



WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

Wisconsin Supreme Court Decision on Indian Gaming Compact [*Panzer v. Doyle*]

INTRODUCTION

On May 13, 2004, the Wisconsin Supreme Court issued its four to three decision in *Panzer v. Doyle*, 2004 WI 52, in which the petitioners (Senator Panzer, Speaker Gard, and the Joint Committee on Legislative Organization) contended that Governor Doyle had exceeded his authority by agreeing to certain provisions in the 2003 amendments to the gaming compact between the state and the Forest County Potawatomi (FCP) Tribe. The original compact with the FCP Tribe was entered into in 1992, amended in 1998, and again amended on three occasions in 2003 (collectively referred to as the 2003 FCP Amendments).

The court held that the Governor had exceeded his authority by agreeing to certain provisions in the 2003 FCP Amendments relating to: scope of games; duration of the compact; and waiver of the state's sovereign immunity. After briefly summarizing the court's holdings on these three issues, this memorandum provides general background information and a further discussion of the court's holdings on these issues.

SUMMARY

SCOPE OF GAMES

The court held that most, but not all, of the games added in the 2003 FCP Amendments are

not compactable as a matter of state law because they violate both the Wisconsin Constitution and state criminal code. Therefore, the Governor had no authority to agree to provisions in the 2003 FCP Amendments adding certain casino games but had authority to agree to *pari-mutuel wagering on live simulcast horse, harness, and dog racing events* because such wagering is not prohibited under state law. The court did not provide a clear answer about casino games that existed before the 2003 FCP Amendments, particularly, electronic games of chance and blackjack.

DURATION OF COMPACT

The court held that the Legislature's delegation of power to the Governor under s. 14.035, Stats., to negotiate and enter into tribal gaming compacts is "not unconstitutional beyond a reasonable doubt" but is subject to "certain implicit limits." Those limits prohibit the Governor from agreeing to the duration provision in the 2003 FCP Amendments, which the court characterized as creating a "perpetual" compact. The "perpetual" nature of the compact meant that the Governor had given away power delegated to him by the Legislature in a way that the Legislature could not take it back, and that action circumvented the procedural safeguards which sustained the delegation in the first place. Thus, the court held that the Governor had not been delegated authority to agree to such a duration provision.

WAIVER OF STATE'S SOVEREIGN IMMUNITY

The court held that the Governor did not have inherent or delegated power to agree to any waiver of the state's sovereign immunity in a gaming compact.

COURT DECISION

SCOPE OF GAMES

General Background

The federal Indian Gaming Regulatory Act (IGRA), enacted in 1988, permits Class III gaming activities on Indian lands in a state only if: the state permits such gaming for any purpose by any person, organization, or entity; the games are conducted in conformance with a tribal-state compact that has been approved by the U.S. Secretary of Interior; and other conditions (not pertinent to the *Panzer* case) are met.

In 1991, the U.S. District Court for the Western District of Wisconsin stated that Wisconsin had a civil regulatory approach to gambling, rather than a criminal prohibitory approach. Thus, the state was required under IGRA to negotiate with an American Indian tribe over including in a compact any activity that includes the elements of prize, chance, and consideration and that is not prohibited expressly by the Wisconsin Constitution or state law. [*Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480 (D.C.W.D. Wis. 1991) appeal dismissed 957 F.2d 515 (7th Cir. 1992).]

The 1992 *FCP Compact* provided for the following Class III games: electronic games of chance with video facsimile displays; electronic games of chance with mechanical displays; blackjack; and pull-tabs or break-open tickets when not played at the same location as bingo.ⁱⁱ

In 1993, the Wisconsin Constitution was amended to prohibit the Legislature from authorizing gambling in any form, except as provided in Article IV, Section 24, of the Wisconsin Constitution. [Wis. Const., art. IV, s. 24 (1).] The 1993 constitutional amendment also clearly prohibited the state lottery from including certain games. [Wis. Const., art. IV, s. 24 (6) (c).] Article IV, Section 24 provides that the Legislature may authorize bingo and raffle games under certain conditions, as well as the state lottery. Article IV, Section 24 further provides that it does not prohibit pari-mutuel on-track betting as provided by law. The Legislature has enacted ch. 945, Stats., criminalizing various types of gaming.

The *FCP 1998 Amendment* did not modify the types of games authorized, although the amendment increased the number of gaming activities permitted and the location where games could be conducted, including authorizing blackjack on the FCP Tribe's Menomonee Valley trust land in Milwaukee.

The *FCP 2003 Amendments* added the following games: variations on blackjack; pari-mutuel wagering on live simulcast horse, harness, and dog racing events; electric keno; roulette; craps; poker and similar non-house banked card games; and games played at blackjack style tables. In addition, the FCP 2003 Amendments removed: (a) limits on the maximum wager for and number of electronic games of chance; (b) limits on blackjack location, time, and maximum wagers, and (c) requirements about the location of pull-tabs and break-open ticket games.

Court Holding

Games Added in 2003 FCP Amendments

The *Panzer* court held that the Governor did not have authority to agree to the games added in the 2003 FCP Amendments, *other than pari-mutuel wagering on live simulcast horse,*

harness, and dog racing events, because Wisconsin statutes prohibit such games and the Wisconsin Constitution prohibits the Legislature from authorizing such games. Specifically, the Governor had no authority to agree to Sections IV. A. 5., 7., and 8. of the 2003 FCP Amendments which provide for: variations on blackjack; electric keno; roulette; craps; poker and similar non-house banked card games; and games played at blackjack style tables. (The court noted that both parties agreed that, even if the Legislature were involved in the compacting process, the Legislature would not have had authority, because of Wis. Const., art. IV, s. 24 (1), to compact for games that are ultimately determined to be uncompactable.)

However, the court noted that because Wisconsin statutes permit pari-mutuel wagering on live simulcast racing, the Governor was authorized to include the provision on pari-mutuel wagering on live simulcast horse, harness, and dog racing events in Section IV. A. 6. of the 2003 FCP Amendments.

Pre-Existing Games

The court stated that its holding would raise inevitable questions about the validity of the 1992 FCP Compact and the 1998 FCP Amendments, noting that the original FCP Compact included games that were and are precluded under state criminal statutes.ⁱⁱⁱ As noted above, electronic games of chance and blackjack were listed as authorized games in the 1992 FCP Compact, and that compact provision was not changed by the 1998 FCP Amendments or the 2003 FCP Amendments. The court made various pronouncements which, when taken together, do not constitute a clear holding regarding blackjack and electronic games of chance.

The court stated that it did not believe the 1992 FCP Compact “suffered from any infirmity under state law when it was entered into.” [*Panzer*, at ¶ 102.] However, the court went on

to state that whether the compact was durable enough to withstand a change in state law [the 1993 constitutional amendment] that alters the court’s understanding of what is “permitted” in Wisconsin was a separate question which was likely to turn, at least in part, on the application of the impairment of contract clauses in the U.S. and Wisconsin Constitutions, as well as IGRA. The court further stated that, because these issues were not before the court and because they may turn on unresolved questions of federal law, its “decision stops short of resolving these important questions.”^{iv} [*Id.*]

On the other hand, the court twice stated that its decision was not invalidating any games authorized by the 1992 FCP Compact or the 1998 FCP Amendments (which include blackjack and electronic games of chance) and once suggested that such games are permitted. [See *Panzer*, at ¶ 40 and n. 46.] However, the court did not state that it was validating the games.

The court also stated that: “The Tribe’s existing games such as slot machines and blackjack must be sustained based on the validity of the original compacts, which were negotiated pursuant to court order before the 1993 constitutional amendment, as well as constitutional and contract law.” [*Panzer*, at ¶ 93.] In light of the court’s other statements cited above, it is not clear whether this sentence is intended to mean that those existing games are sustained or whether this sentence is intended to mean that, if those existing games are to be sustained in another case, the basis for sustaining them would have to be based on the validity of the 1992 Compact.

The dissent in *Panzer* said that the “majority opinion swings from saying [in ¶ 102] it does not decide this issue [that is, the issue of whether the 1993 constitutional amendment prohibits the 1998 FCP Amendments as well as any extension or renewal of the 1992 FCP Compact because that compact provides for

blackjack and electronic games of chance] to *nearly* saying [in ¶ 93] that the 1998 [FCP] [A]mendments negotiated by Governor Thompson are valid.” [Panzer, at ¶ 120 (emphasis added) (Abrahamson, C.J., dissenting).]

The dissent also accused the majority of importing the *Dairyland Greyhound Park, Inc. v. Doyle* (2004 WI 34) issue into the *Panzer* case. Based on the 1993 constitutional amendment, Dairyland had sued in 2001 to stop the Governor from extending or amending compacts that authorize casino gambling, which Dairyland characterized as including blackjack and slot machines. The Wisconsin Supreme Court had taken the *Dairyland* case on certification from the Court of Appeals. Because the Supreme Court was tied three to three (with one recusal (Justice Wilcox)), the Supreme Court very recently withdrew its certification and remanded the case to the Court of Appeals, where it is pending. The *Panzer* dissent questioned where the “contradictory signals emitted by the majority” would leave the Court of Appeals when it decides the *Dairyland* case. [Panzer, at ¶ 121 (Abrahamson, C.J., dissenting).]

In summary, there appear to be unanswered questions about blackjack and electronic games of chance, which likely will not be resolved until the matter is decided by a court in *Dairyland* or in some other case.

DURATION OF COMPACT

General Background

Section 14.035, Stats., provides that: “The governor may, on behalf of this state, enter into any compact that has been negotiated under [IGRA].”

The original FCP Compact provided for a term of seven years and further provided for an automatic extension every five years unless

either the state or FCP Tribe gave notice of nonrenewal at least 180 days prior to the expiration of the original term or any extension (that is, at five-year intervals).^v This provision was unchanged by the 1998 FCP Amendments. However, the 2003 FCP Amendments deleted the provision about the state’s option to unilaterally give a nonrenewal notice at five-year intervals. The 2003 FCP Amendments included the following provisions for periodic amendment: (a) at five-year intervals, either the state or the FCP Tribe could propose amendments to enhance regulation of gaming; and (b) at 25-year intervals, the state, by the Governor as directed by enactment by a session law of the Legislature, or the FCP Tribe could propose amendments to any compact provision. If either party requested amendments under these provisions, the other party was obligated to negotiate in good faith regarding the proposed amendments.

Court Holding

The *Panzer* court held that s. 14.035 is a delegation of legislative power to the Governor and held that “subject to certain implicit limits, s. 14.035 is not unconstitutional beyond a reasonable doubt.” [Panzer, at ¶ 60.] According to the court, a delegation of legislative power to the Governor (such as had occurred with s. 14.035) is constitutional if there are both: (a) an ascertainable purpose; and (b) adequate procedural safeguards which, with delegation to the Governor, are subject to heightened scrutiny to assure that the Legislature retains control over the delegated power.

The court then found that s. 14.035 has an ascertainable purpose: to designate the Governor as the lead negotiator on tribal-state compacts and to permit the Governor to bind the state once agreement has been reached. As for the second part of the test, the court stated that the safeguards include the Legislature’s power to repeal or amend s. 14.035. Because there are

safeguards available to alter the policy choices made by the Governor, the court held that s. 14.035 was not unconstitutional beyond a reasonable doubt.

While the court referred to these safeguards, the court did not require that they be implemented in order for s. 14.035 to be constitutional. For example, the court did not require that s. 14.035 be amended to provide for legislative ratification of proposed compacts in order to be constitutional. What was important to the court was that the Legislature preserve the right to exercise some degree of control over the delegated power.

According to the court, in most situations there are safeguards available to alter the policy choices made by the Governor. However, because the 2003 FCP Amendments eliminated the state's right to unilaterally withdraw from the compact by timely giving a nonrenewal notice (which had been permitted at five year intervals under the compact), the court said that the procedural safeguards that could rein in the Governor's authority would be ineffective and the Legislature would be powerless to alter the course of the state's position on Indian gaming by repealing or amending s. 14.035. According to the court, the Governor had given away power delegated to him in a way so that the Legislature could not take it back, and this circumvented the procedural safeguards.

The court concluded that the Legislature had not delegated to the Governor the authority to agree to a duration provision that circumvented the procedural safeguards that sustained the delegation in the first place. Thus, the court held that the Governor was without authority to agree to the duration provision in Section XXV. of the 2003 FCP Amendments which the court characterized as, in effect, creating a "perpetual" compact. According to the court, such an agreement would violate principles of separation of powers.

WAIVER OF STATE'S SOVEREIGN IMMUNITY

General Background

Sovereign immunity refers to the doctrine that prohibits a lawsuit against a government without its consent. The Wisconsin Constitution provides that: "The legislature shall direct by law in what manner and in what courts suits may be brought against the state." [Wis. Const., art. IV, s. 27.]

The 2003 FCP Amendments include several provisions relating to suits to enforce the compact. Section XXIII. C. of the 2003 FCP Amendments specifies, in pertinent part, that, to the extent the state may do so pursuant to law, the state expressly waives any and all sovereign immunity with respect to any claim brought by the FCP Tribe to enforce any compact provision.^{vi}

Court Holding

The *Panzer* court noted that prior court decisions hold that: (a) only the Legislature may exercise the authority to waive sovereign immunity on the state's behalf; (b) a waiver of sovereign immunity is a fundamental legislative character under the Wisconsin Constitution; and (c) if the Legislature wishes to authorize a designated agent to waive the state's sovereign immunity, the Legislature must do so clearly and expressly. The court concluded that the Governor did not have inherent or delegated power to waive the state's sovereign immunity in Section XXIII. C. of the 2003 FCP Amendments and, thus, under state law, that provision is void. The court also stated that any other provision of the compact that waives the state's sovereign immunity is invalid.

A copy of the court decision may be obtained at: <http://www.wicourts.gov/sc/opinions/03/pdf/03-0910.pdf>.

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statement of the Joint Legislative Council or its staff.

ⁱ Class III games are all games that are not Class I games (social and traditional ceremonial or celebratory games played by American Indians) or Class II games (bingo; certain card games under limited circumstances; and, if played at the same location as bingo, pull-tabs, lotto, punch boards, tip jars, and other games similar to bingo).

ⁱⁱ If played at the same location as bingo, pull-tabs and break-open tickets are Class II games.

ⁱⁱⁱ The *Panzer* court characterized the *Lac du Flambeau* decision noted above as concluding that “once a state regulates one form of Class III gaming, the state must negotiate over all forms of Class III gaming.” [*Panzer*, at ¶ 92.] According to the *Panzer* court, the “continued vitality of the *Lac du Flambeau*’s holding is very doubtful, and the decision’s statements regarding Wisconsin’s policy toward gaming have been seriously undercut by the 1993 amendment to Article IV, Section 24 [of the Wisconsin Constitution].” [*Id.*]

However, the *Panzer* court noted that a very recent decision by the Seventh Circuit Court of Appeals [*Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*, 2004 WL 909159 (7th Cir. April 29, 2004)] “revisited the themes of *Lac du Flambeau*” and “appears to suggest that Wisconsin would have to amend its constitution to abolish the state-operated lottery and pari-mutuel betting and criminalize all Class III gaming in the state in order to regain some authority to prohibit any class III gaming on Indian lands.” [*Panzer*, at n. 36 (emphasis in original).] The *Panzer* court then characterized the 7th Circuit’s discussion as brief and not central to its decision and said that the 7th Circuit did not analyze events transpiring after the 1991 *Lac du Flambeau* decision, including federal court decisions that are contrary to *Lac du Flambeau*.

^{iv} The court noted that the petitioners conceded that the 1992 FCP Compact and the 1998 FCP Amendments were valid. The court then stated that it had not been presented with a persuasive case to conclude otherwise. However, the continued validity of the 1992 Compact and the 1998 FCP Amendments was not an issue raised by the petitioners in *Panzer*.

^v If the state gave a nonrenewal notice and if the state continued to permit some type of Class III gaming (such as the state lottery or pari-mutuel betting), the state would have been required under the compact and IGRA to bargain in good faith regarding the terms of a new compact if the FCP Tribe so requested.

^{vi} The May 2003 technical amendment (included in the 2003 FCP Amendments) added the qualifying phrase: “to the extent the state . . . may do so pursuant to law.” The court stated that this additional phrase did not change the meaning of the sentence waiving the state’s sovereign immunity.

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