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Enforcement of Native American Gambling Debts

Joseph Kelly, Sara Dutschke Setshwaelo, and Steven Paul McSloy

INTRODUCTION

THE ENFORCEMENT OF GAMBLING DEBTS incurred by gamblers at Native American casinos presents a confluence of issues, each with a long history. Gambling debts have historically been disfavored as against public policy in many states of the union. In addition, the legal respect to be accorded to the judgments of the courts of Indian nations has likewise been the subject of case law, statutes, and judicial rules for many years.

Tribal court judgments are not automatically covered under the Full Faith and Credit Clause of the United States Constitution, though some sporadic cases have made such arguments. Congress has specifically provided that Full Faith and Credit be accorded to certain tribal court orders and judgments, mostly with respect to domestic violence and domestic relations matters, but in most cases, tribal court judgments are addressed in state courts under the rubric of "comity."

A common exception to the granting of comity, however, are public policy objections in the state being asked to honor the foreign judgment, and thus public policy issues like those concerning gambling debts come to the fore.

However, since large-scale gaming by Indian nations exists under the aegis of specific tribal-state compacts, approved by the federal government, the provisions of such compacts allowing for casino credit to gamblers have been seen in several cases to override older state case law about policy objections to gambling debt enforcement. This has created in some states a sort of "comity plus" regime, allowing recognition of tribal court judgments beyond the bounds that might be allowed if the judgment had originated in a foreign country.

"COMITY PLUS"

Class II Native American gaming, which includes bingo and similar games and unbanked card games, is regulated by the tribes themselves, with oversight by the National Indian Gaming Commission pursuant to the Indian Gaming Regulatory Act of 1988 (IGRA).[1] Tribal Class III gaming, which includes games such as roulette and card-banked games, is governed through tribal-state compacts. Gambling debts of punters are usually enforceable if the particular tribal-state compact permits or does not prohibit credit. Each compact between a state and a tribe is a unique contract negotiated by the state regulators and the tribe, though there maybe a general similarity in forms used by a state. A careful review of the tribal-state compact is a starting point to determine enforceability of gaming debts, though case law may also provide important analysis on a particular compact's provisions regarding enforceability. Indeed, a tribe might have more flexibility in enforcing gambling debts than state regulations would normally permit.

In *Bay Mills Resort v. Gerbig*,[2] a Native American casino in Michigan sought to enforce a $23,000 credit transaction, but was awarded only $4,000 plus interests and costs. The trial court rejected $19,000 because the Native American

Joseph Kelly is a professor of Business Law at SUNY College Buffalo and an associate of Catania Consulting. Sara Dutschke Setshwaelo (Ione Band) and Steven Paul McSloy are, respectively, an associate and a partner with SNR Denton US LLP. This article is part of a project in "International Enforcement of Gambling Debts."

[1] 25 U.S.C. § 2701 et seq.
[2] 2008 Mich. App. Lexis 1896 (Mich Ct. App. 2008).

casino failed to follow "the proper credit and check cashing procedures" within the Michigan Administrative Code, which required a $3,000 per person limit for check cashing within a 24-hour period unless the shift manager approved a larger limit, which did not happen.

The Appellate Court allowed the entire amount.

> Nowhere in the compact does plaintiff adopt the administrative rule cited by the trial court. In fact, the compact expressly states that plaintiff is not regulated by the state and that nothing in the compact shall be deemed a wavier of the tribe's sovereign immunity.[3]

Furthermore, "IGRA only grants the states bargaining power, not regulatory power, over tribal gaming."[4]

There would be no enforcement of gambling debts if credit were prohibited by the tribal-state compact. In *CBA Credit Services of North Dakota v. Azar*,[5] the gambler was encouraged by Native American casino employees to accept an advance of $4,000 in blackjack chips. After losing the chips, the casino asked the gambler to complete a credit document and write a check to pay for the chips. As the tribal-state compact between Minnesota and the Chippewa Indians prohibited credit, the North Dakota court refused to enforce the debt.[6] Similarly, in Arizona, "between wagering limits and compact provisions prohibiting the extension of credit to players," casino gambling debts have not been a significant issue.[7]

Major Native American casinos, such as Foxwoods and Mohegan Sun in Connecticut, attract high rollers and therefore credit facilities, pursuant to a credit-application agreement, are essential. This would necessitate litigation against a gambler who received, on credit, considerable sums to wager at the casino, but refused to repay the advanced sum. Should the gambler refuse to honor his markers, the Native American casino would then usually sue the gambler in tribal court. The Mashantucket Pequots, owners of Foxwoods, for example, after failing to get the patron to repay the marker, will have its Office of Legal Counsel file suit in tribal court under its debt collection laws. When the legal counsel obtains a judgment, usually by default, he will initiate a secondary suit to enforce the tribal court order in the jurisdiction of the debtor, and retain the legal services of an attorney licensed in that jurisdiction.

Native American gambling judgments, unlike those of a sister-state gambling judgment, will not be enforceable automatically in another state court because the Full Faith and Credit Clause of the United States Constitution is applicable only to sister-state judgments. Instead, a tribal judgment would be treated similarly to that of a foreign country, which might be recognized pursuant to the principle of comity.

A state might follow the Uniform Foreign-Country Money Judgments Recognition Act (UFMJRA), which generally provides for cross-border enforcement of judgments. However, enforcement may still be governed by state-specific policies. The UFMJRA of Michigan, for example, lists various grounds whereby a foreign country judgment may not be recognized. For gaming purposes, the most significant would be section 4 of the UFMJRA, which lists for non-recognition, "the cause of action on which the judgment is based is repugnant to the public policy of this state.…"[8] A Native American judgment, however, might have special status because of a state statute or judicial rule, and thus not be considered a "foreign" judgment subject to the public policy exception. The Michigan UFMJRA, states "As used in this act: (a) 'Foreign country' means a government other than any of the following…(iii) A federally recognized Indian tribe whose tribal court judgments are entitled to recognition and presumed to be valid

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[3] *Id.*

[4] *Id.*

[5] CBA Credit Services of North Dakota v. Azar, 551 N.W. 2d 787 (N.D. 1996). The parties agreed Minnesota law was controlling.

[6] "Section 4 of the Compact addresses the regulatory standards for blackjack, and included a subsection titled, 'No Credit Extended.' This subsection states:

> All gaming shall be concluded on a cash basis. Except as herein provided, no person shall be extended credit for gaming by any gaming facility, operated within the Band, and no operator shall permit any person or organization to offer such credit for a fee. This section shall not restrict the right of the Band or any other person to offer check cashing or to install or accept bank card or credit card transactions in the same manner as would be normally permitted at any retail business within the State."

Id. at 790.

[7] Communication from Mark Brnovich, Director, Arizona Department of Gaming., Aug. 2, 2011.

[8] MICH. COMP. LAWS SERV. § 691.1134 sec 4(3)(c) (2011).

under a court rule adopted by the supreme court."[9] Wisconsin statutes[10] also grant full faith and credit to Wisconsin Tribal Court judgments, with Wisconsin courts only allowed to inquire into tribal jurisdictional and procedural validity. Iowa similarly will recognize tribal judgments, subject to various defenses such as, "The cause of action or defense upon which the tribal judgment is based is repugnant to the fundamental public policy of the United States or of this state."[11]

Enforcement of a tribal judgment may be subject to judicial rules instead of a statute. In Washington State, Superior Court Rule 82.5,[12] "Tribal Court Jurisdiction," states that judgments of federally recognized Washington tribes will be enforced…"unless the superior court finds the tribal court that rendered the order, judgment or decree (1) lacked jurisdiction over a party or the subject matter, (2) denied due process as provided by the Indian Civil Rights Act of 1968, or (3) does not reciprocally provide for recognition and implementation of orders, judgments and decrees of the superior courts of the State of Washington." Most states would probably apply common law and recognize a tribal judgment unless it was contrary to state public policy.[13] The following sections survey several key states and their responses to this issue.

CALIFORNIA

It is doubtful whether either a foreign gambling judgment or a Native American gambling debt could be enforced in California. Historically, gambling debts have been unenforceable in the state since 1851. In *Bryant v. Mead*, the California Supreme Court refused to recognize a $4,000 legal San Francisco gambling debt of a licensed gaming establishment:

> Wagers, which tend to excite a breach of the peace, or are *contra bonos mores* [against good morals], or which are against the principles of sound policy, are illegal; and no contract arising out of any such illegal transaction, can be enforced. These are principles of the common law which has been adopted in this State.[14]

Pursuant to the 1988 case of *Crockford's Club v. Si-Ahmed*, some California decisions would seem to recognize legal foreign gambling judgments,[15] but most would follow the reasoning of *Kelly v. First Astri Corp.*,[16] which criticized the *Crockford* reasoning: "Although the *Crockford's Club* decision turned on the question of California public policy, it is significant that the Court of Appeal did not examine the nature and scope of that public policy, nor did it discuss or even mention the many California cases…that created this public policy." In *First Astri*, the gambler had tried to recover gambling losses at a California tribal casino, and was unsuccessful.

In 1993, California enacted the Gambling Control Act (GCA), which did not prohibit extension of credit and required the California Gambling Control Commission (CGCC) to enact regulations for the extension of credit. In 2008, the CGCC enacted regulations that allowed licensed (non-Indian) card rooms to extend credit to member players.[17] The detailed regulations provide, for example, that the card room

> (a)…(3) Ensure that the patron is credit worthy through an assessment of one of the following:
> (A) Receipt of patron information on a credit application form which includes patron's name and signature, current address, telephone number, social security number, bank and/or trade references, employment information and income information, which shall be verified and used to form an assessment of the patron's financial situation, collateral circumstances and credit worthiness.…
> (j) A licensed gambling establishment shall not have an ATM (automatic teller machine or cash- or voucher-dispensing machine)

[9] MICH. COMP. LAWS SERV. § 691.1132 (2011).
[10] WIS. STAT. § 806.245 (2011).
[11] "Recognition and enforcement of tribal judgments." IOWA CODE § 626D.5.4(e) (2011). The writers are unaware of any Iowa cases addressing this statute with respect to gambling debts.
[12] Rule 82.5 Tribal Court Jurisdiction (c).
[13] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 7.07(b).
[14] (1851) 1 Cal. 441, 444; 1851 Cal LEXIS 35.
[15] Crockford's Club Ltd. v. Si-Ahmed, 203 Cal. App. 3d 1402, 1406, 250 Cal. Rptr. 728 (2d Dist. 1988).
[16] 72 Cal. App 4th 462, 84 Cal. Rptr. 2d 810 (4th Dist. 1999).
[17] CAL. CODE REGS. tit. 4, § 12388.

> accessible by an individual while physically seated at a gaming table, unless otherwise required under the Americans with Disabilities Act.[18]

California tribal-state compacts do not prohibit tribes from establishing credit, and some tribes have credit provisions which are governed by tribal law. According to an analysis of AB 513, a proposed gambling bill that would allow for the judicial enforcement of gambling debts,

> It appears that most, if not all, of the compacts require tribes operating casinos to "adopt and comply with standards that are no less stringent than state laws, if any, prohibiting extensions of credit." (*See, e.g.,* Tribal-State Compact Between the State of California and the Rincon, San Luiseno Band of Mission Indians, Section 10.2(j) (Sept. 10, 1999).)[19]

It is uncertain whether the CGCC Card Room Credit regulations or the tribal gaming credit provisions would legalize enforcement of gambling debts in California. The writers are unaware of any cases addressing this, though California's UFMJRA includes tribal judgments generally.[20]

AB 513 would have allowed "for the very first time in California, gambling entities to use state courts to seek enforcement of gambling judgments."[21] AB 513 would also have allowed enforcement of legal Internet gambling debts if one of the pending state Internet regulatory bills is enacted into law. It would only allow California tribal and card club debt enforcement, and not enforcement of non-California tribal judgments. It had been suggested that the bill should also include consumer protection provisions that would allow a gambler to sue a non-licensed gambling establishment to recover gambling debts and prevent a California gambling entity from foreclosing a jury trial to a gambling client in a debt related matter.[22] The bill was defeated in the Committee on the Judiciary by a 5–4 vote on May 10, 2011.

FLORIDA

Florida has long prohibited enforcement of gambling debts and considers them void, with exceptions:[23]

> All promises, agreements,…other contracts,… when the whole or part of the consideration if 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 pari-mutuels or any gambling transaction expressly authorized by law.

Florida courts have long been reluctant to register valid foreign gambling judgments. A foreign judgment may not be recognized in Florida for various reasons, including "the cause of action or claim for relief on which the judgment is based is repugnant" to Florida public policy.[24]

Yet Florida courts have registered Mashantucket Pequot gaming judgments, without the public policy defense being raised. In *Mashantucket Pequot Gaming Enter. v. Morlans-Diaz*,[25] the Florida court entered a final default judgment of $52,977 on Oct. 9, 2003. After subsequent depositions, the court, on Nov. 3, 2008, concluded the "case (was) eligible for destruction."

The attorney seeking registration in Florida must observe all procedural requirements. In *Weiss v. Mashantucket Pequot Gaming Enter.*,[26] an appellate court overturned a default judgment after two years because the substitute service upon the gambler's wife was improper, since the gambler was in prison at the time of service and was not released until nine days after the service. Thus, the default judgment was void. There was no discussion of whether the tribal-court judgment was otherwise enforceable, though other cases like *Morlans-Diaz*

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[18] § 12388. Extension of Credit, Check Cashing, and Automatic Teller Machines (ATMs).
[19] Leora Gershenzon, "Analysis of AB 513 as amended," Mar. 31, 2011 at 5.
[20] *See* CAL. CIV PROC. CODE § 1714(b).
[21] Gershenzon, *supra* n.19, at 5.
[22] *Id* at 5–6.
[23] "Gambling contracts declared void; exception," FLA. STAT. § 849.26 (2011).
[24] FLA. STAT. § 55.605(2)(c).
[25] No. 2003-005710-CA-01 (2003).
[26] 935 So. 2d 69 (Fla. App. 3 Dist. 2006).

have enforced tribal judgments. A Florida legal expert has opined that it is crucial in any attempt to register a tribal gambling debt, that the state statute be strictly complied with: "Under the Statute (Florida Statutes §§ 55.503–55.509), the procedure to domesticate a foreign judgment must be followed to the letter. Significantly, the specific procedure in each county may vary according to local rules."[27]

In one interesting case, the Mashantucket Pequots registered a $945,174 gaming judgment[28] in Maryland in November 2002, then proceeded to garnish defendant's property. In August 2004, they successfully registered the Maryland gaming judgment in Florida.[29]

It is uncertain whether gambling debts incurred at casinos operated by the Seminole Tribal of Florida, a federally recognized tribe, would be enforceable. In March 2009, Jason Starkman[30] wrote about 13 checks for $1.2 million on his credit line at the Seminole's Hard Rock Casino. He gambled at blackjack and other banked Class III card games which were authorized pursuant to a compact between the then-governor and the Seminoles. After his checks bounced, the Seminoles filed a two-count complaint in February 2010, alleging a violation of Florida's "worthless checks statute" and a breach of the credit agreement between the tribe and Starkman.

Starkman's answer admitted he lost the money, but in an affirmative defense, claimed the gaming was illegal because the tribal compact was ruled unconstitutional. Both sides moved for summary judgment, which was granted to Starkman in July 2010. The Seminole appeal basically argued that because they continued to pay approximately $12.5 million monthly to the state "for the privilege of offering those (Class III) games,"[31] the gambling debt was not against Florida's public policy pursuant to § 849.26. Starkman insisted it was not until 2010 that the Seminole's entered[32] into a valid tribal state compact; only then would gambling debts be enforceable. The Seminole reply brief reemphasized that because the legislature had authorized continuance of the banked card games since 2009, and also because Florida received millions of dollars in Seminole Class III gaming revenue, it was "a clear legislative imperative and shift in Florida's public policy."[33]

NEW YORK

Under comity, foreign gambling judgments were generally recognized in New York as early as 1982, since New York courts have concluded: "Gambling in legalized and appropriately supervised forms is not against this State's public policy."[34] In a case of first impression, *Mashantucket Pequot Gaming Enterprise v. Renzulli*,[35] the tribe asked New York to recognize a Mashantucket tribal default judgment of $5,160. While gambling debts would be unenforceable by statutes in both New York and Connecticut, the court recognized that Foxwoods Casino operated pursuant to IGRA provisions and that Connecticut courts had recognized Connecticut tribal gambling judgments:

> Connecticut courts have examined the applicable Tribal-State Compact and have noted its detailed provisions covering the extension of credit and collection practices. Courts have concluded that judgments obtained in the Tribal Court are entitled to be enforced by the courts of Connecticut under the principle of comity (*see*, *Mashantucket Pequot Gaming Ent. v. DiMasi*,…1999 Conn. Super.LEXIS 2584 (Conn. Sup. Ct., Sept. 23, 1999)) and that the Tribal-State Compact preempts the state law against the extension of credit for gambling (*see, Mashantucket Pequot Gaming Ent. v. Kennedy,*…2000 Conn. Super. LEXIS 679 (Conn. Sup. Ct., March 14, 2000)).[36]

In *Mashantucket Pequot Gaming Enterprise v. Shing Chun Yau*,[37] a New York court recognized a

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[27]Steven M. Davis, *Florida's Gambling Debt Collection Process: Play There, Collect Here*, 8 GAMING L. REV. AND ECON., 35–36 (2004).

[28]Mashantucket Pequot Enter. v. William Dennis, 22-C-02-001476.

[29]Mashantucket Pequot Enter. v. William Dennis, 2004 CA 008514 NC.

[30]Seminole Tribe of Florida v. Starkman, 10-7536 CA 11.

[31]Appellant brief, Nov. 22, 2010; 2010 WL 5819442, *5 (Fla. App. 4 Dist. 2010).

[32]Appellee's answer brief, 2011 WL 1494209, *29–32 (Fla. App. 4 Dist. Mar. 11, 2011).

[33]Appellant's reply brief, 2011 WL 1785442, *12 (Fla. App. 4 Dist. April 4, 2011). The case is set for arguments on November 8, 2011.

[34]Aspinall's Club Ltd. v. Aryeh, 86 A.D. 2d 428, 434; 450 N.Y.S. 2d 199 (2d Dep't 1982).

[35]728 N.Y.S.2d 901; 2001 N.Y. Misc. LEXIS 201 (N.Y. Sup. Ct. 2001).

[36]*Id.* at *5–6.

[37]2010 N.Y. Slip. Op. 30320(U), 2010 N.Y. Misc. LEXIS 1484 (N.Y. Sup. Ct. 2010).

tribal-default judgment of $106, 984, which included interest, legal fees and costs. The court remanded the matter for determination of additional attorney fees in registering the judgment in New York. The tribal attorney filed a motion for summary judgment instead of a complaint, which is permitted when the "action is based on an instrument for the payment of money only or upon any judgment."[38]

As in Florida, any attempt to register a tribal gambling judgment in New York must strictly comply with procedural requirements. In *Mashantucket Pequot Gaming Enter. v. Ping Lin*,[39] the tribal attorney attempted to obtain a $60,000 default by registration of the tribal judgment. The judge dismissed his motion for summary judgment because his affidavit of service, which allowed only seven days instead of the mandatory ten days to respond to the motion, was therefore not in compliance with New York law.

CONNECTICUT

The first case recognizing a tribal gambling judgment in Connecticut was *Mashantucket Pequot Gaming Enterprise v. DiMasi*.[40] The Connecticut court first decided the tribal court had jurisdiction and that the player had received "due notice" of the complaint and a "fair opportunity to contest the allegations in the complaint." The court also concluded that enforcement of gambling debts was no longer against Connecticut public policy, especially when the tribal-state agreement contained—

> detailed provisions concerning the extension of credit and collection practices. This court finds that these state sanctioned activities constitute a significant further erosion of the public policy against gambling.[41]

A different Connecticut court[42] upheld the Mashantucket Pequot's litigating a $60,000 casino credit complaint in a Connecticut court, without having obtained a tribal-court judgment. The Connecticut court granted summary judgment after it concluded that because there was a tribal-state compact pursuant to federal law (the IGRA), the federal law would preempt any contradictory Connecticut law.

The public policy defense against enforcement of a Connecticut tribal gambling debt was argued extensively in *Mohegan Tribal Gaming Authority v. Powers*.[43] In *Powers*, plaintiff alleged defendant failed to pay $1.2 million when six checks were dishonored. Count II alleged defendant over-drafted his player's club amount by over $30,000. Defendant moved to strike both counts "because this court cannot enforce an illegal wagering contract,"[44] enforcement of which is also against state public policy. The court denied the motion because "all the facts and circumstances necessary to resolve this dispute are not properly before the court on a motion to strike."[45]

The Mohegan Tribe in October 2010[46] filed a proposed amended seven-count complaint and obtained in December an *ex parte* pre-judgment remedy claiming defendant "was dissipating assets."[47] Defendant then sought to modify or dissolve the *ex parte* remedy, pursuant to five arguments, viz. the contract violated Connecticut public policy, the tribal-state compact did not authorize civil collection and gaming credit, Connecticut courts had no jurisdiction, Mohegan law had no provision for enforcement of Connecticut gambling debts, and that the pleadings and affidavits were "fatally flawed."[48] The motion was denied and subsequently Powers reached a confidential settlement with the Mohegans in late July 2011, as well as a settlement concerning similar gaming issues in Atlantic City and Las Vegas.[49]

In *Mohegan Tribal Gaming v. Siddiqui*,[50] the tribe sued the gambler directly in November 2008 for a $10 million debt resulting from a dishonored check. The gambler's defense was based on the Mohegans' alleged negligence concerning their failure to recognize defendant's compulsive gambling,

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[38] *Id*. at *3.
[39] 2011 NY Slip Op 50725(U); 2011 N.Y. Misc. LEXIS 1892 (N.Y. Sup. Ct. 2011).
[40] Mashantucket Pequot Gaming Enterprise v. DiMasi, 25 Conn. L. Rptr. 474, 1999 WL 799526 (Conn. Super. Ct. 1999).
[41] *Id*. at *5; $228 in costs were added to the $2,116 judgment.
[42] Mashantucket Pequot Gaming Enterprise v. Kennedy, 26 Conn. L. Rptr. 674, 2000 WL 327243 (Conn. Super. Ct. 2000).
[43] 2010 Conn. Super. LEXIS 1877 (Conn. Super. Ct. 2011).
[44] *Id*. at *2, 3.
[45] *Id*. at *8.
[46] 2011 WL 1288693 (Conn. Super. Ct. 2011).
[47] *Id*. at *1.
[48] *Id*. at *6.
[49] "APNewsBreak: TV exec who settled Connecticut gambling debt had disputes at 2 other casinos," July 28, 2011.
[50] KNL-CV-08-5009515-S (2008).

failure to follow their own credit operation procedures, and a failure to draft a written credit agreement. In September 2010, the Mohegans dismissed the lawsuit, largely because of their conclusion that the defendant did not have payment resources.[51]

NEW JERSEY AND PENNSYLVANIA

Tribes have also been successful in enforcing judgments in New Jersey and Pennsylvania. In *Mashantucket Pequot Gaming Enterprise v. Malhorta*,[52] the tribe advanced $100,000 to defendant, who in the credit application agreed to submit to tribal jurisdiction and that "any credit extended by the casino would be governed by the laws of the Mashantucket Pequot Tribe."[53] The tribe then obtained a tribal judgment, which was served on defendant in New Jersey. The New Jersey Court, pursuant to comity, recognized the judgment—especially since the court had earlier concluded foreign gambling judgment enforcement did not contravene New Jersey's public policy. As home to Atlantic City, public policy in New Jersey has long favored gaming. A Pennsylvania court, in *Mashantucket Pequot Gaming Enter. v. Schuck*, also recognized a tribal judgment for $10,989.[54]

CONCLUSION

Tribal gambling debts appear to be enforceable in most state courts, pursuant to a form of "comity plus" that in some instances would grant greater deference to the tribal judgment than that of a foreign country. However, the lawyer registering a tribal judgment must be especially careful to observe procedural technicalities, as several cases have foundered on such details.

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[51]Brian Hallenbeck, "Mohegan Sun Drops Lawsuit against 'Whale' for $10 million debt," *The Day*, Sept. 17, 2010.
[52]326 N.J. Super. 134, 740 A.2d 703 (Law Div. 1999).
[53]*Id.* at *2.
[54]GD-03.001444. (Court of Common Pleas, Allegheny Co., 2003).