
CASINOS: AN ADDICTION INDUSTRY IN THE MOLD OF TOBACCO AND OPIOID DRUGS

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The growing casino industry in the U.S. is built on a model of profitability that bears very close resemblance to two other industries: the tobacco industry and the opioid pain medication industry. While it is rather obvious that all three industries have demonstrated the ability to be consistently profitable, the models used to achieve that profitability are remarkably similar. All three industries began with addictive products. Through investments in research and development, they continually refined their product designs to emphasize and amplify addiction as a design element in order to increase profits. In each case, aggressive and deceptive marketing tactics were employed to target vulnerable populations and to normalize their addictive products despite the risks they posed to consumers. In each case, these products created substantial social costs. For the tobacco industry this includes the premature deaths of nearly half a million Americans annually, an enormous healthcare burden, and a substantial loss of productivity. For the opioid pain medication industry this includes thousands of deaths, tens of thousands of overdoses and an illicit market for other opioids that create enormous healthcare and criminal justice expenditures funded by tax dollars. The casino industry's products do not directly cause physical harm such as lung cancer or opioid overdose. Rather, this industry's products are designed to induce consumers to get in "the zone" and "play to extinction." The impacts on communities caused by casinos are latent, much like the lung cancer that appears in a smoker a quarter century after she takes her first of more than a million puffs. An addicted gambler will potentially experience bankruptcy, divorce, unemployment, and perhaps engage in embezzlement or larceny to keep gambling. The volume of such individuals reduces civic engagement and family stability in communities located in the vicinity of casinos. Other social costs include

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loss of productivity and healthcare costs associated with comorbidities related to the addiction to casino industry products. The accumulation of social costs and misery caused by highly profitable industries may provoke responses in social attitudes and policy. Over the past twenty-five years or so, federal, state, and local policies have regulated and reduced the impact of tobacco industry products. Litigation, too, has had an impact not only on tobacco industry profits but also in increasing transparency regarding tobacco industry behavior through discovery and whistleblower testimony. Such transparency has contributed to a denormalization of that industry's business model. More recently, the opioid crisis, driven by the opioid pain medication industry, has initiated policymaking as well as thousands of lawsuits against industry leaders. The casino industry, highly reliant upon electronic gambling machines designed to addict consumers may soon find itself in a very defensive legal and policy posture much like the tobacco and opioid pain medication industries which share its business model.

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I. INTRODUCTION

The casino industry in the United States has grown rapidly over the past twenty-five years.¹ While one would need to plan a trip to Las Vegas or Atlantic City to access casinos in this country in the latter half of the twentieth century, as of 2019, there are nearly a thousand domestic casinos in operation including 465 commercial casinos (land, riverboat, and “racinos”) as well as 524 tribal casinos.² In addition to these official casinos, there over 16,000 electronic gaming device locations throughout the country.³ Of these establishments, the non-tribal commercial casinos took in record revenue of \$43.6 billion in 2019.⁴ Clearly, the casino industry is an extremely profitable enterprise.⁵ But like some other extremely profitable but now embattled enterprises, notably the tobacco and opioid pharmaceutical industries, the casino industry may find itself in a very defensive posture in the years to come. In a very real sense, all three are examples of addiction industries.

Besides their profitability, these three industries’ business models share other features which are described herein. Consumer addiction to their products is a key factor in maintaining profitability. This is not to imply that cigarette smoking, opioid analgesic use, and casino gambling are all equally addictive. These three industries, however, have all marketed their products exploitatively in ways that seem to leverage their addictive qualities. They all have, to a greater or lesser extent developed scientific allies to alleviate concerns and control the health narrative surrounding their products. Each industry has engaged in Corporate Social Responsibility (CSR) rhetoric and tactics as a means of reducing negative public relations stemming from the harms their products cause. Finally, each industry’s business model has resulted in enormous social costs that, to a greater or lesser extent, present legal or regulatory challenges.

1. INST. FOR AM. VALUES, WHY CASINOS MATTER: THIRTY-ONE EVIDENCE-BASED PROPOSITIONS FROM THE HEALTH AND SOCIAL SCIENCES 13 (2013).

2. AM. GAMING ASS’N, STATE OF THE STATES 2020: THE AGA SURVEY OF THE COMMERCIAL CASINO INDUSTRY 16 (2020).

3. *Id.*

4. *Id.* at 1.

5. See J.B. Maverick, *Why Does the House Always Win? A Look at Casino Profitability*, INVESTOPEDIA (Jan. 11, 2021), <https://www.investopedia.com/articles/personal-finance/110415/why-does-house-always-win-look-casino-profitability.asp#:~:text=On%20the%20games%20with%20the,1%25%20to%202%25%20profit.&text=The%20house%20edge%20on%20a,of%20slightly%20more%20than%20%2450%2C000> [https://perma.cc/VG65-K9H9].

II. FEATURES OF THE TOBACCO INDUSTRY BUSINESS MODEL

A. *Addiction*

The tobacco business has developed into a business and political powerhouse largely due to the fact that the nicotine in tobacco products, the dosage of which the industry controls, is an addictive substance.⁶⁷ The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (hereinafter “*DSM-5*”) places Tobacco Use Disorder/Nicotine Dependence in the category of Substance Use Disorder.⁸ The tobacco companies developed design techniques to control the amount of nicotine in its products delivered to consumers such that they could create and sustain addiction.⁹

Then-Commissioner of the U.S. Food and Drug Administration (FDA), David Kessler, testified to Congress that cigarettes were “nicotine delivery systems that deliver nicotine in precisely calculated quantities—quantities that are more than sufficient to create and to sustain addiction in the vast majority of individuals who smoke regularly.”¹⁰ The cigarette companies have been so successful at impeding their consumers’ ability to exercise free choice that a recent study shows that sixty-eight of them expressed a desire to quit smoking.¹¹

B. *Marketing*

Tobacco industry marketing can leverage the products’ addictive nature in several ways. One way is to provide potential customers with free samples of the product.¹² In instances described by witnesses in litigation, samples have even been provided to children.¹³ It is only logical that if one were to give away free samples of an addictive product, it may result in a long-term product-dependent customer. When a leading cigarette manufacturer rolled out a new product in the

6. See generally Patrizia Russo, Candid Nastrucci, Giulio Alzetta & Clara Szalia, *Tobacco Habit: Historical, Cultural, Neurobiological, and Genetic Features of People’s Relationship with an Addictive Drug*, 54 PERSPECTIVES IN BIO. & MED. 557 (2011).

7. See generally David A. Kessler, *The Control and Manipulation of Nicotine in Cigarettes*, 3 TOBACCO CONTROL 362 (1994).

8. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 305.1 (5th ed. 2013).

9. David A. Kessler, *Statement on Nicotine-Containing Cigarettes*, 3(2) TOBACCO CONTROL 148, 150 (1994); Geoffrey Ferris Wayne & Carrie M. Carpenter, *Tobacco Industry Manipulation of Nicotine Dosing*, 192 HANDBOOK EXPERIMENTAL PHARMACOLOGY 457, 458 (2009).

10. Kessler, *supra* note 9, at 150.

11. Stephen Babb, Ann Malarcher, Gillian Schauer, Kat Asman & Ahmed Jamal, *Quitting Smoking Among Adults—United States, 2000–2015*, 65 MORBIDITY & MORTALITY WKLY. REP. 1457 (2017).

12. See, e.g., Ronald M Davis & Leonard A. Jason, *The Distribution of Free Cigarette Samples to Minors*, 4 AM. J. PREVENTIVE. MED. 21, 21 (1988); ROBERT N. PROCTOR, THE GOLDEN HOLOCAUST: ORIGINS OF THE CIGARETTE CATASTROPHE AND THE CASE FOR ABOLITION 111–12 (2011); Donald W. Garner, *Tobacco Sampling, Public Policy, and the Law*, 11 J. HEALTH POL., POL’Y & L. 423 (1986).

13. *Evans v. Lorillard Tobacco Co.*, 990 N.E. 2d 997, 1024 (Mass. 2013) (stating that the jury found that “Lorillard was ‘negligent in failing to warn Marie Evans of the health hazards and/or addictive properties of Newport cigarettes at any time prior to 1970,’ and that Lorillard ‘negligently distribute[d] Newport cigarettes by giving samples of such cigarettes to minors, including Marie Evans’”).

Boston area in the early 1970s, it executed a free sampling program which included the giveaway of ninety-six million cigarettes in Boston alone.¹⁴ Another marketing strategy involved the use of cartoon characters to promote particular cigarette brands.¹⁵ The tobacco industry specifically targeted the youth market, viewing them as “replacement smokers,”¹⁶ and strategizing that “[r]ealistically, if our Company is to survive and prosper, over the long term, we must get our share of the youth market.”¹⁷ Again, the approach seemed to be to entice naïve new users of an addictive product to develop loyal lifelong customers, albeit with potentially shortened lives.¹⁸

C. Use of Science to Control the Health Narrative

Beginning in the early to mid-1950s, the general public began to become alarmed over the emerging strong evidence that cigarette smoking causes lung cancer. After *Reader's Digest* ran a feature story titled “Cancer by the Carton,” public concern about the health effects of smoking grew.¹⁹ The cigarette companies joined together and ran a full-page newspaper advertisement published in hundreds of papers promising to sponsor scientific research to determine if their products posed any risks to their customers.²⁰ The resulting organization, the Tobacco Industry Research Committee (later renamed the “Council for Tobacco Research”) was, according to federal Judge Gladys Kessler in her decision finding the cigarette companies liable for violations of the civil provisions of the Racketeer-Influenced and Corrupt Organizations Act, “a sophisticated public relations vehicle—based on the premise of conducting independent scientific research—to deny the harms of smoking and reassure the public.”²¹ One particularly dishonest industry example of this was the Project Whitecoat program Philip Morris organized, which paid scientists and doctors, usually individuals

14. BORAK REPORTING SERV., PHILIP MORRIS INC. AGAINST R.J. REYNOLDS TOBACCO CO. ET AL. CONTINUED DEPOSITION OF JAMES J MORGAN 185 (Nov. 25, 1974).

15. See Joseph R. DiFranza & and Bryan F. Aisquith, *Does the Joe Camel Campaign Preferentially Reach 18 to 24 Year Old Adults?*, 4 TOBACCO CONTROL 367, 367 (1995); Henry Waxman, *Tobacco Marketing: Profiteering from Children*, 266 J. AM. MED. ASS'N 3185 (1991).

16. YOUNGER ADULT SMOKER ANALYSIS, 1982, at 5052 (Jan. 1, 1983).

17. CLAUDE TEAGUE, RESEARCH PLANNING MEMORANDUM ON SOME THOUGHTS ABOUT NEW BRANDS OF CIGARETTES FOR THE YOUTH MARKET 7358 (Feb. 2, 1973).

18. See K. Michael Cummings, Christopher P. Morley, Janet K. Horan, Craig Steger, & Nadine Rae Leavell, *Marketing to America's Youth: Evidence from Corporate Documents*, 11 TOBACCO CONTROL 5, 5 (2002).

19. Roy Norr, *Cancer by the Carton*, 61 READER'S DIGEST 7 (1952).

20. K. Michael Cummings, Christopher P. Morley, & Andrew Hyland, *Failed Promises of the Cigarette Industry and Its Effect on Consumer Misperceptions about the Health Risks of Smoking*, 11 TOBACCO CONTROL 110, 110 (2002).

21. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 41 (D.D.C. 2006). Privately, in an internal tobacco industry document, an executive characterized the Council for Tobacco Research as a “public relations effort.” See ERNEST PEPPLES, CTR BUDGET 2 (Apr. 4, 1978). Eventually, the industry settled on a strategy of creating and sustaining a controversy about whether smoking caused harm, with one internal industry memo stating: “Doubt is our product since it is the best means of competing with the ‘body of fact’ that exists in the mind of the general public. It is also the means of establishing a controversy.” SMOKING AND HEALTH PROPOSAL 4 (1969).

with dubious credentials chosen solely for their willingness to voice the industry's position, to testify in litigation and make unsubstantiated and specious claims that its product did not cause injury and death.²²

D. Corporate Social Responsibility

When an industry sells an addictive and harmful product, markets it to leverage the power of its addictive qualities, and then needs to pay scientists to manufacture doubt about the impact of the product on health, it is important to perform gestures of charity to generate some good will from the public. This is where the tobacco companies' corporate social responsibility activities come into play. In 1999 for example, cigarette industry leader, Philip Morris, unveiled a CSR program to "improve the public's attitude toward the company"²³ This program involved publicizing the company's efforts to help the homeless, support the arts, and fund domestic violence prevention charities.²⁴ In addition, the company offered financial support to interests that might otherwise oppose them, such as women's organizations, African American coalitions, and fire fighters, among others.²⁵ Competing cigarette companies utilized their own CSR programs and the industry, as a whole, relies heavily on CSR internationally as well as domestically.²⁶

III. FEATURES OF THE OPIOID PHARMACEUTICAL INDUSTRY BUSINESS MODEL

A. Addiction

In recent years, the industry with the greatest potential liabilities often compared to the tobacco industry is the opioid pharmaceutical industry.²⁷ Here again is an industry selling highly addictive products that have been around for over a century.²⁸ *DSM-5* includes Opioid Use Disorder/Opioid Dependence, which, like

22. Lissy C. Friedman, Richard A. Daynard & Christopher Banthin, *How Tobacco-Friendly Science Escapes Scrutiny in the Courtroom*, 95 AM. J. PUB. HEALTH 16, 17 (2005).

23. See Lori Dorfman, Andrew Cheyne, Lissy C. Friedman, Asiya Wadud & Mark Gottlieb, *Soda and Tobacco Industry Corporate Social Responsibility Campaigns: How Do They Compare?*, 9 PLOS MED 2, 2 (2012); see also Lissy C. Friedman, *Philip Morris's Website and Television Commercials use New Language to Mislead the Public Into Believing It Has Changed Its Stance on Smoking and Disease*, 16 TOBACCO CONTROL 1, 1 (2007).

24. Dorfman et al., *supra* note 23, at 2.

25. *Id.*

26. Patricia A. McDaniel, Brie Cadman & Ruth E. Malone, *Shared Vision, Shared Vulnerability: A Content Analysis of Corporate Social Responsibility Information on Tobacco Industry Websites*, 89 PREVENTIVE MED. 337 (2016).

27. See, e.g., Rebecca L. Haffajee, *The Public Health Value of Opioid Litigation*, 48 J. L., MED. & ETHICS 279, 279 (2020); Ann W. St. Claire, Adam Kintopf, Doug Blanke & David Willoughby, *What States Preparing for Opioid Lawsuit Funds Can Learn from Tobacco Settlements*, MILBANK MEM'L FUND (Dec. 17, 2019), <https://www.milbank.org/2019/12/what-states-preparing-for-opioid-lawsuit-funds-can-learn-from-tobacco-settlements/> [https://perma.cc/8DL4-58UX].

28. Mark R. Jones et al., *A Brief History of the Opioid Epidemic and Strategies for Pain Medicine*, 7 PAIN & THERAPY 13, 15–16 (2018).

Tobacco Use Disorder, is in the substance abuse category.²⁹ Morphine and combination products such as hydrocodone (Vicodin), methadone, hydromorphone (Dilaudid), meperidine (Demerol), oxycodone (OxyContin), and fentanyl are all Schedule II drugs.³⁰ These are medications with a high potential for severe psychological and physical dependence.³¹ As such, the pharmaceutical companies developing, manufacturing, and marketing these medications should not market them in ways that might increase the inherent risks of addiction posed by these products. Unfortunately, several such companies, most infamously, Purdue Pharma, marketed these products in ways that increased the number of patients who became addicted to their medications.³²

B. Marketing

Unlike the tobacco industry, which operated largely free of product regulation from its inception until 2009 with the Family Smoking Prevention and Tobacco Control Act,³³ the FDA has long regulated opioid pain medications.³⁴ Yet this agency oversight has proven inadequate when medications such as these with very high abuse liability are aggressively marketed.

Such aggressive marketing was evident early on with the sustained release opioid analgesic oxycodone sold under the brand name OxyContin by Purdue Pharma since 1996. This company aggressively marketed its newly approved product based on the dubious claim that it posed a lesser risk of addiction than other opioid drugs.³⁵ In 2007, the company paid \$630 million to the U.S. Department of Justice to settle claims of false and deceptive marketing.³⁶

One key aggressive marketing innovation used by Purdue Pharma was to analyze physician prescriber data to target individual physicians who were likely to increase writing OxyContin prescriptions for treating their target market of

29. *DSM-5 Now Categorizes Substance Use Disorders in a Single Continuum*, ROGERS BEHAV. HEALTH BLOG (Feb. 24, 2014, 11:36 AM), <https://rogersbh.org/about-us/Newsroom/Blog/dsm-5-now-categorizes-substance-use-disorders-single-continuum> [https://perma.cc/ULB4-6H9T].

30. U.S. DRUG ENF'T ADMIN., U.S. DEPT. OF JUST., LISTS OF: SCHEDULING ACTIONS, CONTROLLED SUBSTANCES, REGULATED CHEMICALS (2021), <https://www.deadiversion.usdoj.gov/schedules/orangebook/orangebook.pdf> [https://perma.cc/3S6P-HEBG].

31. *Drug Scheduling*, U.S. DRUG ENF'T ADMIN., <https://www.dea.gov/drug-scheduling> (last visited June 3, 2021) [https://perma.cc/Z7KL-QDH5].

32. See First Amended Complaint & Jury Demand at 2, *Commonwealth of Massachusetts v. Purdue Pharma L.P.*, No. 1884-cv-01808 (BLS2), 2019 WL 1217583 (Mass. Super. Ct. Jan. 28, 2019) [hereinafter *Commonwealth of Massachusetts Complaint*].

33. Family Smoking Prevention and Tobacco Control Act of 2009, Pub L. No. 111-31, 123 Stat. 1776.

34. See NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, PAIN MANAGEMENT AND THE OPIOID EPIDEMIC: BALANCING SOCIETAL AND INDIVIDUAL BENEFITS AND RISKS OF PRESCRIPTION OPIOID USE 360–61 (2017).

35. BARRY MEIER, PAIN KILLER: A “WONDER” DRUG’S TRAIL OF ADDICTION AND DEATH 87 (2003).

36. Richard D. deShazo, McKenzie Johnson, Ike Eriator, & Kathryn Rodenmeyer, *Backstories on the US Opioid Epidemic: Good Intentions Gone Bad, an Industry Gone Rogue, and Watch Dogs Gone to Sleep*, 131 AM. J. MED. 595, 598 (2018).

non-cancer chronic pain patients.³⁷ Purdue further refined its targeting by selecting prescribers in states without early prescription drug monitoring tools known as “triplicate programs” so as to avoid detection as over-prescribers.³⁸

C. *Use of Science to Control the Health Narrative*

In the case of opioid analgesics, the sorts of direct advertising to consumer campaigns used by the tobacco industry are not possible. Marketing consistently targeted prescribers as opposed to end users. In the first five years that the OxyContin drug was on the market, Purdue Pharma hosted all-expenses-paid symposia for roughly 5,000 doctors, nurses, and pharmacists at forty events held at luxury resorts.³⁹ During those same years, the company funded in excess of 20,000 pain-related “educational” events or programs through direct or indirect financial assistance.⁴⁰

This approach to marketing had the effect of manipulating the scientific and medical narrative associated with these products.⁴¹ Another technique used by Purdue Pharma and its owners, the Sackler family, involved funding prestigious institutions such as the Purdue Pain Program at Massachusetts General Hospital⁴² and underwriting the Master of Science in Pain Research, Education, and Policy at Tufts University.⁴³

Purdue was not the only company doing this type of marketing and messaging. Other corporations named as defendants in the thousands of lawsuits pending, including Johnson & Johnson (and its subsidiaries), Janssen Pharmaceuticals Inc., Insys Therapeutics, Teva Pharmaceuticals, Endo Health Solutions Inc., and Allergan PLC, among many others, also made investments in science and education to control the health narrative.⁴⁴

37. See Sheryl Gay Stolberg & Jeff Gerth, *High-Tech Stealth Being Used to Sway Doctor Prescriptions*, N.Y. TIMES (Nov. 16, 2000), <https://www.nytimes.com/2000/11/16/us/high-tech-stealth-being-used-to-sway-doctor-prescriptions.html> [<https://perma.cc/A4EV-YZMD>].

38. Abby E. Alpert, William N. Evans, Ethan M.J. Lieber & David Powell, *Origins of the Opioid Crisis and its Enduring Impacts* 8 (Nat'l Bureau Econ. Rsch., Working Paper No. 26500, 2019), <https://ssrn.com/abstract=3496477> [<https://perma.cc/3WQN-MUFP>].

39. Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH 221, 221 (2009).

40. Andrew Kolodny et al., *The Prescription Opioid and Heroin Crisis: A Public Health Approach to an Epidemic of Addiction*, 36 ANN. REV. PUB. HEALTH 559, 562 (2015).

41. See *id.*

42. See Commonwealth of Massachusetts Complaint, *supra* note 32, at ¶ 273–74.

43. *Id.* at ¶ 279.

44. See Rebecca L. Haffajee & Michelle M. Mello, *Drug Companies' Liability for the Opioid Epidemic*, 377 NEW ENG. J. MED. 2301, 2302–2303 (2017).

D. Corporate Social Responsibility

Purdue Pharma developed a distinct Corporate Social Responsibility Program devoted to addressing opioid prescription abuse.⁴⁵ Insys, on the other hand, directs its CSR efforts to increase access to education.⁴⁶ Johnson & Johnson also maintains a robust and diverse CSR program.⁴⁷

IV. FEATURES OF THE CASINO INDUSTRY BUSINESS MODEL

A. Addiction

Like the tobacco and opioid pharmaceutical industries, the casino industry sells an addictive product. In fact, the *DSM-5* now classifies Gambling Disorder in the category of “Substance-Related and Addictive Disorders” because, “gambling behaviors activate reward systems similar to those activated by drugs of abuse.”⁴⁸ This represents a change in classification from prior DSMs which described recurrent maladaptive gambling behavior as “Pathological Gambling.”⁴⁹ This categorical shift from treating gambling addiction as a maladaptive behavior to a “Substance-Related and Addictive Disorder” more clearly aligns the casino industry’s primary product with those of the tobacco and opioid pharmaceutical industries.

Of the various gambling products offered by the casino industry, electronic gaming machines (EGMs), which are also known by the name of their mechanical predecessors, “slot machines,” generate sixty-two to eighty percent of casino profits.⁵⁰ They have been referred to as the “crack cocaine of gambling.”⁵¹ EGMs are designed with several structural characteristics that, like cocaine, can affect the release of dopamine to stimulate reward centers of the brain.⁵² These include

45. See *Addressing the Crisis: Select Initiatives*, PURDUE, <https://www.purduepharma.com/addressing-the-crisis/select-initiatives/> (last visited June 3, 2021) [https://perma.cc/S9L3-RKBL].

46. See *Corporate Social Responsibility*, INSYS, <http://insys.com/csr.html> (last visited June 3, 2021) [https://perma.cc/497Z-K7RQ].

47. See *Caring and Giving*, JOHNSON & JOHNSON, <https://www.jnj.com/caring-and-giving> (last visited June 3, 2021) [https://perma.cc/X7XL-5AGD].

48. See, e.g., Nina Romanczuk-Seiferth, Wim Van Den Brink, & Anna E. Goudriaan, *From Symptoms to Neurobiology: Pathological Gambling in the Light of the New Classification in DSM-5*, 70 *NEUROPSYCHOBIOLOGY* 95, 95 (2014); AM. PSYCHIATRIC ASS’N, *supra* note 8, at 312.31; Marc N. Potenza, *The Neurobiology of Pathological Gambling and Drug Addiction: An Overview and New Findings*, 363 *PHIL. TRANSACTIONS ROYAL SOC’Y B* 3181, 3181 (2008).

49. Potenza, *supra* note 48, at 3181.

50. David G. Schwartz, *How Casinos Use Math to Make Money When You Play the Slots*, *FORBES* (June 4, 2018, 9:33 AM), <https://www.forbes.com/sites/davidschwartz/2018/06/04/how-casinos-use-math-to-make-money-when-you-play-the-slots/?sh=7b6f70dd94d0> [https://perma.cc/N4KF-LK6R].

51. Nicki A. Dowling, David Smith, & Trang Thomas, *Electronic Gaming Machines: Are They the ‘Crack-Cocaine’ of Gambling?*, 100 *ADDICTION* 33, 33 (2005); Patrick D. Worhunsky, Robert T. Malison, Robert D. Rogers, & Marc N. Potenza, *Altered Neural Correlates of Reward and Loss Processing During Simulated Slot-Machine fMRI in Pathological Gambling and Cocaine Dependence*, 145 *DRUG & ALCOHOL DEPENDENCE* 77, 78 (2014).

52. See Catharine A Winstanley, Paul J. Cocker, & Robert D. Rogers, *Dopamine Modulates Reward Expectancy During Performance of a Slot Machine Task in Rats: Evidence for a ‘Near-Miss’ Effect*, 36 *NEUROPSYCHOPHARMACOLOGY* 913, 913 (2011).

the ubiquitous EGM features of near-misses (where machine symbols almost align in a way that would produce a substantial reward)⁵³ and losses disguised as wins (where a machine's sounds and lights signal as if there is a net win but, in fact, there is a net loss).⁵⁴ The design feature of EGMs that may amplify the risk more than any other is event frequency.⁵⁵ Experienced EGM users can play upwards of 500–1,000 games per hour as a result of EGM design features that encourage multiple simultaneous game play.⁵⁶ Unlike card games, dice games, roulette, or even sports betting, EGMs are designed by engineers to addict consumers in order to maximize revenue.⁵⁷

B. Marketing

Casino advertising varies greatly by market. But the casino industry's overall marketing approach, like that of other industries, focuses largely on attracting and retaining customers.⁵⁸ Common features of casino marketing include loyalty programs, free bus transportation, free foods and alcoholic beverages, and discounted or even complimentary lodging.⁵⁹ Among these, loyalty programs featuring smart cards are considered a most critical component of a successful casino operation.⁶⁰

There are more than 100 million members of casino loyalty programs in the U.S.⁶¹ More than 70% of players are members of such programs.⁶² Memberships in such programs may be needed to provide customers with access to the other complimentary marketing programs that are offered. Typically, club cards can be loaded with funds and used as EGM currency. These clubs provide casinos with the ability to know who every player is demographically and track how much money is spent, on which EGMs, and how frequently.⁶³ This wealth of data allows casinos to develop real-time personalized marketing algorithms including "behavior modification reports" to determine the most effective promo-

53. R.L. Reid, *The Psychology of the Near Miss*, 2 J. GAMBLING BEHAV. 32, 32–39 (1986).

54. Mike J. Dixon, Kevin A. Harrigan, Rajwant Sandhu, Karen Collins & Jonathan A. Fugelsang, *Losses Disguised as Wins in Modern Multi-line Video Slot Machines*, 105 ADDICTION 1819, 1819 (2010).

55. See Jakob Linnet, Kristine Rømer Thomsen, Arne Møller & Mette Buhl Callesen, *Slot Machine Response Frequency Predicts Pathological Gambling*, 5 INT'L J. PSYCH. STUD. 121, 121 (2013).

56. Kevin A. Harrigan & Mike Dixon, *PAR Sheets, Probabilities, and Slot Machine Play: Implications for Problem and Non-problem Gambling*, 23 J. GAMBLING ISSUES 81, 83 (2009).

57. See generally NATASHA DOW SCHÜLL, ADDICTION BY DESIGN: MACHINE GAMBLING IN LAS VEGAS 14–24 (2012).

58. Catherine Prentice & IpKin Anthony Wong, *Casino Marketing, Problem Gamblers or Loyal Customers?*, 68 J. BUS. RSCH. 2084, 2084 (2015).

59. *Id.* at 2089.

60. Seyhmus Baloglu, Yun Ying Zhong & Sarah Tanford, *Casino Loyalty: The Influence of Loyalty Program, Switching Costs, and Trust*, 41 J. HOSP. & TOURISM RSCH. 846, 864 (2017).

61. KELLY HLAVINKA & JIM SULLIVAN, COLLOQUYTALK, THE BILLION MEMBER MARCH: THE 2011 COLLOQUY LOYALTY CENSUS 8 (2011).

62. SCHÜLL, *supra* note 57, at 153–54.

63. Flavia Hendler & Kathryn A. Latour, *A Qualitative Analysis of Slot Clubs as Drivers of Casino Loyalty*, 49 CORNELL HOSP. Q. 105, 107 (2008).

tional strategies to offer individual customers in order to maximize player expenditures and casino profit.⁶⁴ Among the three industries discussed herein, this mode of marketing may be the most intrusive and exploitative of all.

C. *Use of Science to Control the Health Narrative*

The casino industry has utilized a sophisticated approach to funding most of the research on the health narrative related to its own products without making it obvious to the public. One way it has done this has been to fund agencies that, in turn, fund other funders that sponsor scientific research centers. For example, the gambling industry funds the National Center for Responsible Gaming (NCRG) which funds the Institute for Gambling Disorders which funds the Centers of Excellence to study this issue at academic institutions such as Yale University and the University of Minnesota that are meant to appear to have no bias while at the same time lending the prestige of their institutions to the gambling industry, a concept called “innocence by association.”⁶⁵

Recently, a study found that there are no significant differences in research design and outcomes between research that is funded by the gambling industry and research that is not.⁶⁶ It should be noted, however, that this study was conducted by researchers who have received millions of funding dollars from the gambling industry through the NCRG and other downstream sources.⁶⁷ The only research on framing gambling in a public health context funded by the NCRG concluded that a harm reduction approach should use strategies to “foster healthy gambling.”⁶⁸ That study failed to disclose that it was funded by the gambling industry.⁶⁹

D. *Corporate Social Responsibility*

Like the tobacco industry and other industries that can have negative associations in the mind of the public, the casino industry uses CSR programs offensively and defensively.⁷⁰ Offensively, CSR can boost employee morale, while defensively it can help reduce negative perceptions about the industry.⁷¹ The

64. Schüll, *supra* note 57, at 153–154.

65. See Peter Miller, Adrian Carter & Florentine de Groot, *Chapter 15 - Investment and Vested Interests in Neuroscience Research of Addiction: Ethical Research Requires More than Informed Consent*, in ADDICTION NEUROETHICS, 278, 287–88 (2012). See also Dorfman et al., *supra* note 23, at 2.

66. Paige M. Shaffer et al., *Gambling Research and Funding Biases*, 35 J. GAMBLING STUD. 875, 876 (2019).

67. Miller et al., *supra* note 65, at 288.

68. *Id.* at 290.

69. Howard J. Shaffer & David A Korn, *Gambling and Related Mental Disorders: A Public Health Analysis* 23 ANN. REV. PUB. HEALTH. 171, 204 (2002).

70. Lissy C. Friedman, *Tobacco Industry Use of Corporate Social Responsibility Tactics as a Sword and a Shield on Secondhand Smoke Issues*, 37 J. L., MED. & ETHICS 819, 819 (2009).

71. San Yeal Lee, Ji Young Lee & Yong-Suk Cho, *Framing Corporate Social Responsibility for a Controversial Product*, 35 J. TRAVEL & TOURISM MKTG. 988, 989 (2018).

American Gaming Association's 2019 CSR report boasts industry charitable giving of \$367 million in 2017.⁷² In 2013, American Gaming Association President Frank Fahrenkopf told a *Casino Journal* interviewer that he was close friends with a Tobacco Institute executive and was inspired by that trade organization's experience in facing down criticism of its products.⁷³

One example of CSR in the casino industry is the Caesars Foundation, established by casino giant Caesars Entertainment, which has donated about \$70 million to community causes.⁷⁴ In addition, the company touts its environmental commitment, and in particular, a major CSR initiative focused on "responsible gaming."⁷⁵ This includes a program called "We Care. We Card," that bears great similarity in both name and substance to the tobacco industry's "We Card" Program.⁷⁶ Both programs promote the ways that the industry prevents underage use of its products.

V. ANALYSIS OF SOCIETAL RESPONSES TO TOBACCO AND OPIOID PAIN MEDICATION INDUSTRIES AND THEIR IMPLICATIONS FOR THE CASINO INDUSTRY

A. *The Tobacco Industry's Social Costs and Legal/Regulatory Consequences*

This industry's business model is astoundingly lethal and breathtakingly costly. In addition to the more than 500,000 premature annual deaths in the U.S. attributable to the use of tobacco products, about thirty times as many Americans are living with a tobacco-caused disease.⁷⁷ This ends up costing almost \$170 billion annually in direct medical care, more than half of which is paid for with taxpayer dollars.⁷⁸ The injury to the economy is actually greater than that. More than \$150 billion of lost productivity caused by the physical injuries associated with tobacco use adds to the toll that this industry's products take on society.⁷⁹

After forty years of winning every personal injury case filed against it, the tobacco industry found itself under siege in the courts. Beginning in 1994, a flood of leaked internal documents, whistleblowers, and Congressional hearings began

72. U.S. CHAMBER OF COM. FOUND. FOR THE AM. GAMING ASS'N, CORPORATE SOCIAL RESPONSIBILITY IN THE GAMING INDUSTRY 10 (2019).

73. See Charles Anderer, *Lifetime Achiever*, CASINO J. (May 5, 2013), <http://www.casinjournal.com/articles/print/87618-lifetime-achiever> [<https://perma.cc/497X-L5BF>].

74. See *Corporate Social Responsibility*, CAESARS ENT., <https://www.caesars.com/corporate/corporate-social-responsibility> (last visited June 3, 2021) [<https://perma.cc/55C8-49Y3>].

75. See *Responsible Gaming*, CAESARS ENT., <https://www.caesars.com/corporate/corporate-social-responsibility/play/responsible-gaming> (last visited June 6, 2021) [<https://perma.cc/F9FB-Q4QE>].

76. *About Us*, WE CARD, <https://www.wecard.org/about-us> (last visited June 3, 2021) [<https://perma.cc/7P2V-6AW7>].

77. U.S. DEP'T OF HEALTH & HUM. SERVS., THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL 867–70 (2014).

78. Xin Xu, Ellen E. Bishop, Sara M. Kennedy, Sean A. Simpson & Terry F. Pechacek, *Annual Healthcare Spending Attributable to Cigarette Smoking: An Update*, 48 AM. J. PREVENTIVE MED. 326, 326 (2014).

79. U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 77, at 12.

to denormalize the products and the industry that produced them.⁸⁰ This has contributed to increased state⁸¹ and federal⁸² regulation as well as more than \$138 billion paid in settlement payments to the states⁸³ and over a billion dollars paid to plaintiffs in individual cases.⁸⁴ While the tobacco industry is still quite profitable, regulatory actions and ongoing litigation pose substantial risks. The industry itself is largely reviled.⁸⁵

B. The Opioid Pharmaceutical Industry's Social Costs and Legal/Regulatory Consequences

The harm caused by the opioid industry is difficult to measure. It is argued that while all of the morbidity and mortality associated with Opioid Use Disorder does not stem from use of the opioid analgesics sold by the opioid pharmaceutical industry, the deceptive marketing of its highly addictive products is a substantial cause of the larger opioid crisis.⁸⁶ In 2017, there were more than 70,000 drug overdose deaths in the U.S.⁸⁷

The annual economic toll of the opioid crisis in the U.S. ranges from \$100 billion to \$500 billion by some estimates,⁸⁸ and the industry that makes these products is now arguably under greater siege and more reviled than the tobacco industry. With a guilty plea to the U.S. Justice Department in October of 2020

80. See generally DAN ZEGART, CIVIL WARRIORS: THE LEGAL SIEGE ON THE TOBACCO INDUSTRY 4 (2000); MICHAEL OREY, ASSUMING THE RISK: THE MAVERICKS, THE LAWYERS, AND THE WHISTLE-BLOWERS WHO BEAT BIG TOBACCO (1999); PETER PRINGLE, CORNERED: BIG TOBACCO AT THE BAR OF JUSTICE (1998); Ruth E. Malone, Quinn Grundy & Lisa A. Bero, *Tobacco Industry Denormalisation as a Tobacco Control Intervention: A Review*, 21 TOBACCO CONTROL 162 (2012).

81. STATE System Preemption Fact Sheet, CTNS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/statesystem/factsheets/preemption/Preemption.html> (Dec. 10, 2020) [<https://perma.cc/BJ8U-829W>].

82. Ned Sharpless & Mitch Zeller, *Achievements in Tobacco Regulation Over the Past Decade and Beyond*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/news-events/fda-voices/achievements-tobacco-regulation-over-past-decade-and-beyond> (April 30, 2021) [<https://perma.cc/4CG6-E3TZ>].

83. NAT'L ASS'N OF ATT'YS GEN., PAYMENTS TO DATE (AS OF APRIL 21, 2020) (2020).

84. Spreadsheet of judgments paid exceeding \$1 billion on file with authors (2020).

85. John A. Byrne, *Philip Morris: Inside America's Most Reviled Company Part 1*, BLOOMBERG (Nov. 29, 1999, 11:00PM), <https://www.bloomberg.com/news/articles/1999-11-28/philip-morris-inside-americas-most-reviled-company-part-1> [<https://perma.cc/C9BM-62YP>].

86. COMM. ON PAIN MGMT. & REGUL. STRATEGIES TO ADDRESS PRESCRIPTION OPIOID ABUSE, THE NAT'L ACADS PRESS, PAIN MANAGEMENT AND THE OPIOID EPIDEMIC: BALANCING SOCIETAL AND INDIVIDUAL BENEFITS AND RISKS OF PRESCRIPTION OPIOID USE 211 (Jonathan K. Phillips, Morgan A. Ford & Richard J. Bonnie eds., 2017).

87. Lawrence Scholl, Puja Seth, Mbabazi Kariisa, Nana Wilson & Grant Baldwin, *Drug and Opioid-Involved Overdose Deaths—United States, 2013–2017*, 67 CDC MORBIDITY AND MORTALITY WKLY. REP. 1419, 1426 (2019).

88. *Economic Toll of Opioid Crisis in U.S. Exceeded \$1 Trillion Since 2001*, ALTARUM (Feb. 13, 2018), <https://altarum.org/news/economic-toll-opioid-crisis-us-exceeded-1-trillion-2001> [<https://perma.cc/GX8S-M2GC>] (noting the estimated annual cost of the opioid crisis in 2017 was \$115 billion); COUNCIL OF ECON. ADVISERS, THE UNDERESTIMATED COST OF THE OPIOID CRISIS I (2017) (estimating “the economic cost of the opioid crisis was \$504.0 billion,” or 2.8% of GDP in 2015).

and an \$8 billion settlement,⁸⁹ Purdue Pharma is in the midst of bankruptcy proceedings.⁹⁰ There are literally thousands of cases pending against companies in this industry in both a federal multidistrict litigation,⁹¹ as well as hundreds in state courts.⁹² Some, like those brought against the tobacco companies in the 1990s have been filed by state attorneys general.⁹³ Public opinion of these companies has, to put it mildly, soured as a result of the widespread harm caused by their business model and products.⁹⁴

C. *The Casino Industry's Social Costs and Legal/Regulatory Consequences*

In a fairly direct way, casino gambling is a means of wealth transfer from customers—many of whom suffer from a gambling disorder—to the casino industry. Unlike the tobacco or opioid industries, it does not provide a conventional consumer product to its addicted customers. Rather, it provides access to a sort of machine-mediated experience that feeds the addiction.

The economic harm caused by casinos often extends beyond the consumer of casino industry products. Research from Australia has found that for every problem gambler, five to ten people suffer adversely as a result.⁹⁵ This includes family members whose funds are gambled away, employers who may be embezzled from, and various victims of theft.⁹⁶ But social costs of gambling are broader than that. Gambling disorders can lead to bankruptcy, loss of productivity (from unemployment), reliance on social services, as well as significant amplification of comorbidities such as substance abuse and mental illness, often leading to divorce and even suicide.⁹⁷ A Canadian study found that the odds for individuals with a gambling disorder to attempt suicide is more than three times that of individuals without such a disorder.⁹⁸ Those are not good odds. It is a complex task to estimate with any precision all of the social costs related to casino gambling

89. Jan Hoffman & Katie Benner, *Purdue Pharma Pleads Guilty to Criminal Charges for Opioid Sales*, N.Y. TIMES (Dec. 17, 2020), <https://www.nytimes.com/2020/10/21/health/purdue-opioids-criminal-charges.html> [<https://perma.cc/UT8Q-UQ8P>].

90. *In re Purdue Pharms., L.P.*, 619 B.R. 38 (S.D.N.Y. 2020).

91. *See, e.g., In re Nat'l Prescription Opiate Litig.*, 976 F.3d 644 (6th Cir. 2020), in which several cities filed a class action suit against opioid manufacturers, distributors, and pharmacies.

92. *See* Haffajee & Mello, *supra* note 44, at 2302 (listing examples of high-profile state and local suits against opioid companies).

93. *See The Tobacco Settlement*, STATEAG.ORG, <https://www.stateag.org/initiatives/the-tobacco-settlement> (last visited June 3, 2021) [<https://perma.cc/97SR-6VAK>].

94. *See, e.g.,* Haffajee & Mello, *supra* note 44, at 2305.

95. THE PRODUCTIVITY COMM'N, AUSTRALIA'S GAMBLING INDUSTRIES REPORT, 23–24 (1999), <http://stoppredatorygambling.org/wp-content/uploads/2012/12/Australias-Gambling-Industries-1999-Report-Vol.-1-.pdf> [<https://perma.cc/4AMV-ZHHP>].

96. *Id.* at 25 fig.8.

97. JUN KOO, ABIGAIL HORN, MARK S. ROSENTRAU & LOREEN RUGLE, THE SOCIAL COSTS OF CASINO GAMBLING FOR OHIO: A REVIEW OF WHAT IS KNOWN AND ESTIMATES OF FUTURE EXPENSES 19 (2006), <http://stoppredatorygambling.org/site/wp-content/uploads/2013/04/CSU-Ohio-impact-study-2008.pdf> [<https://perma.cc/W73C-XRWW>].

98. Stephen C. Newman & Angus H. Thompson, *The Association Between Pathological Gambling and Attempted Suicide: Findings from a National Survey in Canada*, 52 CAN. J. PSYCHIATRY 605, 605 (2007).

because one must account for criminal justice system costs, social service costs, and costs due to lost productivity.⁹⁹

One national estimate from the 1990s found the cost to the criminal justice system alone from gambling-related crime was comparable to the costs caused by drug addiction or alcoholism.¹⁰⁰ Another national estimate found that approximately 8% of crime in U.S. counties with casinos is casino-related crime.¹⁰¹ This strongly suggests that crime related to gambling has a negative socioeconomic impact on communities where gambling takes place.¹⁰²

Lost productivity is also a significant social cost of Gambling Disorder. One estimate found that the lost productivity per individual with a gambling disorder (then referred to as a “pathological gambler”) ranged from \$25,000 to more than \$50,000 per year (adjusted for 2020 USD).¹⁰³ This comes as no surprise when one of the symptoms of a gambling disorder is having frequent thoughts about gambling and devising ways of obtaining funds with which to play.¹⁰⁴

Estimates of social costs of gambling generally or casino gambling in particular are not as well-developed as those around tobacco-caused or opioid-caused morbidity and mortality. Such burden of harm analyses in this area have been around for less than a decade.¹⁰⁵ To date, only a smattering of lawsuits have been filed against casinos for individual financial losses or wrongful death.¹⁰⁶ None have resulted in judgments paid to plaintiffs to date.

Regulatory scrutiny of the casino industry has, if anything, receded in recent years as more states and tribes operate casinos.¹⁰⁷ While in the late twentieth century casinos operated in only two states, today they operate in more than forty states.¹⁰⁸ State policymakers sought to keep their citizens’ gambling and resulting wealth transfer from crossing state lines and, therefore, licensed casinos within their borders. A primary goal of state regulation of this industry has been

99. See generally E.L. Grinols & J.D. Omorov, *Development or Dreamfield Delusions?: Assessing Casino Gambling’s Costs and Benefits*, 16 J.L. & COM. 49 (1996).

100. *Id.*

101. Earl L. Grinols & David B. Mustard, *Casinos, Crime, and Community Costs*, 88 REV. ECON. & STAT. 28, 28 (2006).

102. See generally John Warren Kindt, *Increased Crime and Legalizing Gambling Operations: The Impact on the Socio-Economics of Business and Government*, 30 CRIM. L. BULL. 538 (1994).

103. Grinols & Omorov, *supra* note 99, at 56.

104. AM. PSYCHIATRIC ASS’N, *supra* note 8, at 312.31.

105. See, e.g., MAX ABBOTT, *THE EPIDEMIOLOGY AND IMPACT OF GAMBLING DISORDER AND OTHER GAMBLING-RELATED HARM 2* (2017), https://www.who.int/docs/default-source/substance-use/the-epidemiology-and-impact-of-gambling-disorder-and-other-gambling-relate-harm.pdf?sfvrsn=5901c849_2&download=true [<https://perma.cc/VZ5T-D2QF>].

106. See, e.g., Bloomberg Bus. News, *Casinos May Be Flush with Suits*, CHI. TRIB. (Nov. 17, 1996), <https://www.chicagotribune.com/news/ct-xpm-1996-11-17-9611170199-story.html> [<https://perma.cc/7BWK-FPWV>]; *Williams v. Aztar Ind. Gaming Corp.*, 351 F.3d 294, 296 (7th Cir. 2003) (discussing a naïve player who received a casino coupon proceeded to quickly lose his family’s life savings); *Stevens v. MTR Gaming Group, Inc.*, 788 S.E.2d 59, 61 (W. Va. 2016) (analyzing a wrongful death action against a casino and EGM manufacturer where the decedent allegedly became addicted to EGM casino gambling, embezzled from his employer, and committed suicide).

107. AM. GAMING ASS’N, *supra* note 2, at 15.

108. *Id.*

to ensure that the host state gets a share of casino revenue.¹⁰⁹ This has resulted in a casino arms race among states.¹¹⁰ As such, compared to the tobacco and opioid pharmaceutical industries, the casino industry's business model draws far less legal and regulatory scrutiny focused on the harms it causes.

D. *Litigation and Fight for Transparency*

In the cases of the tobacco and opioid industries, a combination of overwhelming social costs and personal injuries led to litigation by state attorneys general. In the case of tobacco, discovery in those cases produced tens of millions of pages of internal documents that shed an extraordinarily bright light on the corporate behavior that led to the social costs and personal injuries underlying those legal actions.¹¹¹ These documents also provided the data for a segment of scholarly literature that further described tobacco industry conduct through a bibliography of over a thousand distinct citations.¹¹² These materials, along with the cooperation of whistleblowers, have played a key role in increasing the volume and intensity of litigation against the industry.¹¹³ Moreover, the litigation and increased tobacco industry transparency that it brought about has led to enhanced regulatory controls over the industry.¹¹⁴ Tobacco litigation led to the discovery of internal documents that provided transparency into the industry leading to regulatory scrutiny.

In the case of the opioid pharmaceutical industry, it can be argued that the same basic pattern is at work. Largely unsuccessful individual litigation against the industry, particularly OxyContin's maker Purdue Pharma, developed into litigation by state and local governments.¹¹⁵ These early state actions included discovery and although these plaintiffs settled,¹¹⁶ some of the damaging discovery

109. LUCY DADAYAN, STATE REVENUES FROM GAMBLING 1 (2016), https://rockinst.org/wp-content/uploads/2017/11/2016-04-12-Blinken_Report_Three-min.pdf [<https://perma.cc/L2XZ-5WHP>].

110. Cf. Clyde Barrow, *Gambling Arms Race is Really Just the Beginning*, PATRIOT LEDGER (July 17, 2013, 5:02 PM), <https://www.patriotledger.com/article/20130717/News/307179404/> [<https://perma.cc/FA4N-W5R6>].

111. See generally Michael V. Ciresi, Roberta B. Walburn & Tara D. Sutton, *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477 (1999); Ruth E. Malone & Edith D. Balbach, *Tobacco Industry Documents: Treasure Trove or Quagmire?* 9 TOBACCO CONTROL 334 (2000).

112. *Truth Tobacco Industry Documents: Bibliography—Publications Based on Truth Tobacco Industry Documents*, U.C.S.F. <https://www.industrydocuments.ucsf.edu/tobacco/biblio/> (last visited June 7, 2021) [<https://perma.cc/K3N9-R9KJ>].

113. See Clifford E. Douglas, Ronald M. Davis, & John K. Beasley, *Epidemiology of the Third Wave of Tobacco Litigation in the United States*, 15 TOBACCO CONTROL iv9, iv9 (2006).

114. See Peter D. Jacobson & Kenneth E. Warner, *Litigation and Public Health Policy Making: The Case of Tobacco Control*, 24 J. HEALTH POL. POL'Y L. 769 (1999); Jon S. Vernick, Lainie Rutkow, & Stephen P. Teret, *Public Health Benefits of Recent Litigation Against the Tobacco Industry*, 298 J. AM. MED. ASS'N 86 (2007).

115. Richard C. Ausness, *The Role of Litigation in the Fight Against Prescription Drug Abuse*, 116 W. VA. L. REV. 1117, 1120 (2014).

116. See, e.g., Landon Thomas Jr., *Maker of OxyContin Reaches Settlement With West Virginia*, N.Y. TIMES (Nov. 6, 2004), <https://www.nytimes.com/2004/11/06/business/maker-of-oxycontin-reaches-settlement-with-west-virginia.html> [<https://perma.cc/Y3BQ-QBJQ>]; Associated Press, *Kentucky Settles Lawsuit with OxyContin Maker for \$24 Million*, CBSNEWS (Dec. 23, 2015, 5:11 PM), <https://www.cbsnews.com/news/kentucky-settles-lawsuit-with-oxycontin-maker-for-24-million/> [<https://perma.cc/LUV4-ZEKN>].

materials came to light.¹¹⁷ Shortly thereafter, hundreds of cases were filed against Purdue Pharma and other corporations in the opioid pharmaceutical industry.¹¹⁸

Thus far, it would seem that this pattern is not being repeated with the U.S. casino industry. While there have been a number of unsuccessful lawsuits filed regarding the harms to individuals attributed to the casino industry's business practices,¹¹⁹ none has yet produced a core of discovery documents of great public interest. In the examples of the tobacco industry, it took three to four decades of litigation to develop to the point where significant internal documents were produced in discovery.¹²⁰ It is widely believed that attorneys for the tobacco industry abused attorney-client privilege to avoid releasing many of its damning internal records.¹²¹ This may or may not be happening with other defendants.

By contrast, many internal documents and much data have been produced as a result of litigation against opioid pharmaceutical companies in far less time than it took to obtain similar materials from the tobacco industry. Purdue Pharma's OxyContin product has been on the market for only twenty-five years.¹²² Yet, documents and data unsealed, often as the result of legal actions taken by journalists, continue to shed an increasingly harsh light on this industry's practices.¹²³ Therefore, were litigation against the casino industry to ramp up, increased transparency might not take decades to achieve.

E. Corrective Policymaking

The transparency forced upon the tobacco and opioid industries resulting from litigation and public inquiries brought their practices to the attention of policymakers. One way this happens is that, as the veil is lifted on egregious corporate conduct, society's attitude toward the actors changes and these industries and their products become denormalized.¹²⁴ That is, these industries and their

117. See e.g., David Armstrong, *Kentucky Judge Orders Release of Secret OxyContin Records Sought by STAT*, STAT (May 11, 2016), <https://www.statnews.com/2016/05/11/oxycontin-records-sought-stat-ordered-unsealed-kentucky-judge/> [<https://perma.cc/S9UY-MD53>].

118. See Zachary D Clopton & D. Theodore Rave, *Clifford Symposium: Opioid Cases and State MDLs*, 70 DEPAUL L. REV. (forthcoming 2021) (manuscript at 4–5), <https://ssrn.com/abstract=3680074>.

119. See *supra* note 106.

120. See Stanton A. Glantz, Deborah E. Barnes, Lisa Bero, Peter Hanauer, & John Slade, *Looking Through a Keyhole at the Tobacco Industry: The Brown and Williamson Documents*, 274 J. AM. MED. ASS'N 219 (1995).

121. See e.g., Christine Hatfield, *The Privilege Doctrines-Are They Just Another Discovery Tool Utilized by the Tobacco Industry to Conceal Damaging Information?*, 16 PACE L. REV. 525, 559, 575–85 (1996) (illustrating a case where attorneys for the tobacco industry abused attorney-client privilege).

122. U.S. FOOD & DRUG ADMIN., CENTER FOR DRUG EVALUATION AND RESEARCH APPROVAL PACKAGE FOR APPLICATION NUMBER NDA 20-553/S-002 (1996), https://www.accessdata.fda.gov/drugsatfda_docs/nda/96/020553s002.pdf [<https://perma.cc/RWB5-JE22>].

123. Joel Achenback, *How an Epic Legal Battle Brought a Secret Drug Database to Light*, WASH. POST (Aug. 2, 2019, 11:13 AM), https://www.washingtonpost.com/health/how-an-epic-legal-battle-brought-a-secret-drug-database-to-light/2019/08/02/3bc594ce-b3d4-11e9-951e-de024209545d_story.html [<https://perma.cc/V87R-JJYC>].

124. GARFIELD MAHOOD, TOBACCO INDUSTRY DENORMALIZATION: TELLING THE TRUTH ABOUT THE TOBACCO INDUSTRY'S ROLE IN THE TOBACCO EPIDEMIC, NON-SMOKERS' RIGHTS ASSOCIATION 1, 5 (2004), https://nsra-adnf.ca/wp-content/uploads/2016/08/TID_Booklet.pdf [<https://perma.cc/7PER-6XZ5>].

business models are considered outside of our society's norms and may not be considered legitimate enterprises. As such they may face legislative or regulatory scrutiny and likely corrective policymaking.¹²⁵ The tobacco industry was found to have violated a federal racketeering law.¹²⁶ Purdue Pharma recently pled guilty to criminal charges in federal court.¹²⁷ Such results are to be expected for denormalized industries.

In a little more than two decades since the flood of cases and documents resulting from tobacco litigation began, hundreds of state and local laws or regulations have been enacted to control the impact of the tobacco industry.¹²⁸ Importantly, in 2009, the FDA was authorized by Congress to regulate tobacco products.¹²⁹

As to the opioid pharmaceutical industry, there have been increasing legislative and regulatory actions taken at the federal¹³⁰ and state¹³¹ levels as well as ongoing Congressional oversight hearings.¹³² Unlike the tobacco industry, there are ongoing criminal probes focusing on the opioid pharmaceutical industry's practices.¹³³ Such governmental actions are likely to further denormalize that industry and delegitimize its business model.

As noted herein, there are many similarities in the business models of the tobacco, opioid pharmaceutical, and U.S. casino industries. Each sells a product that can addict consumers. Each uses marketing practices that exploit the addictive properties of the products they try to sell. Each, in some way, has sought to control the health narrative around their industries through funding scientific research that benefits their interests. Each industry has made liberal use of corporate social responsibility campaigns to whitewash negative associations with

125. *Id.*

126. *United States v. Phillip Morris*, 449 F. Supp. 2d 1, 901–03 (D.D.D. 2006).

127. Jan Hoffman & Katie Benner, *Purdue Pharma Pleads Guilty to Criminal Charges for Opioid Sales*, N.Y. TIMES, <https://www.nytimes.com/2020/10/21/health/purdue-opioids-criminal-charges.html#:~:text=Purdue%20Pharma%2C%20the%20maker%20of,Justice%20Department%20announced%20on%20Wednesday> (June 29, 2021) [<https://perma.cc/UT8Q-UQ8P>].

128. *U.S. Tobacco Control Laws Database* AM. NONSMOKERS' RTS. FOUND., <https://no-smoke.org/materials-services/lists-maps/> [<https://perma.cc/AR9C-3U6C>] (listing more than \$15,000 state and local tobacco laws in more than 5,000 U.S. places).

129. Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111–131, §§ 2(3), 2(5), 2(31), 2(49), 123 Stat. 1776, 1777–1781 (2009).

130. Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act of 2018, Pub. L. No. 115–271, 132 Stat. 3894 (2018). A federal law that included over twenty separate bills aimed at curbing the opioid use epidemic.

131. *Prescribing Policies: States Confront Opioid Overdose Epidemic*, NAT'L CONF. STATE LEGISLATURES (June 30, 2019), <https://www.ncsl.org/research/health/prescribing-policies-states-confront-opioid-overdose-epidemic.aspx> [<https://perma.cc/UGA5-UECA>].

132. See e.g., *A Public Health Emergency: State Efforts to Curb the Opioid Crisis Before the H. Comm. Energy & Com., 116th Cong.* (2020), <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-a-public-health-emergency-state-efforts-to-curb-the-opioid> [<https://perma.cc/SAX4-3696>]; *Tackling the Opioid Crisis: A Whole-of-Government Approach Before the Comm. Jud.* (2019), <https://www.judiciary.senate.gov/meetings/12/17/2019/tackling-the-opioid-crisis-a-whole-of-government-approach> [<https://perma.cc/2E9Y-EW9V>].

133. Corinne Ramey, *Federal Prosecutors Launch Criminal Probe of Opioid Makers, Distributors*, WALL ST. J. (Nov. 26, 2019, 4:24 PM), <https://www.wsj.com/articles/federal-prosecutors-launch-criminal-probe-of-opioid-makers-distributors-11574790494?st=5quiedr73vmm9rp> [<https://perma.cc/EYJ7-N67D>].

their businesses. And each industry has created very significant social costs stemming from the impact of their products.

Historically, cigarettes, opioids, and casinos were all subject to restrictions based on our understanding that they posed great potential risks. Cigarettes were banned in fifteen U.S. states in the late nineteenth and early twentieth centuries.¹³⁴ These bans were upheld by the U.S. Supreme Court.¹³⁵ The Harrison Anti-Narcotics Act of 1915 sought to better control the impact of opioids.¹³⁶ The end of the so-called “second wave” of legal gambling in the early twentieth century resulted in casinos and slot machines banned everywhere until Nevada re-legalized them in 1931 (and it would be more than forty years until New Jersey followed).¹³⁷ Yet all of the industries producing these products are contributing to great social costs. But only the casino industry seems to be avoiding the litigation pressure, resulting transparency, and corrective policymaking. And, of these three industries, it is the casino industry that has developed revenue sharing arrangements with the states within which they operate.¹³⁸ This arrangement may offer the casino industry a certain degree of protection. Unlike industry leaders from the tobacco industry and the opioid pharmaceutical industry, the executives from the casino industry have not been denormalized.¹³⁹¹⁴⁰ Casino industry leaders are viewed as purveyors of a legitimate business.¹⁴¹ While one recent casino CEO resigned in disgrace, the moral outrage over his denormalized behavior did not concern the damage caused by this industry’s products.¹⁴²

134. Robert N. Proctor, *Why Ban the Sale of Cigarettes: The Case for Abolition*, 22 *TOBACCO CONTROL* i27, i27–i30 (2013).

135. *Austin v. Tennessee*, 179 U.S. 343, 363 (1900).

136. C.E. Terry, *The Harrison Anti-Narcotic Act*, 5 *AM. J. PUB. HEALTH* 518, 518 (1915).

137. Nelson Rose, *Gambling and the Law: Pivotal Dates*, *GAMBLING & THE LAW* (June 27, 2017), <http://www.gamblingandthelaw.com/article/pivotal-dates/> [https://perma.cc/GW58-ZQ3W].

138. LUCY DADAYAN, *STATE REVENUES FROM GAMBLING: SHORT-TERM RELIEF, LONG-TERM DISAPPOINTMENT*, *ROCKEFELLER INST. GOV.* 25 (2016), https://rockinst.org/wp-content/uploads/2017/11/2016-04-12-Blinken_Report_Three-min.pdf [https://perma.cc/LYT9-K7KL].

139. Roger Rosenblatt, *How Do Tobacco Executives Live with Themselves*, *N.Y. TIMES MAG.*, Mar. 1994 at 34, <https://www.industrydocuments.ucsf.edu/docs/mlhm0085> [https://perma.cc/J5TC-RDV7].

140. Patrick Radden Keefe, *The Family that Build an Empire of Pain*, *NEW YORKER* (Oct. 23, 2017), <https://www.newyorker.com/magazine/2017/10/30/the-family-that-built-an-empire-of-pain> [https://perma.cc/3YWN-E9RQ] (describing the family that owns Purdue Pharma).

141. See, e.g., Wayne Parry, *Atlantic City is Leading a Wave of Female Casino Leaders*, *ASSOCIATED PRESS* (Sept. 13, 2020), <https://apnews.com/article/gambling-industry-archive-atlantic-city-26a85ecd87e5b76164614c2b79293f93> [https://perma.cc/2VPY-XQ2M]; Alexandra Berzon & Kate O’Keeffe, *Gambling Industry Emerges From the Political Shadows*, *WALL ST. J.* (Sept. 28, 2016, 5:30 AM), <https://www.wsj.com/articles/gambling-industry-emerges-from-the-political-shadows-1475055002?st=w5qe3dvluocej071> [https://perma.cc/QD5Q-TED5].

142. Will Yakowitz, *Billionaire Steve Wynn To Pay \$20 Million To Settle Shareholder Lawsuit*, *FORBES* (Nov. 29, 2019, 7:04 PM), <https://www.forbes.com/sites/willyakowicz/2019/11/29/billionaire-steve-wynn-to-pay-20-million-to-settle-shareholder-lawsuit-over-sex-allegations/?sh=7e61844c15f9> [https://perma.cc/Y5TL-3N4T].

VI. CONCLUSION

The casino industry, much like the tobacco and opioid pharmaceutical industries, relies on a multi-faceted business model of methodical exploitation of consumer addiction combined with efforts to control the scientific narrative and use of corporate social responsibility campaigns as a public relations tool. This allows each industry to reap enormous profits that produce highly adverse social consequences. While an avalanche of litigation, transparency through discovery, and corrective policymaking have had some impact in the business operations of the tobacco and opioid pharmaceutical industries, such disruptions to the casino industry have lagged. As its tactics become better understood, perhaps increased litigation and corrective action through the courts and regulatory bodies are likely to denormalize the casino industry's business practices in the years to come.