 2013).

<sup>259</sup> 230 ILL. COMP. STAT. 40 (West 2013). Interestingly, the state lacks the presence of a single Native American tribe due to a history that removed them from the state. Edward McClelland, *No Natives Means More Gambling Revenue for Illinois*, NBCCHICAGO.COM (Dec. 1, 2011, 5:28 PM), <http://www.nbcchicago.com/blogs/ward-room/No-Indians--More-Gambling-Revenue-For-Illinois-134608033.html>. In an agreement in 1804 between the Governor of the Indiana Territory and the leaders of the Sauk and Fox tribes, the Native Americans surrendered their land in Illinois and moved west of the Mississippi River. *Id.* Subsequently, a Native American leader named Black Hawk organized raids in Illinois until he and his other warriors died at the hand of militias

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“gambling game” when permitting machines on riverboats<sup>260</sup> but limits VLTs to playing only games of poker, line up, and blackjack.<sup>261</sup> However, the statutes only authorize the lottery to sell its tickets physically<sup>262</sup> or over the Internet<sup>263</sup> but remain silent on the use of machines. As a result, the outward appearance of a machine in Illinois provides a good indication on how it determines its outcome pursuant to the state’s approach in legalizing gaming in distinct categories.

Accordingly, a player choosing to participate in wagering activities at these types of facilities may rely on the outward appearance that displays reels, bingo, keno, blackjack, and poker and need not face disclaimers that assert the animation only provides entertainment for the underlying game. Hence, the machines generally found in land-based and riverboat casinos will appear and operate in such a manner that allows a player the ability to rely on the outward appearance as an indicator of the manner in which the results are determined.

## B. Native American Gaming

When considering the types of machines available on Native American reservations, IGRA provides the guidance through its different classes of gaming.<sup>264</sup> As previously discussed, IGRA creates three classes for gaming and then gives details as to what encompasses each level.<sup>265</sup> Based on these different levels, the manufacturers of gaming devices now tailor their products to conform to the law but retain many of the outward appearances of a slot machine.

In order for a tribe to operate a slot machine, the state where the reservation is located requires a compact.<sup>266</sup> If a state already permits certain forms of gambling, it must sign the compact with the Native American tribe.<sup>267</sup> Because many states feign the prohibition of gaming devices, they do not want to allow those devices to be in Class

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from Illinois and Michigan in the battle of Bad Axe. *Id.*

<sup>260</sup> 230 ILL. COMP. STAT. 10/4(c) (West 2013). The statute states, “‘Gambling game’ includes, but is not limited to, baccarat, twenty-one, poker, craps, slot machine, video game of chance, roulette wheel, klondike table, punchboard, faro layout, keno layout, numbers ticket, push card, jar ticket, or pull tab which is authorized by the Board as a wagering device under this Act.” *Id.*

<sup>261</sup> 230 ILL. COMP. STAT. 40/5 (West 2013). The state does require that the VLTs connect to a centrally monitored system to oversee the machines for auditing and regulatory purposes. 230 ILL. COMP. STAT. 40/15(1)(15) (West 2013).

<sup>262</sup> 20 ILL. COMP. STAT. 1605/7.2 (West 2013).

<sup>263</sup> 20 ILL. COMP. STAT. 1605/7.12 (West 2013).

<sup>264</sup> 25 U.S.C. §2710 (2012).

<sup>265</sup> *Id.*

<sup>266</sup> 25 U.S.C. § 2710(d)(1)(C) (2012).

<sup>267</sup> *See* 25 U.S.C. § 2710(b) (2012).

II venues. These states do not want to have untaxed tribal casinos within their jurisdiction.<sup>268</sup>

In addition, federal law prohibits the placement of a gaming device within “Indian country.”<sup>269</sup> Congress used its power under the Commerce Clause to prohibit gaming devices from Native American reservations and territories when it passed the Transportation of Gambling Devices Act of 1951.<sup>270</sup> Commonly known as the “Johnson Act,” the original legislation prohibited three-reeled slot machines, but Congress amended the definition of “gaming device” to include anything related to gambling.<sup>271</sup>

Because many states also prohibit Class III gaming, some Native American tribes turned the outward appearance of a bingo or a pull-tab machine into something resembling a slot machine.<sup>272</sup> For instance, Idaho’s Indian gaming has worked around the rules to allow electronic Class II games.<sup>273</sup> They have pull-tabs and other video devices, which print out a receipt of the winnings.<sup>274</sup> This receipt is then taken to a cashier or floor attendant to be redeemed for cash.<sup>275</sup> As a result, several federal courts have permitted Class II Indian casinos to offer machines as “technological” aids that simulate the appearance of reels so long as the inner workings operate by the rules of bingo and other permissible games.<sup>276</sup>

In other situations, the forum state enters into a compact with the Native American tribe to allow Class III gaming.<sup>277</sup> Sometimes the two jurisdictions negotiated amicably to work out a compact, while other times the tribes needed assistance from the courts to enforce

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<sup>268</sup> See Wilson, *supra* note 209.

<sup>269</sup> 15 U.S.C. § 1175(a) (2012). To deter unlawful behavior, Congress made the violation of the statute a felony. See 15 U.S.C. § 1176 (2012).

<sup>270</sup> Transportation of Gambling Devices Act of 1951, Pub. L. No. 906, 64 Stat. 1134 (codified at 15 U.S.C. § 1172 (2012)).

<sup>271</sup> See 15 U.S.C. § 1171(a) (2012).

<sup>272</sup> See Rose 1, *supra* note 8.

<sup>273</sup> Steve Bourie, *Idaho Casinos*, AMERICAN CASINO GUIDE, <http://americancasinoguide.com/casinos-by-state/idaho-casinos.html> (last updated Nov. 21, 2013).

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> See, e.g., *United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000); *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713 (10th Cir. 2000); *United States v. Santee Sioux Tribe of Neb.*, 174 F.Supp.2d 1001 (D. Neb. 2001); *Diamond Game Enter., Inc. v. Reno*, 230 F.3d 365 (D.C. Cir. 2000).

<sup>277</sup> See Dunstan 2, *supra* note 120 (including California, Colorado, Connecticut, Florida, Iowa, Kansas, Louisiana, Michigan, Mississippi, Missouri, Nevada, New Mexico, Oregon, South Dakota, Washington, West Virginia, and Wisconsin). See also AGA Survey, *supra* note 3, at 4.

their rights.<sup>278</sup> For example, the Mashantucket Pequot Tribe filed suit against the State of Connecticut for their right to open a casino shortly after the passage of IGRA in 1988.<sup>279</sup> The tribe argued that Connecticut merely regulated wagering activities instead of prohibiting them because the state already allowed low-stakes charitable gaming in its jurisdiction and that IGRA provided the Native Americans with the ability to operate the same forms that already existed.<sup>280</sup> The court found the tribe's argument persuasive;<sup>281</sup> Foxwoods Casino opened in 1992, and in 1993, the tribe made a deal with the Governor to allow slot machines if the state received 25 percent of all the yearly revenue.<sup>282</sup>

Other states try to limit the impact of Class III casinos by restricting the games available to play in the compact between the tribe and the state.<sup>283</sup> For example, Arizona allows Class III Indian gaming, but individual casinos are limited to a maximum of 1,301 slot machines, and most tribes have a maximum wager of \$29.<sup>284</sup> Other restrictions include that table games are limited to blackjack and poker.<sup>285</sup> In the state of Washington, the tribal casinos must use a central determinant method like a VLT for selecting an outcome with a maximum wager restriction of \$20.<sup>286</sup>

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<sup>278</sup> Compare *Mashantucket Pequot Tribe v. Conn.*, 913 F. 2d 1024 (2d Cir. 1990) with Dennis McAuliffe Jr., *Casinos Deal Indians A Winning Hand: Billions in Revenue Ease Tribes' Dependence on Federal Funds*, WASH. POST, March 5, 1996.

<sup>279</sup> *Mashantucket Pequot Tribe v. Conn.*, 913 F. 2d 1024 (2d Cir. 1990).

<sup>280</sup> See Rose 3, *supra* note 27 (noting that Foxwoods reported \$660 million wagered over its 4,585 slot machines during November of 1996, resulting in the house winning \$38 million dollars solely for that month).

<sup>281</sup> *Id.*

<sup>282</sup> Steve Bourie, *Connecticut Casinos*, AMERICAN CASINO GUIDE, <http://americancasinoguide.com/casinos-by-state/connecticut-casinos.html> (last updated Nov. 21, 2013).

<sup>283</sup> For example, Arizona has slots and video poker but the only table game allowed is blackjack. Minnesota tribes are only allowed to have card games and electronic video slots, not traditional reeled slots. New York, Oklahoma, and Wyoming have both Class II and Class III Indian gambling. North Carolina has Class III Indian gaming but it is limited to table games and skill based slot machines. Skill based slots are those in which after you spin the reel one time, then you choose zero, one, or two of the first outcomes to continue in play for the second pull of the reel. See Steve Bourie, *North Carolina Casinos*, AMERICAN CASINO GUIDE, <http://www.americancasinoguide.com/casinos-by-state/north-carolina-casinos.html> (last updated Nov. 21, 2013).

<sup>284</sup> *History of Gaming*, ARIZ. DEPT. OF GAMING, [http://www.gm.state.az.us/content/hi\\_story](http://www.gm.state.az.us/content/hi_story) (last visited Jan. 24, 2014).

<sup>285</sup> See e.g., STATE OF ARIZ., INDIAN TRIBE GAMING COMPACT, § 3(a) (2003), <http://www.azgaming.gov/sites/all/themes/bluemasters/Files/TribalStateCompacts/compact.final.pdf> (last visited Jan. 24, 2014).

<sup>286</sup> Frank Legato, *The VLT Bounce*, GLOBAL GAMING BUSINESS, no. 6, May 22, *continued . . .*

Thus, a combination of the expansion by states to generate revenue through the taxation of gaming activities and the passage of IGRA, coupled with the push by the federal government for more economic self-reliance by Native American tribes, provided the motivation for manufacturers to make machines that comply with all Classes of gambling permitted under the law. However, this patchwork of approaches now presents a player wishing to participate in this activity with a myriad of possibilities when entering a casino on how the machines actually operate in determining the outcome for each wager based on a given state's public policy and the ability of the sponsoring tribe to gain approval under IGRA.

### C. Racinos

Finally, racetracks around the country received approval to augment the wagering at their facilities with additional forms of gaming to attract more participants.<sup>287</sup> In states like West Virginia and Maryland, the state lottery operates and manages the VLTs at the racetracks and casinos.<sup>288</sup> The state lottery in these states either procures the devices or supervises the central system that connects the games for accounting purposes.<sup>289</sup> These machines essentially operate as the previously described slot, where it determines the outcome independently of other devices.<sup>290</sup> The term VLT only references ownership and not how it determines an outcome.<sup>291</sup>

However, New York provides an example of a jurisdiction where the VLTs use the central determinant system to establish an outcome. Because this jurisdiction requires the machines to operate as a finite-result video lottery, the games return at least 90 percent of the wagers and include additional programming features to ensure compliance.<sup>292</sup> However, this confuses many players in New York because the VLTs at racinos and the slot machines at the state's tribal casinos that

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2013, <http://ggbmagazine.com/issue/vol-12-no-6-june-2013/article/the-vlt-bounce> [hereinafter Legato 2].

<sup>287</sup> See Thalheimer, *supra* note 100. Dog and horse racing as well as Jai-alai are the most common forms of pari-mutuel wagering across the country. See Dunstan 1, *supra* note 20.

<sup>288</sup> See Legato 2, *supra* note 286.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> N.Y. TAX LAW § 1612(c)(1) (McKinney 2013); See Legato 2, *supra* note 286. This commentator explains that one of the features in a New York VLT game of video poker will include the awarding of "bonus" payments for those players that do not utilize basic strategies for clear-cut winning hands. *Id.*

comply with the requirements of a Class III gaming device maintain similar outward appearances.<sup>293</sup>

Consequently, the states vary the amount and types of gaming they allow at the facilities based on their own public policies.<sup>294</sup> Hence, this dichotomy amongst the jurisdictions within and amongst the federal government, states, and tribes to allow machine-based gaming, coupled with a strategy by those offering the games to make the outward appearance resemble that of a slot, may confuse all but the most sophisticated player.

## V. LEGAL ISSUES AND ANALYSIS

Given the widespread access of the public to gaming establishments, the prevalent use of machines for wagering with little notice on their method of operation, and the likelihood that a person playing such a device may feel cheated from winning a jackpot due to the practices and policies of a device manufacturer or operator, a player may turn to the courts for relief. While the gambling establishments must abide by the laws in place when locating machines in its facility or risk losing its license, compliance with a jurisdiction's requirements takes priority.<sup>295</sup> As such, many of the manufacturers and operators believe that compliance with the law absolves them of culpability or an ethical responsibility to conduct games in an open and honest manner at a standard above their legal requirements.

In addition, a player entering a casino or other gaming venue will materially rely upon the government to create and enforce regulations that protect their interests from operators and manufacturers who conduct games in a dishonest and unfair manner.<sup>296</sup> A player will rely

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<sup>293</sup> *Id.*

<sup>294</sup> For example, Indiana and New Mexico have legalized slot machines at their pari-mutuel sites. *See* AGA Survey, *supra* note 3, at 4. In Maine, racinos can have slots, video poker, and video blackjack. *Id.* New York, Ohio, Oregon, Rhode Island, and West Virginia have legalized video lottery terminals at these races which operate like a lottery and not a banked game. *Id.* Oklahoma has limited legalized gaming to Class II games such as card games and bingo. *Id.* In Florida, slot machines are allowed at pari-mutuel wagering sites, but only in Broward and Miami-Dade Counties. *Division of Pari-Mutuel Wagering*, FLORIDA DEPARTMENT OF BUSINESS & PROFESSIONAL REGULATION, <http://www.myfloridalicense.com/dbpr/pmw/> (last visited Feb. 10, 2014). Along with Arkansas' state lottery, they also allow electronic games of skill at their four pari-mutuel racinos. *Racing and Gaming*, ARKANSAS, THE NATURAL STATE, <http://www.arkansas.com/things-to-do/gaming/> (last visited Feb. 10, 2014).

<sup>295</sup> *See* BYBEE, *supra* note 2, at 132.

<sup>296</sup> *See generally id.* at 126.

upon regulators to disallow those games and operators that fail to meet their minimal ethical responsibility articulated by the law.. By making a game available to the public, a player will rely on government regulators to approve machines that meet some type of ethical standard and do not take advantage of the unequal footing that exists between the participants.

However, when a player believes that the manufacturer or operator should meet a standard above one set forth by the government regulators, a private or civil action may occur to rectify the situation and request that the courts intervene. In some situations, a plaintiff may assert that a less restrictive alternative existed to provide better guidance, but the operator and manufacturer chose to take advantage of their superior position instead.

Accordingly, an aggrieved party may assert misrepresentation by the casino or machine manufacturer in a lawsuit, which will require that their claim meet the requirements associated with deceit or negligent misrepresentation.<sup>297</sup>

#### A. Deceit

At common law, deceit occurs when a source withholds pertinent information from the injured party.<sup>298</sup> Any representation that creates a false understanding in such a manner that conceals or obscures the truth also fits within the meaning of deceit.<sup>299</sup> For a party to make a claim of deceit, it must prove that the defendant intended to mislead or took such actions that would lead a reasonable person to believe the false information.<sup>300</sup>

Based upon our previous discussion regarding machine-based gaming, an aggrieved party may attempt to assert deceit in situations where a players' pool exists and where a lack of notice occurs relating to the device itself. Upon entering a casino or other gaming venue, many players have little or no knowledge that a device that looks like

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<sup>297</sup> W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 105 (5<sup>th</sup> ed. 1984). In considering a lawsuit based on misrepresentation, this analysis does not take into account issues relating to jurisdiction, which can derail a claim before it gets a hearing on the merits. In some situations, jurisdiction will reside in the state where the activity occurred; but, in other cases that may involve Native American lands, a complicated scenario whereby tribal, state, or federal court could apply depending on the underlying facts and executed compacts. In addition, we do not consider strict liability because machine-based gaming does not rise to that level of application.

<sup>298</sup> *Id.* § 106.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* § 105.

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a slot machine may not have sufficient financial resources to pay a jackpot or may determine the outcome using an unexpected method with worse odds than anticipated. As such, we will evaluate the merits of a deceit claim in those instances.

*1. Players' Pools*

Depending on the outcome and ability of the players' pool to fulfill its obligations, a player could consider asserting a claim of deceit. In the event of a loss while playing a machine, the player's knowledge on whether the wager contributed to the players' pool would bear no relevance to a claim of deceit. The method in which the operator of a gambling device finances its obligations bears no significance since the player lost the money. A player would have difficulty showing that the financing method for payouts played any role in deciding whether or not to participate in the wagering activity. The operator of the gaming machine did not take any steps to make the player contribute to the players' pool by either misleading or withholding key information as to the identity of those responsible for paying the jackpot. To this extent, a player that suffers a loss and tries to contend deceit for the contribution to the players' pool will fail in proving the required elements.

In contrast, deceit probably becomes an issue when a player hits a jackpot. Should the operator or trustee of the players' pool maintain sufficient funding to fulfill its obligations to the winner or contingent beneficiary, a claim for deceit will also fail to rise to the required levels. All parties will satisfy their obligations such that no misleading information or lack thereof contributed to the transaction.

However, if the pool does not maintain sufficient funds to fulfill its obligations, the player will have an opportunity to claim deceit. The player may assert that they chose to make a wager on a gaming machine without sufficient knowledge and that they reasonably believed that the operator or owner of the facility maintained the obligation and ability to make good on any winnings. This assumption by the player may originate from the physical characteristics of the facilities that generally indicate responsibility in such instances as well as the tendency for the venue to accentuate extravagance and wealth while prominently advertising the winners and their respective winnings.

Moreover, any type of governmental approval through licensing or otherwise may lead players to believe that the operator or trustee meets minimum standards for fulfilling its obligations. Because of the higher level of scrutiny given to gaming operators and machine manufacturers to convey respectability and ethical conduct to the

public, players expect that regulators will address solvency issues in order to ensure the availability of enough liquid assets for paying its obligations like a jackpot winner. While an operator may not own the players' pool, its fiduciary duties as a trustee make it responsible for maintaining proper amounts of liquid assets, which gives the appearance that regulators oversee its solvency.

Hence, in the limited circumstances where the trustee of the players' pool fails to maintain adequate resources to fulfill its obligations to a jackpot winner, a claim of deceit may ultimately find success.

## 2. *Machine Issues*

When considering a claim for deceit with regard to an apparent slot machine, the player will most likely base their assertion on the device's appearance. This may occur in a number of different scenarios where a player receives the wrong impression as to how the outcome gets determined, such as with a slot machine, a Class II device, or a VLT.

Given that the courts now approve of specific machines to qualify as an aid,<sup>301</sup> a plaintiff's case in civil court will face difficulties from the onset. An aggrieved plaintiff will need to overcome the proof that the government's approval demonstrates a lack of deceit on the part of the defendant. However, a plaintiff will assert that the approval only means that the gaming device satisfies the minimal requirements put forth by the government to meet the game's legal definition, and that does not mean that the defendant failed to engage in deceptive practices to lure players. These practices and programming for the gaming device will become the focus of such a claim.

### a. *Determination of Outcomes*

In the scenario where a casino, racino, or slot parlor intentionally places a legal machine for gambling on its floor but chooses to remain silent on how the device selects an outcome, the operator's actions may rise to the level of deceit. These machines usually advertise a payout or the odds of winning, but they fail to give any hint on how the device actually determines the outcome. A simpleminded

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<sup>301</sup> See, e.g., *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000); *United States v. Santee Sioux Tribe of Nebraska*, 174 F. Supp. 2d 1001 (D. Neb. 2001); *Diamond Game Enterprises, Inc. v. Reno*, 230 F.3d 365 (D.C. Cir. 2000); *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713 (10th Cir. 2000).

individual might believe that the number of reels multiplied by the amount of reel stops provides the odds and randomly selects an outcome, while a very sophisticated person would recognize that the amount of electronics surrounding the device would lead to an understanding that a computer picks a solution with each play. In the majority of situations, a player would fall somewhere in the middle of the sophistication level and would not feel that the operator of the venue tried to intentionally deceive them; but, some losers might feel otherwise and suggest a better notice as an alternative.

Because technology continues to intertwine itself with our lives and a regulatory body required testing and approval prior to the machine's public introduction, the plaintiff's argument would be weak. The plaintiff would face difficulty showing that the manufacturers and operators of such machines took specific steps to mislead or entice players to believe that the reels determined the outcome. The manufacturers would assert that most players show a preference that a machine display an outcome with reels and symbols instead of another method for playing the game.

In addition, recent research investigated whether a player could recognize a change in the "house's" advantage over a period of time.<sup>302</sup> In conducting the casino simulation, the researchers determined that the players could not even detect a change of up to 400 percent over the life of the experiment.<sup>303</sup> As such, an initial claim of deception that the manufacture and operator misled the player into believing that the reels determined the outcome would most likely fail.

*b. Class II Devices*

While extremely sophisticated, Class II devices may provide a more troubling situation given that the machines display simulated reels with symbols as an aid for playing a pull-tab or bingo. Interestingly, the game of bingo uses cards with a grid consisting of unique number combinations where each player tries to be the first to complete the winning pattern based on a random drawing of the numbers. While IGRA allows aids, nowhere in the game of bingo does it include simulated reels with symbols.

With the fundamentals of bingo in mind, a player could easily

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<sup>302</sup> Anthony F. Lucas & A. K. Singh, *Estimating the Ability of Gamblers to Detect Differences in the Payback Percentages of Reel Slot Machines: A Closer Look at the Slot Player Experience*, 15 GAMING RESEARCH & REVIEW JOURNAL 17, 17 (2011).

<sup>303</sup> *Id.*

mistake or confuse a Class II device as a slot machine, especially when the promotional screens use animated reels to entice play instead of showing the game actually available for play. These machines may look, sound, and play like a slot machine but in reality are something else.<sup>304</sup> A casino and game manufacturer typically leverage their superior comprehension of the particulars of a device or class thereof by making a Class II machine available to the public with the knowledge that a player will not fully comprehend the manner in which it determines an outcome. Absent some type of notice, a player could easily believe that they are playing a slot machine and fail to realize otherwise, which rises to the level required to provide deceit.

In an attempt to remedy any confusion, a Class II machine may carry a notice that indicates the spinning reels provide amusement only.<sup>305</sup> The placement of such a notice that only addresses the characteristics associated with the visual display, and fails to take into account the actual operation of the device, may rise to the level of deceit because it inadequately informs the player of the subtle differences associated with the different types of machines. Manufacturers could alleviate this issue by providing an unequivocal disclaimer, or by defaulting the programming to bingo with the reels and symbols used as a secondary type of display; however, they have not taken such an approach.

In reacting to these assertions, the defendant will likely respond that no affirmative action took place that caused the player to be deceived. The defendant will claim that a licensed facility offers a safe environment to play legal games that comply with the jurisdiction's laws, and that it offered only those devices approved for its jurisdiction under the law. While criminal law requires a minimal level of ethical conduct, a court in a civil case could find differently, given that the conduct of the defendant would be at issue, rather than the regulations that permit gaming.

Thus, a plaintiff could successfully prove that a more forthcoming approach exists and that the casino and manufacturer followed a less than candid strategy in order to take advantage of unsophisticated players through deceptive practices when offering a Class II machine. Consequently, a claim for deceit will depend on the specific circumstances of a given case, but a claim appears more likely to succeed when, in conjunction with the current strategies used with Class II machines to attract players without properly disclosing the game behind the programming, a players' pool fails to fulfill its obligations.

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<sup>304</sup> See Rose 1, *supra* note 8, at 226.

<sup>305</sup> Wilson, *supra* note 209.

## B. Negligent Misrepresentation

While a claim for deceit fits within the category of intentional torts and requires an affirmative step by the defendant to mislead, negligent misrepresentation looks at the defendant's unintentional actions in a business transaction where a duty exists to provide honesty to the other party in a business.<sup>306</sup> Similar to the common law tort of negligence, a claim for negligent misrepresentation focuses on a defendant's statements and behaviors that deceive the plaintiff, who then carries out an action having relied on the defendant's declarations for guidance.<sup>307</sup> Depending on the specific jurisdiction, a plaintiff must generally prove a sequence of elements in order to prevail on a claim for negligent misrepresentation.<sup>308</sup>

Liability for negligent misrepresentation attaches when the person divulging the information owes a duty to provide such information with care, and the individual receiving it justifiably relies and acts upon it in a manner that causes injury or damages to occur to the plaintiff.<sup>309</sup> This duty also includes such instances where a defendant fails to disclose known facts regardless of intention.<sup>310</sup> In these cases plaintiff must establish that the defendant breached an obligation to supply correct information, that the plaintiff, having justifiably relied on this information or omission, takes action, and that this action caused the injury or damages at issue.<sup>311</sup>

With these requirements in mind, a players' pool, as well as the issues associated with either how a machine determines an outcome or the underlying game, may offer an aggrieved party another theory to pursue. As such, we weigh the merits of a claim that seeks a remedy under negligent misrepresentation for those situations.

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<sup>306</sup> Compare KEETON ET. AL., *supra* note 297, § 105 at 727, § 106 at 737 (explaining that the tort for "deceit" arises when the defendant intentionally misleads the plaintiff through words either spoken or omitted) with 37 C.J.S. *Fraud* § 74-5 (2008) (explaining that in the tort of misrepresentation the defendant, often in the course of business, owes a duty to the plaintiff to provide correct information, and breaches that duty).

<sup>307</sup> 37 C.J.S. *Fraud* § 74 (2008).

<sup>308</sup> 37 C.J.S. *Fraud* § 75 (2008). While each jurisdiction maintains its own nuances, some jurisdictions limit it as a remedy to only those situations that emanate out of a business transaction. *Id.* In the context of machine-based gaming, the circumstances will undoubtedly qualify as a business transaction between a player and casino.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.* The plaintiff need not prove an intention to defraud by the defendant or knowledge of the dishonesty of the statement. *Id.* The plaintiff only needs to show that no reasonable grounds existed for the false statement. *Id.*

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*I. Players' Pools*

In considering a players' pool situation, much of the earlier analysis for deceit applies. In those situations where a player claims that his or her losses while playing a machine-based game occurred due to negligent misrepresentation, the arguments would closely mirror that of deceit;<sup>312</sup> however, a player would need to begin by showing that the operator of the wagering machine maintained a duty to disclose the method in which it financed the gaming activity at its facility. The player would then need to make the causal connection that the operator's lack of notice created a breach in its obligation for disclosure, which induced a material reliance for participation and provided the basis for the injury or loss.

The player would need to prove that some kind of notice would have triggered a reaction that would have kept him from playing the machine. The decision by an operator to use a players' pool in lieu of another financing method would bear a somewhat low relevance to a player that loses a wager. Most likely, the player did not base the decision to operate the machine on the financing method for paying winners and would ultimately fail to rise to the initial requirements associated with negligent misrepresentation.

Moreover, the loss attributed to the outcome determined by the wager would also not rise to the level of damages or injury required under negligent misrepresentation. The player would most certainly understand the risk of loss when operating the machine; thus, the failure to win when wagering would not constitute an injury within the meaning of an unintentional tort.

On the other hand, a winning player who does not get paid by the trustee of the players' pool may have a stronger claim for detrimental reliance against the operator, arising from the obligation to notify potential participants of the financing method. In this circumstance, the player could easily show that the operator's lack of notice regarding the fiscal responsibility for a given machine relates to the inducement of participation. The player could assert that all of the advertising, sounds, and physical characteristics of the facility demonstrate that the environment in the facility encourages participation, and in some instances, a track record of paying winners. This failure to disclose material known facts regarding payout commitments creates circumstances whereby a plaintiff justifiably relies on the appearances and advertising associated with a casino in making the decision to play the machine.

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<sup>312</sup> See *infra* Section V(a)(i).

As such, a player asserting negligent misrepresentation against a casino operator or owner would likely prevail in an instance when the machine's outcome indicated a winner but the trustee of a players' pool failed to pay. Thus, a player that pursues negligent misrepresentation by a casino operator for its financing practices may find its application limited to a specific set of facts that would most likely incorporate a broader claim for nonpayment of a winning outcome.

## 2. *Machine Issues*

A plaintiff may be successful when applying negligent misrepresentation to those situations where a casino offers the play of a legal machine but decides to remain silent on how the device selects an outcome or the underlying game. In these circumstances, the player must draw a causal connection between the operator's decision to place a machine that does not fully disclose its method of operation and the injury in order to receive relief from a court. This situation may occur based on the method in which the machine determines the outcome or out of the desire to make a Class II device appear like something other than an aid for an underlying bingo or pull-tab game. In both of these instances, an aggrieved party may pursue a claim of negligent misrepresentation.

### a. *Determination of Outcomes*

In those situations where the slot's outward appearance led an aggrieved party to incorrectly perceive the method by which the outcome is determined, the plaintiff will begin by demonstrating that the operator failed to disclose the materially known facts that electronic machines function in a different manner than those using mechanical components or that both types of devices look the same. Secondly, the plaintiff will need to establish that the operator placed the gaming machines in the casino with the knowledge that many players will base their decision on the outward appearances of a given piece of equipment. After proving these two components were integral to selecting the gaming machine to play, a plaintiff will need to make evident that the loss occurred due to the reliance on the device's outward appearance and failure to disclose the known facts.

These requirements will pose some difficulty to a plaintiff because the law does not impose a duty upon the operator and manufacturer to disclose such information. However, a business relationship occurs between the player and operator, which may serve as a basis for creating the duty to disclose. This will lead to the plaintiff needing to

prove that the operator and manufacturer introduced, placed, and designed the machine in such a manner as to withhold this key information from the players, and that the defendants knew the key information was material in the decision-making process in selecting and playing a game.

In response to such an assertion, a defendant will likely respond that the player assumed the risk when deciding to play a particular machine. The defendant will claim that a licensed facility offers a safe environment to play legal games that comply with the jurisdiction's laws and regulations, and that negligent misrepresentation fails to occur because there is no obligation for them to post any further information about odds or the inner workings of the machine. The operator and manufacturer only owe a duty to the plaintiff that the machine will operate according to the approved rules of the installed game and that any winners will receive the appropriate compensation. Beyond those requirements, no duty exists between the player and the operator or manufacturer.

Furthermore, the operator will argue that players use a variety of factors in their decision-making process to play a game and that the manner in which a machine determines an outcome is inconsequential to the overall selection criteria by most players. This relationship between how a player selects a particular game to play and the machine's outward appearance includes many other known factors such as the advertised payout schedule, whether it is part of a progressive jackpot, the location within the gaming establishment, and entertainment value. To this extent, the manner in which the machine ultimately determines an outcome will become relatively insignificant given the weight assigned to these other factors by most players.

Thus, a plaintiff will face a daunting task in overcoming these defenses made by the operators and manufacturers while convincing a court that their failure to disclose the method in which the machines used for gaming purposes determines its outcome creates liability under a theory of negligent misrepresentation.

*b. Notices on Class II devices*

Likewise, operators and manufactures of Class II devices will endure some of the same types of arguments in their situation as well. In this case, the outward appearance is even more critical to the player's decision-making process than the previously discussed mechanism for determining the outcome, because it deals with the fundamentals of the game itself. In many of the Class II devices, the machine will look and feel like a slot but will determine the outcome using the rules of bingo or pull-tab. A plaintiff can easily confuse the

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Class II device as a slot machine and will make a compelling argument that the operator and manufacturer's decision to make the equipment available for play was a material misrepresentation that deceives potential players. This argument by a plaintiff will make a stronger justification to a court as to why the operator and manufacturer maintain an obligation to notify a player of the type of game offered.

Responding to this assertion, the defendant will explain that players at Class II locations are already aware that such facilities do not offer slot machines. A Class II facility offers bingo and pull-tab type games and any machine located in the facility obviously provides an aid for those wishing to play. A slot machine at a Class II location would be illegal and no defendant maintains an interest to break the law.

Moreover, the Class II devices also provide a notice to potential players that the spinning reels provide amusement only. This disclaimer offers more than enough notice to the player that the underlying game within the machine is bingo or a pull-tab.

However, a sympathetic court could easily hold that unless the device unequivocally makes sure that the player is aware of the underlying game and that it only provides assistance thereof, the obligation between the parties will occur. Furthermore, the court could find that the only motivation to include spinning reels on an aid for bingo or pull-tab is to make the machine appear like something it is not and maintain minimal entertainment value. Accordingly, a plaintiff could win a claim of negligent misrepresentation against an operator and manufacturer based on its current offerings of Class II devices.

Therefore, the practice by the operators and manufacturers with respect to machine-based gaming generally does not cross the line to impose liability for misrepresentation; however, in limited circumstances, a court could find otherwise. In those limited situations where a plaintiff could attach liability, a court would still need to make many critical decisions concerning the practices of the operators and manufactures for a plaintiff to win.

### **C. Court Precedent**

Given the unique responses from the courts to cases involving gambling, some case precedent exists where plaintiffs file claims against manufacturers and operators of casinos or lotteries based on a misrepresentation theory. While none of these cases directly provides precedent for a misrepresentation claim, each provides some type of guidance and dicta on how the courts will respond should a plaintiff pursue such a lawsuit.

In a misrepresentation claim trying to proceed on a class action basis, a group of players filed a federal lawsuit to recover their gambling losses against “cruise ship defendants” and “land-based defendants” of machine-based gaming because they believed the programming of the devices deliberately intended to deceive them.<sup>313</sup> The plaintiffs contended that while the electronic slot machines offer the same visual display as their mechanical predecessors, they operate in a different manner such that a player's odds of winning a pay-off on an electronic slot machine depends on computer programming, not chance. A computer determines the pay-off and the corresponding appearance of the pay-off line on electronic slot machines, such that the computer-generated ‘spinning’ of the reels has nothing to do with a player's chance of winning the game. Additionally, unlike in the mechanical game, where symbols appearing immediately above and below the pay-off line are symbols that the player “has just barely missed,” in the electronic game, the machine operator can program the computer to generate “near misses” whenever and with whatever frequency desired.<sup>314</sup>

Accordingly, the plaintiffs asserted that a computer selects in advance the outcome of an individual play in such a manner that allows the manufacturer and operators of a gaming machine to manage and design the frequency and timing upon which a machine will select a winning result.<sup>315</sup> Nonetheless, the plaintiffs failed to meet all of the necessary requirements to gain certification as representatives for a class action case; thus, the courts did not decide the case on the merits of the claim.<sup>316</sup>

In agreeing with a lower court, the Ninth Circuit explained that a plaintiff “claiming that the Casinos’ misrepresentations caused her to play the . . . machines and suffer losses must do more than merely allege causation. . . . It is not enough to say, ‘I played the games and I lost money,’ or ‘I didn't make any money.’”<sup>317</sup> The court continued to explain:

[G]ambling is not a context in which we can assume that potential class members are always similarly situated. Gamblers do not share a common universe of knowledge and expectations - one motivation does not “fit all.” Some players may be unconcerned with the odds of winning, instead engaging in casual gambling

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<sup>313</sup> Poulos v. Caesars World Inc., 379 F.3d 654, 658-59 (9th Cir. 2004).

<sup>314</sup> *Id.* at 661.

<sup>315</sup> *Id.* at 660-61.

<sup>316</sup> *Id.* at 664.

<sup>317</sup> *Id.* at 665.

as entertainment or a social activity. Others may have played with absolutely no knowledge or information regarding the odds of winning such that the appearance and labeling of the machines is irrelevant and did nothing to influence their perceptions. Still others, in the spirit of taking a calculated risk, may have played fully aware of how the machines operate. Thus, to prove proximate causation *in this case*, an individualized showing of reliance is required.<sup>318</sup>

While the court did not bar a plaintiff from pursuing an individual claim against manufacturers and operators of casinos or lotteries that use such devices, the court offered examples of the difficulty in proceeding with an assertion for misrepresentation and ways an aggrieved party could demonstrate such reliance.<sup>319</sup> Consequently, the Ninth Circuit upheld the lower court's decision not to certify the class as representative of other similarly situated plaintiffs and did not hear the case based on the merits of the complaint.<sup>320</sup>

Furthermore, courts in other jurisdictions evaluated claims against state run lotteries that continued to sell scratch-off or instant win tickets after someone already won the featured prize.<sup>321</sup> In Colorado, a woman sued the state lottery system after purchasing a predetermined scratcher ticket. She claimed that the lottery did not notify the players that it already awarded the grand prize seventy-two days earlier to another player.<sup>322</sup> She sued both the gas station from which she bought

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<sup>318</sup> *Id.* at 665-66.

<sup>319</sup> *Id.* Similar to our discussion on the subject, this court explained its position with that stated:

A plaintiff claiming that the Casinos' misrepresentations caused her to play electronic slot machines and suffer losses must do more than merely allege causation; she must draw a causal link between the alleged fraud and the alleged harm. The plaintiff might draw this link by proving that the Casinos' failure to inform players that the electronic slot machines operate differently than their mechanical counterparts affected her decision to play, or that she was influenced by the fact that electronic slot machines look like traditional slot machines. In turn, this would require her to establish that she was aware of how the mechanical slot machines operated, was unaware that the electronic slot machines operated differently than those machines, and was motivated to play the electronic slot machine-based on her knowledge of these factors.

*Id.*

<sup>320</sup> *See id.*

<sup>321</sup> *See Prum, supra* note 59.

<sup>322</sup> *Id.* at 293.

the ticket and the Colorado State Lottery Division.<sup>323</sup> The state asserted its sovereign immunity under the Colorado Government Immunity Act (“CGIA”) before a hearing on the merits occurred.<sup>324</sup>

In this case, the Colorado Supreme Court conducted a *de novo* review of the facts to determine whether the exceptions to the CGIA allowed the claims to proceed despite a statute that prohibited a plaintiff from holding a public entity responsible for a liability arising out of a tort, or alternatively, whether the suit would be allowed because the injury emanated from a contract with the state permitting such a suit.<sup>325</sup> In conducting its analysis, the court explained that the plaintiff may structure the pleadings under either a contractual or a tort theory; thereafter, a court must make the final determination as to which aspect of the law provides for the true nature of the claim.<sup>326</sup> Despite acknowledging that the state’s lottery gains significant revenue from its practice of encouraging and selling tickets to unsuspecting players that cannot win, the court found that the underlying claim sounded in tort, even though the plaintiff’s prayer for relief relied on contractual claims.<sup>327</sup>

Applying the same analysis to the plaintiff’s assertion of unjust enrichment as an equitable remedy, the court explained that a successful claim would hinge on evidence that showed the lottery made misrepresentations on the availability of specific prizes.<sup>328</sup> In order to make this link, the plaintiff would need to prove that the practice caused the injury due to the lottery’s misrepresentation, which can become or already occurs as a tort.<sup>329</sup> Accordingly, the Colorado Supreme Court allowed the sovereign immunity claim to prevail instead of deciding the merits of the case.<sup>330</sup>

In another lawsuit based on the subsequent sale of a predetermined scratcher lottery ticket with no chance to win the featured prize, the California Court of Appeals issued an unpublished opinion when it considered a claim for misrepresentation.<sup>331</sup> While this court also turned to the limitation of liability provisions for public entities under the California Tort Claims Act, the plaintiff’s assertion that a statutory

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<sup>323</sup> *Id.*

<sup>324</sup> *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1002 (Colo. 2008).

<sup>325</sup> *Id.* at 1003.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 1006.

<sup>328</sup> *Id.* at 1007.

<sup>329</sup> *Id.* at 1008.

<sup>330</sup> *Id.*

<sup>331</sup> *Stanley v. California Lottery Comm’n*, No. C041034, 2003 Cal. App. LEXIS 8296, at \*7-9 (Cal Ct. App. 2003).

exemption exists for its claim initiated an analysis of the statute.<sup>332</sup> In its analysis of the immunity statute and the applicable codes, the court held that the laws applying to misrepresentation do not pertain to the state lottery and that only the lottery commission serves as the primary agency responsible for enforcement.<sup>333</sup> As such, the court held that the appropriate venue for such a complaint concerning practices that deceive needs adjudication by the lottery commission rather than the judiciary.<sup>334</sup>

Since the courts do not appear to want to intervene in a case between a gambler and casino that involves torts, it is unlikely a player could get a court to hear the case, let alone prevail. For example, one commentator observed that the decision in *Poulos* created several different consequences for a lawsuit that tried to base a misrepresentation claim against manufacturers and operators of casinos or lotteries.<sup>335</sup> He noted the Ninth Circuit's opinion that considered gamblers as dissimilarly situated as creating a difficult financial obstacle for an individual plaintiff to succeed because of the inability for multiple parties to share legal costs and information when facing a well-financed and represented industry.<sup>336</sup>

Furthermore, he contends that should a plaintiff secure legal representation on a contingency basis, the court's opinion places a heavy burden of proof with its dicta that requires the proof of reliance by the gambler in order to succeed, which presupposes that a misinformed consumer will make a rational decision.<sup>337</sup> However, he explains that even the most sophisticated player that understands the inner workings of today's machines made available for gambling will also succumb to the manufacturers' mergers of sophisticated technology with psychological manipulation that obstructs an informed decision from occurring.<sup>338</sup> As such, he believes that the court's decision places a tremendous responsibility on the player while failing to account for the unequal positions in knowledge, understanding, and sophistication of a machine used for gambling between that of the operator and manufacturer in comparison to the consumer.<sup>339</sup>

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<sup>332</sup> *Id.* at \*29.

<sup>333</sup> *Id.* at \*30-\*51.

<sup>334</sup> *Id.* at \*51.

<sup>335</sup> Bradley S. Fiorito, Comment, *Calling a Lemon a Lemon: Regulating Electronic Gambling Machines To Contain Pathological Gambling*, 100 NW. U. L. REV. 1325, 1348 (2006).

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at 1348-9.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

Upon considering these cases and this commentator's viewpoint, an aggrieved party that chooses to pursue a case of misrepresentation against an operator or manufacturer related to machine-based gaming faces a difficult challenge. As seen in all three cases, the court will use its broad discretion to make rulings for the dismissal of a claim before a hearing on the merits. Each of the three courts avoided the central issues linked to the controversial practices associated with gambling, but the *Poulos* opinion did provide some insight through its dicta that indicated a reticence on the part of the judiciary to entertain claims for misrepresentation by suggesting stronger causal connections by an aggrieved party between the different elements.

Because the *Poulos* opinion did not create a precedent, the same venue or one in a different part of the country might make a different determination when presented with a similar claim. The controversial practice of offering a Class II device that appears like a slot machine appears to have a greater issue with a misrepresentation claim because the applicable court decisions only validated the devices as meeting IGRA.<sup>340</sup> These opinions did not include an opinion as to whether the Class II device creates a misrepresentation to a player;<sup>341</sup> they simply determined if the Class II machines served as an aid or facsimile to the underlying game.<sup>342</sup>

While all three cases presented issues addressing controversial practices that reveal serious ethical lapses in conducting business in a straightforward and honest manner, the courts will only find precedent that demonstrates an unwillingness to move forward on these types of claims. Hence, the likelihood of a claim proceeding against an operator or manufacturer of a gaming machine appears highly unlikely for a variety of reasons.

## VI. POLICY SOLUTIONS

Due to advancements in technology and the growth in the machine-based gaming market and corresponding influence,

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<sup>340</sup> See, e.g., *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000); *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713 (10th Cir. 2000); *Diamond Game Enterprises, Inc. v. Reno*, 230 F.3d 365 (D.C. Cir. 2000); *United States v. Santee Sioux Tribe of Nebraska*, 174 F. Supp. 2d 1001 (D. Neb. 2001).

<sup>341</sup> See, e.g., 103 *Electronic Gambling Devices*, 223 F.3d 1091; *Diamond Game Enterprises, Inc.*, 230 F.3d 365; 162 *MegaMania Gambling Devices*, 231 F.3d 713; *Santee Sioux Tribe of Nevada*, 174 F. Supp. 2d 1001.

<sup>342</sup> See, e.g., 103 *Electronic Gambling Devices*, 223 F.3d 1091; *Diamond Game Enterprises, Inc.*, 230 F.3d 365; 162 *MegaMania Gambling Devices*, 231 F.3d 713; *Santee Sioux Tribe of Nevada*, 174 F. Supp. 2d 1001.

government regulation needs to keep up with the changes. The fact that many states receive such large amounts of revenue from gaming and the pulling of a reel no longer determines the outcome as it once did in the past, demonstrate a greater need for the government to protect its citizens from unscrupulous operators and machine manufacturers that exist just above the legal standard while taking advantage of many poorly informed players.

As previously mentioned, the courts appear unwilling to hold those parties responsible for these questionable practices because they do not technically violate the law and do not wish to get embroiled in a civil case on the subject matter.<sup>343</sup> As such, the most effective way to produce a change for a more transparent standard amongst the operators and game manufacturers will need to rely on creating public pressure for new legislation or regulations; otherwise, little incentive occurs to alter the current practices as it relates to the devices used for gaming purposes.

In the cases involving lottery tickets that could not win, the corresponding negative press caused some of the operators to change their practices.<sup>344</sup> In many instances, the public outcry against the operators bred such public outrage that the state lottery stopped the practice all together even though the court validated their position.<sup>345</sup>

In considering legislative or regulatory remedies, the government needs to embrace enhancements that address the advancements in technology that level the playing field between those offering and playing the games. Operators and manufacturers should have a duty to ensure that a reasonable amount of pertinent information is available to a player in order to make an informed decision when deciding to participate regardless of the entertainment value. There are several approaches to help clarify the type of machine or game available for play with little impact upon the operators or manufacturers.

One solution could include the distribution of pamphlets at the entrance of the facility to provide more details as to the machines, their payouts, and their odds. In the absence of legislation forcing them to do so, gaming operators already produce and distribute problem gambling pamphlets and oftentimes post signs on machines acknowledging that players should know when to stop.

Moreover, an operator could clarify many common misconceptions through some type of explanation in the pamphlet that most machines no longer use the spinning reels to determine the outcome. Players might not know that there are different ways that a

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<sup>343</sup> See *supra* Section IV(c).

<sup>344</sup> See Prum, *supra* note 59, at 286.

<sup>345</sup> *Id.*

machine determines outcomes or that a different underlying game exists. Pamphlets that further explain the devices could be located at the entrances to the facilities where machines are located. A pamphlet could provide all of this information without being a nuisance to the establishment or its operations.

Likewise, many operators conduct free lessons in their facilities to teach new players the rules of various table games and answer many of the questions about the payout odds. These informational classes could also extend to machine-based games where available, and other facilities without such lessons could begin such an offering to interested players to bring more transparency into the industry.

Another solution could include the posting of a notice on each machine that explains the manner in which an outcome gets determined along with the odds. This could be a small, nonintrusive plaque on each device stating the type of game and its odds (which already occurs in many instances) as well as the payout schedule on either the face or belly glass of the machine. If players wanted to know this information it would be readily available and would be a cost-effective way for operators and manufacturers to confront the issue of misrepresentation.

Taking these minor measures to offer a handout, conduct a class, or post a sign would not be new to the operators or manufactures because they took such an action when problem gaming activists pressed their issue with the activity many years ago. The operators and manufacturers could easily follow the same strategy to resolve any player confusion issues as well. A backlash against the current practices that withhold pertinent information could force the conclusion of this cycle just like those that ended the two prior waves of gaming in this country; thus, those involved in the machine-based gaming industry must take these issues seriously as well.

Therefore, legislators and regulators need to address the ever-changing technologies that find their way into the latest machines used by gaming establishments within their jurisdictions or risk a backlash from the public as the various methods of operation get exposed and called into question regarding the respectability of the industry's practices.

## VII. CONCLUSION

No matter your viewpoint on the activity of gambling, the industry generates large amounts of revenue for its operators, manufacturers, and governments. Even though the number of jurisdictions in the United States that legalized gambling activities over the past decade has slowed down, many public policies across the nation continue to

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be shaped by our long history and to evolve as an industry so long as it keeps the public's confidence and trust.

From its simple beginnings as games of skill between players, gambling evolved into other forms that use chance as a determining factor. The creation and evolution of machine-based gaming over the last century became a new dynamic within the industry. The machines now offer a broad assortment of simple and complex games for those wishing to participate in the activity.

As the machines continue to evolve with the advancements in technology, some conflicts between the manner in which the devices operate, the law, and transparent business practices remain persistent within the industry. Cutting edge technology now allows a slot machine to electronically determine an outcome using a random number generator or by playing the lottery, bingo or a pull-tab, but display a technically true result to the player of the outcome with reels. Long gone are the days of "what you see is what you get" with gaming machines.

Given these new methods of operation, an operator can place machines into a gaming facility without properly notifying a player as to which system is used. This can place the operator and manufacturer on unequal footing with the player and result in a claim for misrepresentation, and also start to erode the public's confidence and trust in the activity as honest. So far, the courts seem reticent to consider these types of issues, and by default, will allow the operators and manufacturers to continue these questionable practices.

Hence, a change in legislation needs to occur in order to clarify any confusion created by these new applications of technology to machine-based games. The change should occur while maintaining the trust and confidence in the activity, thereby allowing it to keep its status as a legally acceptable industry that provides entertainment to its players, a good source of jobs, and much needed revenue for many governments.