EVEN MOE DALITZ WOULD BLUSH: WHY THE DISTRICT ATTORNEY HAS NO BUSINESS COLLECTING UNPAID CASINO MARKERS

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Gambling has a long and circuitous history in American law.[1] Perhaps the strangest turn in this journey is the current situation in Nevada, in which the District Attorney uses the force of criminal law to collect unpaid loans owed to casinos in return for a generous ten percent bounty.[2] It is part of the lore of Las Vegas that the mob running some of the casinos in the city would send a bagman to collect unpaid debts, with a variety of unpleasant consequences for those who refused to pay. Morris Barney "Moe" Dalitz reputedly was the last of the great mobsters to control gambling in Las Vegas, and common wisdom held that it was most certainly not a good thing to be indebted to Moe. At the same time, the lore holds that he had the reputation for being a reasonable man: you were in real trouble only if you had the ability to pay and were attempting to skirt your obligations. In addition to this reputation for displaying a measure of reasonableness, he was a major benefactor of many charities and cultural sites in Las Vegas, with the result that he was given the honorific title, "Mr. Las Vegas."[3] Thus, it is not too far a stretch to suggest that even Moe Dalitz would

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[1] For a brief history of gambling and gambling regulation with citations to the literature, see Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy and the Law*, 64 MISS. L.J. 291, 294-305 (1995).

[2] 2 The District Attorney is authorized to conduct debt collection programs for dishonored checks by NEV. REV. STAT. § 205.466 (2009). The Bad Check Diversion Unit may seek restitution in lieu of criminal prosecution, and is empowered to collect an administrative fee on a sliding scale that rises to 10% of the face value of a check in excess of $10,000. *See id.* § 205.471.

[3] A brief biography of Moe Dalitz is provided at *Moe Dalitz*, WIKIPEDIA, http://en.wikipedia.org/wiki/Moe_Dalitz (last visited Jan. 8, 2012); *see also Chapter 6: Moe Dalitz, Racket Boss Reborn*, LAS VEGAS REV.-J., Aug. 25, 2005, http://www.reviewjournal.com/lvrj_home/2005/Aug-28-Sun-2005/news/26985900.html; *and* John L. Smith, *The Double*

blush if he could see the current collection operation run by the District Attorney of Clark County.

A customer wishing to secure credit from a casino to continue gambling after exhausting cash on hand can enter a credit agreement with the casino that permits the customer to sign a "marker" at the table in exchange for an advance of chips. Under existing Nevada case law, "markers" are treated as "checks."[4] Consequently, unpaid markers may be presented to the District Attorney for prosecution under the "bad check" criminal statute.[5] Treating each marker as a separate check, and therefore as the basis of a separate criminal offense, can present the customer with a terrifying threat of many years of incarceration.[6] This situation evokes a troubling image. Casinos have no need for a bagman if they can refer the debt to the public prosecutor to collect under threat of a criminal trial leading to imprisonment. The seemingly distant memory of debtors' prisons suddenly returns as an all-too-vivid reality.[7]

This Article, will first describe the basis upon which the District Attorney acts as a collection agent for casinos and then demonstrate that this basis is wholly without support under the law of negotiable instruments. To render the discussion concrete, this Article refers to the recent high-profile case in which Terrance Watanabe was prosecuted by the Clark County District Attorney for refusing to pay $14.75 million in casino markers, a refusal that was motivated by his ongoing legal dispute with the casinos that held the markers.[8] This Article concludes that the strong intuition that there is something fundamentally wrong with the State of Nevada using its police power to collect unpaid loans owed to casinos, and accepting a substantial fee for doing so, turns out to be wholly in accord with the applicable law as properly understood.

Life of Moe Dalitz, LAS VEGAS REV.-J., *available at* http://www.1st100.com/part2/dalitz.html (last visited Jan. 21, 2012).

[4] Nguyen v. State, 14 P.3d 515, 518 (Nev. 2000).

[5] NEV. REV. STAT. § 205.130 (2009).

[6] Under NEV. REV. STAT. § 205.130(1)(e), passing a bad check in excess of $250 is a category D felony. The punishment for a category D felony is a prison term not less than one year and not more than four years in duration, and the court may impose a fine of not more than $5,000. *Id.* § 193.130(d). In addition, the court must award restitution. *Id.* Under the indictment of Mr. Watanabe, described below, he was subject to as many as twenty-eight years in prison for refusing to pay on markers because of Harrah's Entertainment's alleged breaches of the parties' agreement.

[7] As one critic recently summarized, the combination of practices under bad check laws cause them "to violate one of the settled constitutional traditions of our law: No imprisonment for debt." Elwood Earl Sanders, Jr., *Time to Close the Collection Agency: Addressing the Abuse of Bad Check Laws*, 2 CHARLESTON L. REV. 215, 237 (2007).

[8] I must disclose that I was retained as an expert witness by Mr. Watanabe's legal counsel and was disclosed as such to the court shortly before the criminal charges were dropped in June 2010. In the course of my review of the facts of the case, I became convinced that the use of the "bad check" statute as a basis for the criminal prosecution of persons who fail to pay their casino markers is inherently flawed, in addition to having been improperly applied to Mr. Watanabe. This article is a direct outgrowth of my services as an expert retained to testify at trial. It is important to emphasize that I was retained as an independent expert and not as a consultant working for Mr. Watanabe, and that the criminal prosecution has now been dismissed with prejudice. Publishing this article raises no pecuniary conflict of interest for me, and my arguments and conclusions represent my best judgment and are not shaped in any manner by any ongoing work as a consultant or expert.

I. Setting the Stage: Customary Practices Regarding Casino Markers and the Watanabe Indictment

Markers are a "crucial tool" for a modern casino competing for high stakes gamblers.[9] Extending credit "has become vital in facilitating and furthering the goals of companies conducting business in the industry."[10] Typically, a casino will reach a credit agreement with a customer after ensuring that the customer has sufficient funds to cover the credit line and anticipated debt.[11] A blank marker is produced at the table and signed by the customer.[12] The parties often negotiate a disposition date, which specifies how long the casino will hold the marker before submitting it for payment. Delayed presentation permits the customer to seek to "win back" any losses or otherwise arrange his or her financial affairs to pay the debt, without the marker ever being presented to his or her bank.[13] If a customer fails to redeem the marker within the designated time, the casino may enter the customer's bank information on the marker and process it as a check. If the marker is returned by the customer's bank, the casino may then submit it to the Bad Check Unit of the District Attorney's office.

Mr. Watanabe's experience illustrates how very wealthy customers may amass substantial credit debt in the form of markers that translates to the threat of substantial prison time, even if there are very serious questions about the propriety of the debt owed. The following account is drawn from Mr. Watanabe's civil suit against Harrah's, which makes allegations that have never been proven in a court of law. The point of relating his allegations is to demonstrate how criminalizing casino debt by mischaracterizing markers as checks can overshadow serious questions that implicate public policy and the regulation of gambling in the state.

Terrance Watanabe's story begins with his rapid separation from the bulk of his inherited assets over a period of several years spent living and gambling in Las Vegas.[14] Watanabe was living and gambling primarily at the Wynn resort until Steve Wynn reportedly asked him to leave because of his obvious

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[9] Anthony N. Cabot & Joseph M. Kelly, Casino Credit & Collection 1 (2003). A review of the practices in Nevada is provided in Robert D. Faiss, *Nevada Industry Credit Practices and Procedures*, 3 Gaming L. Rev. 145 (1999).

[10] Darren A. Prum, *Enforcement of Gaming Debt*, 7 Gaming L. Rev. 17, 17 (2003); *see also*, E. Malcolm Greenlees, Casino Accounting and Financial Management 298 (2d ed. 2008) ("The availability of casino credit is a crucial element of a casino's marketing and operating strategy."). Greenlees notes that 15-19% of total wagers might be credit, leading him to conclude that extending credit is "essential." *Id.* at 298-99.

[11] *See* Cabot & Kelly, *supra* note 9, at 21-26; *see also* Greenlees, *supra* note 10, at 301-12.

[12] Greenlees, *supra* note 10, at 308.

[13] Cabot & Kelly, *supra* note 9, at 11.

[14] The following account is drawn from the factual allegations in a civil complaint filed by Mr. Watanabe. Complaint at 2-6, Terry K. Watanabe v. Harrah's Entm't, Inc., No. A-09-603929-B XXV (Nev. Clark Cnty. Dist. Ct. Nov. 19, 2009) (WizNet) (copy on file with the author). The complaint was withdrawn with prejudice and the claims were resolved by arbitration subject to a confidentiality agreement. It bears emphasis that for my purpose whether the facts alleged are true is not important, as I am discussing only how these alleged facts should have been analyzed under the law without the warping effect of a criminal prosecution in the background.

alcoholism, gambling addiction, and erratic behavior. In November 2006, Harrah's Entertainment Corporation[15] enticed Watanabe to gamble at their resorts by agreeing to provide additional compensation and benefits to him, including a promise to hold his markers for a longer disposition date before presenting them for payment. As early as April 2007, however, Harrah's began defaulting on its obligations under the agreement in various ways. Watanabe moved to Harrah's properties in June 2007, ultimately residing at Caesars Palace. For the next six months, Watanabe was gambling out of control, and he was severely intoxicated with liquor and painkillers that were provided by Harrah's agents.[16] In response to this alarming behavior, Harrah's decided to increase his credit limit and table limits, despite having reason to know of his rapidly deteriorating health and financial condition. During 2007, Watanabe wagered a staggering $1 billion at Harrah's properties for a net loss of $127 million.

In January 2008, while Watanabe was out of the country, Harrah's unilaterally chose to enter one of Watanabe's bank accounts on a number of markers and then presented them for payment prior to the agreed disposition date. Watanabe then alleged that Harrah's was failing to comply with their agreement and claimed that he was owed substantial sums of money. Harrah's presented the final $14.75 million in markers, but Watanabe's bank did not honor them. In May 2008, Harrah's presented thirty-eight markers to the District Attorney for investigation by the Bad Check Unit, but did not disclose the disposition date for the markers or the ongoing dispute it was having with Watanabe regarding the accounting of his comps and benefits.

Watanabe was indicted for writing bad checks and threatened with a maximum of twenty-eight years in prison. The indictment charged Watanabe with one count of theft and one count of passing bad checks at the Rio Las Vegas Hotel & Casino and the same two counts with regard to his conduct at Caesars Palace Casino (both casinos were part of the Harrah's corporate family). The indictment specified that Watanabe "willfully, unlawfully and with intent to defraud" issued a total of thirty-eight "checks to obtain cash and/or gaming

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[15] Harrah's Entertainment, Inc. changed its official company name to Caesars Entertainment Corporation in November 2010.

[16] Mr. Watanabe's lead attorney, Pierce O'Donnell, provided more graphic descriptions in his letter to the Nevada Gaming Control Board, as related in an article published in the Las Vegas Sun:

> Watanabe's lawyer provided regulators with the names of nearly a dozen witnesses who he says could substantiate Watanabe's accusations that Harrah's officials unlawfully preyed on his gambling addiction and supplied him nonstop with alcohol and prescription painkillers as he racked up $112 million in gambling losses in 2007 . . . .
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> O'Donnell likened Harrah's treatment of Watanabe over the next six months to "drug dealers feeding a heroin addict's deadly habit" and said it "warrants the most severe sanctions."
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> Casino security officers kept watch over Watanabe during this time under orders from the "highest management levels"–not to protect him but to help casino officials control his movements to keep him gambling, O'Donnell wrote.
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> He said Watanabe was "reduced to a robot-like existence" at Caesars Palace, where he stayed for months during his epic gambling binge.

Jeff German, *Regulators Holding Off to Let Court Rule in Watanabe Case*, LAS VEGAS SUN, Nov. 20, 2009, http://www.lasvegassun.com/news/2009/nov/20/regulators-holding-let-court-rule-watanabe-case.

chips . . . when the Defendant had insufficient money, property or credit with the drawee of the instrument to pay it in full upon its presentation."[17]

The indictment immediately had a profound effect on how Mr. Watanabe's allegations were handled. His lawyer filed a detailed complaint with the Nevada Gaming Control Board in light of the serious allegations of misconduct in violation of important gaming regulations,[18] but the Nevada Gaming Control Board refused to act on the complaint in light of the pending criminal case against Mr. Watanabe.[19] If the markers were properly treated as credit instruments, the civil dispute between Mr. Watanabe and Harrah's would not have interfered with the investigation by regulatory authorities of the very serious allegations made by Mr. Watanabe regarding the failure of Harrah's to fulfill its obligations as a licensed casino. Although the criminal complaint against Mr. Watanabe was dropped more than one year ago, the Gaming Control Board has yet to commence an investigation. The global settlement reached by Mr. Watanabe and Harrah's in the shadow of the criminal indictment has apparently served to effectively preclude a public investigation.[20]

The indictment of Mr. Watanabe was premised on a decision by the Supreme Court of Nevada that the failure to pay a casino marker falls within the purview of the bad check statute. In *Nguyen v. State*,[21] the court held that Mr. Nguyen was properly prosecuted when he was charged with four counts alleging the drawing and passing of a check with insufficient funds. The court acknowledged that the casinos held the markers for a period of time before submitting them to the bank on which they were drawn, quoting the testimony at trial that Harrah's permitted customers to replace the marker with a personal

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[17] Indictment at 2-3, State v. Terrance K. Watanabe, No. C254057 (Nev. Clark Cnty. Dist. Ct. Apr. 29, 2009) WizNet) (copy on file with the author).

[18] For example, the following regulation provides for disciplinary action if the Watanabe allegations were to be substantiated.

> 5.011 Grounds for disciplinary action. The board and the commission deem any activity on the part of any licensee, his agents or employees, that is inimical to the public health, safety, morals, good order and general welfare of the people of the State of Nevada, or that would reflect or tend to reflect discredit upon the State of Nevada or the gaming industry, to be an unsuitable method of operation and shall be grounds for disciplinary action by the board and the commission in accordance with the Nevada Gaming Control Act and the regulations of the board and the commission. Without limiting the generality of the foregoing, the following acts or omissions may be determined to be unsuitable methods of operation:
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> > 1) Failure to exercise discretion and sound judgment to prevent incidents which might reflect on the repute of the State of Nevada and act as a detriment to the development of the industry.
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> > 2) Permitting persons who are visibly intoxicated to participate in gaming activity.
> >
> > 3) Complimentary service of intoxicating beverages in the casino area to persons who are visibly intoxicated.

Nev. Gaming Comm'n Reg. 5.011 (2011).

[19] *See* German, *supra* note 16. As the newspaper account summarized, "Regulators don't want to interfere with the criminal case, which is being prosecuted by the district attorney's office, so they have stayed on the sidelines while it plays out."

[20] Jennifer Gross, Reference Librarian at the Weiner-Rogers Law Library at UNLV contacted the Gaming Control Board multiple times to inquire about the status of this matter, but her inquiries received no response. Documentation of these efforts during September 2011 is on file with the author.

[21] 14 P.3d 515 (Nev. 2000).

check within thirty days. However, the court ultimately concluded that the "practice of allowing a customer to pay gaming debts with a second check is a matter of courtesy and convenience to the customer."[22] The court concluded that the markers met the definition of a "check" for the purpose of the bad check statute because they "stated no time or date of payment" on their face and therefore were payable on demand.[23] In response to Mr. Nguyen's argument that the markers were credit instruments because Harrah's agreed to hold them for thirty days before presenting them for payment, the court held that whether "an obligee chooses to cash a check immediately or at a later date does not alter the character of the instrument. Further, there is no evidence that Nguyen and the casinos understood the marker to effect a contract for a loan."[24]

The reasoning in *Nguyen* is unpersuasive on its face. Mr. Nguyen's lawyers may have failed to present his case with strong evidentiary support, but the statement by the Harrah's employee regarding the thirty-day disposition date certainly was sufficient under the law to raise a question of whether the marker was payable on demand or whether the parties had agreed otherwise. As discussed below, the *Nguyen* court made serious mistakes of law that have foreclosed parties from challenging the dogma that casino markers are properly regarded as checks for the purpose of the bad check statute. The status of casino markers under the Uniform Commercial Code—as properly understood and applied—is analyzed by using the allegations made by Mr. Watanabe to provide a rich, factual context.

II. Casino Markers are not Subject to the Bad Check Statute

Casino markers should not be treated as "checks" for the purpose of the bad check statute if there is an agreement with the customer that the marker will not be presented immediately. This part first discusses the evolution and current provisions of the bad check statute. Next, it demonstrates that an agreement by a casino to hold a marker for a period of time before presentation is enforceable and renders the marker a credit instrument rather than a check. Such an agreement would not fall within the scope of the parol evidence rule, nor would it satisfy the parol evidence rule, and so the agreement could be enforced despite not being referenced in the written marker. Finally, it is argued that a party cannot "agree" that a credit instrument is a "check" subject to the criminal provisions of the bad check law when the credit instrument does not meet the legal definition of a check.

A. The Bad Check Statute

The development of the modern banking system in the twentieth century facilitated the use of checks as a form of immediate payment, subject only to the time necessary for the check to clear through banking channels. As noted in a contemporary law review article, in that "era of expanding credit and the

[22] Nguyen v. State, 14 P.3d 515, 517 n.1 (Nev. 2000).
[23] *Id.* at 518.
[24] *Id.*

widespread use of checks as a substitute for currency," states found it necessary to adopt bad check laws to protect the integrity of the checking system as a form of immediate payment, drawing an analogy to the common law crime of obtaining property by false pretenses.[25] This policy justification is evidenced by the fact that checks are by definition payable on demand and that post-dated checks generally fall outside the scope of bad check statutes.[26] "A situation analogous to the post-dated check situation is where the payee agrees to withhold presentment for a given period. This, like the post-dated check, is a credit-type arrangement."[27] Thus, it is generally a valid defense to argue that the parties treated the instrument like a promissory note rather than a check.[28]

The bad check statute in Nevada makes it illegal for a person "willfully, with an intent to defraud" to draw "a check or draft to obtain . . . credit extended by any licensed gaming establishment . . . when the person has insufficient money . . . with the drawee of the instrument to pay it in full upon its presentation."[29] Simply put, the elements of the crime created by the statute require a "check" that is issued by the drafter for the purpose of obtaining casino credit. It is clear that casino patrons obtain credit in exchange for signing casino markers, and so the discrete question presented is whether casino markers are properly considered "checks" for the purpose of the criminal statute.[30]

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[25] *Legislation: Bad Check Laws*, 44 HARV. L. REV. 451, 451-53 (1931). As noted in a more recent article, the fact that many criminal statutes apply to a check written for an antecedent debt establishes that the crime is regarded as one against the checking payment system as an immediate payment mechanism rather than on the fraud perpetrated against the recipient of the check. James E. Crowe, Jr., Comment, *Insufficient Funds Checks in the Criminal Area: Elements, Issues, and Proposals*, 38 MO. L. REV. 432, 433 (1973).

[26] *Legislation: Bad Check Laws*, *supra* note 25, at 454-55 (noting that Kentucky's attempt to bring postdated checks within its bad check statute was later struck down on constitutional grounds). One author explains the distinction between checks and postdated checks for purposes of a bad check criminal statute:

> Theoretically, the scienter essential to a violation of the statue is absent with regard to a post-dated check. The inference from post-dating is that while the defendant may know that there are insufficient funds at issuance, he expects that on the written date there will be sufficient funds. The defendant's culpable intent is further absolved through the recipient's compliance in taking a post-dated check, since the understanding is that present payment of the check is impossible. Thus, this transaction takes on the appearance of a credit arrangement, and failure of sufficient funds at the later date may well be for reasons beyond the maker's control and intent at the date of issuance. Following this rationale, some statutes expressly exclude post-dated checks.

Crowe, *supra* note 25, at 446.

[27] *Id.* at 447. The student author recognizes that an "argument against the credit rationale" is the legislative intent to "curb the flow of worthless commercial paper in the business world, and that an insufficient, post-dated check is still worthless," *id.*, but surely this argument is without merit. Promissory notes are enforceable negotiable instruments that play a large role in the economy, but no state has attempted to criminalize the failure to pay a promissory note when it comes due. The fact of the matter is that states have used the requirement of a "check" to reach only instruments that are payable on demand and to exclude credit instruments. An instrument that is not payable on demand is a credit instrument.

[28] *Id.* at 449 (citing *Gibbs v. Commonwealth*, 273 S.W.2d 583, 584-85 (Ky. 1954) and *Jackson v. State*, 70 So. 2d 438, 439 (Miss. 1965)).

[29] NEV. REV. STAT. § 205.130(1)(e) (2009).

[30] *Id.* On its face, the statute is incoherent because it defines "credit" in a manner that clearly makes no sense if applied to the phrase "casino credit." The statute reads: "For the purposes of this section, "credit" means an arrangement or understanding with a . . . corpora-

It is interesting to note that the Nevada bad check statute originally applied both to promissory notes and to checks. The statute provided that it was a misdemeanor to "make, pass, utter or publish any bill, note, check or other instrument," until the statute was changed in 1979 by adopting the current language making it illegal for a person to draw or pass a "check or draft."[31] Sixteen years later, the legislature increased the crime to a felony, with the maximum penalty of four years in prison and a $5,000 fine.[32] Presumably, the limitation of the scope of the statute to checks—a form of immediate payment—supported the decision to increase the criminal penalties.

There is a strong argument that the legislature has erred in its judgment that state resources and the threat of criminal sanctions should be used to collect unpaid checks.[33] In a recent article, one commentator argues that the inappropriate use of criminal process to collect dishonored checks has a pernicious effect on the poor and amounts to the threat of imprisonment for debt that has widespread and longstanding collateral effects on those who are subject to the prosecutor's decision to indict.[34] For the purpose of this article, of course, it is necessary to accept the legislature's policy determination that the bad check statute reflects a sound public policy. However, the public policy advanced by the statute should guide its application; under the maxim of lenity, there should be a strong presumption against reading this criminal statute more broadly than necessary to accomplish its manifest purpose.[35] Viewed in this light, casino markers do not fall within the scope of the bad check statute.

Application of the bad check statute to debts memorialized by casino markers has occurred only recently. Originally, gambling debts were unenforceable in Nevada as a matter of common law.[36] Twenty-five years ago, the Nevada legislature determined that casino markers should be enforceable by

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tion for the payment of a check or other instrument." *Id.* § 205.130(4). This ambiguity is clarified when one understands that the legislature intended the definition of credit to apply to various overdraft features that a drawer might have in place to ensure the payment of a check. In other words, the effect of the mention of credit later in the provision is to "save" the drawer from liability even if the drawer did not have cash available on deposit at the time the markers were presented for payment. If the drawer had a credit arrangement in place with the bank to cover overdrafts, then the drawer cannot be in violation of the statute simply by making a decision not to pay the check for the reason that the drawer has a defense to the payment obligation. This ambiguity exists in other state statutes. *See* Crowe, *supra* note 25, at 442.

[31] S.B. 174, 1979 Leg., 60th Sess. (Nev. 1979) effected this change in the law.

[32] NEV. REV. STAT. § 205.130 (2009), incorporating NEV. REV. STAT. § 193.130.

[33] *See* SANFORD H. KADISH, BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 29-30 (MacMillan Publishing Co. 1987); *see also* Crowe, *supra* note 25, at 458 ("There is considerable controversy on the question whether the writing of an insufficient funds check should even be a criminal offense. Those in favor of the criminal sanction point to the deterrent effect of a criminal statute and the need for the protection of the negotiability of checks; those opposed argue that an adequate civil remedy exists, that the prosecutor has become a debt-collecting agent, and that merchants are careless in accepting checks because there is a criminal sanction.").

[34] *See generally* Sanders, *supra* note 7, at 215.

[35] The Nevada Supreme Court recently affirmed the importance of the rule of lenity in State v. Lucero, 249, P.3d 1226, 1230-31 (Nev. 2011).

[36] Scott v. Courtney, 7 Nev. 419, 420-21 (1872).

legal process.[37] With gambling debts enforceable, casinos began seeking collection of unpaid markers under the bad check law. This in turn presents a seemingly simple question: is a casino marker a check?

The Uniform Commercial Code defines the term "check," but it is important at the outset not to conflate the definitions of "check" and "negotiable instrument." Not all negotiable instruments are checks. For example, a promissory note can be a negotiable instrument, but it is not a "check." Therefore, the fact that a casino marker may be a negotiable instrument is irrelevant to determining whether that casino marker is a "check" that might trigger criminal liability under the bad check law. Generally, negotiable instruments fall into two categories: they are either a note (a promise by the maker to pay at some point in the future; it can also be payable on demand) or a draft (an order to another party to pay the payee on behalf of the drawer).[38] A check is a type of draft[39] that is drawn on a bank and payable on demand.[40] An item is "payable on demand" if it "does not state any time of payment."[41] Conversely, an item is "payable at a definite time" if it "is payable on elapse of a definite period of time after sight or acceptance . . . ."[42]

Markers do not contain a date and information regarding the bank, and so, at the time of signing, they clearly cannot be considered a check. In effect, the casino attempts to convert the marker to a check at some point after its execution. As explained by industry representatives, if, "after completing play, the patron does not redeem his outstanding credit instrument, the casino may complete the instrument to meet the requirements of a check or can treat the instrument as a promissory note."[43] At the time of execution, then, the marker is clearly not a check. The argument in this Article is simple: a casino cannot convert the credit instrument to a check if the parties have agreed that the marker is not payable on demand.

These fundamental principles of payment systems law under the Uniform Commercial Code establish a simple and clear basis for concluding that casino markers (as commonly utilized in the industry) are not checks. To illustrate this conclusion, we return to the allegations made in the complaint filed by Watanabe against Harrah's. Mr. Watanabe alleged that he had been provided with repayment terms for the markers that had permitted him to pay the amounts at a later point in time. Because the casino markers expressly were not payable on demand, but rather were payable sixty days from their execution, they were not checks and could not be properly converted to checks, and there-

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[37] NEV. REV. STAT. § 463.368(1) (2009) permits licensed gaming establishments to collect gaming debts, which are not specifically defined and therefore presumably include promissory notes, drafts, checks and other instruments.

[38] U.C.C. § 3-104(e)-(f) (2005); NEV. REV. STAT. § 104.3104(5)-(6)(a) (2009).

[39] Another common instance of a draft is a documentary draft commonly used in international transactions. *See* U.C.C. § 4-104(6) (2002); NEV. REV. STAT. § 104.4104(f) (2009). U.C.C. § 3-104 cmt. 4 notes that another example of a non-check draft is a draft drawn on an insurance company but payable through a bank.

[40] U.C.C. § 3-104(f) (2005); NEV. REV. STAT. § 104.3104(6)(a) (2009).

[41] U.C.C. § 3-108(a) (2005); NEV. REV. STAT. § 104.3108(1)(c) (2009).

[42] U.C.C. § 3-108(b) (2005); NEV. REV. STAT. § 104.3108(2) (2009).

[43] CABOT & KELLY, *supra* note 9, at 29.

fore could not serve as the basis for an indictment under Nevada's bad check law even if the markers could properly be deemed negotiable instruments.[44]

B. An Agreement to Hold Markers for a Specified Time Is Enforceable, and Thus Markers Are Not Payable on Demand and Do Not Meet the Definition of a Check

The following sections demonstrate that a casino marker that qualifies as a negotiable instrument but not as a check is subject to ordinary contract defenses. A negotiable instrument is immune from such defenses only when it is enforced by a holder in due course, and the payee-casino is not a holder in due course of a casino marker. This section further explains why the parol evidence rule does not impede the proof of such defenses and agreements relating to the disposition date of a casino marker.

1. Markers Held by Casinos Are Subject to Ordinary Contract Defenses

Negotiable instruments were developed by trading merchants at a time when there were no national currencies as we understand them today.[45] Merchants utilized a private body of law and conflict resolution—*lex Mercatoria* or "the Law Merchant"—and also developed procedures for making the transportation of funds easier and safer. Merchants regarded a writing that had no promises on its face other than an order to a responsible third party[46] to make a payment of a sum certain upon presentation as a critical feature of commercial practice. The merchants exchanged this commercial paper by negotiating it to another merchant, with the result that it might change hands numerous times before being presented and paid. Because the holder of the draft often would be far removed from the initial transaction that led to the issuance of the draft, the Law Merchant began to develop rudimentary principles that the holder of what we now term a "negotiable" draft who acquired it in good faith and in exchange for value given may enforce the obligation on the face of the draft free of any claims or defenses that a prior owner of the draft might have.[47] Lord Mansfield famously incorporated these principles into the English common law in a series of cases that serve as the foundation of the modern law of negotiable instruments.[48]

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[44] The credit nature of markers is underscored by a leading text, which defines "marker" in a glossary as "A document, usually signed by the customer, evidencing an extension of credit to him or her by the casino. A casino receivable." GREENLEES, *supra* note 10, at 480.

[45] For more detail on the history related in this paragraph, *see generally* WILLIAM H. LAWRENCE, UNDERSTANDING NEGOTIABLE INSTRUMENTS AND PAYMENT SYSTEMS 5-7 (2002).

[46] *Id.* At this time, the third party usually was a gold merchant. These merchants filled an important commercial role before the development of the banking industry in England.

[47] *See* JAMES STEVENS ROGERS, THE EARLY HISTORY OF THE LAW OF BILLS AND NOTES (1995) (recognizing the genitive principles of the law merchant in this area, but emphasizing the common law development of the modern law of negotiable instruments).

[48] The principal cases are Miller v. Race, (1758) 97 Eng. Rep. 398, 1 Burr. 452 (K.B.) and Peacock v. Rhodes, (1781) 99 Eng. Rep. 402, 2 Doug. 633 (K.B.). The common law principles were then codified in The English Bills of Exchange Act of 1882, 45 & 46 Vict. C. 61, §§ 29, 38.

A holder in due course of a negotiable instrument is immune from ordinary contract defenses on the instrument, but it is critical to understand that not all "holders" qualify as a "holder in due course." A casino is a "holder" of casino markers executed by its customers, and these markers very well may be negotiable instruments, but the casino is not a "holder in due course" of the markers because it is the original payee on them.[49] As a result, a casino is subject to any defenses that its customer may raise in connection with issuance of a marker by the customer. Although it is a common mistake to think of negotiable instruments in terms of the ease with which they are enforceable by a holder in due course, the situation is different in the case of casino markers held by the original payee. This fundamental rule is set forth in U.C.C. § 3-305, which provides in part:

> (a) Except as otherwise provided in this section, the right to enforce the obligation of a party to pay an instrument is subject to the following:
>
> . . .
>
> (2) a defense of the obligor stated in another section of this Article or a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract;
>
> . . .
>
> (b) The right of a holder in due course to enforce the obligation of a party to pay the instrument is . . . not subject to defenses of the obligor stated in subsection (a)(2).[50]

As explained in Official Comment 2:

> If Buyer issues an instrument to Seller and Buyer has a defense against Seller, that defense can obviously be asserted. Buyer and Seller are the only people involved. The holder-in-due-course doctrine has no relevance. The doctrine applies only to cases in which more than two parties are involved. Its essence is that the holder in due course does not have to suffer the consequences of a defense of the obligor on the instrument that arose from an occurrence with a third party.[51]

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[49] MGM Desert Inn, Inc. v. William Shack, 609 F. Supp. 783, 785 (D. Nev. 1993) (Although a credit instrument [marker] is a negotiable instrument, the casino is a holder and not a holder in due course, and so remains subject to contract defenses to enforcement raised by the maker). In contrast, in *TeleRecovery of La., Inc. v. Gaulon*, 98-1363 (La. App. 5 Cir. 6/1/99); 738 So. 2d 662, the Court noted that the negotiable marker had been assigned to the plaintiff by the issuing casino. Although the court did not expressly determine that the plaintiff was a holder in due course, this would shape the later analysis of the enforceability of the marker. The Court of Appeals for the Ninth Circuit recently provided a correct analysis of holder in due course status in connection with a civil action to enforce a marker. In *Las Vegas Sands, LLC v. Nehme*, 632 F.3d 526, 535 (9th Cir. 2011) the court was constrained to accept the Nevada Supreme Court's incorrect conclusion in *Nguyen* that casino markers are checks. However, the court's failure in *Nguyen* to analyze the question of defenses to payment on the check provided the Court of Appeals with the freedom to properly conclude that a casino receiving a marker is not a "holder in due course" that can avoid ordinary contract defenses.

> At the outset, the Venetian is not a "holder in due course," i.e., "one who takes the instrument (1) for value, (2) in good faith and (3) without notice that it is overdue or has been dishonored or of any defenses or claims to it." . . . The Venetian had dealt with Nehme, and was a party to both the credit application and the marker. . . . Nevada law makes the Venetian "subject to all defenses of [Nehme,] a party with whom the holder has dealt."

Id. at 535-36.

[50] U.C.C. § 3-305(a)(2)-(b) (2002); NEV. REV. STAT. § 104.3305 (2009).

[51] U.C.C. § 3-305, cmt. 2 (2002).

This fundamental principle is reinforced by the provisions of U.C.C. § 3-117:

> Subject to [the parol evidence rule], the obligation of a party to an instrument to pay the instrument may be modified, supplemented, or nullified by a separate agreement of the obligor and a person entitled to enforce the instrument, if the instrument is issued or the obligation is incurred in reliance on the agreement or as part of the same transaction giving rise to the agreement. To the extent that an obligation is modified, supplemented, or nullified by an agreement under this section, the agreement is a defense to the obligation.[52]

Official Comment 1 explains:

> For example, a person may be induced to sign an instrument under an agreement that the signer will not be liable on the instrument unless certain conditions are met . . . . Section 3-117, in treating the agreement as a defense, allows [the promissor] to assert the agreement against Creditor, but the defense would not be good against a subsequent holder in due course of the note that took it without notice of the agreement.[53]

Official Comment 2 makes clear that the general parol evidence rule under state law governs whether the promissor can prove the prior or contemporaneous agreement.[54]

These densely-worded commercial law principles may be illustrated by applying them to the Watanabe matter. The agreement between the parties that the markers would be held for sixty days is an agreement that is enforceable by Mr. Watanabe against Harrah's even though the markers might be regarded as payable on demand if they met the definition of a negotiable instrument and a holder in due course sought to enforce them. *In re Armstrong* (*Harrah's v. Meeks*)[55] provides careful and accurate analysis of the effect of a side agreement to hold a casino marker for payment. *Armstrong* considered whether the casino markers were a loan transaction or constituted payment by check for casino chips. This characterization was important because a loan transaction would be subject to bankruptcy prohibitions on preferential transfers. The court concluded that the markers, even if they are considered checks, were subject to a credit agreement and therefore did not constitute a contemporaneous payment for value received. The court explained:

> The record clearly shows that Harrah's agreed to hold the markers initially for fourteen days, and then thirty days, before submitting them to Armstrong's bank for payment. When Harrah's extended a line of credit to Armstrong, permitted him to sign markers in exchange for chips, and promised not to present the markers to his bank for payment for a definite length of time, Harrah's made a short term loan to Armstrong.[56]

The court emphasized that casino markers do not satisfy the underlying policy of Section 547(c) of the Bankruptcy Code to permit the debtor to continue operating by paying contemporaneously for value received. "Harrah's has not convinced us that these policy concerns will be met by encouraging casinos to issue credit to troubled debtors so they may, with the odds against them, gamble away their remaining assets and increase their debt. A far better policy

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[52] U.C.C. § 3-117 (2004); NEV. REV. STAT. § 104.3117 (2009).
[53] U.C.C. § 3-117 cmt. 1 (2004).
[54] *Id.* § 3-117 cmt. 2.
[55] 291 F.3d 517 (8th Cir. 2002).
[56] *Id.* at 523.

would be to discourage casinos from issuing credit to insolvent individuals like Armstrong."[57]

The *Armstrong* court drew an analogy between markers and payday loans, a transaction in which a business accepts a post-dated check in exchange for an immediate payment. As is generally the case with markers, the entire purpose of a "payday loan" transaction is that the item is not properly deposited immediately.

> It is noteworthy that Harrah's policy requires the immediate deposit of personal checks written or paychecks signed over to the casino for chips; whereas, the casino will hold for later presentment the markers it issues as a part of the "Casino Credit" arrangement . . . . An analogy between the markers issued by Harrah's and short term "payday loans" is enlightening as to why the markers here form part of a loan transaction . . . . The payday lender typically holds the borrower's postdated check until "payday," when it is either redeemed by the borrower with cash or presented to the borrower's bank for payment. Similarly, in the marker context, the casino agrees to hold the gambler's signed marker for a specified period of time, here thirty days, before presenting it to the borrower's bank . . . . Armstrong's debt to Harrah's here was incurred on October 12 and 13, 1995. The payment on the debt was not due until the agreed upon time when the marker could be deposited at the bank, thirty days later. Because the debt here was incurred thirty days before payment, we find the payment of the casino markers constituted the payment of antecedent debt for purposes of 11 USC [§] 547(b).[58]

The court's analogy to the receipt of postdated checks in exchange for payday loans not only clarifies the applicable legal analysis, it refers to a regime where the applicable public policy concerns are likely to be similar to casino markers.[59]

2. The Parol Evidence Rule Does Not Bar Introduction of Evidence of the Agreement to Delay Presentment of the Markers

This section demonstrates that the parol evidence rule should not bar evidence of a delayed disposition date for the marker. First, a delayed disposition date might be part of the "agreement" of the parties as broadly defined by the

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[57] *Id.* at 525.

[58] *Id.* at 524 (internal citations omitted).

[59] Cases dealing with payday loans provide a basis for analogizing to situations such as the Watanabe matter. *See, e.g.*, Hodge v. The Money Shop (*In re* Hodge), 367 B.R. 843 (Bankr. M.D. Ala. 2007), which involved a payday loan company that called the debtor after receiving notice of a stay related to a Chapter 13 filing to threaten her with criminal prosecution for writing a bad check. The bankruptcy court determined that punitive damages against the creditor were appropriate because the threatening call was not only willful but also malicious, since the threat to have the debtor arrested and criminally prosecuted was wrongful and against right. *Id.* at 847-49. As noted, the underlying transaction here was a so-called payday loan. *See* Deferred Presentment Services Act, Ala. Code § 5-18A-1 et. seq. (2003). "Under Alabama law, the maker of a check which is given pursuant to this statute and which is dishonored upon presentment because of insufficient funds cannot be criminally prosecuted under the State's worthless check statute." *In re* Hodge, 367 B.R. at 848 (citing Ala. Code § 5-18A-13(h)). The statute, as is typical in many states, precludes the use of criminal enforcement for payday loan checks, and so the court was not required to analyze the bad check statute. ALA. CODE § 5-18A-13(h). One important implication of these kinds of cases, and the statutory regime, is that states find it contrary to public policy to use criminal sanctions to secure the repayment of checks used as credit instruments.

UCC and therefore not subject to the parol evidence rule. Second, even if the marker constitutes a partial integration of the agreement of the parties, evidence that the undated marker was to be held for a period of time before presentment does not contradict the written marker. In this situation, the evidence would be admitted notwithstanding the parol evidence rule.

a. Parties May Prove the Elements of "Agreement" under the UCC Without Triggering the Parol Evidence Rule

The parol evidence rule in Article 2 of the UCC would not apply to contracts involving markers because those agreements are not a transaction in goods.[60] However, courts may properly draw an analogy to the parol evidence rule of the Uniform Commercial Code (§ 2-202) in cases involving markers because it is premised on the definition of "agreement" in Article 1, which does govern the law of negotiable instruments. The majority of courts have (properly) interpreted the somewhat opaque language of UCC § 2-202 to mean that evidence of course of performance, course of dealing, and usage of trade is always admissible and never will be barred by the parol evidence rule.[61] This stems from the definition of "agreement" as "the bargain of the parties in fact," rather than a technical notion that the agreement is just the formal written expression adopted by the parties.[62] Thus, the agreement of the parties is to be "found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in Section 1-303."[63] These elements of the agreement are not subject to the parol evidence rule because they are not "prior agreements" of the parties; instead, together they constitute the agreement in question.

Parties, and sometimes even courts, mistake the alleged "hierarchy" of UCC § 1-303 as working like the parol evidence rule, but the majority rule clearly rejects this interpretive mistake as creating a "false parol evidence rule."[64] When there is evidence of the agreement that goes beyond language, the law makes clear that the judge shall not preference the terms expressed in language in the first instance. Instead, the UCC provides that "the express terms of an agreement and applicable course of performance, course of dealing, [and/] or usage of trade must be construed wherever reasonable as consistent with each other," and that a preference for terms in writing is permissible only if a consistent construction of all forms of evidence "is unreasonable."[65] In other words, the court is mandated to read all the elements of agreement together if there are reasonable means to do so, even if such a reading is not the

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[60] UCC § 2-102 provides that Article 2 of the UCC "applies to transactions in goods." "Goods" are defined as things that "are movable at the time of identification to the contract for sale other than . . . things in action." UCC § 2-105(1) (2004). Although a marker may be memorialized on paper, it is a contract right to recover payment for the extension of credit and therefore is not a "good."

[61] The leading case in this regard is Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 794-805 (9th Cir. 1981).

[62] RESTATEMENT (SECOND) OF CONTRACTS § 216 cmt. b. (1981).

[63] U.C.C. § 1-201(b)(3) (2004); NEV. REV. STAT. § 104.1201(2)(c) (2009).

[64] Roger W. Kirst, *Usage of Trade and Course of Dealing: Subversion of the UCC Theory*, 1997 U. ILL. L. F. 811, 869.

[65] U.C.C. § 1-303(e) (2004); NEV. REV. STAT. § 104.1303(5) (2009).

most reasonable understanding of the evidence.[66] For example, the course of performance by Harrah's to hold Mr. Watanabe's markers for sixty days, the course of dealing of holding his markers prior to the credit agreement in question, and the usage of trade in the casino industry generally to hold markers for payment and not treat them as payable on demand must all be read together with the terms of the marker to determine the actual agreement (bargain in fact) of the parties, so long as there are reasonable means of doing so. It is eminently reasonable to find that the markers were indeed credit instruments that were not payable on demand in light of this other evidence, evidence of the "agreement" that is not subject to the parol evidence rule.

This point is fundamental to the law of the UCC, but often missed by courts that are applying general contract law principles. The *Nguyen* court was simply wrong in its analysis when it concluded that "the practice of delaying payment of a marker" is insufficient to render "the instrument a loan document."[67] If the evidence provided by Mr. Nguyen met the definition of usage of trade, it was evidence of the agreement of the parties that can undermine the

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[66] A commercial agreement, then, is broader than the written paper and its meaning is to be determined not just by the language used by them in the written contract but "by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context, which may explain and supplement even the language of a formal or final writing." U.C.C. § 1-303 cmt. 1. "Performance, usages, and prior dealings are important enough to be admitted always, even for a final and complete agreement; only if they cannot be reasonably reconciled with the express terms of the contract are they not binding on the parties." *Nanakuli Paving & Rock Co.*, 664 F.2d at 795. The court surveyed numerous courts that "have interpreted their own state's versions of the Code in line with the weight of federal authority on the U.C.C. to admit freely evidence of additional terms, usages, and prior dealings and harmonize them in most instances with apparently contradictory express terms." *Id.* at 799. This approach is embraced as part of general contract law. "Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade." RESTATEMENT (SECOND) OF CONTRACTS § 202(5). The Restatement embraces the contextual approach to interpreting a written agreement:

> When the parties have adopted a writing as a final expression of their agreement, interpretation is directed to the meaning of that writing in the light of the circumstances . . . . The circumstances for this purpose include the entire situation, as it appeared to the parties, and in appropriate cases may include facts known to one party of which the other had reason to know.

RESTATEMENT (SECOND) OF CONTRACTS § 202, cmt. b. (internal citations omitted). Nevada has embraced this interpretive rule. *See* Hilton Hotels Corp. v. Butch Lewis Prod., Inc., 808 P.2d 919, 921-22 (Nev. 1991) (quoting *Nanakuli Paving & Rock Co.*, 664 F.2d at 780) ("Although some courts still follow traditional bargain theory and refuse to delve beyond the express terms of a written contract, the better approach is for the courts to examine the circumstances surrounding the parties' agreement in order to determine the true mutual intentions of the parties. Courts today tend to be willing to look beyond the written document to find the 'true understanding of the parties.'"). For a detailed explanation and defense of the interpretive approach first embodied in the UCC and now more generally embraced in contract law, *see* Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710 (1997).

[67] The relevant language from the opinion is as follows:

> According to Nguyen, the practice of delaying payment of a marker renders the instrument a loan document, whereby the signer agrees to pay the debt before an agreed-upon but unwritten disposition date. We disagree. Whether an obligee chooses to cash a check immediately or at a later date does not alter the character of the instrument . . . .

presumption that the markers are payable on demand. If the disposition date of the marker is established through evidence of course of performance, course of dealing, and trade usage, introduction of this evidence does not implicate the parol evidence rule.

b. Parties may prove prior and contemporaneous oral agreements that do not contradict a partially integrated writing

In most cases, a casino and its customer reach an express agreement about the disposition date of markers prior to their issuance. Casinos might argue that the existence of a written marker precludes a customer from proving a prior express agreement regarding payment of the marker. As detailed in the Restatement (Second) of Contracts, the modern application of the parol evidence rule should have no such effect. First, the trial judge must hear all proffered parol evidence to determine if the writing was intended by the parties to be an integration of their agreement.[68] If the marker is deemed to be a "complete integration" of all the terms of the deal between the parties, then even evidence of a consistent additional term regarding the timing of payment would be barred.[69] A writing is completely integrated if the parties intended it to be a complete and exclusive statement of the terms of their agreement. Courts determine whether the writing was completely integrated by looking to the intent of the parties. In the Restatement formulation, a writing is not completely integrated if the proffered prior agreement is consistent with the writing and is "such a term as in the circumstances might naturally be omitted from the writing."[70]

It is highly unlikely that a court would find that a casino marker was intended by the parties to be a complete and exclusive statement of the terms of their arrangements, given that the marker is a form document with substantial details missing at the time of execution by the customer. Additionally, there is no merger clause, or other warning that the hastily signed marker overrides all pre-existing agreements between the casino and the customer. The fact that essential terms of the writing, such as the bank on which the marker is drawn, are not included at the time of execution and must be completed at a later date plainly establishes that the writing is only partially integrated.[71] The Comments to the Restatement explain the relevant factors of the "naturally omitted" test.

> Nguyen also argues that the agreement by the gaming establishments to hold the markers for a period of time rendered them the 'equivalent' of post-dated checks. However, just as there is no evidence here that the parties intended the markers to represent a loan instrument, there is no evidence that the parties mutually understood that the markers were post-dated checks. The face of the documents demonstrates that they were payable on demand, at the time of issuance.

Nguyen v. State, 14 P.3d 515, 518-19 (Nev. 2000). This is incorrect as a matter of law, unless Mr. Nguyen's lawyers negligently failed to offer evidence that meets the test of course of performance, course of dealing and/or trade usage.

[68] RESTATEMENT (SECOND) OF CONTRACTS § 214. "Whether a writing has been adopted as an integrated agreement and, if so, whether the agreement is completely or partially integrated are questions determined by the court preliminary to determination of a question of interpretation or to application of the parol evidence rule. . . . Writings do not prove themselves . . . ." *Id.*, § 214 cmt. a.

[69] *Id.* §§ 215, 216(1).

[70] *Id.* § 216(2)(b).

[71] Adding the parol evidence rule to the mix increases the complexity of the analysis significantly, especially with respect to court holdings that evidence a lack of understanding of

> If it is claimed that a consistent additional term was omitted from an integrated agreement and the omission seems natural in the circumstances, it is not necessary to consider further the questions whether the agreement is completely integrated and whether the omitted term is within its scope, although factual questions may remain. This situation is especially likely to arise when the writing is in a standardized form which does not lend itself to the insertion of additional terms. Thus agreements collateral to a negotiable instrument if written on the instrument might destroy its negotiability or otherwise make it less acceptable to third parties; the instrument may not have space for the additional term.[72]

This language could have been written with casino markers in mind.

As the Court of Appeals for the Ninth Circuit recently concluded, "a casino marker and a credit application agreement may be, but need not be, part of the same transaction," such that the parties intended them to be read together to define their agreement.[73] Consequently, the court remanded the case for a factual finding in response to the casino's effort to enforce the marker standing alone.[74] In short, to suggest that a written casino marker stands as an independent and exclusive memorial of the agreement of the parties regarding the provision of credit flies in the face of nearly universal practices and is inconsistent with the equally frequently expressed intentions of the parties. In the absence of additional–and, certainly, unusual facts–a court should not conclude that a casino marker was intended by the parties to be a complete integration of the agreement of the parties that supersedes their prior agreements and understandings.

However, a marker is likely to be regarded as a "partial integration" of the parties' agreement, inasmuch as the parties intend the writing to be a final statement of the terms that are included in the writing. Under the parol evidence rule, extrinsic evidence of terms of the agreement between the parties is admissible as long as the evidence does not contradict a term of the writing.[75] On one

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these issues. In *TeleRecovery of La., Inc. v. Gaulon*, 98-1363 (La. App. 5 Cir. 6/1/99); 738 So. 2d 662, discussed in note 49, the court would have properly precluded submission of evidence of a side agreement if it had found explicitly that the plaintiff was a holder in due course. However, the court conflates the fact that the marker is a negotiable instrument with the conclusion that it is a check subject to the bad check law, and does not address the trial court's misapplication of the parol evidence rule to bar evidence of the contingency to payment caused by the credit agreement. The court reaches the correct result, but it does so only by engaging in a horribly mangled analysis that assumes more than it establishes.

[72] RESTATEMENT (SECOND) OF CONTRACTS § 216, cmt. d.

[73] Las Vegas Sands, LLC v. Nehme, 632 F.3d 526, 537 (9th Cir. 2011).

[74] *Id.*

[75] RESTATEMENT (SECOND) OF CONTRACTS § 216. The Nevada Supreme Court expressly adopted the parol evidence rule principles of the First Restatement, *Daly v. Del E. Webb Corp.*, 609 P.2d 319 (1980), and so there is a basis to believe that the Court would adopt the principles of the Second Restatement. The sparse case law in Nevada tracks the modern application of the parol evidence rule as articulated in the Restatement (Second) of Contracts. It is well established that "the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol. Alexander v. Simmons, 518 P.2d 160, 161 (Nev. 1974)." Crow-Spieker #23 v. Robinson, 629 P.2d 1198, 1199 (Nev. 1981). The determination of the integration of the writing is premised on the intent of the parties in the circumstances.

> The case law is clear that the mere existence of a written contract is insufficient to prevent a party from showing a separate and independent contemporaneous oral agreement. Douglass v.

hand, the markers are form documents that are silent as to the date they become payable, and therefore there is no disposition date in the writing to conflict with the offered evidence. On the other hand, in the absence of a date, the UCC presumes that an instrument is "payable on demand."[76] These principles of law are easily reconciled. Courts should find that the express agreement to hold the marker for sixty days, *in light of the usage of trade, course of dealing, and course of performance*, does not contradict an agreed term in a marker that includes no date or time of repayment, and so evidence of the agreement regarding the disposition date would not be precluded by the parol evidence rule.[77]

Thompson, 127 P. 561 (1912). Undoubtedly the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. Seitz v. Brewers' Refrigerating Machine Co., 141 U.S. 510, 517 (1891).

Alexander, 518 P.2d at 161. Recent cases embody the basic principle that a formal and detailed written term may not be altered by introduction of parol, Kaldi v. Farmers Ins. Exch., 21 P.2d 16, 22 (Nev. 2001), but parol evidence should be admitted and considered when the proffered term might reasonably be read together with the written term, Lowden Inv. Co. v. General Elec. Credit Co., 741 P.2d 806, 809 (Nev. 1987).

[76] *See, e.g.*, Fleeger v. Bell, 95 F. Supp. 2d 1126, 1131 (D. Nev. 2000) ("The markers do not delineate any explicit dates for repayment, thereby subjecting the payor to a repayment obligation at the will of the payee. Thus, this court finds the disputed casino markers to be negotiable 'checks' . . . ."). As argued in this article, this presumption of payable on demand is properly overcome by evidence that the agreement of the parties (whether reflected on the face of the marker or not) is otherwise.

[77] An illustration in the Restatement appears to suggest the contrary conclusion, but a careful interpretation of the illustration in context reveals that the Restatement is in accord with my analysis. Illustration 1 provides: "A check states no date of payment, but it is orally agreed that the check will be paid only after six months. The oral agreement contradicts the check." RESTATEMENT (SECOND) OF CONTRACTS § 216, illus. 1. However, this conclusion is justified as follows: "Under Uniform Commercial Code § 3-108 the check is payable on demand, and most competent adults in the United States have reason to know the rule." *Id.* We can easily question the factual premise of this explanation, but it is clear that the explanation assumes that the contextual understanding of the parties in tendering a personal check is that it is payable immediately unless post-dated. In other words, the oral agreement to hold the check is contradicted by the failure to do what is necessary and expected in order to express that agreement: post-date the instrument. This illustration is offered under the comment that explains the standard of "inconsistency" with the writing. This reading is reinforced by illustrations that clear gap-filling terms do not render prior oral agreements contradictory of writings that are silent on the term in question. One illustration of the "naturally omitted" test provides:

> A and B sign a standard form of written agreement for the sale of goods, complete on its face except that a blank for time and place of delivery is not filled in. It is claimed that the writing was signed on the oral understanding that delivery would be made within 30 days at the buyer's place of business. Under Uniform Commercial Code §§ 2-308 and 2-309, the goods would be deliverable, unless otherwise agreed, within a reasonable time at the seller's place of business. The written agreement is not completely integrated, and the oral understanding is admissible in evidence to supplement its terms.

Id. § 216, illus. 6; s*ee also id.* § 216, illus. 7 (default rule for shipment terms is not inconsistent with prior oral agreement). Unlike a situation involving a personal check, the parties have no reason to know the gap-filling rules, and so their omission of some of the terms of their agreement from the writing is not inconsistent with the silence of the written agree-

For example, a "high roller," such as Mr. Watanabe, will negotiate a specific agreement with the casino regarding a variety of benefits, including an extended disposition date for all markers. Express agreement of the disposition date might be regarded as a "prior agreement" reached before the execution of the marker, and thus the parol evidence rule would apply. Even in this situation, the evidence of the agreement on a disposition date should be regarded as evidence that is consistent with the written marker that is only a partial integration of the agreement of the parties. Mr. Watanabe should have been free to prove that the markers were not properly payable until sixty days from the date of execution without this being viewed as contradicting a written term in the markers.[78]

If casinos desire to use the state police power to collect their debts, they may easily do so by accepting personal checks from customers and depositing them immediately. Casinos do not perform preliminary credit checks and then accept personal checks to the exclusion of markers precisely because they wish to facilitate increased gambling by their customers. In other words, the credit nature of the markers is essential to how they operate: high-end gamblers would not agree to "pay as they go," and casinos would make much less money if there were no credit extended. Although it might appear that paying by check rather than by cash is a form of credit transaction because it is still necessary for the casino to present the check for collection, the UCC makes clear that payment by check immediately suspends the debt (which may be treated as paid) subject to the condition of collection.[79] For example, a seller that is paid by a check that is later returned NSF is entitled to reclaim the goods from the buyer as a "cash seller" under UCC § 2-507(2).[80] Markers are different from personal checks because they are designed and marketed to gamblers to serve as a form of credit, which allows the gambler to "win back" losses before having to pay or to adjust his or her finances before payment comes due. This well-known fact would probably be sufficient to establish a clear usage of trade in the industry. The usage of trade might not be specific enough to permit a party to claim that it is entitled to a "hold" for a certain number of days, but it should be sufficient to establish that a "hold" of some kind is in the nature of the instrument, and this is sufficient to establish that markers are not checks.[81]

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ment. Casino markers present an even stronger case for concluding that the disposition date was naturally omitted from the marker. Given the nearly universal practice of "holding" the markers for a specified time, and in issuing markers only in the context of an overriding credit agreement previously agreed by the parties, it is quite natural that the parties would not include the fact of the disposition date on each marker. Silence in the marker is not inconsistent with the agreement of the parties, as manifested by the prior credit agreement, course of performance, course of dealing and usage of trade.

[78] In the event that a court would decide on peculiar facts that the agreed disposition date conflicted with the written marker, it might still be possible to utilize the doctrine of promissory estoppel to avoid application of the parol evidence rule. *See generally*, Michael B. Metzger, *The Parol Evidence Rule: Promissory Estoppel's Next Conquest?*, 36 VAND. L. REV. 1383 (1983).

[79] U.C.C. § 2-511(3) (1994); NEV. REV. STAT. § 104.2511(3) (2009).

[80] U.C.C. § 2-507(2) (2004); NEV. REV. STAT. § 104.2507(2) (2009).

[81] In *MGM Desert Inn, Inc. v. Shack*, 609 F. Supp. 783, 786 (D. Nev. 1993) the court acknowledged that personal checks are negotiable instruments subject to ordinary contract defenses, but then concluded that because the side agreement providing that the checks were

3. Parties May Not Consent to Application of a Criminal Statute Beyond Its Scope

In the Watanabe matter, the marker included language to the effect that the marker was a credit instrument that was equivalent to a check, and therefore, subject to the bad check statute and criminal process.[82] This self-serving legend should have no effect on the legal analysis of whether the marker is within the bad check criminal statute. First, the marker makes this declaration as a statement in quotation marks and does not purport to be describing an agreement of the parties. Second, even if Mr. Watanabe "agreed" to this statement, the parties may not change the meaning of the statutes comprising the law of negotiable instruments. The marker is either a check that falls within the scope of the criminal statute, or it is not. Agreement has no role to play in the determination of the scope of criminal statutes.

C. A Casino is Subject to Defenses to the Enforcement of Markers, and Criminal Liability Should Not Attach When a Customer Refuses To Pay Because of the Offsetting Defenses

Even if a marker is a negotiable instrument that has been executed in exchange for the value given in the form of casino chips, the marker remains subject to any and all contract defenses that the customer might raise regarding the credit arrangement with the casino. In the civil complaint filed by Mr. Watanabe, he asserts he refused payment on the final $14.75 million in markers because Harrah's had breached its agreement with him regarding his benefits as a high roller and had taken advantage of him in breach of their agreement and in violation of gaming regulations. Because Harrah's is not a holder in due course, it is subject to these contract defenses. Although the civil action filed against Harrah's was framed as tort allegations, many of these allegations (fraud, undue influence, misrepresentation, duress, etc.) would potentially serve as contract defenses to the credit arrangement that led to the creation of the

not payable on demand was an oral agreement concluded more than one year earlier it failed to satisfy the one-year provision of the statute of frauds. This is a poor application of the statute of frauds provision, and is not an argument that should be relevant in most cases involving marker agreements. The one-year provision is generally applied by modern courts to include contracts within the statute of frauds only if they could not be completed within one year of the making of the contract. *See, e.g.*, Freedman v. Chem. Constr. Corp., 372 N.E.2d 12 (N.Y. 1977) (oral agreement made nine years earlier is not within the statute because the contract could have possibly been performed within one year). The modern rule is followed in Nevada. *Compare* Stone v. Mission Bay Mortg. Co., 672 P.2d 629, 630 (Nev. 1983) (employment contract for "not less than one year" is not within the statute because it could have been terminated during the probationary period) *with* Edwards Ind., Inc. v. DTE/BTE, Inc., 923 P.2d 569, 573 (Nev. 1996) (multi-year equipment lease cannot be completed within a year and so falls within the statute). It seems implausible that a party would ever assert that a credit arrangement regarding the disposition date of markers was for a term of years that could not possibly be completed within one year.

[82] The Harrah's casino markers signed by Watanabe include the following statement in quotation marks:

> A credit instrument is identical to a personal check. Willfully drawing or passing a credit instrument knowing there are insufficient funds in the account upon which it may be drawn, or with the intent to defraud, is a crime in the State of Nevada, which may result in criminal prosecution.

Copies of the markers upon which the indictment was brought are on file with the author.

markers. If Harrah's defaulted on its contractual arrangements with Mr. Watanabe, these allegations might be a basis for precluding enforcement of the markers or providing a substantial offset. If the markers were determined to be unenforceable or subject to offset, or at least plausibly so, it is difficult to understand how failing to pay the markers as a response to the dispute could constitute a crime. The presumption of intent to defraud that arises when the marker is dishonored is overcome if it is established that the item was not enforceable or was subject to offset.

III. Conclusion

Casino markers are not checks within the meaning of the criminal provisions of the bad check statute if the parties have agreed that the markers are not payable immediately. Agreement may be express, as in the case with high rollers such as Mr. Watanabe, but the agreement may also exist by virtue of course of performance, course of dealing, and industry usage. Markers have special relevance within the modern casino industry precisely because they are not personal checks that are payable on demand, and so it is unlikely that a casino marker should ever trigger criminal liability under the bad check statute.

This does not leave casinos without recourse against those who wrongfully refuse to pay their debts. A casino marker is still an enforceable credit instrument, and casinos have recourse to civil process to collect on the loan no less than any other business that extends unsecured credit. Casinos wishing to secure the collection services of the District Attorney backed by the threat of criminal prosecution may do so by entering into agreements with customers that permits the customer to write a personal check that is payable on demand in exchange for gaming chips.

The warping effect of incorrectly regarding casino markers as checks is apparent in the Watanabe incident. If Harrah's had to collect its unpaid loan like any other commercial enterprise in the state, it would have had to address the very serious accusations made by Mr. Watanabe, and the Nevada Gaming Control Board would not have felt compelled to hold off on taking action pending resolution of the criminal charges against Mr. Watanabe. The threat of as many as twenty-eight years in prison is a powerful motivator; few borrowers will risk prison time no matter how good their defenses may be. With this 800-pound gorilla of a criminal indictment in the room, the ordinary process of civil litigation and regulatory oversight cannot ensure that casinos are abiding by their obligations.

This Article does not address the profound due process concerns raised by the District Attorney having a significant financial interest in successful prosecutions under the bad check statute.[83] These concerns were concretized in the

[83] Mr. Watanabe raised these issues in his Motion to Dismiss Indictment. Defendant's Motion to Dismiss Indictment and to Disqualify the Clark County District Attorney's Office (Motion No. 2) State v. Watanabe, No. C254057 (Nev. Clark Cnty. Dist. Ct. Jun. 11, 2010) (copy on file with author). The legal issues are sketched effectively in an unpublished student note, Dustun Holmes, *Whaling in the Nevada Desert: Does NRS § 204.471 Violate the Constitutional Rights of a Defendant?* (Mar. 27, 2011) (unpublished note) (on file with the *UNLV Gaming Law Journal*).

Watanabe-Harrah's matter when Mr. Watanabe and Harrah's reached an agreement about their contract dispute, but the District Attorney required payment of a $500,000 "fee" before dismissing the criminal charges.[84] Even more dramatic, a bankruptcy court issued a stay of a criminal prosecution under the bad check statute after finding that the prosecution was primarily a debt collection action.[85] Regardless of the strong public policy reasons against this kind of collection arrangement, it is clear that the bad check statute does not apply properly to casino markers. The Supreme Court of Nevada should reverse its error.

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[84] In the cover letter accompanying the payment to the District Attorney, Mr. Watanabe's legal counsel characterized the payment as a "payment of a fee to the Bad Check Unit for its various programs." Letter from Daniel J. Albregts to David J. Roger, Clark County District Attorney (July 7, 2010) (on file with author). The letter was counter-signed by the District Attorney. Under the Nev. Rules of Prof'l Conduct 1.5(a) (2006), "A lawyer shall not . . . collect an unreasonable fee." The public prosecutor was not charging a fee of a client in this case, but the facts suggest that it is at least plausible that the prosecutor collected an unreasonable fee based on the facts known and the work performed by the attorneys in the Bad Check Unit. This is a strange way to view the relationship, but that strangeness is one of the effects of the Bad Check Unit having a financial interest in cases that it prosecutes.

[85] *In re* Simonini, 282 B.R. 604 (W.D.N.C. 2002), *vacated by* 69 Fed. Appx. 169 (4th Cir. 2003). Although noting that the federal government intended to exempt all criminal prosecutions for the automatic stay provision of bankruptcy law, the court concluded that the core of the Nevada system is debt collection. "To put it bluntly, the statute appears to be aptly paraphrased as stating: 'No matter what you do, get this defendant to make full restitution.' . . . . It emphasizes collection no matter what, and correspondingly impacts the target individual like a debtor, unprotected by the automatic stay." *Id.* at 620. Although the Court of Appeals vacated the injunction in an unpublished opinion, it did not take issue with the Bankruptcy Court's characterization of the criminal prosecution as being a debt collection action. Rather, the Court of Appeals simply held that the federal policy not to enjoin state criminal prosecutions was absolute in this context. *In re* Simonini, 69 Fed Appx. at 171.