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Article 9

Gambling Contract Not Violative of Public Policy

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In a recent action the owner of a licensed Puerto Rican gambling casino sought to recover gambling debts incurred by the defendant in Puerto Rico. This type of contractual debt (I.O.U.) is both valid and enforceable under Puerto Rican law. The appellate division ruled that the foreign right was unenforceable because it violated the public policy of New York. The Court of Appeals, reversing in a five to two decision, *held* that a contract based on licensed gambling transactions, and enforceable where made, is neither morally unacceptable per se, nor objectionable under the prevailing standards of social conduct in the state. *Intercontinental Hotels Corp. v. Golden,* 15 N.Y.2d 9, 203 N.E.2d 210, 254 N.Y.S.2d 527 (1964).

The validity of a contract is generally determined by the law of the jurisdiction wherein it was made, and if the contract is found valid, it will be enforced by the courts of New York.[1] There is, however, a well-established exception to this rule. An action cannot be maintained if enforcement of the contract would violate the public policy of the forum.[2]

The phrase "public policy" may connote the common law or general statutory law of the state.[3] It may also mean the prevailing notions of justice and the fundamental conceptions of right and wrong found in the society as a whole. In the past, when the courts have used the phrase, it has not been entirely clear which conception of public policy they were employing. One of the classic definitions of public policy, as applied to the enforceability of foreign contract rights, was adopted by Judge Cardozo in *Loucks v. Standard Oil Co.*[4] He stated that

> the courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.[5]

However, the question remains whether a foreign contract which is illegal in New York can still be said *not* to violate our public policy.

The problem of defining public policy has frequently been encountered in cases involving the enforcement of contracts arising from out-of-state gambling transactions. At common law, gambling was not considered an immoral act, nor was it illegal.[6] Gambling was outlawed and made a crime when the games tended to become an incitement to breach of the peace or constituted a nuisance.[7] Throughout its entire history, the State of New York has constitutionally prohibited gambling.[8] The

[1] F.A. Straus & Co. v. Canadian Pac. Ry., 254 N.Y. 407, 414, 173 N.E. 564, 567 (1930).
[2] *Ibid.*
[3] Bond v. Hume, 243 U.S. 15 (1917); see Glaser v. Glaser, 276 N.Y. 296, 12 N.E.2d 305 (1938).
[4] 224 N.Y. 99, 120 N.E. 198 (1918).
[5] *Id.* at 111, 120 N.E. at 202.
[6] EHRENZWEIG, CONFLICT OF LAWS 832 (1959).
[7] PETERSON, GAMBLING: SHOULD IT BE LEGALIZED? 136 (1951).
[8] N.Y. CONST. art. I, § 9 (1894); N.Y. PEN. LAW § 973. Horse racing and bingo, however, were authorized by constitutional amendments in 1939 and 1957 respectively for the primary purpose of revenue raising.

state's founding fathers were of the opinion that gambling was dangerous to the public morals and that most individuals could not afford to lose without their families suffering a resulting hardship.[9]

Casino gambling, as found in the instant case, has always been, and is today, illegal in New York.[10] Yet actions based on gambling transactions entered into in another state have, in the past, been sustained though contrary to the policy of this state. In 1854, the court of appeals in *Thatcher v. Morris*[11] held that while under our law contracts based on a lottery were illegal, the contracts were nevertheless enforceable in the New York courts if based on a valid and legal obligation made without the state. The court reasoned that since the contract was valid where made, it should be enforced under rules of comity. The contract was held inoffensive to our public policy and not contrary to the general morality of the people of New York even if contrary to our penal statutes.[12]

The question of gambling and public policy was again considered in the case of *Harris v. White*.[13] In that case, a suit was allowed by a jockey for wages earned in out-of-state horse races, although all stake-racing was, at that time, outlawed in New York. Reasoning that New York's domestic policy against this activity could have no extra-territorial effect, the court took the position that stake-racing, although declared illegal in New York, was not such an inherently unlawful thing as to be violative of our public policy.

In contrast to these early cases which allowed enforcement of out-of-state contracts based on various forms of gambling is the lower court case of *Neilsen v. Donnelly*,[14] decided in 1920. In that case, a municipal court judge refused to allow an action to recover the amount of a wager made upon a legal horse race in Louisiana. The court concluded that, since our constitution and penal statutes specifically outlawed wagers dependent upon any race, they expressed our public policy and the contract was consequently unenforceable. The court looked to the gambling transaction on which the contract was based and stated that "the courts of no state will uphold contracts which are deemed to be injurious to the public rights of the people, offensive to their morals or in contravention of public law."[15]

Historically then, there has been some conflict in defining public policy vis-à-vis gambling. The more restrictive view was that if the act on which the contract was based violated our statute, it was violative of our public policy. The other view was that the transaction must necessarily be contrary to general morality before it would contravene public policy, regardless of statute law. The older cases do not stand for the proposition that all out-of-state gambling, of any type, would violate our public policy.

These cases appear to be limited to the specific issues of lottery and horse racing. The question still to be decided is that of casino gambling and our public policy.

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[9] Reports of the Proceedings and Debates of the Convention of 1821, p. 567.

[10] N.Y. CONST. art. I, § 9 (1894); N.Y. PEN. LAW § 973.

[11] 11 N.Y. 437 (1854).

[12] *Id.* at 438. See Kentucky v. Bassford & Nones, 6 Hill 526 (N.Y. Sup. Ct. 1844).

[13] 81 N.Y. 532 (1880).

[14] 110 Misc. 266, 181 N.Y. Supp. 509 (N.Y. City Munic. Ct. 1920).

[15] *Id.* at 269, 181 N.Y. Supp. at 511.

That type of gambling is quite a different thing from a lottery used to raise revenue for the state, and horse racing which is still considered by many to be a sport.

In the instant case, a majority of the Court of Appeals reasoned that all foreign-based rights should be enforced unless such enforcement would amount to approval of a "transaction which is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense."[16] After the Court applied this test of public policy, it held that legalized gambling, as found in Puerto Rico, would be acceptable by the New York courts as not contrary to our public policy.

Relying on the nineteenth century gambling contract cases alluded to previously, the Court was of the opinion that it was an historical fact "even in Victorian times that there was no strong public policy to prevent the enforcement of such contracts."[17] The fact that under New York law the acts committed by plaintiff were illegal was held to be of minor importance. The Court did not believe it was proper to apply our domestic law to decisions which should be governed by the law of another jurisdiction.

In clarifying what is meant by "public policy," the majority stated that it is not to be determined by mere reference to the laws of the forum. The prevailing social and moral attitudes of the community should be given substantial consideration. This being the case, the Court looked to the legislation legalizing pari-mutuel betting and bingo. This coupled with the popular movement to legalize off-track betting appeared to be indicative of the community's growing acceptance of licensed gambling as a morally acceptable activity.[18]

One of the basic objections to enforcing the plaintiff's claim in this case was that it was based on "I.O.U.'s" which were incurred while gambling. The ability to give notes to cover these losses could very well lead to an individual's losing far more than he could ever afford. However, the majority placed great stress on the fact that under Puerto Rican law provision is made for courts to reduce gambling debts or decline to enforce them at all.[19] This power is discretionary with the court and can be exercised if the losses are too large in comparison with the customs of a good family man.[20] Stating that since a New York court would have the same discretion in enforcing the Puerto Rican contract, the court reasoned that the individual could be protected from excessive losses and the unfairness or other dangers found in unauthorized gambling. This would be in conformity with the underlying policy of our anti-gambling statutes. This "safety valve" aspect of Puerto Rican law was a major factor militating against holding the gambling contract in question violative of our public policy.[21]

The minority would give a somewhat more limited interpretation of the public

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[16] Intercontinental Hotels Corp. v. Golden, 15 N.Y.2d 9, 13, 203 N.E.2d 210, 212, 254 N.Y.S.2d 527, 529 (1964).

[17] *Id.* at 14, 203 N.E.2d at 212, 254 N.Y.S.2d at 530.

[18] *Id.* at 14-15, 203 N.E.2d at 212-13, 254 N.Y.S. 2d at 530-31.

[19] *Id.* at 15, 203 N.E.2d at 213, 254 N.Y.S.2d at 531. See P.R. LAWS ANN. tit. 31, § 4774 (1955). Puerto Rican law would govern this case under the general rule of contracts that the validity thereof is to be determined by the *lex loci contractus.*

[20] *Ibid.*

[21] *Ibid.*

policy of the state. It was their contention that the law of New York has always looked at the gambler as an outlaw, and considered the operation of a gambling house a crime. This historic fact is so indicative of New York's public policy that our courts must be closed to the type of suit herein involved. The very facts that casino gambling is today outlawed and the contract, if made here, would likewise be illegal, clearly express New York's public policy and therefore all other considerations are irrelevant.

The legalization of pari-mutuel betting and bingo is not believed to indicate a trend; rather the people of this state have differentiated between these forms of gambling and the kind here in question. The minority underlines its position by emphasizing the fact that while pari-mutuel betting and bingo are legal in many states, only one state (Nevada) licenses gambling casinos.[22] The conclusion of the minority was that the operation of a gambling house is definitely contrary to New York's public policy and that our courts should refuse plaintiff's claim regardless of comity or principles of the law of contracts.

The instant case defines those factors which will be given consideration by the courts in determining our state's public policy. The public policy of this state is not determinable by mere reference to our domestic laws. The legality or illegality of the activity upon which the foreign right is based is not to be given sole consideration. Courts must now look beyond a literal interpretation of the law, and give cognizance to the prevailing "social and moral attitudes of the community."[23]

Under the concept of public policy advanced by the instant case, it would seem that all foreign-based contractual rights, if valid where made, are entitled to enforcement in New York unless inherently heinous or clearly violative of our basic moral tenets, the obvious example of which would be a contract to commit a crime. Aside from this obvious case, the problem arises as to exactly how and by what means a court is to determine the prevailing moral attitude of the members of a community on any given question.

[22] *Id.* at 19, 203 N.E.2d at 215, 254 N.Y.S.2d at 534. Even in Nevada gambling debts cannot be the basis for a valid lawsuit. Nevada Tax Comm. v. Hicks, 73 Nev. 115, 310 P.2d 852 (1957).

[23] Intercontinental Hotels Corp. v. Golden, *supra* note 16, at 14, 203 N.E.2d at 212, 254 N.Y.S.2d at 530-31.

Homosexuality—A New Ground for Annulment?

Plaintiff petitioned the court to annul the marriage of her deceased niece to the defendant. Petitioner alleged that the defendant had induced his wife to enter the marriage by fraudulently misrepresenting his age, origin, ancestry and his intent to have normal sexual relations, in addition to concealing the fact that he was a homosexual. The allegation that the defendant concealed the fact that he was a homosexual was dismissed for insufficiency of evidence, while the other factual issues presented to the jury were resolved in favor of annulment. The Appellate Divi-