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Elizabeth A. Walsh

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CASENOTE

IN RE MASTERCARD INTERNATIONAL, INC.: THE INAPPLICABILITY OF THE WIRE ACT TO TRADITIONAL CASINO-STYLE GAMES

I. INTRODUCTION

The advancement of technology and the emergence of the Internet have presented a new medium for the gaming industry to expand its reach. For example, Bob, an average citizen who has a computer at home, enjoys surfing the Web at night after work. He comes across an online casino site, which perks his interest. Deciding to try his luck, he decides he wants to play. Although there are various ways to set up an account from which to obtain gambling credits, such as sending in a check or a money order to the online casino firm, he decides that he wants instant gratification and inputs his Visa card number to start playing now! There are a series of screens in which Bob enters all pertinent credit card information along with the amount he wishes to spend. Tonight, he puts \$200 on his credit card for the gambling credits and is successful for a while almost doubling his money. Bob is ecstatic because he does not even have to leave his home to enjoy this past time and he can make a profit as well. But then things take a turn for the worst. Bob makes a bad bet, and not only loses all of his profit, but is now in the red \$3,000. Bob did not have a problem with the online gambling site when he was winning, but now that he is in debt, he wants a way out. Even though he placed the bet, he does not want to be accountable for the loss. He thinks for a while and then decides to file a lawsuit to try and hold someone else accountable for the gambling debt that he knowingly acquired. Since the online casino site is located off-shore and is too hard to prosecute, Bob comes to the realization that the easiest way to tag the blame on someone is to sue Visa and its issuing bank located in the United States. Bob's theory is that Visa and the issuing bank are engaged in racketeering activities with the online casino firm and they col-

lected unlawful debt. Bob will contend that “but for” the online casino’s acceptance of Visa, he would have never gambled in the first place.

The *Wire Communications Act of 1961* (“Wire Act”)¹ was assumed by the public to prohibit gaming operators from using the Internet for on-line gambling.² Before *In re MasterCard Intl., Inc.*,³ no court specifically addressed the issue of non-sports betting over the Internet. The court held in *In re MasterCard* that the prohibition of the Act’s gambling activities was limited to only the two items listed in the statute: sports betting and contests.⁴ This was a groundbreaking decision for the gaming industry.

In addition to addressing the alleged violation of this federal act, the court also examined whether defendants’ actions constituted a pattern of racketeering activity in violation of the *Racketeer Influenced and Corrupt Organizations Act* (“RICO”).⁵ This Casenote provides lengthy detail explaining what a RICO claim requires, what fundamental prerequisites need to be satisfied, then the examination of the substantive requirements for each subsection. All of the issues examined by the court are born from the allegations that the activities of the credit card companies and issuing banks facilitated Internet gambling by providing a means of obtaining real cash for use in virtual online casinos.

This Casenote asserts that the reasoning and final determinations found by the court were correct. The court determined that the mere business relationship between the credit card companies, the issuing banks, and the Internet casino did not constitute a corrupt enterprise.⁶ It was merely a contractual relationship that provided financial services as the defendants’ have with millions of other customers. They did not have any hands on input regarding the direct affairs associated with the Internet casino’s business procedures.⁷

1. 18 U.S.C. § 1084 (2000).

2. *Id.* § 1084(a). The Act states that:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility or the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers shall be fined under this or imprisoned not more than two years or both.

Id.

3. 132 F. Supp. 2d 468 (E.D. La. 2001).

4. *Id.* at 480, 482.

5. 18 U.S.C. §§ 1961-1968 (2000).

6. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 487, 490.

7. *Id.* at 490 (citing *Jubelirer v. MasterCard Intl., Inc.*, 68 F. Supp. 2d 1049 (E.D. Wis. 1999)).

II. SUMMARY OF FACTS AND BACKGROUND

This litigation merged five actions pending in three different districts.⁸ All plaintiffs agreed and requested an order centralizing these matters by the Judicial Panel on Multidistrict Litigation.⁹ Based on the papers filed, the Panel determined that all of the actions have common questions of fact that involve “the existence, scope and effect of the alleged scheme to collect credit card debts incurred in connection with Internet gambling.”¹⁰ Each of the cases cited similar factual issues ranging from the way the credit card debts were acquired, to the relationship between the credit card companies and their issuing banks, and the degree that the defendants were aware of the nature of the business of the companies, Internet gaming.¹¹ Finally, the plaintiffs all asserted the same theory of liability and sought the same relief. All wanted a declaratory judgment voiding the credit card charges and damages under RICO and state law.¹²

The Panel determined that the centralization was necessary so that discovery was not duplicated, pre-trial rulings remained consistent, and the parties, attorneys and courts resources were conserved.¹³ They concluded that the appropriate forum for transfer was the Eastern District of Louisiana, in that it is located in a central part of the United States, accessible to all, and it has favorable caseload conditions, so that it had the resources to devote substantial time to the pretrial matters of this complex litigation.¹⁴

On April 3, 2000, the court ordered that additional similar cases be consolidated on this matter with the final number totaling 33 cases.¹⁵

8. *In re MasterCard Intl., Inc.*, 2000 U.S. Dist. LEXIS 2276 (Mar. 1, 2000). MLD (multi district litigation) 1321 consisted of 5 cases. *Id.*

9. *Id.*; 28 U.S.C. § 1407 (2000).

10. *In re MasterCard Intl., Inc.*, 2000 U.S. Dist. LEXIS 2276 at * 3.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at * 6.

15. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 472. Initially, there were six more cases consolidated from MDL 1322 for pretrial purposes. *Id.* In the end, there were a total of 33 cases that made up this litigation. *Id.* They are: *Brown v. MasterCard Intl., Inc. et al*, C.A. 00-0657 (original docket no. 99-778, M.D. Ala.); *Maple v. Capital One Bank, et al*, C.A. 00-0658 (original docket no. 99-665, M.D. Ala.); *Eisele v. MasterCard Intl., Inc. et al*, C.A. 00-0659 (original docket no. 99-8746, M.D. Ala.); *Eisele v. MasterCard Intl., Inc. et al*, C.A. 00-0660 (original docket no. 99-8784, S.D.N.Y.); *Eisele v. MasterCard Intl., Inc. et al*, C.A. 00-0661 (original docket no. 99-8785, S.D.N.Y.); *Cote v. MasterCard Intl., Inc. et al*, 00-1985 (original docket no. 00-3709, S.D.N.Y.); *Thompson v. MasterCard Intl., Inc. et al*, C.A. 00-1986 (original docket no. 00-3710, S.D.N.Y.); *Bradley v. MasterCard Intl., Inc. et al*, C.A. 00-1987 (original docket no. 00-3712, S.D.N.Y.); *Silverlieb v. MasterCard Intl., Inc. et al*, C.A. 00-1988 (original docket no. 00-3713, S.D.N.Y.); *Keys v. MasterCard Intl., Inc. et al*, C.A. 00-1989 (original docket no. 00-3714, S.D.N.Y.); *Silverlieb v. MasterCard Intl., Inc. et*

Also, the court ordered that two "test" cases, one from MDL-1321 and one from MDL-1322; file, answer, and reply to motions.¹⁶ Plaintiffs selected from MDL-1321, *Larry Thompson v. MasterCard International Inc., Fleet Bank (Rhode Island), N.A. and Fleet Credit Card Services, L.P.*, C.A. No. 00-1986 and from MDL-1322, *Lawrence Bradley v. Visa International Service Assoc. and Travelers Bank USA Corp.*, C.A. 00-2002.¹⁷

Plaintiff Bradley stated that he "placed [Internet] gambling wagers" on seven Internet casino sites over a period of nineteen days.¹⁸ Upon entering the site, he entered his credit card number and billing information and then obtained "gambling credit."¹⁹ In the end, even though he was billed \$7,048 on the two credit cards he used, Visa and Travelers, he actually wagered a total of \$16,445.²⁰ Since plaintiff does not clarify the discrepancy between the amount wagered and the amount billed to his

al, C.A. 00-1990 (original docket no. 00-3715, S.D.N.Y.); *Erwin v. MasterCard Intl., Inc. et al*, C.A. 00-1991 (original docket no. 00-3716, S.D.N.Y.); *Thompson v. MasterCard Intl., Inc. et al*, C.A. 00-1993; *Bradley v. MasterCard Intl., Inc. et al*, C.A. 00-1994 (original docket no. 00-3718, S.D.N.Y.); *Freeman v. Provident National Bank et al*, C.A. 00-0662 (original docket no. 99-108, M.D. Ala.); *Freeman v. Citibank Corp. et al*, C.A. 00-0663 (original docket no. 98-3029, M.D. Ala.); *Jones v. Visa Intl. Svc. Assoc., et al*, C.A. 00-0664 (original docket no. 99-785, N.D. Ala.); *Eisele v. Visa Intl. Svc. Assoc., et al*, C.A. 00-0665 (original docket no. 99-4669, N.D. Cal.); *Eisele v. Visa Intl. Svc. Assoc., et al*, C.A. 00-0666 (original docket no. 99-3829, N.D. Cal.); *Eisele v. Visa Intl. Svc. Assoc., et al*, C.A. 00-0667 (original docket no. 99-4833, N.D. Ill.); *Eisele v. Visa Intl. Svc. Assoc., et al*, C.A. 00-1168 (original docket no. 99-5065, N.D. Cal.); *Eisele v. Visa Intl. Svc. Assoc., et al*, C.A. 00-1169 (original docket no. 99-5067, N.D. Cal.); *Normand v. Visa Intl. Svc. Assoc., et al*, C.A. 00-1170 (original docket no. 99-5068, N.D. Cal.); *Thompson v. Visa Intl. Svc. Assoc., et al*, C.A. 00-1171 (original docket no. 99-5069, N.D. Cal.); *Thompson v. Visa Intl. Svc. Assoc., et al*, C.A. 00-1172 (original docket no. 99-5070, N.D. Cal.); *Silverlieb v. Visa Intl. Svc. Assoc., et al*, C.A. 00-1995 (original docket no. 00-1773, N.D. Cal.); *Thompson v. Visa Intl. Svc. Assoc., et al*, C.A. 00-1996 (original docket no. 00-1774, N.D. Cal.); *Cote v. Visa Intl. Svc. Assoc., et al*, C.A. 00-1997 (original docket no. 00-1776, N.D. Cal.); *Silverlieb v. Visa Intl. Svc. Assoc., et al*, C.A. 00-1998 (original docket no. 00-1778, N.D. Cal.); *Silverlieb v. Visa Intl. Svc. Assoc., et al*, C.A. 00-1999 (original docket no. 00-1779, N.D. Cal.); *Thompson v. Visa Intl. Svc. Assoc., et al*, C.A. 00-2000 (original docket no. 00-1780, N.D. Cal.); *Erwin v. Visa Intl. Svc. Assoc., et al*, C.A. 00-2001 (original docket no. 00-1775, N.D. Cal.); *Bradley v. Visa Intl. Svc. Assoc., et al*, C.A. 00-2002 (original docket no. 00-1777, N.D. Cal.). *Id.* at 472 n. 1.

16. *Id.* at 472. The motions referred to dealt with Federal Rule of Civil Procedure 12 and Federal Rule of Civil Procedure 19. *Id.* These motions are limited to defendant's liability under federal law, specifically RICO. *Id.* All other motions were deferred pending the ruling of the two previously mentioned motions. *Id.*

17. *Id.* The court shall refer to MasterCard International, Inc., Fleet Bank, Fleet Credit Card Services, Visa International and Travelers Bank as "defendants." *Id.* at 473. When referring only to MasterCard International Inc. and Visa International Service Association, the court will use "credit card companies." *Id.* When referring to Fleet Bank, Fleet Credit Card Services and Travelers Bank, the court shall state, "issuing banks." *Id.*

18. *Id.* at 474.

19. *Id.*

20. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 474.

credit card, the court determined that he was successful in some of his gambling endeavors.²¹ Plaintiff Bradley contended that since the Visa logo was present on the online gaming site, it encouraged him to use that form of tender to obtain his "gambling credits."²²

Plaintiff Thompson "placed [gambling] wagers" on two web sites over a period of thirteen days.²³ In total, Thompson wagered \$1,520 and he was billed \$1,510 by MasterCard.²⁴ Thompson also claimed that since the MasterCard logo was on the web site, it encouraged him to use that form of payment to place his bets.²⁵

The plaintiffs' class action suit alleged that the defendants violated several federal and state laws in relation to their dealings with the Internet gambling companies.²⁶ Plaintiffs' argument was that regardless of whether their gambling wagers were calculated in points or chips, the player was gambling with real money accessed through their credit card. That money is then taken out and paid to the online casino and later the player is billed.²⁷ Both plaintiffs admit that the Internet casinos accepted different types of payments other than credit cards, however there was a period of delay when using those other means in order for the payment to clear before placing a wager.²⁸ The credit cards were the only instant method for placing a bet.²⁹ They stated the theory of "but for" the online casinos accepting their credit cards as a form of payment for their wagers, they would have never gambled on these sites.³⁰

"Plaintiffs allege that Internet casinos and the defendants engaged in a worldwide gambling enterprise through the transmission" and collection of the individual's gambling debt.³¹ Most importantly, the plaintiffs' alleged that through the defendant's association with the Internet casinos, they "directed, guided, conducted, or participated, directly or indirectly, in the conduct of an enterprise through a pattern of racketeering activity and/or collection of unlawful debt" as defined by RICO.³² The

21. *Id.* at 474 n. 3.

22. *Id.* at 474.

23. *Id.*

24. *Id.*

25. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 475.

26. *Id.* at 473. The plaintiffs argue that defendants were involved in a pattern of racketeering in violation of RICO. *Id.*

27. *Id.* at 474. Both Bradley and Thompson placed wagers through various web sites on different days and were charged a loss on their credit cards. *Id.* The charges were characterized as purchases as opposed to cash advances. *Id.*

28. *Id.* at 475.

29. *Id.*

30. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 475.

31. *Id.* Neither plaintiff alleged that they engaged in sports betting on the Internet. *Id.* at n. 4.

32. *Id.* (talking specifically about 18 U.S.C. § 1961).

plaintiffs' also contend that the defendants "aided and abetted the [casinos] book making activities in the United States."³³ Plaintiffs' brought their claim under the specific section of RICO, § 1964(c),³⁴ stating that defendants violated section § 1962(c)³⁵ in addition to state law.³⁶

III. ISSUES AND CONCLUSIONS

The *In re MasterCard* court addressed defendants' "Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief can be granted and Rule 19 motions for joinder or dismissal for non-joinder."³⁷ These were limited to defendant's liability under federal law, specifically dealing with RICO.³⁸

The court broke down the issues by the following sections: the standards related to motions to dismiss RICO generally; the elements common to all RICO claims; the existence of a RICO person; the alleged pattern of racketeering activity; the alleged predicate acts under state law, the *Wire Act*, mail fraud and wire fraud, other federal laws; the collection of unlawful debt; enterprise in general terms; enterprise and existence separate and apart from the pattern of racketeering activity; enterprise regarding an ongoing organization with a hierarchal or consensual decision making structure; additional elements discrete to 18 U.S.C. § 1962(c) regarding conduct required and the distinctness of a person/enterprise; aiding and abetting under 18 U.S.C. § 1962(c) and the issue of standing to assert a civil RICO claim under 18 U.S.C. § 1964 for violations of 18 U.S.C. § 1962(c).³⁹

Based on oral arguments on the motions, the pleadings, and relevant law; the court dismissed the plaintiffs' RICO claims without leave to amend.⁴⁰ The various elements of a RICO claim that plaintiffs failed to prove were: "any racketeering activity, the existence of an enterprise, the requisite level of conduct and control, and standing."⁴¹ The court stated that due to the plaintiffs' severely flawed cause of action, the defects were incurable.⁴² Finally, the court held that due to the ruling on

33. *Id.* Thompson supports his claim by stating that employees of MasterCard attended online gaming seminars on also learning about MasterCard's role in online gaming. *Id.* Bradley supported his claim by describing how Visa had detailed procedures Internet gaming transactions. *Id.*

34. 18 U.S.C. § 1964(c).

35. 18 U.S.C. § 1962(c).

36. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 475.

37. *Id.* at 472. MasterCard International Inc., Fleet Bank and Fleet Credit Card Services, Visa International Services Association and Travelers Bank filed these motions. *Id.*

38. *Id.* (talking specifically about 18 U.S.C. § 1961 *et seq.*).

39. *Id.* at 473.

40. *Id.* at 497.

41. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 497.

42. *Id.* (citing *Hart v. Bayer Corp.*, 199 F.3d 239, 248 n. 6 (5th Cir. 2000)).

the Rule 12(b)(6) motions, the Rule 19 motions are moot.⁴³ In the following section, the court's analysis of the case will be examined in detail.

IV. COURT'S ANALYSIS

On February 23, 2001, the federal district court for the Eastern District of Louisiana granted the defendants' motion to dismiss the RICO⁴⁴ claims without leave to amend.⁴⁵ The court held that gamblers failed to show violation of state law as a predicate act.⁴⁶ Also, the court held that since the *Wire Act* did not prohibit Internet casino gambling,⁴⁷ or the credit card companies' and the issuing banks' association with this entity, there could be no showing of a predicate act using mail or wire fraud under RICO.⁴⁸ The court held that the gamblers failed to establish that there was a RICO enterprise of the Internet casino companies, the credit card companies and the issuing banks.⁴⁹ Plus, the court held that the gamblers were unable to establish that the credit card companies and issuing banks satisfied the requirements for liability under RICO with regards to management or operations of the Internet casino companies.⁵⁰ Finally, the court held that since the gamblers could not show proximate cause, they could not pursue civil remedies under RICO.⁵¹

A. WHETHER THE DEFENDANTS HAVE ENGAGED IN THE ELEMENTS
COMMON IN ALL RICO CLAIMS: THE EXISTENCE OF A RICO
PERSON, A PATTERN OF RACKETEERING ACTIVITY,
AND THE EXISTENCE OF AN ENTERPRISE

1. A RICO Person

The plaintiffs alleged that defendants have been involved in predicate acts for over a year and continue to engage in the same type of conduct with the Internet casino company.⁵² The definition of predicate act with regards to the law of RICO is "one of two or more acts of racketeering

43. *Id.* In addition, the remaining cases that makeup MDL 1321 and MDL 1322 are "stayed and statistically closed pending further action by the court." *Id.*

44. RICO is defined as "a law designed to attack organized criminal activity and preserve market place integrity by investigating, controlling, and prosecuting persons who participate in racketeering." *Black's Law Dictionary* 1265 (Bryan A. Garner ed., 7th ed., West 1999).

45. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 497.

46. *Id.* at 479.

47. *Id.* at 481.

48. *Id.* at 482.

49. *Id.* at 487.

50. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 494.

51. *Id.* at 496.

52. *Id.* at 477.

necessary to establish a pattern."⁵³ The federal RICO statute greatly broadened the definition of racketeering to include activities such as mail fraud, and the collection of illegal gambling debts.⁵⁴ A RICO person has been described as "any individual or entity capable of holding a legal or beneficial interest in property."⁵⁵ Based on the motion before the court, at which requires that courts views the facts as true in a light most favorable to the plaintiffs, the court found that the plaintiffs established the existence of RICO persons.⁵⁶

2. Pattern of Racketeering Activity

The RICO statute prescribes categories that comprise racketeering activity.⁵⁷ In this case, plaintiffs' allegations arise under two of those categories.⁵⁸ With regards to the first category, plaintiffs allege that defendants violated gambling laws that are punishable under state laws with the penalty of imprisonment of greater than one year.⁵⁹ In the second category, plaintiffs allege that defendants violated several federal statutes including the *Wire Act*,⁶⁰ the *Travel Act*,⁶¹ the *Prohibition of Illegal Gambling Business*,⁶² the *Engagement in Monetary Transactions in Property Derived from Specific Unlawful Activity*⁶³ and the *Prohibition of Illegal Money Transmitting Business*.⁶⁴ Currently, there are no federal statutes that directly address or prohibit Internet gambling.⁶⁵

The defendants contend that plaintiffs failed to claim a violation of

53. *Black's Law Dictionary* at 1196.

54. *Black's Law Dictionary* at 1265.

55. 18 U.S.C. § 1961(3).

56. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 477.

57. *Id.* The first category consists of general state laws that are "chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C. § 1961(1)(A). The second category of offenses identify certain offenses that are indictable under the federal criminal code, found in Title 18 of the United States Code. *Id.* § 1961(1)(B). The third category lists certain labor related acts indictable under Title 29 of the United States Code. *Id.* § 1961(1)(C). The final category encompasses offenses such as securities fraud and narcotics transactions. *Id.* § 1961(1)(D).

58. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 478. The two categories that plaintiffs' allegations arise from are: First, state law offenses that are punishable by imprisonment of more than one year. 18 U.S.C. § 1961(1)(A) and second, specific offenses that are punishable under the federal criminal code. 18 U.S.C. § 1961(1)(B).

59. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 478. Plaintiff Thompson alleged that defendants violated Kan. Stat. Ann. § 60-1704, 21-4302, 21-4304 and 21-3104. *Id.* Plaintiff Bradley alleged that defendants violated N.H. Rev. Stat. Ann. § 491:22, 338:1. *Id.*

60. 18 U.S.C. § 1084(a).

61. *Id.* § 1952.

62. *Id.* § 1955.

63. *Id.* § 1957.

64. *Id.* § 1960.

65. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 478.

any predicate acts.⁶⁶ Therefore, with a failure to satisfy the RICO prerequisite, the plaintiffs' case should be dismissed.⁶⁷ In order to determine this, the court must refer to the underlying offenses alleged which include violations of state law, the *Wire Act*, mail and wire fraud, other federal laws and the collection of unlawful debt.⁶⁸

a) *State Law*

With regards to the alleged violations of state law, the court held that four New Hampshire statutes brought forward by Plaintiff Bradley, are civil statutes.⁶⁹ They are not punishable under state law, not subject to a punishment of more than one year imprisonment, therefore do not qualify as a predicate act under RICO.⁷⁰ Plaintiff Thompson alleged the violations of four Kansas statutes.⁷¹ The court held that three of the four are insufficient to qualify as predicate acts under RICO.⁷² The fourth statute⁷³ does establish a felony offense under the Kansas criminal code regarding commercial gambling offenses.⁷⁴ Since there are no past cases that cite this statute for Internet gambling cases, the plaintiffs used the Kansas Attorney General's opinion⁷⁵ to strengthen their claim.⁷⁶ In the statute, the only remotely relevant point that relates to this case is that it is a felony to "set up for use or collect the proceeds of any gambling device."⁷⁷ Since the plaintiffs make no allegation that the credit card companies or the issuing banks collect the proceeds from the gambling operation, the court therefore held that plaintiffs failed to

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 478.

71. *Id.*

72. *Id.*

73. Kan. Stat. Ann. § 21-3104.

74. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 479. The law establishes activities as felony offenses under this statute, which are: "1) operating or receiving all or part of the earnings of a gambling place, 2) receiving, recording, or forwarding bets, 3) becoming a custodian of anything of value bet or offered to be bet, 4) conducting a lottery, or 5) setting up for use or collecting the proceeds of any gambling device." *Id.*

75. *Id.* (citing Kan. Atty. Gen. Op. No. 96-31). The attorney general's opinion dealt with the legality of Internet gambling. *Id.* He stated, "placing, receiving or forwarding a bet, or conducting a lottery, over the telephone or Internet is illegal." *Id.* Also, "if a bet is placed or a lottery entered into via a computer located in the state of Kansas. . . . then the crime may be prosecuted in this state." *Id.*

76. *Id.* (citing *Unified Schools Dist. No. 501 v. Baker*, 269 Kan. 239 (2000)). The Kansas Supreme Court held that the attorney general's opinion is not binding authority, only persuasive. See *State v. Hall*, 270 Kan. 194 (2000). Along with the attorney general's opinion, the court must consider the statutory language related to it. *Id.* Also, the "Kansas courts are required to strictly construe penal statutes in favor of the accused." *Id.*

77. Kan. Stat. Ann. 21-4304.

prove defendants violated Kansas law.⁷⁸

b) *The Wire Act*

The court next examined the plaintiffs' allegations with regard to federal law, specifically the *Wire Act*.⁷⁹ When interpreting a statute, the court must look to the language of the statute.⁸⁰ Also, when applying criminal laws, the courts are advised to follow the plain and unambiguous language of the statute.⁸¹ The defendants argue that a major defect in the plaintiffs' allegation with regards to the *Wire Act* claim was the failure to allege sports gambling.⁸² The plaintiffs' disagreed and stressed that the *Wire Act* does not require sports betting.⁸³

A plain reading of the statutory language expressly requires that the focus of the gambling in question be either sports betting or contests.⁸⁴ The court held that since the plain language of the statute is clear, there is no need to refer back to the legislative history.⁸⁵ The court held that a

78. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 479. The Attorney General's opinion does not address the conduct of the credit card companies or the issuing banks. *Id.* It only draws an analogy to the conduct of the bettors and the Internet casinos. *Id.*

79. 18 U.S.C. § 1084. Section (a) provides that:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission of interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any SPORTING EVENT OR CONTEST, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned.

Id. (emphasis added); 18 U.S.C. § 1084 Section (b), which carves out the exception to the rule, states that the *Wire Act* shall not "be construed to prevent the transmission of interstate or foreign commerce of information for use in the news reporting of SPORTING EVENTS OR CONTESTS from a state or country where betting on the sporting event or contest is legal to another state or country where such betting is legal." *Id.* (emphasis added).

80. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 479 (citing *Richardson v. U.S.*, 526 U.S. 813 (1999)).

81. *Id.* at 480 (citing *Salinas v. U.S.*, 522 U.S. 52 (1997)). Only with an extraordinary showing, should the court then look to the legislative history for interpretation. *Id.*

82. *Id.* (stating that both the rule and the exception to the rule both state that sports betting or contests are a requirement to the nature of the gambling activity).

83. *Id.*

84. *Id.* (citing *U.S. v. Kaczowski*, 114 F.Supp.2d 143 (W.D.N.Y. 2000)) (holding that the *Wire Act* "prohibits use of a wire communication facility for the transmission of interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest"); see *U.S. v. Sellers*, 483 F.2d 37, 45 (5th Cir. 1973) (overruled on other grounds in *U.S. v. McKeever*, 905 F.2d 829 (5th Cir. 1990)) ("the statute deals with bookmakers"); see *U.S. v. Marder*, 474 F.2d 1192, 1194 (5th Cir. 1973) (holding that the first element of the statute is proved when the government proves that the wagering act in question deals with sporting events).

85. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 480 (citing *In re Abbott Laboratories*, 51 F.3d 524, 528 (5th Cir. 1995)).

game of chance is not prohibited under the *Wire Act*.⁸⁶ Since the plaintiffs failed to state the specific type of gambling they engaged in on the Internet, either a game of chance or sports betting, the court cannot assume that it was in fact sports betting.⁸⁷ Therefore, the court determined that the plaintiffs have no cause of action against the credit card companies or the issuing banks under the *Wire Act*.⁸⁸

c) *Mail and Wire Fraud*

The plaintiffs also brought allegations against defendants claiming that they violated both the federal mail and wire fraud statutes.⁸⁹ With regards to mail fraud, plaintiffs stated that the defendants mailed billing statements reflecting the gambling activity.⁹⁰ For the wire fraud, "plaintiffs allege that defendants opened and authorized merchant accounts and thereafter authorized, cleared, transmitted, approved, paid and collected the electronic purchases of bets."⁹¹

The court found that the plaintiffs' case had two major defects in the two fraud claims. First, "since the court finds that the *Wire Act* does not prohibit Internet casino gambling [on defendants' association therewith], there can be no mail or wire fraud."⁹² Second, another defect with the mail and wire fraud claims is that the plaintiffs did not plead fraud with specific allegations.⁹³ Finally, the court held that with regards to the remaining alleged violations of federal laws, since the defendants have not violated the *Wire Act*, nor committed mail or wire fraud, then they also have no other liability under any other federal laws.⁹⁴

86. *Id.*

87. *Id.* at 481.

88. *Id.*

89. *Id.*

90. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 481.

91. *Id.* (citing *U.S. v. Mills*, 199 F. 3d 184, 188 (5th Cir. 1999)). The court stated that both mail fraud and wire fraud allegations need to be examined together because they share the same language and the same analysis apply to both. *Id.*

92. *Id.* at 482. Since the plaintiffs' claim relied on the finding that the gambling activities in question were to be found to be a violation of both state and federal law, they hoped that defendants' acts were viewed as illegal. *Id.* Plaintiffs' attempt failed because the court found the activities not to be illegal. *Id.*

93. *Id.* Federal Rule of Civil Procedure 9(b) states that specific pleading of fraud is necessary as a predicate act in a RICO claim. *Id.* Plaintiffs simply lumped together all the defendants without any specific referral of the action executed by each defendant. *Id.* The court stated that the billing statements were not an attempt to defraud. *Id.* They simply stated the amount owed by plaintiffs and the plaintiffs do not dispute that amount. *Id.* The court has decided that the act of making those gambling credits available is not an illegal act and that the debts are legally enforceable. *Id.*

94. *Id.* The lack of finding that the defendants violated the *Wire Act*, mail and wire fraud moots out all other alleged violations of federal statutes. *Id.*

d) *Collection of Unlawful Debt*

When Congress enacted RICO, it provided an alternative outlet to activate the statute in addition to the pattern of racketeering activity namely the collection of unlawful debt.⁹⁵ Under the statute there are two categories of unlawful debt; one involving that "gambling activity [is] illegal under either state or federal law," and the other that the interest rates were usurious.⁹⁶ Since the court found that the alleged gambling activity did not in fact violate either state or federal law and the plaintiffs did not bring a claim on alleged usury, the court found that the plaintiffs failed to allege the collection of unlawful debt.⁹⁷

3. *Enterprise*

The final element in a RICO claim is enterprise and a plaintiff must allege the existence of one when asserting its claim.⁹⁸ A RICO enterprise is "a group of persons associated together for a common purpose" and "is proved by evidence of an ongoing organization. . . and by evidence that the various associates function as a continuing unit."⁹⁹ A RICO enterprise¹⁰⁰ can be either one of two things: a legal entity or an association in fact.¹⁰¹ Plaintiffs have alleged an association in fact exists between the Internet online casinos, the credit card companies and the issuing banks.¹⁰² An "association in fact" is described as needing to have "1) an existence separate and apart from the pattern of racketeering, 2) must be an ongoing organization, and 3) its members must function as a continuous unit as shown by a hierarchal or consensual decision making structure."¹⁰³

The Supreme Court stated that the "enterprise" does not necessarily constitute a "pattern of racketeering activity."¹⁰⁴ The courts have used the test that if the enterprise can still stand alone even after the predi-

95. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 482; 18 U.S.C. § 1962. Section (c) states: "for any person through a pattern of racketeering activity or through a COLLECTION OF UNLAWFUL DEBT to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." *Id.* (emphasis added).

96. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 483; 18 U.S.C. § 1961(6)(A), (B).

97. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 483.

98. *Id.* (citing *Crowe v. Henry*, 43 F.3d 198, 204 (5th Cir. 1995)).

99. *Id.* at 484 (citing *U.S. v. Turkette*, 452 U.S. 576, 583 (1981)).

100. 18 U.S.C. § 1961(4). The statute defines an enterprise as "any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity. *Id.*

101. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 484 (citing *St. Paul Mercury Insurance Co. v. Williamson*, 224 F.3d 425, 439 (5th Cir. 2000)).

102. *Id.*

103. *Id.* (citing *Crowe v. Henry*, 43 F.3d at 205)).

104. *Id.* (citing *U.S. v. Turkette*, 452 U.S. at 583)).

cate acts are removed, then the structure is distinct for the pattern of racketeering.¹⁰⁵ The court determined that even if the pattern of racketeering ceased, the enterprise would still exist.¹⁰⁶ Meaning that even if Internet casino gambling were illegal in the United States, the worldwide enterprise of Internet gambling would be active throughout other parts of the world.¹⁰⁷ Therefore, the court held that the enterprise continues and the requirement for being distinct has been qualified.¹⁰⁸

The second and third requirements for establishing an association in fact, ongoing organization and hierarchal or consensual decision-making structure, are analyzed together.¹⁰⁹ With regards to an ongoing organization, the court held that plaintiffs failed to show an ongoing system of authority or that of an ongoing relationship.¹¹⁰ Instead, all they illustrated was a "random intersection" of activity.¹¹¹ With regards to the third requirement, the court found that there was nothing more than a contractual relationship, a normal business relationship that was created between the defendants.¹¹² There was no factual information to

105. *Id.* at 485 (citing *Handeen v. Lemarie*, 112 F.3d 1339, 1352 (8th Cir. 1997)); see e.g. *Bank v. Brooklyn Law School*, 2000 U.S. Dist. LEXIS 16180 (S.D.N.Y. 2000). The plaintiff failed to allege that enterprise existed separate and apart from pattern of racketeering when there was no allegation that the enterprise would exist were the predicate acts removed from the equation. *Id.*; see e.g. *Crowe v. Henry*, 43 F.3d at 205 (finding that alleged enterprise did exist separate and apart from the pattern of racketeering when the enterprise extended beyond the alleged predicate acts of fraud and theft); see *Landry v. Airline Pilots Assoc.*, 901 F.2d 404 (5th Cir. 1990) (stating only purpose is to commit predicate acts, enterprise does not exist separate and apart from the pattern of racketeering activity); see *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740, 748 (5th Cir. 1989) (finding that association in fact enterprise must have an ongoing organization or be a continuing unit, such that the enterprise has an existence that can be defined apart from the commission of the predicate acts).

106. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 485.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 486.

111. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 486. The plaintiffs allege that the defendants' common purpose was monetary gain from Internet Gambling. *Id.* In order for this to succeed, credit card companies contract with millions of merchants across the world in order to supply their payment process systems. *Id.* In addition, the credit card companies also contract out with issuing banks so that they can offer their customers the chance to purchase goods from credit card suppliers. *Id.* It is an occurrence of chance that a customer decides to use a particular credit card, from any one of the many issuing banks at a specific merchant. *Id.* In short, the customer is free and will determine when and where to use the credit card. *Id.* Therefore, there is no ongoing enterprise because the flowing together of the credit card companies, issuing banks and merchants are in the control of the consumer, not the defendants. *Id.*

112. *Id.* at 487.

support a hierarchy of any degree that existed.¹¹³ Therefore, the court determined that the plaintiffs' RICO claim was weakened by yet another determination based on the facts.¹¹⁴ In summarizing the three RICO prerequisites, the plaintiffs failed to prove two of the points: 1) a pattern of racketeering activity and 2) enterprise.¹¹⁵

4. *Whether the Plaintiffs Can Establish that Defendants' Actions Constituted an Operation or Management of the Enterprise Itself*

The most often charged RICO offense is one that deals with the conduct and participation of a group regarding the conduct of an enterprise.¹¹⁶ More specifically, by engaging a measure of control over the enterprise "by knowingly implementing decisions, as well as making them."¹¹⁷ Plaintiffs have alleged that the defendants directed and guided the conduct of the enterprise by name and logos to be used for Internet gaming.¹¹⁸ In summary, the plaintiffs claim that the alleged enterprises' goal was to promote Internet casino gambling across the world.¹¹⁹ The plaintiffs also state that an employee of MasterCard participated in a seminar on Internet gambling and how to use the system, plus it was identified that Visa required its member banks to follow certain procedural requirements when dealing with Internet transactions.¹²⁰ The court held that these actions did not amount to an exercise of direct control over the enterprise itself.¹²¹ Neither the credit card companies nor the issuing banks had any direct control over the direct dealing of the enter-

113. *Id.* (citing *Jubelirer v. MasterCard Intl., Inc.*, 68 F. Supp. 2d 1049 (W.D. Wis. 1999)). Here was an identical fact pattern to *In re MasterCard*. *Id.* The court held that there must be more than a routine contractual relationship to establish an "enterprise." *Id.* The court also held that there couldn't be a hierarchal or consensual decision-making process when all parties conduct their own affairs, which include service contracts with others. *Id.* The only things that differ from this case are the legal conclusions. *Id.*

114. *Id.*

115. *Id.*

116. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 488 (citing *Reves v. Ernest & Young*, 507 U.S. 170, 185 (1993)).

117. *Id.* (citing *MCM Partners, Inc. v. Andrews-Bartlett & Assoc., Inc.*, 62 F.3d 967, 978 (5th Cir. 1996)). It is not required that a defendant be upper management in order to satisfy the management test. *Id.*

118. *Id.*

119. *Id.* (citing *Fernandez Montes v. Allied Pilots Assoc.*, 987 F.2d 278, 284 (5th Cir. 1993)). The court stated that when evaluating the plaintiffs' claims, it is important to not accept legal conclusions camouflaged as factual conclusions. *Id.*

120. *Id.*

121. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 488 (citing *Reves v. Ernest & Young*, 507 U.S. 170)). The court narrowly interpreted the meaning of "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs." *Id.* It held that it was not Congress' intention to extend the arm of the RICO statute § 1962(c) to include those that did not participate "in the operation or management of the enterprise through a pattern of racketeering activity." *Id.*

prises' affairs.¹²²

5. *Whether the Plaintiffs Satisfied the Proximate Cause Requirement of Standing for a RICO Claim*

Standing is generally a threshold issue for pursuing a claim, however in RICO actions, standing is unique in that it requires that the violation of § 1962 lead to the proximate cause of the injury.¹²³ Plaintiffs alleged that "but for" the availability of using credit cards on the Internet gambling sites, they would have never gambled in the first place.¹²⁴ The court rejected plaintiffs' argument stating that unlike an ordinary RICO victim, the parties in this case could have broken the chain of causation by walking away from the site.¹²⁵ The court also stated that although the plaintiffs paint themselves as victims, they are in an unfavorable position because their own voluntary actions landed them in this situation.¹²⁶ Therefore, the court held that their failure to plead proximate cause prevents plaintiffs from pursuing civil remedies under RICO.¹²⁷

V. AUTHOR'S ANALYSIS

The court's holding with regards to the RICO requirements was executed with a precise examination of each issue held out by plaintiffs. Even though the court could have disposed of this case much earlier in their decision, they proceeded to examine each allegation in a cartesian manner and issued a determination supported by the law.¹²⁸ This thorough approach will provide a road map for cases involving similar fact patterns and it will allow courts in the future to use this as precedent with regards to the relationship between credit card companies and issuing banks in relation to Internet casino gambling.

122. *Id.* at 490. The court determined that the plaintiffs failed to apply the *Reves* standard. *Id.* Just because the defendants supplied either goods or services that ended up benefiting the enterprise, that did not constitute that they become liable under RICO as a results. *Id.* An analogous example is when an accountant or lawyer performs their standard services for an enterprise, which does not automatically default into assuming that they are involved in direct management of the enterprise. *Id.* It is merely a performance of a business relationship, executing their basic job skills in a contractual form. *Id.*

123. *Id.* at 495.

124. *Id.* at 496.

125. *Id.*

126. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 496.

127. *Id.* The specific RICO section referred to by the court is § 1964(c). *Id.*

128. *Id.* at 483.

A. THE DEFENDANTS HAVE NOT ENGAGED IN ALL OF THE ELEMENTS
COMMON IN ALL RICO CLAIMS

1. *A RICO Person*

Of the three elements common in all RICO claims; the existence of a RICO person, a pattern of racketeering activity and the existence of an enterprise, the court held that plaintiffs only satisfied the first element.¹²⁹ The plaintiffs successfully claimed the existence of a RICO person.¹³⁰ The failure to prove the remaining¹³¹ two elements will be discussed further in the sections that follow.

2. *Pattern of Racketeering Activity*

In response to plaintiffs' claims, defendants argue that plaintiffs have failed to prove necessary predicate acts, failing to satisfy a RICO prerequisite, therefore asking for their motion to dismiss to be granted.¹³² Plaintiffs responded that Internet gambling violates both state and federal law.¹³³ Therefore, the court began by examining the underlying offenses that are a critical part of instituting a RICO prerequisite.¹³⁴ The court started with examining the state laws.

a) *State Law*

The court was correct to examine the underlying offenses before ruling on defendants' motion to dismiss for failure to satisfy the RICO prerequisite. Through this method, the court was being thorough so as not to overlook any allegation. The court held that the New Hampshire violations alleged by plaintiff Bradley did not qualify as a predicate act under the RICO statute¹³⁵ because they are not punishable by imprisonment for more than one year.¹³⁶ With regards to the Kansas violations alleged by plaintiff Thompson, three of the four failed under the same

129. *Id.* at 487.

130. *Id.* at 477. For the purpose of motions to dismiss, the court looks at the facts alleged by the plaintiffs as true. *Id.* The plaintiffs stated that the defendants, course of conduct had been ongoing for over a year and continued to proceed to date. *Id.* They based this off the definition of a RICO position provided by the United States Court of Appeals for the Fifth Circuit, stating "the RICO person must be one that either poses or has posed a continuous threat of engaging in the acts of racketeering." *Id.* (citing *Crowe v. Henry*, 43 F.3d at 204 (quoting *Delta Truck & Tractor, Inc. v. I. Case Co.*, 855 F.2d 241, 242 (5th Cir.)), cert. denied, 489 U.S. 1079 (1989)).

131. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 477 (specifically; pattern of racketeering activity and enterprise).

132. *Id.* at 478.

133. *Id.*

134. *Id.*

135. 18 U.S.C. § 1961(1)(A).

136. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 478.

terms as the New Hampshire violations as stated above.¹³⁷ The fourth statute, which remotely comes close to this case, requires the defendant "to set up for use or collect the proceeds of any gambling device."¹³⁸ The court was correct in determining that since there is no allegation in the statement of claim that defendants collected the proceeds of the gambling device, there was no violation of this statute.¹³⁹ Also, the court was correct in observing that the Kansas Attorney General's opinion made no mention of the alleged conduct of the defendants in this case, but only that of bettors and online casino firms.¹⁴⁰ With the court's determination that the plaintiffs failed to allege a claim under state law concerning Internet gambling, the court moved to federal law on the same topic.¹⁴¹

b) *The Wire Act*

The purpose of this Casenote is to examine the application of the *Wire Act* in relation to Internet casino gambling. The crux of this whole discussion focuses on the fact that there are no federal statutes that specifically address or prohibit Internet casino gambling. The court's determination in this case set a precedent that the *Wire Act* does not apply to games of chance.¹⁴²

The court was correct in determining that non-sports betting fell outside the parameters of this federal statute. The Department of Justice has known for years that this breach existed.¹⁴³ On various occasions, Deputy Assistant Attorney General, Kevin Di Gregory, made statements to Congress recognizing that § 1084 may not apply to Internet casino gambling.¹⁴⁴ For example, on June 24, 1998, before a sub-

137. *Id.* at 479.

138. *Id.* (quoting Kan. Stat. Ann. 21-4304(e)).

139. *Id.* The court stated that "it would be a temporal impossibility for the defendants to have completed their transaction with the plaintiff before he gambled and to then be prosecuted for collecting the proceeds of a gambling device, which can only take place after some form of gambling is completed." *Id.*

140. *Id.*

141. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 479.

142. *Id.* at 481.

143. U.S. Department of Justice, *Testimony of Kevin V. Di Gregory, Deputy Assistant Attorney General* ¶ 6 <<http://www.usdoj.gov/criminal/cybercrime/kvd0698.htm>> (accessed Nov. 13, 2001).

144. *Id.* The Department acknowledges that the arrival of the Internet has reduced the effect of the *Wire Act*. *Id.* They support amending the *Wire Act* to include Internet casino gambling and that the Act embraces all Internet use, including satellite communications. *Id.* Currently, the *Wire Act* does not encompass such modern technology, as satellite communications, under its definition of "wire communications". *Id.* The Department lays out three criteria that any new legislation regarding transmission of the Internet includes. *Id.* at ¶ 7. First, they stress that any new legislation "treat the physical world and the cyberactivity in the same way." *Id.* Meaning that if one something is prohibited in the physical

committee of the House of Representatives, Mr. Di Gregory stated that with the emergence of the Internet, § 1084's power may be diminished because the "statute may relate only to sports betting and not the type of real-time interactive gambling (e.g. poker) that the Internet now makes possible for the first time."¹⁴⁵ It is important for the court to interpret the plain meaning of the statute, and only if it is ambiguous, to look outside to legislative history for further insight.¹⁴⁶ Here, the statute expressly states that the only acts that are prohibited are sports betting and contests. Therefore, it would be presumptuous for the court to artificially construct a provision that was not included in the statute. Even when the court did look back on the legislative history for the sake of argument, it was clear that Congress did not intend to include Internet casino gambling in the statute.¹⁴⁷ Therefore, the court did a positive ser-

world and not in the cyber world, that will open the floodgates to unscrupulous behavior on the Internet. *Id.* The nucleus of these criteria is that treatment regarding gambling be on equal grounds for both wire and wireless actions. *Id.* What is also stressed is to not distinguish Internet communications from other types of communications because this could cause confusion and ineffectual distinctions. *Id.* at ¶ 8. For example, by drafting legislation differentiating between voice communications, digital Internet telephony, and electronic communications will only lead to disarray. *Id.* The second point is that any new legislation should be technology neutral. *Id.* at ¶ 9. For example, legislation that is connected to a specific type of technology could soon become obsolete and that would not be effective. *Id.* The conduct is what is the critical ingredient to the proposed legislation, not the specific technology. *Id.* Lastly, it is essential that the law acknowledge that the Internet is different from any other type of previous communication vehicle. *Id.* at ¶ 10. It is a "multi-faceted communications medium that allows for both point-to-point" communication as well as "widespread dissemination" to an infinite audience. *Id.* The legislation must be carefully composed so as not to stifle the growth of the Internet or restrict its use for communications and commerce. *Id.*

145. *Id.* The Department opposes two aspects of reoccurring legislative proposals. *Id.* at ¶ 12. First, there is a strong opposition to making the activities of mere bettors at violation of federal law. *Id.* During the hearings on the *Wire Act*, then-Attorney General Robert F. Kennedy declared that the Department had no objective prosecuting individual bettors. *Id.* at ¶ 13. That is not the role of the federal government; instead their resources are best spent focusing on large gambling operations. *Id.* The states have had the primary task to prosecute individual bettors. *Id.* Secondly, that it should not be devised that an anti-Internet gambling statute be an international law priority. *Id.* at ¶ 12. There are countries, such as Australia, that have legalized Internet gambling activities. *Id.* at ¶ 15. And for the U.S. to demand that foreign countries investigate, on our behalf, Internet conduct that is legal in their country, we will be opening the door to reciprocal requests from other countries to investigate their complaints of conduct that is legal and even constitutionally protected in the U.S. *Id.*

146. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 480 (citing *Salinas v. U.S.*, 522 U.S. 52 (1997)).

147. *Id.* at 481 (citing 107 Cong. Rec. 16533 (Aug. 21, 1961)). At the time the *Wire Act* was enacted, the House Judiciary Committee Chairman explained that the purpose of the bill involved "the transmission of wagers or bets and layoffs on horse racing and other sporting events." *Id.*

vice to gaming law by clarifying a very much-assumed idea that the *Wire Act* prohibited and made Internet casino gambling illegal.

The *Wire Act* is cited as the federal law that most closely associates gambling over the Internet as illegal.¹⁴⁸ There are two cases, *United States v. Ross*¹⁴⁹ and *United States v. Cohen*,¹⁵⁰ which are comparable to *In re MasterCard*, because they involve the *Wire Act*. However, both are distinguishable in that neither involved casino gambling, only focusing on sports betting. In both cases, the accused tried to use the exception¹⁵¹ to the *Wire Act* as a way out of the allegations.¹⁵² Their attempts failed with the court stating that the interpretation of the exception is so narrow that the betting would have to be legal in each jurisdiction where the

148. Michael Anastasio, *The Enforceability of Internet Gambling Debts: Law, Politics and Causes of Action*, 6 Va. J.L. & Tech. 6, 7 (2001). The *Wire Act* states that:

Whoever, being engaged in the business of betting or wagering, knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years or both.

18 U.S.C. § 1084.

149. *U.S. v. Ross*, 1999 WL 782749 (S.D.N.Y. 1999). This case dealt with a company known as Island Casino, whose operations involved accepting wagers for sports betting. *Id.* The bets could be placed over an 800 number or through their Internet site. *Id.* The company was located in Curacao, an island in the Netherlands Antilles. *Id.* Allan Ross was indicted in a four-count indictment in violation of 18 U.S.C. § 1084. *Id.*

150. *U.S. v. Cohen*, 260 F.3d 68 (2nd Cir. 2001). A company called World Sports Exchange (WSE) business was bookmaking on American sporting events. *Id.* at 70. The company was located on the Caribbean island of Antigua. *Id.* Cohen ran an "account-wagering" system through WSE, where the customers would wire money to WSE and they would make those credits available to the customer for sports betting. *Id.* WSE would receive a commission off each bet. *Id.* Cohen was convicted on all eight counts and that he had violated all three of the prohibitive clauses in § 1084. *Id.* at 71. He was sentenced to twenty one months imprisonment. *Id.* On appeal, the court affirmed the district court's judgment. *Id.*

151. 18 U.S.C. § 1084(b). The exception states that:

Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in the news reporting or sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

Id.

152. *U.S. v. Ross*, 1999 WL 782749 (S.D.N.Y. 1999). The exemption to § 1084(b) only applies to the transmissions of "information assisting in the placing of bets," NOT (emphasis added) to the other acts listed in § 1084(a). *Id.* The exemption is further narrowed to state that the issue of betting needs to be legal in both jurisdictions in which the betting happens. *Id.*

transmission occurs.¹⁵³ The court's decision in *In re MasterCard* was ground breaking for the gaming industry, in that it excluded a game of chance, i.e. Internet casino gambling, from the prohibition of the *Wire Act*.¹⁵⁴

On June 14, 2001, Governor Kenny Guinn signed a bill into law that makes Nevada the first state to offer Internet gambling.¹⁵⁵ Even though this bill does not legalize Internet gambling at this point,¹⁵⁶ it directs the Nevada Gaming Control Board and the Nevada Gaming Commission to license and regulate this type of gaming only if certain conditions are met.¹⁵⁷ First, the Commission must establish whether Internet gambling is legal in the United States.¹⁵⁸ They are scheduled to meet with the Department of Justice to discuss their view on the issue.¹⁵⁹ To date, the Bush administration has not yet announced a position on Internet gambling.¹⁶⁰ Second, it must also prove and establish that technology can be implemented to prevent betting by children and people in jurisdictions where this type of gambling is illegal.¹⁶¹ And third, the Commission will have to develop rules to authorize this practice.¹⁶² The Gaming Commission Chairman, Brian Sandoval, expressed that they are also

153. *Id.* The purpose of section (a) and (b) was to assist Congress with a dual purpose in enacting the Act. *Id.* It assists States with enforcing their own State laws with regards to gambling and also helps suppress organized gambling activities nationally. *Id.*

154. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 481.

155. Ed Vogel, *Bill Advancing Internet Gambling Signed by Guinn*, Las Vegas Review-Journal (Las Vegas, Nev.) A10 (June 15, 2001) [hereinafter *Bill Advancing Internet Gambling*].

156. Dave Berns, *Official Seeks Ashcroft Meeting*, Las Vegas Review-Journal (Las Vegas, Nev.) D1 (June 7, 2001) [hereinafter *Official Seeks Ashcroft Meeting*].

157. *Bill Advancing Internet Gambling*, *supra* n. 155.

158. Jeff Simpson, *State Gaming Commission: Panel to Tackle New Gambling Issues*, Las Vegas Review-Journal (Las Vegas, Nev.) D3 (June 28, 2001) [hereinafter *State Gaming Commission*].

159. *Official Seeks Ashcroft Meeting*, *supra* n. 156. The regulators are to meet with Mr. Ashcroft or his representatives in the near future. *Id.* The Bush administration has not taken a stance on their interpretation of Internet gambling. *Id.* However, under the Clinton administration, the Department of Justice opposed the specific prohibition of Internet gambling by Congress. *Id.* The Department had the belief that with alterations, the *Wire Act* could be adapted to encompass the topic. *Id.* It is noted, however, that when Mr. Ashcroft, a conservative republican, was a Missouri senator, he supported the Kyl bill that did expressly prohibit Internet gambling. *Id.* The American Gaming Association's Chief and the casino industry's main Capitol Hill lobbyist, Frank Fahrenkopf, said that based on a meeting with Rep. Bob Goodlatte, R-Va., earlier in the week, Rep. Goodlatte said that Mr. Ashcroft said expressed his support of Goodlatte's new efforts to push forward efforts to prohibit Internet gambling. *Id.*

160. *State Gaming Commission*, *supra* n. 158.

161. *Id.*

162. *Id.*

looking at how the courts are interpreting the *Wire Act*.¹⁶³

The American Gaming Association ("AGA"), a national trade association comprised of commercial casino companies, gaming equipment manufacturers, employees, patrons and shareholders,¹⁶⁴ was established to address federal legislative and regulatory issues that affect its members.¹⁶⁵ The AGA "opposes all forms of unregulated and illegal gambling" and it stands in support of future legislation to update the *Wire Act*.¹⁶⁶ It takes this position for two reasons. First, because the commercial casino industry believes that in order to preserve the integrity and high ethical standards of the industry, tight regulations must be upheld.¹⁶⁷ Internet gambling, as it exists today is untaxed, unregulated, unsupervised which opens the door for unscrupulous operators.¹⁶⁸ Second, the unregulated Internet gambling allows offshore operators to bypass state policies about the restriction of gambling within their borders.¹⁶⁹

Due to the explosive growth of the unregulated, offshore Internet gambling companies, Congress has been forced to take up the issue of drafting legislation to reserve the states' right to regulate gambling within its own borders. In past years, several bills have been drafted, but have not received the necessary votes either in the House of Representatives or the Senate.¹⁷⁰ On November 2, 2001, Rep. Bob Goodlatte, R-Va., introduced a revised version of legislation he had introduced the year before,¹⁷¹ which would describe what comprises illegal Internet

163. *Official Seeks Ashcroft Meeting*, *supra* n. 156. The article references the *In re MasterCard* decision, where a U.S. District Court judge held that the *Wire Act* does not include Internet casino gambling. *Id.*

164. American Gaming Association, *Prepared Testimony: Internet Gambling*, Frank J. Fahrenkopf, Jr., President and CEO before the House Finance Committee ¶ 2 <http://www.americangaming.org/media_update/speeches/speech.cfm/ID/32> (accessed Nov. 13, 2001).

165. *Id.*

166. American Gaming Association, *AGA Fact Sheets* ¶ 6 <http://americangaming.org/casino_entertainment/aga_facts/facts.cfm/ID/17> (assessed Nov. 13, 2001).

167. *Id.* at ¶ 7.

168. *Id.* at ¶ 8.

169. *Id.* at ¶ 10. "The 10th Amendment of the U.S. Constitution states that any right not explicitly granted to the federal government lies with the states or the people. As a result, each state has the right to determine whether or not it will allow any form of gambling and, if so, how it would be regulated and taxed." *Id.*

170. U.S. Department of Justice, *Testimony of Kevin V. Di Gregory, Deputy Assistant Attorney General* ¶ 17 <<http://www.usdoj.gov/criminal/cybercrime/s692tst.htm>> (accessed Nov. 13, 2001). Di Gregory references Senator Kyl's bill, S. 692, the *Internet Gambling Prohibition Act of 1999*, focusing on how the Department is concerned with not only with its silence with regards to Indian gaming on the Internet, but also to its express exemptions to fantasy sports leagues and contests, state lotteries, and parimutuel wagering. *Id.*

171. Tony Batt, *Bill to Ban Web-based Gambling Toughened*, Las Vegas Review-Journal (Las Vegas, Nev.) D1 (Nov. 2, 2001). In 2000, the House voted 245-159, but since it was put

gambling activities.¹⁷² One of the main points of the legislation would be to update the *Wire Act* to expressly state that using the Internet to operate gambling businesses would be illegal.¹⁷³ Although it may be too early in the process to take a stand on this legislation, AGA Chief Frank Fahrenkopf, said that it would seem counter to the states' right to regulate.¹⁷⁴ He gave the example that if states including Nevada moved forward with Internet gambling laws, the legislation would prevent residents in states, where Internet gambling is legal, from engaging in participating in other states that have Internet gambling laws.¹⁷⁵ Goodlatte's bill has been referred to the House Legislation Committee for its issues to be explored further.¹⁷⁶

The court in *In re MasterCard* not only says no to players, it also says that there is no basis for liability for these defendants under the *Wire Act*. Based on this decision, we know that the *Wire Act* will not work under RICO, but there is dicta about the potential liability under state law. What is the effect on other federal laws that might apply, when there is a violation of state law? The *Illegal Gambling Business* statute¹⁷⁷, the *Travel Act*¹⁷⁸ and the *Interstate Transportation of Wagering Paraphernalia Act*¹⁷⁹ are general intent crimes and the elements of these statutes are satisfied by a violation of a state statute. The plaintiffs in this case could go back and individually file a claim in state court bringing forth a state gambling violation, which would then trigger one of the above-mentioned federal crimes.¹⁸⁰

On October 31, 2001, the Ninth Circuit ruled that the *Buchal*¹⁸¹ case be remanded back to Oregon state court stating that defendants

forward vote under an expedited procedure, the necessary votes needed to be at a 2/3 majority, which was not obtained. *Id.* at ¶ 16.

172. *Id.* at ¶ 2. Rep. Goodlatte said that in summary, the effect of his bill would be to wipe out Internet gambling all together, whether it is legal or illegal. *Id.*

173. *Id.* at ¶ 12.

174. *Id.* at ¶ 9.

175. *Id.*

176. Tony Batt, *Leach Takes Aim at Web Gambling*, Las Vegas Review-Journal (Las Vegas, Nev.) D1 (Nov. 23, 2001) [hereinafter *Leach Takes Aim*]. It has been hinted that the House Judiciary Committee is leaning towards Rep. Goodlatte's approach. *Id.*

177. 18 U.S.C. § 1955.

178. 18 U.S.C. § 1952.

179. 18 U.S.C. § 1953.

180. U.S. Department of Justice, *Testimony of Kevin V. Di Gregory, Deputy Assistant Attorney General* ¶ 19 <<http://www.usdoj.gov/criminal/cybercrime/kvd0698.htm>> (accessed Nov. 13, 2001). The Department of Justice states that it can prosecute Internet gambling under existing law. *Id.* There are other federal statutes, such as 18 U.S.C. § 1955, that are predicated on a violation of state law. *Id.* For example, if a state has not authorized a type of wager, and individuals or enterprises engage in such conduct, they are violating a state criminal law, and often this triggers a federal criminal law as well. *Id.*

181. *Buchal v. 3748472 Canada, Inc.*, CV 01-656-BR (D. Or. Oct. 31, 2001).

failed to prove that federal law was a necessary element of plaintiff's *Oregon Racketeer Influenced and Corrupt Organizations Act* ("ORICO") claim.¹⁸² The facts in *Buchal* are similar to the facts in *In re MasterCard*.¹⁸³ What makes this *Buchal* case so timely is that had it been removed to federal court, it would have forced a determination by the Ninth Circuit as to what their position would have been towards the *Wire Act*. The Fifth Circuit's decision on *In re MasterCard* is persuasive, but not authoritative in the Ninth Circuit. Nevada was clearly waiting to see whether the Ninth Circuit would take a position.¹⁸⁴ On July 31 and August 1, 2001, the Nevada Gaming Commission held hearings and talked about the effects of the Fifth Circuit decision.¹⁸⁵ To date, there is no binding precedent for Nevada, which is a part of the Ninth Circuit, on the *Wire Act*.¹⁸⁶ The outstanding question is IF the Ninth Circuit had heard *Buchal* and, ruled differently on the *Wire Act* issue, would the Supreme Court have stepped in or granted certiorari?

3. *Enterprise*

The issue of unenforceable gambling debts presents itself by parties who gamble, because they do not want to be accountable for their losses.¹⁸⁷ The court in *Cie* held that the lender did not participate in an

182. *Id.* at 17.

183. *Id.* at 6. The plaintiff, Cathy Buchal, brought this action on behalf of herself and a potential group of Oregon class action plaintiffs. *Id.* Through Internet gambling sites, they lost money on bets wagered. *Id.*

184. Jeff Simpson, *Nevada Stands Alone on E-Gaming*, Las Vegas Review-Journal (Las Vegas, Nev.) D1 (Aug. 2, 2001). A University of Nevada law student, Joe Cain, told the gaming regulators that the after researching the topic, the other 49 states have laws that make Internet gambling illegal. *Id.* Therefore, it looks like the residents of those other states will not be able to participate in Nevada's proposed Internet gambling project. *Id.* The Gaming Commission's Chairman, Brian Sandoval, responded that he thinks that Joe Cain is correct and if that is the case, and the project proceeded successfully, they would only be able to take bets from Nevada residents and international gamblers. *Id.* The other 49 states' sovereignty has to be upheld. *Id.* Sandoval said that he is still waiting for input from the Department of Justice on this subject. *Id.*

185. *State Gaming Commission*, *supra* n. 158.

186. Jeff Simpson, *Internet Gambling: Gaming Regulators Seek Legal Advice*, Las Vegas Review-Journal (Las Vegas, Nev.) D3 (June 30, 2001). The Nevada gaming regulators plan on hiring an east coast law firm, from either New York or Washington, D.C., in order to evaluate the federal laws pertaining to Internet gambling. *Id.* They chose an out-of-state firm in order to have complete impartiality. *Id.* A firm experienced in constitutional law is the choice of the Gaming Commission. *Id.* In addition, the Commission has asked the Department of Justice to research the laws of the 50 states in order to see if this type of gambling is legal in those jurisdictions. *Id.* Brian Sandoval, the Gaming Commission's Chairman, termed this the "blue-sky analysis" meaning that everything "under the sun" will be examined for this process. *Id.*

187. *Cie v. Comdata Network, Inc.*, 275 Ill. App. 3d 759, 760 (1995). In this case, plaintiffs obtained cash advances at legal gambling establishments. *Id.* They ran their credit

unlawful gambling enterprise.¹⁸⁸ Instead, they provided a service, issuing a loan to plaintiff, and the plaintiff was obligated to pay them back.¹⁸⁹ There were no stipulations on the loan that would restrict it for gambling wagers.¹⁹⁰ The court held that this was a basic contract between cardholder and the defendant.¹⁹¹ Even though *Cie* did not involve Internet gambling, it did point out that the process has significantly similar points that deal with funding a wager.¹⁹²

In *Jubelirer*,¹⁹³ the fact scenario was extremely similar to *In re MasterCard* being that it was a RICO claim related to an online gambling debt.¹⁹⁴ However since the claimant never alleged a violation of the *Wire Act*, that issue was not an element of the case.¹⁹⁵ Plaintiff was a gambler who lost \$20 at an online casino gambling site.¹⁹⁶ Ari Jubelirer brought a claim against his credit card and issuing bank alleging that their participation in financing his gambling debts was a violation of RICO and his debt should be forgiven.¹⁹⁷ The court granted defendant's motion to dismiss.¹⁹⁸ The court arrived at the same conclusion as in *In re MasterCard*, however using different legal reasoning, which was a result of having the *Wire Act*, was involved in the allegations.

On November 1, 2001, the House Financial Services Committee approved a bill sponsored by Rep. Jim Leach, R-Iowa, which would ban Internet gambling in the U.S. by outlawing payments in the form of credit cards, checks and electronic fund transfers, for online wagers.¹⁹⁹ It is

cards through machines owned by defendant, which issued checks to the plaintiff. *Id.* Plaintiff then cashed in the check for gambling chips and after losing the money they filed a class action lawsuit stating that these gambling debts were unenforceable. *Id.* at 761.

188. *Id.* There was no wager between the cardholder and the defendants. *Id.* Instead, Comdata was acting as the defendants' agent and this agent advanced *Cie* a loan to be paid back regardless of whether he won or lost the money. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* For the plaintiff to assume that this transaction was really an illegal gambling contract is incorrect. *Id.* This was a debt that was incurred based on the cardholder's contract agreement with the credit card. *Id.* The credit card agrees to loan money, up to the specified credit limit, and the cardholder agrees to pay this amount back. *Id.*

192. *Cie*, 275 Ill. App. 3d at 767.

193. *Jubelirer v. MasterCard Intl., Inc.*, 68 F. Supp. 2d at 1049.

194. *Id.* at 1052.

195. *Id.* The fact in this case was that a gambler lost \$20 in an online casino and sued the credit card company and issuing bank under RICO and for a declaratory judgment that the debt was uncollectible. *Id.* at 1051. The court came to the same holding as in *In re MasterCard*, but they used different legal reasoning. *Id.* at 1053, 1054.

196. *Id.* at 1051.

197. *Id.*

198. *Jubelirer*, 68 F. Supp. 2d at 1055.

199. Tony Batt, *Internet Gambling: House Panel Approves Restrictions*, Las Vegas Review-Journal (Las Vegas, Nev.) D1 (Nov. 1, 2001). The House Financial Services Committee voted 34-18 to approve the legislation to ban online wagers for Internet gambling. *Id.*

expected that this bill will be combined with Rep. Goodlatte's bill with the hopes of establishing a far-reaching prohibition on Internet gambling.²⁰⁰ Rep. Leach's bill, like Rep. Goodlatte's bill, was referred to the House Judiciary Committee for further review.²⁰¹

VI. CONCLUSION

In conclusion, the court's interpretation of the application of the *Wire Act* with respect to Internet casino gambling is justified and correct. Since to date, there are no federal statutes that expressly deal with the illegality of Internet casino gambling, it would be overreaching to import meaning into a statute that gives no mention to that specific type of gaming. This decision is monumental to Gaming Law. It creates a definite road map for courts presented with cases dealing with these same facts. The court's reasoning in *In re MasterCard* helped establish a uniform method for analyzing the role of credit card companies and issuing banks performing a standard business function for an enterprise. The result was that there was no basis for liability for these defendants under § 1084.²⁰²

The plaintiffs cannot escape their voluntary acts of gambling.²⁰³ Whether done at a casino or on the Internet at home, it is inappropriate to try and pin the wrong on a business provider in order to escape paying a debt that was knowingly and voluntarily conducted.²⁰⁴ If the plaintiffs had made a profit from the Internet casino gambling, they would not have proceeded with this case. They need to be barred from pursuing their claims through a loophole in the *Wire Act*, when related to online casino gambling.

Nevada having passed a law that allows Internet gambling, only hastens the Legislative Branch's assignment to create new laws that clarify what is and is not legal with respect to Internet gambling. Currently, the Fifth Circuit made a broad determination that the *Wire Act* does not prohibit Internet casino gambling, however there are no other

The bill would specifically terminate online wagers to offshore gambling sites as well as try and stop the creation of U.S. mainland web site regarding gambling. *Id.* An important point is that since Leach's bill only targets illegal Internet gambling, it would not interfere with Nevada's plans. *Id.* In addition, Leach's bill could quash the Indian tribes pursuit for activating gambling sites on their reservations. *Id.* Credit card companies have lobbied hard aggressively against the Leach bill. *Id.* It places a burden on the banks and credit card companies to make a good faith effort to terminate processing transactions, via a court order, against illegal Internet gambling sites. *Id.*

200. *Id.*

201. *Leach Takes Aim*, *supra* n. 176.

202. *In re MasterCard Intl., Inc.*, 132 F. Supp. 2d at 481.

203. *Id.* at 496.

204. *Id.*

federal circuit court rulings on this issue nor has the Bush administration taken a position either. Whether other courts will hear these types of cases, and make similar or contrasting holdings, will be the determining factor for the future of the gaming industry regarding Internet casino gambling.

Elizabeth A. Walsh[†]

[†] Elizabeth A. Walsh will graduate from The John Marshall Law School in June 2004. She works full-time for the NASD Dispute Resolution, Inc. as their Senior Mediation Administrator. In addition, she is the Editor-in-Chief of *The Journal of Computer and Information Law*. In 2002, she completed a summer clerkship for Horseshoe Gaming Holding Corporation. Elizabeth graduated from St. Ignatius College Prep in Chicago, Illinois in 1989 and then went on to earn a B.A. in Organizational Communications from Xavier University in Cincinnati, Ohio in 1993. Elizabeth would like to thank Cory Aronovitz, Esq. for all of his input and guidance throughout this process. Finally, she would like to extend a special thanks to her family and friends for their constant encouragement, love and support while attending law school.