# CHEATER'S JUSTICE: JUDICIAL RECOURSE FOR VICTIMS OF GAMING FRAUD

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## I. INTRODUCTION

Legends of extrajudicial "cheater's justice" dealt upon gaming con-artists and swindlers have deep historical roots. In the Old West, a card shark may have been shot on sight.[1] Later, when the mob (allegedly) ran Las Vegas, a hustler might have been given the choice of "hav[ing] the money and the hammer or [walking] out of here," but not both.[2] Gradually, as gambling became more socially acceptable and government regulation of it increased, disputants transitioned from wielding brutish self-help remedies to pursuing legal retribution.[3] Today, courts largely accept that a party cheated in a gambling game can recover any losses in a civil action without necessarily being limited to administrative remedies through a state's gaming regulators.[4]

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1 *See* People v. Grimes, 64 P. 101, 103 (Cal. 1901) ("The deceased may have treated the appellant unfairly and unjustly in the matter of the game of cards, but that treatment gave appellant no legal excuse or justification for taking his life."); *see also* State v. Vansant, 80 Mo. 67, 73–74, 1883 WL 9952, *5 (1883); Johnson v. State, 10 S.W. 235, 236 (Tex. App. 1888); State v. Shadwell, 57 P. 281 (Mont. 1899).

2 Casino (Universal Pictures 1995); *see also* United States v. Williams, 641 F.3d 758, 768 (6th Cir. 2011) ("When Sam 'Ace' Rothstein directs guards to smash a cheater's hand in Martin Scorsese's *Casino*, a reasonable person could interpret that as a threat.").

3 *See* I. Nelson Rose, *Compulsive Gambling and Gaming Debts*, 20 GAMING L. REV. & ECON. 627, 628–30 (2016) (recognizing "[m]ajor changes" in Americans' views towards gambling and discussing the gaming industry's evolution from "threats" and "cruder" methods of collecting gaming debts to collecting through the court system).

4 *See, e.g.,* Berman v. Riverside Casino Corp., 323 F.2d 977, 979 (9th Cir. 1963) ("[T]he common law rule, as of the time of Nevada's admission to the Union, appears to have been that one who lost money in a crooked gambling game could recover in a civil action."); Erickson v. Desert Palace, Inc., 942 F.2d 694, 697 (9th Cir. 1991) ("[A] party may assert an action outside the administrative process to recover *gambling losses* sustained due to casino fraud" but disputes over alleged *winnings* in a legitimate game are considered "gaming debts" under the statutory

Nevertheless, many facets of litigation against cheaters remain uncertain, and courts sometimes struggle with the appropriate theory of liability, the role of administrative remedies, and the proper calculation of damages. The recent dispute between a professional gambler, Phil Ivey, and the Borgata Hotel Casino & Spa illustrates these issues and, given the case's notoriety, the court's missteps are likely to influence other cases where victims of cheating attempt to recover their losses.

In a trio of decisions, the *Ivey* court misapprehended the established common law rule that claims to recover losses sustained in a crooked gambling game sound in fraud, not contract. The court compounded its error, in part, through an inability to reconcile a wager's contractual nature with the fraudulent character of cheating. Wagers between a patron and a casino form a contract, and the governing statutes, regulations, and game rules supply the gaming contract's material terms. These sources always contain express or implied prohibitions against cheating that are, in turn, incorporated into the gaming contract. But, contrary to the *Ivey* court, cheating does not only give rise to a breach of contract claim for statutory violations. Rather, charlatans commit fraud by placing their bet—entering into the gaming contract—without the intent to honor their contractual promise not to cheat. And even though contractual breach alone cannot establish fraud, direct or circumstantial evidence that the patron entered the gaming contract without the intent to play by the rules can establish cheating.

Regardless of the liability theory employed, the *Ivey* court erred by rejecting as too speculative the use of expectation or probabilistic damages. The Restatements and case law approve damage calculations based on the casino's statistical advantage on any one roll of the dice or turn of the cards. While luck is always a factor, odds-based damages are ascertainable to a sufficient degree of mathematical certainty and, if there remains any doubt about the amount of damages, the cheater—not the casino—should bear the risk.

## II. MARINA DISTRICT DEVELOPMENT CO., LLC V. IVEY

### A. *Ivey Tips the Odds in his Favor.*

In 2012, Ivey and a colleague, Cheng Yin Sun, arranged a high-stakes Baccarat game at Borgata.[5] Baccarat is a game of chance where patrons bet on

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scheme and "are confined to the administrative process followed by state judicial review"); *see also* Golden Nugget v. Gemaco, Inc., ATL–L–5000–12, 2015 WL 689437 (N.J. Super. Ct. Law Div. Feb. 9, 2015) (holding that courts may interpret gaming statutes to resolve disputes related to allegations of "illegal" gaming when regulators decline to act) *but see* Kelly v. First Astri Corp., 72 Cal. App. 4th 462 (1999) (holding that California's strong public policy against judicial resolution of gaming related disputes bars enforcement of gaming debts as well as tort actions to recover losses from alleged cheating).

[5] Marina Dist. Dev. Co., LLC v. Ivey, — F. Supp. 3d —, 2016 WL 6138239, at *2

the relative value of two hands before the dealer deals from a shoe.[6] The general goal is to bet on the hand that ends up closest to, or totaling, nine.[7] The dealer initially deals two cards to each hand and might deal a third card to either or both hands, depending on each hand's value after the deal.[8] "Tens, face cards, and any cards that total ten are counted as zero. All other cards are counted at face value."[9] Unlike blackjack, neither hand can "bust."[10]

Patrons can place three types of wagers.[11] A patron can bet on a "banker" hand, a "player" hand, or on a tie.[12] The "banker" hand is not the casino (or "the house") and the "player" hand does not represent any patron playing the game.[13] A wager on "banker" is a bet that the banker hand will be closest to nine; a wager on "player" is a bet that the player hand will be closest to nine; and a wager on the tie is (intuitively) a bet that the both hands will equal the same amount.[14] "A winning bet on 'banker' pays 19 to 20. A winning bet on 'player' pays even money. A winning bet on 'tie' pays 8 to 1. The house advantage for Baccarat is approximately 1.06% on 'banker' bets, 1.24% on 'player' bets, and 4.84% on 'tie' bets."[15]

Baccarat patrons are known for their superstitious rituals.[16] In some game variations, casinos allow patrons to squeeze, crease, bend, or tear cards (non-reusable), and ask the dealer to let them "peek" at the cards before the deal.[17] Because of these unique traditions, Borgata did not become suspicious when Ivey made five apparently idiosyncratic requests as conditions to playing Baccarat at Borgata.[18] He requested a private pit area, a guest (Sun) to sit with him while he played, a dealer who spoke Mandarin Chinese, one 8-deck shoe of purple Gemaco-brand Borgata playing cards for each playing session, and the use of an automatic shuffling device between shoes.[19] Borgata agreed to these conditions, and Ivey accepted maximum betting limits ranging from $50,000 to $100,000 per hand.[20] Under these arrangements, Ivey visited Borgata four times over a few months and won $9,626,000.[21]

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(D. N.J. Oct. 21, 2016) [hereinafter "Ivey II"].

6 *Id.* at *2 n.3.

7 *Id.*

8 *Id.*

9 *Id.*

10 *See id*.

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.* at *9.

17 *Id.*

18 *Id.* at *2.

19 *Id.*

20 *Id.* at **2–3.

21 *Id.* at *3.

After Ivey's fourth visit, Borgata learned that a casino in London was withholding millions of Ivey's winnings from a similar game, played with the same five conditions.[22] Its suspicions aroused, Borgata decided that Ivey's requested prerequisites were a ruse to perpetrate a form of alleged cheating known as an "edge sorting scam."[23] "Edge sorting" arranges the playing cards to reveal a discrepancy in the pattern on the back of the cards.[24] The pattern, in turn, foretells the value of the cards before betting.[25] In this particular case, under the guise of being superstitious, Sun asked the dealer to turn the cards in different directions so the pattern would show.[26] Sun knew that the automatic shuffler would not change the direction of the cards between shoes.[27] With the design pattern visible, Ivey was able to acquire "first card knowledge" about the value of the cards before each deal and was able to increase his bets when he saw favorable starting cards.[28] Using this method, Ivey tilted the odds of the game from a 1.06% house advantage to a 6.756% advantage in *his* favor.[29]

*B. Borgata files suit.*

Feeling scammed, Borgata filed suit in federal district court alleging "that 'Ivey's true motive, intention, and purpose in negotiating these playing arrangements was to create a situation in which he could surreptitiously manipulate what he knew to be a defect in the playing cards in order to gain an unfair advantage over Borgata.'"[30] Borgata alleged a variety of claims, including breach of contract, fraud, conspiracy, and RICO violations.[31] The thrust of Borgata's breach of contract claim was that each wager contained a contractual obligation to comply with the New Jersey's Casino Control Act ("CCA") and that Ivey's and Sun's failure to do so breached their gaming contracts (wagers) with Borgata.[32] Borgata's fraud, RICO, and conspiracy claims were based on similar allegations. For those claims, Borgata asserted that Ivey and Sun "misrepresented that they intended to abide by the rules of honest play established and required by the CCA."[33] Borgata also alleged that

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[22] *Id.*
[23] *Id.*
[24] *Id.* at *3.
[25] *Id.* at *4.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Marina Dist. Dev. Co., LLC v. Ivey, 93 F. Supp. 3d 327, 332 (D. N.J. 2015) [hereinafter "Ivey I"] (quoting Amend. Compl. Dkt. No. 5 ¶ 42).
[31] *Id.* at 332; *see also* Ivey II, *supra* note 5, at *10 n.22 (discussing Borgata's alternative theories of liability). Borgata also filed suit against the manufacturer of the cards, Gemaco. Ivey I, *supra* note 30, at 332 n.3.
[32] Ivey I, *supra* note 30, at 336.
[33] *Id.* at 339.

Ivey and Sun misrepresented the reasons for requesting the playing accommodations.[34]

Ivey and Sun moved to dismiss the complaint.[35] They argued that Borgata lacked any private causes of action under the CCA.[36] They also claimed that, if they played an "illegal game," then Borgata's claims were statutorily time-barred.[37] And they contended that the court should dismiss the fraud, conspiracy, and RICO claims because they did not commit an underlying fraudulent act.[38] Ivey and Sun maintained that they did not defraud or cheat Borgata because Ivey merely used his keen eyesight to observe information on the back of the cards that was equally available to other patrons and the casino.[39]

In opposition to the motion to dismiss, Borgata asserted that the CCA precludes only patrons' claims against casinos and does not bar casinos' claims against patrons.[40] Borgata also averred that, while Ivey's conduct may have violated the CCA, the casino was not attempting to privately enforce the statutes.[41] Instead, Borgata described its action as a common law breach of contract and fraud case, for which violations of the CCA may constitute evidence of breach or evidence of fraud.[42] Lastly, Borgata clarified that it was not claiming the game was "illegal," it was arguing that Ivey and Sun had an '"illegality of purpose' in playing an otherwise lawful game."[43]

When ruling on the motion to dismiss, the court threatened to administratively terminate Borgata's breach of contract claim as covered by the CCA.[44] The court agreed with Borgata that, since gaming is generally illegal except where authorized by statute, all gaming contracts contain an express or implied promise that both parties will comply with the CCA.[45] The court recognized that entertaining Borgata's contract claim would require determining whether Ivey's and Sun's actions amounted to cheating under the CCA and therefore whether they breached the terms of the gaming contract.[46] But in the court's estimation, case law precluded it from conducting this analysis or considering any claim that required an interpretation of the CCA.[47]

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[34] *Id.*
[35] *Id.* at 332, 334.
[36] *Id.* at 334.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.* at 339.
[45] *Id.* at 336.
[46] *Id.* at 338–39.
[47] *Id.* at 338 (citing Campione v. Adamar of N.J., Inc., 714 A.2d 299, 308 (N.J. 1998)).

New Jersey Supreme Court authority held that, because of the importance of maintaining stability and uniformity in the casino industry, the legislature vested gaming regulators with primary jurisdiction over claims involving CCA interpretation.[48] Under this precedent, the *Ivey* court stayed Borgata's breach of contract claim until the New Jersey Casino Control Commission or Division of Gaming Enforcement administratively resolved it.[49]

The court left open the possibility that casinos can assert other claims in a judicial forum—without first resorting to regulators—because the legislature did not design the CCA to preempt all common law causes of action.[50] "The CCA," the court noted, "does not create a common law cause of action that does not otherwise exist[,]"[51] and it was because "[t]here is no statutory or common law cause of action for a breach of an agreement to abide by the rules of an illegal gambling activity[,]" that the court could not hear the contract claim.[52] The court identified fraud as an available common law cause of action for casinos victimized by cheating, even if the fraud occurs within the confines of a regulated game.[53]

But the court narrowed the permissible factual allegations that it would allow to support a fraud claim outside the administrative process. As with its ruling on the breach of contract claim, the court refused to entertain Borgata's contention that Ivey and Sun defrauded Borgata by "misrepresent[ing] that they intended to abide by the rules of honest play established and required by the CCA…"[54] The court also thought these allegations required CCA interpretations that must first go before gaming regulators.[55] To avoid these administrative entanglements, the court construed Borgata's fraud-based claims as hinging on Ivey's and Sun's alleged misrepresentations about their purpose for requesting the playing accommodations.[56] So construed, the fraud-based claims did not depend on an application of the CCA and the court deemed those claims sufficiently pleaded to withstand the motion to dismiss.[57]

*C. The Court Enters Summary Judgment on Liability.*

Discovery did not materially alter the arguments presented at the motion to dismiss stage, and the case proceeded to summary judgment.[58] All parties agreed that the central issue before the court was whether the "use of the edge

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[48] *Id.*
[49] *Id.* at 339.
[50] *Id.* at 337 n.5.
[51] *Id.* at 337–38.
[52] *Id.* at 337 n.6.
[53] *Id.* at 337 n.5.
[54] *Id.* at 339.
[55] *Id.* at 339 n.9.
[56] *Id.* at 339.
[57] *Id.* at 342–43.
[58] Ivey II, *supra* note 5, at *1.

sorting technique in Baccarat constitutes fair play, breach of contract, or fraud."[59] Even though the court ruled earlier that there was "no statutory or common law cause of action for a breach of an agreement to abide by the rules of an illegal gambling activity,"[60] the court determined that it could address Borgata's breach of contract claim because the New Jersey regulators still had not issued a decision.[61]

After analyzing the CCA, the court ultimately concluded that edge sorting is a prohibited form of "using" or "possessing" "marked cards."[62] The court ruled as a matter of law that "Ivey and Sun's violation of the card marking provision in the CCA constitutes a breach of their mutual obligation with Borgata to play by the rules of the CCA."[63] Accordingly, the court granted summary judgment in favor of Borgata on its breach of contract claim.

Somewhat contradictorily, the court continued to focus on Ivey's and Sun's representations about their motivations for requesting the playing accommodations and did not also reconsider Borgata's fraud allegations about their alleged lack of intent to abide by the applicable statutes and rules when entering play.[64] The court's evaluation of their motivations stressed the role of Baccarat's game rules rather than the statutory scheme.[65] Although it earlier found that Ivey and Sun violated the CCA, the court deduced that "none of the actual rules of Baccarat were broken" because the rules of Baccarat do not prohibit players from handling or manipulating cards.[66] And because none of the game rules were broken, Ivey and Sun did not make any material misrepresentation to Borgata.[67] "That Borgata chose to believe that Ivey and Sun were superstitio[us]," the court explained, "does not amount to detrimental reliance, when no explanation at all could have resulted in the same course of

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[59] *Id.*

[60] Ivey I, *supra* note 30, at 337 n.6.

[61] Ivey II, *supra* note 5, at *5.

[62] *Id.* at **6–7. The Author takes no position on whether edge sorting constitutes impermissible cheating, or permissible "advantage play," nor does the Author express an opinion about Ivey's or Sun's alleged liability. *See* Kevin Schweitzer, *Living on the Edge, Sorting Out the Rules: Advantage Play Cuts the Risk of Losing Money in A Casino, and Puts Players at Risk of Incurring Legal Action*, 6 UNLV GAMING L.J. 324, 332–33 (2016) (describing edge sorting as falling within the "gray area" "between innocent play and cheating"); *see also* Jordan Scot Flynn Hollander*, Superstition, Skill, or Cheating? How Casinos and Regulators Can Combat Edge Sorting*, 24 JEFFREY S. MOORAD SPORTS L.J. 1, 6–7 (2017) (describing edge sorting as an example of the second category of advantage play within the framework offered by Anthony Cabot and Robert Hannum).

[63] Ivey II, *supra* note 5, at *7.

[64] *See id*. at **7–12.

[65] *See id*. at *9 n.17.

[66] *Id.* at *9. Additionally, the court did not discern a violation of any CCA provision that requires a finding of fraud. *Id.* at *7 n.14.

[67] *Id.* at 9. Assuming the court is right that edge sorting is a form of cheating, its statement that "none of the actual rules of Baccarat were broken" is incorrect. *See infra* text accompanying note 149.

events."[68] Similarly, the court decided that Ivey's and Sun's misrepresentations were not material because Borgata could have granted or denied their requests to turn the cards even without an explanation.[69]

The court also relied on the maxim that a breach of contract alone does not amount to fraud and further held that "Ivey and Sun did not defraud Borgata in the legal sense…because their representations did not violate Baccarat's rules…."[70] The implication of the court's reasoning is that a violation of Baccarat's rules *would* amount to fraud—but not a breach of contract—while a violation of the CCA amounts to a breach of contract, but not fraud.[71] To reach this result, the court separated the game rules from the terms of the gaming contract and separated the CCA from the game rules. The court reasoned that "Borgata and Ivey and Sun were obligated to follow the proscriptions of the CCA in order to lawfully gamble in the first place, *and then* they were also obligated to follow the rules of Baccarat. Ivey and Sun breached their *primary* obligation" but not the *secondary* obligation imposed by the game's rules.[72] In the *Ivey* court's view, if game rules were part of the gaming contract like the CCA, representations in conflict with the game rules would merely breach the contract and would not be an independent basis for a fraud action.

On the record before it, the court did not find a misrepresentation, distinct from the breach of contract, that violated Baccarat's rules.[73] According to the court, "Borgata's argument devolve[d] into a contention that defendants acted fraudulently because they did not reveal their fraudulent intent. Fraud is not so easy to prove."[74] The court compared Ivey's and Sun's representations to a play-action pass in football or the "Marshall swindle" in chess—maneuvers designed to deceive an opponent within the confines of each game's respective rules.[75] It concluded that "Ivey and Sun's actions violated the rules of the CCA, a necessary, material, and mutual term of their contract with Borgata" but they "did not defraud Borgata in the legal sense…because their representations did not violate Baccarat's rules, were not material to Borgata, and no independent obligation to disclose existed under the circumstances."[76] The court entered judgment in favor of Ivey and Sun on Borgata's fraud-related claims and requested additional briefing on the issue of Borgata's contract damages.[77]

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[68] Ivey II, *supra* note 5, at *9.
[69] *Id.* at **9–10.
[70] *Id.* at *12.
[71] *See id*. at **11–12.
[72] *Id.* at *11 (emphases added); *see also infra* text accompanying note 149.
[73] Ivey II, *supra* note 5, at *12.
[74] *Id.* at *10 n.19.
[75] *Id.* at **11–12.
[76] *Id.* at *12.
[77] *Id.*

*D. The Court Rejects the Application of Expectation Damages.*

In its supplemental briefing, Borgata advanced two different measures of its contract damages.[78] First, it offered restitution damages as a way to return the parties to their pre-wager positions.[79] Borgata calculated this amount by accounting for all the money that Ivey deposited, withdrew, redeemed, and won at Baccarat.[80] Borgata also included an amount that Ivey won during a craps session purportedly with some of his ill-gotten Baccarat winnings, but Borgata excluded an allegedly unrelated amount that Ivey lost at craps.[81] This figure totaled $10,130,000.[82] Borgata separately requested the return of $249,199.83 in "comps."[83]

Borgata's second damage calculation used expectation damages—"what Borgata would have won had Ivey and Sun not engaged in edge-sorting."[84] This measure would have added an additional $5,418,311.40 to Borgata's recovery by computing what Borgata should have mathematically won if the casino's 1.06% banker bet and 1.24% player bet advantages were applied to the amount Ivey wagered during his four playing sessions.[85]

The court accepted the restitutionary measure of damages and rejected the expectation-damage calculation as too speculative.[86] The court surmised that "[a]lthough basic math can calculate Borgata's potential winnings based on the house edge, the number of hands played, and the average bet,…the whims of Lady Luck" make it impossible to determine "whether defendants would have beaten the odds in a normal game over those four days, by luck or otherwise, and by what amount."[87] To the court, expectation damages unduly relied on hypothetical facts.[88] Except for the comps, the court awarded the return of all of Ivey's and Sun's winnings, including the amount that Ivey won playing craps with his Baccarat winnings.[89]

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[78] Marina Dist. Dev. Co., LLC v. Ivey, —- F. Supp. 3d —-, 2016 WL 7246074, at *1 (D. N.J. Dec. 15, 2016) [hereinafter "Ivey III"].
[79] *Id.* at **1–3.
[80] *Id.* at *3.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.* at *1.
[85] *Id.* at *3 n.6.
[86] *Id.* at *1.
[87] *Id.* at *3 n.6.
[88] *Id.*
[89] *Id.* at **3-4.

## III. CAUSES OF ACTION AND ADMINISTRATIVE REMEDIES

### A. *Fraud is the Proper Common Law Claim to Recover Losses Caused by Cheating.*

Between the motion to dismiss and motion for summary judgment rulings, the *Ivey* court flip-flopped on the appropriate cause of action and the role of administrative remedies.[90] At first, the *Ivey* court relegated the breach of contract claim to the administrative process while it proceeded with the fraud claim.[91] As the basis for doing so, the court highlighted that the CCA—like most states' gaming regimes—does not create a cause of action unknown at common law.[92] The court acknowledged that a common law fraud claim exists for victims of cheating,[93] but "[t]here is no statutory or common law cause of action for a breach of an agreement to abide by the rules of an illegal gambling activity."[94] Yet, at summary judgment, the court's decision rested entirely on Borgata's contractual theory of liability and rejected the fraud-based claims without any examination of the common law.[95] The court's change of liability theories did not give sufficient weight to the history and nature of the established common law rule that a party cheated at gambling can recover any losses through a cause of action for fraud, not breach of contract.

The activity of gambling predates the common law—it "has been present in all cultures during all periods of time."[96] King Richard II introduced the first English statute prohibiting any kind of gambling game in 1388.[97] The statute prohibited only laborers and servants of husbandry, artificers, and victuallers (but not "gentleman") from playing "hand and foot ball, coits, dice, throwing of stone keyles, and such other importune games."[98] Subsequent statutes imposed various other restrictions, but in 1603, the court decision in *The Case of*

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[90] Setting aside, for the moment, whether the *Ivey* court correctly understood the nature of the fraudulent misrepresentation. *See infra* Section III(B).

[91] *See generally* Ivey I, *supra* note 30 (discussing administrative termination of contract based claims but allowing fraud based claims to proceed).

[92] *Id.* at 338; *see also id*. at 337 n.5; Campione v. Adamar of N.J., Inc., 714 A.2d 299, 309 (N.J. 1998) (courts will recognize a casino patron's private right of action for money damages if the claim has a common law basis).

[93] Ivey I, *supra* note 30, at 337 n.5.

[94] *Id.* at 337 n.6.

[95] *See generally* Ivey II, *supra* note 5.

[96] *See* Anthony N. Cabot et al., *Alex Rodriguez, A Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance*, 57 DRAKE L. REV. 383, 384 (2009) (stating "gambling has been present in all cultures during all periods of time.") (quotations omitted); *see also* Richard O. Faulk & John S. Gray, *Public Nuisance at the Crossroads: Policing the Intersection Between Statutory Primacy and Common Law*, 15 CHAP. L. REV. 495, 509 n.89 (2012) ("The traditional date marking the beginning of the common law is 1066 A.D., the year of the Norman Conquest.").

[97] United States v. Dixon, 25 F. Cas. 872, 874 (D.C. Cir. 1830).

[98] *Id.* (quoting 11 Hen. IV c. 4 (1409)).

*Monopolies* made it virtually impossible to outlaw all gaming.[99] That decision held that each game was legal unless expressly prohibited by the legislature.[100] In practice, the decision allowed gaming operators to slightly modify each game to avoid prohibition and the legislature could not outlaw each new variation fast enough.[101] Thus, wagering contracts were effectively valid under the common law.[102]

Without the realistic ability to ban all gaming, the Crown restricted its regulatory efforts to prohibiting cheating and limiting the amount of wagers.[103] For example, the Statute of Charles II in 1661 provided that the victim of cheating "'by any Fraud, Shift, Cousenage, Circumvention, Deceit, or unlawful Device, or ill Practice whatsoever', might recover treble damages, one moiety thereof for the Crown, by suit within 6 months 'next after such play', or suit might be brought by any other person within one year after the six months expired."[104] The Statute of Charles II also rendered judicially unenforceable gaming debts in excess of one hundred Pounds.[105] But parties could still gamble for any amount of ready money, and gaming debts remained enforceable up to the one hundred Pound limit.[106]

In 1710, the Statute of Anne further restricted the enforceability of gaming debts and provided other protections against gaming fraud.[107] Its comprehensive framework rendered void and unenforceable most (but not quite all) claims to recover unpaid gambling debts.[108] Only gaming debts for ten Pounds or less remained fully enforceable in court.[109] Losers of more than ten Pounds could sue within three months to recoup losses along with their costs of suit.[110] "If the loser did not sue, any other person could sue for treble damages, one moiety for the suitor, and one moiety for the poor of the parish."[111]

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[99] *See* Ronald J. Rychlack, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 17 (1992).

[100] *Id.*

[101] *Id.*

[102] *Id.*; *see also* Evans v. Cook, 11 Nev. 69, 74 (1876).

[103] Rychlack, *supra* note 99, at 17–18 & n.31 (1992) ("Cheating has long been a primary reason for regulating gambling").

[104] *See* LaFontaine v. Wilson, to Use of Ugast, 45 A.2d 729, 732 (Md. 1946) (quoting 16 Charles 2, Ch. 7 (1664) ("An Act against deceitful, disorderly and excessing gaming")); *see also* Rychlack, *supra* note 99, at 17–18.

[105] Rychlack, *supra* note 99, at 18; *LaFontaine*, 45 A.2d at 732.

[106] Rychlack, *supra* note 99, at 18; *LaFontaine*, 45 A.2d at 732.

[107] *See* Rychlack, *supra* note 99, at 19; *see also LaFontaine*, 45 A.2d at 732.

[108] Rychlack, *supra* note 99, at 19–20; *see also LaFontaine*, 45 A.2d at 732; Burke v. Buck, 99 P. 1078, 1080 (Nev. 1909) (describing the Statute of Anne's prohibitions as "comprehensive.").

[109] *See* Rychlack, *supra* note 99, at 20; *see also* Barret v. Hampton, 4 S.C.L. 226 (S.C. Const. App. 1807) ("Assumpsit lies to recover money won at play under £10, if the play be fair.").

[110] *See* Rychlack, *supra* note 99, at 19.

[111] *LaFontaine*, 45 A.2d at 732.

Notably, Section 5 of the Statute of Anne decreed that winning more than ten Pounds by fraud was punishable as perjury with forfeiture of five times the amount won.[112] Courts could also impose corporal punishment for cheating.[113]

These English statutes were received and incorporated into American jurisprudence at the Founding.[114] Many early American jurisdictions, through statutes or court decisions, extended the Statute of Anne's protections by declaring all wagering contracts illegal and barring all enforcement of gaming debts.[115] In one early decision, the United States Supreme Court observed the different English and American approaches: "In England, it is held that the contracts, although wagers, were not void at common law, and that the statute has not made them illegal, but only non-enforceable, while generally, in this country, all wagering contracts are held to be illegal and void as against public policy."[116]

Even though American courts treated gaming contracts as illegal, the majority of jurisdictions continued to permit parties cheated "in a crooked gambling game" to pursue an action for fraud.[117] Judges treated wagers

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[112] *Id.*

[113] *See* Rychlack, *supra* note 99, at 19; W. Indies, Inc., v. First Nat. Bank of Nev., 214 P.2d 144, 151 (Nev. 1950).

[114] *See* Rychlack, *supra* note 99, at 20 ("As the New World developed, the Statute of Anne, like other common law doctrines, became part of the law of every state."); *see also* Sigel v. McEvoy, 707 P.2d 1145, 1145–46 (Nev. 1985) (citing Sea Air Support, Inc. v. Herrmann, 613 P.2d 413 (Nev. 1980); Burke v. Buck, 99 P. 1078 (Nev. 1909); Evans v. Cook, 11 Nev. 69 (1876)).

[115] *See, e.g.,* Scott v. Courtney, 7 Nev. 419, 421 (1872) (holding that the common law right to recover money won at gaming "is burdened with so many restrictions, that at present it can hardly be said the right exists at all. In the United States, wagering and gaming contracts seem to have met with no countenance from the courts, and consequently in nearly every state they are held illegal . . . ."); *see also* Tatman v. Strader, 23 Ill. 493 (1860) (stating the Statute of Anne "9 Anne makes all bets upon games void.").

[116] Irwin v. Williar, 110 U.S. 499, 510 (1884).

[117] *See* Berman v. Riverside Casino Corp., 323 F.2d 977, 979 (9th Cir. 1963) (citing, among others, Harris v. Bowden, Queen's Bench, 1563, Cro. Eliz. 90, 78 Eng. Rep. 348; Dufour v. Ackland, 1830, 9 L.J.K.B. 3) ("[T]he common law rule, as of the time of Nevada's admission to the Union, appears to have been that [a defrauded party] who lost money in a crooked gambling game could recover in a civil action."); Catts v. Phalen, 43 U.S. 376, 381 (1844) (holding that lottery operators can recover amounts paid to individual who fixed the drawing through "a deeply concocted, deliberate, gross, and most wicked fraud"); Hobbs v. Boatright, 93 S.W. 934 (Mo. 1906) (recognizing common law causes of action for fraud and conspiracy to recover losses stemming from fixed footrace); Stewart v. Wright, 147 F. 321 (8th Cir. 1906) (similar); *see also* Zaika v. Del E. Webb Corp., 508 F. Supp. 1005, 1008 (D. Nev. 1981) (citing *Berman* and recognizing a fraud action for losses caused by cheating); State Gaming Control Bd. v. Breen, 661 P.2d 1309, 1310 (Nev. 1983) (distinguishing action to recover alleged keno winnings from *Berman* and *Zaika* but citing them with approval) *but see* Babcock v. Thompson, 20 Mass. 446, 449 (1826) ("Clearly if the gaming had been fair, the law would give no remedy. The only question then is, whether the fraud will alter the case. We think it

impacted by cheating as forming no illegal contract at all[118]—the bets were a nullity or void *ab initio*[119]—and courts did not construe cheated losses as *true* unrecoverable "gaming debts."[120] For example, the Supreme Court of North Carolina held in 1843

> that money, fairly lost at play at a forbidden game and paid, cannot be recovered back in an action for money had and received. But it is perfectly certain, that money, won by cheating at any kind of game, whether allowed or forbidden, and paid by the loser without a knowledge of the fraud, may be recovered.[121]

The availability of common law fraud claims—and the distinction between money exchanged in a legitimate (or square) game and money lost as a result of cheating—persisted through the creation of modern regulatory regimes.[122] The Ninth Circuit's decision in *Erickson v. Desert Palace, Inc*. is an illustration. There, a casino refused to pay a slot machine jackpot won by a minor.[123] After unsuccessfully exhausting administrative remedies and seeking judicial review in state court, the minor's parents filed a second action in federal court alleging (among other things) breach of contract, quasi-contract, fraud, and cheating.[124] The casino moved to dismiss, citing Nevada statutes that largely mirror the common law unenforceability of "gaming debts" and that restrict actions to recover certain gaming debts to an administrative review process.[125] The

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will not."); Bradley v. Doherty, 106 Cal. Rptr. 725, 726 (Ct. App. 1973) (stating the general rule that California courts will not enforce illegal betting contract applies even if the winner wins by fraud or deceit) (citing Abbe v. Marr, 14 Cal. 210, 211 (1859)).

[118] *See* Webb v. Fulchire, 25 N.C. 485, 487 (1843) ("Such a transaction cannot for a moment be regarded as a wager, depending on a future and uncertain event; but it was only a pretended wager").

[119] Criswell v. Gaster, 5 Mart.(n.s.) 129, 131–32 (La. 1826) ("The aleatory contract was clearly simulated and feigned, and although intended to defraud, it could legally produce no effect; nothing could have been lost on it, and consequently nothing could be won. . ..the contract must be considered as void *ab initio*. . ..").

[120] *See* Grim v. Cheatwood, 257 P.2d 1049, 1051 (Okla. 1953) ("Plaintiffs' action is not an action to recover losses sustained in a gambling game."); Lockman v. Cobb, 91 S.W. 546, 550 (Ark. 1905) ("There was no uncertain event to constitute a wager. It was determined and understood what the result of the pretended race would be before it was made. By fraud and deceit they caused him to make a pretended wager and robbed him of his money, pretending that he had lost it."); *see also* Erickson v. Desert Palace, Inc., 942 F.2d 694, 696 (9th Cir. 1991) (characterizing actions to collect unpaid winnings as a "gaming debt" and distinguishing between actions to recover losses sustained in a "crooked" game).

[121] *Webb*, 25 N.C. at 486.

[122] Rose, *supra* note 3, at 629 ("It is important to note that these changes in the law on the collectability of gambling debts did not change the common law of Nevada. . .there is nothing in these statutes to indicate that the Nevada legislature meant to overturn the Statute of Anne.").

[123] *Erickson*, 942 F.2d at 694–95.

[124] *Id.* at 694–97.

[125] *See id*. at 695–96 (citing NRS 463.361; NRS 463.361–NRS 463.366; NRS

parents tried to avoid the unenforceability bar, and the prior unfavorable outcome of the administrative proceeding, by invoking the common law exception for fraud claims.[126] They argued that the casino's refusal to pay the jackpot amounted to fraud and did not involve a "gaming debt" confined to administrative remedies.[127]

The Ninth Circuit disagreed. It clarified that the common law "provides for a cause of action for fraud to recover *losses* sustained in a gambling transaction."[128] The court indicated that the enactment of the gaming statutes, and the creation of the administrative process, did not abrogate the common law rule that a party can file a civil fraud action to recover losses suffered from cheating.[129] Instead, the statutes reflect the common law understanding that unpaid *winnings* from a legitimate game—including slot machine jackpots—are considered "gaming debts," and those debts are now only enforceable through the administrative process, if at all.[130] Because the parents sued for the amount that the minor *would have won* had he been old enough to play, not an amount lost from cheating, their suit was actually for a "gaming debt," and they were restricted to administrative remedies.[131] The court summarized that "parties who assert they are owed a gaming debt, fraud or no fraud, are confined to the administrative process followed by state judicial review."[132]

A Third Circuit Court of Appeals decision interpreting New Jersey law and the CCA aligns with the Ninth Circuit's opinion in *Erickson*. In *Mankodi v. Trump*, a patron sued a casino over a hand of blackjack.[133] The patron bet $3,700 and, after he was dealt an ace, the dealer rescinded the hand.[134] Gaming regulators later ruled that the dealer illegally withdrew the hand.[135] Thereafter, the patron sued the casino asserting a laundry list of claims, including breach of contract and fraud.[136] The Third Circuit, like the *Ivey* court's motion to dismiss

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463.3662- NRS 463.3668); *see also* Zoggolis v. Wynn Las Vegas, LLC, 768 F.3d 919, 921 (9th Cir. 2014) ("This part of the statute is consistent with the common-law prohibition against enforcement of gaming debts.").

126 *Erickson*, 942 F.2d at 696.

127 *Id.*

128 *Id.* at 696.

129 *See id*. at 696–97.

130 *See id*. at 695–97.

131 *Id.* at 696–97; *see also* Mattes v. Ballys Las Vegas, 227 F. App'x 567, 572 (9th Cir. 2007) ("Mattes' claim falls clearly within this category, because he is attempting to recover a gaming debt allegedly owed, which he argues he legitimately won or would have won."); Devon v. Unbelievable, Inc., 29 F.3d 631 (9th Cir. 1994) (unpublished) (unpaid slot machine jackpot winnings considered a "gaming debt" and patron must exhaust administrative remedies).

132 *Erickson*, 942 F.2d at 697.

133 Mankodi v. Trump Marina Assocs., LLC, 525 F. App'x 161, 162 (3d Cir. 2013).

134 *Id.*

135 *Id.* at 163.

136 *Id.* at 163, 164–67.

ruling, affirmed dismissal of the patron's breach of contract claim as a disguised attempt to privately enforce the CCA.[137] But the court substantively addressed the patron's fraud allegations and did not consider them preempted or covered by the CCA.[138] By entertaining the fraud allegations outside the administrative process, the Third Circuit adhered to the common law rule that a victim of gaming fraud may seek recourse in court. Even the *Ivey* court initially conceded that it was unlikely that "the New Jersey legislature intended that casinos could be victimized by fraud and thereafter bar them, indirectly, from seeking redress in the courts, even if the fraud arose in the context of a regulated game, the rules of which are designed by state regulation."[139]

Against this background, the *Ivey* court's reliance on a breach of contract theory appears misplaced. As the court originally acknowledged, the CCA did not preempt all common law claims or create a cause of action that did not otherwise exist.[140] Under the common law, there was no contract action to recover cheated losses—fraud was the proper claim for victims of cheating. And even though the New Jersey courts take an apparently broad view of the issues that litigants must first present to gaming regulators,[141] a properly framed and supported fraud claim does not need to be referred to regulators before filing in court.[142]

### *B. The Fraudulent Act is Entering the Wager Without the Intent to Honor the Rules of Play.*

The *Ivey* court's resort to a contractual theory of liability may be a symptom of misunderstanding the features of the gaming contract and the nature of a cheating patron's fraudulent misrepresentation. Laboring under those misunderstandings, the court strained to distinguish the bases of contractual and tort liability and stretched to find a fraudulent act distinct from the breach of the gaming contract. Without an explanation, the *Ivey* court seemingly drew the dividing line between statutory provisions, as "primary

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[137] *Id.* at 166. In a footnote, the *Ivey* court disagreed with what it described as the *Mankodi* court's summary dismissal of "a plaintiff's claim against a casino because his claims required an interpretation of the CCA." Ivey I, *supra* note 30, at 339 n.8.

[138] *See Mankodi*, 525 Fed. App'x at 166–67 & n.5 (noting one judge would have found the fraud claim preempted along with the contract claim); *see also* notes 167–68 & accompanying text (describing the nature of the fraud claim at issue in *Mankodi*).

[139] Ivey I, *supra* note 30, at 338 n.5.

[140] *Id.* at 337–38 & n.5.

[141] *See id.* at 338–39 & n.8 (citing Campione v. Adamar of N.J., Inc., 714 A.2d 299, 308 (N.J. 1998); *Golden Nugget*, 2015 WL 689437).

[142] *Mankodi*, 525 F. App'x at 166–67; *Erickson*, 942 F.2d at 696; *cf.* Smerling v. Harrah's Entm't, Inc., 912 A.2d 168, 172 (N.J. Super. App. Div. 2006) (explaining the difference between primary and exclusive jurisdiction and surveying the types of common law causes of action that must first go to gaming regulators).

obligations," and game rules, as secondary obligations.[143] Under the court's framework, the CCA is part of the gaming contract so that a breach of contract claim exists for a violation of its statutory provisions, but, unlike the CCA, Baccarat's game rules are not part of the gaming contract so that a representation in conflict with the game rules can be an independent basis for a fraud claim.[144] The court's arbitrary exclusion of the game rules from the terms of the gaming contract and convoluted analysis of Borgata's fraud claim overlook several fundamental elements of gaming law.

Each wager between a casino and a patron forms a contract.[145] The patron makes the contractual offer by placing the wager, and the casino accepts the patron's offer by acknowledging the bet or simply starting the game.[146] In the fast-paced gaming environment, contract formation generally occurs in a matter of seconds without any negotiation over the terms of the contract.[147] As a result, the statutes and regulations that dictate game play supply the gaming contract's specific terms.[148] These statutes and regulations are the default rules for the games, and the *Ivey* court correctly determined that they also act as the default terms of the gaming contract.[149]

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[143] Ivey II, *supra* note 5, at *11.

[144] *See id.*; *see also* Ivey III, *supra* note 78, at *1 ("The Court determined that Ivey and Sun breached their primary obligation to not use marked cards in violation of the CCA, which constituted a breach of contract to abide by the CCA."); *Id.* at *1 n.2. ("The Court found in favor of Ivey and Sun on Borgata's claim that the edge-sorting scheme constituted fraud because Ivey and Sun did not violate the rules of Baccarat, and Borgata did not rely upon a material misrepresentation.").

[145] Anthony Cabot & Robert Hannum, *Advantage Play and Commercial Casinos*, 74 Miss. L.J. 681, 722 (2005).

[146] *Id.* at 723–24; ANTHONY N. CABOT AND KEITH C. MILLER, THE LAW OF GAMBLING AND REGULATED GAMING 202 n.1 (2011); *see also* Jordan T. Smith, *The Iowa Supreme Court's Flawed Application of Gaming Law Principles in* Blackford v. Prairie Meadows Racetrack and Casino, 17 GAMING L. REV. & ECON. 275, 277–79 (2013) (analyzing the Iowa Supreme Court's erroneous conclusion that the casino is the offeror).

[147] *See* Cabot & Hannum, *supra* note 145, at 722 (noting "[c]asino style wagering is essentially an adhesion contract between the casino and its patrons."); *see also* Tose v. Greate Bay Hotel & Casino Inc., 819 F. Supp. 1312, 1316 n.8 (D. N.J. 1993) (stating "there is little freedom of contract in the usual sense" as "every aspect of the relationship between the gambler and the casino is minutely regulated by the state").

[148] Cabot & Hannum, *supra* note 145, at 726; *see also* Blackford v. Prairie Meadows Racetrack & Casino, Inc., 778 N.W.2d 184, 189 (Iowa 2010) (stating statutory and regulatory restrictions are part of the parties' gaming contract).

[149] *See* Ivey I, *supra* note 30, at 336 ("It follows then that contractual agreements, whether express or implied, governing casino gambling in New Jersey include a provision that both parties agree to abide by the CCA."). But because statutes and regulations are game rules, the *Ivey* court's conclusion that "none of the actual rules of Baccarat were broken" is inaccurate. Ivey II, *supra* note 5, at *9. If edge sorting is cheating, and violates a statute, then, by definition, Ivey broke the rules of the game. It also appears that the parties violated baccarat's game rules for another reason. Subchapters 3 and 4 of the New Jersey Administrative Code § 69F set forth

However, the *Ivey* court failed to consider that written game rules displayed at the gaming area, and unwritten rules established by custom, tradition, and common understanding, may impose additional contractual terms.[150] For instance, slot machine signage may set a maximum payout or describe the jackpot symbol alignment.[151] Likewise, the statutes, regulations, or rules governing craps may not explicitly disclose that a patron loses if he rolls a seven after establishing a point number, but this rule is commonly understood.[152] These written and unwritten game rules are also part of the gaming contract just like statutes and regulations.[153] And it is beyond serious debate that "don't cheat" is, at minimum, an unwritten rule of every game—and is part of every gaming contract—even if there is no statute, regulation, or written rule expressly prohibiting it.[154]

But the incorporation of game rules and anti-cheating provisions into the gaming contract does not mean that a contractual theory of liability necessarily subsumes all actions to recover cheated losses. It is well accepted that "the failure to fulfill a promise to perform in the future may give rise to a fraud claim if the promisor 'had no intention to perform at the time the promise was made.'"[155] The Restatement (Second) of Torts explains that this rule "is true whether or not the promise is enforceable as a contract."[156] If the contract is void or unenforceable—like early American courts treated gaming contracts afflicted by cheating—the injured party's sole remedy is an action in deceit.[157] On the other hand, if the gaming contract is enforceable—and prohibitions on cheating are incorporated into the contractual terms through statutes, regulations, or game rules—"the person misled by the representation has a cause of action in tort as an alternative at least, and perhaps in some instances

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the state's rules for Baccarat and those provisions seem inconsistent with the conduct of Borgata and Ivey. *See* N.J. ADMIN. CODE § 69F Subchapters 3 and 4, http://www.nj.gov/oag/ge/docs/Regulations/CHAPTER69F.pdf (last visited May 15, 2017). The *Ivey* court did not address these regulations.

150 *See* Cabot & Hannum, *supra* note 145, at 725.

151 *See, e.g.,* McKee v. Isle of Capri Casinos, Inc., 864 N.W.2d 518, 527 (Iowa 2015) ("We agree with the district court that the Miss Kitty [slot machine] rules of the game are the relevant contract here and that they form an express contract."); Macon Cty. Greyhound Park, Inc. v. Knowles, 39 So. 3d 100, 110 (Ala. 2009) ("Thus, we hold that the terms that were necessary and indispensable to the formation of an enforceable contract between Victoryland and Knowles were the rules of the wager incorporated into the help screens and pay tables of [the] machine"); Eash v. Imperial Palace of Miss., LLC, 4 So. 3d 1042, 1048 (Miss. 2009) (stating that game rules posted on slot machine were the relevant contractual terms).

152 Cabot & Hannum, *supra* note 145, at 725.

153 *Id.*

154 *See id.*

155 *See, e.g.,* Cundiff v. Dollar Loan Ctr. LLC, 726 F. Supp. 2d 1232, 1241 (D. Nev. 2010) (quoting Bulbman, Inc. v. Nev. Bell, 825 P.2d 588, 592 (Nev. 1992)).

156 RESTATEMENT (SECOND) OF TORTS § 530 cmt. c (1977).

157 *See id.*

in addition to his cause of action on the contract."[158]

In *U.S. ex rel. O'Donnell v. Countrywide Home Loans, Inc.*, the Second Circuit Court of Appeals recently examined in exhaustive detail common law fraud claims and their interaction with contract law.[159] It concurred with the *Ivey* court's assessment "that a breach of contract alone is not fraud."[160] The Second Circuit observed that "the common law does not permit a fraud claim based solely on contractual breach; at the same time, a contractual relationship between the parties does not wholly remove a party's conduct from the scope of fraud."[161] The relevant inquiry "is *when* the representations were made and the intent of the promisor *at that time*."[162] "[A]t common law," the court continued, "a post-agreement intent to breach the contract is not actionable as fraud."[163] "Failure to comply with a contractual obligation is only fraudulent when the promisor *never intended* to honor the contract."[164] The Second Circuit pointed out that direct proof of fraudulent intent is rare and usually comes from inferential or circumstantial evidence.[165] "In sum," the court concluded, "a contractual promise can only support a claim for fraud upon proof of fraudulent intent not to perform the promise at the time of contract execution. Absent such proof, a subsequent breach of that promise—even where willful and intentional—cannot in itself transform the promise into a fraud."[166]

Applying these principles to the gaming context, there exists a common law fraud action to recover cheated losses—even though wagers are contracts with express or implied anti-cheating provisions—where a patron places a bet without intending to abide by his obligation to play by the rules. The Third Circuit's *Mankodi* blackjack case, discussed above, correctly applied this rule. That court affirmed the dismissal of the patron's fraud claims because the complaint insufficiently pleaded "facts showing that the Casino intended to rescind the blackjack hand *at the time it represented that it would play it*."[167] The court reasoned that "[a]lthough the Casino later did rescind the hand, we may not 'infer fraudulent intent from mere nonperformance' of a contract, as

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158 *Id.*

159 822 F.3d 650, 656–62 (2d Cir. 2016).

160 *Compare* Ivey II, *supra* note 5, at *12 *with O'Donnell*, 822 F.3d 650, 658 (2d Cir. 2016); *see also* RESTATEMENT (SECOND) OF TORTS § 530 cmt. d (1977) ("The intention of the promisor not to perform an enforceable or unenforceable agreement cannot be established solely by proof of its nonperformance. . . .").

161 *O'Donnell*, 822 F.3d at 658.

162 *Id.*

163 *Id.* at 659. A claim for breach of contract or breach of the implied covenant of good faith and fair dealing may be appropriate when a party first decides to cheat during play (after the wager has been offered and accepted).

164 *Id.* at 660 (quotations omitted).

165 *Id.* at 659.

166 *Id.* at 662.

167 Mankodi v. Trump Marina Assocs., LLC, 525 F. App'x 161, 166-67 (3d Cir. 2013) (emphasis added).

doing so would 'eviscerate the distinction between a breach of contract and fraud.'"[168] To state a gaming fraud claim, the plaintiff must plead facts demonstrating that the defendant did not intend to play by the rules when it offered or accepted the wager.[169]

From an evidentiary standpoint, there will often be direct or circumstantial proof beyond the act of cheating itself that demonstrates the cheater did not intend, at contract formation, to perform his contractual obligation to play by the rules. For example, in *Grim v. Cheatwood,* the plaintiff lost money in a sham poker game and recovered in a fraud action based on evidence of pre-game "collusion and collaboration" between the defendant and "two of his cohorts" to mark cards and cheat the plaintiff out of $1,000. [170] There was similar evidence in *Hobbs v. Boatright* where a jury found overwhelming proof of a long-running, elaborate con to entice wealthy individuals to participate in fixed footraces.[171] *Lockman v. Cobb* is another case involving rigged footraces where the court emphasized evidence of "a previous understanding" that one of the runners would intentionally fall down.[172]

Criminal prosecutions of cheaters provide other examples. Indeed, the *Ivey* court noted the similarities between civil and criminal fraud actions.[173] In *Sheriff of Washoe County v. Martin*, authorities arrested the defendant and charged him with cheating in violation of Nevada's gaming statutes.[174] The prosecution alleged that the defendant sat at a blackjack table next to a known card crimper who, after tampering with the cards, signaled to the defendant how the defendant should play his hand.[175] Both the defendant and card crimper varied their betting patterns when new decks of un-crimped cards rotated into play.[176] After the preliminary hearing, the defendant filed a writ of habeas corpus arguing that the cheating statutes were unconstitutionally vague.[177]

On appeal, the Nevada Supreme Court upheld the statutes and affirmed the

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[168] *Id.* at 167 (quoting United States v. D'Amato, 39 F.3d 1249, 1261 n.8 (2d Cir.1994)); *see also* Ocean Cape Hotel Corp. v. Masefield Corp., 164 A.2d 607, 613–14 (N.J. Super Ct. App. Div. 1960) (holding that a "false state of mind" when making the promise may give rise to actionable fraud provided there is evidence to establish fraudulent intent beyond the mere nonperformance of the contract).

[169] *See Mankodi*, 525 F. App'x at 167 (citing Jewish Ctr. of Sussex Cnty. v. Whale, 432 A.2d 521, 524 (N.J. 1981); N.J. STAT. ANN. § 56:8–2 (requiring a "concealment, suppression or omission" for statutory fraud liability)).

[170] 257 P.2d 1049, 1049 (1953).

[171] 93 S.W. 934, 934–36 (1906).

[172] 91 S.W. 546, 550 (1905).

[173] Ivey II, *supra* note 5, at *10 n.19.

[174] 662 P.2d 634, 635–36 (Nev. 1983) (citing NRS §§ 465.015, 465.083, 199.480).

[175] *Id.* at 636.

[176] *Id.*

[177] *Id.*

decision to bind over the defendant.[178] The court highlighted that the legislature did not intend "to remove from the crime of cheating the requirement of fraudulent intent" and the court had "consistently drawn parallels between cheating and fraudulent conduct."[179] The court held that "if a player or dealer deceitfully alters the identifying characteristics or attributes of a game with the intent to deprive another of money or property by affecting the otherwise established probabilities of the game's various outcomes, he or she is guilty of cheating within the meaning of [the statutes]."[180] The court's analysis distinguished card counters[181] from card crimpers because crimpers illegally alter a characteristic of the game and eliminate the element of chance, while card counters merely use mental skills to take advantage of information that is equally available to everyone.[182] As for the defendant, the court found sufficient evidence of fraudulent intent, even though he did not crimp the cards himself, based on his conversation with the card crimper while playing, the card crimper's signaling, and the defendant's suspicious betting patterns between crimped and un-crimped decks.[183]

In Ivey's case, if edge sorting is actually cheating,[184] there was ample evidence of pre-contract formation fraudulent intent aside from the act of edge sorting. Ivey requested the five conditions so that he could successfully edge sort, and those requests indicate that he intended to ignore the rules of play before making any wager. One could also infer from Ivey's request to play with Sun that there was a prior agreement between the two to cheat, as with the fraudsters in *Grim*, *Hobbs*, and *Lockman*. And, like the defendant in *Martin*, Ivey varied his betting patterns—his contractual offers—to exploit the advantage of edge sorting.[185] The court found that Ivey bet small until the entire

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[178] *Id.* at 638.

[179] *Id.* (citing, among others, Berman v. Riverside Casino Corp., 247 F. Supp. 243, 251 (D. Nev. 1964), *aff'd*, 354 F.2d 43 (9th Cir. 1965) (knowledge and control are minimum requirements for imposing civil or criminal liability under statute prohibiting act of allowing operation of any cheating or thieving game or device)).

[180] *Id.*

[181] In another case, *Chen v. Nevada State Gaming Control Bd.*, 994 P.2d 1151, 1151–53 (Nev. 2000), the Nevada Supreme Court determined that a card counter using a fake passport did not commit fraud because the casino did not detrimentally rely on the passport when it allowed the card counter to play. Nor was the fake passport the proximate cause of the casino's damages—the patron's skill was the proximate cause. *Id.* at 1152.

[182] *Martin*, 662 P.2d at 638.

[183] *See id.* at 636–38. The Nevada Supreme Court relied on similar evidence to uphold the cheating conviction in *Skipper v. State*, 879 P.2d 732, 732–33 (Nev. 1994) where a dice slider changed his method of throwing the dice to conceal his attempts to slide, altered his betting pattern, and used a partner to block the dealer's view.

[184] *See* Ivey II, *supra* note 5, at *6-7; *see* Schweitzer, *supra* note 62; *see also* Hollander, *supra* note 62.

[185] Ivey II, *supra* note 5, at *4.

shoe was sorted and, once the sorting was complete, he bet the maximum amount on every hand.[186] Even without considering the act of edge sorting, these circumstances demonstrate that neither Ivey nor Sun placed a wager with the intent to play by the rules. Quite the opposite. They never intended to honor their promise not to cheat when entering each gaming contract.

Properly conceptualized, it was unnecessary for the *Ivey* court to manufacture a separate basis for a fraud claim by excluding Baccarat's game rules from the terms of the gaming contract. Statutory, regulatory, and rules-based prohibitions on cheating are integral parts of the gaming contract. Still, victims of cheating possess a viable fraud claim to recover losses—despite the contractual nature of a wager—where the player places a bet without intending to play by the rules.

## IV. CALCULATION OF DAMAGES

No matter the theory of liability adopted, the *Ivey* court erred by rejecting Borgata's damage calculation using its statistical advantage or expected win probability. Both tort and contract law agree that parties to a gaming transaction can recover damages based on their statistical chance of winning when the odds are defined or ascertainable to a reasonable degree of certainty. In tort actions, like those sounding in fraud, a party may recover damages based on its probabilistic injury or loss of chance of winning a prize. The Restatement (Second) of Torts provides that an injured party can recover in "[c]ases in which the plaintiff is wrongfully deprived of the expectancy of winning a race or a contest, when he has had a substantial certainty or at least a high probability of success."[187] The Restatement contains two illustrations to illuminate the point:

> [T]he plaintiff is entered in a contest for a large cash prize to be awarded to the person who, during a given time limit, obtains the largest number of subscriptions to a magazine. At a time when the contest has one week more to run and the plaintiff is leading all other competitors by a margin of two to one, the defendant unjustifiably strikes the plaintiff out of the contest and rules him ineligible. In such a case there may be sufficient certainty established so that the plaintiff may successfully maintain an action for loss of the prospective benefits.[188]
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> A is one of the three remaining contestants for a prize to be awarded in a newspaper popularity contest, all three remaining contestants having received substantially the same number of votes. For the purpose of discrediting A, B, a friend of one of the other contestants, causes A to be arrested, thus destroying A's chance of winning the prize, $3000. Assuming that there was more than a mere possibility that A might have won the prize, A is entitled to damages

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[186] *Id.*

[187] RESTATEMENT (SECOND) OF TORTS Nine 37A Spec. Note (1979); *see also* RESTATEMENT (SECOND) OF TORTS § 912 cmt. f (1979).

[188] RESTATEMENT (SECOND) OF TORTS Nine 37A Spec. Note (1979).

> from B based on the value of the chance that he would have received the prize, that is, in the absence of further evidence, $1000.[189]

These examples allowed recovery because the plaintiff's chance of winning was sufficiently certain. By contrast, there may be cases where the odds of winning are too fluid or uncertain to use probabilistic-injury theory. For instance, the Restatement (Second) of Torts indicates that the chances of winning a horserace may be too speculative to permit recovery.[190] But where the odds of a gambling game are defined, probabilistic-injury theory is an appropriate measure of damages. The best example comes from Judge Richard Posner of the Seventh Circuit Court of Appeals in *Milam v. Dominick's Finer Foods, Inc.*:[191]

> Suppose you're playing roulette on a 37-number wheel (18 red, 18 black, and 1 green) at the Casino de Monte-Carlo, and after you have placed your $1,000 bet on red, which will pay you $2,000 if the ball lands on red, the casino collapses through the negligence of a building contractor, destroying not only the roulette wheel but also your chips, and you cannot get the money you paid for them back because all the casino's records were destroyed when it collapsed. You've suffered a loss equal to a 48.6 percent chance of winning $2,000. So $972.73 would be your damages.[192]

Judge Posner's hypothetical demonstrates that the patron could rely on roulette's set odds to mathematically calculate his potential damages to a reasonable degree of certainty.[193] If the *Ivey* court had correctly conceived Borgata's fraud claim, Borgata should have been able to recover its loss of chance damages based on its established house edge in Baccarat and the

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[189] RESTATEMENT (SECOND) OF TORTS § 912 cmt. f Illus. 16 (1979).

[190] RESTATEMENT (SECOND) OF TORTS Nine 37A Spec. Note (1979) ("On the other hand, if the plaintiff has a horse entered in a race and the defendant wrongfully prevents him from running, there may well not be sufficient certainty to entitle the plaintiff to recover."); *see also Youst v. Longo,* 729 P.2d 728, 737 (Cal. 1987) ("[T]he winner of a horserace is not always the leader throughout the race for a horse can 'break the pack' at any point in the race, even as a matter of strategy. Further, many races are won by a 'nose.' Thus, no cause of action exists for interference with this horseracing event.").

[191] 588 F.3d 955 (7th Cir. 2009). The Author has previously criticized Judge Posner's roulette example because it fails to consider gaming statutes, regulations, and rules of play that terminate the spin (and gaming contract) as soon as a foreign object falls into the wheel. Jordan T. Smith, *No Spin: Why Judge Posner's Roulette Player Can Recover his Orange Chip*, 15 GAMING L. REV. & ECON. 693 (2011). The Author's critique does not undermine the application of probabilistic injury theory to the gaming context.

[192] *Milam*, 588 F.3d at 958.

[193] Judge Posner's example also demonstrates that a patron cheated by a casino would be wiser to rely on restitutionary damages to recover the amount wagered. *See* RESTATEMENT (SECOND) OF TORTS § 901 (1979) (setting forth the general principles of tort damages as including "compensation, indemnity or restitution for harms"). The odds of every gambling game favor the house so a cheated patron's use of probabilistic injury theory will always result in a recovery lower than the amount actually bet.

amount that Ivey bet on each hand. The standard house advantage in Baccarat is 1.06% for banker bets and 1.24% for player bets.[194] Applying those percentages to the amount Ivey bet, the court was able to calculate that Borgata was entitled to an additional $5,418.311.40.[195] Thus, the amount of Borgata's damages was mathematically certain.

The mere presence of Lady Luck does not render probabilistic-injury theory too speculative. In another case using his roulette hypothetical as an example, Judge Posner explains that luck-based "deviation[s] would matter. . .if the victim of a fraud had to prove his loss with mathematical exactitude. He does not."[196] Statistical calculations are enough when supported by adequate evidence.[197] And if there is any uncertainty, "doubts should be resolved against the wrongdoer [o]therwise the more grievous the wrong done, the less likelihood there would be of a recovery."[198]

The *Ivey* court should have adopted this type of calculation even under its contractual theory of liability. The Restatement (Second) of Contracts provides that

> [i]f a breach is of a promise conditioned on a fortuitous event and it is uncertain whether the event would have occurred had there been no breach, the injured party may recover damages based on the value of the conditional right at the time of breach.[199]

Under this rule, an injured party to an aleatory[200] contract "has the alternative remedy of damages based on the value of his conditional contract right at the time of breach, or what may be described as the value of his 'chance of winning.'"[201] Modifying the Restatement (Second) of Torts' horseracing example, the Restatement (Second) of Contracts allows a bettor to recover:

> A offers a $100,000 prize to the owner whose horse wins a race at A's track. B accepts by entering his horse and paying the registration fee. When the race is run, A wrongfully prevents B's horse from taking part. Although B cannot prove that his horse would have won the race, he can prove that it was considered to have one chance in four of winning because one fourth of the money bet on the race was bet on his horse. B has a right to damages of $25,000 based on the value of the conditional right to the prize.[202]

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194 Ivey III, *supra* note 78, at *3 n.6.

195 *Id.*

196 BCS Servs., Inc. v. Heartwood 88, LLC, 637 F.3d 750, 760 (7th Cir. 2011).

197 *Id.*

198 *Id.* at 759 (internal citations and quotations omitted).

199 RESTATEMENT (SECOND) OF CONTRACTS § 348(3) (1981).

200 "An aleatory contract is one in which at least one party is under a duty that is conditional on the occurrence of an event that, so far as the parties to the contract are aware, is dependent on chance . . . . Common examples are contracts of insurance and suretyship, as well as gambling contracts." RESTATEMENT (SECOND) OF CONTRACTS § 379 cmt. a (1981).

201 RESTATEMENT (SECOND) OF CONTRACTS § 348 cmt. d (1981).

202 *Id.* at cmt. d Illus. 5.

Again, the presence of set or defined odds facilitates recovery. Therefore, even under a contractual theory of liability, the court should have permitted Borgata to recover the value of its chance of winning as established by its statistical advantage in Baccarat.

## V. CONCLUSION

The available remedies for victims of cheating have advanced considerably over time. Instead of breaking kneecaps (or worse), most parties duped in a gambling game are now able to seek recourse in a civil action for fraud without being limited to administrative remedies. And while the *Ivey* court mistakenly limited Borgata to a breach of contract theory, victims of cheating can state a viable fraud claim if they possess evidence—aside from the act of cheating itself—that the cheater never intended to play by the rules when he entered the gaming contract. Under either theory of liability, parties cheated at gambling can recover damages based on their statistical chance of winning. After all, every gambler knows, deep down, that the odds of each game are established to such a degree of mathematical certainty that the house will win in the long run.