Mississippi College Law Review

Volume 18
Issue 2 *Vol. 18 Iss. 2*

Article 12

1998

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Custom Citation
18 Miss. C. L. Rev. 459 (1997-1998)

WHEN THE DEALER GOES BUST: ISSUES IN CASINO BANKRUPTCIES

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I. INTRODUCTION

The gambling industry is booming nationwide. In 1996, casinos, including those on Indian reservations, had gross revenues of almost $24.5 billion, approximately six times the figure for 1982.[2] Other forms of legalized gambling, such as state lotteries, have grown over the same time period.[3] In the past ten years, casino gambling has grown from its original bases in Las Vegas and Atlantic City to twenty-six states, with scores of casinos and approximately 125 million gamblers per year.[4]

Mississippi has capitalized on the gambling explosion, with casinos now lining its Gulf Coast and the Mississippi River.[5] Despite widely reported secondary effects[6] from its introduction into Mississippi, the casino gambling industry will

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1. B.S., Massachusetts Institute of Technology; J.D., University of Virginia School of Law. Assistant Professor of Law, University of Mississippi School of Law. I wish to express my sincere thanks to the Lamar Order of the University of Mississippi School of Law for generous summer research grants without which this Article would not have been possible. My interest in bankruptcy issues raised by casino bankruptcies initially was sparked by consulting work I performed for a creditor in the bankruptcy of the Treasure Bay casinos in Mississippi. In addition, I encountered a discussion of many of the same issues and cases treated in this Article at a 1995 Mississippi Bankruptcy Conference Annual Seminar presentation by Judge Linda B. Riegle and Mr. Gerald M. Gordon and in the materials prepared in connection with that conference. Finally, I thank my colleague, Professor Richard Barnes, for his willingness to discuss these issues with me.

2. JOSHUA HARRIS PRAGER, THE WALL STREET JOURNAL ALMANAC 1998 935-36 (Ronald J. Alsop ed., 1997) (citing International Gaming & Wagering Bus. and Christiansen/Cummings Assocs.).

3. The one exception is jai alai, which suffered a 5.1% decline in gross revenues between 1982 and 1996. Other forms of legalized gambling have experienced increases in gross revenues during the same period, as follows: horse racing, 2.4%; greyhounds, 1.2%; lotteries, 15.5%; casinos, 11.4%; legal bookmaking, 11.4%; card rooms, 9.0%; charitable bingo, 20.5%; charitable games, 9.8%. There was no legal gambling on Indian reservations in 1982, but the 1996 gross revenues from such gambling was $5.358 billion, approximately 15% more than in 1995. PRAGER, *supra* note 2, at 936. Thirty-seven states run state lotteries, up from one state in 1963. *Id.*

4. *Id.*

5. Between 1990 and 1996, Mississippi saw an increase of almost ten times the number of jobs that it had between 1980 and 1986, a statistic attributed to the growth of casino gambling and its effects in related service industries. Reed Branson, *Lack of Skills Will Stall Mississippi Boom,* COM. APPEAL (Memphis), Jan. 25, 1998, at B5 (citing State Economist Phil Pepper's prediction that the boom will slow with saturation of the Mississippi market for gambling). The Mississippi State Tax Commission reported "a statewide revenue increase of $1.98 billion in 1997, up 6.5 percent from $1.86 billion the year before." *Mississippi Casino Revenues Up in '97,* COM. APPEAL (Memphis), Feb. 7, 1998, at B7. "The take at Mississippi's state-regulated casinos generated roughly $250 million in taxes for governments." *Id.* Revenues in Tunica County, Mississippi alone are projected to reach $1 billion in 1998. *Id.* Mississippi is the nation's third-largest gaming jurisdiction, trailing Nevada and New Jersey. *Id.*

6. For example, in 1996, Shelby County, Tennessee, home to an estimated 47% of the gamblers in Tunica County, Mississippi casinos, had a personal bankruptcy rate of more than four times the national average, one of the highest in the country. Bartholomew Sullivan, *'I Didn't Come Home for Weeks at a Time': Is the Gamble Paying Off?,* COM. APPEAL (Memphis), Oct. 20, 1997, at A1. The counties in the Northern District of Mississippi saw bankruptcy filings increase from 4,017 in 1992 to 5,430 in 1996. *Id.* (quoting Court Clerk Joseph E. Wroten). Similarly, the bankruptcy rate for south Mississippi in 1997 was nearly 18% greater than in 1996, with 5,522 cases in 1997, compared to 4,703 cases in 1996. Lisa Monti, *Bankruptcies Continue Steady Rise,* THE SUN HERALD (Biloxi), Jan. 13, 1998, at A6. Even more startling, the number of bankruptcy cases in that area jumped 40% between 1995 and 1996. *Id.* For an excellent discussion of other social consequences of casino gambling, *see generally* Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy and the Law,* 64 MISS. L.J. 291, 328-60 (1995).

continue to be a major force in the state. Since 1992, the number of casinos in Mississippi has grown from two to thirty.[7] Mississippi adopts a "laissez-faire"[8] attitude toward the entry of new casinos into its market, granting permits to casinos whose investors can meet the requirements of the Mississippi Gaming Control Act (MGCA).[9] It is reasonable to assume that Mississippi's gaming industry will likely continue to be marked by such dynamism. With freewheeling, open competition will inevitably come a sorting of winners and losers among the casinos themselves. Since casino gambling was introduced in 1992, two Mississippi casinos have filed bankruptcy petitions,[10] and several have moved or consolidated their operations.

The intersection of bankruptcy law and gaming is ripe for scholarly examination and synthesis.[11] Rather than analyzing issues that arise in the bankruptcies of gamblers, this Article turns the tables and discusses two general issues that arise when a *casino* files a petition for protection under the Bankruptcy Code[12] (hereinafter "Code"). Section II examines state government gaming regulation of a casino once it has filed a bankruptcy petition. That section reviews the handful of cases dealing with the status of gaming licenses in bankruptcy and suggests the limits and proper approach for state regulators in a casino bankruptcy. Section II also examines briefly the impact of a recent United States Supreme Court decision concerning sovereign immunity on a state's ability to regulate a casino during a bankruptcy case.

Section III addresses secured creditors' rights in two types of collateral that are unique to casino bankruptcy. Specifically, the Article analyzes whether and how a secured creditor might obtain and perfect a security interest in the mounds of cash on hand in a casino at any given time. Second, Section III reviews recent case law regarding the legal characterization of a dockside casino's physical plant and the implications of such characterization for secured creditors. The Article concludes with brief remarks on the lessons of this Article for parties to casino bankruptcies.

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7. These figures do not include one Indian casino in the state. Mississippi has no regulatory control over the Silver Star Casino, which is on the Choctaw Indian Reservation in Philadelphia, Mississippi. *Mississippi Casino Revenues Up in '97*, COM. APPEAL (Memphis), Feb. 7, 1998, at B7.

8. *See* Bartholomew Sullivan, *Gaming Regulators Prefer a Light Touch, We're Not Social Scientists: Is the Gamble Paying Off?*, COM. APPEAL (Memphis), Oct. 20, 1997, at A1 (quoting members of the state Gaming Commission regarding their laissez-faire, law enforcement attitude to gaming regulation).

9. MISS. CODE ANN. §§ 75-76-1 to 75-76-313 (1991 & Supp. 1997).

10. The bankruptcy debtors were Biloxi Casino Belle, Inc. and Treasure Bay Casino Corp. *See* Roy Anderson Corp. v. Treasure Bay Gaming & Resorts, Inc. (*In re* Treasure Bay Corp.), 205 B.R. 490 (Bankr. S.D. Miss. 1997); Charles N. White Constr. Co. v. MRA, Ltd. (*In re* Biloxi Casino Belle Inc.), 176 B.R. 427 (Bankr. S.D. Miss. 1995).

11. Current commentary dealing with the gambling/bankruptcy intersection primarily plumbs the law regarding dischargeability of the gambling debts of individual debtors, an increasingly frustrating phenomenon to unsecured creditors, such as credit card issuers. *See, e.g.*, Craig A. Bruens, Note, *Melting the Plastic Theories: Advocating the Common Law of Fraud in Credit Card Non-dischargeability Actions Under 11 U.S.C. § 523 (a)(2)(A)*, 50 VAND. L. REV. 1257 (1997); James M. Cain, *Proving Fraud in Credit Card Dischargeability Actions: A Permanent State of Flux?*, 102 COM. L.J. 233 (1997); Lawrence M. Ausubel, *Credit Card Defaults, Credit Card Profits, and Bankruptcy*, 71 AM. BANKR. L.J. 249 (1997); Thomas O. Depperschmidt & Nancy Hisey Kratzke, *Bankruptcy For Gamblers: The Questions Of Fraudulent Intent, Dischargeability, And Remedial Policy In Credit Card Cash Advance Cases*, 13 BANKR. DEV. J. 389 (1997); Hon. David S. Kennedy & James E. Bailey, III, *Gambling and the Bankruptcy Discharge: An Historical Exegesis and Case Survey*, 11 BANKR. DEV. J. 49 (1994-95).

12. 11 U.S.C. §§ 101-1330 (1993 & Supp. 1997).

II. STATE REGULATION OF CASINO DEBTORS IN BANKRUPTCY

Legalized gambling, including casinos, is one of the most highly regulated industries in the country.[13] During the time leading up to a bankruptcy petition,[14] a casino debtor will likely owe the state some combination of licensing fees and taxes and other assessments.[15] If a state interferes with a casino's continuing post-bankruptcy operations through attempting to exercise control over the debtor's gaming license, three questions arise. First, is the state's action, given the facts of the case, a violation of the automatic stay[16] or is it excepted from the reach of the stay? Second, does the state's action violate the anti-discrimination provisions of the Code?[17] Third, may a bankruptcy court, consistent with the Eleventh Amendment to the U.S. Constitution, order that the state cease and pay damages for any proven violations of the automatic stay or other Code provisions?

A. Stays of Gaming License Surrender and Revocation Proceedings

Upon the filing of a bankruptcy petition, an automatic stay arises which prohibits any entity from taking any of the following actions: collecting on pre-bankruptcy debts; enforcing pre-petition judgments; obtaining property of the bankruptcy estate;[18] creating or perfecting liens against estate property; or collecting any claim against the debtor that arose before the bankruptcy case.[19] The automatic stay is intended to give the debtor a "breathing spell" from creditor actions that would gravely impair the debtor's ability to reorganize and to ensure

13. For an introduction to the regulatory scheme and its enforcement in Mississippi, *see* David Maron, Comment, *The Mississippi Gaming Commission: An Analysis of the Structure, Duties, and Regulatory Rule of the Agency in Light of the Growing Mississippi Gaming Industry*, 64 MISS. L.J. 635 (1995).

14. A bankruptcy case is commenced by filing a petition for bankruptcy relief with the appropriate United States Bankruptcy Court. The debtor may file a petition voluntarily, or creditors meeting certain requirements may file an involuntary petition against a debtor for Chapter 7 or 11 relief. 11 U.S.C. §§ 301, 303 (1993 & Supp. 1997).

15. The statutory provisions governing fees payable by Mississippi gaming licensees are set forth in MISS. CODE ANN. §§ 75-76-177 to 75-76-197 (1991 & Supp. 1997).

16. 11 U.S.C. § 362 (1993 & Supp. 1997).

17. 11 U.S.C. § 525 (1993 & Supp. 1997).

18. Property of the bankruptcy estate is defined as "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (1993 & Supp. 1997).

19. 11 U.S.C. § 362(a) reads, in pertinent part:

> Except as provided in subsection (b) of this section, . . . [the filing of a bankruptcy petition] operates as a stay, applicable to all entities, of--
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case . . . , or to recover a claim against the debtor that arose before the commencement of the case . . . ;
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> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
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> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> (4) any act to create, perfect, or enforce any lien against property of the estate;
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> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case . . . ;
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title . . . .

that similarly situated creditors be treated the same, rather than permitting the spoils (i.e., the debtor's assets) to go to the fleetest or nimblest creditor.[20] Importantly, bankruptcy courts also have the power, under Code § 105, to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[21]

The automatic stay is perforce quite broad. However, the drafters of the Code recognized that certain actions should not, for reasons of public policy, be stayed. Therefore, the Code contains a number of specific exceptions[22] that render the stay inoperative in special situations, ranging from the commencement of a criminal action[23] against the debtor to suits by an accrediting agency regarding accreditation of educational institutions.[24] Theoretically, the exceptions to the automatic stay represent Congress' attempt at weighing core bankruptcy goals served by the automatic stay against other pressing public policy goals.[25]

Two of the exceptions to the automatic stay are particularly relevant to a casino debtor. First, the automatic stay does not operate as a stay of the commencement of a suit by a governmental unit[26] to enforce its police or regulatory power. Second, the stay does not prevent the enforcement of a non-monetary judgment obtained by a governmental unit in an action to enforce its police or regulatory power.[27]

Though post-bankruptcy regulation of various types of licenses is recurring grist for bankruptcy litigation,[28] there are only a handful of cases bearing directly

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20. The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions . . . .

The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that. H.R. REP. No. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.A.A.N. 5963, 6296-97.

21. 11 U.S.C. § 105 (1993 & Supp. 1997).

22. 11 U.S.C. § 362(b)(1)-(b)(18) (1993 & Supp. 1997).

23. *Id.* § 362(b)(1).

24. *Id.* § 362(b)(14).

25. Some of the choices, however, seem difficult to understand in this light. *See id.* § 362(b)(7) (setoffs by "repo participants" in connection with "repurchase agreements").

26. " '[G]overnmental unit' means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States . . . , a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government." 11 U.S.C. § 101(27) (1993 & Supp. 1997). The Mississippi Gaming Commission fits the definition of a governmental unit, as does the Mississippi Department of Revenue and any other state agency.

27. (b) The filing of a [bankruptcy] petition . . . does not operate as a stay –

. . . .

(4) . . . of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) . . . of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

11 U.S.C. § 362(b)(4), (b)(5) (1993 & Supp. 1997).

28. *See generally* 1 DAVID G. EPSTEIN, STEVE H. NICKLES, & JAMES J. WHITE, BANKRUPTCY § 3-21 (1992) (discussing enforcement of police powers and gathering cases regarding licenses granted by the state); Emerson, *Governmental Actions Under the Section 362(b)(4) Bankruptcy Exemption of Police Powers and Pecuniary Interests*, 90 COM. L.J. 101 (1985) (same).

on gaming or casino licenses under the Code.[29] The earliest case, *In re NLV Corp.*,[30] involved the Chapter 11 case of a Las Vegas casino owned by NLV Corporation (hereinafter "NLV"). After its bankruptcy filing, NLV continued to operate its casino gaming operations.[31] Approximately six months after the debtor's filing, the State of Nevada assessed a half million dollar gaming tax bill against NLV. [32] NLV could not raise this amount and did not pay the tax bill when due.[33]

Upon default, the Nevada gaming authorities threatened to close the debtor's casino pursuant to Nevada law which deemed a failure to pay gaming taxes an "automatic surrender" of NLV's gaming license.[34] Normally, if NLV continued operating its gaming establishments, it would be committing a felony in Nevada.[35] The Nevada Attorney General argued that the bankruptcy court should not interfere, through any affirmative act (e.g., through tolling), with the running of the statutory time period, which would result in an automatic surrender of the gaming license and/or criminal prosecution for running an unlicensed gaming operation.[36] The bankruptcy court, however, refused to ignore "the substance of the state's action, i.e., the threat of closure for the nonpayment of slot machine taxes."[37]

The court began its analysis by stating that "being an unassignable privilege a Nevada gaming license can hardly be deemed an asset of the Debtor's estate, to be maintained for the direct benefit of general creditors."[38] This conclusion was too hasty. A gaming license may be property of the debtor's bankruptcy estate,[39] despite the fact that it is non-assignable or only assignable under stringent restrictions under non-bankruptcy law.

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29. *See In re* National Cattle Congress, Inc., 179 B.R. 588 (Bankr. N.D. Iowa 1995), *remanded with directions,* 91 F.3d 1113 (8th Cir. 1996) (license for greyhound racetrack); Elsinore Shores Assocs. v. Casino Control Comm'n of N.J. (*In re* Elsinore Shores Assocs.), 66 B.R. 723 (Bankr. D.N.J. 1986) (casino gaming license); *In re* NLV Casino Corp., 1981 WL 157765 (Bankr. D. Nev. 1981) (same). I shall consider each of these cases *infra.*

30. 1981 WL 157765 (Bankr. D. Nev. 1981).

31. *Id.* at *1.

32. *Id.*

33. *Id.* The Nevada Gaming Commission had granted the debtor one extension of time to pay the bill, but the debtor failed to do so. *Id.*

34. Nevada gaming law provided that

> 1. Subject to the power of the commission to deny, revoke, suspend, condition or limit licenses, any state license in force may be renewed by the commission for the next succeeding license period upon proper application for renewal and payment of state license fees and taxes as required by law and the regulations of the commission.
>
> . . . .
>
> 7. If any licensee or other person fails to renew his license as provided in this section the commission may order the immediate closure of all his gaming activity until the license is renewed by the payment of the necessary fees, taxes, interest and any penalties . . . . *[F]ailure to renew a license within 30 days after the date required by this chapter shall be deemed a surrender of the license.*

NEV. REV. STAT. § 463.270(1), (7) (West 1995) (emphasis added). The Mississippi Gaming Control Act contains similar language. *See* MISS. CODE ANN. §§ 75-76-177, 75-76-197 (1991 & Supp. 1997).

35. *In re NLV Corp.*, 1981 WL 157765, at *2.

36. *Id.* at *3. Presumably, the Nevada Attorney General would argue that any such criminal prosecution clearly fit within the exception to the automatic stay for criminal prosecution. *See supra* text accompanying note 19.

37. *In re NLV Corp.*, 1981 WL 157765, at *2.

38. *Id.* at *3 (citations omitted).

39. The Code defines property of the estate, in pertinent part, to include "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (1993 & Supp. 1997).

In *Board of Trade of Chicago v. Johnson,*[40] the United States Supreme Court held that a seat on the Chicago Board of Trade was property of the seatholder's bankruptcy estate, despite the fact that Illinois law did not recognize such seats as "property" and that any disposition of the seat by the bankruptcy trustee would be subject to the attributes attached to it by state law.[41] In holding that the seat was property of the bankruptcy estate, the Court refused to limit the concept of "property of the estate" to the definition of "property" under non-bankruptcy law.[42]

Consistent with the approach in *Board of Trade of Chicago,* Professors Baird and Jackson suggest that the method for analyzing whether or not property is "property of the estate" under the Bankruptcy Code is *not* simply whether or not the debtor's creditors would be able to reach the property outside of bankruptcy through legal process, such as levy.[43] Rather, the proper inquiry is whether the creditors would have *any* means of reaching the asset under nonbankruptcy law.[44] If so, the property should become part of the bankruptcy estate and thus, available to satisfy the claims of general creditors.[45]

Baird and Jackson identify the "hardest case" as a corporate debtor with an asset, such as a seat on an exchange, that cannot be sold at all under non-bankruptcy law.[46] Because the stock of such a corporation could be sold or transferred, however, a third party still could exercise control over the property,

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40. 264 U.S. 1 (1924).

41. *Id.* at 14-16; *see* Vern Countryman, *The Use of State Law in Bankruptcy Cases, Part I,* 47 N.Y.U. L. REV. 407, 438 (1972) ("[W]hat is 'property' was a question of federal bankruptcy law, [though] the attributes of that property were still determined by state law . . . ."); *see also* 11 U.S.C. § 541(c)(1) (1993 & Supp. 1997) (providing that an interest of the debtor in property becomes property of the estate notwithstanding non-bankruptcy law that "restricts or conditions transfer of such interest by the debtor"); *In re* Central Ark. Broad. Co., 170 B.R. 143, 146 (Bankr. E.D. Ark. 1994) (broadcasting license is property of the estate); *In re* Draughon Training Inst., Inc., 119 B.R. 921, 926 (Bankr. W.D. La. 1990); and Bernstein v. Williams (*In re* Rocky Mountain Trucking Co.), 47 B.R. 1020, 1021 (D. Colo. 1985). Courts split in cases at the margin as to whether certain interests of a debtor constitute property. *Compare* Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (*In re* Braniff Airways, Inc.), 700 F.2d 935 (5th Cir. 1983) (ruling that landing slots at airports are not property of the estate because of restrictions on transferabilty and F.A.A. regulations), *with* Federal Aviation Admin. v. Gull Air, Inc. (*In re* Gull Air, Inc.), 890 F.2d 1255, 1260 (1st Cir. 1989) (opposite); *In re* American Cent. Airlines, Inc., 52 B.R. 567 (Bankr. N.D. Iowa 1985).

42. Congress derive[d] its power to enact a bankruptcy law from the Federal Constitution, and the construction of it is a federal question. Of course, where the bankrupt law deals with property rights which are regulated by the state law, the federal courts in bankruptcy will follow the state courts; but when the language of Congress indicates a policy requiring a broader construction of the statute than the state decisions would give it, federal courts can not be concluded by them.

Board of Trade of Chicago, 264 U.S. at 10 (citations omitted); *see generally* 1 DAVID G. EPSTEIN, STEVE H. NICKLES, & JAMES J. WHITE, BANKRUPTCY § 2-8 (1992) (discussing property of the estate and Board of Trade of Chicago, and gathering cases); Countryman, *supra* note 41, at 431-73 (gathering cases under Bankruptcy Act, the statute in effect at the time of *Board of Trade of Chicago*); and Aaron, *The Bankruptcy Reform Act of 1978: The Full Employment Act for Lawyers Bill,* 1979 UTAH L. REV. 405, 416-29 (discussing broader concept of "property of the estate" under the Bankruptcy Code). A seat on the Chicago Board of Trade was subsequently held to be property of the estate under Bankruptcy Code § 541(a). *In re* Drexel Burnham Lambert Group Inc., 120 B.R. 724, 737 (Bankr. S.D.N.Y. 1990).

43. DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES AND MATERIALS ON BANKRUPTCY 215-18 (2d ed. 1990).

44. *Id.* at 217.

45. *Id.*

46. *Id.*

though not as directly as through levy. Thus, the exchange seat in such a "hard case" should be regarded as property of the estate, though subject to third parties' rights in it.[47]

Casino licenses in Mississippi, as in Nevada, are highly regulated by the state Gaming Commission and are deemed to be a mere "revocable privilege" in which no holder "acquires any vested right . . . ."[48] Moreover, the MGCA restricts the rights of stockholders in corporations and partners in limited partnerships to dispose of their interests in the corporation or partnership which holds a gaming license.[49] Thus, a Mississippi gaming license is intended to give its holder no property interest under state law other than the privilege of conducting casino gaming operations in the state.

This, however, may be enough under § 541(a) of the Code and the reasoning of *Board of Trade of Chicago.* Despite being labeled a "privilege" under state law, a gaming license, in effect, may be transferred to another qualified licensee, albeit circuitously.[50] Because the privilege to conduct gaming operations may be granted to third parties who have purchased an interest in the entity running the casino, subject to Gaming Commission approval, there is little practical difference between this procedure and a transfer of a gaming license subject to state regulation of the transferee. As in *Board of Trade of Chicago,* the fact that state law deems the gaming license not to be "property" and, moreover, attaches additional strings to its transfer does not preclude the gaming license from being considered property of the bankruptcy estate under § 541 of the Code. Admittedly, this analysis takes us to the outer limit of the concept of "property of the estate," but it does raise an important point for state regulators enmeshed in a casino bankruptcy -- their actions with regard to gaming licenses *might* be within the prohibitions of the automatic stay. Thus, state officials must act prudently, and hopefully with bankruptcy court approval, unless they are confident that their actions are sheltered by the automatic stay exceptions for governmental units exercising their police or regulatory powers.

Returning to *In re NLV Corp.,* after the court set forth Nevada's gaming regulatory scheme and noted "the need the Debtor has to maintain this license until it can pay its gaming taxes in full," it decided not to permit the tolling of the statutory period leading up to automatic surrender of the debtor's gaming license.[51] The court was "uneasy about founding its decision upon such an undeveloped caselaw formulation"[52] regarding whether or not gaming licenses are property of a casino's bankruptcy estate. The court avoided the issue entirely, however, by invoking § 105(a) of the Code "to prevent, by injunction, the closure of the

47. *Id.*

48. MISS. CODE ANN. § 75-76-3(5) (1991 & Supp. 1997).

49. MISS. CODE ANN. §§ 75-76-207, 75-76-227 (1991 & Supp. 1997).

50. *See, e.g.,* Miss. Gaming Comm'n Reg. §§ II(I)(1), (I)(2) (1991) (setting forth the restrictions on transfers of interests in gaming licensees and making voluntary transfers of such interests contingent upon approval of the Commission).

51. *In re NLV Casino Corp.*, 1981 WL 157765, at *4.

52. *Id.* The Court presumably meant that it is unclear how the automatic stay applies to property in which a debtor has an "interest," but which the Court was unwilling to characterize as property of the bankruptcy estate.

Debtor's gaming businesses and the prosecution of criminal proceedings against the Debtor and/or its agents."[53] A § 105 injunction was appropriate because the court was "not faced with a usual criminal prosecution, based upon the generally unlawful conduct of the Debtor or its agents. It was merely presented with an 'over-extended' debtor, trying to repay its creditors in an orderly, if delayed, fashion."[54] Thus, a § 105 injunction was appropriate to facilitate the debtor's reorganization.

In *Elsinore Shores Associates v. Casino Control Commission of New Jersey (In re Elsinore Shores Associates),*[55] the debtor, Elsinore Shores Associates (ESA),[56] asked the bankruptcy court for permission to pay pre-petition fees owed by ESA to the New Jersey Casino Gaming Control Commission, presumably in an effort to prevent the Commission from shuttering ESA's casino operations.[57] The unsecured creditors' committee[58] opposed ESA's motion and countered with a request that the court find, among other things, that the Casino Gaming Control Commission's request violated the automatic stay and merited a § 105(a) injunction.[59] After reviewing the New Jersey casino regulatory scheme and the automatic stay, the court cited the decision in *In re NLV Corp.* for the proposition that "the casino license at issue . . . and the rights given to the debtor-in-possession emanating therefrom, including the legal right to operate its casino business, constitute an interest protected by the automatic stay provisions of 11 U.S.C. § 362."[60]

The question remained, however, whether the state's action in seeking payment of pre-petition license fees and taxes fell within the exceptions for the exercise or enforcement of police or regulatory powers under § 362(b) of the Code.[61] After

53. *Id.* at *4.

54. *Id.* at *5.

55. 66 B.R. 723 (Bankr. D.N.J. 1986).

56. The debtor was a partnership which ran the Atlantis Casino Hotel in Atlantic City, New Jersey. *Id.* at 726.

57. *Id.* at 727.

58. "[A]s soon as practicable after the order for relief" is entered in a Chapter 11 bankruptcy, the United States Trustee, an official of the U.S. Department of the Treasury, appoints a committee of unsecured creditors, normally consisting of representatives of the creditors holding the seven largest claims against the debtor. 11 U.S.C. § 1102 (1993 & Supp. 1997). As the representative of the unsecured creditors, the Creditor's Committee may consult with the debtor and appear on any matter in the bankruptcy case. *Id.*

59. *In re Elsinore Shores Assocs.,* 66 B.R. at 728.

60. *Id.* at 734. The court was apparently unwilling to unambiguously label a gaming license as property of the bankruptcy estate.

61. *See supra* note 27; *see generally* Ellen E. Sward, *Resolving Conflicts Between Bankruptcy Law and the State Police Power,* 1987 WIS. L. REV. 403 (1987).

examining three seminal cases[62] dealing with the issue of when a state is exercising its police or regulatory powers, the court

> reject[ed] the conclusion that if governmental action relates primarily to public health, safety or welfare, 11 U.S.C. § 362(b)(4) perfunctorily excepts the action from the automatic stay. It is clear that in establishing whether particular governmental action is exempted from the automatic stay, the specific action the government is attempting to carry out must be examined.[63]

Absent proof of an actual threat to the public or to public policy, courts consider the revocation of a business license by the state, due to non-payment of prepetition fees or taxes, as an act in the state's pecuniary interest, not one intended to protect the health, safety, or welfare of the public.[64] Therefore, such revocations are not within any exception to the automatic stay.

The *In re Elsinore Shores Associates* court concluded that the payment of prepetition fees and taxes by the debtor would constitute a "clear obstacle to the purposes and objectives of Congress as contained in the Bankruptcy Code and to the reorganization provisions of Chapter 11 of the Bankruptcy Code."[65] The court permanently enjoined the Commission "from enforcing the license condition which requires the payment by ESA of prepetition license fees and taxes."[66]

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62. In *Penn Terra Ltd. v. Department of Environmental Resources, Commonwealth of Pennsylvania,* 733 F.2d 267 (3d Cir. 1984), the Third Circuit held that the key to determining whether or not a pre-petition consent order, which would have required the debtor to clean up hazardous waste on its property, ought to be enforced in bankruptcy was determinining the true purpose of the injunction. Was it intended merely to force the debtor to pay monetary damages on a pre-petition claim, or was it truly designed to protect the public health, safety or welfare? If the latter, then the injunction would fall into the stay exception and be permissible. If the former, the attempt to enforce the consent decree would violate the automatic stay. *Id.* at 275-77.

In *Ohio v. Kovacs,* 469 U.S. 274 (1985), the Court analyzed the obligation of a debtor to comply with an injunction obtained by the state of Ohio which had been issued prior to the commencement of the bankruptcy proceeding. The injunction in *Kovacs* also required the debtor to clean up a hazardous waste disposal site. *Id.* at 275. The Supreme Court held that this obligation constituted a "debt" which was subject to discharge under the Code. *Id.* at 281. Therefore, an attempt to enforce the judgment was actually an impermissible attempt to gain a pecuniary advantage by collecting a pre-petition debt, which would not be within the police or regulatory power exceptions to the automatic stay. *Id.* at 283.

In *Midlantic National Bank v. New Jersey Department of Environmental Protection,* 474 U.S. 494, 507 (1986), the Supreme Court noted that the exception to the automatic stay for enforcement of a state's police or regulatory powers permits the government to enforce *non-monetary* judgments against a debtor's estate.

63. *In re Elsinore Shores Assocs.*, 66 B.R. at 737.

64. *See, e.g.*, Shimer v. Fugazy (*In re* Fugazy Express, Inc.), 114 B.R. 865 (S.D.N.Y. 1990) (holding that a radio license was property of the estate and post-petition cancellation was not within exceptions to the stay); Pub Dennis of Mineral Spring Ave., Inc. v. Town of North Providence (*In re* Pub Dennis of Mineral Spring Ave., Inc.), 126 B.R. 903 (D.R.I. 1991) (liquor license, same result); and Beker Indus. Corp. v. Florida Land and Water Adjudicatory Comm'n (*In re* Beker Indus. Corp.), 57 B.R. 611 (Bankr. S.D.N.Y. 1986) (state revocation of equivalent of license not within stay exceptions); *see generally* 1 EPSTEIN, *supra* note 28, at § 3-21 (summarizing and gathering cases); Robert E. Korroch, *The 1978 Bankruptcy Reform Act's Police or Regulatory Power Exemption to the Automatic Stay: Unnecessary, Unfounded, and Unrestrained,* 29 WM. & MARY L. REV. 855 (1988) (arguing that the police power exceptions to the automatic stay are superfluous and will lead to pressure for payment of pre-petition claims); and Andrew F. Emerson, *Governmental Actions Under the Section 362(b)(4) Bankruptcy Exemption; Of Police Powers and Pecuniary Interests,* 90 COM. L.J. 101 (1985).

65. *In re Elsinore Shores Assocs.*, 66 B.R. at 743.

66. *Id.*

The court made one additional point which is worthy of note. Requiring payment of pre-petition taxes and fees for re-licensure interferes with "the priorities scheme contained in the United States Bankruptcy Code."[67] Pre-petition taxes may be entitled to priority treatment as unsecured claims in the casino's bankruptcy case.[68] The court recognized that the state simply was attempting to gain a priority above even those enumerated in § 507(a) by being paid in full on its pre-petition debt.[69] This insight clarifies the issue in cases such as *In re Elsinore Shores Associates*--the parties actually are bickering over priorities in estate assets; therefore, the court need not address the automatic stay or its exceptions. A court ought to recast such automatic stay motions as motions for priority treatment for the state's claim. This approach avoids the temptation for courts to lift the automatic stay to permit the assessment and collection of pre-petition taxes or fees under the guise of the exercise of "police powers," rather than an end run by state authorities around the Code's carefully constructed priority scheme.

In *In re National Cattle Congress, Inc.*,[70] the state of Iowa's Racing and Gaming Commission revoked the debtor's pari-mutuel dog racing license after the debtor had filed a bankruptcy petition.[71] The debtor sought to have the court declare the Commission's action void *ab initio* as, among other theories, a violation of the automatic stay. After a brief review of several cases concerning the treatment of other types of licenses in bankruptcy, the court concluded that the debtor's pari-mutuel betting license was property of the estate.[72] The court framed the ultimate issue as whether the state had exercised "control" over property of the debtor by revoking the debtor's gaming license.[73] If the state exercised control over estate property, it violated the automatic stay by (1) taking an action in an attempt to collect a pre-petition debt and (2) by exercising control over property of the estate.[74] The exception for a state exercising its police power does not apply when the state attempts to exercise control over property of the estate through post-bankruptcy payment in full of a pre-petition claim.[75] The court concluded that "as the attempted license revocation resulted in the

67. *Id.*

68. *Id.* at 738-39. Section 507(a) of the Code lists, by order of priority, categories of unsecured creditors who are entitled to be paid before general unsecured creditors.

69. This point has not escaped commentators who have examined the automatic stay/police power intersection in the Code. *See* BAIRD, *supra* note 43, at 218-19.

70. 179 B.R. 588 (Bankr. N.D. Iowa 1995), *remanded with directions*, 91 F.3d 1113 (8th Cir. 1996).

71. *Id.* at 591.

72. Based on the foregoing authorities and the United States Supreme Court's holding that property interests under the Bankruptcy Code are to be broadly construed, this Court concludes that Debtor's racing license does constitute property of the estate. It is a property interest in which Debtor has, at a minimum, a proprietary interest to be administered by the Bankruptcy Court balanced against the State's legitimate interest in regulation of the subject matter of the license. Within those parameters, the Bankruptcy Code's broad definition of property of the estate, which has been expansively embraced by this Court, ultimately encompasses Debtor's interest in this racing license.

Id. at 593; *see supra* note 41 for a discussion of the proper analytical framework for arriving at this result.

73. *Id.* at 596.

74. *Id.*; *see also* 11 U.S.C. § 362(a)(1), (a)(3) (1994).

75. *In re Nat'l Cattle Congress*, 179 B.R. at 596-97.

Commission's control over property of the estate, the automatic stay renders the actual revocation void *ab initio*."[76]

Taken as a trio, these cases point to the proper analysis, in the context of a bankruptcy case, of attempts by state gaming authorities to revoke or otherwise cancel a casino debtor's license to conduct gaming activities. First, despite its attributes under state law, a gaming license properly is considered property of the bankruptcy estate. As such, the state authorities cannot exercise control over the license itself without violating the automatic stay. Moreover, it is a violation of the automatic stay, not within the police power exceptions, for a state to attempt to collect pre-petition license fees or taxes under threat of revocation of a gaming license. A bankruptcy court ought to exercise its injunctive powers under § 362 and/or § 105 of the Code to prevent state authorities from revoking a gaming license based upon pre-petition conduct. Finally, cases involving threatened revocations of gaming licenses, due to non-payment of pre-petition fees and taxes, are best analyzed as priority disputes going to the question of whether or not the state gaming authorities are entitled to be paid before other unsecured creditors. Viewing such cases as priority disputes sharpens the issues and permits courts to avoid the tangle of law surrounding the automatic stay.

B. Anti-Discrimination Under the Bankruptcy Code[77]

The Code prohibits the government from revoking, suspending, or refusing to renew a license to a bankruptcy debtor "solely" because the debtor has filed a petition in bankruptcy.[78] In adopting § 525, Congress codified the result of the Supreme Court's decision in *Perez v. Campbell*,[79] which held that the core bankruptcy policy of granting a fresh start to debtors through discharge of debts[80] was jeopardized if the government could refuse to renew a driver's license because a debtor had not satisfied a tort judgment which had been discharged in the debtor's bankruptcy case.[81] The legislative history contains an important caveat to the general rule of non-discrimination--§ 525 "does not prohibit consideration

76. *Id.* at 597-98.

77. *See generally* Douglass G. Boshkoff, *Fresh Start, False Start, or Head Start?*, 70 IND. L.J. 549 (1995); Douglas G. Boshkoff, *Bankruptcy-Based Discrimination*, 66 AM. BANKR. L.J. 387 (1992); Elizabeth A. Bronheim, Comment, *Interpreting Section 525(a) of the Bankruptcy Code*, 7 BANKR. DEV. J. 595 (1990); and John C. Chobot, *Anti-discrimination Under the Bankruptcy Laws*, 60 AM. BANKR. L.J. 185 (1986).

78. [A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

11 U.S.C. § 525(a) (1993 & Supp. 1997).

79. 402 U.S. 637 (1971).

80. *See* 11 U.S.C. §§ 727, 1141 (1993) (Bankruptcy Code discharge provisions in Chapters 7 and 11, respectively).

81. *Perez*, 402 U.S. at 648.

of other factors, such as *future* financial responsibility or ability, and does not prohibit imposition of requirements such as net capital rules, if applied non-discriminatorily."[82]

The court in *In re Elsinore Shores Associates* considered whether or not the New Jersey Gaming Control Commission could refuse to renew the casino's gaming license unless the casino paid pre-petition taxes and fees.[83] After citing § 525 and its legislative history, the court reviewed the pertinent case law[84] to determine whether the Gaming Commission's actions were permissible.[85] The Gaming Commission argued that § 525 should not result in a benefit to a debtor to which it would not otherwise be entitled.[86] The Commission further claimed that it would have treated the debtor, ESA, the same even if ESA were not a debtor in bankruptcy, since the Commission requires all casino licensees to comply with New Jersey gaming law by paying outstanding license fees and taxes.[87]

In reaching its decision, the court examined closely the Sixth Circuit's decision in *Duffey v. Dollison*.[88] The issue in *Duffey* was whether or not Ohio's Motor Vehicle Financial Responsibility Act, which required the suspension of driver's licenses and registrations of individuals who failed to pay judgments arising out of automobile accidents, was consonant with § 525 of the Code.[89] The court distinguished *Perez v. Campbell* because, rather than an absolute requirement of repayment, the Ohio statute in *Duffey* merely required proof of future financial responsibility.[90] Thus, the Ohio statute did not violate the anti-discrimination principle of § 525.

The court in *In re Elsinore Shores Associates* held that the Gaming Commission's requirement that ESA pay pre-petition license fees and taxes as a condition of the renewal of its casino license required the debtor to pay pre-petition debts, rather than prove future financial responsibility.[91] Therefore, although § 525 would not prohibit a governmental unit from requiring a debtor to prove *future* financial responsibility, the conditioning of license renewal on the payment of the fees and taxes owed by the debtor violated § 525. Accordingly, the court per-

82. H.R. REP. NO. 95-595, at 366-67 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6321-22; S. REP. NO. 95-989, at 81 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5867 (emphasis added).

83. *In re* Elsinore Shores Assocs. v. Casino Control Comm'n of N.J., 66 B.R. 723 (Bankr. D.N.J. 1986).

84. The first case the Court discussed was *Anderson v. Mississippi State Tax Comm'n (In re Anderson)*, 15 B.R. 399 (Bankr. S.D. Miss.1981), wherein the court precluded the enforcement of a state regulation against debtors, pursuant to 11 U.S.C. § 525. *Id.* at 400. The regulation at issue in that case prohibited the renewal of the debtors' liquor license due to their failure to pay monies owed to the Mississippi State Tax Commission. *Id.* The court found that the state's refusal to renew the liquor license would preclude the reorganization of the debtors because they would be forced to close their liquor store, which was their primary source of income. *Id.* at 400-01. The court ordered the State Tax Commission to renew the debtors' liquor license and to continue to supply the debtors with alcoholic beverages on a cash basis. *Id.* at 401.

85. *In re Elsinore Shores Assocs.*, 66 B.R. at 741.

86. *Id.* at 742.

87. *Id.* This point supports the argument that the Commission's actions were not *solely* due to ESA's status as a bankruptcy debtor.

88. 734 F.2d 265 (6th Cir. 1984).

89. *Id.* at 269.

90. *Id.* at 272.

91. *In re Elsinore Shores Assocs.*, 66 B.R. at 743.

manently enjoined the Gaming Commission from enforcing the license condition that requires the payment of pre-petition license fees and taxes.[92]

The court in *In re National Cattle Congress, Inc.*[93] took a more sympathetic view of the Iowa Gaming Commission's actions in revoking the license of the debtor's pari-mutuel betting license. Noting that § 525 is not violated "where the denial of a license is based on other factors such as the debtor's lack of financial responsibility," the court stated that the Code does not prohibit a state agency's examination of financial responsibility (i.e., a factor *other* than the debtor's bankruptcy case) in deciding whether to suspend a debtor's license.[94]

The Iowa Racing and Gaming Commission's written ruling indicated that it revoked the debtor's license due to the debtor's failure to demonstrate its financial responsibility and viability.[95] The court noted that two public referenda upon which the debtor based its plan for reorganization were defeated.[96] Moreover, the Commission had additional evidence of the non-viability of the debtor's racing operations in the future.[97] The court held that the Commission's revocation was not *solely* based on the debtor's Chapter 11 filing nor on the debtor's pre-bankruptcy insolvency and, therefore, did not run afoul of § 525.[98]

The lesson of the *Elsinore Shores* and *National Cattle Congress* opinions is that bankruptcy courts will police compliance with § 525 closely, on a case-by-case basis. Practically speaking, these cases suggest the prudent course of action for state gaming regulators in dealing with casinos in Chapter 11. The state should not attempt to recoup pre-petition gaming license fees or taxes, but, rather, should rely on the available priority structure of the Bankruptcy Code for repayment. If state gaming authorities are concerned about permitting a casino to continue to operate because of *prospective* problems with the casino's financial viability, the state should ask permission of the bankruptcy court to lift the automatic stay in order for the regulators to conduct the appropriate investigation and hearings, under state gaming regulations, to determine whether or not the casino will be financially sound in the future.

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92. *Id.* at 743.

93. 179 B.R. 588 (Bankr. N.D. Iowa 1995), *remanded with directions,* 91 F.3d 1113 (8th Cir. 1996).

94. *Id.* at 598 (citing Will Rogers Jockey & Polo Club, Inc. v. Oklahoma Horse Racing Comm'n (*In re* Will Rogers Jockey & Polo Club, Inc.), 111 B.R. 948, 954 (Bankr. N.D. Okla. 1990) (holding that debtor's pari-mutuel racing license application was validly denied)); Christmas v. Maryland Racing Comm'n (*In re* Christmas), 102 B.R. 447, 448 (Bankr. D. Md. 1989) (concluding that horse trainer's license was validly suspended). The court noted that the Iowa Code requires that racing license applicants demonstrate financial responsibility. *In re National Cattle Congress,* 179 B.R. at 598. "Related regulations require that an applicant demonstrate that it is viable and properly financed. The Commission is required to immediately revoke the license of any licensee who is unable to demonstrate financial responsibility." *Id.* (citing IOWA CODE § 99D.9(7)).

95. *In re National Cattle Congress*, 179 B.R. at 598.

96. *Id.* The Iowa Legislature previously had permitted racetrack facilities to operate expanded, casino-style gaming, such as slot machines, and the debtor used projections of the take from such facilities in arguing for its long term viability. *Id.* at 591. However, the Legislature required a county referendum prior to installation of slot machines at a racetrack, and two such referenda were defeated by the citizens of Black Hawk County, Iowa. *Id.*

97. *Id.* at 591.

98. *Id.*

The state should not revoke the gaming license of the debtor unilaterally without evidence that will satisfy the non-discrimination provision of the Bankruptcy Code and, in any event, without obtaining bankruptcy court permission. Even if regulators have such non-discriminatory evidence, the state should be prepared for the bankruptcy judge to deny a motion requesting revocation of the license at an early stage of a bankruptcy case in order to permit the debtor a chance to propose a plan of reorganization to its creditors. If the state authorities act unilaterally and/or without the proper evidence required to permit a revocation of a gaming license, the state faces the possibility that the bankruptcy court will undo the state's actions and, in an appropriate case, order damages for violation of the automatic stay, including the possibility of punitive damages for willful violations.[99]

C. *The Impact of* Seminole Tribe of Florida v. Florida

The recent United States Supreme Court decision of *Seminole Tribe of Florida v. Florida,*[100] which delineated the extent of Congress' power to abrogate a state's sovereign immunity from suit in federal courts, casts a shadow over decisions such as *In re Elsinore Shores Associates* and *In re National Cattle Congress.* Indeed, the Eighth Circuit remanded the appeal in *In re National Cattle Congress*[101] to the district court with the direction "to remand to the bankruptcy court for further consideration in light of *Seminole.*"[102] The *Seminole Tribe* decision is potentially quite important to suits in bankruptcy courts[103] against gaming regulators who seek to exercise control of some sort over casinos.

The issue in *Seminole Tribe* was whether or not Congress had the power, under the Indian Commerce Clause,[104] to abrogate, pursuant to the Indian Gaming Regulatory Act (IGRA),[105] a state's Eleventh Amendment[106] grant of sovereign immunity. The IGRA permits an Indian tribe to conduct gaming activities under the terms of a valid compact between the tribe and the state in which the gaming activities are located.[107] States must negotiate the compact with the Indian tribe

99. 11 U.S.C. § 362(h) (1993 & Supp. 1997) (willful stay violation punishable by punitive damages).

100. 517 U.S. 44 (1996).

101. 91 F.3d 1113 (8th Cir. 1996).

102. *Id.* at 1114.

103. *See* Leonard H. Gerson, *Circuits Uphold 'Seminole Tribe' Doctrine in Bankruptcy,* N.Y.L.J. 1 (Oct. 30, 1997). The *Seminole Tribe* decision already has attracted wide scholarly attention. *See, e.g.,* Kurt E. Springmann, *The Impact of* Seminole *on Intellectual Property Infringement by State Actors: The Interaction of Article I, Article III, the Eleventh Amendment, and the Fourteenth Amendment,* 29 ARIZ. ST. L.J. 889 (1997); Wayne L. Baker, Seminole *Speaks to Sovereign Immunity and* Ex Parte Young, 71 ST. JOHN'S L. REV. 739 (1997); Vicki C. Jackson, Seminole Tribe, *The Eleventh Amendment, and the Potential Evisceration of* Ex ParteYoung, 72 N.Y.U.L. Rev. 495 (1997); and Carlos Manuel Vazquez, *What Is Eleventh Amendment Immunity?,* 106 YALE L.J. 1683 (1997).

104. Article I, Section 8, Clause 3 of the Constitution provides that "[t]he Congress shall have Power . . . to regulate Commerce . . . with the Indian Tribes." Coincidentally, Clause 4 of the same section of Article I permits Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4.

105. 25 U.S.C. §§ 2701-2721 (Supp. 1997).

106. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

107. 25 U.S.C. § 2710(d)(1)(C).

in good faith, and the IGRA permits a tribe to sue a state in federal court in order to compel good faith negotiations.[108] The state of Florida moved to dismiss a complaint filed by the Seminole Tribe, which sought an injunction to compel good faith negotiations, on the ground that the suit violated Florida's sovereign immunity from suit in federal court.[109]

The Supreme Court held that the Eleventh Amendment did not permit Congress to enact legislation pursuant to the Indian Commerce Clause, such as the enforcement provision of IGRA.[110] The Court reasoned that in order for there to be a valid abrogation of state sovereign immunity, two requirements must be met. First, the Congressional intent to abrogate the immunity must be "unequivocally expresse[d]."[111] Second, Congress must have acted "pursuant to a valid exercise of power."[112] Because the Congressional intent to abrogate sovereign immunity was clear on the face of the statute,[113] the Court's inquiry turned to whether Congress had the power, under the Indian Commerce Clause, to unilaterally abrogate Florida's immunity from suit.[114]

The Court noted that it previously had found authority to abrogate state sovereign immunity under only two constitutional provisions, the Fourteenth Amendment[115] and, in a plurality opinion in *Pennsylvania v. Union Gas Co.*,[116] the Interstate Commerce Clause.[117] In *Union Gas,* the Court held that Congress' power to abrogate state sovereign immunity came from the states' relinquishment of their sovereignty when they gave Congress plenary power to regulate commerce.[118] The issue seemingly presented by the appeal in *Seminole Tribe* was whether the abrogation of state sovereign immunity, pursuant to the Indian Commerce Clause, was constitutional under the reasoning of *Union Gas*.[119]

The Supreme Court chose bolder action--it overruled its *Union Gas* decision, deeming it a departure from established law.[120] The Court held that the *Union Gas* opinion contradicted the principle that Article III contains the constitutional limits on judicial power, and congressional powers enumerated in Article I cannot be used to do an end run around Article III.[121]

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108. 25 U.S.C. § 2710(d)(3)(A), (d)(7).
109. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 52 (1996).
110. *Id.* at 54-73.
111. *Id.* at 55.
112. *Id.* at 58 (citing Green v. Mansour, 474 U.S. 64, 68 (1985)).
113. *Seminole Tribe,* 517 U.S. at 55-57.
114. *Id.* at 59.
115. *Id.* (citing Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)).
116. 491 U.S. 1 (1989).
117. The Interstate Commerce Clause reads: "The Congress shall have Power . . . to regulate Commerce . . . among the several States . . . ." U.S. CONST., art. I, § 8, cls. 1, 3.
118. 491 U.S. 1.
119. *Seminole Tribe*, 517 U.S. at 60-63.
120. *Id.* at 66. Noting that the *Union Gas* decision was joined by a shaky plurality of the Justices, the Court reasoned that the resulting confusion in lower courts and the fact that the decision deviated sharply from established jurisprudence in the area of federal jurisdiction required *Union Gas* to be overruled. *Id.*
121. *Id.* at 61-66. Moreover, the Court held inapplicable the doctrine of *Ex parte Young,* 209 U.S. 123 (1908), which permits a suit against a state official to go forward, notwithstanding the Eleventh Amendment, if the suit seeks prospective injunctive relief to end a continuing federal-law violation. *Seminole Tribe,* 517 U.S. at 73. The Court cited two rationales in not applying *Ex parte Young.* First, the IGRA contains a detailed enforcement scheme which should not be cast aside blithely; and, second, such an application of *Ex parte Young* would render the IGRA's enforcement provisions superfluous. *Id.* at 73-76.

The Iowa Racing and Gaming Commission, in *In re National Cattle Congress*, argued to the Eighth Circuit that an order enforcing the automatic stay against the Commission violated the state of Iowa's Eleventh Amendment immunity, as construed in *Seminole Tribe*.[122] In remanding the case to the bankruptcy court, the Eighth Circuit characterized the interplay of the *Seminole Tribe* decision and the Bankruptcy Code as "a complex and serious issue" worthy of further study.[123]

The Fifth Circuit, in *Department of Transportation and Development v. PNL Asset Management Co. (In re Julian E. Fernandez),*[124] took up the issue of whether the abrogation of state sovereign immunity in the Code[125] was constitutional under the Eleventh Amendment. In *In re Fernandez*, a judgment creditor of the debtor brought an adversary proceeding contesting the state of Louisiana's title to property purportedly purchased from a partnership, alleging that the Chapter 11 debtor, not the partnership, owned the property at the time it was sold.[26] The issue before the Fifth Circuit was whether or not the suit against the state should be dismissed under the Eleventh Amendment.

The court held that Congress did not have power, pursuant to the Bankruptcy Clause of Article I of the Constitution, to abrogate state sovereign immunity by enacting a bankruptcy statute (§ 106 of the Code) purporting to do so.[127] The court reasoned that, consistent with *Seminole Tribe*, Congress did not have power, pursuant to its Article I bankruptcy power, to circumvent the Eleventh Amendment's restrictions on federal judicial power, notwithstanding the Bankruptcy Clause's uniformity requirement.[128] The court rejected the argument that the *Seminole Tribe* decision dealt exclusively with Congress' power to abrogate sovereign immunity pursuant to the Indian and Interstate Commerce Clauses and, therefore, did not address all of Congress' Article I powers.[129] Moreover, the court held that Congress did not have authority, pursuant to the Fourteenth Amendment, to abrogate state sovereign immunity.[130] The Fifth Circuit concluded with the unequivocal statement that "Section 106(a) of the Bankruptcy Code is unconstitutional."[131]

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122. *In re* National Cattle Congress, 91 F.3d 1113, 1114 (8th Cir. 1996).

123. *Id.* at 1114 (citing Ohio Agric. Commodity Depositors Fund v. Mahern, 517 U.S. 1130 (1996), *vacating In re* Merchants Grain, Inc., 59 F.3d 630 (7th Cir.1995) (remanding a bankruptcy case for further consideration in light of *Seminole Tribe*); In re Martinez, 196 B.R. 225, 230 (D.P.R. 1996)).

124. 123 F.3d 241 (5th Cir 1997).

125. "Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit . . . ." 11 U.S.C. § 106(a) (1993 & Supp. 1997).

126. *In re Fernandez,* 123 F.3d at 242-43.

127. *Id.* at 243-44. *But see* Headrick v. Georgia (*In re* Headrick), 203 B.R. 805 (Bankr. S.D. Ga. 1996) (holding that Georgia was subject to the Bankruptcy Code automatic stay provision, regardless of whether Congress specifically stated that the Code applied to the states via the Fourteenth Amendment; Georgia's argument that the Eleventh Amendment gave it immunity from the Code was rejected on the basis that an Article III court, not the bankruptcy court, ultimately would pass on the validity of a constitutional challenge to the Bankruptcy Code).

128. *In re Fernandez,* 123 F.3d at 243.

129. *Id.* at 244.

130. *Id.* at 245.

131. *Id.* at 246.

Therefore, at least in the Fifth Circuit, it appears that the Code's abrogation of state sovereign immunity is contrary to the Eleventh Amendment. In an action concerning a post-petition revocation of a casino license by state gaming authorities, it may not be possible to enforce the automatic stay or, concomitantly, to request sanctions for such violations. How courts and Congress ultimately respond to the full implications of *Seminole Tribe* remains to be seen, though it is obvious that state gaming authorities ought to consider a sovereign immunity claim in any action involving their post-bankruptcy attempts to exercise control over estate property.

III. COLLATERAL IN THE CASINO CONTEXT

Casinos are normally financed with a complicated combination of secured and unsecured debt.[132] A casino owns property much like any other business. It has furniture, fixtures, equipment, inventory, accounts, etc., which the casino can pledge as security in obtaining financing to begin or sustain its operations. Two types of potential collateral--the cash on hand at the casino and the casino building itself--raise interesting legal questions, particularly if the parties have not fully anticipated the consequences of a default by the casino debtor.

A. Treatment of Cash

Naturally, one of the hallmarks of a casino operation[133] is the importance and amount of cash on the premises at all times.[134] Assuming that the casino has granted security interests in all of its personal and real property to one or more secured creditors, what is the legal status of cash on hand in the casino when a casino files a bankruptcy petition?

Article 9 of the Uniform Commercial Code (hereinafter "U.C.C.") does not permit a secured creditor to perfect a security interest in cash unless the secured party has possession of the money.[135] Therefore, even if a casino debtor has granted a secured creditor a security interest in "cash" or "money" in the casino's possession, the security interest is not perfected and will not have priority over competing secured creditors, including a bankruptcy trustee.[136] The Code pro-

132. *See* Roy Anderson Corp. v. Treasure Bay Gaming & Resorts, Inc. (*In re* Treasure Bay Corp.), 212 B.R. 520 (S.D. Miss. 1997) (listing of the various creditor constituencies involved in the latest bankruptcy case involving a Mississippi casino); *see also* Deidre Darsa, *Financing Casinos Usually a Safe Bet,* REAL ESTATE FINANCE TODAY, Nov. 14, 1997, at 6 (describing financing of casino project); Jennifer Goldblatt, Goldman Leads High Stakes Casino Financing, AM. BANKER, Nov. 17, 1997, at 1 (same).

133. For a Hollywood depiction of the handling of cash in casinos in the 1970's, *see Casino* (Universal Pictures 1995).

134. Indeed, the Mississippi Gaming Commission requires that "[e]ach licensed gaming establishment shall maintain, in such manner and amount as the Executive Director may approve or require, cash or cash equivalents in an amount sufficient to reasonably protect the licensee's patrons against defaults in gaming debts owned by the licensee." Miss. Gaming Comm'n Reg. III(A) § 13 (1991).

135. MISS. CODE ANN. § 75-9-304(1) ("A security interest in money . . . can be perfected only by the secured party's taking possession except as provided in . . . Section 75-9-306(2) and (3) on 'Proceeds'.").

136. A bankruptcy trustee is deemed to have the status of a hypothetical judgment lien creditor as of the date of the filing of the bankruptcy petition. 11 U.S.C. § 544(a) (1993).

vides that the casino, as "debtor-in-possession,"[137] will have priority over the unperfected secured creditor in such collateral.[138]

However, if cash in a casino's possession fits the U.C.C. definition of "proceeds" of collateral in which a secured creditor *does* have a perfected security interest, then, under the U.C.C., the security interest attaches and is perfected in the proceeds as well.[139] Similarly, the Bankruptcy Code provides that if a secured creditor has obtained a perfected security interest in property of a debtor that subsequently files a bankruptcy petition, and if the security agreement extends to "proceeds, product, offspring, rents, or profits of such property" acquired after the bankruptcy case, then the security interest extends to such proceeds, product, offspring, rents, or profits,[140] despite the fact that they were obtained *after* the bankruptcy filing.[141] Therefore, whether cash in a casino's possession at the moment of filing a bankruptcy case is subject to a security interest depends upon whether or not the cash constitutes "proceeds" within the definition of the U.C.C.

Section 9-306(1) of the U.C.C. defines proceeds to "include whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds."[142] Thus, whether or not cash in possession of a casino generated by gaming operations[143] constitutes "proceeds" depends upon whether the cash is "received upon . . . disposition of collateral or proceeds." Research for this Article uncovered no reported cases which tackle this issue in the context of revenue generated by a casino's gaming operations.

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137. In a Chapter 7 bankruptcy case, an interim trustee is appointed upon the filing of the petition, and the creditors have the opportunity to vote on a permanent trustee. 11 U.S.C. §§ 701-03 (1993). In a Chapter 11 bankruptcy, no trustee is appointed automatically; rather, the debtor's management continues to operate the business as the "debtor in possession." *Id.* § 1107. In general, the "debtor in possession" has the rights and duties of a Chapter 7 trustee. *Id.* This Article assumes that the casino debtor in any hypothetical has filed a voluntary bankruptcy petition under Chapter 11 of the Code.

138. 11 U.S.C. § 544.

139. MISS. CODE ANN. § 75-9-306 (1981 & Supp. 1997). Money is specifically included in the definition of "cash proceeds" under the U.C.C. *Id.*

140. The term "proceeds" will be discussed *infra* notes 142-153 and accompanying text. "Products" and "offspring" are most often used in the context of agriculture. LYNN M. LOPUCKI & ELIZABETH WARREN, SECURED CREDIT: A SYSTEMS APPROACH, 214-15 (1995). The word "profits" applies to "profits a prendre," which is defined as a "right to take a part of the soil or produce of the land." *Id.* (*citing* BLACK'S LAW DICTIONARY 1211 (6th ed. 1990)); *see also* V. DiFrancesco & Sons v. West Chesnut Realty of Haverford, Inc. (*In re* West Chestnut Realty of Haverford, Inc.), 173 B.R. 322 (E.D. Pa. 1994) (holding that the "profits" to which § 552 refers is *not* general business profits, but, rather, income generated from the soil).

141. 11 U.S.C. § 552(b) (1993 & Supp. 1997). Other post-petition property of the debtor not specifically mentioned in § 552(b) "is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case," effectively rendering floating liens void post-petition. 11 U.S.C. § 552(a) (1993 & Supp. 1997).

142. MISS. CODE ANN. § 75-9-306(1).

143. This Article limits discussion of cash to cash generated by the actual gaming operations of the casino, as opposed to cash attributable to food and beverage service, gift shops, hotels, actual sale of gaming machines and equipment, etc., because the issues raised in those situations are not unique to casino bankruptcies and are treated amply in existing case law. It may be possible, given modern computer technology, for a secured creditor with a security interest in particular collateral (e.g., gift shop inventory) to require the debtor to segregate cash generated by sales of its collateral and use that cash to meet state gaming regulations for cash on hand. The salutary effect of such "churning" of funds, from the secured creditor's point of view, would be that the cash reserved in the casino would be identifiable "proceeds" of the secured creditor and thus, reachable by that creditor upon default by the casino debtor. The author of this Article is not aware of such arrangements in practice and would guess that state regulators, for one, would have concerns about implementing such a system.

In *In re S & J Holding Corp.*,[144] however, the debtor was in the business of operating video games.[145] The debtor executed a security agreement covering "[a]ll of the assets of Shazamm Enterprises, Inc.," to include "all . . . equipment, . . . inventory, . . . accounts receivable, contract rights, intangibles, video games, cigarette machines, coin changes [sic], and any and all other personal property or assets owned and used by the debtor in its business wherever located as well as any and all personal property hereinafter acquired."[146] The debtor also checked the box on the recorded financing statement that said "[p]roducts of collateral are also covered."[147]

The court held that the video game equipment *was* collateral covered by the security agreement, but revenue from the video games *did not* fit the definition of "proceeds" under the U.C.C.[148] Though the cash was earned through the *use* of the collateral, that fact was not sufficient to classify the money as *proceeds* of the video games.[149] The money was not the result of any sale or disposition of the collateral and was more analogous to income generated through the use of construction equipment.[150] Because the money from the video machines was not proceeds and not subject to a perfected security interest in its own right,[151] the debtor-in-possession was entitled to the cash, free from any claims of the secured creditor.[152] The reasoning of *In re S & J Holding* applies with equal force to revenue derived from gaming activities. A casino does not, in any way, "dispose" of its gaming equipment (blackjack tables, slot machines, roulette wheels, etc.) in exchange for a gambler's money. Thus, on the date of the filing of a bankruptcy petition, the secured creditor has little recourse with respect to cash in the casino's possession that was generated by gaming operations.[153]

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144. 42 B.R. 249 (Bankr. S.D. Fla. 1984).

145. *Id.* at 249. The line between video games and gaming devices is blurring as "video poker" machines and other electronic gaming devices that resemble video games in many respects are introduced at casinos.

146. *Id.* at 249-50.

147. *Id.* at 250.

148. 42 B.R. 249 (Bankr S.D. Fla. 1984).

149. *Id.*

150. *Id.; see also In re* Everett Home Town Ltd. Partnership, 146 B.R. 453 (Bankr. D. Ariz. 1992) (holding that fees for greens fees and golf cart rentals were not "proceeds" of collateral, but, rather, more akin to fees for use or services); General Elec. Credit Corp. v. Cleary Bros. Constr. Co. (*In re* Cleary Bros. Constr. Co.), 9 B.R. 40 (S.D. Fla. 1980) (deciding that rents received for a crane are not proceeds because there was no disposition of crane; collateral must be "finally or permanently converted into another form" before that new form will constitute proceeds).

151. The court made three additional observations. First, the category of "intangibles" that appears in the security agreement was not specific enough to identify the revenue stream from the video machines. *In re S & J Holding Corp.*, 42 B.R. at 250. The definition of "general intangibles" in the U.C.C. includes "any personal property other than . . . money." MISS. CODE ANN. § 75-9-106 (1981). Second, the U.C.C. requires that a description of personal property in a security agreement is sufficient if it "reasonably identifies what is described . . . ." *In re S & J Holding Corp.*, 42 B.R. at 250. *See* MISS. CODE ANN. § 75-9-203(1)(a) (1981). However, cases interpreting the "reasonably identified" requirement have found phrases such as "all property of the undersigned of every name and nature whatsoever" or "all other personal property" impermissibly broad, citing *National Ropes, Inc. v. National Diving Serv., Inc.*, 513 F.2d 53 (5th Cir.1975). Third, even if another category of collateral mentioned in the security agreement applied to the cash generated by the video games, the only way to perfect a security interest in the money is through possession. *See* Weiss, *Money and Deposit Accounts as Primary Collateral in 1C*, BENDER'S UCC SERV. § 23.09 (P. Coogan and J. McDonnell eds., 1984).

152. *In re S & J Holding Corp.*, 42 B.R. at 251.

153. One potential route for a secured creditor to perfect a security interest in at least some of the cash on the premises of a casino might be to set up some type of constructive possession arrangement whereby the cash is under the control of the secured party or its agent and can only be released upon permission from the creditor. Again, it is not clear how state gaming regulators would react to such an arrangement.

The result is the same with regard to revenues generated *during* the bankruptcy case. Section 552(b) of the Bankruptcy Code extends a security interest acquired pre-bankruptcy to "proceeds, product, offspring, or profits acquired by the estate after the commencement of the case," to the extent permitted by the security agreement or non-bankruptcy law.[154] As discussed above, non-bankruptcy law, in particular the U.C.C., would not classify gaming revenues as proceeds, product, offspring, or profits of gaming collateral.[155] Even if a secured party's security agreement with the debtor included "proceeds, product, offspring, or profits" of collateral, such as gaming tables and slot machines, the result in bankruptcy would be the same as that outside of bankruptcy: the secured party would have no security interest in cash generated by such collateral even if the collateral itself was properly subject to the secured party's security interest.

B. What Type of Collateral is a Dockside Casino?

Many casinos are a hybrid of waterborne craft and building.[156] Determining the precise legal status of such "dockside" casinos is critical to the willingness of financiers to lend money in exchange for a security interest in it.[157] Several statutes are implicated by this question. If the casino building is a fixture, then Article 9 of the U.C.C. governs the perfection of a security interest taken in the structure. If it is a building, then state mortgage law applies. If such casinos are vessels, the federal law scheme for obtaining and perfecting liens in maritime vessels applies.

The debate in the recent case law[158] regarding dockside casinos centers around the latter possibility--is such a casino a "vessel" for purposes of federal law? The Ship Mortgage Act (SMA)[159] defines a "preferred mortgage" as "a mortgage, whenever made, that . . . includes the whole of a vessel; . . . is filed in substantial compliance with Section 31321 of this title; and . . . covers a documented vessel . . . ."[160] A mortgagee, therefore, can have only a preferred mortgage in a

154. 11 U.S.C. § 552(b) (1993 & Supp. 1997). The "non-bankruptcy law" in the case of automatic perfection in proceeds would be state law in the form of the U.C.C. *See* Butner v. United States, 440 U.S. 48 (1979) (directing that courts apply non-bankruptcy state law in determining whether or not creditor had obtained a security interest in rents).

155. *See supra* notes 141-151 and accompanying text.

156. This Article examines only the issues surrounding casinos that are such hybrids, rather than, for example, casinos that are actually working ships that travel on navigable waterways or casinos that are simply buildings not located on waterways.

157. This Article only briefly reviews recent cases which deal with the question of whether a dockside casino is subject to federal maritime lien law. For more detailed excursions into this and analogous areas of law, *see* Richard McLaughlin, *Floating Casinos, Personal Injury and Death Claims, and Admiralty Jurisiction,* 64 MISS. L.J. 439 (1995); Henry N. Dick, III, Comment, *Dockside Gambling and the Federal Maritime Lien Act: Why Dockside Casinos Shoud Not Be Deemed Vessels for Purposes of the Federal Maritime Lien Act,* 64 MISS. L.J. 659 (1995); John T. Lozier, Comment, *A Vessel or Not a Vessel--That is the Question: The Definition of the Term 'Vessel' Under the Longshore and Harbor Workers' Compensation Act,* TUL. MAR. L.J. 139 (1995); and Brian P. Brancato, Comment, *Blackjack or Bust, Personal Injury Suits on Riverboat Casinos,* 19 TUL. MAR. L.J. 133 (1994).

158. This Article does not detail the full intricacies of maritime mortgage and lien law, as the issue of casinos as collateral implicates only a small nook in a much larger topic.

159. 46 U.S.C. App. §§ 31301-31343 (Supp. 1997).

160. 46 U.S.C. App. § 31322(a)(1)-(3)(A).

casino building under federal maritime law if the casino in question qualifies as a "vessel." The United States Code, in its general definition and rules of construction section, defines a "vessel" as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[161] Thus, the efficacy of a ship mortgage on a casino depends upon whether a particular casino structure qualifies as a "vessel," as defined in the United States Code.

A few courts have analyzed the status of dockside casinos under federal law in recent years.[162] The Fifth Circuit opinion in *Pavone v. Mississippi Riverboat Amusement Corp.*[163] involved a consolidated appeal by two appellants claiming damages for injuries pursuant to the federal Jones Act.[164] The appellants, Pavone and Ketzel, were both employees on the *Biloxi Belle*, a floating dockside casino moored in Biloxi, Mississippi.[165]

The Fifth Circuit began its analysis with a careful description of the *Biloxi Belle* and her attributes.[166] The court quickly identified the nub of the matter as whether the *Biloxi Belle* was a Jones Act "vessel" at the time in question. The court cited three characteristics that distinguish a "vessel" from a "nonvessel" under the Jones Act:

> (1) the structure was constructed to be used primarily as a work platform;
> (2) the structure is moored or otherwise secured at the time of the accident; and
> (3) although the platform is capable of movement, and is sometimes moved across navigable waters in the course of normal operations, any transportation function is merely incidental to the platform's primary purpose.[167]

Given this test, according to the Fifth Circuit, the casino did not fall within the definition of a "vessel."[168] Dockside casinos are constructed to be used primarily for gambling, which is more closely analogous to a work platform than to a ship. Dockside casinos are normally secured in permanent locations. Finally, it is impossible to move such casinos without a great deal of effort, and such casinos do not move across navigable waters in the course of normal operations.[169]

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161. 1 U.S.C. § 3 (1997). The SMA defines "vessel" as having "the same meaning given that term in section 3 of title 1 [of the United States Code]." 46 U.S.C. App § 2101(45) (Supp. 1997).

162. Pavone v. Mississippi Riverboat Amusement Corp., 52 F.3d 560 (5th Cir.1995); McAdow v. Promus Cos., Inc., 926 F. Supp. 93 (W.D. La. 1996) (Jones Act case for injuries while alleged seaman was working on the M/V Shreveport Rose, a Louisiana dockside casino); Roy Anderson Corp. v. Treasure Bay Gaming & Resorts, Inc. (*In re* Treasure Bay Corp.), 205 B.R. 490 (Bankr. S.D. Miss. 1997); Charles N. White Constr. Co. v. MRA, Ltd. (*In re* Biloxi Casino Belle, Inc.), 176 B.R. 427 (Bankr. S.D. Miss. 1995).

163. 52 F.3d 560 (5th Cir. 1995).

164. 46 U.S.C. App. § 688 (Supp. 1997).

165. *Pavone,* 52 F.3d at 562-63.

166. *Id.* at 563-64.

167. *Id.* at 570 (quoting Gremillion v. Gulf Coast Catering Co., 904 F.2d 290, 293-94 (5th Cir. 1990)).

168. *Pavone,* 52 F.3d at 570.

169. The court in *Pavone* limited the analysis of what constitutes a "vessel" to those that either had been withdrawn from navigation or never placed in navigation. The Fifth Circuit reviewed the cases involving vessels "withdrawn from navigation" and concerning "work platforms" and concluded that under either line of cases, the *Biloxi Belle* was not a vessel for purposes of the Jones Act or the general maritime law.

Therefore, the Fifth Circuit held that the *Biloxi Belle* was not a "vessel" for purposes of federal law.[170]

Charles N. White Construction Co. v. MRA, Ltd. (In re Biloxi Casino Belle, Inc.)[171] involved the question of whether or not the *Southern Belle Casino* and *Biloxi Belle II Casino* were "vessels" for the purpose of, among other matters, the Ship Mortgage Act. The court, applying the *Pavone* test, noted that

> [t]he Biloxi Belle II Casino and the Southern Belle Casino certainly float on water. However, . . . [these casinos] were not designed or intended nor are they realistically capable of being used as a *means of transportation* on water in the business of maritime commerce. Instead, the Biloxi Belle II Casino and the Southern Belle Casino were designed and intended to be used exclusively as permanently moored, dockside gaming casinos pursuant to the Mississippi Gaming Control Act, MISS. CODE ANN., § 72-76 1 *et seq.* Therefore, the Biloxi Belle II Casino and the Southern Belle Casino do not constitute "vessels" for purposes of federal admiralty and maritime matters and the Ship Mortgage Act, 46 U.S.C. § 30301 *et seq.*[172]

Similarly, in the recent case of *Roy Anderson Corp. v. Treasure Bay Gaming & Resorts, Inc. (In re Treasure Bay Casino Corp.),*[173] the bankruptcy court took up the same question concerning the Treasure Bay casinos[174] located in Biloxi and Tunica, Mississippi. The court noted that

> [t]here is no language anywhere in the *Pavone* opinion permitting this court to coin a different definition of "vessel" for purposes of the Ship Mortgage Act. *Pavone* specifically set forth the proper analytical approach for defining a vessel for general maritime law purposes. The Ship Mortgage Act adopts the definition of "vessel" from the general maritime law.[175]

Because the Treasure Bay casinos lacked any of the three attributes of a vessel mentioned in *Pavone*,[176] the court concluded that the Treasure Bay casinos were virtually identical to the ones at issue in *In re Biloxi Casino Belle, Inc.*[177] Thus, the court concluded that the Treasure Bay casinos were not vessels for purposes of the Ship Mortgage Act.[178]

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170. The court stated that "[t]he approach we adopt *infra* also avoids the conflict in 'vessel' status among the Jones Act, the general maritime law, state casino licensing classification, Coast Guard documentation, and 'dictionary' definitions." *Pavone*, 52 F.3d at 568 n.23.

171. Charles N. White Constr. Co. v. MRA, Ltd. (*In re* Biloxi Casino Belle, Inc.), 176 B.R. 427 (Bankr. S.D. Miss. 1995).

172. *Id.* at 433.

173. 205 B.R. 490 (Bankr. S.D. Miss. 1997).

174. Ironically, the Treasure Bay casinos were designed as large pirate ships, complete with masts and employees dressed as pirate "crews."

175. *In re Treasure Bay Corp.*, 205 B.R. at 495 (citations omitted).

176. *Id.* at 495-96 (noting that neither structure was constructed to be used primarily as anything other than a gambling casino; both structures were moored or otherwise secured at all relevant times at their permanent locations; and they were not capable of movement and never moved across navigable waters in the course of normal operations).

177. *Id.* at 496.

178. *Id.* at 497. Moreover, the court specifically rejected the argument that the definition of a vessel for purposes of the Jones Act is different than that for purposes of the Ship Mortgage Act. *Id.*

Two conclusions can be gleaned from these recent cases. First, the analysis of whether a particular dockside casino is a "vessel" under federal law is fact intensive. Few, if any, dockside casinos should meet the definition of "vessel" under the test in *Pavone*. On the other hand, due to the inherent uncertainty in marginal cases, the prudent secured creditor/mortgagee whose collateral is a dockside casinō ought to perfect its security interest in the ways required by all potentially relevant lien statutes--U.C.C. Article 9, land mortgages, and federal maritime statutes. The additional transaction cost involved in filing is recouped in the savings generated in precluding a competing creditor's arguments for priority upon default by the casino.

IV. CONCLUSION

The issues discussed in this Article are surely only a few of many potentially unique questions that will arise at the intersection of bankruptcy and gambling. This Article has attempted to dissect, synthesize, and suggest possible approaches for parties to a casino bankruptcy in the absence of highly developed case law or commentary on the topic. Unfortunately, more casinos will inevitably file bankruptcy petitions in the future, particularly in states with philosophies of casino competition akin to that of Mississippi. An important theme that emerges, not surprisingly, is that careful planning and a true understanding of the Bankruptcy Code and the U.C.C. will help mitigate the effects of casino bankruptcies.