An overview of the enforceability of gambling debt

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ABSTRACT

Casinos grant credit to their customers, and unpaid casino markers and bad checks paid to casinos run into many millions of dollars at large casinos. With the proliferation of casinos from their traditional home in Nevada to Atlantic City and now at least 38 other states (counting Native American Casinos) the issue of unpaid gambling debts has become a matter of crucial concern to the hospitality industry. This article explores some of the areas surrounding the legality of gambling debts and the use of the courts to enforce and collect them.

Keywords: Markers, Queen Ann, Fair Debt Collection, Non-dischargeable, Third Party

INTRODUCTION

Commercial casinos have become a major part of the hospitality industry and the number of casinos providing access for the participation in gambling is growing at a high rate. These casinos have provided employment for hundreds of thousands of people, produced billions of dollars of tax revenue and pumped significant amounts of money into the economy.

Casinos grant credit to their customers, and unpaid casino markers and bad checks paid to casinos run into many millions of dollars at large casinos. With the proliferation of casinos from their traditional home in Nevada to Atlantic City and now at least 38 other states (counting so-called Indian Casinos) the issue of unpaid gambling debts has become a matter of crucial concern to the hospitality industry. This article explores some of the areas surrounding the legality of gambling debts and the use of the courts to enforce and collect them.

The basis of laws in the United States which attempt to control the enforceability of gambling debts can be traced back to Queen Anne, who reigned over Great Britain in the first decade of the 18th century. In an effort to prevent the aristocracy from gambling away their land (and titles, in some cases) parliament passed the Statute of Anne, which made gambling debts "utterly void, frustrate, and of none effect, to all intents and purposes whatsoever ...."[1], and which has been part of American law since that time.

Through the 1980's, gambling debts remained unenforceable, even in Nevada. The leading case of West Indies v. First Nat. Bank of Nevada[2] discusses at great length the history of, and public policy considerations behind, Nevada's refusal to make gambling debts enforceable. In short, the Supreme Court of Nevada held that the 1931 law making gambling legal did not have the effect of repealing other laws based on the Statute of Anne making debts incurred by gambling unenforceable. However, in 1983, the Nevada legislature, for some reason, made credit instruments evidencing gambling debts owed to licensed persons, and the debts represented thereby, valid and enforceable by legal process.[3] The Supreme Court of Kentucky has ruled that a legally incurred debt on the results of a horse race was unenforceable[4] in a case where the betting establishment took what turned out to be worthless checks from the bettor. Pennsylvania, to the contrary, provides that checks given to a licensed establishment in exchange for cash or chips "shall be valid instruments, enforceable at law in the courts of this Commonwealth"[5].

Another issue arises in the context of the enforceability of a gambling debt incurred in a jurisdiction where it is legal and enforceable, but which is transferred to another jurisdiction where it is not. A gambling creditor seeking to enforce such a debt has two options; one is to sue the debtor where the debt is legal, obtain a court judgment, and transfer the judgment to the other jurisdiction; the other is to sue the debtor in his home jurisdiction (where the debt would have been unenforceable, had it been incurred there) using the law of the place where the debt was incurred.

The United States Constitution provides that "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."[6] The United States Supreme Court has interpreted this to mean that the *judgments* of a sister state are to be enforced without question, but the *statutes* thereof not necessarily so. In the landmark case of Fauntleroy

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[1] 9 Anne, ch. 14, §1
[2] 67 Nev. 13, 214 P.2d 144 (1950)
[3] Nev. Rev. Stat. § 463.368
[4] Ky. Off-Track Betting, Inc. v. McBurney, 993 S.W.2d 946 (1999)
[5] 4 PaCS §13A26
[6] US Constitution, Article IV §1

v. Lum[7] Justice Oliver Wendell Holmes, Jr., ruled that a gambling debt incurred in Mississippi between two Mississippians[8], which was submitted to arbitration and later reduced to judgment in Missouri, could be enforced in Mississippi as the judgment of a sister state entitled to full faith and credit. Florida, likewise, will enforce gambling judgments properly obtained in a sister state. The 1983 case of Trauger v. A.J. Spagnol Lumber Co., Inc.[9] holds that an action to recover on a foreign judgment is completely independent from the underlying case, the validity of which is not open to question in an action on the judgment itself. On the other hand, the California Court of Appeals has ruled that California will not enforce a gambling debt incurred in Nevada, which was enforceable in Nevada, if the suit is originally brought in California.[10]

A somewhat different aspect of this same issue involves trying to determine where a gambling debt is incurred and what law applies to it. Scott Elliott, a resident of Florida, boarded a ship known as Ocean Jewel, which was anchored off of St. Petersburg, Florida, where he commenced to write three post-dated checks aggregating $200,000, which he lost playing blackjack, and he later stopped payment on the three checks. Ocean Jewel was not registered anywhere in the United States, and the entire transaction took place on the high seas. Although the procedural aspects of the case are confusing, the court eventually held that Florida's strong public policy against enforcement of gambling debts overcomes any other consideration regarding the nature of the debt or the way in which it was incurred.[11]

Debts incurred at on-line casinos are subject to the provisions of the Unlawful Internet Gambling Enforcement Act of 2006[12] which essentially outlaws all internet gambling. However, the law does contain an exception for intra-state on line gambling. The statute has been widely criticized for being incomprehensible and poorly written and it is generally ignored by federal prosecutors.

Gambling debts incurred at Indian casinos also present collection issues. Such casinos are governed by compacts between the various tribes and the states involved. The Commerce Clause of the United States Constitution[13] vests exclusive regulation of commerce with the Indian tribes in the United States, and the Indian Gaming Regulation statute, 25 USC § 2701 et seq. allows the establishment of Indian casinos. "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."[14]

Fair Debt Collection Practices Act

In addition to the other issues surrounding the collectability of gambling debt, which is considered consumer debt, there have been strict limitations placed upon debt collectors. The

[7] 210 U.S. 230 (1908)
[8] The parties were apparently speculating in cotton futures, which was illegal in Mississippi
[9] Trauger v. A.J. Spagnol Lumber Co., 442 So.2d 182 (Fla. 1983)
[10] Metropolitan Creditors Service v. Sadri (1993) 15 Cal.App.4th 1821, 19 Cal.Rptr.2d 646. This case was brought after Nevada made gambling debts enforceable.
[11] TITAN CRUISE LINES v. SCOTT ELLIOT and SCOTT ELLIOT, INC., Adv. Pro. 05-00841, United States Bankruptcy Court for the Middle District of Florida, Tampa Division, 2006, also, In re Titan Cruise Lines, 353 B.R. 919. Titan, the owner of the ship, was in bankruptcy and the bankruptcy trustee was attempting to recover assets.
[12] 31 USC 5361-5366
[13] Article 1, Section 8, Clause 3 of the U.S. Constitution
[14] 25 USC sec. 2701(5) (1988)

methods by which consumer debt may be handled has become a highly controversial topic. Since the mid 1970's, as a result of unscrupulous debt collectors, the Congress has cracked down on unfair and abusive practices. The Fair Debt Collection Practices Act[15] regulates how "debt collectors" may go about collection of debts from individuals. The nuances of the Act are beyond the scope of this article, but, in general, a debt collector is prohibited from using illegal or abusive means to collect or attempt to collect a debt. A breach of the Act subjects the debt collector to various civil penalties, including a possibility of a class action if it is found to have multiple violations of the Act. The Act applies to consumer debt[16] and does not apply to original creditors who are collecting their own debts. Thus, a casino who employs its own in-house staff to make phone calls and send letters to patrons who presented bad checks or markers, is not subject to the restrictions of the Act. Once the casino hires an outside collector or law firm, that outsider is subject to the restrictions of the act. Of course, any creditor is well-advised to heed the restrictions of the Act even if it does not technically apply in order to avoid the expense of defending a FDCPA lawsuit, which expense can easily exceed the amount of damages incurred.

Criminal Aspects of Gambling Debt Collection

In addition to the potential civil liability involved in the collection of casino debt, there are risks of criminal sanctions as well. Two federal statutes which are involved with criminalizing attempts to collect gambling debts are first, the Travel Act[17], which criminalizes travel in interstate commerce that is carried on with the intention to carry on an illegal activity (not necessarily gambling) and second, the Wire Act[18], which makes illegal the use of "wire communication" to transmit bets on sporting events in interstate or foreign commerce. An interesting case involving these two acts is United States v. Corrar[19] in which the rather hapless Larry Parker, a bartender, acted as an agent for an offshore betting operation based in the Netherlands Antilles. He eventually became indebted to the operation for at least $20,000, became an informant for the FBI, and helped snare Danny Corrar and some others. Corrar was charged and eventually acquitted of a Travel Act violation on the basis that his activity did not violate the underlying Georgia statute outlawing "Commercial Gambling," and was therefore not an illegal activity. The court's highly technical reading of the Georgia statute, basically that Parker did not attempt to share in the earnings of the operation, got him off the hook. The Wire Act conviction, not depending on state law, was upheld.

In 2011, the Department of Justice issued an opinion[20] that the Wire Act applied only to sports betting and did not apply to state lotteries, thus opening the door for state lotteries to sell their tickets through the internet. This ruling has raised a great ruckus in the blogosphere, many lamenting the opening of new markets to state run lotteries. However, private betting organizations may benefit as well. One commentator, Professor I. Nelson Rose of the

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[15] 15 USC § 1601 et seq.
[16] The Act excludes "Credit transactions involving extensions of credit primarily for business, commercial, or agricultural purposes…"
[17] 18 USC § 1952
[18] 18 USC § 1084
[19] 2007 US Dist. Lexis 4786 (US District Court, Northern District of Georgia, 2007)
[20] September 20, 2011 MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, *www.justice.gov/olc/2011/state-**lotteries-opinion**.pdf*, retrieved November 13, 2013

Whittier Law School, notes that there simply were no laws on the books that could apply to organized crime involved in gambling, because the Wire Act will no longer apply.[21]

Interestingly enough, the Gambling Ship Act[22] makes it illegal to transport people to offshore vessels for gambling purposes, but no one raised this statute to shut down the Ocean Jewel, above, or as a defense to enforceability of debts incurred aboard it.

Gambling debts may (or may not) be dischargeable in bankruptcy.

Under United States bankruptcy laws, only certain types of debts can be discharged. In Chapter 7 and Chapter 13 bankruptcy, debtors may, in general, eliminate their unsecured debts, such as credit card debt, medical bills, utility bills, service bills, personal loans, payday loans and judgments. Debts incurred through fraudulent activity, however, are one type which are not dischargeable under the Bankruptcy Code which provides in § 523(a)(2)(A), that a debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud…" is exempt from discharge.

The test to be met is, generally, whether the debtor in bankruptcy had the ability to repay the debt at the time it was incurred. If not, the debt can be found to be fraudulently incurred and hence non-dischargeable. The measurement of ability to repay, however, is subjective from the debtor's point of view; i.e., if the debtor had a reasonable belief that he could repay, then it was not fraudulently incurred. Most courts have held that debtors who know that their only chance to repay a cash advance for gambling is to get lucky at the tables do not have that reasonable belief. On the other hand, for example, in AT&T Universal Card Services v. Alvi[23], the debtor, a regular gambler who used his winnings to supplement his modest income, incurred debt of approximately $54,202.19, mostly as cash advances at casinos. Even though the amount of credit card debt in relation to income appeared excessive, the court found that, based on his history, the debtor genuinely believed he would be able to pay his debts and had the intent to pay his credit card debts at the time he incurred them. Similarly, Chase Manhattan Bank v. Murphy[24], found for the debtor who had successfully supplemented his regular income for years with his gambling winnings, and who believed that he could continue to do so.

This analysis applies to gambling debts if they were incurred as "cash advances aggregating more than $750 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief"[25] under the Bankruptcy Code, which are presumed to be non-dischargeable. Which means that if a gambler goes to the ATM at the casino (or any other ATM, for that matter), gets a cash advance (or series of cash advances) that exceed $750, uses the money for gambling, then files a bankruptcy petition within 70 days, those cash advances are presumed to be non-dischargeable. The debtor in bankruptcy can try to overturn that presumption, but that is a high burden to meet. Bankruptcy practitioners may advise their clients to wait at least 70 days after their last cash advance to file.

Surprising many gamblers, Nevada law also imposes criminal liability for unpaid casino markers. A gambler could be charged with making false statements to obtain chips[1] because he knew that he had insufficient cash, credit or collateral to cover the marker or dissembled to

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[21] http://www.gamblingandthelaw.com/index.php/columns/100-73igcreditcardcase, retrieved November 13, 2013
[22] 18 USC § 1081 et seq
[23] 191 B.R. 724, 734 (Bankr. N.D. Ill. 1996)
[24] 190 B.R. 327 (Bankr. N.D. Ill. 1995)
[25] 11 USC § 523(a)(2)(C)(i)(II) - Exceptions to discharge

obtain the chips[2]. Also, since a marker is like a check under Nevada law, signing a bad marker is like passing a bad check[3] with knowledge that there is no money in the bank to cover it. The gambler is usually given 30 days to make the marker good before criminal action can be taken. If he fails to do so, an arrest warrant can issue and the gambler can be jailed or required to post bond in the amount of the bad marker.

In conclusion, in light of the sentiment of Congress and the public to be overwhelmingly in favor of the consumer, the difficulty in collecting casino debt will continue to have a significant impact on the ability of casinos and their third party agents to recover monies from debtors who fail to honor checks and markers from casinos. Consequently, casinos and the hospitality industry supported by revenue from casinos will be confronted with major hurdles in the collection process resulting in a loss of billions of dollars of revenue.

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