

STATE OF KANSAS

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June 10, 1992

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ATTORNEY GENERAL OPINION NO. 92- 76

The Honorable Tom Sawyer
State Representative, Ninety-Fifth District
1115 Dayton Street
Wichita, Kansas 67213

Re: State Boards, Commissions and Authorities--State
Lottery; Kansas Lottery Act--Executive Director,
Powers; Limitation on Promotions at Amateur
Athletic Events; Restraint of Trade

Synopsis: 1992 Senate Bill No. 472, amending K.S.A. 1991
Supp. 74-8704 of the Kansas lottery act to prohibit
advertising or promotion of the lottery at amateur
athletic events, is not an unlawful restraint of
trade. The Sherman act does not prohibit a state's
actions taken in its governmental capacity as
sovereign regulator. Cited herein: K.S.A. 1991
Supp. 74-8704, as amended by 1992 S.B. No. 472, §
1(b); 15 U.S.C. §§ 1, 2.

* * *

Dear Representative Sawyer:

You request our opinion regarding section 1(b) of 1992 Senate
Bill No. 472, and specifically whether it constitutes an
unlawful restraint of trade.

The provision in question states:

"(b) The Kansas lottery shall not engage
in on-site display advertising or
promotion of the lottery at any amateur

athletic or sporting event including, but not limited to, amateur athletic sporting events at institutions under the jurisdiction and control of the state board of regents."

By this legislation, the state has prohibited one of its agencies (the Kansas lottery) from advertising the state's product (lottery games) at state institutions (regents' institutions) and other places where amateur athletic or sporting events are being conducted.

Section 1 of the Sherman act, 15 U.S.C. § 1, makes unlawful "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states. . . ." Section 2 proscribes activity to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states. . . ."

In the landmark case of Parker v. Brown, 317 U.S. 341, 87 L.Ed. 315, 63 S.Ct. 307 (1943), the United States Supreme Court held that the Sherman act does not apply to anticompetitive restraints imposed by the states "as an act of government." See Columbia v. Omni Outdoor Advertising, 499 U.S. ___, 113 L.Ed.2d 382, 111 S.Ct. ___ (1991). In Parker the Court upheld state legislation that restricted competition among private raisin growers and maintained prices of their commodities in an effort to "conserve the agricultural wealth of the State" and to "prevent economic waste in the marketing of agricultural products" of the state. The Court said:

"We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.

. . . .


"Here the state command to the Commission . . . is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for

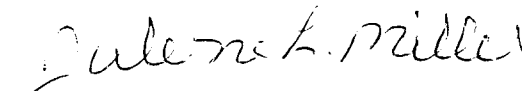
establishing the prorate program . . . it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. . . . The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application."

The only exception to this rule is when the state acts as a market participant and restrains trade via a contract or other conspiracy. Columbia, 113 L.Ed.2d at 397.

We believe section 1(b) of 1992 Senate Bill No. 472 was enacted by the state in its governmental capacity as sovereign regulator rather than as a commercial participant in a given market. Prohibiting the promotion of gambling at high school and college sporting events is, in our opinion, a valid exercise of the state's police power and thus not subject to the Sherman act.

Very truly yours,


Robert T. Stephan
Attorney General of Kansas


Julene L. Miller
Deputy Attorney General

RTS:JLM:jm