University of St. Thomas Journal of Law and Public Policy

Volume 15
Issue 1 *Neuroscience and the Law*

Article 5

October 2021

An Update on Gambling Disorder, Neuroscience, and the Law

Stacey A. Tovino

AN UPDATE ON GAMBLING DISORDER, NEUROSCIENCE, AND THE LAW

STACEY A. TOVINO*

INTRODUCTION

The American Psychiatric Association (APA) defines gambling disorder as "[p]ersistent and recurrent problematic gambling behavior leading to clinically significant impairment or distress," indicated by an individual exhibiting a minimum of four diagnostic criteria during a twelve-month period.[1] This Essay builds on my prior scholarship examining the legal treatment of individuals with gambling disorder in the context of health, disability, and professional responsibility laws.[2] In an article published in 2014, for example, I argued that gambling disorder is not a legally

* Professor of Law and Faculty Lead, MLS and LLM in Healthcare Law Programs. The University of Oklahoma College of Law, Norman, Oklahoma. The Author thanks Dr. Charles Reid, Ms. Allison Cole, Mr. Jack Buck, and the *University of St. Thomas Journal of Law and Public Policy* for the opportunity to participate in the Neuroscience and the Law Symposium on November 13, 2020.

[1] *Diagnostic and Statistical Manual of Mental Disorders,* AM. PSYCH. ASSO. (5th ed. 2013). [hereinafter DSM-5] (providing the following diagnostic criteria: (1) "Needs to gamble with increasing amounts of money in order to achieve the desired excitement;" (2) "Is restless or irritable when attempting to cut down or stop gambling;" (3) "Has made repeated unsuccessful efforts to control, cut back, or stop gambling;" (4) "Is often preoccupied with gambling (e.g., having persistent thoughts of reliving past gambling experiences, handicapping or planning the next venture, thinking of ways to get money with which to gamble;" (5) "Often gambles when feeling distressed (e.g., helpless, guilty, anxious, depressed):" (6) "After losing money gambling, often returns another day to get even;" (7) "Lies to conceal the extent of involvement with gambling;" (8) "Has jeopardized or lost a significant relationship, job, or educational or career opportunity because of gambling;" and (9) "Relies on others to provide money to relieve desperate financial situations caused by gambling").

[2] *See, e.g*., Stacey A. Tovino, *Problem Gambling and the Business Lawyer*, THE LAW OF REGULATED GAMBLING: A PRACTICAL GUIDE FOR BUSINESS LAWYERS 137 (Keith Miller ed., 2020); Stacey A. Tovino, *The House Edge: On Gambling and Professional Discipline*, 91 WASH. L. REV. 1253 (2016); Stacey A. Tovino, *Dying Fast: Suicide in Individuals with Gambling Disorder*, 10 ST. LOUIS U.J. HEALTH L. POL'Y 159 (2016); Stacey A. Tovino, *Gambling Disorder, Vulnerability, and the Law: Mapping the Field*, 16 HOUS. J. HEALTH L. POL'Y 102 (2016); and Stacey A. Tovino, *Lost in the Shuffle: How Health and Disability Laws Hurt Disordered Gamblers*, 89 TUL. L. REV. 191 (2014).

sympathetic health condition. In particular, I showed that: (1) health insurers frequently exclude gambling disorder treatments and services from insurance coverage; (2) individuals with gambling disorder tend not to succeed in actions against disability income insurers for disability income insurance benefits; and (3) federal and state disability non-discrimination laws uniformly exclude gambling disorder from the definition of disability.[3]

In an article published in 2016, by further example, I focused on the high rates of suicidal ideation and suicide attempts by individuals with gambling disorder.[4] According to the APA, more than one in two disordered gamblers experience suicidal ideation and approximately one in five disordered gamblers attempt suicide.[5] Notwithstanding these statistics, I showed that individuals with gambling disorder still do not have the same legal rights and benefits as individuals with other disorders that are similarly classified, such as alcohol use disorder.[6] As an illustration, individuals with alcohol use disorder are considered individuals with disabilities who may receive workplace accommodations, such as permission to attend Alcoholics Anonymous (AA) meetings during lunch,[7] but individuals with gambling-related conditions are not so considered[8] and their requests to attend Gamblers Anonymous meetings as an accommodation may be denied. In a second article published in 2016, I explored how attorneys with gambling disorder are treated in professional disciplinary actions, including law license suspension, revocation, and reinstatement proceedings.[9] Themes that emerged from my exploration included public misunderstanding of gambling

---

[3] *See* Tovino, *Lost in the Shuffle, supra* note 2,.

[4] Tovino, *Dying Fast*, *supra* note 2, at 160.

[5] DSM-5, *supra* note 1, at 585.

[6] *Id.* (In its DSM-5, the APA classifies alcohol use disorder and gambling disorder in the same "Substance-Related and Addictive Disorders" section); DSM-5, *supra* note 1, at Table of Contents.

[7] *See, e.g.*, ADA NATIONAL NETWORK, THE ADA, ADDICTION, RECOVERY, AND EMPLOYMENT (2020) (explaining that a reasonable accommodation under the Americans with Disabilities Act (ADA) for an individual with alcohol use disorder might include including allowing the employee to attend an Alcoholics Anonymous (AA) meeting).

[8] *See, e.g.*, DePiano v. Atlantic Cty., 2005 WL 2143972, at 5-7 (D.N.J., Sept. 2, 2005) (holding that gambling disorder is not a disability under a state disability non-discrimination law despite the APA's recognition of gambling disorder as a mental disorder in the DSM-5).

[9] *See* Tovino, *The House Edge*, *supra* note 2.

disorder, stigma against individuals with gambling disorder, and statutory recognition of substance addictions but not behavioral addictions.[10]

I wrote these scholarly pieces when I served on the faculty of the University of Nevada, Las Vegas (UNLV), which is located just a few minutes away from the Las Vegas Strip, the entertainment capital of the world.[11] In summer 2020, I moved to the University of Oklahoma (OU), located in Norman, Oklahoma. After leaving UNLV and Las Vegas, I thought my days of thinking about the legal issues faced by individuals with gambling disorder were over. Shortly after arriving in Oklahoma, however, I learned that OU is located five miles from a large casino—the Riverwind Casino—and that I could jog to this casino from my office and my new home, as could many of our faculty, staff, and students.[12] I also learned that 3.2% of Oklahomans meet diagnostic criteria for gambling disorder, a statistic that is not surprising considering that the state of Oklahoma has the second-highest number of casinos in the United States, behind only the state of Nevada.[13] I further learned that 73% of Oklahomans with gambling disorder also have alcohol use disorder as a co-occurring disorder.[14]

These statistics are consistent with broader information provided by the APA about gambling disorder. According to the APA, rates of gambling disorder tend to be higher within African American and Native American communities compared to non-minority communities.[15] (Together with California and Arizona, Oklahoma has one of the highest concentrations of

---

[10] *Id.*

[11] *See* University of Nevada, Las Vegas, *Our Campus*, https://www.unlv.edu/campuslife/our-campus (last visited Jan. 28, 2021); Scott M. Pruett, *Formula for Success: How Las Vegas Became the Entertainment Capital of the World*, UNLV RETROSPECTIVE THESES DISSERTATIONS (2008) (referring to Las Vegas as the entertainment capital of the world).

[12] The Riverwind Casino is located at 1544 OK-9, Norman, Oklahoma 73072. The University of Oklahoma College of Law is located at 300 W. Timberdell Road, Norman, Oklahoma 73019. According to Google Maps, the Riverwind Casino is located exactly 5.0 miles from the University of Oklahoma College of Law.

[13] *See* OKLAHOMA ASSOCIATION ON PROBLEM AND COMPULSIVE GAMBLING, http://www.oapcg.org (last visited Jan. 30, 2021) [hereinafter OAPCG] (providing these statistics); *Problem Gambling and Gambling Addiction*, A CHANCE TO CHANGE https://achancetochange.org/problem-gambling-oklahoma-city (last visited Jan. 29, 2021) (providing similar statistics).

[14] OAPCG, *supra* note 13.

[15] *Id.*

Native Americans in the country.[16]) According to the APA, gambling disorder aggregates in families, and this effect appears to be based on both genetic and environmental factors.[17] Individuals with gambling disorder have poor general health and utilize medical services at higher rates than individuals without gambling disorder.[18] According to the APA, gambling disorder aggregates with depressive and bipolar disorders as well as other substance use disorders, especially alcohol use disorder. Given what I knew about gambling disorder from the APA and what I have observed about gambling disorder in Oklahoma, perhaps my days of thinking about the legal treatment of individuals with gambling disorder are not over. Perhaps they are just getting started.

This Essay attempts to build on my prior scholarship in the area of gambling disorder and the law, with a particular focus on assessing the impact that advances in neuroscience may have had on the legal treatment of individuals with gambling disorder. In Part I of this Essay, I reference recent (*i.e.*, post-2016) illustrative advances in the neuroscientific understanding of gambling disorder. In Part II of this Essay, I explore whether there have been any post-2016 changes in the ways that health insurance and disability non-discrimination treat individuals with gambling disorder. A conclusion suggests directions for future law and policy efforts.

I. NEUROSCIENCE AND GAMBLING DISORDER

Hundreds of reviews, systematic reviews, meta-analyses, and clinical trials investigating a variety of features of gambling disorder have been published in the past five years.[19] As discussed in more detail below, these works suggest that: (1) the etiology of gambling disorder is complex, with implicated genetic and environmental factors; (2) structural and functional neuroimaging studies implicate a number of structures and circuits in the pathophysiology of gambling disorder; (3) cognitive behavioral therapy, motivational interviewing, and Gamblers Anonymous attendance are supported in the treatment of individuals with gambling disorder; (4)

---

[16] Andrew Soergel, *Where Most Native Americans Live*, U.S. NEWS WORLD RPT., Nov. 29, 2019 ("California, Arizona and Oklahoma are home to 31% of Americans who identify as 'American Indian or Alaska Native' according to the U.S. Census.").

[17] DSM-5, *supra* note 1, at 585.

[18] *Id.*

[19] *See* Results of PubMed search for "Gambling Disorder" using the "past five years" date limitation feature.

some placebo-controlled trials suggest that opioid receptor antagonists may have a role as a pharmaceutical intervention in gambling disorder; and (5) improved law and policy efforts in a variety of areas are needed to help individuals with gambling disorder.

In a 2019 review article, for example, researchers affiliated with Yale University described the current scientific knowledge regarding gambling disorder.[20] In terms of the cause of gambling disorder, the researchers explained: "The aetiology of gambling disorder is complex, with implicated genetic and environmental factors. Neurobiological studies have implicated cortico-striato-limbic structures and circuits in the pathophysiology of this disorder."[21] In terms of non-pharmaceutical interventions, the researchers further explained: "Behavioural interventions, particularly cognitive-behavioural therapy but also motivational interviewing and Gamblers Anonymous, are supported in the treatment of gambling disorder."[22] Although the researchers recognized that "[n]o pharmacological therapy has a formal indication for the treatment of gambling disorder," some placebo-controlled trials have suggested that "some medications, such as opioid-receptor antagonists, may be helpful."[23] The researchers concluded by calling for improved law and policy efforts to help individuals with gambling disorder: "Given the associations with poor quality of life and suicide, improved identification, prevention, policy and treatment efforts are needed to help people with gambling disorder."[24]

That same year, a group of Canadian researchers integrated structural and functional neuroimaging research assessing individuals diagnosed with gambling disorder.[25] Noting that gambling disorder and substance use disorders share clinical and behavioral features and are similarly classified in the DSM-5,[26] the researchers were particularly interested in identifying qualitative similarities and differences between gambling disorder and the substance use disorders. The authors found that structural neuroimaging studies "indicate modest changes in regional gray matter volume and diffuse

---

[20] *See* Marc N. Potenza et al., *Gambling Disorder*, 5 NATURE REVIEWS DISEASE PRIMERS 51 (2019).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *See* Luke Clark et al., *Neuroimaging of Reward Mechanisms in Gambling Disorder: An Integrative Review*, 24 MOLECULAR PSYCHIATRY 674 (2019).

[26] *See* note 6, *supra*.

reductions in white matter integrity in [individuals with gambling disorder], contrasting with clear structural deterioration in [individuals with substance use disorder]."[27] The authors also found that functional neuroimaging studies "consistently identify dysregulation in reward-related circuity (primarily ventral striatum and medial prefrontal cortex) [in individuals with gambling disorder] and that neurotransmitter position emission tomography (PET) studies indicated "amplified dopamine release in [individuals with gambling disorder]."[28] The authors concluded that: "Coupled with consistent observations of correlations with gambling severity and related clinical variables within [gambling disorder] samples, the overall pattern of effects is interpreted as a likely combination of shared vulnerability markers across [gambling disorder and the substance use disorders] but with further experience-dependent neuroadaptive processes in [gambling disorder]."[29]

Also in 2019, a large group of scientists affiliated with a number of prominent international universities recognized that gambling disorder is a serious mental disorder characterized by impairments in decision making and reward processing that are associated with dysfunctional brain activity in the orbitofrontal cortex (OFC) of the brain.[30] Interested in the particular question whether OFC functional abnormalities are accompanied by structural abnormalities, the scientists gathered structural neuroimaging data from nine existing studies, reaching a total of 165 individuals with gambling disorder and 159 healthy controls.[31] The scientists found that the distribution of OFC sulcogyral patterns[32] is "skewed in individuals with gambling disorder, with an increased prevalence of Type II pattern[33] compared with healthy controls" and that the Type II pattern "might represent a pre-morbid structural brain marker of the disease."[34]

---

[27] Clark et al., *supra* note 25, at 674.

[28] *Id.*

[29] *Id.*

[30] *See* Yangsong Li et al., *Altered Orbitofrontal Sulcogyral Patterns in Gambling Disorder: A Multicenter Study*, 9 TRANSLATIONAL PSYCHIATRY 186, 1 (2019).

[31] *Id.*

[32] A sulcus is a groove or furrow on the surface of the brain. A gyrus is a ridge or fold between two clefts on the surface in the brain. The term "sulcogyral pattern" thus refers to the pattern of furrows and ridges on the surface of the brain.

[33] *See Li et al., supra* note **Error! Bookmark not defined.**, at 2 (explaining the three main sulcogyral patterns); Motoaki Nakamura et al., *Altered Orbitofrontal Sulcogyral Pattern in Schizophrenia*, 130 BRAIN 693, 697 at fig.1 (2007).

[34] *See* Li et al*., supra* note **Error! Bookmark not defined.**, at 1.

In yet another study published in 2019, researchers affiliated with the Universities of Cambridge and Chicago conducted a systematic review of case-control studies examining certain cognitive domains in individuals with gambling disorder, including attentional inhibition, motor inhibition, discounting, decision-making, and reflection impulsivity.[35] Among other findings, the study authors reported that gambling disorder was associated with significant impairments in motor inhibition, attentional inhibition, discounting, and decision-making.[36] The study authors concluded that: "This meta-analysis indicates heightened impulsivity across a range of cognitive domains in Gambling Disorder."[37]

More recently, in 2020, researchers affiliated with UNLV and Yale University noted that gambling disorder is an addictive disorder that is associated with "significant distress and impairment in personal, social, occupational or other important areas of functioning."[38] Recognizing that "no pharmacotherapy has a formal indication for gambling disorder" but that "data suggest potential benefits of specific medications," the researchers systematically evaluated findings from nineteen clinical trials investigating the efficacy of medications for the treatment of gambling disorder. The researchers concluded that although results are limited, "opioid antagonists like naltrexone showed promise in the pharmacological treatment of gambling disorder."[39] The researchers further concluded that: "Pharmacotherapy combined with psychotherapy treatments for gambling disorder may provide better rates of patient retention in comparison to pharmacology-only treatments, though further research is needed in this area."[40] The researchers encouraged future scientists to address gaps in knowledge relating to: (1) racial, ethnic, gender, and other individual differences in gambling disorder; and (2) due to the frequent co-occurrence of gambling disorders with other mental disorders, treatments for individuals with dual diagnoses, such as gambling disorder and alcohol use disorder.[41]

---

[35] *See* Konstantinos Ioannidis et al., *Impulsivity in Gambling Disorder and Problem Gambling: A Meta-Analysis*, 44 NEUROPSYCHOPHARMACOLOGY 1354 (2019).

[36] *Id.*

[37] *Id.*

[38] *See* Shane W. Kraus et al., *Current Pharmacotherapy for Gambling Disorder: A Systematic Review*, 21 EXPERT OP. PHARMACOTHERAPY 3, 287 (2020).

[39] *Id.*

[40] *Id.*

[41] *Id.*

In summary, both pre- and post-2016 publications report associations between gambling disorder and poor quality of life; impairment in personal, social, occupational, and other important areas of functioning; suicidal ideation; suicide attempt; and impairments in motor inhibition, discounting, reward processing, and decision making. Post-2016 structural and functional neuroimaging studies further reveal skewed OFC sulcogyral patterns, modest changes in regional gray matter volume, diffuse reductions in white matter (brain) integrity, dysregulation in brain reward-related circuity, and amplified dopamine release among individuals with gambling disorder. Have these advances in the neuroscientific understanding of gambling disorder impacted the legal treatment of individuals with gambling disorder in the past five years? As discussed in more detail below, the answer is part "yes" and part "no."

II. GAMBLING DISORDER AND THE LAW

A. Health Insurance

In the context of health insurance, individuals with gambling disorder have seen modest improvements in insurance coverage of their condition over the past five years. As background, the APA formerly classified the gambling-related condition formerly known as pathological gambling as an "impulse control disorder," alongside other mental disorders such as kleptomania, pyromania, and intermittent explosive disorder.[42] In part, due to then-recent neuroimaging studies involving individuals with pathological gambling,[43] the APA in 2013 re-named the condition "gambling disorder" and re-classified the condition in the "substance related and addictive disorders" section of the DSM-5.[44] One result of this re-classification is that insurance policies that exclude treatments and services for the "impulse control disorders" but not the "substance-related and

[42] *See* Tovino, *Lost in the Shuffle*, *supra* note 2, at Part II (reviewing the history of the APA's description and classification of gambling disorders in the DSM).

[43] *See* Mary Bates, *Gambling Addiction and the Brain*, BRAINFACTS.ORG, Sept. 3, 2015 (explaining "Much of the research that supports classifying gambling disorder with other addictions comes from brain imaging studies and neurochemical tests. These have revealed commonalities in the way that gambling and drugs of abuse act on the brain, and the way the brains of addicts respond to such cues. The evidence indicates that gambling activates the brain's reward system in much the same way that a drug does.").

[44] *Id.*

addictive disorders" should, to the extent gambling disorder is not specifically excluded elsewhere and if the policy as a whole is interpreted logically, no longer exclude treatments for gambling disorder. That is, medically necessary treatments and services for individuals with gambling disorder should be covered the same way that medically necessary treatments and services for other physical and mental health conditions are covered. This has proved true in states such as Nevada, where the state's benchmark health plan continues to exclude coverage of treatments and services for the "impulse control disorders" but the Nevada Division of Insurance has confirmed its understanding and recognition that gambling disorder is no longer considered an impulse control disorder and is now considered an addictive disorder.[45] Therefore medically necessary treatments and services for gambling disorder should be covered.

That said, some insurance plans continue, even today, to exclude certain gambling-related conditions. Due to the language used by these plans, the interpretation of these plans is open to interpretation (and, hence litigation). For example, the current Iowa benchmark health plan, which remains in effect through the end of 2022, excludes "impulse control disorders, such as pathological gambling."[46] The current South Dakota benchmark plan, which also remains in effect through 2022, similarly excludes "impulse control disorders, such as pathological gambling."[47] Defendant individual and small group health plans in Iowa and South Dakota could try (at least through the end of 2022) to argue that gambling disorder is specifically excepted from coverage and therefore not required to be covered. Plaintiff insureds in Iowa and South Dakota may try to respond by arguing—as I would argue—that because "pathological gambling" has been re-named "gambling disorder" and because gambling disorder has been re-classified as a "substance-related and addictive disorder" (and is no longer an "impulse control disorder"), the coverage exclusion no longer applies.

The Nebraska benchmark health plan also contains a gambling-related exclusion, but the exclusion is worded differently. That is, the Nebraska benchmark plan excludes coverage of "programs that treat obesity or gambling addiction."[48] Defendant individual and small group health plans

---

[45] *See* Health Plan of Nevada, Small Business Evidence of Coverage at 24, 46 (2014).

[46] *See* Wellmark Blue Cross Blue Shield of Iowa, CompleteBlue 2000B Coverage Manual at 20 (Jan. 2014).

[47] *See* The South Dakota Benchmark Plan at 15 (2021-2022).

[48] *See* Blue Cross Blue Shield of Nebraska, BluePride Plus at 28 (Jan. 2014).

in Nebraska thus could argue that treatments and services for gambling disorder are simply not covered. Plaintiff insureds in Nebraska might try to argue—as I would argue—that "gambling addiction" is an outdated phrase (but whether the argument would succeed is unclear).

The reason why the coverage and exclusion provisions of the state benchmark plans are important is that regulations implementing the Affordable Care Act (ACA), signed into law by President Obama in 2010, directed individual and small group health plans in each state to provide benefits that are "substantially equal" to the benchmark plan, including "covered benefits" as well as "[l]imitations on coverage," including limitations on benefit amount, duration, and scope.[49] This means that individual and small group health plans in Iowa, South Dakota, and Nebraska (at least through the end of 2022) may try to argue that they are permitted to exclude treatments and services for gambling disorder because the state benchmark health plan excludes treatments and services for "pathological gambling" and "gambling addiction," respectively.

In summary, the re-naming of pathological gambling (to gambling disorder) and the re-classification of this condition from the impulse control disorders to the substance-related and addictive disorders has improved insurance coverage of treatments and services for gambling disorder in some states, such as Nevada, but remains open to interpretation in others. The extent to which federal laws governing mandatory health insurance benefits (and permissible exclusions) in the individual and small group health plan market change during the Biden administration and impact the above analysis remains to be seen.

Moving outside the context of the ACA and the selection of benchmark health plans by states, recent disability non-discrimination litigation has the potential to improve insurance coverage of gambling disorder. Consider *Schmitt v. Kaiser Foundation Health Plan*, decided by the U.S. Court of Appeals for the Ninth Circuit in July 2020 and interpreting Section 1557 of the ACA (Section 1557).[50] As background, before President Obama signed the ACA into law, a health insurer could draft its health insurance policies and plans as the insurer saw fit; that is, without worrying about violating federal non-discrimination law (including disability non-discrimination law) to the extent the insurer did not discriminate against an individual with a disability in covering whatever treatments and services the

[49] 45 C.F.R. § 156.115(a)(1)(i)-(a)(1)(ii) (2020).

[50] *See* Schmitt v. Kaiser Foundation Health Plan, 965 F.3d 945 (9th Cir. 2020).

insurer chose to cover.[51] Signed into law in March 2010, Section 1557 of the ACA provided, in relevant part: "an individual shall not, on the ground prohibited by … section 504 of the Rehabilitation Act of 1973[52] . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance."[53] In short, Section 1557 prohibits covered health insurers from discriminating based on various grounds, including disability.[54] The issue in *Schmitt* was whether Section 1557 constrains a health insurer's selection of plan benefits. The Ninth Circuit "h[e]ld that it does."[55]

In *Schmitt*, plaintiffs Andrea Schmitt and Elizabeth Mohundro were individuals with disabilities.[56] That is, they had severe hearing loss.[57] Both plaintiffs required treatments and services for their hearing loss other than cochlear implants.[58] Their Kaiser health insurance policies covered cochlear implants but excluded other treatments and services for hearing loss.[59] On behalf of themselves and a putative class, the plaintiffs alleged that Kaiser violated section 1557 of the ACA, reasoning that the plaintiffs' health insurance policies' categorical exclusions of most hearing loss treatments and services discriminated against individuals with disabilities — that is, individuals with hearing loss.[60]

The Ninth Circuit began its analysis by explaining that nondiscriminatory health insurance plan design does not require health insurers to cover all treatments and services for all possible physical and mental health conditions.[61] However, the Ninth Circuit also explained that Kaiser's categorical exclusion of coverage for hearing loss treatments and services other than cochlear implants could be a form of proxy

---

[51] *Id.* at 948.

[52] The Rehabilitation Act of 1973 was the first major federal statute that was designed to provide non-discrimination protections to individuals with disabilities. 29 U.S.C. § 701 et seq. *See generally* Smith v. Barton, 914 F.2d 1330, 1338 (9th Cir. 1990) (discussing the Rehabilitation Act); Fleming v. Yuma Reg'l Med. Ctr., 587 F.3d 938, 940 (9th Cir. 2009) (same).

[53] 42 U.S.C. § 18116 (2020).

[54] *Schmitt*, 965 F.3d at 948, 950.

[55] *Id*. at 948.

[56] *Id*. at 949, 951.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* at 957-58.

discrimination: "'[Proxy discrimination] arises when the defendant enacts a law or policy that treats individuals differently on the basis of seemingly neutral criteria that are so closely associated with the disfavored group that discrimination on the basis of such criteria is, constructively, facial discrimination against the disfavored group.'"[62] Because the plaintiffs' complaint failed to show the fit of their alleged proxy,[63] the Ninth Circuit affirmed the district court's dismissal of the plaintiffs' case, holding that they did not state a claim for disability discrimination under Section 1557 of the ACA.[64] Because the Ninth Circuit found that the plaintiffs might be able to amend their complaint to specify facts that could raise an inference of proxy discrimination or another theory of relief, however, the Ninth Circuit reversed the district court's decision not to allow amendment and remanded the case, instructing the district court to allow such amendment.[65]

Going forward, individuals with gambling disorder may try to argue that their individual and small group plans (*i.e*., those plans regulated by the ACA and required to provide essential health benefits (EHBs), including mental health and substance use disorder benefits) are not providing the statutorily-mandated EHBs to the extent their plans discriminate against them on the basis of their disabilities; — that is, gambling disorder. As discussed in more detail below, the success of this claim would depend on federal and state disability non-discrimination's law recognition of gambling disorder as a protected disability as well as judicial challenges to Trump-era regulations implementing Section 1557.

B. Disability Non-Discrimination Law

Federal and state disability non-discrimination laws frequently exclude certain gambling-related conditions from their definitions of disability. For example, the federal Rehabilitation Act of 1973 states that the phrase "individual with a disability" does not include an individual with "compulsive gambling."[66] By further example, the federal Americans with

---

[62] *Id.* at 958.

[63] *See id.* at 959 ("Here, Schmitt and Mohundro allege no facts giving rise to an inference of intentional discrimination besides the exclusion itself. Thus, the crucial question is whether the proxy's ''fit'' is ''sufficiently close'' to make a discriminatory inference plausible. The second amended complaint sheds no light on the answer.") (internal references and citations omitted).

[64] *Id.* at 960.

[65] *Id.*

[66] 29 U.S.C. § 705 (20)(F)(ii) (2020).

Disabilities Act (ADA) excludes from the definition of a disability certain conditions such as pedophilia, exhibitionism, voyeurism, kleptomania, and pyromania.[67] Also included in this list is "compulsive gambling."[68] California disability non-discrimination law similarly excludes from the definition of disability "compulsive gambling."[69] If an individual does not have standing under the federal Rehabilitation Act, the individual does not have standing under Section 1557 of the ACA, discussed in Part II(A), above.

One possible counterargument, however, is that federal and state disability non-discrimination laws exclude from protection "compulsive gambling," not "gambling disorder," and that only the latter condition is currently recognized, defined, and classified by the APA in the DSM-5. By analogy, some courts (but not others) have held that individuals with "gender dysphoria" (also newly named and added to the DSM-5 by the APA in 2013) could be protected under the ADA[70] even though the ADA excludes individuals with certain "gender identity disorders" from the definition of disability.[71]

As a result, disability non-discrimination litigation involving individuals with gambling disorder must be watched carefully. Perhaps a future court will rule that an individual with "gambling disorder" is protected under federal and/or state disability non-discrimination law because such laws only exclude from protection individuals with "compulsive gambling." Or, perhaps, Congress during the Biden Administration and/or state legislatures will repeal their current statutory exclusions of "compulsive gambling" from the definition of disability. Or, perhaps, federal and state administrative agencies charged with implementing regulations interpreting disability non-discrimination law will clarify that individuals with "gambling disorder" are protected despite the exclusion for individuals with "compulsive gambling."

---

[67] 42 U.S.C. § 12211(b)(1)-(b)(2) (2020).

[68] *Id.* § 12211(b)(2).

[69] CAL. GOV. CODE § 12926(j)(5) (2020); CAL. CODE REGS., tit. 2, § 11065(d)(9)(A) ("'Disability' does not include: . . . compulsive gambling, kleptomania, pyromania . . . ").

[70] *See, e.g.*, Blatt v. Cabela's Retail, Inc., No. 5:14-CV-04822, 2017 WL 2178123 (E.D. Pa. May 18, 2017); Doe v. Mass. Dep't of Corr., No. 17-12255-RGS, 2018 WL 2994403 (D. Mass. June 14, 2018). *But see* Doe v. Northrop Grumman Sys. Corp., No. 5:19-CV-00991-CLS, 2019 WL 5390953 (N.D. Ala. Oct. 22, 2019) (finding no distinction between gender dysphoria and gender identity disorder and excluding the condition from protection).

[71] 42 U.S.C. § 12211(b)(1) (2020).

To the extent federal disability non-discrimination statutes are amended, or regulations implementing these federal statutes are promulgated and interpret "gambling disorder" differently than "compulsive gambling," then *Schmitt* may, perhaps, support a claim of discriminatory plan design based on categorical exclusion of treatments and services for individuals with gambling-related conditions. That said, another court analyzing a similar health insurance design fact pattern that developed after the promulgation of Trump-administration regulations[72] (which are currently being challenged in court[73]) could rule differently.

CONCLUSION

The neuroscientific understanding of gambling disorder has improved over the last five years. Scientists conducting structural, functional, and other neuroimaging studies involving individuals with gambling disorder now recommend "improved identification, prevention, policy and treatment efforts" to help individuals with gambling disorder.[74] Health insurance coverage of medically necessary treatments and services for individuals with gambling disorder as well as disability accommodations, such as permission to attend Gamblers Anonymous meetings during lunch, would be consistent with these science-based recommendations. That said, health insurance laws and disability non-discrimination laws, which continue to exclude individuals with gambling-related conditions from coverage and protection, have not kept pace.

---

[72] *See* 85 Fed. Reg. 37160 (June 19, 2020).

[73] *See, e.g.*, MaryBeth Musumeki et al., *The Trump Administration's Final Rule on Section 1557 Non-Discrimination Regulations Under the ACA and Current Status*, KAISER FAMILY FOUNDATION (Sept. 18, 2020), https://www.kff.org/racial-equity-and-health-policy/issue-brief/the-trump-administrations-final-rule-on-section-1557-non-discrimination-regulations-under-the-aca-and-current-status/.

[74] *See* Potenza et al., *supra* note 20.