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# Rolling the Dice on Precedent and Wagering on Legislation: The Law of Gambling Debt Enforceability in Kentucky after Kentucky Off-Track Betting, Inc. v. McBurney and KRS § 372.005

Jeffrey R. Soukup
*University of Kentucky*

# Rolling the Dice on Precedent and Wagering on Legislation: The Law of Gambling Debt Enforceability in Kentucky after *Kentucky Off-Track Betting, Inc. v. McBurney* and KRS § 372.005

*Jeffrey R. Soukup*[1]

## I. Introduction

When it comes to gambling and the law, all bets seem to be off. One of the most heavily debated and controversial issues faced by Kentucky citizens in recent years is the push for the expansion of legalized gambling facilities and instruments throughout the commonwealth. Though such an expansion has been building for over ten years,[2] the magnetism of this issue has recently been exemplified in several major ways. In 2005, state representative Tom Burch introduced a bill that would allow 21,000 video slot machines throughout the commonwealth.[3] The Kentucky Equine Education Project, a coalition of the commonwealth's horse industry, called for a referendum on a state constitutional amendment that would allow the building of casinos.[4] State Attorney General Gregory D. Stumbo opined that such an amendment may not even be necessary, as he argued that the state constitution's prohibition on "lotteries" should be read narrowly, not disallowing gambling facilities.[5] In opposition, numerous individuals, businesses, and organizations have mobilized to fight the expansion of legalized gambling in Kentucky.[6] Polls, however, have indicated growing support for gambling, both at racetracks and other locations.[7]

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1 J.D. expected 2007, University of Kentucky College of Law; B.S., Finance, 2004, University of Illinois. The author wishes to thank his family and friends for their love and encouragement.

2 Janet Patton, *Tracks Renew Push for Casinos, Horse Industry Seeks Referendum Gathers Broader Support*, Lexington Herald-Leader, Sept. 17, 2005, at A1.

3 Editorial, *Proposed Bill Takes Low Road to Gambling*, Courier-J. (Louisville, Ky.), Aug. 15, 2005, at 10a.

4 Patton, *supra* note 2.

5 Ky. Const. § 226(3); *see* 05-003 Op. Ky. Att'y Gen. 2-3 (2005).

6 *See* Patton, *supra* note 2; Bruce Schreiner, *Gambling Opponents Speaking Out*, Cincinnati-Ky. Post, Jan. 20, 2006, at A10.

7 *See* Janet Patton, *KEEP Says its Poll Results Favor Casino Gambling*, Lexington Herald-Leader, Jan. 6, 2006, at A8. It should be noted, though, that this poll was conducted

This well-publicized gambling expansion controversy evokes a compelling legal issue that has been ignored by most commentators—the enforceability of gambling debt obligations under Kentucky law. The legal status of gambling debts is a question that should command the attention of all those interested in Kentucky's gambling expansion movement. Whatever the answer, gambling debt enforceability will undoubtedly be a significant factor in expanded gambling's impact on the future of the commonwealth.

This Note explains the significance of gambling debt enforceability, describes the state of the law regarding the issue, and offers predictions about what changes may occur to this status. Part II[8] gives a brief synopsis of the background on the general rule against the enforceability of gambling debt and offers reasons to believe that this rule may become less than absolute. Part III, Section A[9] explains the state of gambling debt enforceability in Kentucky up through the key case of *Kentucky Off-Track Betting, Inc. v. McBurney*,[10] and particularly describes the constitutional and statutory approach to the issue and the historical stance of Kentucky courts against holding such debt enforceable. Part III, Section B[11] further discusses why the legal status of enforceability is far less clear in light of the 2000 enactment of Kentucky Revised Statute section 372.005 (KRS § 372.005).[12] Part IV[13] examines other jurisdictions' positions on gambling debt enforceability, with Section A[14] covering out-of-state debts and Section B[15] covering in-state debts. Finally, Part V[16] examines Kentucky's position on gambling debt enforceability in light of other jurisdictions' positions and predicts how Kentucky's law against the enforceability of gambling debt may change in light of the factors previously discussed.

## II. The Issue of Gambling Debt and Enforceability

The issue of the enforceability of loans made for gambling purposes is not a new one; its public policy considerations and traditions stretch back to both Roman Civil Law and English Common Law.[17] The lengthy history

by an organization "which is lobbying for casinos to help the horse industry," raising the risk of polling bias. *Id.*

8 *Infra* notes 17–29.

9 *Infra* notes 30–83.

10 Ky. Off-Track Betting, Inc. v. McBurney, 993 S.W.2d 946 (Ky. 1999).

11 *Infra* notes 84–91.

12 Ky. Rev. Stat. Ann. § 372.005 (West 2005).

13 *Infra* notes 92–132

14 *Infra* notes 93–106.

15 *Infra* notes 107–32.

16 *Infra* notes 133–44.

17 *See* Joseph Kelly, *Caught in the Intersection between Public Policy and Practicality: A Survey of the Legal Treatment of Gambling-Related Obligations in the United States*, 5 Chap. L. Rev.

of the issue, however, should not beguile one into believing that the question of gambling debt enforceability has been definitively answered. While the almost complete unenforceability of gambling obligations used to be indisputable law, this law is now far less certain both in Kentucky and in the United States as a whole.

Considering the prevalence of gambling and gambling debts, a resolution of the now uncertain issue of gambling debt enforceability is critical for the future of both Kentucky and the United States. As of 2006, 48 states allowed some form of legalized gambling, including large and small land-based casinos, riverboat casinos, lotteries, racetracks, and manual or video gambling machines.[18] The legalization of these various gambling activities is not a phenomenon that occurred gradually; gambling was largely illegal throughout most of the twentieth century, and this illegality was only reversed in the last twenty to thirty years.[19]

The amount of money involved in these various gambling operations is enormous. Total casino gambling revenues in the United States were estimated at $51 billion in 2005 and are projected to increase to over $64 billion by 2009.[20] These statistics, however, do not account for most non-casino

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87, 88–89 (2002). Kelly explains that many state laws prohibiting the enforcement of gambling debt stem from adoption of the English Statute of Anne, a 1710 statute that both prohibited gambling debt enforceability and provided a recovery action by the losing gambler. *Id.* at 87–88. Similarly, Kelly explains that some United States jurisdictions have exceptions to the unenforceability law for gambling based on "skill," a tradition derived from Roman law. *Id.* at 88.

18 *Id.* at 90; *see also* Kavan Peterson, *48 States Raking In Gambling Proceeds*, STATELINE.ORG, May 23, 2006, http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=114503. Casinos in particular are an extremely prevalent venue of gambling in these states.

> Bets can be placed in nearly 900 casinos—455 privately run in 11 states, 406 on Indian reservations in 29 states and 29 racetrack casinos—known as racinos—in 11 states. And at least nine states (Delaware, Georgia, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Ohio and Texas) are considering opening their doors to casino or racetrack gambling.

*Id.*

19 *See* John Warren Kindt, *Diminishing or Negating the Multiplier Effect: The Transfer of Consumer Dollars to Legalized Gambling: Should a Negative Socio-Economic "Crime Multiplier" Be Included in Gambling Cost/Benefit Analysis?*, 2003 MICH. ST. DCL L. REV. 281, 308 (2003). By comparison, "[i]n 1976, only a few states allowed gambling." NAT'L GAMBLING IMPACT STUDY COMM'N, FINAL REPORT, at 7-1 (1999) [hereinafter GAMBLING COMM'N REPORT]. The National Gambling Impact Study Commission was a government commission created in 1996 that was charged "to conduct a comprehensive legal and factual study of the social and economic impacts of gambling in the United States." *Id.*, EXECUTIVE SUMMARY, at 2.

20 Howard Stutz, *Gambling Study: Projected Revenue: $100 billion, Casinos Expected to Hit Mark by End of Decade*, LAS VEGAS REV.-J., June 22, 2005, http://www.reviewjournal.com/lvrj_home/2005/Jun-22-Wed-2005/business/2221014.html. These statistics "took into account information from traditional casinos, both riverboat casinos and dockside gambling halls,

gambling outlets, such as horse race betting and state lotteries. Factoring in these other sources yields estimated revenues to the gambling establishments of approximately $73 billion in 2003 and possibly $100 billion in 2006.[21] Moreover, these statistics only account for the actual income to the gambling establishments. The total amount legally bet in the United States, on the other hand, was estimated at nearly $640 billion for 1997.[22] This number increased to nearly $826 billion by 2000, the most recent year for which this statistic could be obtained.[23]

The growth of legalized gambling is widely understood to have caused a corresponding growth of gambling debt[24] due to the ready availability of credit for the purpose of gambling.[25] Sources of such gambling-related credit abound. Casinos and other gambling establishments loan their patrons billions of dollars each year through devices called "credit markers." In 1997, for example, over $2 billion were lent through credit markers by the casinos in Atlantic City, New Jersey, alone.[26] Another method of extending credit to gamblers is to offer cash advances on casino charge cards, which typically carry very high transaction fees.[27] Credit cards are an additional source of

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American Indian casinos and racetrack casinos." *Id.*

21 David R. Francis, *Gambling: Where the Money Goes*, CHRISTIAN SCI. MONITOR, June 19, 2006, at 16, *available at* http://www.csmonitor.com/2006/0619/p16s01-cogn.htm.

22 I. Nelson Rose, *The Role of Credit in the Third Wave of Legal Gambling*, *in* GAMBLING AND THE LAW (Anthony Cabot ed.) at 2 n.10 (1999), *available at* http://govinfo.library.unt.edu/ngisc/meetings/11nov98/rose.pdf.

> However, this number, called the "handle," is inflated, because it includes all wagers: If a player bets $25 and wins and then $25 and loses, a total of $50 has been wagered, even though no money has changed hands. A more accurate number for making comparisons with other industries is the gross revenue or "win," i.e. the amount players lose. Since this is money left behind by customers after the gambling transaction, it corresponds nicely with gross revenue or sales from other retail businesses.

*Id.* The gambling revenue statistics cited in the text above are examples of the "gross revenue or 'win'" numbers Rose refers to. *Supra* notes 20–21 and accompanying text.

23 CHRISTIANSEN CAPITAL ADVISORS LLC, GROSS ANNUAL WAGER OF THE UNITED STATES, 2000 HANDLE BY INDUSTRY (2003), http://www.cca-i.com/Primary%20Navigation/Online%20Data%20Store/Free%20Research/2000%20US%20Handle%20Data.pdf.

24 GAMBLING COMM'N REPORT, *supra* note 19, at 7-14 ("The Commission found widespread perception among community leaders that indebtedness tends to increase with legalized gambling . . . .").

25 *See id.* ("One of the issues of most concern to this commission is the ready availability of credit in and around casinos, which can lead to irresponsible gambling and problem and pathological gambling behavior.").

26 *Id.* at 7-14 to 7-15.

27 *Id.* at 7-14 ("Additional sums are charged by casino customers on their credit cards as cash advances. Casinos charge fees for cash advances ranging from 3 percent to 10 percent or more.").

gambling indebtedness. In fact, some believe traditional credit cards are even more widely used than the credit extended by gambling establishments, as credit card debt does not need to be reported to state gambling regulators.[28] As a result of such ready availability of financing for gambling activities, "some individuals are able to spend far more than they can afford and incur dangerously high debts."[29] With gambling expansion efforts underway in Kentucky, and likely to continue in the rest of the United States, Kentucky residents are likely to accrue even more gambling debt more frequently. Therefore, whether such debt can be legally enforced when the casino creditors take their patron debtors to court for collection is a question likely to take center stage in the time ahead.

## III. A History of Gambling Debt Enforceability in Kentucky

### *A. Gambling Debt Enforceability through* Kentucky Off-Track Betting, Inc. v. McBurney

In order to discuss the state of the law concerning the enforceability of gambling debt in Kentucky, it is useful to discuss the constitutional and statutory background of gambling itself in the commonwealth. Gambling is addressed in section 226 of the Kentucky Constitution, which addresses the constitutionality of state and charitable lotteries.[30] Lotteries of any kind were illegal in Kentucky until section 226 of the constitution was created through the passage of amendments in 1988 and 1992.[31] The 1988 amendment authorized state-operated lotteries, and the 1992 amendment allowed "charitable lotteries" and "charitable gift enterprises."[32] Discretion was placed in the hands of the General Assembly to define "lottery," "charity," and the circumstances in which the use of them would be illegal. The General Assembly also had discretion to regulate such instruments and define proper penalties for violations therein.[33] Most importantly, for the

28 Rose, *supra* note 22, at 6. Though states often require that casino-issued credit be reported to state regulators, "there does not appear to be any reliable source for even making a 'guesstimate' as to how much money gamblers are borrowing from other sources." *Id.*

29 Gambling Comm'n Report, *supra* note 19, at 7-15.

30 Ky. Const. § 226.

31 Commonwealth v. Louisville Atlantis Cmty./Adapt, Inc., 971 S.W.2d 810, 814 (Ky. Ct. App. 1997) (briefly discussing the history of section 226 of the Kentucky Constitution).

32 Ky. Const. § 226(1)–(2); *Louisville Atlantis Cmty.*, 971 S.W.2d at 814.

33 Section 226(2)(a)–(f) of the Kentucky Constitution reads:

> (2) The General Assembly may by general law permit charitable lotteries and charitable gift enterprises and, if it does so, it shall:
>
> (a) Define what constitutes a charity or charitable organization;
>
> (b) Define the types of charitable lotteries and charitable gift enter-

purposes of Kentucky gambling law, the 1992 amendment also disallowed "schemes for similar purposes,"[34] providing a seemingly broad prohibition on all other forms of lotteries and gift enterprises. The breadth of this prohibitory scheme became the key question, as it arguably could have been construed to encompass many forms of gambling, as long as they could be characterized as "lotteries" or "schemes for similar purposes."

However, the particular gambling establishments for which Kentucky is arguably best known, parimutuel horseracing systems[35] in which gamblers can place bets either at the tracks or from off-track betting facilities,[36] were not subject to this constitutional prohibition on gambling. Long before the

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prises which may be engaged in;

(c) Set standards for the conduct of charitable lotteries and charitable gift enterprises by charitable organizations;

(d) Provide for means of accounting for the amount of money raised by lotteries and gift enterprises and for assuring its expenditure only for charitable purposes;

(e) Provide suitable penalties for violation of statutes relating to charitable lotteries and charitable gift enterprises; and

(f) Pass whatever other general laws the General Assembly deems necessary to assure the proper functioning, honesty, and integrity of charitable lotteries and charitable gift enterprises, and the charitable purposes for which the funds are expended.

KY. CONST. § 226(2)(a)–(f).

34 Section 226(3) of the Kentucky Constitution reads:

(3) Except as provided in this section, lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes, and none shall be exercised, and no schemes for similar purposes shall be allowed. The General Assembly shall enforce this section by proper penalties. All lottery privileges or charters heretofore granted are revoked.

KY. CONST. § 226(3).

35 Parimutuel betting is defined by Black's Law Dictionary as follows: "A system of gambling in which bets placed on a race are pooled and then paid (less a management fee and taxes) to those holding winning tickets." BLACK'S LAW DICTIONARY 1147 (8th ed. 2004). Parimutuel betting is the method of gambling used in Kentucky's horse racing industry. *See* Robert Lawrence & Richard Thalheimer, *Go, Baby, Go! Keeping Horse Racing Healthy*, U. LOUISVILLE MAG., Winter 1999, http://www.louisville.edu/ur/ucomm/mags/winter99/front&center.html ("Legalized gambling in Kentucky includes pari-mutuel horse racing, a state lottery, and charitable gaming."). *See also Hearing on Financial Aspects of Internet Gaming: Good Gamble or Bad Bet? Before the Subcomm. on Oversight and Investigations of the H. Comm. on Fin. Servs.*, 107th Cong. 192 (2001) (statement of Gregory C. Avioli, Deputy Comm'r and Chief Operating Officer, National Thoroughbred Racing Association) ("Unlike most other forms of gambling, horseracing uses the pari-mutuel system in which bettors wager against one another instead of against the 'house.'") [hereinafter *Gaming Hearing*]. Considering the cultural and economic significance of horse racing in Kentucky, the importance of the parimutuel system becomes obvious.

36 The Congressional hearings on internet gambling elaborated on this:

above constitutional amendments were passed, Kentucky's highest court specified that these parimutuel gambling establishments did not legally constitute "lotteries."[37] In accordance with this, statutory additions were passed in 1992 that encouraged the use of such parimutuel facilities and made clear that wagers there were not limited to cash, telephone accounts, and credit cards, but could be placed in other forms as well.[38]

Casino gambling, however, was understood to be prohibited by section 226(3) of the Kentucky Constitution (being considered a forbidden "lottery" or "scheme for similar purposes") until 2005, when Attorney General Gregory D. Stumbo drew a different conclusion.[39] Going directly against prior attorney general opinions, Stumbo argued that the constitutional prohibition was only meant to address the sale of lottery licenses, and that the framers of the prohibition were "confident gambling would continue to be effectively regulated by statute, and further that statutory law, which is inherently more flexible than the dictates of a constitution, was the best way to regulate other forms of gambling in the future."[40] Though the commonwealth would have the power to prohibit forms of gambling as an exercise of its general police powers,[41] according to Stumbo there is apparently no constitutional barrier to the legalization of various forms of gambling, perhaps including casino gambling. While only the courts can officially inter-

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> [T]oday over eighty percent of the money wagered on racing is bet at facilities or locations other than where the race itself is run . . . . Another process for pari-mutuel wagering . . . is account wagering, whereby an account holder establishes an account with a licensed account wagering facility and is able to send instructions to place wagers from that account via telephone or other electronic means without being physically present at the facility. Currently, eleven states, including . . . Kentucky . . . have enacted legislation specifically authorizing the acceptance of account wagers by licensed facilities within those States . . . .

*Gaming Hearing*, *supra* note 35, at 194.

37 Commonwealth v. Ky. Jockey Club, 38 S.W.2d 987, 994 (Ky. 1931) ("We are unable, in the face of the facts recited, to declare that the section of the Constitution condemning lotteries was understood by the people who adopted it as itself outlawing betting upon horse races, by the pari mutual system, or the other forms of betting.").

38 KY. REV. STAT. ANN. § 230.215 (West 2005) ("Further, it is the policy and intent of the Commonwealth to foster and to encourage the business of legitimate horse racing with pari-mutuel wagering thereon in the Commonwealth on the highest possible plane."); *see also* KY. REV. STAT. ANN. §§ 230.379, 380 (West 2005) (concerning the methods of wagering at parimutuel facilities and the applicable restrictions).

39 05-003 Op. Ky. Att'y Gen. 2-3 (2005).

40 *Id.* at 2-8.

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> It was then understood, and has been the accepted opinion, that the subjects of betting and gaming were within the absolute control of the police power, possessed by the Legislature. It is the duty and function of the Legislature to discern and correct evils, and evils within that power are not limited to some definite injury to public safety or morals, but

pret the constitution's language to decide this question, Stumbo's opinion has further opened the door for the gambling expansion movement.

Due to the foregoing, the need for a more definite understanding of the enforceability of gambling debt is crucial, as the issue presented is one of liability. If such debt is held enforceable, the individual gamblers would be held responsible for payment; if the debt is held unenforceable, the gambling establishments would be unable to collect. Should the expansion efforts succeed, more gambling would take place in Kentucky, logically resulting in more gambling debt. A correspondingly greater amount of litigation would likely develop over efforts to have such debt enforced, thus repeatedly raising the question about whether such debt *can* be enforced in court.

Until recent years,[42] this appeared to be a well-settled question in Kentucky. A long line of cases stretching back into the 19th Century upheld a strong statutory rule that contracts or assurances based on the consideration of gambling winnings or losses are void and unenforceable.[43] This rule against enforceability, moreover, was maintained well into modern times. The statutory ban on gambling debt enforceability in *Lyons v. Hodgen*,[44] one example from this line of cases, is almost identical to the one at issue in more recent cases.[45] The apparent breadth of the statutes—"*[e]very* contract . . . or assurance . . . *any* game . . . or wager . . . lent or advanced at

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> embrace the removal of obstacles to a greater public welfare. The power is ample, coextensive with the duty, and equal to any exigency.

*Ky. Jockey Club*, 38 S.W.2d at 994.

42 *Infra* notes 84–91.

43 *See, e.g.*, White v. Wilson's Adm'r, 37 S.W. 677 (Ky. 1896); Lyons v. Hodgen, 13 S.W. 1076 (Ky. 1890); Pace v. Martin, 63 Ky. (2 Duv.) 522 (1866); Brittain v. Duling, 54 Ky. (15 B. Mon.) 138 (1854); Brown v. Watson, 45 Ky. (6 B. Mon.) 588 (1846); Lyle v. Lindsey, 44 Ky. (5 B. Mon.) 123 (1844); Levy v. Perkins, 7 Ky. (4 Bibb) 505 (1817); Clay v. Fry, 6 Ky. (3 Bibb) 248 (1813); Richard's Adm'r v. Allen, 4 Ky. (1 Bibb) 189 (1808).

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> Every contract, conveyance, transfer, or assurance for the consideration, in whole or in part, of money, property, or other thing won, lost, or bet at any game, sport, pastime, or wager, or for the consideration of money, property, or other thing lent or advanced . . . at the time of any betting, gaming or wagering, to a person then actually engaged in betting, gaming, or wagering, shall be void.

*Lyons*, 13 S.W. at 1077.

45 KRS § 372.010 reads:

> Every contract, conveyance, transfer or assurance for the consideration, in whole or in part, of money, property or other thing won, lost or bet in any game, sport, pastime or wager, or for the consideration of money, property or other thing lent or advanced for the purpose of gaming, or lent or advanced at the time of any betting, gaming, or wagering to a person then actually engaged in betting, gaming, or wagering, is void.

KY. REV. STAT. ANN. § 372.010 (West 2005).

the time of *any* betting . . . or wagering"[46]—seems clear, and the courts have found few limitations on their applicability in the past.

One possible limitation on the reach of the enforceability statutes, suggested the Kentucky Supreme Court in *Holzbog v. Bakrow*,[47] was the inducement of an innocent third party. In *Holzbog*, the plaintiff was assigned a note that was originally executed in consideration of the settlement of the assignor's gambling debts to the defendants.[48] The plaintiff had no reason to know of the possible invalidity of the note, and the defendants assured him that the note was indeed valid.[49] Based on this misrepresentation by the defendants, the plaintiff used the note as security on another note that he executed to another party.[50] When the defendants then denied the validity of the note after he tried to collect on it, the plaintiff claimed that the defendants were estopped from doing so due to their inducement of the plaintiff via a note that they assured him was valid.[51] The Court held that estoppel cannot be claimed between the original parties to the gambling transaction, or between them and assignees who "simply stand in the shoes of the original party."[52] This plaintiff, however, was different, since he knew nothing of the underlying transaction and had no reason to suspect that the note was invalid under the unenforceability statute.[53] He was "an innocent purchaser who ha[d] been induced to purchase the paper by the representations of the maker."[54] The key was that the plaintiff had no notice of the note's invalidity as a gambling obligation.[55] The estoppel principle apparently would not have otherwise allowed the enforceability of the debt in this case,[56] despite the principle's usual application to other types of contractual disputes.

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46 *Id.* (emphasis added); *Lyons*, 13 S.W. at 1077 (emphasis added).

47 Holzbog v. Bakrow, 160 S.W. 792 (Ky. 1913).

48 *Id.* at 792.

49 *Id.* at 793 ("[Plaintiff] . . . had no notice, knowledge, or information that there was any invalidity, infirmity . . . of such existing as against the note; on the contrary, until that time [defendants] had assured him that the note was valid and had repeatedly promised to pay it.").

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.* at 794.

56

> If he had notice of the infirmity of the note when he had the transaction with the administrator, he cannot recover; for the rule is that the assignee of a note based on a gambling consideration, who knows the consideration on which the note is based, cannot recover although the makers of the note before he purchased it assured him that it is valid

Approximately forty years later, the Kentucky Supreme Court reached an opposite result in *Dobbs v. Holder*,[57] a case with facts similar to *Holzbog*. Here, the defendant wrote a check to a party to whom he owed gambling debts.[58] The bank drawer stopped payment on the check, and after hearing of this, the party purchased a car from the plaintiff and used the defendant's check as payment for the car.[59] The plaintiff was not aware of either the check's origin in gambling payments or that the bank had previously stopped payment on it; the Court specifically noted that the plaintiff was "an innocent holder for value."[60] The situation is thus closely analogous to that in *Holzbog*, with the exception that here the plaintiff was not an assignee of a note by the original party executing the note, but an assignee of a check by the party originally receiving it.

Despite the similar facts, the Court reached the conclusion that the check was still void because of the statute prohibiting the enforcement of gambling obligations, stating that the innocence of the plaintiff to the nature of this transaction was irrelevant for the purposes of the statute. "The whole current of authority is that a check or other evidence of indebtedness based upon a gambling consideration is absolutely void, and the obligor is not bound to even an innocent holder of the instrument."[61] The Court stated that once an obligation is originally void by statutory decree, simply circulating the obligation to other parties does not act to make it legally binding.[62] Otherwise, parties could circumvent declared public policy against the enforcement of such obligations by assignment of the void obligation.[63] If the differences noted above between *Dobbs* and *Holzbog* are not considered significant, then *Dobbs* can only represent a retreat from the Court's "innocence exception" to the general prohibition against the enforceability of gambling obligations, and an affirmation of the broad applicability of the statute.

The issue of gambling debt enforceability became more complicated with the advent of the gambling expansion movement starting in the early 1990s and the passage of the above-noted legislation promoting racetrack wagering and off-track betting facilities.[64] Specifically, the question regarding enforceability turned to the nature of the public policy identified by the Court in *Dobbs*: was public policy still against the enforceability of gam-

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and will be paid.

*Id.* at 795.

57 Dobbs v. Holder, 242 S.W.2d 605 (Ky. 1951).

58 *Id.* at 606.

59 *Id.*

60 *Id.* at 606–07.

61 *Id.* at 607.

62 *Id.*

63 *Id.* at 608.

64 *See supra* note 38 and accompanying text.

bling debt? The passage of the parimutuel statutes and the constitutional amendments allowing state lotteries[65] indicated that public policy was beginning to favor legalized gambling. If the policy against enforceability that the *Dobbs* Court noted was derived from the assumption that public policy was against legalized gambling, there would now be little basis for the strict rule against the enforceability of gambling debt.[66] The Court squarely addressed this issue in *Kentucky Off-Track Betting, Inc. v. McBurney*.[67]

In *McBurney*, the defendant made a substantial number of unsuccessful bets at the plaintiff off-track betting facility—betting that was legal due to the passage of the 1992 horseracing statutes. The bets were originally paid with a series of checks, but when the defendant admitted to the plaintiff that his bank account had insufficient funds to cover the checks, the defendant agreed to pay with a promissory note.[68] The defendant ultimately defaulted on the note and the plaintiff sought to enforce the obligation.[69] The defendant then argued that the note was void and unenforceable under the aforementioned KRS § 372.010.[70] The plaintiff, in turn, claimed that the passage of the 1992 horseracing statutes implied that public policy was now in favor of the enforceability of gambling debts, at least for those incurred in a legal gambling transaction like the defendant's.[71] The plaintiff continued that the unenforceability statute spoke to an older public policy, one that had now been overturned by a new public policy more favorable to legalized gambling.[72] The policy of the unenforceability statute was thus in conflict with that of the 1992 statutes, and the unenforceability statute was therefore repealed by implication and could not be applied to hold such gambling obligations void.[73]

The Court, however, disagreed with the plaintiff and refused to enforce the gambling obligation. It began by re-emphasizing a broad construction of the applicability of the unenforceability statute.[74] The Court stated that the defendant's checks, promissory note, and any verbal assurances to pay were void, as "a check or other evidence of indebtedness based upon a gambling consideration is absolutely void."[75] The plain language of the statute made the parties' exchanges unenforceable gambling transactions, as the

65 *See supra* notes 30–34 and accompanying text.

66 *See Dobbs*, 242 S.W.2d at 608.

67 Ky. Off-Track Betting, Inc. v. McBurney, 993 S.W.2d 946 (Ky. 1999).

68 *Id.* at 947.

69 *Id.*

70 *See supra* note 45.

71 *See McBurney*, 993 S.W.2d at 947.

72 *See id.*

73 *Id.* ("In effect, [plaintiff] argues that the statute prohibiting the lending of money for wagering has been repealed by implication.").

74 *Id.* at 948.

75 *Id.*

defendant accepted worthless checks while the plaintiff gambled, and allowed the plaintiff to continue gambling on the basis of these checks.[76]

After confirming that the checks and note in question fell within the purview of the enforceability statute, the Court went on to uphold the continuing validity of the statute, stating that it had not been implicitly overruled by the horseracing statutes.[77] The Court explained that the policies expressed by the enforceability statute and the horseracing statutes are not directly in conflict with each other, and thus the courts are bound to uphold them unless the legislature clearly expressed a desire to overturn one by the passage of the other. "Courts will presume that where the legislature intended a subsequent act to repeal a former one, it will so express itself so as to leave no doubt as to its purpose."[78] Applying this presumption, the Court said that the horseracing statutes were not meant to express a new public policy in favor of gambling—a policy in conflict with the policy of the enforceability statute—but rather were designed to "simply . . . acknowledge the various technological advances of modern times" by allowing racetrack betters to legally do so at off-track betting facilities, since "[i]t is now no longer necessary to physically go to a race track to place a bet."[79] The real issue to the Court was "whether one may collect money loaned or advanced to a person to bet while that person is actually engaged in betting," and this issue was independent from the one of the legality, or lack thereof, of gambling.[80] In the Court's eyes, the legislature did not intend to make gambling debt enforceable by making further types of gambling legal.

While the majority thus interpreted the statute so as to make gambling obligations unenforceable regardless of the legality of the underlying gambling acts in question, the dissent argued the opposite view—that the enforceability prohibition depended on the legality of the gambling itself. "The purpose of [the enforceability statute] is to prevent *illegal* gambling by rendering void and unenforceable the gambling contract itself and certain related agreements."[81] The dissent thus viewed the purpose of the enforceability statute as stemming from a public policy against the legalization of gambling. Hence, the dissent reasoned that the growing acceptance of legalized gambling in Kentucky, as seen by the passage of the lottery amendments and the racetrack statutes, showed that the policy of the enforceability statute was no longer relevant, and that gambling obligations incurred in now-legal transactions should be enforceable in court. "The social evil that [the enforceability statute] was designed to curb was gam-

76 *Id.*

77 *Id.* at 949.

78 *Id.*

79 *Id.* at 948.

80 *Id.*

81 *Id.* at 949 (Johnstone, J., dissenting).

bling, an *illegal activity* at the time of the statute's enactment, not money lent for a *legal activity*."[82] Since in the dissent's eyes the enforceability statute was designed to prevent a gambling legalization that had already occurred, continuing to apply the statute so as to invalidate loans that were made in valid gambling acts would be "preposterous."[83]

Thus, through 1999, the general unenforceability of gambling debt in Kentucky was strongly established. Despite the apparent willingness of the public to authorize an expanded menu of legal gambling activities, the courts were unwilling to enforce obligations incurred in such legal activities, even with regards to innocent third parties.

### *B. Gambling Debt Enforceability After* McBurney

The legislature, however, did not appear to agree with the *McBurney* Court. Since *McBurney* was handed down, an important statutory change has occurred that contradicts the Court's holding. KRS § 372.005[84] was enacted in 2000, just one year after *McBurney*, and, by its terms, seems to adopt the position of the dissent.[85] In providing that the terms and provisions of chapter 372 are inapplicable with regards to "betting, gaming, and wagering that has been authorized, permitted, or legalized," the statute appears to prevent the unenforceability rule from applying to gambling debt that was incurred in the pursuit of legalized gambling activities.[86] This statute would seemingly apply to *McBurney* if the case were reheard. Based on the content of the statute and the timing of its passage, it is difficult to escape the conclusion that this provision was enacted to reject the Kentucky Supreme Court's interpretation of the policies underlying the enforceability and horseracing statutes. The *McBurney* dissent's view, that the passage of the horseracing statutes demonstrates a public policy shift that debt incurred in legal gambling transactions should be held enforceable, is reflected by the legislature.

KRS § 372.005 may represent an enormous turning point in the issue of the enforceability of gambling debt in Kentucky. A literal reading of the statute overturns decades of cases holding gambling debt strictly unenforceable, at least in cases that concern legal gambling transactions. Many

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82 *Id.* at 950.

83 *Id.*

84 KRS § 372.005 reads:

> The terms and provisions of this chapter do not apply to betting, gaming, or wagering that has been authorized, permitted, or legalized, including, but not limited to, all activities and transactions permitted under KRS Chapters 154A, 230, and 238.

KY. REV. STAT. ANN. § 372.005 (West 2005).

85 *See supra* notes 81–83 and accompanying text.

86 § 372.005.

questions have yet to be answered about the full impact of this statute; for example, whether *all* gambling obligations incurred in legal gambling activities can be enforced or if there are instead implicit limits to the applicability of the statute. The issue is wide open, as KRS § 372.005 has not been interpreted by any Kentucky court in a reported decision.

The Court of Appeals' recent holding in *DeMoisey v. River Downs Investment Co.*,[87] may suggest the future direction of the courts with regards to the new statute's impact. In *DeMoisey*, the executor of a deceased gambler was sued in order to collect on a promissory note for the deceased's gambling debt.[88] Though the executor claimed that the obligation was void since the gambling transaction was allegedly illegal under other statutory provisions, he did not act to disallow the plaintiff's claim until over three years after it was first pressed.[89] The court, though acknowledging the existence of both the enforceability statute and the new KRS § 372.005, held the claim enforceable on unrelated grounds.[90] The court, therefore, did not need to determine the legality of the underlying gambling transaction, and the possible impact of KRS § 372.005 was not addressed.[91]

Despite the court's reluctance to interpret KRS § 372.005, *DeMoisey* still constitutes a rare instance in which a Kentucky court held a gambling obligation enforceable—a particularly surprising result in light of *McBurney*'s strong holding. *DeMoisey* may thus be indicative of a future willingness of the courts to embrace the *McBurney* dissent's view and enforce otherwise legal gambling obligations. Put more specifically, *DeMoisey* may be the prelude to a fairly broad interpretation of KRS § 372.005 in later cases. Only time and further litigation will answer this question.

## IV. Other Jurisdictions' Approaches to the Enforceability of Gambling Debt

Though the future of Kentucky's jurisprudence on the enforceability of loans made for gambling purposes remains unclear, comparisons to other jurisdictions may provide some guidance. As discussed earlier, the trend in favor of gambling expansion is occurring throughout the United States, not only in Kentucky, and this trend is having noticeable effects on enforceability jurisprudence across the country. Analyzing the approach that other states take to this issue can provide clarity on how a more gambling-friendly Kentucky may approach it in turn. This analysis is two-fold, as creditors'

87 DeMoisey v. River Downs Inv. Co., 159 S.W.3d 820 (Ky. Ct. App. 2005).

88 *Id.* at 821.

89 *Id.*

90 *Id.* at 822 (by failing to timely disallow the claim, the executor's inaction made the claim allowable against the estate, and therefore enforceable).

91 *Id.* at 821 n.3 ("Because we hold that the claim was allowed and payable under KRS Chapter 396, we need not decide the effect of the 2000 enactment of KRS 372.005 . . . .").

claims to enforce gambling debts can be pressed either in the state where the debt was actually incurred, or in the state that the debtor resides at the time of the lawsuit.[92] Judicial results vary depending on whether these happen to be the same state or different states. A proper analysis of comparative state enforceability policies requires consideration of both scenarios.

### *A. Enforceability Outcomes When the Two States Differ*

If the debtor's state of residency and the state where the debt was incurred differ, the creditor may take two routes in his attempt to enforce the debt. He may either obtain a judgment against the debtor in the state where the debt was incurred (the "foreign debt/judgment") then seek to enforce this foreign judgment in the state of residency,[93] or he may instead attempt to directly enforce the foreign debt in the state of residency.[94] The former is a clear issue with uniform results in all states—the foreign judgment must be recognized by the courts of the residency state, and the debt must therefore be enforced.[95]

A more difficult question, however, is presented when the creditor seeks to recover on the gambling debt in the debtor's state of residency before obtaining a foreign judgment in the state where the debt was incurred. The outcomes of these cases seem dependent on the policies of the state of residency towards gambling and enforceability—not those of the state where the debt was incurred—since the outcomes of such lawsuits vary from state to state. As such, they are very useful for a comparative analysis of state gambling debt enforceability.

*1. California.*—In *Metropolitan Creditors Service v. Sadri*,[96] the plaintiff, a Nevada casino, attempted to enforce checks and memoranda of indebtedness

92 *See* Kelly, *supra* note 17, at 114–21. The general structure of this subsection was derived in large part from Kelly's article.

93 Kelly's article refers to this process as the registration of "sister-state judgments." *Id.* at 114.

94 *See id.* at 116–21.

95 The Full Faith and Credit Clause of the Federal Constitution, providing that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State," is the reason for this uniform result. U.S. CONST. art. IV, § 1. If the creditor were to obtain a valid judgment enforcing the debt in the state in which it was incurred, the Constitution mandates that the judgment be accorded full faith and credit and be upheld in the state of residency, regardless of public policy differences between the two states on the issue of gambling debt. *See* Fautleroy v. Lum, 210 U.S. 230 (1908). Further analysis of this issue, however, is beyond the scope of this Note. As indicated, the results of this doctrine are uniform throughout the United States. As such, they do not provide substantial insight into the judicial stances that outside jurisdictions have taken towards gambling debt enforceability as indicators of Kentucky's potential approach to the issue.

96 Metro. Creditors Serv. of Sacramento v. Sadri, 19 Cal. Rptr. 2nd 646 (Ct. App. 1993).

executed by the defendant debtor, a California resident.[97] The debts were incurred while the debtor gambled in Nevada, but instead of first seeking a Nevada judgment and enforcing it against the debtor, the plaintiff sought direct enforcement of the debt in California.[98] Despite the fact that the debt could have been legally enforced in Nevada, the court concluded that the Constitution does not require enforcement of the debt in California:

> A forum state must give full faith and credit to a sister state *judgment*, regardless of the forum state's public policy on the underlying claim. However, the forum state may refuse to entertain a lawsuit on a sister state *cause of action* if its enforcement is contrary to the strong public policy of the forum state.[99]

Concluding that the enforceability of foreign claims unsupported by foreign judgments is dependent on the forum state's public policy towards the claim, the court dismissed the claim on the grounds that enforcing gambling debts is against California's public policy.[100]

*2. Tennessee.*—The opposite outcome was reached on similar facts in *Robinson Property Group, L.P. v. Russell.*[101] In *Russell* the defendant debtor, a Tennessee resident, incurred lawful gambling debt in Mississippi. The plaintiff creditor then brought suit in Tennessee to enforce the debt, without first seeking a judgment in Mississippi. Though the court recognized that the debt would not have been enforceable had it been incurred in Tennessee,[102] it allowed enforcement of the debt, finding that the Constitution provides that full faith and credit be given to Mississippi law where the debt was incurred under it.[103] The court did indicate that enforcement of such foreign laws is not necessarily automatic (as is the case with foreign *judgments*), stating that if applying the foreign law would "contravene a strong public policy of Tennessee," then the laws of Tennessee would be enforced, rather than the laws of Mississippi.[104] However, the court argued

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97 Id. at 647.

98 *Id.*

99 *Id.* at 648 (internal citations omitted).

100 *Id.* at 653.

101 Robinson Prop. Group, L.P. v. Russell, No. W2000-00331-COA-R3-CV, 2000 WL 33191371 (Tenn. Ct. App. Nov. 22, 2000).

102 *Id.* at *3.

103 *Id.* at *4.

104 *Id.* at *3;

> The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.

*Id.* at *4 (quoting Cardozo, J., in Loucks v. Standard Oil Co., 224 N.Y. 99, 111 (1918)).

that applying Mississippi law and enforcing the foreign debt would not be against Tennessee public policy. The state's legislature had earlier allowed parimutuel racetrack betting, indicating that gambling may not be per se against public policy,[105] and not enforcing the Mississippi debt would result in "great injustice if Tennesseans could reap the benefits of gambling in states where it is legal when they are successful, but seek shelter in Tennessee courts when they lose."[106] Enforcement of the gambling debt was thus allowed, demonstrating that results in these situations are by no means uniform, as with foreign judgments on gambling obligations.

### *B. Enforceability Outcomes When the Two States Are the Same*

When the debtor's state of residency is the same state that the debt was incurred in, results also vary by jurisdiction. Analyzing how other states' courts rule on such in-state gambling debt lawsuits may provide insight on how Kentucky's courts may act on this question when it arises again in the commonwealth.

*1. Wisconsin.*—Some jurisdictions, despite the introduction of legalized gambling into the state, have taken the position of the majority in *McBurney*; that even a shifting public policy favoring legalized gambling does not indicate a similar shift towards the enforceability of gambling debt. In *State v. Gonnelly*, the Wisconsin Court of Appeals dealt with this issue when the plaintiff attempted to enforce checks that the defendant debtor cashed at a kennel club.[107] After noting that the checks are unenforceable gambling contracts under the relevant state statute, the court rejected the argument that the legalization of various gambling activities in Wisconsin implies that debts incurred in such activities were meant to be enforced.[108] Much like the *McBurney* Court, this court said that repeal by implication was not a favored approach, and further, that the policies in favor of legalized gambling and against the enforceability of gambling debt are not logically inconsistent.[109] Importantly, the court pointed out that the statutes legalizing various forms of gambling in Wisconsin contained no express exception allowing debts incurred under these authorized gambling acts to be enforced, indicating that this would have changed the outcome of the case.[110]

*2. California.*—Wisconsin is certainly not alone in taking this approach. As discussed earlier, for example, these same arguments were made in Califor-

105 *Id.* at *3.

106 *Id.* at *4.

107 State v. Gonnelly, 496 N.W.2d 671 (Wis. Ct. App. 1992).

108 *Id.* at 674–75.

109 *Id.* at 675.

110 *Id.*

nia in *Metropolitan Creditors Service v. Sadri* when creditors tried to enforce gambling obligations that arose out of otherwise legal gambling transactions.[111] Although this transaction originally arose in a different state and was only sought to be enforced in California, the same reasoning and considerations of policy that drove the court's decision not to enforce the debt provide insight into its understanding of the state's public policy towards the enforceability of gambling debt overall.[112] The court pointed out, as the *McBurney* majority did, that the mere legalization of gambling transactions in the state is not conclusive of the question of the enforceability of gambling obligations, as the two issues rest on different matters of public policy.[113] However, just as in *Gonnelly*, here there was no statutory provision exempting legalized gambling activities from any rules that might prohibit the enforcement of gambling debts.

*3. Indiana.*—Other jurisdictions have taken a position that is more in tune with that of the *McBurney* dissent: that in light of an increased tolerance for gambling, denying the enforceability of debt incurred in such activities would be illogical. One such jurisdiction is Indiana. In *Schrenger v. Caesars Indiana*,[114] the Indiana Court of Appeals held a gambling debt incurred at a riverboat casino enforceable, despite the absence of an express statutory provision allowing this outcome. In reaching this result, the court explained that though gambling had historically been illegal in Indiana, recent statutory enactments allowed the creation of lottery, racetrack, and riverboat gambling, indicating that "the current state of the law has carved out several exceptions to [the] anti-gambling policy."[115] Furthermore, while Indiana's long-standing policy was against the enforceability of gambling obligations, a recent statutory provision stated that riverboat casinos are allowed to extend credit to their gamblers.[116] To the court, this was meant to be an exception to the unenforceability rule with regards to riverboat gambling, despite the absence of any express language to this effect in the statutory

111 *See* Metro. Creditors Serv. of Sacramento v. Sadri, 19 Cal. Rptr. 2nd 646 (Ct. App. 1993), *supra* notes 96–100.

112 *Id.* at 648 ("The pivotal question is whether such enforcement is against the public policy of the State of California.").

113

> [I]t matters little that gambling itself has become more accepted in California. The cornerstone of the . . . rule against enforcement of gaming house debts is not simply that the game played is unlawful, but that the judiciary should not encourage gambling *on credit* by enforcing gambling debts, whether the game is lawful or not.

*Id.* at 651.

114 Schrenger v. Caesars Ind., 825 N.E.2d 879 (Ind. Ct. App. 2005).

115 *Id.* at 882–83.

116 *Id.* at 882.

provision.[117] The court thus allowed the enforceability of gambling obligations that had an underlying basis in legal gambling transactions, and it did so on its own accord, arguably by its perception of state public policies and without the express prompting of the legislature. A holding like this, apparently based on a perceived shift in public policies towards legalized gambling, is precisely what the *McBurney* dissent had in mind.

*4. Maryland.*—Maryland reached a similar result in *Bender v. Arundel Arena, Inc.*,[118] with the closely related issue of recovery of gambling losses. Gambling losses have traditionally been recoverable at common law on the grounds that preventing a gambler from recovering the money he lost would be akin to enforcing a gambling obligation in court.[119] Thus, decisions regarding gambling loss recovery inherently turn on the same policy-based reasoning often employed in decisions regarding gambling debt enforceability.[120] Debt recovery cases therefore serve as further examples of outside jurisdictions' enforceability policies. In *Bender*, the plaintiff gamblers tried to recover the losses they sustained at various bingo tables, slot machines, and other legalized gambling devices, under a Maryland statute

117 *Id.* at 883 ("While we acknowledge that [the statute allowing the extension of credit] does not explicitly refer to [the statute forbidding the enforcement of gambling debts], our holding is that it effectively creates an exception for riverboat casino debts incurred legally pursuant to [the statute authorizing riverboat gambling].").

118 Bender v. Arundel Arena, Inc., 236 A.2d 7 (Md. 1967).

119 *See* Kelly, *supra* note 17, at 87–88 (explaining that the Statute of Anne, the 1710 English statute that was the original legal basis for the unenforceability of gambling debts in the United States, also provided that bettors could recover their gambling losses and litigation costs if brought to court); *see also* R. Randall Bridwell & Frank L. Quinn, *From Mad Joy to Misfortune: The Merger of Law and Politics in the World of Gambling*, 72 Miss. L.J. 565, 637–38 (2002) (further demonstrating the importance of this recovery provision by explaining that "in the absence of such a suit by the loser, allowing any other 'person or persons' to sue for treble the amount of the loss, one half of the recovery going to the person so suing and the other half going to the parish").

120 *Compare*

> To permit a civil recovery for gambling losses is legislative recognition that the gambling which produced the loss was illegal. It would not only be futile, it would be a contradiction in terms to say that a wager lawfully could be made but if the licensed gambling establishment won the wager it could not keep the stake.

*Bender*, 236 A.2d at 11 (regarding gambling losses), *with*

> It is preposterous that while it is legal to place a pari-mutuel wager on a horse race at an authorized facility [because of the 1992 statutes], and it is legal to loan money, it is illegal to loan money to someone to place a legal wager on a horse race in this Commonwealth.

Ky. Off-Track Betting, Inc. v. McBurney, 993 S.W.2d 946, 950 (Ky. 1999) (Johnstone, J., dissenting) (regarding gambling debts).

that allowed the recovery of such losses up to a certain amount.[121] The court held, in a similar fashion to the Indiana court in *Schrenger*, that losses could not be recovered by the plaintiff gamblers even though the statutes legalizing these gambling transactions made no express reference to the loss recovery statute.[122] The court argued that the disallowance of civil recoveries was intended by the legalizing statute despite the lack of express language indicating this effect.[123] This seemed obvious to the court because the reasoning behind the recovery of gambling losses is tied to the illegality of the underlying gambling transaction.[124] Again, though the court here does not specifically speak in terms of shifting public policies, the basic argument of the *McBurney* dissent in favor of enforceability is clearly beneath the surface of the Maryland court's reasoning.[125]

*5. Illinois.*—Moreover, some jurisdictions have reached the result that gambling obligations incurred in legal gambling activities are enforceable even without the need to justify it in terms of shifting public policies or express statutory language. Illinois is one such jurisdiction, as illustrated in *Cie v. Comdata Network, Inc.*[126] In *Cie*, the plaintiffs obtained loans from ATMs at legalized gambling establishments and used the cash to make wagers at parimutuel facilities in the state. When the credit companies tried to collect on these loans, the plaintiffs argued that these loans were made for gambling purposes, and that under the relevant Illinois statute, such loans are void and unenforceable.[127] The court disagreed. First, the court held that the loans were not gambling contracts, as they resulted from a credit card obligation that the debtor promised to repay regardless of his winnings

121 *Bender*, 236 A.2d at 9.

122 *Id.* at 13.

123 *Id.* at 11 ("It seems clear that the legalization of some forms of gambling in Anne Arundel County had the effect of disallowing any civil recoveries against the gambling establishments [that were] licensed.").

124

> To permit a civil recovery for gambling losses is legislative recognition that the gambling which produced the loss was illegal. It would not only be futile, it would be a contradiction in terms to say that a wager lawfully could be made but if the licensed gambling establishment won the wager it could not keep the stake.

*Id.*

125 *Compare id.* at 13 ("[Bingo] has grown rapidly and tremendously since [1928] . . . [T]he legislature authorized the playing of bingo . . . for the raising of money for churches, charitable and fraternal enterprises, and volunteer fire companies. Since then the legislature has authorized bingo games for similar purposes in fourteen more counties."), *with McBurney*, 993 S.W.2d at 950 ("[I]n the past decade, amendments to the Kentucky Constitution have permitted a state lottery and charitable gaming. Statutory additions and amendments in 1992 legalized pari-mutuel wagering on horse racing at simulcast facilities . . . .").

126 Cie v. Comdata Network, Inc., 656 N.E.2d 123 (Ill. App. Ct. 1995).

127 *Id.* at 125.

or losses in gambling.[128] The loans were thus made independent of the underlying gambling activity, thereby placing them outside of the unenforceability rule.[129] Further, the court held that even if the loans were gambling contracts, the enforceability statute could only be interpreted to deny enforcement to gambling contracts incurred in illegal gambling transactions, not legal ones, as here. Taking a textualist approach, the court said that the enforceability statute limits itself to gambling contracts entered into for consideration "won or obtained *in violation of* the [Illinois] Gambling Act."[130] As the underlying gambling activities here were legal ones, they could not be "in violation of" the Gambling Act, and therefore, the debts were enforceable.[131] The court thus achieved a change in the enforceability status by statutory interpretation alone, without needing to make policy-based arguments in light of gambling's legalization, as other courts have done. Indeed, the court even stated its opinion that public policy against the enforceability of gambling debts had *not* been altered by the legalization of gambling.[132]

## V. The Future of Gambling Debt Enforceability in Kentucky

Consequently, the question of gambling debt enforceability no longer has a simple answer, as jurisdictions across the country have come to different conclusions in the wake of the gambling expansion movement. Predicting Kentucky's response to this expansion movement must now be done in the context of a judicially uncertain environment. Some observations about the likely direction to be taken by the commonwealth's courts in this matter, however, can be made at this time.

When lawsuits over gambling debts and obligations arise again in Kentucky's courts, the impact of KRS § 372.005 must be addressed. Though the statute appears on its face to exempt legal gambling transactions from the general unenforceability rule, neither its actual effect, nor its constitutionality, have ever been tested in court. Indeed, the fact that the Kentucky Court of Appeals in *DeMoisey* stated "we need not *decide the effect* of the 2000 enactment of KRS 372.005"[133] perhaps implies that the effect of the statute may not be self-evident after all, and that its full extent needs to first be

128 *Id.*

129 *Id.* at 125–26 ("This is a simple contract having nothing whatever to do with gambling. Accordingly, the general rule regarding gambling contracts in [the enforceability statute] does not apply to cash advances such as those obtained by Plaintiff Cie.").

130 *Id.* at 126 (citation omitted) (emphasis added).

131 *Id.* at 129.

132 *Id.* at 128 ("[W]e note at the outset that Illinois public policy towards gambling on credit has not changed simply because certain types of gambling are now legal.").

133 DeMoisey v. River Downs Inv. Co., 159 S.W.3d 820, 821 n.3 (Ky. Ct. App. 2005) (emphasis added).

judicially determined before observations can be made about the status of enforceability law. If so, the question of the enforceability of gambling debt remains open in Kentucky.

The legality of the underlying gambling transaction that the debt is based on will clearly be a deciding factor in such forthcoming cases. If KRS § 372.005 is given its apparent intent by allowing the enforceability of debts based on all legal gambling obligations, any debts based on gambling transactions that have not been legalized would not be enforced. The statute by its own terms only applies to "betting, gaming, or wagering that has been authorized, permitted, or legalized."[134] If the Kentucky Supreme Court was so recently unwilling to extend enforceability to gambling debt based on legal transactions,[135] it would almost certainly be unwilling to do so for those based on illegal transactions, at least in the absence of a statutory command to do so.

As discussed, some outside jurisdictions have embraced the view that gambling's legalization implies that public policy has shifted in favor of enforcing gambling debt. To bring about this end, these courts have occasionally given legalizing or exemption statutes the effect of enforcing gambling debts, even in situations where such statutes do not expressly address the issue of enforceability.[136] The Kentucky Supreme Court, as seen in the *McBurney* opinion, has clearly taken the view that the policies behind gambling and enforceability are separate, and that a shift in favor of the former does not imply an analogous shift in favor of the latter.[137]

The enactment of KRS § 372.005, however, allows parallels to be drawn to these outside jurisdictions, shedding light on potential approaches to gambling debt enforceability that Kentucky may take in response to its new statute. Wisconsin in *State v. Gonnelly* took precisely the position of the *McBurney* Court towards enforceability but noted that the existence of a statutory exemption for legal gambling debts might have changed the case's outcome.[138] This seems to be the very kind of exemption provision that was added to the Kentucky statutes by KRS § 372.005. Similarly, California in *Metropolitan Creditors Service v. Sadri* also followed *McBurney*'s holding, but in *Sadri* there also was no legal gambling debt exemption.[139] Now that Kentucky has what appears to be such an exemption provision, the *Gonnelly* dictum about enforcing legal gambling debts may be followed, despite the *McBurney* holding.

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134 KY. REV. STAT. ANN. § 372.005 (West 2005).

135 *See* Ky. Off-Track Betting, Inc. v. McBurney, 993 S.W.2d 946 (Ky. 1999).

136 *See supra* notes 101–06, 114–32 and accompanying text.

137 *McBurney*, 993 S.W.2d 946.

138 State v. Gonnelly, 496 N.W.2d 671 (Wis. Ct. App. 1992); *see supra* notes 107–10 and accompanying text.

139 Metro. Creditors Serv. of Sacramento v. Sadri, 19 Cal. Rptr. 2nd 646 (Ct. App. 1993); *see supra* notes 96–100, 111–13 and accompanying text.

This being the case, it should be noted that KRS § 372.005, though apparently having the effect of making legal gambling debt enforceable since it includes all of chapter 372 (which contains the unenforceability rule) in its scope, never expressly references gambling debt enforceability. In the absence of an express, unambiguous application of enforceability to debt incurred in legal gambling transactions, a Kentucky Supreme Court clearly opposed to enforceability could possibly interpret this statute in a way that keeps such debt unenforceable. It could argue that, considering the long-standing common-law unenforceability rule and the view against implying a policy shift against such rules, the failure to specifically refer to enforceability in express terms means that the rule of unenforceability remains intact.

A lack of express statutory language regarding enforceability, however, did not prevent states such as Indiana, Maryland, and Illinois from allowing the enforceability of legal gambling debts (or with Maryland, to deny the recovery of gambling losses). Indiana[140] and Maryland,[141] as discussed, overlooked the lack of express language allowing enforceability by making policy-based arguments in light of the legalization of various forms of gambling in the respective states—a position that Kentucky has rejected.[142] Illinois, on the other hand, did not resort to such policy arguments to allow enforceability; it simply interpreted its statute's language as implicitly allowing enforceability for legal gambling debts.[143] It thus based its decision entirely on statutory language. The willingness of these courts to enforce legal gambling obligations despite any express statutory language may indicate an enforceability jurisprudence fundamentally inconsistent with that of the Kentucky Supreme Court. Predictions that Kentucky may follow these courts' positions should not be made lightly.

However, despite any misgivings of the Court to interpret KRS § 372.005 in such a way that allows the enforceability of legal gambling debt, the likelihood of this outcome is difficult to ignore. The natural reading of the statute applies enforceability to debts incurred through legal gambling by referencing the state code chapter containing the unenforceability rule, even if not specifically referencing the unenforceability provision itself. This may be enough to convince a majority of the Court that public policy now has shifted in favor of enforceability, especially considering that the *McBurney* plaintiffs were making this argument without the aid of a statute like KRS § 372.005. Even in outside jurisdictions that have taken

140 *See* Schrenger v. Caesars Ind., 825 N.E.2d 879 (Ind. Ct. App. 2005); *supra* notes 114–17 and accompanying text.

141 *See* Bender v. Arundel Arena, Inc., 236 A.2d 7 (Md. 1967); *supra* notes 118–25 and accompanying text.

142 *See McBurney*, 993 S.W.2d at 946; *supra* notes 68–80 and accompanying text.

143 *See* Cie v. Comdata Network, Inc., 656 N.E.2d 123 (Ill. App. Ct. 1995); *supra* notes 126–32 and accompanying text.

the same approach to enforceability as the *McBurney* Court, the cases there were dealing with repeal of unenforceability by implication, as *McBurney* was, not with statutory exemptions to the unenforceability rule.[144]

As a result, though the issue of gambling debt enforceability in Kentucky is still unclear due to its lack of case law since the 2000 enactment of KRS § 372.005, it appears likely that when the courts do return to the issue, they will find themselves bound to enforce otherwise legal gambling obligations. For better or worse, the *McBurney* dissent has proven prophetic: the future of gambling debt enforceability in Kentucky is now irrevocably tied to the future of gambling in Kentucky.

144 *See supra* notes 107–13 and accompanying text.