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## Conflicts – Enforceability of Foreign Gambling Contracts

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# COMMENTS

## CONFLICTS—ENFORCEABILITY OF FOREIGN GAMBLING CONTRACTS

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### I. INTRODUCTION

Under general conflict of laws rules, a claim validly created in one state will be enforced in the courts of any other state.<sup>1</sup> Uniformity of law and cooperation of the states are best served by the recognition of this general rule. As stated by Goodrich, "because our entire economic and industrial system is based on the need for performing agreements, this protection of justified expectations responds to the need for certainty, predictability and commercial convenience."<sup>2</sup>

An exception to this general rule of enforcement arises where the claim sought to be enforced violates the strong public policy of the forum.<sup>3</sup> This Comment explores the use of this exception in refusing recognition of a contract for the payment of a gambling debt incurred in a jurisdiction where this type of contract is both valid and enforceable.

### II. HISTORICAL BACKGROUND

Gambling is probably as old as man himself.<sup>4</sup> It is "an inevitable concomitant of man's basic culture patterns."<sup>5</sup> The identification of primitive religion with gambling as well as its mention in the Bible further exemplify man's historical preoccupation with games of chance.<sup>6</sup> Professor Ehrenzweig's statement is therefore not surprising that "at common law gambling was neither illegal nor considered immoral."<sup>7</sup>

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1. RESTATEMENT, CONFLICT OF LAWS § 332 (1934).

2. H. GOODRICH, CONFLICT OF LAWS 200 (4th ed. 1964).

3. RESTATEMENT, CONFLICT OF LAWS § 612 (1934).

4. "The most primitive aboriginals of the western hemisphere had crude dice and gambled on 'bowl' games." 9 ENCYC. BRITANNICA 998 (1959).

5. *Id.*

6. "The Hebrews cast lots before the Lord (Joshua xviii, 10), but the Lord decided (Proverbs xvi, 33)." 9 ENCYC. BRITANNICA 998 (1959).

7. A. EHRENZWEIG, CONFLICT OF LAWS 482 (1962). *But see* West Indies v. First Nat'l Bank, 67 Nev. 13, 214 P.2d 144 (1950).

Gambling pursuits naturally result in monetary obligations. Society has frowned upon much of this gambling and legislation preventing enforcement of various forms of gambling obligations has been enacted.<sup>8</sup> Under these circumstances, it would seem natural that this propensity to gamble, available as a legal form of entertainment in some jurisdictions,<sup>9</sup> would eventually create many situations where courts would be confronted with debts which were valid where incurred, yet void under the law of the forum. Surprisingly, there is little in the way of scholarly discussion in this area. Perhaps most writers agree with Rabel's statement concerning the enforceability of foreign debts validly incurred while participating in legal casino gambling: "Whether really much authority is available, seems doubtful; however, games of chance indeed are not worthy of serious judicial consideration, nor of scholarly discussion."<sup>10</sup> However, as more Americans become members of the "affluent society" with leisure time and the opportunity to travel to legalized gambling areas this problem will undoubtedly become more prevalent.

### III. GENERAL TREND

The modern trend is best exemplified by the New York case of *Intercontinental Hotels Corp. (P.R.) v. Golden*.<sup>11</sup> In this case, a valid obligation to pay gambling debts was created in Puerto Rico where such debts are legal and enforceable.<sup>12</sup> Enforcement of this obligation was sought in the New York courts. Since New York had not legalized casino gambling and held such gambling contracts void, the primary issue confronting the court was whether such an obligation was unenforceable as contrary to the public policy of the forum. The New York court used normal conflict of law rules, applied the law of Puerto Rico, and held that in the absence of a clear showing that the enforcement of the cause of action would offend a sense of justice or menace the public welfare the forum should not refuse to enforce the contractual obligation.<sup>13</sup> The court felt that although this contract would be void if incurred in New York, enforcement by New York of this validly-created obligation would not offend the public policy of the state. The court found the gambling from which the debt arose to be licensed by the territory of Puerto Rico and stated:

Informed public sentiment in New York is only against unlicensed gambling, which is unsupervised, unregulated by law and which affords no protection to customers and no assurance of fairness or honesty in the operation of the gambling devices.<sup>14</sup>

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8. FLA. STAT. § 849.26 (1967).

9. Notably Nevada, Puerto Rico, Freeport, and Lucaya.

10. 2 E. RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 573 (2d ed. 1960).

11. 15 N.Y.2d 9, 203 N.E.2d 210, 254 N.Y.S.2d 527 (1964).

12. 31 LAWS P.R. ANN. § 4774 (1956).

13. 15 N.Y.2d 9, 13, 203 N.E.2d 210, 212, 254 N.Y.S.2d 527, 529 (1964).

14. *Id.* at 15, 203 N.E.2d at 213, 254 N.Y.S.2d at 529.

An earlier New York case also chose to use the law of the place where the contract was executed to enforce a gambling debt incurred in Cuba.<sup>15</sup>

One federal court has also followed this more lenient approach. In *Caribbean Mills, Inc. v. McMahon*,<sup>16</sup> although recognizing that gambling was prohibited in Oklahoma, the federal court sitting in that state enforced the payment of notes executed in Haiti which were given in consideration for the purchase of a gambling casino. The court found that gambling was legal in the Republic of Haiti.

The more modern approach seems to recognize that these debts are incurred where they are entirely legal and where the gambling involved is sanctioned by the government. To allow one to incur such a debt and then, safe in his home jurisdiction, to renege on his validly assumed obligations would be an unjust benefit to the defendant.<sup>17</sup> The courts are reluctant to allow the defendant to assert a violation of public policy to avoid legally incurred debts.

#### IV. FLORIDA POSITION

The cases of *Young v. Sands, Inc.*<sup>18</sup> and *Dorado Beach Hotel Corp. v. Jernigan*<sup>19</sup> exemplify the Florida position on the question of whether the enforcement of foreign gambling debts validly incurred would be against the public policy of the state.

*Young v. Sands, Inc.* involved a Nevada gambling debt sought to be enforced in the Florida courts. The District Court of Appeal, Third District felt that a Florida statute which declared such gambling debts void was a conclusive reflection of the public policy of the state and any enforcement of such debts would be in violation of this policy. Section 849.26 of the Florida Statutes provides:

All promises, agreements, notes, bills, bonds or other contracts, mortgages or other securities, when the whole or part of the consideration is for money or other valuable thing won or lost, laid, staked, betted or wagered in any gambling transaction whatsoever, regardless of its name or nature, whether heretofore prohibited or not or for the repayment of money lent or advanced at the time of a gambling transaction for the purpose of being laid, betted, staked or wagered are void and of no effect; provided, that this act shall not apply to wagering on parimutuals or any gambling transaction expressly authorized by law.<sup>20</sup>

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15. *Tropicales, S.A. v. Drinkhouse*, 15 Misc.2d 425, 183 N.Y.S.2d 679 (Sup. Ct. 1959).

16. 217 F. Supp. 639 (N.D. Okla. 1963).

17. See RESTATEMENT, CONFLICT OF LAWS § 612, comment c (1934); H. GOODRICH, CONFLICT OF LAWS 198 (4th ed. 1964).

18. 122 So.2d 618 (Fla. 3d Dist. 1960).

19. 202 So.2d 830 (Fla. 1st Dist. 1967).

20. FLA. STAT. § 849.26 (1967).

It is submitted that this statute itself clearly states that its provisions do *not* apply to "any gambling transaction expressly authorized by law." Thus, if we are to accept this statute as a reflection of public policy it seems that the enforcement of a gambling transaction which took place in Nevada, where it was authorized by law, would not be contrary to the public policy of Florida.

Although the writer does not agree that this Florida statute reflects a public policy opposed to enforcement of gambling debts incurred in states where such gambling is licensed by state law, it is submitted that the court in the *Young* case still reached the proper result. Although Nevada law allows legalized gambling, there are no provisions for enforcing debts incurred in this manner and the Nevada courts have refused to enforce legal gambling debts.<sup>21</sup> Thus, the Florida court's judgment would have been the same even if it had applied the law of Nevada. It is submitted, however, that the application of Nevada law would have been the proper approach.

In the second case, *Dorado Beach Hotel Corp. v. Jernigan*, the District Court of Appeal, First District did not rely upon Florida Statutes, section 849.26 but rather attempted to articulate the public policy of Florida regarding gambling contracts. The court felt that the public policy of the state permits "a restricted type of gambling which is incidental to spectator sports."<sup>22</sup> The plaintiff wanted Florida to enforce a valid gambling obligation incurred in Puerto Rico. The court held that the public policy of Florida would not allow such enforcement and that it was Florida's policy that the only forms of gambling made legal are "contests staged for those seeking pleasure in the State—primarily tourists."<sup>23</sup> The court's attempted definition of Florida public policy will be discussed in depth in a later section.

It is submitted that the laws of Puerto Rico should have been applied in *Jernigan*, and that since Puerto Rican law does allow enforcement of gambling debts,<sup>24</sup> the obligation should have been enforced. The gambling involved in this case was licensed by the Puerto Rican government. Consequently, it does not seem that such gambling contracts should be held as against the public policy of the forum. The fact that Puerto Rican law also allows the court discretion in lowering the amount of loss<sup>25</sup> should make the recognition of Puerto Rican law even more acceptable to the forum. Public policy arguments should not be effective as a defense against enforcement of this cause of action.

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21. *Weisbrod v. Fremont Hotel, Inc.*, 74 Nev. 227, 326 P.2d 1104 (1958); *West Indies v. First Nat'l Bank*, 67 Nev. 13, 214 P.2d 144 (1950); see also *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85 (1961).

22. 202 So.2d 830, 831 (Fla. 1st Dist. 1967).

23. *Id.* at 831.

24. 31 LAWS P.R. ANN. § 4474 (1956).

25. *Id.*

## V. VALID GAMBLING OBLIGATIONS AND PUBLIC POLICY

The primary consideration in a court's refusal to apply the laws of a foreign jurisdiction in these gambling cases is the forum's public policy. We have seen that if a court feels such obligations are contrary to its public policy it will choose not to enforce the contract. Hence, this leaves us with the difficult determination of when the enforcement of a certain obligation will violate the public policy of the forum.

Justice Cardozo has stated that to refuse enforcement because of public policy a cause of action must "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."<sup>26</sup> In this connection, the very strong public policy supporting the enforcement of contractual obligations should be noted.<sup>27</sup> As stated by Goodrich:

There is much to be said for a policy of enforcing obligations deliberately contracted and legally entered into. A paramount public policy in a day of easy communication and unlimited international and interstate business is the uniform interstate enforcement of contractual undertakings. A refusal to enforce the valid foreign contract makes the forum a sanctuary for those seeking to avoid their legal obligation.<sup>28</sup>

Courts which have dealt with the elusive question of public policy will deny enforcement after applying the test of whether the action will be prejudicial to the standards of morality or the general interest of the forum's citizens.<sup>29</sup> Rabel states: "In the soundest decisions, the exception of public policy, in fact, is reduced to the function of an objectively ascertained moral sense."<sup>30</sup>

It should be noted that the gambling obligations involved in this problem were incurred in jurisdictions where such contracts are legal. In light of this, it should be difficult for a forum to hold that such obligations are against its public policy:

It is hard to think of many transactions which have the stamp of approval of the law of some civilized state upon them which reek so of immorality that to give a money judgment upon the claim will jeopardize the ethnical standards of the forum. For one state of the union to assume such an attitude with regard to a contract centered in another seems an intolerable, provincial affectation of virtue.<sup>31</sup>

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26. *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918).

27. *RESTATEMENT, CONFLICT OF LAWS* § 612, comment c (1934).

28. H. GOODRICH, *CONFLICT OF LAWS* 199 (4th ed. 1964).

29. *Dennick v. Railroad*, 103 U.S. 11 (1880); *Powell v. Great N. Ry.*, 102 Minn. 448, 113 N.W. 1017 (1907); *Herrick v. Minneapolis & St. L. Ry.*, 31 Minn. 11, 16 N.W. 413 (1883); *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918).

30. 2 E. RABEL, *supra* note 11, at 576.

31. H. GOODRICH, *supra* note 30, at 198.

## VI. FLORIDA PUBLIC POLICY

*Young v. Sands, Inc.*<sup>32</sup> and *Dorado Beach Hotel Corp. v. Jernigan*<sup>33</sup> demonstrate that contracts based on gambling transactions will be unenforceable in Florida since they are against the state's public policy. What is determinative of when a contract is against Florida public policy? Justice Terrell, although recognizing that no standard rule can be fixed, stated that "a contract is not void for public policy *unless it is injurious to the public or contravenes some settled social interest.*"<sup>34</sup> Justice Buford in his dissent in *Knott v. State*<sup>35</sup> wrestled with a definition:

[I]t may be said to be community common sense and common conscience extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like. It is that general and well settled public opinion relating to man's plain, palpable duty to his fellow men, having due regard to all the circumstances of each particular relation and situation.

Since the *Sands* and *Jernigan* cases involved gambling obligations incurred where such gambling was licensed, it does not appear that enforcement of such obligation would be "injurious to the public" or "contravene some social interest." The enforcement of valid gambling obligations would not have an adverse effect locally since a court does not break down local control over local transactions by applying the foreign law to decide a foreign contract.<sup>36</sup>

Florida courts have pronounced a "strong adherence to the common law principle of the freedom of contract."<sup>37</sup> Yet *Young v. Sands, Inc.* has declared that because there is a statute which provides that contracts made involving forms of casino gambling are void, this reflects a public policy not to enforce such contracts although validly created. Statutes in derogation of the common law are to be strictly construed and a mere difference between state statutes does not make a cause of action contrary to public policy.<sup>38</sup> Justice Cardozo has recognized that "a right of action is property. If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him."<sup>39</sup>

32. 122 So.2d 618 (Fla. 3d Dist. 1960).

33. 202 So.2d 830 (Fla. 1st Dist. 1967).

34. *Russell v. Martin*, 88 So.2d 315, 317 (Fla. 1956) (emphasis added).

35. 136 Fla. 184, 191, 186 So. 788, 795 (1939).

36. Paulsen & Sovern, *Public Policy in the Conflict of Laws*, 56 COLUM. L. REV. 969, 970 (1956).

37. *Inland Container Corp. v. Atlantic Coast Line R.R.*, 266 F.2d 857 (5th Cir. 1959).

38. *Warner v. Florida Bank & Trust Co.*, 160 F.2d 766 (5th Cir. 1947); *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918); RESTATEMENT, CONFLICT OF LAWS § 612, comment b (1934).

39. *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 110-11, 120 N.E. 198, 201 (1918).

It is clear that there must not only be a difference in statutes, but also enforcement of the contract must violate good morals and the public interest in order for public policy to invalidate it. The intent of Florida Statutes, section 849.26 was to enforce only licensed gambling transactions. Public policy would be indeed violated if Florida should enforce unlicensed and unsupervised gambling obligations. On the other hand, licensed gambling obligations, it is submitted, should be enforced.

The *Jernigan* decision, in order to define the forms of gambling which shock the public morals, attempted to distinguish between various types of licensed gambling, stating that Florida would recognize licensed spectator sport gambling but not casino gambling. This distinction seems to be rather weak. For a period of one year between July 1, 1966 and June 30, 1967, the State of Florida received \$40,567,398 from licensed gambling within the state.<sup>40</sup> Gambling, whatever its form, is therefore no stranger to Florida. The determinative factor in deciding public policy in Florida should be whether or not the gambling from which the debt arose was licensed. If licensed, enforcement of the debt should not shock the public morality.

#### VII. ENFORCEABILITY OF PUERTO RICAN JUDGMENTS

Assuming that the cause of action in the *Jernigan* case had been reduced to judgment in Puerto Rico, there is little doubt that such a judgment would be enforceable in Florida. Although Puerto Rico is not a state and thus does not come under the constitutional provision of full faith and credit, a federal statute assures enforceability of Puerto Rican judgments:

Such acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.<sup>41</sup>

The statute as applied to Puerto Rican judgments has been held constitutional and given effect in *Americana of Puerto Rico, Inc. v. Kaplus*.<sup>42</sup> Clearly, the defense of public policy is not available against a judgment of the territory of Puerto Rico.

#### VIII. CONCLUSION

It is submitted that conflict of laws rules should be applied in situations involving gambling obligations incurred where such gaming is legal. The forum should use the law of the *lex loci actus* to determine liability

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40. 1967 FLA. STATE RACING COMM'N ANN. REP. 17.

41. 28 U.S.C. § 1738 (1964).

42. 368 F.2d 431 (3d Cir. 1966).



in this case. The forum's public policy should not stand in the way of the enforcement of the foreign law, especially in light of the fact that some jurisdictions do not hesitate to enforce validly incurred foreign gambling debts. Refusal of enforcement is "particularly unfortunate where evasion of the forum's prohibitions can be easily achieved by recovering a judgment on the prohibited contract in a state with more lenient standards."<sup>43</sup>

In most instances, gambling is closely supervised and licensed by the respective state or territory in which the gambling debt is incurred. Contracts which result from these pursuits should not shock the morals of the enforcing jurisdiction. On the contrary, it seems morally wrong not to recognize and enforce such obligations. As Professor Bayitch has stated in discussing the *Jernigan* case,

[T]here is involved a simple question of basic propriety, namely whether public policy should condone that an adult, apparently of some means, who executed a valid check to pay for his pleasures at the licensed gambling tables in another jurisdiction within the United States may, upon returning to his home in Florida take the moralistic attitude that what he did was wrong and, consequently renege on his otherwise valid promise.<sup>44</sup>

It does not seem that the defense of public policy should provide an undeserved benefit to one who legally and knowingly enters into an apparently binding contract. The overriding importance of uniformity of law and of the freedom of contract should compel the courts to encourage the enforcement of obligations and avoid an approach which will provide a sanctuary for those who wish to disavow their legally undertaken obligations.

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43. A. EHRENZWEIG, *CONFLICT OF LAWS* 487 (1962).

44. Bayitch, *Survey of Conflict of Laws*, 22 U. MIAMI L. REV. 509, 513 (1968).