

**INDIAN CASINOS/SEPARATION OF POWERS,  
UNEMPLOYMENT BENEFITS AND TOXIC TORTS**

ROY L. REARDON AND MARY ELIZABETH MCGARRY  
SIMPSON THACHER & BARTLETT LLP

AUGUST 2003

Recently the Court of Appeals addressed a challenge to casino gambling on Indian reservations in the State, finding that a compact allowing such gambling violated the separation of powers doctrine because the Governor had entered into compact without legislative authorization. And in what may be the first decision in the U.S. on the topic, the Court decided which state is responsible for the unemployment benefits of an interstate "telecommuter." Finally, the Court ruled that the date-of-discovery statute of limitations for toxic torts "does not provide a remedy to every asbestos-related personal injury or property damage claimant."

**Indian Gambling Casinos**

In another display of diversity of views not characteristic of the Court and that may portend change, the Court in *Saratoga County v. Pataki* and *Wright v. Pataki*, in an opinion by Judge Albert M. Rosenblatt, concurred in by Chief Judge Judith S. Kaye and Judge Carmen Beauchamp Ciparick and in part by Judge George Bundy Smith (creating the majority) concluded, over the voluble dissent by Judge Susan Phillips Read, joined in by Judges Victoria A. Graffeo and Richard C. Wesley, that the Governor violated the principle of separation of powers when he entered into an agreement with the St. Regis Mohawk Tribe (the "Tribe") to permit gambling casinos on Indian reservations without legislative authorization.

The opinions in the cases, coming near the end of the Court's term, were extraordinary. The cases raised sophisticated constitutional and other legal issues, were bound within a current and historical factual framework that had both social and political implications and called for the Court's most serious consideration.

In 1993, Governor Cuomo on behalf of the State entered into a compact under which the Tribe would be allowed to open a gambling establishment in Franklin County that could provide those games found in a typical gambling casino. The compact was entered into under the terms of the Federal Indian Gaming Regulatory Act ("IGRA"). IGRA was enacted after the Supreme Court of the United States, in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), held that Indian tribes had the exclusive right to run gambling activities on their lands unless prohibited by federal law or by the law or policy of the State in which the activities would be located. The compact, as required by IGRA, was approved by the U.S. Department of the Interior.

The Tribe's casino opened in April 1999. On May 27, 1999, Governor Pataki and the Tribe amended the compact to permit the casino to operate electronic games. The amendment, also approved by the Interior Department, expired by its terms on May 27, 2000. Despite the expiration of the authorizing amendment, the Court noted in its opinion, "electronic gaming" continues at the casino.

The challenge to the 1993 compact and 1999 amendment was made soon after the amendment and was based upon an alleged violation of the doctrine of the separation of powers and the prohibition of gambling under the New York Constitution. The relief sought was a declaration that the compact and amendment were unconstitutional, and an injunction against the Governor spending any State money in furtherance of the purposes of the casino or taking any unilateral action to extend gambling in the State.

After a reversal and remand by the Appellate Division, Third Department of the trial court's initial ruling dismissing the action because the Tribe was an indispensable party and had not been joined in the suit, the trial court awarded summary judgment to the plaintiffs, declaring the compact and the amendment void and unenforceable and enjoining the Governor from taking any further action to reenact the 1999 amendment without the approval of the legislature. The Appellate Division unanimously affirmed and the State appealed to the Court as of right based upon the constitutional issue.

In Judge Rosenblatt's opinion for the majority, the Court quickly declared the plaintiffs' challenge to the one-year 1999 amendment moot by reason of its expiration by its own terms. Because the Court found no "live controversy," was satisfied that the judicial machinery was in place to deal with any effort to revive the amendment, and concluded that the 1993 compact was unconstitutional (*see infra*), the Court vacated the order of the Appellate Division declaring the amendment void and unenforceable.

Finding the 1993 compact to be a "live controversy," however, the Court then proceeded to quickly and persuasively deal with several preliminary issues before it reached the key separation of powers issue, as follows.

First, the Court held that the citizen-taxpayer plaintiffs, among the other plaintiffs, had standing because they were not required to show an injury-in-fact and had adequately alleged the illegality of spending State money for the casino. The Court appears also to have been persuaded by the fact that, because the Tribe was not likely to challenge the compact, it was important due to the significance of the constitutional issue to provide citizens with the standing to do so.

Next, the Court rejected the State's assertion that the challenge to the compact should have been brought by an Article 78 proceeding with its four-month statute of limitation, finding that Article 78 could not provide the relief sought by plaintiffs. The Court applied the six-year statute of limitations under CPLR 213(1) and held that the action had been timely brought.

Then, the Court found that the equitable defense of laches was legally available to the State, but held that because of the absence of a requisite showing of economic prejudice to the Tribe which had by then been operating the casino for four years, dismissal on the basis of laches was not justified.

Lastly before reaching the separation of powers issue, the Court declined to find the Tribe to be an indispensable party to the action requiring dismissal. The Tribe had declined to become a party to the action and, by reason of its sovereign immunity, could not be joined against its will. Dismissal therefore would have the effect of denying anyone the right to challenge the constitutionality of the compact – an untenable result.

**Separation of Powers.** A principal basis for the plaintiffs’ challenge to the compact was that, because legislative authorization had not been given for the gubernatorial action, the agreement was unconstitutional. The Court agreed, and found “no difficulty” in concluding that the Governor’s actions were policy-making in character and therefore legislative. Because IGRA did not dictate the manner in which States should negotiate and agree to compacts (as between the legislative or the executive branches), the compacts were “laden with policy choices” and therefore the province of the legislature, and there was no required legislative authorization for the State agency charged with some casino oversight responsibility (the State Racing and Wagering Board), the Court found the Governor’s action in agreeing to the 1993 compact to be unconstitutional in violation of the separation of powers. The Court took some comfort in the fact that the highest court of every state which has considered the issue reached the same conclusion.

**The Constitutional Anti-Gambling Provision.** In light of the Court’s decision invalidating the compact, and because the issue had not been considered by either court below, the plurality found it unnecessary to decide the issue of whether the compact violated the anti-gambling provision of the State Constitution (NY Constitution Article I, § 9), which it was claimed prohibited the kind of gambling provided at the casino, on ripeness grounds. In doing so the Court took note of the parties’ advice that the issue was squarely presented in a pending case in a lower court (*see infra*).

The thorough and lengthy dissenting opinion of Judge Reed challenged every aspect of the majority’s opinion and expressed strong disagreement with the Court’s unwillingness to consider the anti-gambling provision of the State Constitution. Judge Smith’s partial dissent, leaving no doubt of his view that the compact violates the anti-gambling provision of the Constitution, carefully traced the history of the State’s unwillingness to approve gambling and the deference of IGRA not to impose gambling upon states where it is forbidden.

Where are we now? The State, following the Court’s decision on June 12, 2003, obtained a stay from the Court of its order until August 1, 2004 and also sought a stay in the Supreme Court of the United States pending review by that court. On July 29, 2003, Justice Ruth Bader Ginsburg denied the stay application on the basis that the plaintiffs in the Appellate Division had not sought to shut down the casino insofar as it operated in accordance with the 1993

compact and on the “understanding” by Justice Ginsburg that the continued operation of the casino under the compact included continued oversight by the relevant State agencies and law enforcement by the State Police. What confuses this column is that the casino appears to be operating under a compact which our State’s highest court has declared to be void and unenforceable. No one appears sure of where that leaves the matter or the next step.

In the meantime, on July 17, 2003, Albany County Supreme Court Justice Joseph C. Teresi, in *Dalton v. Pataki* and *Karr v. Pataki*, upheld the gambling conducted at the casino as within that permitted by the Constitution, relying in significant part upon the dissent of Judge Reed in *Saratoga* and *Wright*. It seems inevitable that casino gambling will be back on the docket of the Court of Appeals.

### **Unemployment Benefits**

The phenomenon of “telecommuting” raised a novel question that the Court resolved in *Matter of Allen v. Comm’n of Labor* - which state should cover unemployment benefits, the state from which the employee works or the state into which he or she telecommutes. Utilizing the “localization” test, the Court determined that claimant was employed in the state in which she resided and from which she performed her job.

Maxine Allen had worked for Reuters in New York, but relocated to Florida. For nearly two years Allen performed her job over the Internet from an office she set up in her Florida home with equipment supplied by Reuters. Reuters became unwilling to continue the arrangement and offered Allen work back in New York. She declined the offer. She then first applied for unemployment benefits in Florida, over Reuter’s objection that she had voluntarily quit her job. While that application was pending, Allen also filed for unemployment benefits in New York.

Allen’s claim was governed by Section 511 of the Labor Law, which provides a definition of “employment” in New York that is derived from the uniform definition used in most states. The Court’s unanimous opinion by Judge Susan Phillips Read noted that the uniform definition was intended to promote efficiency, allocate an individual’s employment to one state, and make that state the one in which the individual is most likely to become unemployed and seek work.

The Labor Law addresses work “localized in state” and work “within and without the state.” Different tests apply to each category. The Court of Appeals found that Allen’s work was localized in Florida and thus did not even find it necessary to apply the test for work “within and without the state” that may be eligible for New York benefits.

Work is “localized” in New York if it is performed either “entirely within the state” or “both within and without the state but that performed without the state is incidental to the person’s service within the state, for example, is temporary or transitory in nature or consists of isolated transactions.” Rejecting petitioner’s argument that her services were performed at her

employer's mainframe computer in New York, the Court held that "physical presence determines localization for purposes of interpreting and applying section 511 to an interstate telecommuter." Because petitioner was physically present in Florida when working for her New York employer, she was not "employed" in New York for purposes of the Labor Law and was thus ineligible for unemployment benefits here.

### Limitations for Toxic Torts

A toxic tort for property damage does not fall within the three years from date of discovery statute of limitations, CPLR Section 214-c, unless the damage was caused by the latent effects of exposure to the toxic substance, the Court held in *Germantown Central School District v. Clark, Clark, Millis & Gilson, AIA*.

Section 214-c was enacted in 1986 in order to ameliorate the harsh effect of the statute of limitations beginning to run on the date of exposure to a toxic substance because the effects of exposure might not begin to manifest themselves for many years. The statute thus provided that the limitations period would commence when injury was discovered or "through the exercise of reasonable diligence such injury should have been discovered by the plaintiff." *Germantown* presented a novel question of how Section 214-c should be applied in a property damage case.

The plaintiff school district retained an architectural firm, which in turn hired an engineering subcontractor, to remove asbestos from designated areas. Defendants performed work and certified to the district that all asbestos had been removed. It had not. Unfortunately for the school district, however, it did not discover that some asbestos remained in the designated areas until it began another project 13 years later, well after the running of the CPLR Section 214(6) three-year limitations period for non-medical professional malpractice.

The district attempted to take advantage of Section 214-c, arguing that its "latent" injury was the need to remove the asbestos, which arose when the presence of asbestos was discovered.

Unanimously affirming the Appellate Division, Third Department's grant of summary judgment in defendants' favor, the Court held that Section 214-c was inapplicable in the circumstances. The statute explicitly applies to injuries "caused by the *latent effects* of exposure to any substance . . . upon or within property." Here, the district was injured when asbestos was first applied. The asbestos was not alleged to have migrated or become airborne. Defendants' failure to remove the asbestos did not cause any additional damage, and thus "latent effects" were not the cause of the injury. The opinion by Judge Victoria A. Graffeo stated, "where the passage of time has produced no change in the consequences of the presence of asbestos . . . the injury cannot be said to have resulted from the latent effects of exposure to a toxic substance."

The opinion explained that there may be circumstances of late-discovered property damage from a toxic substance that fall within Section 214-c. For example, if there has been a chemical spill and damage is caused by the seepage of the toxic substance over time, the “latent effects” requirement of the date-of-discovery statute of limitations may be satisfied. Such was not the circumstance in *Germantown*, however.