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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

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March 25, 2002

The Honorable Michael E. Easterday
Member, House of Representatives
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Columbia, South Carolina 29211

The Honorable Dwight A. Loftis
Member, House of Representatives
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The Honorable Robert W. Leach
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The Honorable Glenn L. Hamilton
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The Honorable Lewis R. Vaughn
Member, House of Representatives
P. O. Box 11867
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Dear Gentlemen:

You have asked whether the General Assembly may, by statute, authorize South Carolina's participation in multi-state lottery games. It is our opinion that the literal language of the State Constitution appears to prohibit South Carolina's joining multi-state lottery games. Therefore, such participation may well be unconstitutional and permitted only by amendment of the Constitution through a vote of the people.

Background

Multi-state lottery games are operated under various names such as Powerball and The Big Game. In some instances, the games are operated on a regional basis and virtually nationwide in the case of games such as Powerball.

According to its web site, Powerball is conducted by the Multi-State Lottery Association (MUSL). MUSL is a non-profit, government-benefit association owned and operated by its 22 member states. Each MUSL member offers one or more of the games administered by MUSL.

Request Letter

Big Game is a multi-state lottery currently played in Georgia, Illinois, Maryland, Massachusetts, Michigan, New Jersey and Virginia. This lottery operates as follows:

> [u]nlike some multi-state or multicountry lotteries that have central offices, many Big Game duties are shared by each member as part of its membership in the game. While most accounting is handled by each member state individually, key duties such as projecting jackpots, budgeting and expenditures, settlements of draw and wagering data, financial settlements (prize expense shares and banking/cash settlements), the monitoring of draw data and statistics, public relations, draw show production and broadcasting, technical duties (i.e. software development) and legal duties are all shared.

Law / Analysis

The 1895 Constitution of South Carolina forbade all lotteries. This broad constitutional prohibition remained in place virtually unchanged (with the exception of bingo in 1974) for more than 100 years. However, Art. XVII, § 7 of the Constitution was amended recently to authorize state-run lotteries as an exception to South Carolina's continuing constitutional prohibition. A favorable vote was conducted in 2000 and the General Assembly ratified the people's decision the following year. As a result of the recent constitutional amendment, Art. XVII, § 7 now provides in pertinent part as follows:

> § 7. Lotteries.
>
> Section 7. Only the State may conduct lotteries, and these lotteries must be conducted in the manner that the General Assembly provides by law. The revenue derived from the lotteries must first be used to pay all operating expenses and prizes for the lotteries. The remaining lottery revenues must be credited to a separate fund in the state treasury styled the 'Education Lottery Account," and the earnings on this account must be credited to it. Education Lottery Account proceeds may be used only for education purposes as the General Assembly provides by law. (Emphasis added).

The question presented is what legal effect the newly adopted language - "only the State may conduct lotteries" - upon the State's authority to participate in multi-state lottery games.

Several fundamental principles of interpretation guide us in construing the constitutional provision. The words of the Constitution are presumed to be used in their ordinary and popular meaning. State v. Broad River Power Co., 177 S.C. 240, 181 S.E. 41 (1935). Additionally, a court is not at liberty to change the wording of a constitutional provision. Neel v. Shealy, 261 S.C. 266,

199 S.E.2d 542 (1973). The plain language of the provision must be given effect. McDowell v. Burnett, 92 S.C. 469, 75 S.E. 873 (1912). Constitutional amendments should be interpreted in order to effectuate the purpose for which they are obviously intended. Holland v. Kilgo, 253 S.C. 1, 168 S.E.2d 569 (1969).

If we apply these basic principles, it is apparent that multi-state lotteries, such as Powerball, are not authorized by the 2000 constitutional amendment. As noted, the Constitution, as amended, instructs that "only the State may conduct lotteries ... ." "Only" means "exclusively, solely." Akin v. Missouri Gaming Commission, 956 S.W.2d 261 (Mo. 1997). The word "conduct" means to carry on, operate, or cause to function and is, in terms of gambling, construed broadly to include all aspects of the gambling operation. Courts view the "conduct" of a gambling business "to include not only the upper, but also the lower echelon ...." U.S. v. Grezo, 566 F.2d 854 (2d Cir. 1977). The fact that the literal language of our Constitution limits the "conduct" of a lottery to "only" the State, results in the requirement that the State do more than merely maintain "supervision and control" over the operation of a lottery. Indeed, the State must actually "conduct" the lottery and make all the necessary decisions regarding its operation. Obviously, the framers could have employed far less restrictive language had they desired to do so, but they did not. Compare, Art. XII, § 9 [Penitentiary shall be "under the supervision and control of officers employed by the State ...."]

With respect to South Carolina's participation in a multi-state lottery such as Powerball or the Big Game, it is apparent that the State will not be "conducting" that lottery; instead, such games would be conducted by the particular association which administers the multi-state games in question. Or, in the instance of the Big Game, duties in running the multi-state lottery will be "shared" by the participating states. In other words, in sharp contrast to the express constitutional requirement that the State "conduct" the lottery, South Carolina would simply be one participant in a multi-state conglomerate lottery.

It is also striking that Courts have routinely concluded that a delegation of particular functions to private entities by contract or otherwise is not an operation by "the State." See, Opinion of the Justices, 254 Ala. 506, 49 So.2d 175 (1950) [private corporation is not "the State" for purposes of constitutional provision]; Credit Bureau Enterprises, Inc. v. Pelo, 608 N.W.2d 20 (Iowa, 2000) [term "state hospital" does not include private hospitals]; Willis v. University Health Services, Inc., 993 F.3d 837 (11th Cir. 1993) [firing by private corporation which operated University Hospital pursuant to lease agreement is not "state action;" Ky. Region Eight v. Commonwealth, 507 S.W.2d 489 (Ct. App. 1974) [private non-profit corporations are not "state agencies."] By analogy, these cases would plainly suggest that where South Carolina participates in a multi-state lottery, "the State" ceases to be the entity "conducting" that lottery.

Further, our Supreme Court has often recognized that a governmental function cannot be divested by contract. City of Bft. v. Bft.-Jasper County Water and Sewer Auth., 325 S.C. 174, 480

S.E.2d 728 (1997); G. Curtis Martin Investment Trust v. Clay, 274 S.C. 608, 266 S.E.2d 82 (1980). The operation of a state lottery is "fully governmental and not proprietary in nature." Hilton Apothecary, Inc. v. State of N.Y., 165 Misc. 697, 630 N.Y.S.2d 446 (1995). Here, our Constitution has expressly authorized the conducting of lotteries "only" by the State. For the State to divest itself of much of the authority to "conduct" multi-state lotteries or to "share" that authority with other states runs the risk of constituting an unlawful delegation of a governmental function, in contravention of the Constitution.

Also, evident is a possible conflict with the constitutional amendment's mandate that "all account proceeds" from the State-run lottery must be "used only for education as the General Assembly provides by the law." While multi-state games such as Powerball specify that "[a]ll profits are retained by the state lottery and are used to fund projects approved by the state legislatures," it is easy to see that this in fact would not be the case where South Carolina is a participant in multi-state games. The monies collected to play the multi-state game are derived from the various states participating. That is what to many makes the jackpots so much larger and the lure of these games so much more attractive than ordinary state-run lottery games. To argue that the multi-state game can be separated into the "South Carolina portion" thereof to insure compliance with the Constitution would be rather disingenuous. If we view the multi-state game as a single lottery with multi-state participants - as indeed it is - a strong case can be made that the proceeds from that lottery are being given to other participating states which are obviously using those proceeds for purposes other than South Carolina education. Therefore, where a multi-state game is involved, the spirit, as well as the letter, of the constitutional mandate of Art. XVII, § 7 - that the particular lottery proceeds must be used solely for South Carolina education - may well be contravened.

Nor could we say that the voters clearly recognized they were voting for multi-state games when they approved the South Carolina "Education Lottery" Amendment in 2000. The explanation placed on the ballot as information to assist the voters in deciding whether to amend the Constitution, made it quite clear that "only the State of South Carolina would be authorized to conduct lotteries in the future and only for education purposes." Applying a common sense reading of that explanation makes it difficult if not impossible to see how a voter thought he or she was approving multi-state games.

The Attorney General of Ohio has reached the conclusion that multi-state games are prohibited by a similar provision of the Ohio Constitution. See, Op. Ohio Atty. Gen., 1988 WL 428788 (Op. No. 88-002, January 25, 1988). Pursuant to Art. XV, § 6 of the Ohio Constitution, "[t]he General Assembly may authorize an agency of the state to conduct lotteries provided that the entire net proceeds of any such lottery are paid into a fund of the state treasury." In arguing that this constitutional provision does not permit multi-state lottery games, the Ohio Attorney General possessed the view that

> Article XV, § 6 categorically prohibits all lotteries with the exception that the General Assembly may designate 'an agency of the state' to conduct and operate a lottery, the 'entire net proceeds' of which are paid into the state treasury. Given this constitutional limitation, I discern no basis upon which to imply the authority for the Lottery Commission to join other states in the operation of a lottery. To the contrary, participation of other states in the actual conduct and operation of a joint lottery, and in sharing the proceeds of such a lottery, would violate the express constitutional limitations which define a permissible lottery.

Litigation is now pending in Ohio contesting the constitutional validity of Ohio's decision to participate in multi-state lottery games. See, Cincinnati Enquirer, January 21, 2002. "Lawsuit Contests Multistate Lottery." Media accounts indicate that the suit contends that "Ohio would not run the multistate lottery ..." and it would thus violate the Ohio Constitution for the State to participate in multi-state games.

Finally, we are unpersuaded that the case of Tichenor v. Missouri State Lottery Commission, 742 S.W.2d 170 (Mo. 1988) provides authority to conclude that multi-state lotteries are not prohibited by the constitutional provision under review. In Tichenor, the Missouri Supreme Court (en banc) addressed the issue of whether the constitutional authorization to the Missouri General Assembly to establish a "Missouri state lottery" served to limit the General Assembly from authorizing participation in multi-state lottery games. Reasoning that the Missouri language was simply intended to prohibit authorization of a lottery "for the benefit of a political subdivision, or a charitable or private interest," the Court concluded that it did not ban Missouri's joining a multi-state lottery. 742 S.W.2d at 174. However, the South Carolina constitutional language is much more specific than that of Missouri. In our view, the phrase "only the State may conduct lotteries" appears to be a limitation upon the Legislature's power to delegate the operation of its lottery to others as much as it is upon who may operate a lottery.

Conclusion

In construing the Constitution, we must remain faithful to the language used and approved by the voters. It is our opinion that South Carolina's participation in multi-state lottery games would conflict with the literal language of the South Carolina Constitution and thus may well be unconstitutional. Absent a constitutional amendment requiring a statewide vote of the people, it would, therefore, appear to be beyond the power of the General Assembly to authorize these multi-state lottery games.

The language of the State Constitution, which the voters of South Carolina just recently approved by amendment, makes it clear that "only the State may conduct lotteries." That wording constitutes an exception to the State's century-old constitutional prohibition against all lotteries. It is evident from the language used that the State itself, rather than a governing board of a multi-state conglomerate, must maintain control over and must operate the lottery. Neither could the decision-making authority to operate the State lottery be "shared" with other states. In contrast to other provisions of the Constitution which simply require that governmental operations such as prisons remain under the State's "supervision and control," the lottery provision of our Constitution does not appear to allow a delegation or transfer of discretionary duties to other states or other entities to conduct the South Carolina lottery. In the case of participation in multi-state lotteries, the State would, in essence, abdicate decision-making authority as to the lottery's operation.

Moreover, the Constitution requires that South Carolina's lottery proceeds be used only for South Carolina education. The Constitution does not permit use of lottery proceeds for the various other purposes which state lotteries elsewhere serve.

It is important to note that Ohio's Attorney General has construed similar language in the Ohio Constitution to prohibit that State's participation in multi-state lottery games. Litigation in Ohio is presently underway to decide the question of whether Ohio's participation in multi-state games is constitutional.

The South Carolina Constitution serves as a written limitation upon the Legislature's power. Provisions of the Constitution must be necessarily be given literal effect. Voters who went to the polls in 2000 to amend the lottery provisions of the Constitution were advised that they were voting on the question of the "South Carolina Education Lottery,' not Powerball, the Big Game or some other multi-state lottery. Thus, we read the constitutional amendment which states that "only the State may conduct lotteries" as not authorizing the Legislature to approve South Carolina's participation in multi-state games. The Legislature thus may wish to reconsider the advisability of authorizing South Carolina's participation in multi-state lotteries in light of this opinion. If multi-state lottery participation is to be authorized in South Carolina, it is our opinion that a new constitutional amendment would be required.

Sincerely,

Charlie Condon
Attorney General