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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 14, 1998

The Honorable André Bauer
Member, House of Representatives
6356 St. Andrews Road
Columbia, South Carolina 29212

Re: Informal Opinion

Dear Representative Bauer:

On behalf of a constituent, you have requested an opinion concerning so-called "cruises to nowhere." By way of background, you state the following:

> [i]t is my information that gambling "cruises to nowhere" are currently out of both Florida and Georgia under the Federal "Johnson Act" which makes such cruises legal under both Federal and state law unless the state has passed legislation prohibiting such cruises. The vessels carry their passengers outside the three-mile limit at which time the casino opens up for a period of time, after which they close down and the vessels return to port.
>
> I do not find where this state has passed legislation prohibiting such cruises, and I would appreciate your opinion on whether or not such cruises could legally operate out of South Carolina ports under the current law.

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Request Letter

Law / Analysis

The Johnson Act, 15 U.S.C. § 1172(a) makes it unlawful "to transport any gambling device to any place in a State or a possession of the United States from any place outside of such State or possession ... ." However, the federal statute provides the following exemption:

> Provided, that this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exception of such subdivision from the provisions of this section, nor shall this section apply to any gambling device used or designed for use at and transported to licensed gambling establishments where betting is legal under applicable laws: Provided further, That it shall not be unlawful to transport in interstate or foreign commerce any gambling device into any State in which the transported gambling device is specifically enumerated as lawful in a statute of that State.

15 U.S.C. § 1177 further provides in part that

> [a]ny gambling device transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed, or used in the violation of the provisions of this chapter shall be seized and forfeited to the United States.

Federal decisions have interpreted the foregoing provisions (prior to the 1992 amendments) as requiring that a state must have affirmatively exempted itself from the statute's reach. See, U.S. v. Two (2) Quarter Fall Machines, 767 F. Supp. 153 (E.D. Tenn. 1991) [holding that quarter fall machines were illegal as "gambling devices" and subject to seizure under the federal statute, as Tennessee had not enacted a provision making such devices legal]; U.S. v. 294 Various Gambling Devices, 718 F.Supp. 1236 (W.D. Pa. 1989) [video poker machines subject to forfeiture under federal statute because Pennsylvania law did not affirmatively and specifically exempt such machines].

In 1992, the federal statute was amended significantly. 15 U.S.C. § 1172(c) provides as follows:

> [t]his section does not prohibit the transport of a gambling device to a place in a State or a possession of the United States on a vessel on a voyage, if --
>
> (1) use of the gambling device on a portion of that voyage is, by reason of subsection (b) of section 1175 of this title, not a violation of that section; and
>
> (2) the gambling device remains on board that vessel while in that State.

Section 1175(b), to which § 1172(c) refers, provides as follows:

> (1) In general
>
> Except as provided in paragraph (2), this section does not prohibit --
>
> (A) the repair, transport, possession, or use of a gambling device on a vessel that is not within the boundaries of any State or possession of the United States; or
>
> (B) the transport or possession, on a voyage, of a gambling device on a vessel that is within the boundaries of any State or possession of the United States, if --
>
> (i) use of the gambling device on a portion of that voyage is, by reason or subparagraph (A), not a violation of this section; and
>
> (ii) the gambling device remains on board that vessel while the vessel is within the boundaries of that State or possession.

(2) Application to certain voyages

(A) General rule

Paragraph (1)(A) does not apply to the repair or use of a gambling device on a vessel that is on a voyage or segment of a voyage described in subparagraph (B) of this Paragraph if the State or possession of the United States in which the voyage or segment begins and ends has enacted a statute the terms of which prohibit that repair or use on that voyage or segment.

(B) Voyage and segment described

A voyage or segment of a voyage referred to in subparagraph (A) is a voyage or segment, respectively --

(i) that begins and ends in the same State or possession of the United States, and

(ii) during which the vessel does not make an intervening stop within the boundaries of another State or possession of the United States or a foreign country. (emphasis added).

The problem here is the meaning of § 1175(b)(2)'s exemption enabling the State to proscribe gambling or the use of gambling devices aboard "cruise-to-nowhere" ships. Such proscription may be enforced if the State "has enacted a statute the terms of which prohibit the repair or use on that voyage or segment." Thus, the question is whether this exemption requires that the State, after passage of the 1992 Johnson Act amendments, must specifically enact a prohibition against the use or possession of gambling devices aboard such "cruise-to-nowhere" ships; or, in the alternative, whether the State may rely upon the fact that its laws already generally prohibit such possession or use, wherever found, and thus such proscription includes gambling equipment carried aboard the ship in South Carolina territory. No court, to my knowledge, has definitively answered this question.

When construing federal law, the general rules of statutory construction apply. The Fourth Circuit has stated that the most fundamental guide to statutory construction is common sense. First United Methodist Church of Hyattsville v. U.S. Gypsum Co., 882 F.2d 862 (4th Cir. 1989). The primary rule is to ascertain and declare Congress' intent. Provident Life and Accident Co. v. U.S., 740 F. Supp. 492, appeal dismissed, 925 F.2d 1465, 1466 (6th Cir. 1991). In determining the meaning of an Act of Congress, the Court looks not only to particular statutory language, but to the design of the statute as a whole and to its object and policy. Crandon v. U.S., 494 U.S. 152, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990). When the meaning of a statute can be argued both ways, resort to extrinsic proof is appropriate. Dubois v. Thomas, 820 F.2d 943 (8th Cir. 1987). Legislative history may be utilized where there is ambiguity or where a literal construction could lead to absurd results or thwart the obvious purpose of the statute. In re Kerns, 111 B.R. 777 (S.D. Ind. 1990). A court construing a statute assumes that the statute's true meaning provides a rational response to a relevant situation. Salomon Forey Inc. v. Tauber, 8 F.3d 966 (4th Cir. 1993). An absurd or odd result is to be avoided. Grand ex rel. U.S. v. Northrup Corp, 811 F.Supp. 333 (S.D. Ohio 1992).

Prior to the 1992 amendments to the Johnson Act, the State could, unquestionably, enforce its gambling laws out to the three mile limit and, arguably, even beyond. See, Miss. v. Europa Cruise Line Ltd., 528 So.2d 839, 840 (Miss. 1998) ["the modus operandi for the vessel is to travel from its berth in Biloxi into that area of the Mississippi Sound without activating the gambling equipment, saloons and operations which would be in violation of the laws of the State of Mississippi."]; U.S. v. Montford, 27 F.3d 137 (5th Cir. 1994) [here, the Europa Jet, an American-owned, Bahamian flagged "cruise-to-nowhere" vessel would travel briefly beyond 3 miles off shore" in order to avoid the reach of Mississippi state law"]. As the Court noted in Smith v. McGrath, 103 F.Supp. 286, 287 (D. Md. 1952),

> [t]he main purpose of the Act is to aid the States in the local enforcement of anti-gambling laws by prohibiting the interstate transportation of such gambling devices.

See also, United States v. Black, 291 F. Supp. 262, (S.D.N.Y. 1968) [federal prosecution for use of facility of interstate commerce (gambling ship) to promote an activity under state law]; Op. Atty. Gen., January 18, 1982 [state arguably may enforce its laws against gambling even beyond the three-mile limit if its interest is deemed "an important state interest."] Indeed, as already seen, under the law as it existed prior to amendment, only where the State had specifically and affirmatively made transportation of gambling equipment legal, would prosecutions be prohibited.

Thus, it would seem to make little or no sense for Congress to have required the State now affirmatively and specifically to enact a new statute prohibiting the very same conduct which Congress had previously encouraged the State to enforce against. Federal preemption will not be implied and must be clearly stated. 81A C.J.S., States, §24. Rather than requiring a State to expressly and specifically make the importation of gambling devices within its territory legal in order for the federal statute not to apply -- as it previously had -- such a reading would now attribute to Congress a turn of one hundred and eighty degrees; now, a State would be required to enact a provision expressly and specifically prohibiting the repair or use of gambling equipment on "cruise-to-nowhere" ships in order to make such conduct illegal.

Admittedly, the statute now requires that a State "has enacted" a statute the "terms of which prohibit the repair or use on that voyage or segment." In a pre-1992 amendment case, North Beach Amusement Co. v. United States, 240 F.2d 729 (4th Cir. 1957), the Fourth Circuit construed the term "has enacted a law providing for the exemption of such State from the provisions of this section ..." as it was used in the Johnson Act prior to amendment. There, the Court construed the application of § 1171 et seq. to Calvert County, Maryland in view of the fact that a state statute enacted prior to the Johnson Act had immunized "that county from the general statute of the state of Maryland which outlaws gambling machines." 240 F.2d at 731. The Fourth Circuit observed that if the federal statute had merely stated that a state could exempt itself by allowing the "use" of gambling devices, the phrase "has enacted" could be deemed to "fairly include prior state legislation." However, the Johnson Act required, concluded the Court, that a State "has enacted" a statute which specifically makes importation into a State illegal. Thus, in the Court's view, since a state could not have known of this requirement in the Johnson Act until after passage of the Act, the State was required specifically to exempt itself after the passage of the Johnson Act amendments in order to make importation of gambling devices into the State legal.

Here, however, it is not clear that Congress required a State to make possession, repair or use of gambling equipment aboard a "cruise-to-nowhere" ship an offense after passage of the Johnson Act amendments. The statute simply mandates that the State "has enacted a statute the terms of which prohibit that repair or use on that voyage or segment." It is at least arguable Congress intended that if the State has (or had) such a proscription, the federal law did not change it. In short, an alternative reading of the statute is that the federal law did not intend to alter the State's substantive laws against possession of gambling equipment including such possession on a "cruise-to-nowhere" ship.

The legislative history and Congressional debates concerning the 1992 Johnson Act amendments at least suggest that this alternative reading is available. The following excerpts from the Act's history are instructive:

> Mr. Lent. Mr. Speaker, I rise in support of H.R.3866. This legislation will permit U.S. Flag cruise vessels to offer gambling to their passengers when embarked on cruises on the high seas. Currently, foreign-flag cruise ships departing from U.S. ports offer gambling but it is against the law for a U.S. ship to have gambling on board. This prohibition has limited opportunities for American interests to engage in the profitable cruise ship trade.
>
> H.R.3866 changes the law so that American and foreign-flag cruise ships will operate under the same rules regarding gambling on board.
>
> By allowing U.S.-flag vessels to have gambling devices on board we will open doors for U.S. companies to acquire cruise vessels. The revenues received from gambling operations will allow American interests to design and construct new cruise ships in American shipyards to begin competing with the foreign-flag operations. ...
>
> Mr. Speaker, the Merchant Marine and Fisheries Committee has held several hearings on this matter and very carefully crafted this legislation as an amendment to the so-called Gambling Devices Act. **It will allow the possession and operation of gambling equipment on U.S.-flag vessels to the same extent that gambling is currently allowed on foreign-flag vessels as one of the forms of entertainment for the passengers**. This bill does not affect in any way the current prohibitions in the Gambling Ship Act, which make it illegal to operate a vessel that is principally engaged in gambling as a floating casino.
>
> I would also like to point out to my colleagues that **we have preserved in this bill** the right of a coastal State to enact legislation that would prohibit gambling on a vessel that operates from a port of that State even if that vessel sails from

> that port out into international waters and then returns to the same port. **The committee was aware that a number of coastal States have elected not to allow gambling on vessels in their waters** and **this legislation retains the right of States to continue to prohibit gambling**.

137 Cong. Rec. H 11021-04, 11022. (emphasis added).

Further, the history notes:

> Mr. Taylor of Mississippi.
>
> > ... The Johnson Act was passed in about 1950 and prohibited Americans from having gaming devices on board. Unfortunately, it did not prohibit our foreign-flag competitors, Mr. Speaker, this is an effort to even the playing field, give our vessels a chance to compete.

Supra.

The history also recognizes:

> Mr. Jones of North Carolina.
>
> > ... This bill would eliminate an unfair situation in current law. At present, foreign-flag cruise ships can legally offer gambling, but U.S.-flag passenger ships are prohibited from doing so by law.
>
> As reported by the Committee on Merchant Marine and Fisheries, this bill would legalize the repair, use, possession and transportation of gambling devices on U.S. and foreign-flag vessels so long as the gambling occurs beyond the jurisdiction of a State. **Voyages to nowhere could occur only if the gambling activities have not been prohibited under the laws of the State from which the vessel is operating**. (emphasis added).

137 Cong. Rec. H 11021-04.

Clearly, the legislative history speaks in the past tense, using terms such as "preserved" and the State "retains" the right to "continue" to prohibit gambling. It certainly could be argued that such legislative intent is inconsistent with any requirement that the State must now enact a specific prohibition as to gambling equipment on "cruise to nowhere" vessels.

Section 16-19-10 et seq. proscribes gambling and lotteries in South Carolina. Pursuant to Section 16-19-50, it is unlawful to "set up, keep or use" gambling devices as specified therein. Such provision states that

> [a]ny person who shall set up, keep or use any (a) gaming table, commonly called A, B, C, or E, O, or any gaming table known or distinguished by any other letters or by any figures, (b) roley-poley table, (c) table to play at rouge et noir, (d) faro bank or (e) any other gaming table or bank of the like kind or of any other kind for the purpose of gaming except the games of billiards, bowls, chess, droughts and backgammon, upon being convicted thereof, upon indictment shall forfeit a sum not exceeding five hundred dollars and not less than two hundred dollars.

The meaning of the word "keep is "to have or retain in one's power or possession; not to lose or part with; to preserve or retain." Black's Law Dictionary (5th ed.). Section 16-19-120 also

> empowers law enforcement officers to confiscate and destroy all gambling devices:
>
> > [a]ll officers of the law in whose possession or keeping may be placed any gambling or gaming machine or device of any kind whatsoever or any gambling or gaming punchboard of any kind or description whatsoever which has been confiscated for violation of any criminal law or laws of this State shall immediately after conviction of the violator destroy the same.

Thus, under existing South Carolina law, particularly § 16-19-50, it is unlawful in South Carolina to set up, use or possess gambling equipment not otherwise excepted by § 16-19-60 (coin operated device with a free play feature). See also, § 12-21-2710 ["It is unlawful

for any person to keep on his premises or operate or permit to be kept on his premises or operated **within this State** any vending or slot machine, punch board, pull board, or other device pertaining to games of chance of whatever name or kind ..." (emphasis added)]; § 12-21-2712 [seizure and destruction of unlawful machines, devices, etc.]; Squires v. S.C. Law Enforcement Division, 249 S.C. 609, 155 S.E.2d 859 (1967) ["It is clear that the Legislature, by the enactment of the statutes here involved, did condemn any devices pertaining to games of chance."]

I have been unable to locate any case which definitely construes the phrase "has enacted a statute the terms of which prohibit that repair or use on that voyage or segment." However, a Georgia Attorney General's Opinion, Ga. Op. Atty. Gen. No. U92-20 (December 10, 1992) does comment thereupon. There, the Georgia Attorney General read the provision as requiring a State to enact a new law after the 1992 amendments:

> [i]n conclusion, it is my unofficial opinion that the 1992 amendments to the Johnson Act (15 U.S.C. § 1175) have preempted Georgia's statute prohibiting the possession of gambling devices (O.C.G.A. § 16-12-24) as applied to foreign or U.S. registered vessels where all gambling activities take place beyond the State's three-mile territorial limits, and the gambling devices remain on board when the vessel is in a Georgia port. However, the provisions of the Johnson Act amendments permit the State to enact future legislation to prohibit the repair or use of such devices on vessels beginning and ending voyages in a Georgia port. It should be noted that Georgia's legislature has not yet had the opportunity to address this issue created by the Johnson Act amendments. Finally, I would emphasize that although the Johnson Act amendments would appear to require a narrow interpretation of the Gambling Ship Act, one should not forget that the latter continues to prohibit ships "principally" used as gambling establishments.

Notwithstanding the Georgia Attorney General's opinion, I would advise that until a court rules otherwise, the Johnson Act should be interpreted cautiously and conservatively, consistent with the General Assembly's policy against gambling. In other words, a declaratory judgment should probably be sought by those who advocate implementing "cruises-to-nowhere" off the shores of South Carolina prior to such cruises being instituted. This Office, in an opinion, is unable to conclude that the amendments to the federal Johnson Act displace South Carolina's laws against the possession and use

of gambling equipment. In short, even though it may be argued that the Johnson Act amendments now require further legislation from the General Assembly prohibiting the repair or use of gambling equipment aboard "cruises-to-nowhere," such is not clear, and thus a declaratory judgment is advisable before displacing present state anti-gambling laws.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an