

## MEMORANDUM

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FROM: Dorsey & Whitney LLP  
DATE: April 27, 2010  
RE: Lac du Flambeau Management Contract Decision

### INTRODUCTION<sup>1</sup>

A federal district court in Wisconsin has declined to reconsider its decision that a trust indenture securing \$50,000,000 million in bonds issued by a tribal corporation was void as a management contract unapproved by federal gaming regulators. In the case, *Wells Fargo Bank, N.A. as Trustee v. Lake of the Torches Economic Development Corporation*,<sup>2</sup> the court rejected arguments that the tribal corporation's waiver of sovereign immunity could be severed from the Trust Indenture securing bonds held by Saybrook Capital LLC ("Saybrook") and declined to permit the Trustee for Saybrook to amend the complaint to add new legal theories for recovery tied to the Bond instruments themselves.

The Trustee for Saybrook had asked the court to vacate its decision issued in January concerning the Lake of the Torches Economic Development Corporation ("EDC"), a tribal corporation of the Lac du Flambeau Band of Lake Superior Chippewa Indians. The January decision held that the Trust Indenture securing bonds issued by the EDC was a management contract that under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* ("IGRA"), must be approved by the Chairman of the National Indian Gaming Commission ("NIGC"). Because the Trust Indenture had not been approved by the NIGC, the court found it was void *ab initio*, and dismissed the Trustee's suit to enforce the bondholders' remedies in the contract.

We have reviewed certain of the filings and the resulting Decision and Order filed April 23, 2010, (the "April Decision") from the court and provide this summary for your convenience. Please let us know if you would like to discuss this matter in further depth.

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<sup>1</sup> **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. Attorneys of Dorsey & Whitney LLP will be pleased to provide further information regarding the matters discussed in this Memorandum.**

<sup>2</sup> Case No. 09-CV-768 (W.D. Wis. April 23, 2010).

## DISCUSSION

### I. The LDF 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:

- 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 the EDC to engage an independent management consultant and use its best efforts to implement the consultant's recommendations if the EDC's debt service coverage ratio fell below a specified level;
- Section 6.20: prohibiting the 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; and
- 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 IGRA, management contracts must be approved by the Chairman of the NIGC 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 the EDC since it could not rely upon the waiver contained in the void Trust Indenture; (2) the waiver of immunity in the Trust Indenture could not be severed from the offending provisions of the Trust Indenture; 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 Latest Court Order

#### A. The Trustee's Motions

The Trustee asked the court to vacate, or withdraw, its January decision and permit the Trustee to amend its complaint to assert new legal theories for relief. The motion was based in part upon the Trustee's arguments that: (1) the disputed provisions of the Trust Indenture could be severed from the contract; (2) the Trustee should be entitled to offer evidence on the issue of the Trust Indenture's status under IGRA; (3) the EDC waived its immunity to suit in an EDC Board resolution authorizing the transaction and in the Bond instruments themselves; (4) the

Bonds provided a basis for recovery independent of the Trust Indenture; and (5) agreements collateral to the Trust Indenture did not need to be approved by the NIGC.

## **B. EDC's Response**

In its response to the Trustee's motion, the EDC noted that after the court's January decision, it learned from its bank statements that "nearly *all* of the funds from the Corporations accounts" had been swept from the accounts and that the Trustee distributed \$5,000,000 of Bond proceeds from the Bond Reserve Account and about \$1,200,000 of casino revenue from its Operating Reserve Account to Saybrook. See EDC Memorandum in Opposition to Plaintiffs' Motion to Vacate the Judgment and for Leave to Amend the Complaint at 5 (emphasis in original). The EDC estimated that in total, Saybrook had been paid about \$20,000,000 on the Bonds. *Id.* The EDC also stated in its response that one of its vendors, Great Lakes Foods, sought to change its payment terms for the Tribe after learning of the dispute with Saybrook. *Id.* at 6.

The EDC asked the court to deny the Trustee's motion because the Trustee provided no new reason why the complaint should not be dismissed and had ample opportunities to be heard on the issue. *Id.* at 29.

## **C. The Court's Decision and Order**

In the April Decision, the court found that the sovereign immunity provisions of the Trust Indenture could not be severed from the contract because even if the EDC's waiver of sovereign immunity were severed, the Trustee could not use the waiver to enforce the Trust Indenture because everything else in the contract would be void. See April Decision at 5. The court also found that it could not sever the illegal provisions of the Trust Indenture because severance would leave the parties with no means to secure repayment of the Bonds, which was the primary purpose of the Trust Indenture. *Id.* at 6.

The court next found that the Trustee was not entitled to an opportunity to offer evidence on the issue of the Trust Indenture's status under IGRA because the Trustee had a prior fair opportunity to be heard on the issue, the facts in the case were not disputed, and dismissal was warranted where an entity entitled to sovereign immunity did not waive its immunity to suit. See April Dec. at 7-8.

With regard to the Trustee's request to amend its complaint to assert new legal theories, the court determined that due to the unusual history of the case, it would consider the proposed amended complaint and determine whether the complaint as amended could proceed. *Id.* at 9. The amended complaint included a claim based upon the Bond instruments themselves, which provided a separate waiver of the EDC's sovereign immunity to suit. *Id.* at 10. The court, however, found that the Bonds could not provide a means of recovery because they, too, were void as agreements collateral to the Trust Indenture. *Id.* at 11.

Ultimately, the Court's ruling that the Trust Indenture is a management contract means that the entire transaction was subject to the management contract approval process. Accordingly, the parties would have been expected to submit all of the related (i.e. 'collateral') agreements to the NIGC for approval. This does not mean that all of those agreements are management contracts. But it does mean that the failure to procure NIGC

approval in the first instance renders all of the collateral agreements void *ab initio*.

The court also found that the Bonds could not be separated from the Trust Indenture and must be construed together. As such, they “reflect the parties’ intention to allow the Trustee to exert managerial control” in the event of default. *Id.* at 13.

The court noted next that the claims in the amended complaint based upon non-contract theories relied upon other transaction documents, such as the Board’s resolution approving the offering, for a waiver of sovereign immunity. *Id.* at 15. But, the court found, the waiver provisions “were generated in connection with the bond transaction, and they presuppose the validity of the same. To the extent that these waivers could be considered enforceable against the Corporation, they are collateral agreements to the bond transaction and are void for the reasons previously articulated.” *Id.* Finally, the court found that the transaction documents were a “precursor” to the issuance of the Bonds and were void because they were merged into the Trust Indenture when it was executed. *Id.*

## II. Next Steps

The Trustee has the opportunity to appeal the court’s decisions to the U.S. Court of Appeals for the Seventh Circuit.

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