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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

March 23, 1999

The Honorable W. Greg Ryberg
Member, South Carolina Senate
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Ryberg:

You have asked for clarification of my recent opinion to Senator Rankin regarding so-called "cruises to nowhere." You inquire as to "whether any provision of the Johnson Act expressly mentions political subdivisions." If so, you wish to know "what impact, if any, does this have on [the opinion's] conclusion that the federal law may not permit localities to opt out of its provision by local option?"

LAW / ANALYSIS

The March 9, 1999 Opinion to Senator Luke Rankin dealt in part with the attempt to predict how a court might interpret the federal Johnson Act, 15 U.S.C. § 1172 et seq., in light of District Judge Norton's recent ruling in Casino Ventures v. Stewart regarding the Act's effect upon "cruises to nowhere." The specific issue posed by Senator Rankin was whether the Johnson Act allows not only a State, but a political subdivision, to exempt itself from the effect of the federal law. I pointed out that "[i]n my view the Johnson Act does not really speak to that issue." Moreover, I indicated that I was extremely reluctant to comment upon how the Johnson Act might be interpreted. I noted that this Office "strenuously disagrees with Judge Norton's ruling" which concluded that the Johnson Act preempts pre-existing state laws prohibiting cruises to nowhere as well as laws which could have had that effect, and that a new enactment by the General Assembly was necessary to now ban such cruises in South Carolina. Furthermore, I cautioned that we are presently appealing Judge Norton's Order to the Fourth Circuit in Richmond. Thus, I expressed concern that any opinion by this

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REQUEST LETTER

Office could somehow jeopardize or prejudice our appeal. With that caveat, however, in an effort to address Senator Rankin's question of whether the Johnson Act, as so interpreted by Judge Norton, permits a state to enact a statute which allows localities by local option to decide for themselves whether to "opt out" of the Johnson Act's preemptive scheme, the March 9 opinion was rendered. Therein, I advised Senator Rankin that it is my view that, while the Johnson Act "does not speak to the question specifically, its language contemplates that the state will by statute exempt itself completely or not at all."

You have now asked that I address the issue of whether any provision of the Johnson Act deals with political subdivisions and, if so, whether such might make any difference with respect to my conclusion. I have reviewed again the Johnson Act, as well as the Order of Judge Norton. I would thus make the following comments with respect to your question.

Enclosed is a copy of my Informal Opinion to Representative Andre Bauer, dated May 14, 1998. This opinion attempts to summarize the history behind the Johnson Act and the reasons why the Act was amended in 1992.

The Johnson Act was first enacted by Congress in 1951. As the Court noted in Smith v. McGrath, 103 F.Supp. 286, 287 (D. Md. 1952), the purpose of the Act was "to aid the States in the local enforcement of antigambling laws by prohibiting the interstate transportation of such gambling devices." To that end, 15 U.S.C. § 1172 (a) of the Act 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. . . ." In other words, from the very start, the federal law (in aid of state law) made the transportation of any gambling device into a state illegal.

However, Congress did leave states one loophole, should they decide that they wanted to have legal gambling in that state or locality. Inserted in the Johnson Act from the outset, this portion of § 1172 reads as follows:

> [p]rovided, 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**. . . . (Emphasis added).

The above portion of the Johnson Act's § 1172, is quoted in my 1998 Opinion to Representative Bauer. As can be seen, this provision **does permit** a state legislature to authorize local subdivisions to "opt out" of the § 1172 provision making the transportation of gambling devices illegal. In other words § 1172 makes the transportation of gambling devices illegal, but authorizes states and localities to exempt themselves **if they desire to make the transportation of gambling devices into that state or subdivision legal.**

A number of cases have interpreted this original "opt out" provision of the Johnson Act over the years. See, e.g., North Beach Amusement Co. v. U.S.. 240 F.2d 729 (4th Cir. 1957) [phrase "has enacted" indicate Congress did not intend that a State could exempt itself from Johnson Act prior to passage to the Act]; U.S. v. 46 Gambling Devices, 138 F. Supp. 896 (D. Md. 1956) [statute exempting a state or political subdivision must indicate such exemption on its face "and not leave the matter to arguable inference based on a comparison of its provisions with those of the statute of another sovereignty to which it makes no reference."] It is important to remember that these cases deal only with § 1172, not § 1175.

As can be seen in my opinion to Representative Bauer, the 1992 amendments to Section 1175 passed over forty years after the Johnson Act was originally enacted, are simply an exception with respect to cruise vessels to the broad proscription against the transportation of gambling equipment into a state. Judge Norton recognized that "the 1992 amendments created an exception to the then existing prohibition on possession and use of gambling devices on U. S. Flags ships." Citing § 1175(b)(2)(A), his analysis was that

> any state that "has enacted" a statute that prohibits the repair or use of gambling equipment on voyages that begin and end in the same state without intervening stops may prohibit the type of business Plaintiff proposes.

He held that unless and until a statute is enacted opting out of **§ 1175**, Plaintiff "has the right to operate day cruises from ports in South Carolina . . . " because, in his view,

> South Carolina has not enacted any statute opting out of the 1992 amendments to the Johnson Act and **the statutes South Carolina adopted prior to the 1992 amendments to the Johnson Act . . . do not meet the criteria of the opt out provisions of 15 U.S.C. § 1175**. . . . (Emphasis added).

In other words, Judge Norton did not rely at all upon § 1172, but only on § 1175.

Clearly, if only § 1172 were involved and there were no 1992 amendments to § 1175, cruises to nowhere would remain just as illegal in South Carolina as they ever were, because South Carolina law has for over two hundred years made the possession of gambling equipment illegal. Instead, Judge Norton interpreted only § 1175 (incorrectly we believe) which he held makes cruises to nowhere legal unless a States "opts out" of that provision to make such cruises illegal. In Judge Norton's view, the situation with respect to day cruises is, therefore, just the opposite from § 1172's general proscription: with respect to § 1172, the transportation of gambling equipment is illegal unless and until a State or political subdivision exempts itself to make such legal; however, concerning cruises to nowhere, Judge Norton believes federal law makes such cruises legal unless and until a State exempts itself to make these cruises illegal.

The question is what constitutes an "opt out" by "the State." Judge Norton deemed § 1172 (which does mention political subdivisions, but in the above-referenced different context) as irrelevant to that question. It is apparent that the Judge believes (although not directly faced with that question) that the Johnson Act requires the State to "opt out" in its entirety, not simply on a locality-by-locality basis. He quotes with approval a Georgia Attorney General's Opinion which states that "15 U.S.C.§ 1175 (b)(2)(A) requires specific state legislation to remove **the State** from the Act's expansive exception. . . ." (Emphasis added). Moreover, as stated, Judge Norton relies solely upon § 1175's 1992 amendments, which do not mention political subdivisions in any way, and he expressly held that the General Assembly must opt out "of the 1992 amendments." Since the 1992 amendments do not mention political subdivisions, but only speak in terms of the State as a whole, I believe that opting out is an all-or-nothing proposition.

Accordingly, for the foregoing reasons, as I previously indicated to Senator Rankin, Judge Norton's Order, until set aside, must be read as requiring the State to exempt itself completely as one, rather than on a piecemeal basis through a local option system. That is why his Order should be deferred to by the General Assembly unless and until that Order is reversed.

CONCLUSION

Judge Norton's Order addresses the Johnson Act and what he believes the General Assembly must do if cruises to nowhere are to be banned in South Carolina. While I disagree with Judge Norton's ruling that states are required to opt out of the 1992 Johnson Act amendments, at the same time, I believe his interpretation of the Act does not permit a piecemeal approach through local option with respect to what constitutes the act of opting

out. The Court appears to be saying, consistent with the language of the 1992 Johnson Act amendments, that exemption by the State must be complete and total, not bit by bit, or locality by locality. Accordingly, I would advise that Judge Norton's Order should thus be followed by the General Assembly, if the Legislature desires to ban casino boats.

However, the issue of the State Constitution, as interpreted by Supreme Court in the Martin v. Condon case poses an even greater obstacle to a local option approach than Judge Norton's interpretation of the Johnson Act. My analysis of the Martin case is set forth at length in my letter to Senator Rankin and I will not repeat it herein. Suffice it to say that the Martin case does not appear to allow a local option approach to banning casino boats in South Carolina. As I said in the earlier letter, "a court could conclude that the local option provision in the Bill may create a checkerboard of different laws, and is thus special legislation." Accordingly, regardless of whether or not the Johnson Act allows a State to exempt itself from the federal law on a piecemeal, local option basis, the State Constitution does prohibit this from being done.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph

Enclosure