

MEMORANDUM

FROM: Dorsey & Whitney LLP
DATE: February 12, 2010
RE: Lac du Flambeau Management Contract Decision

INTRODUCTION¹

The Trustee for Saybrook Capital LLC (the “Trustee”) has asked a federal district court to vacate its decision issued last month concerning the Lake of the Torches Economic Development Corporation (“EDC”). The decision held that a trust indenture (“Trust Indenture”) securing \$50,000,000 million in bonds held by Saybrook Capital LLC (“Saybrook”) and issued by EDC was void as a management contract unapproved by the National Indian Gaming Commission (“NIGC”). The most recent court filings in *Wells Fargo Bank, N.A. as Trustee v. Lake of the Torches Economic Development Corporation*, Case No. 09-CV-768 (the “LDF Case”), also ask the court to permit the Trustee to file an amended complaint asserting both breach of contract and non-contract claims against EDC.

We have reviewed certain of the filings and provide this summary for your convenience. In its latest filings, the Trustee has submitted declarations – signed and sworn statements – from a former NIGC general counsel and a gaming finance expert that the provisions the court found to be indicia of a management contract do not provide impermissible lender control over the EDC casino. The Trustee’s filings also assert a new legal theory that the EDC waived its immunity to suit in the EDC’s resolution authorizing the bond transaction and in the actual Bonds themselves such that the EDC can be sued for either breach of contract or on non-contract legal theories.

Please let us know if you would like to discuss this matter in further depth.

DISCUSSION

I. The LDF Case Decision

The U.S. District Court for the Western District of Wisconsin issued a decision on January 11, 2010, in which it found five provisions of the EDC Trust Indenture to constitute indicia of a management contract. The disputed provisions of the Trust Indenture are:

¹ **Disclaimer. This Memorandum is intended for general information purposes only and should not be construed as legal advice or legal opinions on any specific facts or circumstances. An attorney-client relationship is not created or continued by sending and/or receiving this Memorandum. Members of Dorsey & Whitney LLP will be pleased to provide further information regarding the matters discussed in this Memorandum.**

- Section 6.18: limiting capital expenditures to 25% of the prior year's capital expenditures unless written consent of the majority Bondholders is obtained;
- Section 6.19: upon request by the majority Bondholders, requiring EDC to engage an independent management consult and use its best efforts to implement the consultant's recommendations if debt service coverage ratio fell below a specified level;
- Section 6.20: prohibiting EDC from replacing or removing key management personnel for any reason without first obtaining the prior written consent of the majority Bondholders;
- Section 8.02: upon an Event of Default, providing the majority Bondholders with the right to require the hiring of new management and the right to consent to replacement management;
- Section 8.04: upon an Event of Default, and upon the filing of a suit or other commencement of judicial proceedings to enforce the rights of the Trustee and the Bondholders, providing the Trustee with "as a matter of right" the appointment of a receiver or receivers of the Trust Estate with such powers as the court making such appointment shall confer.

Under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*, management contracts must be approved by the Commissioner of the National Indian Gaming Commission or they are void *ab initio*. The court held that, in the context of the EDC Trust Indenture, which also included a pledge of gross gaming revenues and casino equipment, the five provisions "[t]aken collectively and individually" constitute a management contract. The court further held that: (1) the Trustee lacked a waiver of sovereign immunity to sue EDC since it could not rely upon the void Trust Indenture; (2) the waiver of immunity in the Trust Indenture could not be severed; and (3) the offending provisions of the Trust Indenture could not be severed or separated from the contract. The court denied the Trustee's motion to appoint a receiver and dismissed the case.

II. The Trustee's New Filings

A. Motions

In its latest filings, the Trustee asks the court to vacate, or withdraw, its decision and permit the Trustee to amend its complaint to assert new legal theories for relief. In its legal brief filed to support this motion, the Trustee argues:

- The court erred by dismissing the case before the Trustee's time to amend its complaint had passed and without an opportunity for the Trustee to present evidence or address the affidavit of Kevin Washburn, a law dean and former NIGC general counsel, in which Dean Washburn stated his preliminary opinion that the NIGC "would very likely have found that the Trust Indenture as written constitutes a management contract".
- The EDC waived its immunity to suit in a resolution passed by its Board of Directors that authorized the bond transaction and waived its immunity to suit in the Bonds themselves.

- The Trustee should be permitted to sue the EDC based upon the Bonds instruments themselves.
- The Trustee should be permitted to sue under legal theories such as restitution, unjust enrichment, fraud in the inducement, and reformation of contracts.
- The agreements collateral to the Trust Indenture did not need to be approved by the NIGC.
- The Trustee is entitled to present its own expert opinions on the issue of whether the Trust Indenture is a management contract.
- The Trustee could have shown that EDC is a sophisticated party, none of the purported management contract provisions had ever been invoked, none of the parties intended the document to be a management contract, and the Trust Indenture was ancillary to the loan but for the "mere appearance" of a few provisions that, in a different context, might be indicia of a management contract.
- The court erred by dismissing the case based upon EDC's sovereign immunity defense because the prevailing rule in the federal Court of Appeals for the Seventh Circuit, in which Wisconsin is located, is that sovereign immunity does not deprive the court of jurisdiction to hear the case.
- Dean Washburn's affidavit purportedly contained impermissible speculation, unclear assertions, and should have been struck by the court because he was not disclosed as an expert as required by court rules.
- The disputed provisions of the Trust Indenture could be severed for several reasons, including the fact that: (a) the parties contemplated that they could be severed as described in the contract; (b) Dean Washburn stated that the NIGC's remedy would be to remove the offending contract provisions; (c) EDC presented no evidence that anyone tried to exert management control over the casino; and (d) since the essence of the bargain between Saybrook and EDC was a loan, removal of any purported management provisions would be ancillary to the core purpose of the Indenture.
- The court's ruling would mark the first time an agreement providing for a fixed payment for a fixed time had been deemed a management contract under IGRA. Other contracts voided under an unapproved management contract theory have been developer contracts in which compensation is based upon a percentage where the developer also is operating the casino.

To support its position, the Trustee submitted two declarations. The Declaration of Michael Cox, a former general counsel for the NIGC, states that in his opinion the provisions of the Trust Indenture do not convert the agreement into a management contract because: (1) the bondholders are not authorized to manage the day-to-day operations of the casino; (2) the Trust Indenture is clearly not intended to be a management contract under IGRA; and (3) each provision of the Indenture cited by the court has to be considered in light of the central purpose of the agreement, which is to ensure the payment of obligations. Mr. Cox called the capital expenditure limit a "minimal intrusion" into the casino management decision-making intended to ensure expenditures are not so excessive that EDC is unable to pay interest or repay the

Bondholders. He stated that the provisions relating to appointment and approval of key managers and the hiring of an independent consultant permitted EDC to make the selections and did not permit the Bondholders to exercise any control over the managers. Mr. Cox also opined that Dean Washburn overstated the control that an appointed receiver would have over the casino operation and that a receiver's role in requiring the deposit of revenues and payment of liabilities would not make the receiver the manager or convert the Indenture into a management contract.

In the second declaration, provided by William Newby, a managing director at UBS Investment Bank and head of Gaming and Leisure, Americas at UBS, Mr. Newby opined that the EDC bond transaction followed a standard structure for the tribal casino gaming finance industry. He stated that it was common in such transactions not to have the loan or bond documents, including the trust indenture, reviewed by the NIGC. Mr. Newby stated that if the provisions identified by the court converted loan agreements into management contracts requiring NIGC approval, it would "exorbitantly" increase the cost of capital to tribes and have a chilling effect on lending to tribes. He estimated that two dozen financing transactions include provisions with characteristics like the ones at issue in the LDF Case and could be considered management contracts. Mr. Newby explained that the lender's interest in such provisions was to ensure that the casinos are well managed and that the lenders had a voice in the discussion of management issues.

II. Next Steps

The EDC will have an opportunity to respond to the Trustee's filings, after which the court can be expected to issue a decision on whether it will withdraw the January 11, 2010, Order dismissing the case and permit amendment of the complaint or deny the Trustee's motions, leaving the prior decision in place.

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