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GAMING LEGALNEWS

WAR GAMES IN WISCONSIN (2013 STYLE)

by Dennis J. Whittlesey

Wisconsin is home to 11 recognized Indian tribes. It is a fact that 11 tribes will not unanimously agree on all issues. It also is a fact that not all issues require unanimous agreement. However, Governor Scott Walker has created a unique situation regarding off-reservation approvals by stating his own rule which states that any proposed off-reservation casino project must be supported by every tribe in the state.

The "Walker Rule" is a major modification of the statutory process established by Section 20(b)(1)(A) of the Indian Gaming Regulatory Act ("IGRA"). The law states that the Governor has an unrestricted power to approve or veto any off-reservation tribal casino. There is no standard of reasonableness imposed by the law and, indeed, the prevailing interpretation of that provision is that the Governor's decision can even be arbitrary and capricious, no matter how unfair.

The issue is red hot because the Menominee Indian Tribe wants to develop a casino on land in Kenosha, which is both off-reservation and conveniently located near Milwaukee. And it is of current interest throughout Indian Country because the Governor has stated that he will veto the project if the Menominee Tribe cannot secure tribal unanimity by this Friday. (The date was previously set for Tuesday of this week, but was deferred for three days only last Monday.)

The project is strongly opposed by the Forest County Potawatomi Tribe, which operates a casino and bingo hall in Milwaukee, which it estimates could lose up to 40 percent of its current revenue. In addition, the tribe estimates that up to 3,000 jobs in its gaming facility could be lost as a direct result of the proposed competition in Kenosha.

The United States Department of the Interior has approved the off-reservation acquisition pursuant to IGRA Section 20, putting the ultimate decision on the Governor's desk. The Assistant Interior Secretary for Indian Affairs has been quoted as stating that the Department has reviewed the Potawatomi claims and concluded that the projected adverse impacts simply will not happen. Several gaming industry experts also question the Potawatomi projections in light of an estimated market population of 3 million people, a market that likely would generate an estimated $1 billion in annual gaming revenue.

A second tribe has voiced opposition to the Kenosha project, but the projected impact on its casino revenues is much less than those estimated by the Potawatomi, and it has been less visible as the decision day approaches. The remaining eight tribes seem to have stayed away from the debate.

Friday is "D-Day" for the Wisconsin Indian community. The Kenosha project would represent a substantial addition to the gaming opportunity in the immediate market area, and it would generate sorely needed revenue for the Menominee tribal members who are reported to suffer widespread poverty and unemployment. Indeed, Interior expressed concern about the tribal economic problems in approving the trust acquisition.

Governor Walker controls both the process and the future of an impoverished tribe, and he has unfettered statutory discretion to make the decision. The economic facts and projected positive impacts normally would indicate a decision in favor the Menominee. However, if the two opposing tribes stand their ground and Governor Walker invokes the "Walker Rule" that he articulated, Menominee will lose.

THE ILLUSION OF FEDERAL JURISDICTION IN TRIBAL CONTRACTS

by Patrick Sullivan

Contracts with Indian tribes should specify a venue for disputes arising from those agreements. A common mistake for attorneys drafting agreements involving tribes is to assume that federal courts automatically have subject matter jurisdiction over matters involving Indian tribes. In fact, the presence of an Indian tribal party in litigation invokes neither diversity nor "arising-under" federal jurisdiction. Contracts often specify a federal court as the venue for disputes, likely because tribal parties sometimes distrust state courts and non-tribal parties may distrust tribal courts, so federal court seems like a neutral choice. However, experienced Indian law attorneys know that federal courts generally lack subject matter jurisdiction over contract disputes and will summarily dismiss such actions. As a result, litigants may unexpectedly find themselves in state and tribal courts. In fact, state courts increasingly defer to tribal courts when such courts have jurisdiction and may dismiss in favor of tribal court as a matter of comity.

A related issue is the proper venue for enforcement of tribal court awards. The 2010 Florida case of *Miccosukee Tribe v. Kraus-Anderson* involved a construction firm's tribal court action against the Miccosukee Tribe for breach of contract. The tribal court found for the Tribe and awarded it $1.65 million on a counterclaim. When the firm refused to pay the judgment, the Tribe sued to enforce the award in federal court. The district court granted the construction firm summary judgment, but the Eleventh Circuit reversed and remanded with instructions to dismiss for lack of subject matter jurisdiction. The Eleventh Circuit held that federal question jurisdiction did not exist merely because an Indian tribe was a party or because the case involved a contract with an Indian tribe. It further ruled that the Tribe's presence did not establish diversity jurisdiction and that no issue of "federal common law" established jurisdiction as the Tribe had argued.

Brenner v. Bendigo, an action recently dismissed from a federal district court in South Dakota, reiterates the point. After a federal criminal conviction for the tragic murder of a child, the victim's family brought a civil wrongful death action in Cheyenne River Sioux Tribal Court, which entered a $3 million award for the plaintiffs. The plaintiffs sought to enforce the tribal court award in federal district court, pursuant to South Dakota's garnishment law. They requested garnishment and the setting aside of transfers of personal assets and real property interests on the Cheyenne River Sioux Reservation. The federal court rejected plaintiffs' argument that the court had federal question jurisdiction over the action, despite the fact that the claim implicated Indian land interests. The court dismissed, holding that the action arose under state law despite the claim for Indian land and assets, and it held that the proper venue to enforce the tribal court judgment against tribal members is the tribal court itself.

While the tribal court is a natural venue for resolution of claims involving Indian assets, the outcome begs the question of the proper venue to execute tribal court awards involving off-reservation property. In that case, prevailing litigants will have to pursue off-reservation assets in state courts. In order to reach those assets, tribal court awards must generally be domesticated in the court of the state where the assets are located pursuant to state law.

Contracting with Indian tribes can sometimes appear to be a tangled mess of tribal, state, and federal jurisdiction. While federal courts seem like a tempting middle ground for dispute resolution, ordinary contracts with Indian tribes should specify arbitration or a tribal or state court venue, specify tribal or state law, provide for a valid waiver of tribal sovereign immunity, and consider in advance the proper venue for enforcement of judgment and arbitration awards.

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DETROIT CASINOS' SEPTEMBER REVENUES DECREASE FROM SAME MONTH LAST YEAR: MICHIGAN GAMING CONTROL BOARD RELEASES SEPTEMBER 2013 REVENUE DATA

by Ryan M. Shannon

The Michigan Gaming Control Board ("MGCB") released the revenue and wagering tax data for September 2013 for the three Detroit, Michigan, commercial casinos. The three Detroit commercial casinos posted a collective 6.8% decrease in gaming revenues compared to the same month in 2012. Aggregate gross gaming revenue for the Detroit commercial casinos also decreased by approximately 5.8% compared to August 2013 revenue figures, continuing a pattern of decrease in revenues between September and August from prior years.

MGM Grand Detroit posted lower gaming revenue results for September 2013 as compared to the same month in 2012, with gaming revenue decreasing by more than 10.8%. MGM Grand Detroit continued to maintain the largest market share among the three Detroit commercial casinos and had total gaming revenue in September 2013 of approximately $45.3 million. MotorCity Casino had monthly gaming revenue approaching $35.7 million, with revenues increasing by more than 0.4% in September 2013 compared to

September 2012. Greektown Casino had monthly gaming revenue of nearly $25.4 million and posted an 8.6% decrease in revenues for September 2013 compared to the same month in 2012.

The revenue data released by the MGCB also includes the total wagering tax payments made by the casinos to the State of Michigan. The gaming revenue and wagering tax payments for MGM Grand Detroit, MotorCity Casino, and Greektown Casino for September 2013 were:

Casino	Gaming Revenue	State Wagering Tax Payments
MGM Grand Detroit	$45,258,504.74	$3,665,938.88
MotorCity Casino	$35,689,062.25	$2,890,814.04
Greektown Casino	$25,392,633.55	$2,056,803.32
Totals	$106,340,200.54	$8,613,556.24

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