



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

JAMES C. HO
SOLICITOR GENERAL

(512) 936-1695
JAMES.HO@OAG.STATE.TX.US

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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*, No. 08-0523

Dear Mr. Hawthorne:

The State of Texas would like to offer these final thoughts as the Court considers how best to resolve the issues presented in this case. Accordingly, we ask that you circulate this letter to the members of the Court.

* * *

1. As the State has noted, this case presents *two* distinct jurisdictional questions, not one. As a result, the Court has a choice.

First, the Court could decide this case simply by concluding that Plaintiffs failed to sue a proper defendant—namely, a government official, not a government entity, as required in *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009)—and thus vacate the judgment below on the ground that it violates sovereign immunity.

Alternatively, the Court could additionally hold that Plaintiffs failed to “allege, *and ultimately prove*, that the officer acted without legal authority or failed to perform a purely ministerial act,” *id.* at 372 (emphasis added)—because the 1999 Lottery Act amendments trump UCC Article 9—and thus vacate the judgment below on this second basis as well.

Like the absence of a proper defendant, the absence of a valid ultra vires claim is likewise a matter of sovereign immunity and thus jurisdictional under *Heinrich*. After all, an ultra vires claim is valid—and thereby avoids sovereign immunity—only if the plaintiff proves that the official’s conduct is indeed “without legal authority.” *Id.*

Accordingly, the Court has a choice. It can address both jurisdictional defects in this case. Or it can vacate solely on the basis of one defect, and reserve judgment on the other.

2. Because the Court is not required to address the second issue in this case, it could simply vacate the judgment below based on the first issue alone—the absence of a proper defendant—and thereby give the Legislature the opportunity during the next session to further clarify its intentions with respect to the Lottery Act. This result would certainly be better than precipitously denying legal effect to the Lottery Act altogether.

The State continues to recommend, however, that the Court reject jurisdiction on both grounds—and to hold that sovereign immunity bars this suit, not only because Plaintiffs have failed to sue a proper defendant, but also because they have not stated a valid *ultra vires* claim in any event.

If the task of statutory interpretation is simply to discern, and give legal effect to, the will and intention of the Legislature—and this Court has repeatedly said that it is—then the 1999 Lottery Act Amendments should be enforced. After all, it is undisputed that the Legislature amended the Lottery Act in 1999 specifically (and indeed, almost entirely) for just one purpose: to provide various consumer protections to lottery winners, including the two protections violated in this case—(1) the right to independent counsel, and (2) the ban on assignments of the two payments most susceptible to usurious and predatory offers. It is likewise undisputed that the Legislature did *not* specifically intend the 1999 UCC amendments to trump the Lottery Act amendments.

Moreover, the 1999 Lottery Act amendments were carefully negotiated and ultimately supported by all relevant stakeholder groups—including the Texas Lottery Commission itself as well as various financial institutions interested in receiving assignments of lottery winnings—not to mention an overwhelming majority of legislators in both chambers.

Although there is little doubt that legislators *could* bring the parties back to the table and reassemble a coalition to support even more explicit legislation in the next session, there is no reason for the Court to force the Legislature to undertake such a redundant exercise.

3. Plaintiffs' argument to the contrary not only conflicts with legislative intent. It is also precluded by, among other things, (1) the definition of consumer under UCC

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§ 9.201(b), (2) UCC § 1.103 cmt. 3, (3) the canon that specific provisions should be construed as exceptions to general provisions, so that the specific provision is not rendered completely surplusage, and (4) deference to agencies.

In addition, Plaintiffs' argument, if accepted, would put this Court in direct conflict with the reasoning employed by a majority of courts in other states that have addressed these issues to date. *See, e.g., Stone Street Capital, LLC v. California State Lottery Comm'n*, 165 Cal. App. 4th 109, 118-20 (Cal. App. 2008) (concluding that "[t]he specific provisions of the Lottery Act control over the general provisions of the UCC," because that is the only way to construe "the statutes in a way that allows both statutes to operate concurrently"); *State Lottery Dept. v. Settlement Funding, LLC*, 69 Va. Cir. 265, 2005 WL 3476682, *2-3 (Va. Cir. Ct. 2005) (same); *In re Duboff*, 290 B.R. 652, 657 (Bankr. C.D. Ill. 2003) (construing UCC narrowly to avoid conflict with lottery law, by holding that, "[w]hile the winnings of Illinois State Lottery winners are clearly nonassignable under Section 13, the Illinois Commercial Code provides for the possibility of a security interest in lottery winnings from *another state*") (emphasis added).

4. Plaintiffs' reading of UCC § 9.201(b), as detailed in their December 28 letter, is curious.

According to the plain text of UCC § 9.201(b), if "a transaction [is] subject to [UCC] chapter [9]," that same transaction nevertheless remains "subject to any applicable rule of law that establishes a different rule for consumers."

There are two simple steps to applying UCC § 9.201(b) to this case. *First*, the assignment of lottery winnings is indeed "a transaction subject to this chapter." (And if it were not, then nothing in UCC chapter 9 would apply to this case in the first place—which Plaintiffs plainly do not contend.) *Second*, the Lottery Act amendments plainly constitute "an[] applicable rule of law that establishes a different rule for consumers."

This case indisputably satisfies the definition of "consumer" in UCC § 1.201(b)(11). That provision defines "consumer" to cover any "individual who *enters into a transaction primarily for personal, family, or household purposes*" (emphasis added). Notably, UCC § 1.201(b)(11) does not require a "consumer" to be either a buyer or seller. It only requires (1) that the consumer "enter[] into a transaction," and (2) that the transaction be undertaken

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primarily for consumer purposes—that is, for “personal, family, or household purposes”—rather than for commercial purposes.

Plaintiffs’ sole argument to the contrary is that the Lottery Act amendments fail to constitute “a different rule for consumer transactions,” as defined elsewhere in the UCC. But that is not what the statute says. UCC § 9.201(b) applies to “any applicable rule of law that establishes a different rule for consumers.”

Moreover, Plaintiffs’ countertextual argument conflicts with the legislative history of the 1999 amendments, as well as the unanimous views of the court below, State’s Reply Br. at 3, both of which confirm what common sense teaches—that the Legislature amended the Lottery Act in 1999 to protect “consumers.”

The proper reading of UCC §§ 1.201(b)(11) and 9.201(b) is an entirely sensible one, because it merely confirms that the core purpose of the Uniform *Commercial* Code is to establish rules to govern commercial transactions between merchants—while recognizing that ordinary *consumers* may deserve (and state legislatures may enact) additional statutory protections not needed by more sophisticated merchants.

5. Plaintiffs’ ultra vires claim was plainly brought against the wrong defendant.

For their part, Plaintiffs look to the Uniform Declaratory Judgments Act, TEX. CIV. PRAC. & REM. CODE § 37.006(b), discussed in footnote 6 of *Heinrich*, in hopes of avoiding sovereign immunity. But this argument fails for at least two distinct reasons. First, that Act applies only to suits involving constitutional invalidation—whereas this case indisputably involves statutory interpretation only (as the parties make clear in the Clerk’s Record at pages 149 and 156), and not constitutional invalidation. In addition, the plain text of § 37.006(b) waives only the immunity of a “municipality”—and not a state entity—because under the Act, only a “municipality must be made a party.”

The most that might be said for Plaintiffs’ position is that the Act may be ambiguous with respect to the waiver of immunity, when it comes to statutory interpretation cases and cases against the State. But any ambiguity must be resolved in favor of the State. As Texas law requires, and this Court has repeatedly admonished, any waiver of sovereign immunity—to be effective—must be expressed in “clear and unambiguous language.” TEX. GOV’T CODE § 311.034.

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6. The Lottery Act reflects a number of sensitive policy judgments made by the Legislature governing the assignability of lottery winnings—judgments to protect not only lottery winners, but also to protect various *debtors* of lottery winners as well.

For example, the Legislature has made the understandable policy judgment that lottery winners should not enjoy a windfall when they are subject to child support obligations, tax debts, student loan debts, debts for improper welfare payments, or debts to various Texas state agencies, such as the Comptroller, Workforce Commission, and Alcoholic Beverage Commission. *See generally* TEX. GOV'T CODE §§ 466.407, 466.4075, 466.410(h).

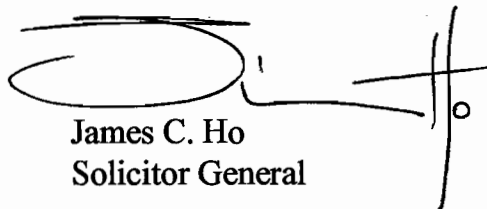
In addition, because many past lottery winners have faced tragic consequences as a result of predatory business practices, the Legislature has seen fit to grant important consumer protections to the lottery winners themselves as well.

All of these provisions deserve respect—and demand enforcement.

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The State is grateful for the opportunity to submit these comments in the hope of further facilitating the Court's consideration of the issues presented in this case.

Sincerely,



James C. Ho
Solicitor General

JCH:vlc

cc: Jeffrey S. Boyd (*via PDF & U.S. Certified Mail-RRR*)
Max R. Tarbox (*via PDF & U.S. Certified Mail-RRR*)