

IN THE SUPREME COURT OF FLORIDA

HOUSE OF REPRESENTATIVES,
et al.,

Petitioners,

v.

CHARLIE CRIST,

Respondent.

Case No. SC07-2154

_____ /

AMICUS BRIEF
OF THE FLORIDA SENATE
IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE AMICUS

Recently, the Governor entered into a compact with the Seminole Tribe of Florida that purports to bind the state in a contract allowing the Tribe to sponsor expanded gambling without having submitted the compact to the Florida Legislature for ratification. The Senate is in doubt about whether the Governor should be required to submit the compact to the Legislature for ratification in order to ensure that it is an enforceable agreement between the state and the Tribe. As a part of the legislative branch, it would be the Senate's responsibility to review and, if warranted, approve the agreement should the compact be submitted to the Legislature. Thus, the Senate believes that its responsibilities under Art. III and Art. X, sec. 13, Fla.Const., are in question due to the manner in which the compact is being implemented.

ARGUMENT

The Governor's entry on the state's behalf into a gambling compact with the Seminole Tribe of Florida and the apparent decision to implement it without legislative ratification raise fundamental constitutional questions about the responsibilities of the Legislature and the role of the executive branch. This Court must resolve these matters before it will be possible to implement the compact.

The Court will have the benefit of many fine briefs discussing at length the important issues raised in the case. However, the Court may wish to be mindful of the following point during its deliberations.

To transform the agreement into a binding contract, the Governor needs state constitutional and statutory authority to enter into the compact on the state's behalf. A binding contract with the state under Florida law requires either an express or implied waiver of sovereign immunity — which only the Legislature can give. Since nothing either in the Constitution or in statute authorizes the Governor to bind the state in this instance, it appears that the compact should be ratified by the Legislature.

The Indian Gaming Regulatory Act (IGRA) does not confer on any state official or state body the power to bind a state to a gaming compact. Rather, the courts must look to state law to determine who is authorized to bind the state. See *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1553 (10th Cir. 1997) (“We hold that . . . state law determines the procedures by which a state may validly enter into a compact . . .”).

Compacts between sovereigns are contracts. Certainly that is true of interstate compacts. See *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). These compacts, as contracts, bind the sovereigns involved like any other contract. *State v. Sims*, 341 U.S. 22, 28 (1951) (“It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between states by those who alone have political authority to speak for a state can be unilaterally nullified . . .”); *Fetty v. Commissioner, Department of Transportation*, 784 A.2d 236, 241 (Pa. 2001); *Hall v. Washington Metropolitan Area Transit Authority*, 486 A.2d 970 (D.C. 1983) (interstate compact is a contract binding the “constituent sovereignties”). A compact with the tribe is no different than an interstate compact, because it seeks to bind Florida with another sovereign and to impose reciprocal rights and responsibilities.¹ Other states have treated such compacts as contracts.

See Confederated Tribes of Chehalis Reservation v. Johnson, 958 P.2d 260, 267 (Wash. 1998) (“Tribal-state gaming compacts are agreements, not legislation, and are interpreted as contracts.”), cited by the Seminole Tribe in their motion to join the proceeding as a respondent, p. 5. See also, Pueblo of Santa Ana v. Kelly, 104 F.3d at 1556 (treating IGRA compact as “a form of contract”). Therefore, the compact is a contract.

Executive branch officials cannot enter contracts binding the state simply because they judge it is good policy to so do. They must have statutory authority. American Home Assurance Co. v. National Railroad Passenger Corp., 908 So.2d 459, 474-475 (Fla. 2005); Carlton v. Constitutional Indemnity Co., 157 So. 431 (Fla. 1934). Such authority to contract either may be express, or it may be implied from some express statutory grant of power. See Mayo v. Matthews, 150 So. 900 (Fla. 1933) (governor had implied power to contract for land purchase arising from express legislative directive to provide a laboratory for a state chemist).

There is good reason for requiring legislative permission to contract. In Florida, contracts with the state are void without a waiver of sovereign immunity.

¹ It may be worth noting that the compact calls for arbitration. The state is required to arbitrate compact disputes; it may challenge the dispute in court, thus waiving sovereign immunity. The failure to seek judicial review requires the state to comply with the arbitrator’s decision. See compact part XIII(H), (I) and (J).

Pan-Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4 (Fla. 1985)

(waiver of sovereign immunity implied from legislative authorization to enter into contracts). And only the Legislature has the power to waive the state's sovereign immunity. Art. X, sec. 13, Fla.Const.² Thus, since only the Legislature can waive sovereign immunity, only the Legislature can authorize an executive branch official, including the governor, to enter into any type of binding contract on the state's behalf.

The Governor apparently depends on Art. IV, sec. 1(a), Fla.Const., as the source of his authority. This section says in part:

The supreme executive power shall be vested in a governor, who shall be commander-in-chief of all military forces of the state not in active service of the United States. The governor shall take care that the laws be faithfully executed, commission all officers of the state and counties, and transact all necessary business with the officers of government.

The underscored words are those that the Governor seems to contend support his independent authority to negotiate, to sign, and to bind Florida to the compact.

“Executive power,” however, does not carry with it the unilateral power to enter contracts. The phrase simply means the power to carry out the law, not to make it.

² Congress did not validly waive Florida's sovereign immunity in IGRA. Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

In re Advisory Opinion to Governor, 55 So.2d 99 (Fla. 1951). As noted above, whether a state official has the power to bind the state is a legislative decision.

The latter wording — “transact all necessary business with the officers of government” — is the key passage. The Governor apparently reads the phrase “necessary business” to include the power to enter this compact and “officers of government” to include officials of the tribe.

There is some reason to question whether the phrase “officers of government” authorizes the Governor to negotiate a binding contract with tribal officials.³ Certainly, it is understandable why the Governor felt it was necessary to

³ It is doubtful that the phrase “officers of government” was intended by the people to embrace tribal officials, given the history of how that language came into the Constitution. Almost identical language first made its appearance in the 1868 Constitution:

He [the governor] shall transact all executive business with the officers of the government, civil and military, and may require information in writing from the officers of the administrative department upon any subject relating to the duties of their respective offices.

Art. V, sec. 5, Fla.Const. (1868). Until then, previous Constitutions had merely authorized the governor to obtain written reports from government officials. So, the addition of the language “shall transact all executive business with the officers of the government” seems intended to broaden the governor’s authority in dealing with government officials. “The government,” as used in section 5 appears to refer only to state government, for wherever the 1868 Constitution mentions “government” it means state government. See, e.g., Art. XVI, sec. 15, Fla.Const. (1868) (requiring the governor and cabinet to keep their offices at the “seat of government” and authorizing the removal of “the government” to a safe place in the event of invasion or epidemic). The Journal of the Proceedings of the

conduct such negotiations. In any case, even if the Court assumes the Constitution gives him the power to negotiate, Art. IV, sec. 1(a) still does not authorize the Governor to bind the state in this compact. This is so because the phrase “necessary business” cannot include an independent power to contract. That phrase must be read with Art. X, sec. 13, Fla.Const., which gives the Legislature the sole power to waive sovereign immunity and thus, under Pan-Am Tobacco, the sole

Constitutional Convention of the State of Florida (Tallahassee, FL; Edward M. Cheney, 1868), reporting the events of the convention adopting the 1868 Constitution, does not shed any light on the reasons for adopting Art. V, sec. 5. The members adopted the section without amendment or apparent discussion. Id. at 67, 92, 130.

The same identical section appears in the 1885 Constitution. Art. IV, sec. 5, Fla.Const. (1885).

The 1968 Constitution makes only cosmetic changes to what had been Art. V, sec. 5, substituting “necessary” for “executive” in the phrase “executive business” and dropping the “the” before “government.”

Dropping the “the” is such a minor change that one cannot infer any intent to change the meaning of the word “government.” When an identical provision of the Constitution is subsequently readopted, it is presumed to have the same meaning as the previous version. Gray v. Bryant, 125 So.2d 846, 856 (Fla.1960). Here, “government” in Art. IV, sec. 1(a), Fla.Const. (1968), must mean the same as it did in 1868. Dropping “the” from the sentence was not so significant a change as to change the meaning ascribed to the word in the ancestral document. See, e.g., State v. Creighton, 469 So.2d 735, 739 (Fla.1985) , where the court said, “Where there is a significant change in the language of the constitution, it is to be presumed that the change was intentional and was intended to have a different effect from the prior language.” Conversely, where the change is trivial, the passage retains the original meaning.

power to grant executive branch officials the ability to enter contracts binding the state.

Legislative ratification of the compact would seem to be the most appropriate step now. See, for example, s. 285.165, Fla.Stat., ratifying a water rights compact with the Tribe; State v. Johnson, 904 P.2d 11, 24 (N.M. 1995) (“While the legislature might authorize the Governor to enter into a gaming compact or ratify his actions with respect to a compact he has negotiated, the Governor cannot enter into such a compact solely on his own authority.”).

For these reasons, the Court must determine whether legislative ratification is necessary to make the compact an enforceable contract.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by U.S. mail on Jeremiah M. Hawkes, General Counsel, Florida House of Representatives, R. 422 The Capitol, Tallahassee, FL 32399-1300; Jon Mills and Timothy McLendon, PO Box 2099, Gainesville, FL 32602; The Honorable Charlie Crist, PL-01, The Capitol, Tallahassee, FL 32399; Barry Richard and Glenn T. Burhans Jr., 101 East College Ave., Tallahassee, FL 32302, on this _____ day of November, 2007.

Jason Vail

CERTIFICATE OF TYPE SIZE AND STYLE

The brief is printed in 14 point Times New Roman.

Jason Vail