



For a fully searchable and synchronized transcript and oral argument video, go to the TX-ORALARG database on Westlaw.com.

This is an unofficial transcript derived from video/audio recordings  
Supreme Court of Texas.

Texas Lottery Commission, Petitioner,

v.

First State Bank of DeQueen, Stone Street Capital, Inc., and Cletius L.  
Irvan, Respondents.

No. 08-0523

December 16, 2009

Oral Argument

Appearances: James C. Ho, Office of the State Attorney General, Austin,  
TX, for Petitioner.

Jeffrey S. Boyd, Thompson & Knight LLP, Austin, TX, for Respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet O'Neill,  
Dale Wainwright, David Medina, Paul W. Green, Phil Johnson, Don R.  
Willett and Eva M. Guzman, Justices.

CONTENTS

ORAL ARGUMENT OF JAMES C. HO ON BEHALF OF THE PETITIONER

ORAL ARGUMENT OF JEFFREY S. BOYD ON BEHALF OF THE RESPONDENT

REBUTTAL ARGUMENT OF JAMES C. HO ON BEHALF OF PETITIONER

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear  
argument in the first case, 08-0523, Texas Lottery Commission vs. First  
State Bank of DeQueen.

MARSHALL: May it please the Court, Mr. Ho will present argument for  
the Petitioner. The Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF JAMES C. HO ON BEHALF OF THE PETITIONER

ATTORNEY JAMES C. HO: Mr. Chief Justice and may it please the Court,  
the legislature did not intend to do nothing when it amended the  
Lottery Act in 1999. To the contrary, it intended to protect consumers  
against predatory business practices. The Act is indisputably  
constitutional, yet the court below refused to enforce it as written in  
conflict with rulings across the country. The court below lacked  
jurisdiction for two separate and independent reasons. The lack of a  
proper defendant in this case is a relatively simple issue, so we will

focus our time today instead on the second jurisdictional defect, one that precludes jurisdiction even if plaintiffs had sued a proper state official, and that's the fact that plaintiffs cannot ultimately prove, a valid ultra vires claim. Under Heinrich, a plaintiff can avoid sovereign immunity only if it both alleges and ultimately proves a valid ultra vires act. After all, the only reason an ultra vires act avoids sovereign immunity is if an official's conduct does indeed fall outside of legal authority. The parties have competing statutory arguments, but it all comes down to this one central point, surely the legislature did not intend to do nothing when it amended the Lottery Act in 1999, so we should try to do everything we can to avoid this extreme result unless every legal indication requires it. And in this case, all arrows actually point to enforcing the Lottery Act as written. I'll talk about the UCC text first and then the canons of interpretation. The plaintiff's central theory is this, that 9406(f) of the UCC bumps out all of the Lottery Act provisions.

JUSTICE NATHAN L. HECHT: Well, before 1999 and the amendment that year, did the UCC impact lottery winnings, assignment of lottery winnings?

ATTORNEY JAMES C. HO: It did not.

JUSTICE NATHAN L. HECHT: Before 1999 it restricted assignments of contracts, but I guess there's no contract involved?

ATTORNEY JAMES C. HO: Right. I believe in 1999 the UCC went through a major overhaul, a 218-page amendment. The word "account" was modified as part of that.

JUSTICE NATHAN L. HECHT: I was trying to get in mind the status before '99 and that was that the Lottery Act restricted assignments and the UCC didn't, did not.

ATTORNEY JAMES C. HO: Right.

JUSTICE NATHAN L. HECHT: Yes.

ATTORNEY JAMES C. HO: If it helps the Court, let me be very clear, these statutes conflict, so one has to give way to another, the only question is which one. If you start with the UCC text, the plaintiffs talk about 9406(f) allegedly bumping out the protections of the Lottery Act. The problem with that argument is that 9406(f) is itself bumped out by another provision of the UCC, namely 9201 with regard to consumers. After all, let's remember, the core purpose of the Uniform Commercial Code is to establish a set of rules to govern commercial transactions, but the UCC also recognizes that consumers may need additional protections and that's what 9201 makes clear. It explicitly states that when you have cases of conflict between the UCC and other statutes that deal with consumers, that the UCC must give way to the statute that establishes a different rule for consumers.

CHIEF JUSTICE WALLACE B. JEFFERSON: Is there a definition of "consumer" that makes this lottery purchaser governed by the Act?

ATTORNEY JAMES C. HO: There is, Your Honor. It appears in 1201(b)11 of the UCC. That provision defines "consumer" as an individual who enters

into a transaction primarily for personal, family or household reasons, as opposed to of course commercial for-profit reasons. And even the judges below who ruled against the Commission, even they confirm what the legislative history makes clear and what policy makers nationwide understand which is that these provisions were of course intended to protect consumers.

JUSTICE DALE WAINWRIGHT: Is there anything in the records of the legislature that show that they knew that there was a conflict between these provisions passed within two weeks of each other?

ATTORNEY JAMES C. HO: No. We have not found, I don't think either side has found anything in the legislative history to indicate a specific intent. It's sort of ships passing in the night. What that I think confirms then is that when the legislature passed the amendments to the Lottery Act, it fully intended for those words to have meaning and that when they passed the UCC, they had no specific intent to disrupt any future legislation of this kind.

JUSTICE DALE WAINWRIGHT: So your two primary arguments, as I understand it, are that the Lottery Act Amendments are more specific to this transaction at issue and that they were passed subsequent to the UCC amendments and therefore take precedent? Is that accurate?

ATTORNEY JAMES C. HO: That is accurate. Frankly, we don't even need to get to those canons because 9201 is so clear, but even if we didn't have 9201 we could just follow other Courts around the country who have held very clearly that the specific control is the general, the canon against surplusage, both of those indications point directly towards enforcement of the Lottery Act. 9201 expressly applies to consumers and expressly applies to the entire chapter, Chapter 9, including 9406. 9201 is further bolstered by other elements of the UCC, namely UCC 1.103, Comment 3, where the UCC makes very clear that courts may use, quote, "Other interpretive principles addressing the interrelationship between statutes." And what they mean by that is the UCC may give way to statutes that, quote, "are specifically intended to provide additional protections to a class of individuals," precisely what is going on in this case. It's essentially the UCC's own articulation of the principle that specific controls the general.

JUSTICE DAVID M. MEDINA: Mr. Ho, what is so specific or so significant for the State to have an interest to control the last two payments as opposed to the first three or the middle five? Why is it the last two?

ATTORNEY JAMES C. HO: Sure, right. That is an important part of really a whole schedule, a whole set of protections, but that protection in particular is designed to shield lottery winners with respect to really the two payments that are most vulnerable to exploitation because those are going to be the ones most undervalued by lottery winners. But let's be clear, there's much more at stake in this case than even just those two years. The Lottery Act Amendments in 1999 provide a number of protections. The right to independent counsel, the right to tax advice, the right to financial advice, a number of notice requirements, a three-day cooling period various other provisions. According to the plaintiff's theory and according to the majority below, all of those protections are wiped off the books, so it's not just the two-year protection. The last thing I'll mention about the two-year protection

is this was not some specific or unique provision to Texas, California, for example, has a three-year provision and the California courts have rejected Stone Street's arguments and enforced the Lottery Act provisions in California precisely as they are written.

JUSTICE EVA GUZMAN: And the rationale behind the two years is just that those are the most critical or im-portant payments to a lottery winner?

ATTORNEY JAMES C. HO: It's essentially a policy judgment by the legislature, Your Honor, to decide that those two payments are so far away consumers or some lottery winners may be particularly vulnerable to just sort of ignoring those, and we want to make sure that they at least get something out of their lottery prize.

JUSTICE HARRIET O'NEILL: They're also discounted the greatest, aren't they?

ATTORNEY JAMES C. HO: Precisely, Your Honor, precisely. Now because 9201 expressly bumps out 9406, you really don't need any canons of interpretation, you can just sort of resolve the case right there. But in any event, the canons simply reinforce the precisely the same conclusion that we've already reached in any event and as other courts in other states have already held. You begin with the canon against surplusage. The canon against surplusage, of course, is the principle that you shouldn't lightly read a few words out of a statute, every word should have meaning. Well, this canon has special force in this context because what we're talking about here is not just reading a few words out of a provision and we're not even talking about reading a whole statutory section out of law, we're talking about essentially reading an entire act of the legislature out of the law. Relatedly, there's the canon of the specific controlling the general. The obvious question you have to ask when you invoke this canon is which provision is the specific one and which provision is the general one. And what you do, what this Court has made clear is you interpret both statutes in a manner that allows both statutes to have effect, to have at least some effect. The specific provision would then simply be a carve-out, an exception to the general provision. Under the ruling below there would be nothing left to the Lottery Act. In fact, the ruling below couldn't be clearer, they are essentially writing those provisions off the books.

JUSTICE DON R. WILLETT: Mr. Ho, I know you're saying that 406 is bumped out by 201, is the State also arguing, I saw in a footnote that there's an argument that may be subsidiary that Article 9 doesn't apply at all because the assignment was undertaking to satisfy a preexisting debt. Is the State still contending, making that argument or how does that--what's the interplay between that and what you're arguing today?

ATTORNEY JAMES C. HO: We do argue that. That is a narrower way of addressing just the factual issues in this case. We presume that the Court took this case because you want to address the broader issues, but that would resolve this specific transaction. So with respect to the specific controls the general --

JUSTICE PHIL JOHNSON: Can I stop you there for just a minute?

ATTORNEY JAMES C. HO: Certainly.

JUSTICE PHIL JOHNSON: What is the preexisting debt?

ATTORNEY JAMES C. HO: The preexisting debt is the fact that Irvan, as I understand the transactions here, Irvan had a substantial debt to the First State Bank of DeQueen.

JUSTICE PHIL JOHNSON: But that was incurred after he won the lottery?

ATTORNEY JAMES C. HO: Correct.

JUSTICE PHIL JOHNSON: And so the Lottery was owed as of the time he won the lottery? All of those payments were owed as of the time he won the lottery?

ATTORNEY JAMES C. HO: I think that's correct, Your Honor.

JUSTICE PHIL JOHNSON: Well, when else would they become owed? He didn't--he only won it one time, right?

ATTORNEY JAMES C. HO: Our submission on this argument that Justice Willett referred to is this. The reason Irvan entered into this selling of the last two payments is because he owed First State Bank of DeQueen a sum of money.

JUSTICE PHIL JOHNSON: But it has to be preexisting is what I'm saying. You're saying if he incurred the debt after he won the lottery and after he was owed all this money from the lottery. So how can it be preexisting, the account? It has to be he incurred the debt after he won the lottery. I don't see how it's preexisting.

ATTORNEY JAMES C. HO: Well, we're happy to focus I think on our broader argument in any event, Your Honor.

JUSTICE PHIL JOHNSON: Okay.

ATTORNEY JAMES C. HO: So under the ruling below, the 1999 Lottery Act would have no affect whatsoever. Whereas under our approach, 406(f) would still have a wide range of applications. It would still apply to nonconsumer statutes, it would apply to past statutes, it would apply to the lotteries of other states.

JUSTICE PHIL JOHNSON: But if you take that position, isn't it a matter of the legislature passing any law and then saying that the UCC provision simply becomes subject to any specific law, so that it becomes a nullity in effect, does it not?

ATTORNEY JAMES C. HO: The UCC would not become a nullity, it for one -  
-

JUSTICE PHIL JOHNSON: The first thime they pass a specific statute, we say, "Well, this specific statute, we'll just say that it's not covered by the UCC general language," and that just leaves that language out there, and every time they pass a statute it doesn't count.

ATTORNEY JAMES C. HO: If you're in a situation where the statutes irreconcilably conflict, then, yes, one has to give way to the other. Our primary submission is that 9201 makes this case quite straightforward because 9201 tells you 9406 doesn't apply at all. In fact, nothing in Chapter 9 applies to this context. But even if you get past 9201 you just go to what these other courts, California, Virginia, what other Courts have done, and they've invoked these canons to reconcile the conflict, to avoid surplusage and to favor the specific provision.

JUSTICE NATHAN L. HECHT: The problem with the argument though is it expressly, the UCC expressly addresses lottery winnings and then you say it takes it out because it's a consumer transaction. But lottery winnings would never be in your view other than a consumer transaction. So it's curious why the UCC would say, "We specifically cover lottery winnings, but we don't cover any consumer transactions which a lottery winning is."

CHIEF JUSTICE WALLACE B. JEFFERSON: And if I can add to that, and then says, "Any statute to the contrary is ineffective." Now won't--I mean 406(f)1, "A rule of law statute or regulat that prohibits or restricts the assignment or transfer of an account including state lottery prizes is ineffective."

ATTORNEY JAMES C. HO: Well, the word "lottery" in the UCC would still have substantial effect. It would have effect in every respect so long as it doesn't bump into a consumer protection. So the UCC --

JUSTICE NATHAN L. HECHT: Well, when would that be?

ATTORNEY JAMES C. HO: Any number of transactions involving lottery payments sort of downstream, for example, might be one situation. Lotteries of other states --

JUSTICE DALE WAINWRIGHT: What do you mean by "downstream"?

ATTORNEY JAMES C. HO: I can imagine a situation where after this transaction, let's take the lottery of another state because the provision in the UCC doesn't apply to just the Texas Lottery, it applies to any state. If a transaction were valid and then they wanted to flip it to another financial entity, as I believe they want to do, that would--the UCC provisions would continue to have effect. I see that my time is up.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Mr. Ho. The Court is now ready to hear argument from the Respondents.

MARSHALL: May it please the Court, Mr. Boyd will present argument for the Respondents.

ORAL ARGUMENT OF JEFFREY S. BOYD ON BEHALF OF THE RESPONDENT

ATTORNEY JEFFREY S. BOYD: Mr. Chief Justice and may it please the Court, and Solicitor General. If I may just briefly acknowledge Max Tarbox, who is in the courtroom, he represents Mr. Irvan's bankruptcy trustee. He drove down from Lubbock to be here and I didn't want his presence to go without mention. The Uniform Commercial Code clearly

provides that accounts are fully assignable, specifically defines "accounts" to include lottery winnings, and then expressly declares that any law that prohibits or limits the assignment of an account is ineffective. Because of that there are really --

JUSTICE HARRIET O'NEILL: Okay, if can follow up --

ATTORNEY JEFFREY S. BOYD: Yes, Your Honor?

JUSTICE HARRIET O'NEILL: If I can follow up on the line of questioning that just ended. Then why would the legislature do that and in the same session turn around and put these restrictions in the Lottery Act?

ATTORNEY JEFFREY S. BOYD: Your Honor, there are really probably two possibilities here, and I'll acknowledge a potential third. The two possibilities are this. Either the legislature specifically intended to render the Lottery Act provisions ineffective, or the legislature made a mistake. Now we from the beginning in this case have been willing to assume that the latter is the case.

JUSTICE HARRIET O'NEILL: But don't we, if we can read them together and give them both effect, it seems like we're supposed to do that, and there is a way to read these two together without rendering ineffective the language in the UCC.

ATTORNEY JEFFREY S. BOYD: There's not, there's no way to render both - - there's no way to give full effect to both of these statutes.

JUSTICE HARRIET O'NEILL: Well, but it could still be effective as to out-of-state lottery winnings, as Mr. Ho said, and so there are still things that would apply to that wouldn't make it meaningless.

ATTORNEY JEFFREY S. BOYD: No, it would be meaningless as applied to Texas lottery winnings, and so you would be rendering ineffective the UCC provisions as applied to Texas lottery winnings. Now, the argument that you should construe it to apply only to other states' lottery winnings is completely illogical. Texas law cannot govern the assignability of Indiana lottery winnings any more than Indiana law could ever govern the assignability of Texas lottery winnings. There's no way that some law that some other state passes could govern whether or not a person could assign Texas winnings.

JUSTICE HARRIET O'NEILL: And is that why full faith and credit was not an issue up here?

ATTORNEY JEFFREY S. BOYD: Is not an issue here. So the two possibilities, we've acknowledge it could potentially be a mistake here. Now let me mention the third potential one. It's a bit of more of a stretch, but it's actually the most logical, and that is because the UCC was expressly made effective July 1, 2001, as opposed to the Lottery Act made effective September 1, 1999, it could have been that the intent was to make that restriction on assignments effective for two years, but thereafter no longer effective because that's how the law was between September 1, 1999 and July 1, 2001 when the UCC came into effect. But let's assume that wasn't the case and it was actually a mistake, two ships passing in the night. Even if that's the case, and this I think will be the most important thing I say today, although it

is at least theoretically possible that legislators like judges or anyone else may make a mistake, that does not give this Court the power as the United States Supreme Court has stated "to legislate to fill any hiatus that Congress may have left." That of course is a direct quote from this Court's opinion in *Brown v. De La Cruz* in 2004.

JUSTICE DAVID M. MEDINA: Well, but you know of course if we don't think the legislature made a mistake, we can follow the analysis by Justice Patterson, Janet Patterson there were she said we can give both of these effect by having a carve out. I mean you can do the assignments up to the last two.

ATTORNEY JEFFREY S. BOYD: Justice Medina, the problem with Justice Patterson's analysis is that she completely ignored 9406(f). This is not a case where you have one law that says "You cannot do X," and you have another law that says "You can do X," and now the Court has to figure out which of the two to enforce. Rather this is a case that says "You cannot do X," and the second law says "You can do X," and then 9406(f), "any law that says you can't do X is ineffective." The statute's own language resolves that conflict and Justice Patterson, read her dissent, never discussed 9406(f). The real issue in this case is what is the role of this Court.

JUSTICE NATHAN L. HECHT: Can I ask you your understanding of the UCC before 1999. It had a very ab-breviate provision in 9318 and it just applied to contracts, so would that not restrict -- that would not impact lottery winnings or what?

ATTORNEY JEFFREY S. BOYD: It would not, Your Honor. It did not, it would not.

JUSTICE NATHAN L. HECHT: So before 1999 the Lottery Act restricted assignments on winnings and the UCC did not?

ATTORNEY JEFFREY S. BOYD: That's correct. With the limitation for under 466406(a), which was adopted in 1991 of the Government Code which allowed for the payment to be made to a different party under an appropriate judicial order.

JUSTICE NATHAN L. HECHT: But that was always in the Act?

ATTORNEY JEFFREY S. BOYD: That was always in the Lottery Act. 1999 is when all of this occurred. Now this Court has repeatedly answered the key question in this case, and that is that it's not the role of the Courts to decide what it thinks the law should be or to fix what the legislature may have gotten wrong, or to do anything other than to apply the law that the legislature has written, even if the legislature has made a mistake. There are two --

JUSTICE DALE WAINWRIGHT: And that's the problem, Counsel, the laws the legislature have written are not so clear in this instance. Let me ask you about the UCC 9.102(a)2, it defines "account." And this is the only place where it mentions lottery winners or winnings. Subsection viii, and so lottery winnings are mentioned in the context of defining "account." Now, where in 9.406(f) does that definition of account get incorporated into your position? I'm looking at 9.406(f) and I'm



looking for account. It says, "9.406(f)1 refers to account debtor," but I don't see "account."

ATTORNEY JEFFREY S. BOYD: 9406 --

JUSTICE DALE WAINWRIGHT: Let's just assume "account" means account and "debtor" is just an extra word added there, or is "account debtor" the term that should be defined in 9.406(f)?

ATTORNEY JEFFREY S. BOYD: Well, "account debtor" is defined, but, no, 9406(f), Your Honor, if that's what you're asking about, specifically says, "That except as otherwise provided," bla-bla-bla, and there are some exceptions that no one has every argued are applicable here, and subject to Subsections H, "a rule of law, statute or regulation that prohibits, restricts or requires the consent of the government, governmental body or official or account debtor to the assignment or transfer of," and then dot, dot, dot, "an account." That's where it shows, for any rule of law that restricts or prohibits the assignment of an account is ineffective, then you get to the little sub sub paragraph, "to the extent it restricts or prohibits the assignment of an account." The Lottery Act prohibits or restricts the assignment of an account, and 406(f) therefore expressly declares that law to be ineffective. Now the--

JUSTICE DON R. WILLETT: Why is the Lottery Act not a consumer law?

ATTORNEY JEFFREY S. BOYD: The Lottery Act you know, Your Honor, there are at least eight rabbit trails that the State has presented for this Court, and that jurisdiction is the first probably to address, although the last written, consumer is the second one. When you asked that question about whether this is a consumer issue, we're dealing with 9.201(b) of the UCC. 9.201(b) of the UCC says, "A transaction subject to this chapter, Article 9 of the UCC, is subject to any law that establishes a different rule of law for consumers." The Lottery Act does not establish a different rule of law for consumers. It's as Justice Medina wrote in the Marks case in August of this year, when we're looking at this language, we start by using the definitions prescribed by the legislature. What did the legislature mean when it talked about transactions subject to a different rule of law for consumers? In arguing that that applies here, the State does not cite to the Lottery Act because the Lottery Act never refers to lottery winners as consumers. It doesn't cite to the --

JUSTICE HARRIET O'NEILL: Clearly those provisions in the Lottery Act are to protect. I mean the lottery winner is a consumer in that sense. They purchased --

ATTORNEY JEFFREY S. BOYD: It's not, Your Honor, it is to protect lottery winners. Now, let me drop a footnote here because it was asked earlier, I think Justice Johnson, about the protection on-- on the prohibition on the the last two years payments. And Mr. Ho described to you all the reason for that. I suppose he thinks that's the case, but he can't point to anything anywhere that tells you. I think it is probably more likely that that was the intent behind the prohibition on the, the absolute prohibition on the last two year payments was to protect the interest of the State because of tax liabilities, child support obligations and otherwise. That's as logical of a supposition

for the legislative intent for that prohibition as protecting lottery winners. But even if it was all intended to protect lottery winners, that is not a law that protects consumers. They are never referred to as "consumers" in any law, and in fact they are not consumers under any definition you can find. They don't cite the DTPA because a consumer under the DTPA is one who seeks or acquires goods or services. Lottery winners who assign their winnings do not seek or acquire goods or services.

JUSTICE EVA GUZMAN: Well, they do seek some type of benefit though by the assignment, and that could be a service. [inaudible]

ATTORNEY JEFFREY S. BOYD: No, they sell a right. They are the seller not the buyer, they are the one who receives the benefit of the obligation, they are not the one who incurs the obligation.

JUSTICE EVA GUZMAN: Your position is that under Texas law they can never be classified as a consumer, but simply as lottery winners?

ATTORNEY JEFFREY S. BOYD: I am saying that under the terms of the Lottery Act, and more importantly under the UCC, they are a lottery winner who clearly are intended to be protected, but the real question here is are they consumers as the UCC uses that term in Article 9?

JUSTICE PHIL JOHNSON: Does the UCC define the term "consumer"?

ATTORNEY JEFFREY S. BOYD: UCC Article 102, Article 1 defines it as someone who enters into a transaction for primarily personal, family or household purposes. But then you go to 9.102(a)22, defines a "consumer debtor" as a debtor in a consumer transaction. And then you go to Subsection 26, a consumer transaction -- and remember what they rely on is the statement that a transaction subject to this chapter, Article 9, is subject to any law that establishes a different rule of law for consumers. What is a transaction involving a consumer? 9102(a)26, "A consumer transaction is one in which an individual incurs an obligation secured by a security interest for personal, family or household purposes." If I go buy a vehicle and I take a note on that vehicle and allow that vehicle to secure that debt, I am engaged in a consumer transaction. I've incurred an obligation, to secure my--and to secure that obligation I have placed the good up as collateral. The purpose and effect of that is to protect those consumers.

JUSTICE DAVID M. MEDINA: Those are very compelling arguments there. How do you classify someone that participates in other games of chance, going to the horse track and you're buying a ticket to win. Is that not a consumer at that point? And if it is, when does that stop?

ATTORNEY JEFFREY S. BOYD: Your Honor, we can't confuse the transactions here. The transaction at issue here is not the purchase of the lottery ticket, the transaction at issue here is the assignment of the right to receive the future payments. That's the transaction that the UCC governs, that's the transaction that the UCC says may be freely made and that any law that purports to restrict or prohibit that is ineffective. It's as Justice Hecht wrote in concurring in the Entergy case, "It matters now what someone thinks the text may have meant to say." The Solicitor General and this Court may think that the legislator may have meant to call lottery winners consumers, but

they're not consumers under any definition because they don't incur an obligation, they don't purchase, they don't seek or acquire to purchase, they're not consumers.

JUSTICE DALE WAINWRIGHT: Under 9102(a), what specific number defines consumer?

ATTORNEY JEFFREY S. BOYD: It's 9102 -- no, it's 1201(b)11. So it's not in this chapter to which 9201 on which they rely applies. The general, 1201(b), consumers, an individual enters into a transaction primarily for personal, family or household purposes. But they're relying on Article 9, and for purposes of Article 9, a consumer transaction is not this transaction because the lottery winner is not seeking to acquire or incurring an obligation. So we must use the definitions that the legislature has provided.

JUSTICE DALE WAINWRIGHT: Let's go back to 9406(f). I see "account" there and "account debtor." F says that some exceptions are not applicable, as you pointed out, "that a statute that prohibits, restricts or requires the consent of the government... to the assignment or transfer of an account or chattel papers ineffective to the extent, to the extent the rule of law, statute or regulation." Then there's provision that define what "to the extent" means. The restricting definition here says, "To the extent the rule of law or statute prohibits or restricts or requires the consent of the government or account debtor to the assignment or transfer." Explain how F(1), 406(f)1, specifically subsection 1, fits within your argument.

ATTORNEY JEFFREY S. BOYD: Well, because 9406(f)1 says a rule of law that does X is ineffective to the extent it does X. It repeats the exact same language in the subsection to which you've referred. A rule of law that restricts or prohibits or requires the consent of the government to the assignment of an account, is ineffective to the extent that it restricts or prohibits or requires the consent of the government to an account. It repeats itself, but it's not ambiguous because it's very clear. If there is a law that requires the consent of the government or prohibits or restrict the assignment of an account, then it is ineffective, and so it is ineffective to the extent it does exactly what the statute says. The realities in this case are this --

JUSTICE DALE WAINWRIGHT: And what was the consent of the government that was required here?

ATTORNEY JEFFREY S. BOYD: Well, there was no consent of the government required by law.

JUSTICE DALE WAINWRIGHT: Which is why I wonder why 1 applies.

ATTORNEY JEFFREY S. BOYD: Because it --

JUSTICE DALE WAINWRIGHT: It says it applies to the extent, as you said, it requires the consent of the gov-ernment.

ATTORNEY JEFFREY S. BOYD: No.

JUSTICE DALE WAINWRIGHT: Or did you mean something else?

ATTORNEY JEFFREY S. BOYD: Rule of law that restricts or prohibits or requires the consent of the government to an assignment is ineffective to the extent it does so. We're not arguing that the Lottery Act requires the consent of the government; we're arguing that the Lottery Act restricts and prohibits the assignment of an account.

JUSTICE DALE WAINWRIGHT: Okay, so you read Subsection 1, the first word there "prohibits," then you skip the words in between and go to the "the assignment."

ATTORNEY JEFFREY S. BOYD: Well, that's exactly the object of the verb in that.

JUSTICE DALE WAINWRIGHT: So prohibits the assignment?

ATTORNEY JEFFREY S. BOYD: Yes, Your Honor.

JUSTICE DALE WAINWRIGHT: I'm not sure. It's a fairly complicated dependent clause here, but that's how you read it?

ATTORNEY JEFFREY S. BOYD: Yes, Your Honor.

JUSTICE DALE WAINWRIGHT: "Prohibits the assignment"?

ATTORNEY JEFFREY S. BOYD: That's right.

JUSTICE DALE WAINWRIGHT: "Or transfer."

ATTORNEY JEFFREY S. BOYD: "Prohibits, restricts or requires the consent of the government for an assignment or transfer."

JUSTICE DALE WAINWRIGHT: I see.

JUSTICE NATHAN L. HECHT: Let me take you to the argument that the last, the later-enacted statute prevails.

ATTORNEY JEFFREY S. BOYD: Yes.

JUSTICE NATHAN L. HECHT: What's your view of that?

ATTORNEY JEFFREY S. BOYD: Your Honor, first our response is you don't get to those extrinsic aids when the statute is unambiguous. Let's assume that you get to that extrinsic aid. The UCC is the later-enacted in this case. Now, if we look at 1999 it is not, by a span of 13 days it is not the later-enacted. But to answer this question you don't look at 1999, you look at 2001. Four things happened in 2001 that show that the UCC was the later-enacted. The first is that the UCC became effective as per the 1999 rule. When they adopted it in 1999 they said the effective date is in 2001, so in July 1st of 2001 the UCC became effective. But number two, the legislature in 2001 reenacted 9.406(f). They passed a law which expressly --

JUSTICE NATHAN L. HECHT: Okay, then they changed (f)2, right?

ATTORNEY JEFFREY S. BOYD: That's right, but they reenacted all of it, of all of 9406(f). They reenacted 9406(f)1 and (2). If you look at the bill, you will see it, both of them are stated. Now, the State argues,

"Well, they only did that because of the constitutional prohibition on blind amendments." It doesn't matter. The question is not the later amended statute governs; the rule is the later-enacted statute governs. If the legislature wanted to change 9406(f)(1), they could have changed it right then and there. They didn't, they reenacted it in 2001, thereby reaffirming that any law that prohibits or restricts the assignment of an account is ineffective. The third thing -

JUSTICE PAUL W. GREEN: Do you define "enactment" as pegged to what date? To presentment and signature to?

ATTORNEY JEFFREY S. BOYD: Well, the Code Construction Act, Your Honor, defines "enactment," and the first thing you look at is the date that the vote was taken. In 1999 we were 13 days early; the UCC was 13 days early.

JUSTICE DAVID M. MEDINA: Mr. Boyd, before you get to your third issue you wanted to conclude with, Mr. Ho indicated that other states or other courts agreed with their interpretation. Could you address that, is there any different about those cases?

ATTORNEY JEFFREY S. BOYD: Absolutely. There are seven decisions out there. Three of them are analogous to this, four of them are not. In Indiana it was an agreed order that the UCC prevails. In Massachusetts the Lottery Act expressly -- contrary to Texas -- the Lottery Act expressly states that it prevails over the UCC. In New Hampshire the Lottery Act does the same. And then in Illinois the assignment occurred two years before the UCC was adopted. Those four are not analogous. The three that are analogous are California, which held that the Lottery Act controls because it's more specific, an argument I haven't been able to get to today, but is briefed. Second was Virginia, which held that the Lottery Act prevails -- this is key, look at Virginia -- the Lottery Act prevails because it was later reenacted. And we're arguing here the UCC prevails because it was later reenacted in 2001. And then Kentucky held that the UCC prevails because it was later enacted. Those are the only three that are analogous. The third thing that happened in 2001 was that the legislature amended the definitions in the UCC, did not touch the definition of account, did not say it no longer includes lottery winnings. But then the fourth thing is they also amended 9.309 to specifically show that "account" does include lottery winnings. So in 2001 the latest statement of the legislature on this issue, the legislature confirmed that "accounts" include lottery winnings and that all accounts are freely assignable and any law that purports to restrict or prohibit that assignment is ineffective. In closing, Your Honor, in the end it comes down to the question of whether this Court is going to legislate or be a Court. You cannot enforce both statutes; one must be expressly determined to be at least partially ineffective. One of these statutes expressly declares the other one is ineffective, and that should end the Court's inquiry and the Court should enforce the law exactly as the legislature has written it.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Boyd. Are there any further questions?

JUSTICE HARRIET O'NEILL: I just have one quick question.

CHIEF JUSTICE WALLACE B. JEFFERSON: Yes.

JUSTICE HARRIET O'NEILL: Does your view hamper the Attorney General's ability to enforce child support orders?

ATTORNEY JEFFREY S. BOYD: They have proposed that it would, and that's where I get to my point about the purpose of the prohibition on the assignment of the last two payments probably has a lot more to do with protecting the state than the lottery winners, because the argument is, "We need to have those last two payments available to go collect child support payment from lottery winners if we need to. We don't want them to be able to assign that off and take it out of our reach." That may in fact have this affect, but the simple answer to that is, if the legislature doesn't like that, then as a policy matter they change the law.

JUSTICE HARRIET O'NEILL: I just wanted to see if you agreed that it could have that affect.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions?

ATTORNEY JEFFREY S. BOYD: Nothing further, Your Honor. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Boyd.

JUSTICE DON R. WILLETT: Mr. Ho, you may be kind of constrained in how you answer this, but in your opening presentation you mentioned how these statutes conflict and how one has to give way to the other. When you have two state statutes that clash head on, how exactly does the Attorney General's Office determine which one gives away to the other?

REBUTTAL ARGUMENT OF JAMES C. HO ON BEHALF OF PETITIONER

ATTORNEY JAMES C. HO: Well, I would answer the question this way, Your Honor. There's an easy way and a hard way to decide this case, and the easy way is to look 9201, which talks about consumers, not consumer debtors, not anything else, it talks about consumers and "consumer" is defined in UCC 1201(b)11. Counsel has argued that 1201(b)11 is in the Chapter 1 not Chapter 9, fine. But Chapter 1, this definition applies to the entire title; it applies to the entirety of the UCC.

JUSTICE HARRIET O'NEILL: But it doesn't seem to fit Irvan even so.

ATTORNEY JAMES C. HO: Well, but let's ask two questions. Why did he buy the lottery ticket and why did he get into this loan arrangement, the assignment? Was it for personal, family or household reasons, as 1201(b) talks about?

JUSTICE EVA GUZMAN: What is the obligation though, because it does say an individual incurs an obligation primary -- what is the obligation that was incurred here primarily for personal, family or household purposes?

ATTORNEY JAMES C. HO: He has said he wants to give away these two final payments in exchange for pay-ments right away. And so under 1201(b)11 the question is simple. Is he a consumer? Is he entering into this transaction, it's clearly a transaction, is he entering into it for personal, family or household reasons?

JUSTICE EVA GUZMAN: Then what is the obligation?

ATTORNEY JAMES C. HO: The obligation is to assign the last two payments.

JUSTICE EVA GUZMAN: So you're calling the assignment the obligation?

ATTORNEY JAMES C. HO: Correct. Is he doing it for personal reasons or is he doing it for commercial reasons? We would submit he's doing it clearly for personal reasons. That's the easy way to decide the case. The more difficult is to engage in 9406(F).

JUSTICE HARRIET O'NEILL: Does your argument hinge on us finding him to be a consumer?

ATTORNEY JAMES C. HO: It doesn't. We would submit that there are so many indications pointing in favor of this enforcing the Lottery Act as amended that any of these arguments would alone suffice, but we do think that 9201 quite convincingly applies to consumers and quite convincingly applies to this case.

JUSTICE NATHAN L. HECHT: I don't recall seeing an answer in your brief to the last point that Mr. Boyd made on the timing, the 2001 enactment of 930914 to the sale of an individual, an account that has a right to payment of the winnings of the lottery rather than the chance, immediately takes effect. What's --

ATTORNEY JAMES C. HO: To be candid, I think both sides agree that the last in time rule is sort of the weakest of all the canons. We have arguments on both sides in the briefs, but we agree with them that Texas governs, and then the other canons are frankly stronger. 9406(f) with respect to this issue of the other states, I'll just note that this is precisely what the Federal Court in Illinois concluded. Justice Medina, you asked about courts, if you just look at the logic of the Virginia ruling and just look at the logic of the California ruling, as well as the logic of the Illinois ruling, the logic is devastating. There is no way they would win if they were in those courts. At the end of the day, this is a conflict, something has to give way, and the touchstone of interpretation as this Court repeatedly has said is legislative intent. So let's consider this. Let's consider the story that plaintiffs are basically asking you to accept. That the legislature in 1999 introduced a number of amendments to the Lottery Act, but they held multiple hearings on this bill, they amended the bill to further strengthen consumer protections. They even convened a conference committee when the House and the Senate couldn't agree. And then finally they enacted the bill as amended. Yet according to plaintiffs, all of this work, all of this time, energy and activity in the legislature was only because the legislature intended to do absolutely nothing.

JUSTICE HARRIET O'NEILL: No, that's not what he said; he said it was a mistake. They may have intended that, but they just made a mistake and we have to take the words as we read them.

ATTORNEY JAMES C. HO: That's absolutely true, Your Honor, and 9201 we submit makes clear that they did not make a mistake. 9201 talks about

consumers, as Your Honor noted earlier, we have a very strong argument that this is precisely a consumer protection provision. No ordinary citizen reading the 1999 amendments to the Lottery Act could fathom that they would not be enforced as written, and we ask the Court not to fashion such a result either. Accordingly, the judgment below should be vacated for want of jurisdiction for two reasons. First, because they have not sued a proper defendant, and second, if the Court wishes to reach this issue, because plaintiffs' ultra vires claim is invalid in any event.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Ho.

ATTORNEY JAMES C. HO: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: The cause is submitted and the Court will take a brief recess.

MARSHALL: All rise.

[End of proceedings.]

Texas Lottery Commission, Petitioner, v. First State Bank of Dequeen,  
Stone Street Capital, Inc., and Cletius L. Irvan, Respondents.  
2009 WL 5113427 (Tex. ) (Oral Argument )

END OF DOCUMENT