STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
FAX (402) 471-3297

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

91027

APR 11 1991

DATE: April 10, 1991

SUBJECT: Constitutionality of Various Restitution Options for Commonwealth Depositors in Light of Haman v. Marsh

REQUESTED BY: Governor E. Benjamin Nelson, Senator Don Wesely, Senator David Landis, Senator Dianna R. Schimek, Senator Chris Beutler, Senator Lavon Crosby, and Senator Jerome Warner

WRITTEN BY: Don Stenberg, Attorney General

This Opinion is in response to your correspondence of April 5, 1991, in which you requested our views as to the constitutionality of various options for the restitution of depositors who suffered losses as a result of the Commonwealth failure. You indicated that your proposals came about as a result of meetings and discussions of possible legislative options to provide restitution to Commonwealth, American Savings, and State Securities depositors following our state supreme court's decision in Haman v. Marsh, No. 90-474, March 29, 1991, which struck down LB 272A. Our responses to your various questions are set out below.

At the outset, we must note that we have no specific legislation in front of us. You have simply requested our Opinion concerning several "options" that generally describe various funding proposals for payment of depositors. As a result, our responses to your questions must necessarily also be general, based upon the broad concepts that you have presented to us.

We must also note that our responses below are based upon the court's decision in Haman. We have reviewed that opinion, and our conclusions regarding your proposals reflect our assessment of the supreme court's likely reaction to your various "options." We have

L. Jay Bartel
J. Kirk Brown
Laurie Smith Camp
Elaine A. Chapman
Delores N. Coe-Barbee
Dale A. Comer
David Edward Cygan
Mark L. Ells
James A. Elworth
Lynne R. Fritz
Royce N. Harper
William L. Howland
Marilyn B. Hutchinson
Kimberly A. Klein
Donald A. Kohtz
Sharon M. Lindgren
Charles E. Lowe
Lisa D. Martin-Price
Lynn A. Melson
Harold I. Mosher
Fredrick F. Neid
Paul N. Potadle
Marie C. Pawol
Kenneth W. Payne
LeRoy W. Sievers
James H. Spears
Mark D. Starr
John R. Thompson
Susan M. Ugai
Barry Waid
Terri M. Weeks
Alfonza Whitaker
Melanie J. Whittamore-Mantzios
Linda L. Willard

asked for a rehearing in the Haman case. Should the court grant a rehearing, different conclusions may ultimately be warranted based upon any different opinion issued by the court in that case.

Your first suggested option is to amend the Crime Victims Reparation Act, Neb.Rev.Stat. §§ 81-1801 et seq., so as to allow for repayment of depositor claims. In our view there are a number of potential constitutional and other problems which would be encountered with this approach.

Initially, we note the statute of limitations under the Act which limits claims to those filed within 2 years of the alleged crime and also provides that notice of the crime must have been given to the police within 3 days of its occurrence. Neb.Rev.Stat. § 81-1821 (Reissue 1987). It appears that depositor claims would be barred by this provision. Further, if the statute were amended to extend the limitations period and to apply the extended period retroactively to the depositors, this would likely violate the special legislation provisions of Article III, § 18 of the Nebraska Constitution. In Cox v. State, 134 Neb. 751, 279 N.W. 482 (1938), the Nebraska Supreme Court held that that constitutional provision prohibited the Legislature from enacting a law which extended a statute of limitations which had already run and waived the state's sovereign immunity so as to allow a particular individual to sue the state. Certainly if the statute of limitations were extended it would have to be extended for everyone with a potential claim under the Crime Victims Reparations Act - not just the Commonwealth, American Savings and State Securities depositors.

Similarly, this principle also applies to other provisions in the Act which otherwise would bar or limit depositor recovery. For example, § 81-1823 limits the amount of recovery to $10,000 per claimant per incident; and under §§ 81-1818 and 81-1819 payment is limited to losses incurred as the result of personal injury or death of the victim. Again, such provisions would all have to be changed for all potential claimants. Any attempt to limit the amendments so that only depositors in the three institutions are covered would probably run afoul of the special legislation prohibition in the Nebraska Constitution.

It is clear from the Haman decision that any legislation which, as a practical matter, provides state compensation to these depositors uniquely and without a general law which could realistically cover others within a reasonable classification would be struck down as unconstitutional "class legislation." Such legislation would also be deemed to create an unconstitutional "closed class" because it, in effect, limits the application of the law to a present condition with no room or opportunity for an increase in the numbers of the class by future growth or development.

Another problem with the first option is the fact that the real "victim" of the crimes you list is the financial institution itself - not depositors therein. As established in Weimer v. Amen, 235 Neb. 287, 455 N.W.2d 145 (1990), the institution - and hence, its receiver - owns all claims for wrongs done to the institution and to the depositors and creditors in common. Therefore, the receiver must assert these claims - not the individual depositors. However, as the court noted in Haman, the Commonwealth receiver did proceed with tort claims against the state and settled them for $8.5 million. In return, the receiver, with specific court approval, executed a release which released the state, its officers and employees from any and all claims or causes of action whatsoever arising out of the Commonwealth debacle. This release is clearly broad enough to encompass claims under the Crime Victims Reparation Act and is binding on individual depositors and creditors of Commonwealth. Any legislative attempt to circumvent that release by making the state liable to individual depositors through retroactive changes in the Crime Victims Reparation Act would constitute the kind of special legislation condemned by the court in Haman and Cox v. State, supra. Likewise, because the successors to American Savings and State Securities did bring legal actions against the state which were ultimately dismissed, the depositors in those institutions are barred by those legal results from proceeding individually with claims against the state.

Also in connection with the first option, we are concerned by the basic legal principle that the Legislature cannot circumvent express provisions of the Constitution by doing indirectly what it cannot do directly. Banner County v. State Board of Equalization, 226 Neb. 236, 411 N.W.2d 35 (1987); Moeller, McPherrin & Judd v. Smith, 127 Neb. 424, 255 N.W. 551 (1934). Haman has made clear that the Legislature cannot simply appropriate sums to pay the depositors for their losses without violating the "special legislation" and "extending the credit of the state" prohibitions of the Nebraska Constitution. Attempting to achieve the exact same result by means of amending the Crime Victims Reparation Act such that funds would still end up being appropriated to reimburse these individuals for their losses as the result of acts which occurred more than 7 years ago might well be seen by the court as merely seeking to do indirectly what cannot be done directly under the Constitution.

Finally, we have serious concerns about attributing all or any particular portion of the depositor losses to crimes. Of course, the losses are ultimately all tied to the collapse of Commonwealth Savings Company. It is unclear, however, whether that collapse was caused by criminal activity or by mismanagement or by underlying economic conditions in the real estate market or by some combination of those three elements. Moreover, it would be extremely difficult, if not impossible, to trace any particular losses or portion of losses to any particular criminal activity.

Such an allocation would be extremely complex from a fact point of view and, as a practical matter, we do not know how it could be done. On the other hand, the Legislature could not simply declare that all remaining losses are the result of criminal acts since such a legislative determination would not be based on any rational basis or any logical analysis. The courts would certainly not be bound by such a legislative declaration.

The second question which you have requested us to address concerns the constitutionality of legislation providing a state income tax credit to depositors to "reimburse" them for losses resulting from the failure of Commonwealth, American Savings, and State Securities Savings. Your initial query in this regard concerns whether the establishment of a state income tax credit, available solely to depositors sustaining financial losses as a result of the failures of these three specific institutions, would be constitutional.

While the Legislature obviously possesses authority to classify and define in the area of income taxation, its power to legislate on this subject is necessarily limited by the provisions of the state and federal constitutions. In this regard, we believe the opinion in Haman reveals our supreme court would find unconstitutional an attempt to "reimburse" depositors of these specific financial institutions in this manner for losses suffered as the result of the failure of these entities.

In Haman, the court declared the provisions of LB 272A to be unconstitutional special legislation in violation of Neb. Const. art. III, § 18. Specifically, the court held the reimbursement provided to depositors in these institutions under the Act violated the constitutional prohibition against special legislation because the classification created was unreasonable and arbitrary, and because the Act created an impermissible "closed" classification. Haman, slip op. at 16-18; 20-21. The court further found LB 272A accomplished an unconstitutional extension of the credit of the state in aid of a private corporation, the NDIGC, by requiring the state to act as the "surety or guarantor of another's debts," contrary to Neb. Const. art. XIII, § 3. Haman, slip op. at 21-27.

The same constitutional infirmities would exist if legislative action were taken to establish a state income tax credit to provide "reimbursement" to depositors of these three institutions. There is no reason to believe the court would alter its opinion as to the "reasonableness" of such a classification in this context, and, in any event, the "closed" nature of such a classification seems self-evident. Thus, we believe the court would reject any attempted legislation of this nature as violative of Article III, § 18, irrespective of its views as to the effect of the prohibition in Art. XIII, § 3.

Alternatively, you ask whether it would be permissible for the Legislature to provide a state income tax credit to reimburse depositors for any losses resulting from the failure of any "financial institution subject to state regulation."

In the event the Legislature were to enact legislation of a general nature, providing for a credit against state income tax liability based on losses suffered by depositors due to the failure of any financial institution regulated by the state, we believe the prohibition against special legislation contained in Article III, Section 18, would not apply. It appears reasonable for the Legislature to provide an income tax credit to a class consisting of all depositors incurring unrecovered losses as a result of the failure of any state regulated financial institution, and that such would not create an impermissible "closed" classification. Based on the decision in Haman, however, there is some risk that our supreme court may not accept such a classification as reasonable, or that the court may find legislation of this type creates an unconstitutional "closed" classification if it is not "reasonably probable" that others beyond the depositors in the three institutions previously mentioned may benefit from such legislation. We believe it is possible for the Legislature to structure legislation of this nature which may avoid these constitutional concerns.

With regard to the question of whether the establishment of a state income tax credit may run afoul of the prohibition against extending the credit of the state in Article XIII, Section 3, relied upon, in part, by the court in Haman in striking down LB 272A, it is our view that legislation could be enacted which would not contravene this restriction. A distinction should be drawn in this context between a "nonrefundable" credit and a "refundable" credit. In our view, the allowance of a "nonrefundable" credit (available only to offset actual tax liability) should not be construed to violate Article XIII, Section 3, as the "credit of the state" is not being given or loaned in any manner by the provision of an income tax credit of this nature. In Haman, the court noted, "[t]he state's credit is inherently the power to levy taxes and involves the obligation of the general fund." Haman, slip op. at 23. An income tax credit simply does not involve an "obligation of the general fund" in the sense contemplated by Article XIII, Section 3.

If the Legislature were to establish a "refundable" credit (available irrespective of actual tax liability), we believe a different result may apply. In this context, a depositor receiving a refund based on a credit which eliminated any state income tax liability would necessarily be receiving a payment of state funds by virtue of the credit. As noted previously, the court has consistently held the Legislature cannot circumvent an express

provision of the Constitution by doing indirectly what it cannot do directly. Banner County v. State Board of Equal., supra; Moeller, McPherrin & Judd v. Smith, supra. The court may find legislation requiring the expenditure of state funds by payment of refunds to depositors in this manner to be an indirect attempt to permit the obligation of state funds in contravention of Article XIII, Section 3, based on the analysis applied by the court in Haman.

Option Three, your final proposal for providing state funds to depositors, involves amending our state Constitution in an attempt to circumvent some of the constitutional difficulties raised by the Haman case. Specifically, you propose a change in Legislative Resolution 24CA, the proposed state constitutional amendment creating a state lottery, which would authorize the Legislature to reimburse the depositors out of lottery fees or proceeds notwithstanding any other provisions of the state Constitution.

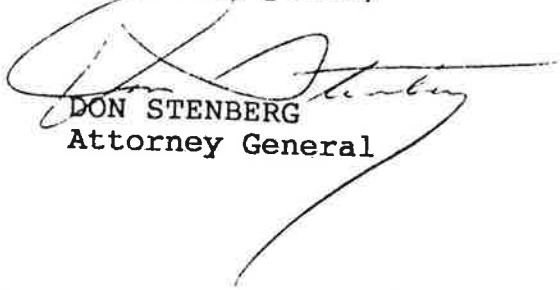
The Haman decision rejected LB 272A on the basis of Article III, Section 18, of our state Constitution, which prohibits special legislation and closed legislative classifications, and on the basis of Article XIII, Section 3, which prohibits extending the state's credit to a private corporation. If the Nebraska Constitution were to be specifically amended so as to suspend those constitutional prohibitions with respect to payments to depositors, such payments could be paid without constitutional difficulty under those sections. As a result, we believe that such an amendment to our state Constitution could apply retroactively and could be limited to this class of citizens. In effect, the state constitutional barriers cited in Haman limiting such provisions would not apply.

We would observe, with respect to Option Three, that it might be possible to argue that such a repayment plan would violate the due process provisions of the federal Constitution. However, such an argument would be based upon antiquated notions of substantive due process, and we do not believe that it would prevail.

In sum, we believe that the proposals outlined in your Option One would run into the same constitutional objections as did LB 272A in the Haman case. On the other hand, broadly defined legislation based on Option Two as discussed above or a constitutional amendment in the form proposed by Option Three could avoid the constitutional infirmities described in Haman. As we noted initially, our conclusions in this Opinion are based upon

your general proposals. If we are asked to review specific legislation, we will be in a better position to analyze the constitutionality of a particular repayment plan.

Sincerely yours,



DON STENBERG
Attorney General

05-04-14.91

cc: Patrick J. O'Donnell
Clerk of the Legislature