



DICKINSON WRIGHT

Gaming & Hospitality

GAMING & HOSPITALITY LEGAL NEWS

GAMING ADVERTISING FINES AND BANS: HOW MIGHT RECENT INCREASES IN RESTRICTIONS ON GAMING ADVERTISEMENTS ACROSS THE GLOBE IMPACT GAMING ADVERTISING IN NORTH AMERICA?

by Jennifer Gaynor, Jeff Silver, Kevin Weber, Greg Gemignani and Kate Lowenhar-Fisher

Recent months have seen a noticeable uptick in news about gaming advertising bans and restrictions across the globe.

A few examples:

- In the **U.K.**, a “whistle-to-whistle” advertising ban is set to be introduced at the start of the 2019-20 football season in August, and the British Parliament is calling to extend this to a complete ban on gambling ads during sports broadcasts (other than horse racing). Other ideas that have been floated, most recently by GVC Holdings (the owners of Ladbrokes and Coral) and William Hill, include a shirt sponsorship and perimeter advertising ban.
- Italy’s** ban on gaming advertisements, known as the “Dignity Decree,” was approved by its Council of Ministers in July of 2018 and went into effect on January 1, 2019. Italy’s advertising and communications regulator Autorità per le Garanzie nelle Comunicazioni (AGCOM)’s recently published guidance as to how advertisers can comply with the Decree confirms that direct and indirect advertising, sponsorship or promotional communications, product placements, distribution of branded items, and influencer marketing will all be banned.
- Citing concerns expressed by **Sweden’s** Minister for Consumer Affairs of overly aggressive advertising in this new market, Sweden’s leading gambling trade associations Spelbranschens Riksförbund (SPER) and Branschföreningen för Onlinespel (BOS) have set out a new code of conduct regarding advertising for its members. The new code of conduct includes requirements that all ads must be factually accurate and not misrepresent gaming in a way that could harm consumer confidence, avoid encouraging excessive play, not appeal to minors, and include responsible gaming messaging. Other requirements include privacy controls and sponsorship limitations.
- In **Australia**, New South Wales regulators recently charged

May 15, 2019 | Volume 12, Number 3

GAMING & HOSPITALITY LEGAL NEWS EDITORIAL BOARD

NEVADA (LAS VEGAS/RENO)

Kate Lowenhar-Fisher
702.550.4459 | klowenhar-fisher@dickinsonwright.com

Gregory R. Gemignani
702.550.4468 | ggemignani@dickinsonwright.com

Jennifer J. Gaynor
702.550.4462 | jgaynor@dickinsonwright.com

Jeffrey A. Silver
702.550.4482 | jsilver@dickinsonwright.com

TORONTO

Michael D. Lipton, Q.C.
416.866.2929 | mdliptonqc@dickinsonwright.com

Kevin J. Weber
416.367.0899 | kweber@dickinsonwright.com

WASHINGTON, D.C.

Jacob S. Frenkel
202.466.5953 | jfrenkel@dickinsonwright.com

MICHIGAN

Peter H. Ellsworth
517.487.4710 | pellsworth@dickinsonwright.com

Peter J. Kulick
517.487.4729 | pkulick@dickinsonwright.com

ARIZONA

Glenn M. Feldman
602.285.5038 | gfeldman@dickinsonwright.com

OTHER OFFICES

California | Florida | Kentucky | Ohio | Tennessee | Texas

COOPERATION AGREEMENT FIRMS

MdME, Macau
Varela & Fonseca Abogados, Peru
Velchev & Co., Bulgaria
WH Partners, Malta

Disclaimer: Gaming & Hospitality Legal News is published by Dickinson Wright PLLC to inform our clients and friends of important developments in the fields of gaming law, federal Indian law, and hospitality law. The content is informational only and does not constitute legal or professional advice. We encourage you to consult a Dickinson Wright attorney if you have specific questions or concerns relating to any of the topics covered in Gaming & Hospitality Legal News.



GAMING & HOSPITALITY LEGAL NEWS

Sportsbet with an AUS \$10,000 fine for an advertisement they found in violation of new laws introduced last July that prohibit displaying advertisements that include “any inducement to participate, or participate frequently, in any gambling activity (including an inducement to open a betting account) .” The ad in question displayed cartoon depictions of two male characters with their thumbs up, alongside the text: “Refer a Friend – Get a \$100 Bonus Bet for every friend you refer to join sportsbet.com.au.”

The goal of these bans and enforcements is to reduce rates of problem gaming by protecting minors, problem gamblers and other such groups from what is seen as the current onslaught of gaming and sports wagering advertisements. But how might this tide of gaming advertising crackdowns play out in the U.S. and Canada?

United States

With the continued spread of land-based casinos across the U.S., along with the growth of the online gaming space and, of course, sports wagering, this is a topic that must be on the minds of elected officials and regulators from coast to coast. But will the U.S. see the introduction of similar restrictions on gaming advertising?

The short answer is no. The longer answer is that, because of the unique protections of speech found in the U.S. Constitution, it is very unlikely that similar bans or restrictions on gaming advertisements would withstand legal scrutiny in the U.S.

As most Americans can attest, speech in the U.S. is generally protected by the First Amendment to the U.S. Constitution, which provides that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The protection of speech is not inviolate, however, and some regulation of speech is allowed. Different forms of speech are afforded different levels of protection under current interpretations of the First Amendment by the U.S. Supreme Court.

Advertising is universally recognized as commercial speech, which is a form of speech that has been singled out by the U.S. Supreme Court for limited First Amendment protection. Commercial speech is speech that is related solely to the economic interests of a speaker and its audience. In general, there is a four-part test for determining whether commercial speech will be protected from government regulation and, as such, courts will consider the following:

1. Whether the speech is misleading or related to an unlawful activity;
2. Whether the state has a substantial interest in restricting the speech;
3. Whether the governmental restriction advances the substantial interest of the state;
4. Whether the restriction is proportional and reasonably tailored to advance the government’s interest.

As this test first appeared in *Central Hudson Gas & Electric Corp. v. Public Service Comm’n of New York*, it is often referred to by courts as the *Central Hudson* test.

Because of these Constitutional considerations, today very few states have direct statutes that regulate the advertising of gaming. And those that do often focus on the advertising of *illegal* gambling activity.

This is not to say the U.S. doesn’t have a history of attempting to regulate commercial speech in the form of gaming advertisements. However, such regulation is fairly limited today, with a primary focus on consumer protections against commercial speech that is misleading or related to an unlawful activity. Advertisements for legal and regulated gaming activity that are not misleading will generally be protected from government censorship.

The gaming industry in the U.S. does, however, have its own voluntary “responsible marketing” standards, as supplied by the American Gaming Association (the “AGA”), which is a gaming industry advocacy group that represents the U.S. casino industry, including commercial and tribal casino operators, suppliers, and other affiliated entities. In light of the expansion of sports wagering across the U.S., the AGA has just introduced its “Responsible Marketing Code for Sports Wagering” (<https://www.americangaming.org/wp-content/uploads/2019/05/>



GAMING & HOSPITALITY LEGAL NEWS

[Responsible-Marketing-Code-for-Sports-Wagering.pdf](#)). This code provides the AGA's members with guidelines tailored to the responsible marketing and advertising of sports wagering services. These include that they should: 1) respect the legal age for sports wagering and not have sports betting messages that are designed to appeal to minors or place sports wagering logos or messages on clothing, toys or games meant for minors; 2) support responsible gaming, including avoiding advertising that promotes excessive or irresponsible participation in sports wagering; and 3) control how their messages are shared on digital media and websites, including third party internet and mobile sites and social media sites.

Canada

Canada's laws regarding gaming advertising are already fairly robust. The Criminal Code (the "Code") prohibits advertising of all gambling in Canada, save and except for gambling that is conducted and managed by provincial governments and/or charitable organizations pursuant to s. 207 of the Code and provincial law.

All advertising (gambling-related or otherwise) must comply with the federal Competition Act and provincial consumer protection laws, both of which address false or misleading advertising. The provincial gaming authorities regulate advertising for gambling that is lawful under the Code and provincial law by applying restrictions designed to discourage gambling by minors and encourage "responsible gambling" for persons of legal age.

For example, these restrictions generally provide that promotions cannot encourage consumers to play beyond their means or imply certainty of financial gain. In sum, marketing cannot reflect that "winning" is a probable outcome.

In addition, Canada follows the American Gaming Association's voluntary Code of Conduct for Responsible Gambling which contains a pledge to "advertise responsibly."

Jennifer Gaynor, Greg Gemignani, and Kate Lowenhar-Fisher are Members in Dickinson Wright's Las Vegas office, and Jeff Silver is Of Counsel in the Las Vegas office. Kevin Weber is a Partner in Dickinson Wright's Toronto Office. See the masthead for their contact information.

DON'T LOSE PROGRESSIVE JACKPOTS IN THE CASINO PURCHASE AGREEMENT

by Brenda Roubidoux Taylor

Sometimes obscured within the purchase agreement for a casino are liabilities amounting to several hundred thousand dollars, depending on the deal. The liabilities arise from progressive slot machines, progressive table games, progressive pool programs, or any game with a progressive feature. Although a player has not "hit the jackpot," the casino incurs a fixed liability for the difference between the progressive jackpot and the base jackpot that is recorded on the financial statement as an accrued liability with a corresponding charge against gaming revenue (see *United States v. Hughes Properties, Inc.*, 476 U.S. 593 (1986); FASB ASC 924-405-25-2). These accrued progressive jackpot liabilities are known as "progressive liabilities."

The purchase agreement may be completely silent about progressive liabilities, in which case they will fall within the scope of the general definition of liabilities. The purchase agreement may also only provide a single reference to progressive liabilities, such as "Buyer agrees to assume any progressive slot machine liability existing on the Closing Date." However, because progressive liabilities can add up to a large amount and arise through different gaming assets, the purchase agreement should incorporate them through exact language.

A purchase agreement robustly addressing progressive liabilities will do so by the following mechanisms:

Definition of Progressive Liabilities

Although the purchase agreement already defines "liabilities" generally, it should contain a concrete definition of progressive liabilities. The definition can be standalone or incorporated into other sections of the purchase agreement, such as the section describing assumed liabilities. The definition can ideally include an approximate dollar amount and accounting standard, and utilize schedules. The following is an example of one such definition:

"Progressive Liabilities" means the Liabilities of the Casino as of the Time of Possession, determined in accordance with GAAP, in respect of (i) slot machines with an in-house



GAMING & HOSPITALITY LEGAL NEWS

progressive jackpot feature (if such slot machines are not removed by the vendor at or before the Closing) in the cumulative amount of approximately \$750,000.00, (ii) table games with an in-house progressive jackpot feature, (iii) progressive pool programs in which Seller participates with other gaming entities as set forth on Schedule 10.2(e) (i) attached hereto, and (iv) all progressive games as set forth on Schedule 10.2(e)(ii) attached hereto.

amount of progressive liabilities assumed by the buyer, the assets generating them, and the calculation at closing.

Brenda Roubidoux Taylor is an Of Counsel in Dickinson Wright's Las Vegas office. Brenda can be reached at 702.550.4470 or btaylor@dickinson-wright.com

Assumption of Progressive Liabilities by the Buyer

The purchase agreement should make it clear the buyer will assume the progressive liabilities. For example, the assumed liabilities section of the purchase agreement can specifically list progressive liabilities and, if not previously provided, include a definition. The purchase agreement can go another step further by requiring the buyer to deliver an assumption agreement expressly for progressive liabilities as a condition to closing, with a form of the assumption agreement attached as an exhibit.

Calculation of Progressive Liabilities at Closing

The purchase agreement should set forth precisely how progressive liabilities will be calculated and accounted for at closing. For example, the net working capital calculation can include a distinct line item for the dollar amount of progressive liabilities as part of the total current liabilities to the working capital adjustment. Alternatively, the purchase agreement can require an accounting of progressive liabilities to be included in the estimated and final closing statements. Another approach is for the purchase agreement to include language reducing the purchase price by the amount of progressive liabilities outstanding at the time of possession.

As buyer and seller are negotiating the definitive purchase agreement for a casino, it is important to work through the details of progressive liabilities because they can comprise a sizable liability assumed by the buyer. As part of this process, the parties should not let progressive liabilities get lost in the language of or entirely omitted from the purchase agreement. Utilizing a definition, language across other sections, schedules, and exhibits specific to progressive liabilities in the draft purchase agreement will ensure everyone is on the same page about the