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DATE: April 4, 1991

SUBJECT: Constitutionality of LB 718 as Amended - Legislative Authorization of Parimutuel Wagering on the Results of Horseraces by Means of "Telephonic Wagering" or Through "Teleracing Facilities."

REQUESTED BY: Senators Arlene Nelson and Stan Schellpeper
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
L. Jay Bartel, Assistant Attorney General

You have each requested our opinion regarding the constitutionality of LB 718, as amended by Committee Amendment AM0425. In its original form, LB 718 proposed to authorize parimutuel wagering on the results of horseraces by "racetrack messenger services" approved and licensed by the Nebraska State Racing Commission. Under the Committee Amendments to the bill, the references to "racetrack messenger services" have been eliminated, and, generally, have been replaced by references to the allowance of "telephonic wagering" on the results of horseraces or the placing of wagers through "teleracing facilities." You have each asked us to consider whether LB 718, as amended, violates Neb. Const. art. III, § 24.

Article III, Section 24, of the Nebraska Constitution, which expressly limits the power of the Legislature to authorize various gambling activities, provides, in pertinent part:

> Nothing in this section shall be construed to prohibit the enactment of laws providing for the licensing and regulation of wagering on the results of horseraces, wherever run, either within or outside of the state, by the parimutuel method, when such wagering is conducted by licensees within a licensed racetrack enclosure,.... (Emphasis added).

In a prior opinion, we concluded that the restrictions on the Legislature's power in Article III, Section 24, did not preclude the Legislature from authorizing parimutuel wagering at licensed racetrack enclosures in the state via simulcast arrangements on the results of horseraces conducted at other licensed racetrack facilities in Nebraska. Attorney General Opinion No. 87041, March 31, 1987. We noted that the courts of New Jersey had grappled with the constitutionality of legislation authorizing wagering on the results of horseraces conducted within the state under a "simulcast" system similar to that proposed to be established in Nebraska. Atlantic City Racing Ass'n v. Attorney General, 189 N.J. Super. 549, 461 A.2d 178, aff'd 198 N.J. Super. 247, 486 A.2d 1261 (1983), rev'd 98 N.J. 535, 489 A.2d 165 (1985).[1] Upon consideration of these cases, we determined that, under our state constitution, the Legislature's authority to permit parimutuel wagering on the results of horseraces "when such wagering is conducted by licensees within a licensed racetrack enclosure" was consistent with the wagering authorized under the simulcast legislation, as such wagers were, in fact, placed "within a licensed racetrack enclosure." In considering the constitutionality of the prior legislation authorizing "simulcast" arrangements of this nature, we were not required to deal with the specific issue raised by your current requests, to wit, whether the state constitution permits the Legislature to authorize parimutuel wagering on the results of horseracing by providing for "telephonic wagering" or the operation of "teleracing facilities" located outside the boundaries of licensed racetrack enclosures, such as proposed under LB 718 as amended.[2]

In State ex rel. Hunter v. The Araho, 137 Neb. 389, 289 N.W. 545 (1940), the Nebraska Supreme Court addressed the question of whether the 1934 amendment to Article III, Section 24 (and implementing legislation) which legalize parimutuel horserace betting permitted the operation of establishments accepting wagers on the results of horseraces when such establishments were located outside the enclosure of licensed racetracks. Rejecting the contention that the constitutional amendment, and the legislation adopted pursuant to the amendment, authorized such wagering, the court stated:

> [I]t must be evident that such wide-spread gambling upon horseraces was not within the scope of the amendment, adopted by the majority of the voters of Nebraska, to permit only pari-mutuel betting and

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[1] For a complete discussion of these cases, we refer you to our prior Opinion No. 87041.

[2] Subsequent to the issuance of our opinion and the Legislature's enactment of legislation approving "intrastate" simulcasting of this nature, the voters in 1988 approved an amendment to Neb. Const. art. III, §24, authorizing wagering on horseraces conducted outside of Nebraska. The authorization of "interstate" simulcast wagering of this nature does not affect our response to your requests concerning the constitutionality of legislation approving "telephonic wagering" or the operation of "teleracing facilities" located outside the boundaries of racetrack enclosures in the state.

> gambling, or in the minds of the members of the legislature, who adopted section 2-1513, supra, but it only permitted a definite form, known as pari-mutuel horse race betting, and required that the same must be conducted under license duly issued by the state racing commission, and be conducted in strict accordance with the conditions and limitations as set out in said law, which requires that it be conducted by licensees within the race track enclosure at licensed horserace meetings.
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> In our opinion, nothing in the amendment to the constitution of Nebraska, or in the laws passed to carry said change into effect, supports the contention of the defendants that the bars are now down on all forms of games of chance, betting, and gambling in connection with horse races of any kind, wherever held.

Id. at 396-97, 289 N.W. at 550 (Emphasis added).[3]

In our opinion, the authorization of "telephonic wagering" or the placing of wagers through "teleracing facilities" under the proposed bill, as amended, is contrary to both the letter and spirit of our fundamental law. "Telephonic wagering" is defined as "the placing of parimutuel wagers by telephone to a telephone deposit center at a licensed racetrack . . .." LB 718, as amended, § 6(5). "Teleracing facility" is defined as "an area occupied by a licensee for the purpose of conducting telewagering. . . ." LB 718, as amended, § 6(6). "Telewagering" is defined as "the placing of a wager through betting terminals linked to a licensed racetrack, which electronic link instantaneously transmits the wagering information to the parimutuel pool for acceptance and issues tickets as evidence of such wager." LB 718, as amended, § 6(7).

The Legislature's power to define terms is limited because the Legislature may not, under the guise of definition: (1) abrogate or contradict an express constitutional provision; or (2) establish a definition which is unreasonable or arbitrary. See Natural Gas Pipeline Co. v. State Bd. of Equal., 237 Neb. 357, 377, ___ N.W.2d. ___ (1991) (Grant J., concurring); State ex rel. Meyer v.

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[3] The constitutionality of legislation prohibiting the operation of off-track "messenger services" accepting wagers for delivery to racetracks has been upheld in several cases. Midwest Messenger Ass'n v. Spire, 223 Neb. 748, 393 N.W.2d 438 (1986); Pegasus of Omaha, Inc. v. State, 203 Neb. 755, 280 N.W.2d 64 (1979); Nebraska Messenger Services v. Thone, 478 F. Supp. 1036 (D.Neb. 1979). These decisions, while upholding the authority of the Legislature to prohibit messenger service activities of this nature, do not address the question of whether the Legislature may constitutionally permit the telephonic wagering or placing of wagers from off-track "teleracing facilities" locations provided for under LB 718, as amended.

Peters, 191 Neb. 330, 215 N.W.2d 520 (1974); Moeller, McPherrin & Judd v. Smith, 127 Neb. 424, 255 N.W. 551 (1934). The Legislature may not, under the guise of definition, nullify or circumvent a provision of the Nebraska Constitution.[4]

Section 2 of LB 718, as amended, provides, in part, that "[w]agers placed through licensed teleracing facilities or by approved telephonic wagering. . . shall be deemed to be wagers placed and accepted within the enclosure of any racetrack." (Emphasis added). Section 3 of the bill, as amended, would amend Neb.Rev.Stat. § 2-1216 (Reissue 1987) to provide, in part, that: "The parimutual (sic) system of wagering on the results of horseraces, when conducted within the racetrack enclosure at licensed horserace meetings or through teleracing facilities, shall not under any circumstances be held or construed to be unlawful, ..." (Emphasis added).

In light of the foregoing, while we determined it was permissible for the Legislature to authorize simulcast wagering on horseraces within the confines of a "licensed racetrack enclosure" under Neb. Const. art. III, § 24, we cannot conclude that it is permissible for the Legislature to enact legislation such as LB 718, as amended. Simply put, we believe it is apparent that any attempt to define the telephonic wagering authorized under the bill as the making of wagers "within licensed racetrack enclosures" is contrary to any common understanding of such terms, and defies any reasonable interpretation of the plain language of the limits on parimutuel wagering imposed by the Constitution. The people have not authorized parimutuel wagering on the results of horseracing at any location other than "within a licensed racetrack enclosure." The Legislature cannot circumvent this provision by impermissibly defining wagering by telephone from locations outside a racetrack to be "deemed" to be wagering within the confines of a licensed racetrack enclosure. Authorization for this type of wagering must be obtained by amending the provisions of our Constitution.

We recognize there are cases from other jurisdictions holding, in a variety of contexts, that a "wager" or "bet" is contractual in nature, and requires both an offer and an acceptance in order to be created. See State ex rel. Reading v. Western Union Tel. Co., 336 Mich. 84, 57 N.W.2d 537 (1953) (telegraphing out-of-state of offers to bet on horseraces not subject to injunction as public nuisance for violating gambling laws, as bets did not occur until acceptance, which

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[4] In two prior opinions, we concluded that the Legislature could not, consistent with Article III, Section 24, legislate to authorize "off-track" parimutuel wagering on the results of horseraces. Report of Attorney General 1973-74, Opinion No. 7, Feb. 7, 1973, and Opinion No. 14, Feb. 20, 1973. In each instance, we advised that, in our view, the Legislature was without authority to employ its definitional powers to "define" off-track wagering sites as being "a part of the racetrack enclosure" for purposes of satisfying the requirements of Article III, Section 24. Id. at pp. 8, 20.

occurred outside the state); see also State ex rel. Turner v. Drake, 242 N.W.2d 707 (Iowa 1976) (individual's placing of and collecting bets on the results of horseraces at racetracks for others, without compensation, did not violate statute prohibiting the recording or registration of bets, as bet requires agreement between two parties to pay something of value upon the happening or unhappening of a specified contingent event); State v. Countdown, Inc., 319 S.2d 924 (La. 1975) (operation of messenger service which took money from customers to racetrack and placed bets did not constitute illegal "off-track" betting, as no bet or wager occurred until the purchase of parimutuel tickets at the racetrack). But see Hochberg v. New York City Off-Track Betting Corp., 74 Misc. 2d 471, 343 N.Y.S.2d 651 (N.Y. Sup. Ct. 1973), aff'd 43 A.D.2d 910, 352 N.Y.S.2d 1423 (N.Y. App. Div. 1974) (placing of wager at racetrack does not create a wagering contract or agreement between the bettor and the track).

Under such authority, it could be argued that the Legislature's definitions in LB 718, as amended, providing that wagers placed through "teleracing facilities" or by "telephonic wagering" are deemed to be placed and accepted "within a licensed racetrack enclosure," might satisfy the requirements of Article III, Section 24, if no wager may be said to exist until it is "accepted" when received at the racetrack. In view of the restrictive nature of the language of our state constitution, as well as our prior opinions concluding the constitutional requirement that parimutuel wagering on the results of horseraces be "conducted within a licensed racetrack enclosure" precluded the Legislature from enacting legislation authorizing "off-track" betting, we are compelled to conclude the provisions of LB 718, as amended, would, if challenged, be found unconstitutional. While the Legislature possesses broad powers of definition, we do not believe our Nebraska courts would construe the constitution's authorization of wagering on the results of horseraces "when conducted by licensees within a licensed racetrack enclosure" to encompass the type of "off-track" activities contemplated under LB 718, as amended.

In sum, it is our opinion that, based on the language of Neb. Const. art. III, § 24, the provisions of LB 718, as amended, are unconstitutional.

Very truly yours,

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APPROVED BY:

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