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December 28, 2009

Mr. Blake A. Hawthorne
Supreme Court of Texas
201 West 14th Street, Room 104
Austin, Texas 78701

VIA HAND-DELIVERY

Re: *Texas Lottery Commission v. First State Bank of DeQueen, et al.*
No. 08-0523

Dear Mr. Hawthorne:

Respondents First State Bank of DeQueen and Stone Street Capital respectfully request that you circulate the enclosed copies of this letter to Court:

* * *

In response to the State's letter briefs, and to clarify an issue addressed at oral arguments, Respondents respectfully submit the following:

A. The "Consumer" Issue

On December 18, 2009 (following the oral arguments in this case), the State submitted a letter brief reiterating its "consumer" argument. Specifically, the State asserts that UCC § 9.201 applies to any 'different rule for consumers' – not just 'consumer debtors' (nor, for that matter, 'consumer transactions')."

To the contrary, what section 9.201(b) actually provides is:

A transaction subject to *this chapter* [UCC Article 9] is subject to any applicable rule of law that establishes a different rule for *consumers*

In support of its contention that the Lottery Act "establishes a different rule of law for *consumers*," the State cites to the definition of "consumer" in UCC § 1.102(b)(11). That section defines "consumer" as "an individual who enters into a *transaction* primarily for personal, family, or household purposes." The State contends that Mr. Irvan's assignment of his lottery winnings qualifies as such a "transaction." But it cites no statutory or other support for that contention.

By its own terms, section 9.201 applies only to "transactions" that: (1) are "subject to [Article 9]" and (2) involve a "consumer." The UCC does not define a "transaction." But

section 9.102(a)(26) (which, of course, is in Article 9 – the chapter to which section 9.201 applies) specifically defines a “transaction” that involves a “consumer” –

"Consumer transaction" means a transaction in which (i) an *individual incurs an obligation primarily for personal, family, or household purposes*, (ii) a security interest secures the obligation, and (iii) the collateral is held or acquired primarily for personal, family, or household purposes. The term includes consumer-goods transactions.

Thus, a “consumer” in an Article 9 “transaction” is one who “incurs an obligation” and acquires collateral to secure that obligation (all primarily for personal, family, or household purposes).

This, of course, is consistent with the DTPA’s definition of “consumer,” *see* TEX. BUS. & COM. CODE § 17.45(4) (a “consumer” is one “who seeks or acquires by purchase or lease, any goods or services”),¹ as well as the term’s common meaning, *see* BLACK’S LAW DICTIONARY 358 (9th ed. 2009) (a “consumer” is “a person who buys goods or services for personal, family, or household use”). “Consumers” are those who seek or acquire something, not those who sell or provide something. The State has not cited – and Respondents are not aware of – *any* definition or usage under which a *seller* or *assignor* would ever qualify as a “consumer.”

Under section 9.201, the question is not whether the Lottery Act establishes rules for prize winners who wish to assign their future payments. Respondents concede that it does. But the question is whether such persons are “consumers” engaged in “transactions” as UCC § 9.201(b) uses those terms. Under UCC § 9.102(a), they are not, because they do not incur any obligation, or acquire anything. The Lottery Act, therefore, does not “establish a different rule for consumers,” and UCC § 9.201(b) thus does not apply.

B. Child support argument

Toward the end of Respondent’s oral presentation, Justice O’Neill asked whether Respondents agree with the State’s position that the judgment below will “hamper the Attorney General’s ability to enforce child support orders.” Respondents’ counsel spoke too quickly in answering that question.

In the State’s September 4 letter brief, to which Justice O’Neill apparently referred, the State pointed to and attached a trial court pleading filed in *Texas Lottery Commission v. Warren*. According to that pleading, Leslie Warren won the Texas lottery in 1994, divorced in 1998, and assigned all but the last two prize payments in 1999. Notably, the parties to that assignment fully complied with section 466.410’s restrictions on assignments, and even obtained a court order (to which the Commission agreed) approving that assignment. Then, in 2005, Mr. Warren was found to be delinquent in child support payments and, in 2008, the Attorney General’s office issued a notice to the Commission, demanding that it withhold the child support debt from the future prize payments that the Commission had already agreed to make *to the assignee*. Because

¹ *See Fielder v. Abel*, 680 S.W.2d 655, 657 (Tex. App.—Austin 1984, no writ) (to qualify as a consumer [under the DTPA]: (1) the person must have sought or acquired goods or services by purchase or lease, and (2) the goods or services purchased or leased must form the basis of the complaint.”).

Mr. Warren had assigned the right to receive those payments long before any child support debt arose, the Commission initiated the lawsuit and interpleaded the 2008 payment. The question in *Warren* is whether the State can offset lottery payments in order to collect on a child support debt when the payments were assigned *before* the child support debt arose.

The State cites to two sections of the Lottery Act in support of its contention that it can offset such payments: (1) section 466.4075(b), which provides that the Commission “shall deduct an amount a court has ordered a person to pay as child support from a person's periodic installment winnings,” and (2) section 466.410(h), which provides that an assignment under that section “may not include or cover payments or portions of payments that are subject to any offset provided by this chapter.”

In response, the assignee argues that: (1) section 466.4075(b) does not allow the Commission to deduct child support from payments that were assigned *before* the child support debt accrued; and, alternatively, (2) the UCC renders section 466.410(h) ineffective.

Without taking a position on the parties' arguments in that case, it appears to Respondents that the assignee's second argument is actually irrelevant to its position, and that this Court's decision in this case will not affect the outcome in that one. Section 466.410(h) only prohibits the assignment of the portions of future payments “that are subject to an offset under this chapter.” The real question, then, is whether, under section 466.4075(b), future lottery payments are “subject to an offset” even *before* any child support debt arises. If they are, then they can only be assigned “subject to [that] offset,” since it is well-established that an assignee stands in the shoes of the assignor, and an assignor can only deliver the rights that the assignor has. If, under section 466.4075, future lottery payments are “subject to an offset” even before the child support debt arises, then the assignee only receives the right to receive the payments subject to that offset. If, under section 466.4075, future lottery payments are not “subject to an offset” unless and until a child support obligation arises, then section 466.410(h) does not prohibit the assignment of those payments, because that is not an assignment of amounts “that are subject to an offset under this chapter.” In either case, it is section 466.4075 (which creates the right of an offset) and not section 466.410(h) (which prohibits assignment of amounts subject to an offset), that will control the outcome of that case.

Thus, if the Court concludes in this case (as it should) that the UCC renders the Lottery Act's restrictions on assignment ineffective, that decision will in fact render section 466.410(h) ineffective, but it will not “hamper the Attorney General's ability to enforce child support orders,” because section 466.410(h) only prohibits assignments of amounts that are subject to an offset, and if the future payments are subject to an offset, then the winner can only assign them subject to that offset.

C. Jurisdictional argument

Finally, in its December 10 letter brief, the State reiterated its argument that sovereign immunity deprives the Court of jurisdiction because Respondents sued the Commission instead of its officers in their official capacity. The State's suggestion that Respondents should have sued the officers “in the first place, as many litigants do,” is disingenuous, as the State itself agreed in the trial court that “[t]he Court has jurisdiction under the UDJA to consider Plaintiffs' complaint *against the Commission.*” C.R. at 117.

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In any event, to now conclude that sovereign immunity bars this suit, the Court must overrule its prior decisions, not only in *Texas Educ. Agency v. Leeper* and in *Wichita Falls State Hosp. v. Taylor*, but also its recent decision in *City of El Paso v. Heinrich*. In all three of those cases, the Court confirmed that, “[f]or claims challenging the validity of ordinances or statutes, . . . [section 37.006 of] the Declaratory Judgments Act requires that governmental entities be made parties, and thereby waives immunity.” *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009). The facts of *Leeper* and the language of the Court’s holdings in these cases confirm that this is true anytime a party challenges the validity of a statute, regardless of whether the defendant is a municipality or a state agency, and regardless of whether the challenge is based on constitutional or other grounds.

Respectfully submitted,

/s/ Jeffrey S. Boyd
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