Linda willard

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

#90036

NO.
STATE OF NEBRASKA
OFFICIAL
MAY 6 1991
DEPT. OF JUSTICE

DATE: May 6, 1991

SUBJECT: Amendment to LR 24CA Which Would Require the Proceeds of a State Lottery to be Used to Repay Depositors of Failed Industrial Savings Institutions

REQUESTED BY: Senator Chris Beutler, Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

Legislative Resolution 24CA is a proposed constitutional amendment which, if passed by the voters of Nebraska, would establish a lottery to be operated and regulated by the state. You have proposed an amendment to LR 24CA which is apparently intended to allow reimbursement of the losses of certain depositors of failed industrial institutions out of state lottery proceeds. You have asked us whether the amendment in question "will result in the depositors of failed industrial banks, including Commonwealth, American Savings, and State Securities, being paid in full should the people approve this proposition." You have also asked us for drafting suggestions. Our opinion on the issue you have raised is set out below.

The amendment to LR 24CA at issue provides that proceeds of a state lottery shall be appropriated by the Legislature:

> (b) For payments to depositors of industrial loan and investment companies for any certificate of indebtedness or any other evidence of indebtedness of an industrial loan and investment company which was unpaid when an industrial loan and investment company that filed bankruptcy pursuant to Chapter 11 of the United States Bankruptcy Code after November 1, 1983, filed bankruptcy or when an industrial loan and investment company in

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

> receivership entered receivership, until such time as all such indebtedness is paid;

The amendment also provides that the proceeds of a lottery shall be used for repayment of depositors "notwithstanding any other provision of this Constitution to the contrary."

In our Opinion No. 91027, dated April 11, 1991, we considered several proposals for reimbursement of the depositors of failed industrial savings institutions in light of our supreme court's decision in Haman v. Marsh, 237 Neb. 699, ____ N.W.2d ____ (1991). One such proposal was an amendment to LR 24CA which would authorize the Legislature to reimburse the depositors out of state lottery fees or proceeds notwithstanding any other provisions of the Nebraska Constitution. We concluded that such a constitutional amendment would be sufficient to circumvent the constitutional difficulties noted in Haman. For the reasons detailed in our Opinion No. 91027, we believe that your current proposal would similarly avoid the constitutional problems discussed in that case.

While we believe that your proposed amendment to LR 24CA would avoid the constitutional difficulties set out in Haman, we would also make several comments concerning the language you have proposed.

First of all, you ask if your amendment would be sufficient to ensure that depositors are "paid in full should the people approve this proposition." We are not entirely sure what you mean by "paid in full." For example, some individuals have taken the position that depositors of the institutions in question are entitled to interest on the monies deposited and lost over the period of time from the failure of the institutions. If your reference to "payment in full" includes interest, you may wish to state that specifically in the proposed constitutional language.

Your method for designating the depositors who will receive lottery proceeds is greatly dependent on facts. For example, in your draft, the only institutions covered by the proposed constitutional amendment are those industrial loan and investment companies which filed bankruptcy pursuant to Chapter 11 of the United States Bankruptcy Code after November 1, 1983, or which entered receivership. We are concerned that some depositors might inadvertently be omitted because their institution is somehow left out of the ones described. Is there some way to designate the institutions involved more broadly without being so fact specific? In that regard, you should draft the language describing the institutions covered in such a way that changes in the status of any institution between passage of the constitutional amendment and full payment to depositors or changes in status in any other way do not result in excluding that institution from those covered.

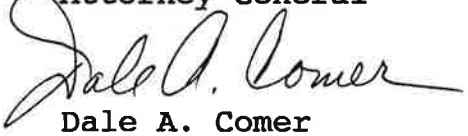
In a similar fashion, we are concerned that your references to "certificate of indebtedness" or "other evidence of indebtedness" might not be broad enough to cover all the types of accounts held by the depositors in the various failed institutions. Is there some way to broaden that language so that all forms of accounts are clearly covered?

We also believe that your proposed language could be read to require payments of the total sums deposited by depositors irrespective of any monies they may have received subsequently from the state or from the receiver. We assume that you wish depositors to receive only the unpaid portion of their original investment which was lost. If so, you may wish to alter the amendment language to clearly require a setoff.

Finally, we would suggest that your proposed language requiring expenditure of lottery funds for repayment of depositors "notwithstanding any other provision of this Constitution to the contrary" may not be entirely clear since there are no other constitutional provisions which contain language specifically referencing either such a repayment or a lottery. Perhaps it might be better to provide that the proceeds of the lottery will be used for the purposes of subdivision (3)(b) notwithstanding any other provision of the Constitution "which might otherwise prevent payments to depositors as described in said subdivision."

Sincerely yours,

DON STENBERG
Attorney General

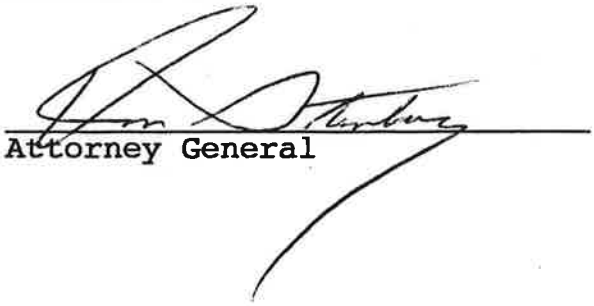


Dale A. Comer
Assistant Attorney General

05-06-14.91

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

APPROVED BY:



Attorney General