

1985

# Matthew Fenn Hilton vs. Mirvin D. Borthick : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

45.9 198520040

MATTHEW FENN HILTON, et al., :

Plaintiffs-Appellants, :

Case No. 20040

vs. :

MIRVIN D. BORTHICK, et al., :

Defendants-Respondents. :

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BRIEF OF RESPONDENTS

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APPEAL FROM ORDER GRANTING SUMMARY JUDGMENT  
OF THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY  
HONORABLE TIMOTHY R. HANSON, JUDGE

---

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**FILED**

NOV29 1984

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Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE  
STATE OF UTAH

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MATTHEW FENN HILTON, et al., :  
Plaintiffs-Appellants, :  
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IN THE SUPREME COURT OF THE  
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Defendants-Respondents. :

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BRIEF OF RESPONDENTS

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NATURE OF THE CASE

This appeal involves three consolidated actions, including a class action, brought on behalf of investors in Grove Finance Company of Pleasant Grove, Utah, seeking to recover the full amount of their investment (plus interest) in Grove Finance at the time that institution became insolvent.

### DISPOSITION IN THE LOWER COURT

The Third District Court of Salt Lake County, Honorable Timothy R. Hanson, District Judge, granted Respondents' Motion for Summary Judgment on the basis of governmental immunity.

### RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the District Court's order granting summary judgment.

### STATEMENT OF FACTS

Respondents agree with some of the facts set forth in Appellants' Statement of Facts, but controvert others, and believe that some additional facts with citation to the record should be before the Court.

#### A. ADDITIONAL FACTS

1. Prior to 1969, Grove Finance was licensed as both a small loan business (under title 7, chapter 10 of the Utah Code as it was then written), and an industrial loan corporation without authority to issue thrift (title 7, chapter 8 as then written) (R. 771). During that period, the Utah Department of Financial Institutions was aware of no problem in Grove Finance, either by Department inspections or from any other source (*id.*). Appellants have not alleged any occurrence in this period as a basis for liability.

2. In 1969, the Uniform Consumer Credit Code, or U.C.C.C., was enacted in Utah as title 70B of the Utah Code; Utah Code Ann. 7-10-1, et seq., the Utah Small Loan Act, was repealed, and all small loan licenses were terminated (R. 771-2). Grove

Finance surrendered its industrial loan license at that time, and was granted a license under the U.C.C.C., as were a number of others previously licensed as small loan businesses (R. 771-2, 778-82; see also Utah Code Ann. 70B-9-102).<sup>1</sup> Grove Finance held no other license as a financial institution for the remainder of its existence (R. 771-2, 786).

3. From the time of the enactment of the U.C.C.C., the policy of the Department of Financial Institutions was that the auditing requirements and policy of fairly close fiscal supervision which applied to banks and other institutions under Utah Code Ann. title 7, chapter 1, did not apply to supervised or regulated lenders licensed under title 70B. It was determined at that time that the reporting and examination requirements contained in title 70B, regarding disclosure of loan terms and maximum loan charges, were the only such requirements which applied to supervised lenders (R. 772). This policy was set by the Department's administration, was based upon the statutory language in titles 7 and 70B, and was in accordance with what the Department perceived to be the underlying purpose of the U.C.C.C., to foster more open entry and competition in the cash loan field (R. 772-3). The Department administration concluded that it had no authority to audit supervised lenders for

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<sup>1</sup> The texts of statutes and rules cited are set forth in Appendix B, infra.

financial soundness (id.; Deposition of Mirvin D. Borthick, pp. 115-16).

4. This policy remained in effect during the remainder of the existence of Grove Finance (R. 772, 786), and was applied to all supervised and regulated lenders in the State of Utah (as of 1980, approximately fifty supervised lenders and 1,800 regulated lenders) (id.).

5. From 1969 to 1980, Grove Finance filed a composite annual report with the Department each year, as required by Utah Code Ann. 70B-3-505(2), and their loan records were examined each calendar year by the Department, pursuant to Utah Code Ann. 70B-3-506. No violation of the U.C.C.C. or any other law, or other improper dealings, were ever indicated (R. 389-90, 693-4, 696, 773).

6. At some point, the Department received several telephone inquiries as to whether debentures being sold by Grove Finance were insured, and as to whether the caller could obtain a refund from Grove for a debenture. Upon checking with S. Hal Haycock, Grove's chief executive officer, the Department was assured that the problem arose from misstatements made by Grove salesmen, which would not be made again, and that any complainant would receive a full refund. The Department also determined that Grove salesmen were properly registered with the Utah Securities Commission to sell debentures at that time (R. 773-4).

7. In March, 1980, the Department received a complaint that Grove may be involved in a "check-kiting" scheme (R. 375). Commissioner Mirvin D. Borthick assigned two examiners to visit Grove Finance to investigate the complaint (id).

8. The examiners found Grove Finance's record-keeping inadequate to determine a balance between liabilities and assets, particularly as to debentures which Grove Finance had sold. Because of this, Commissioner Borthick caused a cease-and-desist order to be issued on April 8, 1980, directing that no further debentures or similar obligations be sold by Grove until a satisfactory financial statement could be compiled. The terms of the order were agreed to by Grove's chief executive officer (R. 787, 790).

9. The Department retained a certified public accountant and his firm to perform a complete audit of Grove Finance and, during approximately the next three-month period, monitored progress in the audit; an effort was made to explore any possible means of resolving Grove Finance's financial difficulties and of conserving whatever assets Grove had, so that, if possible, the Grove investors would be able to recover their investments (R. 787-8; Deposition of Howard D. Sherwood, pp. 7, 34, 42-3; Borthick deposition, pp. 108-9, 117-18).

10. The accountant confirmed that the Grove records pertaining to supervised loans were generally in accordance with

accepted accounting principles (Sherwood deposition, p. 39). However, apparently Grove Finance had sold a number of debenture bonds which it treated almost as deposit accounts, evidencing the debentures with either a bond or a document resembling a savings passbook, and allowing withdrawals and deposits in odd amounts at odd intervals (*id.*, pp. 13-15; R. 867-95).

11. In July of 1980, the Department determined with certainty that employees of Grove Finance were disobeying the cease-and-desist order and making inaccurate representations as to the nature of Grove's business (Sherwood deposition, pp. 29-30; Borthick deposition, pp. 32-3, 103-4). Commissioner Borthick immediately had prepared a Stipulation for an Order granting possession of Grove Finance to the Department, which was signed by Mr. Haycock for Grove; pursuant to the Stipulation, Judge George Ballif of the Fourth District Court of Utah County entered an Order Granting Possession, authorizing the Department to take possession of the business and property of Grove Finance (R. 788, 791-4).

12. In September, 1980, jurisdiction over Grove Finance was assumed by the United States Bankruptcy Court (R. 788-9).

Respondents believe that the Procedural History set forth at p. 5 of Appellants' Brief is accurate.

B. AREAS OF APPELLANTS' STATEMENT OF FACTS CONTROVERTED BY RESPONDENTS

Respondents controvert the following portions of Appellants' Statement of Facts, for whatever significance these matters may have to the questions now before the Court:

1. Appellants state at page 2 of their brief that Grove Finance "held itself out to the general public as accepting monies on deposit" from the early 1970's until its closure in 1980. No reference cited gives any indication that the sale of debentures occurred for that period; the very earliest indication in the record of a debenture transaction is June, 1977 (R. 875), and apparently all of the other debenture transactions in the record occurred from 1978 on (R. 867-95).

2. Appellants also allege that, from the early 1970's on, Grove advertised through its agents and "in the mass media" that "deposits" in Grove were insured. No reference cited mentions any date when advertising is supposed to have occurred. The vague statements in the Hilton affidavit (R. 835) and the Sherwood deposition (p. 23), cited by Appellants do not disclose the place or manner of advertising alleged, and may be inadmissible as hearsay. On the other hand, Commissioner Borthick testified that the Department was not aware of any advertising done by Grove Finance (Borthick deposition, pp. 15-16).

## ARGUMENT

### I. DEFENDANTS ARE IMMUNE FROM SUIT UNDER PROVISIONS OF THE UTAH GOVERNMENTAL IMMUNITY ACT (UTAH CODE ANN. 63-30-1, ET SEQ.).

In Madsen v. Borthick, 658 P.2d 627 (Utah, 1983), a very similar action where a group of investors in Grove Finance Company sued the State and Commissioner Borthick to recover the full amount of their investment, this Court ruled that governmental supervision of financial institutions is a "governmental function" to which provisions of the Utah Governmental Immunity Act apply. The Court also held that Utah Code Ann. 63-30-4, a section of the Immunity Act, authorizes public employees to be joined in a representative capacity in suits against governmental entities only where the entity in question may be liable under the Immunity Act; "[i]n other words, the governmental official or employee can only be sued in a representative capacity when the governmental entity is liable." Id. at 633.

In the instant action, Commissioner Borthick is named a defendant in his representative capacity, as Commissioner of the Department of Financial Institutions (R. 2), and it is evident that all allegations relating to him center on activities in his official capacity. Appellants do not claim that Commissioner Borthick acted with gross negligence, fraud, or malice (see Complaints at R. 190-200; Nelson, R. 1-7; DeRose, R. 2-17). An



allegation that Commissioner Borthick engaged in any regulation of state financial institutions in his role as a private individual would be absurd, and Appellants make no such suggestion. Thus, the Madsen case indicates that the Court must look to the Immunity Act to determine whether or not the State may be sued in this action; and that, if the State is immune from suit, so is Commissioner Borthick.

Utah Code Ann. 63-30-10(1) waives immunity for damages caused by the negligent acts or omissions of governmental employees, except if the injury:

(a) arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is based, or . . .

(c) arises out of the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization, or

(d) arises out of a failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property, or . . .

(f) arises out of a misrepresentation by said employee whether or not such is negligent or intentional. . . .  
(emphasis added).

In light of the allegations made in the three complaints on file in this action, the District Court correctly concluded that Defendants are immune from suit on these specific statutory grounds.

A. DISCRETIONARY FUNCTION

This Court, while eschewing any single litmus-paper test as to what constitutes a "discretionary function," has indicated generally that such a function is one where the act or decision in question requires "the exercise of basic policy evaluation, judgment, and expertise," Little v. Utah State Division of Family Services, 667 P.2d 49, 51 (Utah, 1983); Carroll v. State Road Commission, 27 Utah 2d 384, 496 P.2d 888, 891 (1972), or where the immunity is necessary to shield governmental decisions impacting on large numbers of people in unforeseeable ways from legal actions, "the continual threat of which would make public administration all but impossible." Frank v. State, 613 P.2d 517, 520 (Utah, 1980).

Utah's Governmental Immunity Act was patterned after the Federal Tort Claims Act, Carroll v. State Road Commission, supra, 496 P.2d at 890-891, and this Court has consistently applied a substantially identical standard as federal cases construing that Act, in determining the meaning of "discretionary function." Frank v. State, supra, 613 P.2d at 519.

Utah's exceptions to waiver of governmental immunity closely parallel those enumerated under 28 U.S.C., sec. 2680(a) of the Federal Tort Claims Act. This Court has followed the lead of cases interpreting that act. Little v. Utah State Division of Family Services, supra, 667 P.2d at 51.

Federal cases in which the issue has arisen have unanimously held that regulation of financial institutions is a

discretionary function under the Federal Tort Claims Act, for which regulatory agencies are immune from suit.

For example, in Emch v. United States, 630 F.2d 523 (7th Cir., 1980), cert. den., 450 U.S. 966, 101 S.Ct. 1482 (1982), shareholders in an insolvent bank and trust company which was taken over by the F.D.I.C. brought suit against the Comptroller of the Currency, the F.D.I.C., and the Federal Reserve Board. Very much as in the instant case, it was alleged that the defendants failed:

. . . to properly and adequately supervise, examine and control the condition, performance, operation, liquidity and solvency of American City Bank . . . and . . . to take proper and adequate measures to correct deficiencies, . . . and . . . to take proper and adequate measures to preserve and conserve the assets of said bank  
. . . . Id. at 525.

The Emch complaint also alleged that the federal agencies had been negligent in permitting the issuance of misleading reports to the shareholders, in allowing fraudulent activities by the bank's officers to occur, and in committing "mistakes, errors, and omissions in the course of examining" the bank. The Court of Appeals affirmed a dismissal of the complaint, holding that such allegations "fall facially" within the "discretionary function" exception. Id. at 528. In determining whether a function is discretionary, the Court said, relevant considerations include whether the judgment exercised called for policy considerations

and was one which officials should be free to make without the fear of vexatious litigation. Id. at 527. The claims in Emch:

. . . were an attempt to saddle the government with liability on the basis of its failure, in the course of its statutory regulatory activities, to anticipate the financial difficulties of American City Bank, to insure the honesty and competency of its officers, and to successfully prevent the losses to [thel] stockholders which resulted from the bank's various difficulties. These are claims of the type which section 2680(a) was designed to preclude . . . Id. at 529 (emphasis added).

In Dannhausen v. First National Bank of Sturgeon Bay, 538 F.Supp. 551 (E.D. Wis., 1982), the plaintiffs sued the Comptroller of the Currency and lower-level administrators under his supervision, for failure to enforce the National Banking Acts against a bank which had set off the plaintiffs' accounts against their obligations. Granting a motion to dismiss, the court cited the Emch case for this dispositive principle:

. . . 28 U.S.C. 2680(a) [the discretionary function exception] precludes suits against agencies of the United States involved in the regulation and examination of banks based on failure of the federal agency either to supervise, examine, or control adequately and properly the condition, performance, or operation of a bank, or failure of the federal agency to take proper and adequate measures to correct deficiencies existing in the bank. Id. at 561.

The court also held that a claim could not be stated for "withholding relevant information from the public" under the discretionary function exception, id. at 562.

The Federal Reserve Bank and Comptroller of the Currency were sued for failing to disclose the Franklin National Bank's insolvency sooner, extending credit to the Bank after learning of its difficulties, and allowing the Bank to remain open as long as it did, in Huntington Towers, Ltd. v. Franklin National Bank, 559 F.2d 863 (2d Cir., 1977), cert. den., 434 U.S. 1012, 98 S.Ct. 726 (1978). Affirming a summary judgment for these defendants "for sound reasons of policy," the Court of Appeals stressed that the acts alleged were the result of decisions which officials should be free to make without the threat of vexatious lawsuits or alleged personal liability. 559 F.2d at 870. Other federal cases where summary judgment or dismissal was granted for federal agencies alleged to have been negligent in the regulation of financial institutions include First Savings & Loan Association v. First Federal Savings and Loan Association, 531 F.Supp. 251 (D. Haw., 1981), and 547 F.Supp. 988 (D. Haw., 1982) (actions against F.S.L.I.C. dismissed); Davis v. F.D.I.C., 369 F.Supp. 277 (D. Colo., 1974); Magellsen v. F.D.I.C., 341 F.Supp. 1031 (D. Mont., 1972). Each of these actions was summarily dismissed on the basis of the discretionary function exception in the Federal Tort Claims Act.

The United States Supreme Court's most recent analysis of the discretionary function exception, as it applies to regulatory inspection activities by governmental agencies, is particularly pertinent here. In United States v. Varig Airlines, 467 U.S. \_\_\_, 104 S.Ct. 2755 (1984), the Court held that suits could not be maintained against the Federal Aviation Administration for its negligent failure to detect hazardous conditions in airplanes which were in violation of federal air safety regulations, in the course of the agency's inspection prior to type certification of the airplanes. The FAA's "spotcheck" program failed to find a non-fireproof trash receptacle in one aircraft, and a faulty gasoline line to a cabin heater in another, and both caused fatal in-flight fires. The Court of Appeals ruled, inter alia, that the inspection of aircraft for compliance with safety regulations did not entail policymaking, and therefore was not a discretionary function.

In a unanimous opinion, the Supreme Court reversed. The Court found in the legislative history of the Federal Tort Claims Act an intention to exempt claims against government agencies growing out of their regulatory activities, 104 S.Ct. at 2763. The Court reaffirmed its analysis in Dalehite v. United States, 346 U.S. 15, 73 S.Ct. 956 (1953), which held immune the decision to implement a post-war fertilizer export program, failure to determine the fertilizer's explosive capability, and

failure to police the storage and loading of the fertilizer before a dock-side explosion; the Court reiterated that "discretionary function":

. . . includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion.

73 S.Ct. 956, cited at 104 S.Ct. 2764. The Varig Court noted that the nature of the conduct, not the status of the actor, determines a discretionary function, and continued:

. . . whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals. Time and again the legislative history refers to the acts of regulatory agencies as examples of those covered by the exception. . . .

104 S.Ct. at 2765. The Court held that both the FAA's decision to adopt a spot-check program, and its application of the program to the particular airlines in question, were immune discretionary functions:

Here, the FAA has determined that a program of "spot-checking" manufacturers' compliance with minimum safety standards best accommodates the goal of air transportation safety and the reality of finite agency resources. Judicial intervention in such decisionmaking through private tort

suits would require the courts to "second-guess" the political, social, and economic judgments of an agency exercising its regulatory function. It was precisely this sort of judicial intervention in policymaking that the discretionary function exception was designed to prevent.

. . .  
In rendering the United States amenable to some suits in tort, Congress could not have intended to impose liability for the regulatory enforcement activities of the FAA challenged in this case. The FAA has a statutory duty to promote safety in air transportation, not to insure it.

Id. at 2768, 2769 (emphasis by the Court).

Similarly, the Utah Department of Financial Institutions may have a duty to promote investor security, but it has no duty or ability to insure it (point II, infra). The Department's decisions as to the form its examinations will take, and the performance of those examinations at particular banks, closely resemble in this setting the FAA's adoption of a particular inspection program and the performance of inspections of individual airplanes. The Department's activities in this area clearly fall within the ambit of its role as a regulator of the acts of private individuals and entities, pursuing enforcement and inspection duties, and under both Dalehite and its explication in Varig, must be deemed discretionary.

A non-federal case squarely on point here is Gormley v. State, 54 Ga.App. 843, 189 S.E. 288 (1936), where the State



Superintendent of Banks did not examine the savings and loan institution in which the plaintiff deposited her money, because (as in this case) he had concluded that the institution was not a bank which he was statutorily authorized to examine; the plaintiff lost her savings when the institution failed. The Court found that the Superintendent's decision was a discretionary function, and dismissed the action. The case was found controlling in State v. Gormley, 57 Ga.App.. 714, 196 S.E. 90, 91 (1938), where a former investor in the same institution alleged that the Superintendent's "willful neglect to perform his legal duty" caused the loss of her investment. The action was summarily dismissed.

This Court has not yet had occasion to rule on whether regulation of financial institutions is an immune discretionary function. However, the most recent analysis of what constitutes such a function clearly indicates that this action may not be maintained. In Little v. Utah State Division of Family Services, supra, 667 P.2d 49 (Utah, 1983), citing Evangelical United Brethren Church of Adna v. State, 407 P.2d 440, 445 (Wash., 1965), the Court looked to the following factors in deciding whether a function is discretionary:

- (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?
- (2) Is the questioned act, omission, or decision essential to the realization or

accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?

(3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?

(4) Does the government agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision? 667 P.2d at 51.

In the United Brethren case it was held that the application of variable security measures in making housing and work assignments to an incarcerated juvenile (who escaped and burned down plaintiffs' buildings) was a discretionary function. In weighing the four questions listed above, the Washington Court looked to the long history of statutory governmental regulation in the area; the furtherance of such regulatory policy by the function in question; and the nature of the state agency's statutory authority to perform the function.

Applying these criteria to this case, it is clear that a discretionary function is involved. Regulation by the State of certain enumerated financial institutions has been mandated by statute since at least 1911 (see, e.g., legislative history of Utah Code Ann. 7-1-6 and -7). As financial conditions and institutions have changed, the statutory parameters of regulation have been adjusted accordingly to balance the competing public needs for fiscal safety, on the one hand, and free competition in

certain financial areas, on the other (see, e.g., Commissioners' Comment on Utah Code Ann. 70B-3-503, and at 7 Uniform Laws Annotated, 242-3).<sup>2</sup> Both common sense, and the deposition testimony and affidavits on file, indicate that the determination of which financial institutions are subject to what kind of regulation is a decision essential to carrying out the State's regulatory policy. Commissioner Brimhall (R. 772-3) and Commissioner Borthick (R. 786) both attest that the Department's policy in this area involve basic policy judgment and evaluation, i.e., a determination of what form of regulation both the language and purpose of the U.C.C.C. would permit for supervised lenders.

The Department's conclusion that no authority existed for assuring the financial soundness of supervised lenders was entirely correct, as a matter of law (see Point II-A, below). Nevertheless, even assuming arguendo that that determination was in error, it was still a discretionary act for which immunity is retained. Gormley v. State, supra; State v. Gormley, supra.

Appellants seek to circumvent the clear application of the "discretionary function" exception by arguing (1) that, in former title 7 of the Utah Code, the Legislature determined the kind and manner of supervision to which Grove Finance was

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<sup>2</sup> Excerpts from the Commissioners' comments on the U.C.C.C. are set out in Appendix D, infra.

subject, rendering such a determination non-discretionary (Appellants' Brief, points II-B, -C, and -E), and (2) that Respondents' activities did not amount to high-level policy-making decisions, and therefore were not discretionary functions (Appellants' Brief, points II-A and -D).

Of course, Appellants' first argument entirely begs the point that the title 7 examination scheme did not apply to Grove Finance, and that Utah Code Ann. 70B-3-506, the examination provision of the U.C.C.C., did not authorize auditing for financial soundness (see Point II-A, infra). It also ignores the solid case law, set out above, which holds that a decision as to what regulatory control is statutorily authorized for particular classes of institutions, even if erroneous, is discretionary, e.g., Gormley v. State, supra; and that such regulation is precisely the kind of activity the "discretionary function" exception was intended to include, e.g., Emch v. United States, supra.

Appellants' citation of Fidelity Casualty Company of New York v. Brightman, 53 F.2d 161 (8th Cir., 1931), does not support their position. Aside from the fact that this Court should apply the criteria it has recently set out in the Little case as to discretionary function, rather than 1931 Missouri law, the Fidelity Casualty result favors a finding of immunity for Respondents. The Missouri Commissioner of Finance sought to

enjoin the prosecution of some sixty-one actions by depositors in a defunct bank, seeking recovery on the Commissioner's bond for his alleged negligence in permitting a bank to remain open after he learned of its financial plight, while he attempted to work with existing management to save the bank. After discussing Missouri statutes regarding the Commissioner's duty to determine and report insolvency, the Court of Appeals stated:

It might be a mandatory duty of the Commissioner of Finance to settle the question of insolvency or danger to depositors, but how the question should be determined is a matter of judgment and discretion. A mere erroneous conclusion uninfluenced by malice or corruption cannot be the basis of an action for damages.

• • •  
It is not for us to determine whether the state officials exercised poor judgment or to substitute our judgment for theirs. 53 F.2d at 168, 169 (emphasis added).

In the instant action, Appellants similarly aver that Commissioner Borthick failed to enforce the cease-and-desist order (Appellants' Brief, p. 25). Such is not the case (e.g., R. 787-8), but even if it were, such activities are discretionary and immune from suit.

Appellants' argument also misperceives the nature of a statutory immunity. The point of an immunity is that it bars an action even if duty and other elements of a negligence claim can be set out.

The Fidelity Casualty case noted State ex rel. Funk v. Turner, 42 S.W.2d 594 (Mo., 1931) (also cited by Appellants) for the proposition that a duty to examine a financial institution annually may have been ministerial, but decisions as to the length, character, and extent of the examinations were discretionary. The Turner case found that, where a bank examiner failed to discover a large embezzlement during an examination, the State was immune from suit. Thus, any claim Appellants have, based on any purported inadequacy of the annual U.C.C.C. examinations which were performed is similarly barred.

Appellants' second contention--that discretionary immunity only applies to policy-making functions--is similarly ill-taken. As discussed supra, this Court has not applied any single, mechanical test in this area, without properly weighing the pertinent statutory setting and aims; the policy evaluation, judgment, and expertise necessarily involved in performing the function in question;; and the practical need of shielding far-reaching governmental decisions from the threat of continual litigation, Little v. Utah State Division of Family Services supra, Frank v. State, supra.

Appellants aver that the Utah Governmental Immunity Act was patterned after California's immunity statutes, and reason from this that the result in this case should be the same as that reached in two cases decided under California's "discretionary

function" statute. It is true, as Appellants suggest, that the California laws were mentioned generally in debate when the 1965 Utah Legislature considered Senate Bill 4, which became the Governmental Immunity Act. However, the only reference to California statutes was that the proposed Utah bill employed the same general approach as California, preserving immunity with specifically enumerated exceptions;<sup>3</sup> there is simply no indication at all in the debates that Utah Code Ann. 63-30-10(1)(a) was patterned after the differently worded California statute. Also, the California cases cited by Appellants were decided after passage of the Utah Act, so there can be no pretense of a legislative intent to adopt their holdings.

Nevertheless, assuming arguendo that the California case law is of probative assistance, that state's appellate courts have properly refused to apply a purely mechanical semantic analysis regarding discretionary function, looking instead to whether the act required "personal deliberation, decision, and judgment." Thompson v. Alameda County, 27 Cal.3d 741, 614 P.2d 728, 731 (1980). Far from applying the blanket test that discretionary immunity "only applies to basic policymaking decisions" (Appellants' Brief, p. 19), the

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<sup>3</sup> Excerpts from the legislative debate referring to the California statutes are set out in Appendix C, infra.

California courts have recently ruled that discretionary functions include, e.g., an improper selection of a mental health facility for an adjudged incompetent, Foy v. Greenblott, 141 Cal.App.3d 1, 190 Cal.Rptr. 84 (1983); a Highway Patrol officer's decision not to investigate a stranded automobile, Bonds v. State, 138 Cal.App.3d 314, 187 Cal.Rptr. 792 (1982); an officer's request that parties in a dispute with a landowner leave the property, Watts v. Sacramento County, 136 Cal.App.3d 232, 186 Cal.Rptr. 154 (1982); the appointment of a delinquent's mother as his custodian, where the delinquent subsequently committed a murder, Thompson v. Alameda County, *supra*; the determination of the lowest responsible bidder to a public contract, Pacific Architects Collaborative v. State, 100 Cal.App.3d 110, 166 Cal.Rptr. 184 (1980); and a decision not to have lifeguards patrol a particular dangerous stretch of beach, Fuller v. State, 51 Cal.App.3d 926, 125 Cal.Rptr. 586 (1975). None of these cases involved high-level policy-making, yet each activity was discretionary.

If Appellants in the instant action are held to have stated a cause of action, it is clear that every investor in any financial institution of any kind which fails (whether due to the stupidity or dishonesty of its officials, recessionary economic times, or whatever the cause) may henceforth bring suit against the State and the Commissioner of Financial Institutions to



recover the full amount of the investment. The inescapable fact to be faced in this case is that, in regulating financial institutions throughout the state, the Commissioner must be free to make a myriad of highly technical decisions based upon his informed judgment and expertise, decisions often likely to raise the ire of one group or another, whether management or shareholders or depositors or others; in determining when and whether to take possession of an institution, the Commissioner must exercise his sound discretion in weighing whether abrupt closure or continued efforts at possible recovery will best serve the public and the investors; and to subject the State and the Commissioner to potential liability whenever a party disagrees with such a decision would effectively cripple all regulatory efforts in this area.

The Court In re Franklin National Bank Securities Litigation, 478 F.Supp. 210, 222 (E.D.N.Y., 1979), made the following cogent observations as to the wisdom of applying immunity in the area of financial regulation:

Officials of administrative agencies possess resources and expertise unavailable to courts. Their policy decisions rest upon delicate technical and political judgments of the risks and benefits of possible courses of action. It is highly unlikely that damage actions brought in the courts will consistently produce a more desirable balancing of the competing policy considerations [citations omitted]

. . . .

Moreover, allowing such review of agency policy decisions in the guise of damage actions would disrupt the intricate balance of power among the branches of government that the constitution requires; it would unduly elevate the courts. See Raichle v. Federal Reserve Bank, 34 F.2d 910, 915 (2d Cir. 1929) ("The remedy sought would make the courts, rather than the Federal Reserve Board, the supervisors of the Federal System, and would invoke a cure worse than the malady."). The extent that agency officials have inadequately exercised their discretion, or have inequitably balanced the risks of agency action, presents a political problem to be solved by legislation or changes in agency personnel, and not a judicial problem to be solved by the imposition of tort liability. [Citation omitted.] (emphasis added.)

Finally, it is obvious as a matter of sound legal analysis and of ordinary common sense that, in providing for regulation of Utah's financial institutions, the Legislature did not intend to establish the State as an insurer or guarantor for every dollar invested in every financial institution. Yet that would be the ineluctable result if Appellants were to succeed in this "attempt to saddle the government with liability" on the basis of its financial regulatory activities, Emch v. United States, supra, 630 F.2d at 529. The Emch court approvingly cited the following from Zabala Clemente v. United States, 567 F.2d 1140, 1151 (1st Cir., 1977), regarding claimed liability under OSHA laws:

We do not believe that the expanded role of the federal government in the safety area through such legislation as OSHA indicates an intent of Congress to make the United States a joint insurer of all activity subject to inspection. . . Nor do we believe that there is any sound policy basis for requiring that government attempts to protect the public must be accompanied by per se tort liability if they are unsuccessfully carried out. Cited 630 F.2d at 527, n. 4.

In this case, the substance of Appellants' allegations is that Respondents erred in determining the authority for and manner of examination of Grove Finance, and erred in the ways in which they enforced the cease-and-desist order after Grove's financial irregularities were discovered. When such allegations are examined in light of the criteria applied by this Court and federal courts for discretionary immunity, the pertinent statutes, and public policy considerations, immunity clearly applies. The District Court's granting of summary judgment on this ground was proper, and should be affirmed.

B. ISSUANCE OR REVOCATION OF LICENSE; ISSUANCE OF ORDER

In paragraph 13 of DeRose v. State, one of the three actions consolidated here, it is alleged that the State negligently issued a license as a regulated lender to Grove Finance, absent adequate investigation (DeRose, R. 5). In paragraph 15, Appellants claim that the State failed in its duty to revoke Grove's license (id.). Even if true, these allegations

would not support a cause of action against the State. Under Utah Code Ann. 63-30-10(1)(c), immunity is specifically preserved for injury arising both from the issuance of a license, and by the failure to deny or revoke a license. The broad statutory language on its face preserves immunity generally in the area of governmental licensing, dependent as that function is upon the exercise of informed discretion and judgment by the licensing authority. Insofar as the alternative cause of action in the DeRose Complaint, or any other allegation in this matter, seeks recovery for issuance of a license or failure to revoke a license, such portion of the suit must be dismissed under 63-30-10(1)(c).

Appellants also allege that Respondents "totally failed to enforce the cease and desist order" (Appellants' Brief, p. 25). The factual fallacy of this position (R. 787-8; Borthick deposition, pp. 30-34) and applicability of discretionary immunity are discussed in the preceding sub-point. Appellants' citation of Seymour National Bank v. State, 384 N.E.2d 1177 (Ind. App., 1979), as applying to this point is somewhat puzzling; Seymour was a wrongful death action for the negligent or willful misconduct of a state trooper in participating in a high-speed chase, so its pertinence to this case is not clear. The opinion of the Indiana Court of Appeals was subsequently vacated in Seymour National Bank v. State, 422 N.E.2d 1223 (Ind., 1981),

appeal dismissed, 457 U.S. 1127, 102 S.Ct. 2951 (1982), on the basis of Indiana's statute preserving immunity for the enforcement of laws.

Appellants' claim clearly "arises out of the issuance . . . of . . . [an] order," and is thus barred under Utah Code Ann. 63-30-10(1)(c). Again, the statutory language preserving immunity from claims arising from the issuance of "any . . . approval, order, or similar authorization" is broad, and the policy underlying this provision seems to be that public entities will not be subjected to liability or cast in the role of guarantors of safety in all areas where they are charged with supervising responsibilities for licensing or ordering either action or a restriction of activities by private parties.

Moreover, to whatever extent Appellants may base their action on an allegation that Commissioner Borthick pursued the order granting possession either too early or too late, the claim would also be barred by Utah Code Ann. 63-30-10(e), preserving immunity where injury:

. . . arises out of the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause. . .

#### C. INADEQUATE OR NEGLIGENT INSPECTION

Perhaps the gravamen of Appellants' Complaints in these actions is that the State failed to inspect, or inadequately or negligently inspected, the records of Grove Finance either under

title 7 (e.g., R. 3-6) or under title 70B (e.g., R. 7) Utah Code Ann. 63-30-10(1)(d) specifically preserves the State's immunity from suit for failure to make an inspection, or for making an inadequate inspection, and Plaintiffs' action must also be dismissed on this ground.

This Court was confronted with an analogous situation in White v. State, 579 P.2d 921 (Utah, 1978), where a plaintiff who was injured by the machinery in a vegetable cannery alleged that the State, by inspection, should have been aware of violations of the Utah Occupational Safety and Health Act at the cannery. A far stronger case for recovery was present in White than in the instant matter, because Utah Code Ann. 35-9-13(d) provides that one who is injured by failure of the Industrial Commission to seek relief for OSHA violations may bring an action for appropriate relief. The Court stated that the OSHA statute was not a waiver of governmental immunity and, relying upon Utah Code Ann. 63-30-10(1)(a) (discretionary function) and (d) (failure to make an inspection), held that the State was immune from suit. As to the sound public policy basis for immunity in this instance, the Court stated:

The legislature, in setting up the Occupational Safety and Health Division in 1973, had no intention of making it the scapegoat for every industrial accident. Id. at 924.

In the instant action, of course, Appellants have cited no statutes (because there are none) waiving the State's immunity or giving disappointed investors a cause of action against the State or its officers. As in the OSHA area, the Legislature has set up certain limited, well-delineated regulatory controls over financial institutions, but has not undertaken to act as a guarantor of the safety of all financial activities, nor intended to make the State liable for all losses which occur if regulatory efforts do not create a world of perfect fiscal safety for investors.

Appellants again seek to avoid this conclusion by claiming that the Utah Immunity Act was patterned after California's law, and therefore, the scope of Utah Code Ann. 63-30-10(1)(d) is limited by the language of the California statute.<sup>4</sup> (Appellants' Brief, point III.) Of course, just the contrary is true; the Utah Legislature's failure to adopt the additional, limiting language present in the California section must be taken to indicate an intention to make the scope of the Utah statute broader, extending immunity to the "inspection of any property."

Nor can the two sentences of Senate debate, cited by Appellants (their Brief, p. 24), be reasonably applied as

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<sup>4</sup> Compare Utah Code Ann. 63-30-10(1)(d) with California Government Code 818.6, in Appendix B.

limiting the application of Utah Code Ann. 63-30-10(1)(d) to the two casually mentioned examples (plumbing and furnace inspections). Were that the case, substantially different results would have obtained in Velasquez v. Union Pacific Railroad Company, 24 Utah 2d 217, 469 P.2d 5 (1970) (State immune from suit for failure to inspect railroad crossing and direct installation of active warning devices) and White v. State, *supra* (State immune for failure to performed adequate OSHA inspection), both cited by Appellants.

Instead, both the broad statutory language and prior precedent suggest an intent that government should not be subjected to liability for its regulatory enforcement activities in inspecting the property of private individuals and entities for compliance with applicable statutes and regulations--even when such inspections are less than perfect and failed to detect particular non-compliance. Implicit here are the same policy considerations relied on by the Supreme Court in United State vs. Varig Airlines, *supra*, 467 U.S. \_\_\_, 104 S.Ct. 2755, 2765 (1984): subjecting such regulatory activities to second-guessing though tort actions would seriously impair the ability of execute agencies to efficiently function in these areas. Like the Varig plaintiffs, Appellants base their action on an alleged failure to inspect; immunity is preserved by Utah Code Ann. 63-30-10(1)(d).



D. NEGLIGENT OR INTENTIONAL MISREPRESENTATION

In paragraph 30 of the Hilton Amended Complaint referring to the cease-and-desist order issued by Commissioner Borthick, Appellants state that they "had no indication from the State . . . that such an order was in effect." (R. 196; see also Nelson Complaint, Count Two, R. 4-5). Appellants also allege (e.g., Hilton Amended Complaint, paragraph 16, R. 194) that if Respondents had properly performed their duties, Appellants would not have invested their funds in Grove Finance. If, by these allegations, Appellants wish to include in their cause of action a claim that somehow their losses resulted from the fact that they were not informed earlier of Grove Finance's financial condition, Utah Code Ann. 63-30-10(1)(f) also bars this action. That section preserves immunity for all misrepresentations, whether negligent or intentional.

Once again, a solid line of federal cases, construing the misrepresentation exception of the Federal Tort Claims Act, 28 U.S.C. 2680(h), have barred claims arising out of banking and securities regulation by federal agencies. In First State Bank of Hudson County v., United States, 471 F.Supp. 33 (D.N.J., 1978), affirmed on other grounds, 599 F.2d 558 (3d Cir., 1979), cert. den., 444 U.S. 1013, 100 S.Ct. 662 (1980), the plaintiff based its action in part on the failure of the F.D.I.C. to notify the Bank's board of directors of irregularities discovered in a

bank examination. The district court found that this amounted to a claim of implied misrepresentation, an allegation that the board was misled by the F.D.I.C.'s failure to take any of the statutory enforcement steps it had authority to take. Such a claim was held barred by the misrepresentation exception in the Federal Tort Claims Act. Other cases with the same result, where an intentional misrepresentation was alleged, include First Savings & Loan Association v. First Federal Savings & Loan Association, 531 F.Supp. 251, 255 (D. Haw., 1981) (barred action for damages against F.S.L.I.C. for allegedly joining in conspiracy to place plaintiff in receivership); and United States v. Sheehan Properties, Inc., 285 F.Supp. 608 (D. Minn., 1968) (barred counterclaim against United States Agency for International Development for failure to inform the defendant of facts concerning two corporations which allegedly would cause the defendant not to invest in the corporation).

Thus, even if Appellants could prove that they were misled by Respondents' failure to inform them earlier of problems at Grove Finance, this would simply amount to a claim of implied misrepresentation. Particularly in light of this Court's reliance on federal case law construing parallel provisions of the Federal Tort Claims Act, Little v. Utah State Division of Family Services, supra, this action must also be deemed barred by the misrepresentation provision of the Utah Governmental Immunity Act.

II. RESPONDENTS HAD NO DUTY TOWARD INVESTORS  
IN GROVE FINANCE COMPANY UPON WHICH TORT  
LIABILITY MAY BE BASED.

It is a rudimentary principle of tort law that a prerequisite for liability in negligence is the existence of a duty of care running from the alleged tortfeasor to the injured plaintiff. Prosser, Law of Torts, 4th ed., p. 143. Duty is "a question of whether the defendant is under any obligation for the benefit of the particular plaintiff," and no liability may be founded "upon the breach of a duty owed only to some person other than the plaintiff. . . . 'Negligence in the air, so to speak, will not do.'" Id., p. 206; see Gray v. Scott, 565 P.2d 76, 78 (Utah, 1977), citing Restatement of Torts (Second), Section 328(b). The existence of a duty "is entirely a question of law . . . and it must be determined only by the court," and if no duty is found to be present, the defendant is entitled to a judgment in his favor, Prosser, supra, p. 206.

Respondents submit that they had no statutory authority or duty to examine Grove Finance each year for financial soundness, as Appellants claim; and even if such authority existed, it would not give rise to a duty of care to Appellants upon which tort liability could be based. Respondents are also entitled to judgment on this basis, even if the District Court's ruling were not sustained on immunity grounds. It is well settled that a trial court's judgment may be affirmed on

different grounds from those relied upon below where, as here, the other grounds were presented to the trial court, do not involve disputed facts, and have been fully briefed on appeal (Appellants' Brief, point I). Global Recreation, Inc. v. Cedar Hills Development Company, 614 P.2d 155, 157 (Utah, 1980). A judgment will be affirmed on proper legal grounds, even if such grounds were not relied upon by the district court, Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah, 1982), Matter of Estate of Hock, 655 P.2d 1111 (Utah, 1982), and this principle fully applies to appellate review of summary judgments, Allphin Realty, Inc. v. Sine, 595 P.2d 860 (Utah, 1979), Goodsel v. Department of Business Regulation, 523 P.2d 1230 (Utah, 1974).

A. STATUTORY FRAMEWORK

Appellants argue that Grove Finance was somehow a supervised financial organization under title 7 of the Utah Code, whose financial soundness the State had a statutory duty to insure; and that based upon Utah Code Ann. 7-1-7 as then written, the alleged failure to fulfill this duty provides a basis for liability (Appellants' Brief, p. 7; Hilton Amended Complaint, First and Second Causes of Action, R. 191-5; DeRose Complaint, paragraphs 6-10, R. 3-4; Nelson Complaint, Count One, R. 4). A brief review of the statutory scheme which applied to Grove Finance is necessary in order to appreciate the fallacy of these

contentions.<sup>5</sup>

Under Utah Code Ann. 7-1-7, a statute initially enacted in 1911, the institutions over which the state bank commissioner (now the Commissioner of Financial Institutions) had authority were set out:

All banks, all loan and trust corporations, all building and loan associations, all industrial loan companies, all credit unions, all small loan businesses required to obtain a license under any provision of law, and all bank service corporations shall be under the supervision of the banking department, and shall be subject to examination by the bank commissioner and the examiners.

Utah Code Ann. 7-1-8, enacted initially in 1913, set out the Commissioner's examination responsibility:

The bank commissioner, or an examiners, shall visit and examine every bank, savings bank, every loan and trust corporation, every building and loan association, every industrial loan company, every small loan business, and every co-operative bank, at least once in each year. At every such examination careful inquiry shall be made as to the condition and resource of the institution examined, the mode of conducting and managing its affairs, the official actions of its directors and officers, the investment and disposition

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<sup>5</sup> Title 7 of the Utah Code was repealed and substantially amended by the Financial Institutions Act of 1981, current Utah Code Ann. 7-1-101, et seq. Plaintiffs base their action on Title 7 as it existed prior to that time, and any statutory citations to title 7 sections which follow refer to the pre-1981 statutes.

of its funds, the security afforded to members, if any, and to those by whom its engagements are held, whether or not it is violating any of the provisions of law relating to corporations or to the business of the institution examined, whether or not it is complying with its articles of incorporation and bylaws, and as to such other matters as the commissioner may prescribe.

Prior to 1969, Grove Finance was licensed as a small loan business under chapter 10 of title 7 and as an industrial loan corporation under chapter 8 (R. 771). In that year, the Utah Legislature enacted the Uniform Consumer Credit Code as title 70B of the Code, and repealed chapter 10 of title 7 (see Utah Code Ann. 70B-9-103). There were then no more small loan business licenses in Utah, and Grove surrendered its industrial loan license, as did many others, electing to be licensed as a supervised lender under the U.C.C.C. (R. 771-2). Licensing as supervised lenders for those previously licensed under title 7 was, by statutory directive, automatic, Utah Code Ann. 70B-9-102 and accompanying Comment of Commissioners on Uniform State Laws.

Thus, after 1969, the State had no regulatory or examination authority over Grove Finance under Title 7, because Grove was then licensed as a supervised lender under title 70B.

The legislative history of section 7-1-7<sup>6</sup> clearly demonstrates that the institutions listed were purposely and advisedly selected by the Legislature over an extended period of time; the intent obviously was to include only those institutions specifically enumerated in section 7-1-7 within the State's title 7 jurisdiction, and not to include financial institutions not so enumerated.

Enactment of the U.C.C.C. in Utah in 1969 created new categories of financial institutions (supervised and regulated lenders) and provided separate, less stringent government controls on such institutions to encourage open entry and competition in the cash loan field. Cf. Comment 1 of Commissioners on Uniform State Laws to Utah Code Ann. 70B-3-503;

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<sup>6</sup> L. 1913, ch. 45, sec. 4 originally provided that "all banks organized under the laws of this State, and all private banks doing business within the State and any Loan, Trust and Guaranty associations" were subject to examination. Subsequently, building and loan associations, doing business within the State (L. 1915, ch. 12, sec. 1); "co-operative banks for personal credits" (L. 1915, ch. 120, sec. 5 and L. 1929, ch. 40, sec. 1); "small loan businesses" (L. 1917, ch. 41, sec. 4); and "industrial loan companies" (L. 1925, ch. 116, sec. 7 and L. 1927, ch. 50, sec. 1) were added to the State's examination jurisdiction, and included as section 7-1-8 in R. S. 1933. The reference to "cooperative banks" was later changed to "credit unions" (L. 1945, ch. 14, sec. 1), and "bank service corporations" were included in the section (L. 1963, ch. 7, sec. 3). National banks were initially excluded from the banking chapter (L. 1911, ch. 25, sec. 42) and from this section (R.S. 1933, sec. 7-1-8), but the exclusion was deleted in 1963 (L. 1963, ch. 7, sec. 3). (All emphasis in footnote added).

7 Uniform Laws Annotated, pp. 242-3.<sup>7</sup>

Supervised lenders were not made subject to the examination and other requirements of Title 7. First, from 1969 to 1981, no change was made in any applicable language of title 7 to refer to "supervised lenders" or "regulated lenders," even though those two terms were clearly defined and their unique legal characteristics extensively set out in Title 70B. No statute in either title (or elsewhere) empowers the State to examine and supervise all aspects of the financial soundness of supervised and regulated lenders, much less to deploy an army of investigators to ensure that no such entity ever engages in a fraudulent or foolhardy investment activity, much less to guarantee all funds invested in institutions licensed as supervised lenders.

Second, both the language of the U.C.C.C. and the comments of the Commissioners on Uniform State Laws indicate that "supervised lenders," subject to U.C.C.C. requirements, are different from "supervised financial organizations," defined as financial organizations "subject to supervision by an . . . agency of this state. . . .", Utah Code Ann. 70B-1-301(17)(b). Utah Code Ann. 70B-3-503 sets forth licensing requirements for

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<sup>7</sup> See text of comments in Appendix D. This Court has recognized that the Commissioners' comments are appropriate aids in construing provisions of uniform laws, e.g., State v. Intermountain Farmers Association, 668 P.2d 503 (Utah, 1983).



supervised lenders; comment 3 to that section states:

This section does not apply to supervised financial organizations. Their authority to open new offices at which they may receive deposits and make loans is found not in this Act, but in the statutes otherwise governing those organizations. (Emphasis added.)

Utah Code Ann. 70B-3-502(1) states that supervised loans may be made only by "a supervised financial organization or "one licensed as a supervised lender. Comment 1 to this section notes:

Supervised lenders may include supervised financial organizations. . . Since supervised financial organizations are already subject to a supervision by a state or federal official or agency, such organizations are not required to obtain a license under this Act. . . but their power may be limited by statutes other than this Act.

The clear intent is that supervised lenders (such as Grove Finance) and supervised financial organizations (which Grove Finance was not) be subject to separate statutory schemes, and not simply lumped together for regulatory purposes. While it is true that supervised financial organizations, already subject to regulation under other laws, may sometimes also qualify as supervised lenders, the converse is not true; no statute makes lenders licensed under Title 70B subject to control under Title 7.

Appellants also claim (Appellants' Brief, p. 9) that the State had a duty to examine Grove for financial soundness

under Utah Code Ann. 70B-3-506, requiring the Commissioner to "examine periodically . . . the loans, business and records" of each licensee, and under Utah Code Ann. 70B-3-505(1):

Every licensee shall maintain records in conformity with generally accepted accounting principles and practices in a manner that will enable the administrator to determine whether the licensee is complying with the provisions of this act. The record keeping system of a licensee shall be sufficient if he makes the required information reasonably available . . . .  
(Emphasis added).

Appellants' interpretation, of course, ignores the statutory language emphasized above. The requirement is that records be kept to permit a determination of compliance with the provisions of the U.C.C.C.; and if such compliance can be determined, the record are sufficient. U.C.C.C. requirements for supervised lenders relate to disclosure (e.g., Utah Code Ann. 70B-2-301, et seq. and -3-301, et seq.) and maximum charges (e.g., Utah Code Ann. 70B-3-508 and -511). No provision of the U.C.C.C. requires the State to probe into or insure the financial integrity of supervised lenders, or to exercise the more stringent supervisory powers which pertained to title 7 entities. Furthermore, it is clear on the record and not disputed that the Grove Finance records pertaining to supervised loans were generally in accordance with accepted accounting principles (Sherwood deposition, p. 39), fulfilling any duty imposed by Utah Code Ann. 70B-3-505(1).

The record now before the Court attests that Grove Finance complied with all reporting requirements, both as a small loan business and as a supervised lender, and that examinations by the Department of Financial Institutions indicated no U.C.C.C. violations, prior to issuance of the cease-and-desist order in 1980 (R. 771-3, 717-47). Appellants have not alleged that their loss resulted from any violation of disclosure rules or of maximum charge limits or of any other substantive restriction on supervised lenders imposed by the U.C.C.C., and Respondents are not aware of any such violation. Appellant would have the Court go far beyond the statutory directive for the Department to receive reports and perform examinations for U.C.C.C. compliance--Appellants would impose a duty on the State to make all supervised lenders failure-proof and all investments in such entities loss-proof. There is simply no basis for concluding that the Utah Legislature intended to impose such a duty on the State, or to allow potential enormous liability to result from the State's examinations.

B. DUTY OF CARE

The commanding majority of cases considering the issue have concluded that, even where a statutory duty exists to regulate financial institutions, no duty of care exists in the regulating agency upon which tort liability may be based for disappointed creditors or investors. No statutory duty of

supervision exists in the instant matter, but even if it did, Appellants still could not recover.

Perhaps the best-reasoned of numerous opinions on this issue are two which concern the failure of Franklin National Bank, the largest bank failure in United States history. In complex litigation involving the F.D.I.C., auditors and insurance companies, the United States was named as a third-party defendant on the grounds that bank inspections and other regulatory functions were performed negligently.

In re Franklin National Bank Securities Litigation, 445 F.Supp. 723 (E.D.N.Y., 1978), the Court considered the government's motion to dismiss. In an attempt to establish a duty running to the bank and its shareholders, the third-party plaintiffs cited the mandatory language of 12 U.S.C. 481, providing, "The Comptroller of the Currency . . . shall examine every national bank twice in each calendar year. . . ." (emphasis added). The Court found no duty on that basis.

Notwithstanding possible incidental benefits to the examined banks, to hold that the examinations were therefore designed to protect the shareholders, officers or directors from any fraud at these banks would make the United States an insurer of all banking activities. This would be an enormous liability that should not be read into the statute absent a clearer expression of congressional intent. . . . (emphasis added).

The third-party plaintiffs also alleged that the government assumed a duty toward the bank and its shareholders by extensive involvement in the daily operations of the bank for a considerable time before its insolvency. The Court held that the government assumed no duty by regulating a bank, such that negligent regulation would give rise to tort liability. Id. at 732. Nevertheless, the Court found this "an extraordinary case," where the completion of discovery was necessary, so the motion was denied, id. at 734, without prejudice to a motion for summary judgment, id. at 728.

Subsequently, In re Franklin National Bank Securities Litigation, supra, 478 F.Supp. 210 (E.D.N.Y., 1979), the government's motion for summary judgment was granted. The Court found no theory of duty (either a statutory duty or an assumed duty) to be convincing, and noted that, "So far no court has held that any of the statutory provisions" regarding the Comptroller, Federal Reserve Bank, or F.D.I.C., "create any actionable duty running to the regulated institutions." Id. at 214. The court stated that supervision of the banking system was for the protection of the public as a whole, not for the protection of individual banks and their shareholders.

This analysis has led every court addressing the issue to conclude that the Comptroller's mandate to conduct national bank examinations does not create an actionable duty running to the examined bank; the Comptroller's failure

to detect weakness or dishonesty at an examined bank gives rise to no cause of action against the United States. . . .  
Id. at 215 (emphasis added).

Other cases where the duty issue has been examined include First State Bank of Hudson County v. United States, 599 F.2d 588 (3d Cir., 1979), cert. den., 444 U.S. 1013, 100 S.Ct. 662 (1980), supra (affirming dismissal of action on failure of F.D.I.C. examiner to warn bank of discovered criminal activities by bank officer); Harmsen v. Smith, 586 F.2d 156 (9th Cir., 1978) (affirming dismissal of action for Comptroller's negligent failure to discover illegal practices during bank examination); Davis v. F.D.I.C., 369 F.Supp. 277 (D. Colo., 1974) (dismissing action for failure to notify public of discovered irregularities in bank); and Social Security Administration Baltimore Federal Credit Union v. United States, 138 F.Supp. 639 (D. Md., 1956) (holding of no duty and no liability for negligent failure of government examiners to discover embezzlement by credit union official).

In earlier proceedings in this matter, Appellants have cited Tcherepnin v. Franz, 570 F.2d 187 (7th Cir., 1978), cert. den., 439 U.S. 876, 99 S.Ct. 214 (1978), and State v. Superior Court of Maricopa County, 123 Ariz. 324, 599 P.2d 777 (1979), where regulatory agencies have been found to have a duty running to creditors of failed financial entities. These cases are the only cases so holding, are poorly reasoned and aberrational, and

have been consistently distinguished and avoided by courts in the states where they were handed down (cf., e.g., Cady v. State, 129 Ariz. 258, 630 P.2d 554 (1981), and Hicks v. Williams, 104 Ill.App.3d 172, 432 N.E.2d 1278 (1982), and analysis of these cases at R. 629-33). At this junction, it may suffice simply to point out that (1) Tcherepnin and State v. Superior Court involved the failure of a savings association and two thrift associations, respectively--entities whose financial soundness government had a clear statutory duty to supervise, unlike the instant case; and (2) the holdings in those cases were based on repeated statutory references to protection of those in the plaintiffs' class, an aspect entirely absent from this case.

A far more sound consideration of the question is Commonwealth, Department of Banking & Securities v. Brown, 605 S.W.2d 497 (Ky., 1980), where the plaintiffs sought damages for the dereliction of state examiners in not ascertaining or reporting the true condition of the records of two building and loan associations. Reversing a judgment and dismissing the action, the Kentucky Supreme Court stated:

There is no public policy requiring government to guarantee the success of its efforts. When the governmental entity is performing a self-imposed protective function as it was in the case at hand, the individual citizen has no right to demand recourse against it though he is injured by its failure to efficiently perform such function. Any ruling to the contrary would tend to

constitute the Commonwealth an insurer of the quality of services its many agents perform and serve only to stifle government's attempts to provide needed services to the public which could not otherwise be effectively supplied.

Id. at 499. Conceding that the state may sometimes act imperfectly, but finding that risk to be "the natural concomitant of our form of government," the Court continued:

We perceive that the public interest is better served by a government which can aggressively seek to identify and meet the current needs of the citizenry, uninhibited by the threat of financial loss should its good faith efforts provide less than optimal--or even desirable--results. Id.

Respondents are not aware of any case, in any jurisdiction, where an administrator under the U.C.C.C. has been found liable for any failure to properly regulate a supervised lender. As noted above, suits to recover damages for bank failures have regularly been dismissed; the same result must obtain, a fortiori, for the failure of a supervised lender, where government's statutory duty of supervision is far less stringent than for banks and most other kinds of financial institutions.

In Little v. Utah State Division of Family Services, supra, 667 P.2d 49 (Utah, 1983), this Court recently applied a duty-risk analysis in reviewing a negligence judgment, relying on Professor Thode's article, "Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between



Judge and Jury," at 1977 Utah L. Rev. 1. According to Professor Thode, the duty-risk determination of whether the legal system's protection extends to the risk in question--i.e., whether the risk to which the plaintiff was subjected was within the scope of the defendant's duty--is entirely a legal question for the court to determine, based upon a weighing of public policy and other pertinent considerations. Thode, op. cit., 26-28; see Little, supra, 667 P.2d at 54, where the Court looks to applicable statutes in determining the scope of the duty of a state agency.

In the instant matter, the absence of statutory duty has already been discussed, and the sound public policy grounds for finding no duty are evident. If government is found to have a duty upon which tort liability can be based toward every person affected by an activity which government must, by statute, regulate, then government becomes an insurer for the total safety and soundness of all regulated activities. In particular, if, as here, an agency is charged by statute with limited regulatory duties for a particular kind of business, and on that basis a duty is inferred to protect all parties from any loss arising from any activity of the business, it is difficult to foresee the extent to which government's liability for not providing an injury-free society may extend.

Furthermore, there is and can be no allegation here that any action or inaction of Respondents gave rise to any

justifiable reliance by Grove Finance investors on which any theory of an assumption of duty could be based. From 1969 on, the Department of Financial Institutions did not examine or regulate supervised lenders for financial soundness, and that policy applied across the board to all supervised and regulated lenders licensed under the U.C.C.C. (R. 772, 786).

There is simply no basis, statutory, common-law, common-sense, or otherwise, to extend the State's duty to protecting all investors in Appellants' class. As a matter of law, no liability may be found.

III. APPELLANTS' CHALLENGE TO THE MONETARY  
LIABILITY LIMITS OF THE GOVERNMENTAL  
IMMUNITY ACT ON EQUAL PROTECTION GROUNDS  
WAS NOT PROPERLY RAISED IN THE DISTRICT  
COURT; IS NOT RIPE FOR DECISION IN THIS  
ACTION; AND IN ANY EVENT, HAS NO MERIT  
AS A MATTER OF LAW.

In Point V of their Brief, Appellants argue that the statutory limit on the amount which may be recovered in an action against a governmental entity or employee, currently codified in Utah Code Ann. 63-30-34,<sup>8</sup> violates the equal protection provisions of the United States Constitution (Fourteenth Amendment, sec. 1) and Utah Constitution (article I, sec. 24).

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<sup>8</sup> At the time Grove Finance closed its doors, Utah Code Ann. 63-30-34 instructed courts to reduce judgments against governmental entities and their employees to the dollar limits then set out in Utah Code Ann. 63-30-29; see text of these sections in Utah Code Ann., 1981 pocket supplement to second replacement volume 7A and in Appendix B herein.

This Court has held that issues not raised in the trial court on motions for summary judgment may not be raised for the first time on appeal and be considered, e.g., Franklin Financial v. New Empire Development Company, 659 P.2d 1040 (Utah, 1983), Bangerter v. Poulton, 663 P.2d 100 (Utah, 1983). The same rule applies to the raising of constitutional issues, where no individual's liberty is at stake, Pratt v. City Council of City of Riverton, 639 P.2d 172 (Utah, 1981). A review of each of the memoranda of law submitted by Appellants below, pertaining to their own and Respondents' summary judgment motions (R. 656-87, 838-63, 949-59), fails to disclose any mention of a constitutional question as to the liability limits. Nor was the matter raised in oral argument. The issue not having been raised or considered below, it may not be raised now for the first time.

Furthermore, this Court has very properly disfavored the rendering of advisory opinions, particularly on constitutional issues, where a challenged statute has not been applied to a litigant's disadvantage:

[A] fundamental rule of long-standing is that unnecessary decisions are to be avoided and that the courts should pass upon the constitutionality of a statute only when such a determination is essential to the decision in a case. A constitutional question does not arise merely because it is raised and a decision is sought thereon. . . .

A further fundamental rule is that the courts do not busy themselves with

advisory opinions. . . It has been found to be far wiser, and it has become settled as a general principle, that a constitutional question is not to be reached if the merits of the case in hand may be fairly determined on other than constitutional issues.

Hoyle v. Monson, 606 P.2d 240, 242 (Utah, 1980). An appellant affected by one portion of a statute or act may not attack the constitutionality of another portion of the same act not applicable to his case, Cavaness v. Cox, 598 P.2d 349, 351-2 (Utah, 1979).

As of 1980, Utah Code Ann. 63-30-34 stated:

If any judgment or award against a governmental entity . . . or against a governmental employee . . . exceeds the minimum amounts . . . specified in section 63-30-29, the court shall reduce the amount of the judgment or award to a sum equal to the minimum requirements  
. . . .

By its clear terms, the statute does not apply unless and until a judgment or award in excess of the statutory limits is entered. Of course, no judgment of any kind has been entered in this case, and it is entirely problematic and speculative at this point whether or not any judgment in excess of the statutory limits will ever be entered. Appellants clearly seek an advisory opinion on a statute which has not been, and may never be, applied to them. The question is not ripe for decision (and, in any event, Respondents submit that the non-constitutional grounds set forth in Points I and II herein are dispositive of this case).

Finally, even assuming arguendo that the issue is properly before the Court, Appellants' legal argument simply does not hold water. Numerous courts have upheld statutory limits on governmental liability under equal protection attack, pursuant to both the Fourteenth Amendment and state constitutional provisions, e.g., Packard v. Joint School District No. 171, 104 Idaho 604, 661 P.2d 770 (Ida. App., 1983); Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983); Winston v. Reorganized School District R-2, 636 S.W.2d 324 (Mo., 1982); Sambs v. City of Brookfield, 97 Wis.2d 356, 293 N.W.2d 504 (1980), cert. den., 449 U.S. 1035, 101 S.Ct. 611 (1981); Stanhope v. Brown County, 90 Wis.2d 823, 280 N.W.2d 711 (1979); Estate of Cargill v. City of Rochester, 406 A.2d 704 (N.H., 1979), appeal dismissed, 445 U.S. 921, 100 S.Ct. 1304 (1980). Each of these cases held, applying the "rational basis" test for equal protection, that the limitation statutes reasonably served a valid legislative objective: "To compensate victims of government tortfeasors while at the same time protecting the public treasury." Stanhope v. Brown County, supra, 280 N.W.2d at 719. These cases are fully in line with the strong line of cases holding that state tort claims and governmental immunity acts do not violate federal and state equal protection guarantees, e.g., Brown v. Wichita State University, 547 P.2d 1015 (Kan., 1976), and cases cited therein at 1026. Brown also applied a "rational basis" test, and noted,

"There are no cases which hold governmental immunity invalid based on the equal protection clause of the Fourteenth Amendment." Id. at 1029.

This Court has consistently looked to a "rational basis" test for its equal protection analysis where no fundamental right is in question, holding that a legislative classification "must be merely rationally related to a valid public purpose" to withstand Fourteenth Amendment scrutiny. Utah Public Employees' Association v. State, 610 P.2d 1272, 1273 (Utah, 1980).

When neither a fundamental right nor a suspect classification is involved, equal protection requires that statutory classifications bear a reasonable relation to the purpose sought to be accomplished and that there be a reasonable basis for the distinction between the classes.

J.J.N.P. Company v. State, 655 P.2d 1133, 1137 (Utah, 1982).

This same "rational basis" test applies when an equal protection attack is based upon Article I, section 24 of the Utah Constitution, id.; Liedtke v. Schettler, 649 P.2d 80 (Utah, 1982).

It is also noteworthy that the United States Supreme Court has applied a "rational basis" test in reviewing the equal-protection validity of statutes limiting the amount of monetary liability for nuclear incidents, Duke Power Company v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 98 S.Ct. 2620

(1978); see also Continental Insurance Company v. Illinois Department of Transportation, 709 F.2d 471, 475 (7th Cir. 1983), suggesting that a "rational basis" test would be the appropriate equal-protection means of review of a state statute limiting governmental liability to \$100,000.

Respondents submit that there is no fundamental right to have unlimited recovery against governmental entities; that, therefore, the "rational basis" test is the proper means of assessing Utah's liability limits under both state and federal constitutional equal protection provisions; and that the liability limits are rationally related to the valid public purpose of providing some measure of recovery for injured parties while protecting the fiscal means or providing necessary governmental services.

Appellants have cited what appears to be the only case invalidating a state liability limit and applying a "strict scrutiny" test rather than a "rational basis" test, White v. State, 661 P.2d 1272 (Mont., 1983). Yet even that court acknowledged, "We recognize that some limit on the State's liability may comport with the constitutional guarantees of equal protection." Id. at 1275. The White ruling invalidated a statutory scheme which limited recovery of economic damages and completely barred recovery of non-economic damages, a result inapposite to Utah Code Ann. 63-30-34, which makes no such

distinction. The Montana Court based its result on a state constitutional provision guaranteeing a "speedy remedy . . . for every injury of person, property, or character" (Montana Constitution, article II, section 16), similar to Utah's guarantee of a "remedy by due course of law" for "an injury done" to one's "person, property or reputation. . ." (Utah Constitution, article I, section 11). This Court has recently ruled that sovereign immunity does not violate article I, section 11, Madsen v. Borthick, supra, 658 P.2d at 629.

Also, it has been recognized that the White decision deviates from decisions in "the vast majority of courts which have held that statutes limiting or barring governmental liability are measured by the rational basis test," Ryszkiewicz v. City of New Britain, 193 Conn. 589, 479 A.2d 793, 799 (1984), and cases cited therein. Respondents submit that the White case reaches an aberrant conclusion, based upon a particular statutory approach which does not resemble Utah Code Ann. 63-30-34, and is not sound precedent as to the application of Utah and federal constitutional analyses.

This Court has recently recognized that a statute may violate article I, section 24 of the Utah Constitution where it is "so shot-through with exceptions as to be incapable of reasonably furthering the statutory objectives." Malan v. Lewis, no. 17606, slip op. at 16 (Utah, May 1, 1984). This is not such



a case. Utah Code Ann. 63-30-34 applies across the board to all parties who are granted judgments in excess of the specified limits, suggesting no "crazy-quilt" or discriminatory pattern of application. Furthermore, Madsen v. Borthick, supra, emphasized that sovereign immunity "was a well-settled principle of American common law at the time Utah became a state," 658 P.2d at 629, and hence, at the time Article I, section 24 was enacted. Absolute sovereign immunity did not violate that section, and it clearly would not be violated by a statutory provision which waives immunity up to certain levels of recovery, and operates uniformly on all who recover judgments in tort up to or over those levels.

In sum, no basis exists for Appellants' contention that Utah Code Ann. 63-30-34 violates state and federal equal protection principles--even if that question were properly before the Court.

#### CONCLUSION

Regulation of financial institutions is a governmental function, subject to provisions of the Utah Governmental Immunity Act. The substantive exceptions to the Act's waiver of immunity in Utah Code Ann. 63-30-10(1)(a), (c), (d), and (f) clearly bar suit in this matter, and the District Court's order should be affirmed.

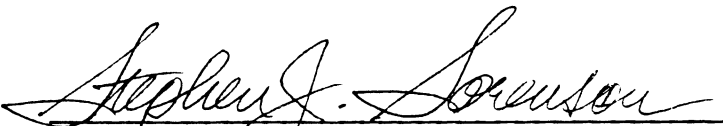
As a matter of law, Respondents had no statutory duty and no duty of care upon which liability may be based, extending

to Appellants. To hold otherwise would go far toward a legal requirement impossible of attainment, that governmental agencies with limited regulatory responsibilities in a given area must somehow render injury-proof all activities undertaken by private parties in the area.

Appellants' attempt to raise the issue of whether Utah's governmental liability limits (Utah Code Ann. 63-30-34) violate equal protection is not well-founded as a matter of law, and in any event is untimely and not ripe for decision, and should be disregarded.

Respectfully submitted this 28th day of November, 1984.

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CERTIFICATE OF MAILING

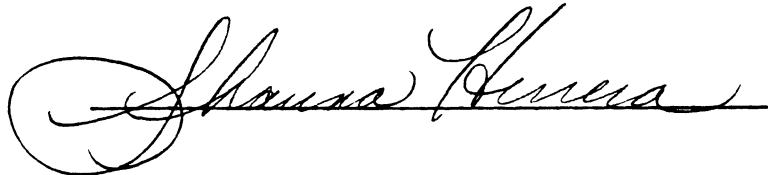
I hereby certify that two copies of the foregoing Brief of Respondents was mailed postage prepaid to the following this 29th day of November, 1984:

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A handwritten signature in cursive script, appearing to read "Charles W. Hanna", written over a horizontal line.

APR 26 1984

H. Dixon Hindley, Clerk 3rd Dist Court

By \_\_\_\_\_ Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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MATHEW FENN HILTON, et al.,	:	MEMORANDUM DECISION
Plaintiffs,	:	CIVIL NOS. C-82-5165
vs.	:	C-82-5872
MIRVIN D. BORTHICK, et al.,	:	C-82-3798
Defendants.	:	(Consolidated)

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The Motions of the plaintiffs for Summary Judgment, and the reciprocal Motions for Summary Judgment of the defendants all came on regularly for hearing on November 3, 1983. Argument was had on that date, and the hearing was continued to November 8, 1983 for further argument. The matters before the Court in the above-referenced civil numbers have all been consolidated into one action. All interested parties were present or represented by counsel at the hearings above-referenced. Counsel argued their respective positions, and the Court granted defendants' Motion to open and publish Depositions of Howard Sherwood and Mirvin Borthick. The Court took the matter under advisement to further review the extensive Memoranda filed by the parties, and to review the case law cited by counsel. The Court has now carefully considered the arguments advanced by

the respective parties, and the case law authority cited by all counsel to the controversy, and otherwise being fully advised, enters the following Memorandum Decision.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Based upon the Court's review of this matter, including the Affidavits, Depositions and matters in the file and the legal authorities cited, the Court concludes that the plaintiffs' Motion for Summary Judgment must be denied in that there are existing significant and material issues of fact to be determined by the trier of fact. The material issues of fact prohibit this Court from passing on the questions presented as a matter of law on a motion for summary judgment. Likewise, plaintiffs' more limited request, presented orally at the time of the argument in this matter, that this Court determine at this stage of the proceedings what statutory duties, if any there be, apply to the facts of this case, must also be denied. This Court should not, under the disputed facts of this case, determine what statutory standards may apply to the defendants at this stage of the proceedings. Such a decision should be made when the evidence is in, or sufficient evidence is presented to allow this Court to reach some determinations on the respective theories of liability, and make appropriate decisions based upon the evidence then presented as to what statutory duties or other duties that may run from the defendants to the plaintiffs may be.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

As to the defendants' Motion for Summary Judgment, and that portion thereof which seeks a ruling of this Court that all obligations toward the plaintiffs were adhered to as a matter of law by the defendants, this Court must similarly deny such a request as was done in the plaintiffs' Motion for Summary Judgment, there being substantial and material questions of fact remaining for determination.

Dealing with that portion of the defendants' Motion for Summary Judgment asserting the defense of governmental immunity, the Court is compelled to reach a substantially different result. Based upon the case authority cited by the defendants, including the Utah Supreme Court language in Madsen vs. Borthick, 656 P.2d 627 (Utah 1983), supervision of a financial institution, as was the situation here, constitutes a governmental activity. Accordingly, unless the governmental immunity statute waives governmental immunity, the action must be dismissed. Under the laws of this state, governmental immunity has been waived for negligent acts and/or omissions of state employees, unless the conduct falls into those specific exceptions listed in Section 63-30-10 of the Utah Code Annotated, 1953 as amended. Addressing the question as to whether or not the alleged conduct of the defendants falls into the exceptions where governmental immunity is not waived under the subparts of Section 63-30-10,

this Court finds that the defendants' arguments are persuasive. The claims asserted against the defendants arise out of acts or omissions that fall into the exceptions listed in Section 63-30-10. The nature of defendant Borthick's actions or claimed failure to act, even if such were proven, are discretionary, and do not fall into a class of activities where governmental immunity has been waived. •The alleged misrepresentations of the defendants are not waived under Section 63-30-10. The alleged errors of the defendants in issuing or revoking licenses are also not waived under Section 63-30-10. The foregoing, coupled with the policy reasons enumerated by the Supreme Court for not imposing liability on public officials who perform discretionary functions in good faith, leads this Court to the conclusion that that portion of the defendants' Motion for Summary Judgment asserting the defense of governmental immunity is well taken and should be the finding of this Court in this case. It follows that as no claim against the state can be maintained, there therefore can be no claim against Commissioner Borthick. Plaintiffs' claims against the defendants are therefore dismissed on the basis of governmental immunity.

Counsel for the defendants is to prepare an appropriate Order in conformance with this Memorandum Decision, and submit

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MEMORANDUM DECISION

the same to the Court for review and signature pursuant to  
Rule 2.9 of the Rules of Practice for the District and Circuit  
Courts of the State of Utah.

Dated this 26 day of April, 1984.

15/  
\_\_\_\_\_  
TIMOTHY R. HANSON  
DISTRICT COURT JUDGE



## APPENDIX B

### TEXT OF STATUTES AND RULES CITED

(Note: The texts of session laws and of statutes cited only by chapter or sub-chapter are not included).

#### 1. Utah

##### Utah Constitution, article I, section 11:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

##### Utah Constitution, article I, section 24:

All laws of a general nature shall have uniform operation.

##### Utah Code Ann. 7-1-6 (prior to repeal in 1981):

The bank commissioner, with the advice and consent of the governor, may appoint such examiners as shall be required for the proper conduct of the banking department; one of whom he may designate as chief examiner at a salary to be fixed in accordance with standards adopted by the department of finance, who in the absence of disability of the bank commissioner shall exercise all of the powers of the bank commissioner, except those required of him as a member of any board. Such examiners shall hold a corporate surety bond in such form and in such amount as shall be determined by the state department of finance, conditioned for the faithful performance of his duties. The premium on such bond shall be paid by the state. Such examiners shall not be interested directly or indirectly in any institution under the supervision of the banking department. They shall perform such duties as are prescribed by this title or that may be assigned to them by

the bank commissioner. The bank commissioner may also with the approval of the finance commission employ such clerical help as may be necessary for the proper carrying on of the work of the banking department. The salaries of examiners and of such assistants shall be fixed in accordance with salary standards adopted by the department of finance and shall be payable monthly as the salaries of other state employees  
. . . .

Utah Code Ann. 7-1-7 (prior to repeal in 1981):

All banks, all loan and trust corporations, all building and loan associations, all industrial loan companies, all credit unions, all small loan businesses required to obtain a license under any provision of law, and all bank service corporations shall be under the supervision of the banking department, and shall be subject to examination by the bank commissioner and the examiners.

Utah Code Ann. 7-1-8 (prior to repeal in 1981):

The bank commissioner, or an examiner, shall visit and examine every bank, savings bank, every loan and trust company, every small loan business, and every co-operative bank, at least once in each year. At every such examination careful inquiry shall be made as to the condition and resources of the institution examined, the mode of conducting and managing its affairs, the official actions of its directors and officers, the investment and disposition of its funds, the security afforded to members, if any, and to those by whom its engagements are held, whether or not it is violating any of the provisions of law relating to corporations or to the business of the institution examined, whether or not it is complying with its articles of incorporation and bylaws, and as to such other matters as the commissioner may prescribe.

Utah Code Ann. 35-9-13(d):

If the administrator arbitrarily or capriciously fails to seek relief under this section, any employee who may be injured by reason of such failure, or the representative of such employees, may bring an action against the administrator in the district court of the county in which the imminent danger is alleged to exist or the employer has its principal office, for a writ of mandamus and for further appropriate relief.

Utah Code Ann. 63-30-4 (prior to amendment in 1983):

Nothing contained in this act, unless specifically provided, is to be construed as an admission or denial of liability or responsibility in so far as governmental entities are concerned. Wherein immunity from suit is waived by this act, consent to be sued is granted and liability for the entity shall be determined as if the entity were a private person.

The remedy against a governmental entity or its employee for an injury caused by an act or omission which occurs during the performance of such employee's duties, within the scope of employment, or under color of authority is, after the effective date of this act, exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless the employee acted or failed to act through gross negligence, fraud, or malice.

An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee shall be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment or under color of authority, unless it is established that the employee acted or failed to act due to gross negligence, fraud or malice.

Utah Code Ann. 63-30-10(1):

Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of his employment except if the injury:

(a) arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused, or

. . .

(c) arises out of the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization, or

(d) arises out of a failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property, or

(e) arises out of the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause, or

(f) arises out of a misrepresentation by said employee whether or not such is negligent or intentional.

Utah Code Ann. 63-30-29 (prior to repeal in 1983):

Every policy or contract of insurance purchased by a governmental entity as permitted under the provisions of this chapter shall provide:

(a) In respect to bodily injury liability that the insurance carrier shall pay on behalf of the insured governmental entity all sums which the insured would be legally obligated to pay as damages because of bodily injury, sickness or disease, including death resulting therefrom, sustained by any person, caused by accident, and arising out of the ownership, maintenance and use of automobiles, or arising out of the ownership, maintenance or use of premises, and all operations necessary or incidental thereto, or in respect to other operations and caused by accident

subject to a limit, exclusive of interests and costs, of not less than \$100,000 because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, to a limit of not less than \$300,000 because of bodily injury or death of two or more persons in any one accident.

(b) In respect to property damage liability that the insurance carrier shall pay on behalf of the insured governmental entity all sums which the insured would in the absence of the defense of governmental immunity be legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident, and arising out of the ownership, maintenance and use of automobiles, or arising out of the ownership, maintenance or use of premises, and all operations necessary or incidental thereto, or in respect to other operations and caused by accident to a limit of not less than \$50,000 because of injury to or destruction of property of others in any one accident.

Utah Code Ann. 63-30-34 (prior to amendment in 1983):

If any judgment or award against a governmental entity under sections 63-30-7, 63-30-8, 63-30-9, and 63-30-10, or against a governmental employee for which a governmental entity may have a statutory duty to indemnify the employee, exceeds the minimum amounts for bodily injury and property damage liability specified in section 63-30-29, the court shall reduce the amount of the judgment or award to a sum equal to the minimum requirements unless the governmental entity has secured insurance coverage in excess of said minimum requirements in which event the court shall reduce the amount of the judgment or award to a sum equal to the applicable limits provided in the insurance policy.

Any governmental entity that acts as a self-insurer under section 63-30-28 is liable for any judgment or award entered against it or its employee under sections 63-30-7, 63-30-8, 63-30-9, and 63-30-10, and is liable to indemnify its employees against personal liability in accordance with sections 63-48-1 through 63-48-7, but only to the extent of the minimum amounts for bodily injury and property damage liability specified in section 63-30-29, and no judgment or award shall be entered in such action in excess of such minimum amounts.

Utah Code Ann. 70B-1-301(17) (prior to recodification as -301(8) in 1983:

"Supervised financial organization" means a person, other than an insurance company or other organization primarily engaged in an insurance business,  
(a) organized, chartered, or holding an authorization certificate under the laws of this state or of the United States which authorize the person to make loans and to receive deposits, including a savings, share, certificate or deposit account, and  
(b) subject to supervision by an official or agency of this state or of the United States.

Utah Code Ann. 70B-3-502(1):

Unless a person is a supervised financial organization or has first obtained a license from the administrator authorizing him to make supervised loans, he shall not engage in the business of:  
(a) making supervised loans, or  
(b) taking assignments of and undertaking direct collection of payments from or enforcement of rights against debtors arising from supervised loans, but he may collect and enforce for three months without a license if he promptly applies for a license and his application has not been denied.

(See Commissioners' comments in appendix D, infra).

Utah Code Ann. 70B-3-505 (prior to amendment in 1983):

(1) Every licensee shall maintain records in conformity with generally accepted accounting principles and practices in a manner that will enable the administrator to determine whether the licensee is complying with the provisions of this act. The record keeping system of a licensee shall be sufficient if he makes the required information reasonably available. The records need not be kept in the place of business where supervised loans are made, if the administrator is given free access to the records wherever located. The records pertaining to any loan need not be preserved for more than two years after making the final entry relating to the loan, but in the case of a revolving loan account the two years is measured from the date of each entry.

(2) On or before April 15 of each year every licensee shall file with the administrator a composite annual report in the form prescribed by the administrator relating to all supervised loans made by him. The administrator shall consult with comparable officials in other states for the purpose of making the kinds of information required in annual reports uniform among the states. Information contained in annual reports shall be confidential and may be published only in composite form.

(See Commissioners' comment in Appendix D, infra).

Utah Code Ann. 70B-3-506:

(1) The administrator shall examine periodically at intervals he deems appropriate the loans, business, and records of every licensee. In addition, for the purpose of discovering violations of this act or securing information lawfully required, the administrator or the official or agency to whose supervision the organization is subject (section 70B-6-105) may at any time investigate the loans, business, and records of any regulated lender. For these purposes he shall have free and reasonable access to the offices,

places of business, and records of the lender. . . .

(See Commissioners' comment in appendix D, *infra*).

Utah Code Ann. 70B-3-508 (prior to amendment in 1983):

(1) With respect to a supervised loan, including a loan pursuant to a revolving loan account, a supervised lender may contract for and receive a loan finance charge not exceeding that permitted by this section.

(2) The loan finance charge, calculated according to the actuarial method may not exceed the equivalent of the greater of either of the following:

. . .

Utah Code Ann. 70B-3-511 (prior to amendment in 1983):

(1) Regulated loans, not made pursuant to a revolving loan account and in which the principal is \$1,000 or less, shall be scheduled to be payable in substantially equal installments at equal periodic intervals except to the extent that the schedule of payments is adjusted to the seasonable or irregular income of the debtor, and

(a) over a period of not more than 37 months if the principal is more than \$300, or

(b) over a period of not more than 25 months if the principal is \$300 or less. Nothing herein shall prevent full payment without penalty, and provided further, interest may be charged only to date of prepayment. Except as specifically provided for in this act.

(2) The amounts of \$300 and \$1,000 in subsection (1) are subject to change pursuant to the provisions on adjustment of dollar amounts (section 70B-1-106).

Utah Code Ann. 70B-9-102:

All persons licensed or otherwise authorized under the provisions of Title 7, Utah Code Annotated 1953, on the effective date of this act are licensed to make supervised loans under this act pursuant to the part on Regulated and Supervised Loans (sections 70B-3-501 to



70B-3-514) of the chapter on Loans (sections 70B-3-101 to 70B-3-605), and all provisions of that part apply to the persons so previously licensed or authorized. The administrator may, but is not required to, deliver evidence of licensing to the persons so previously licensed or authorized.

(See Commissioner's comment in Appendix D, infra).

Utah Code Ann. 70B-9-103:

(1) The following acts and parts of the acts are repealed:

(a) Chapter 10 of Title 7, Utah Code Annotated 1953; . . . .

2. Federal

U. S. Constitution, Fourteenth Amendment, section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

12 U.S.C. 481 (prior to amendment in 1980):

The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall appoint examiners who shall examine every national bank twice in each calendar year, but the Comptroller, in the exercise of his discretion, may waive one such examination or cause such examinations to be made more frequently if considered necessary. . . The examiner making the examination of any national bank shall have power to make a thorough examination of all the affairs of the bank and in doing so he shall have power to administer oaths and to examine any of the officers and agents thereof under

oath and shall make a full and detailed report of the condition of said bank to the Comptroller of the Currency. . . .

The examiner making the examination of a national bank shall have power to make a thorough examination of all the affairs of the affiliate, and in doing so he shall have power to administer oaths and to examine any of the officers, directors, employees, and agents thereof under oath and to make a report of his findings to the Comptroller of the Currency. . . .

28 U.S.C. 2680 (Federal Tort Claims Act):

The provision of this chapter and section 1346(b) of this title shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

. . .  
(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. . . .

3. Other states

California Government Code, section 818.6:

A public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, other than its property (as defined in subdivision (c) of Section 830), for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety.

Montana Constitution, article II, section 16:

Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workman's Compensation Laws of this state. Right and justice shall be administered without sale, denial, or delay.

## APPENDIX C

Excerpts from Proceedings of the 36th Session of the Utah Legislature, House of Representatives, Day 32 (Feb. 11, 1965), Disc. 1, Side 2, on file with the Clerk, Utah House of Representatives:

SENATOR WELCH:

This is a matter which needs some explanation, and that's why I'm pleased to be before you to explain what went on and that frankly what has happened in three of our neighboring states. And this, ladies and gentlemen, is of importance and should be considered seriously by all of you, whether you are interested in the schools, whether you are interested in the county governments, the city governments, or in the State government. In the State of California, about two years ago, we judicially abolished governmental immunity in that State. Almost immediately, the State was flooded by lawsuits. This is so serious that the Governor had to call in a special session of the Legislature, and they established a moratorium for one year on suits. The Legislature then met and the special committee was set up somewhat similar to the one that we had, and that special committee came up and a bill was passed, a series of bills was passed, in California, in which they have followed a somewhat similar procedure to that which we follow. And that gentlemen and ladies is a matter of "open the doorway a little bit," and I'll explain to that just a little bit later on.

. . .

REPRESENTATIVE LOVERIDGE:

I would like Senator Welch to explain section 3 on page 1 and 2 of the bill if he will please.

SENATOR WELCH:

Section 3 is just setting up governmental immunity. As I explained to you, what we did, we followed the California practice by setting up statutorily governmental immunity. We say there is immunity, except as we provide in this bill, and then we carve out of that certain exceptions, such as driving automobiles and doing this and that, whereby we can bring an action. This is to avoid multiplicity of suits, I can't quite explain what they might be, but all kinds of things which would be a bother and a hindrance to the governmental entities. So actually what this does is establish by statute the fact of governmental immunity, and that's all that does.

## APPENDIX D

Excerpts from Comments of Commissioners on Uniform State Laws on Uniform Consumer Credit Code (U.C.C.C.)

Preface. (In their prefatory note to the 1968 final draft of the U.C.C.C. (the version adopted by Utah as U.C.A. title 70B), the Commissioners stated that the "basic assumptions" on which the Code was predicated include:)

First, the successful American Way of permitting competition to determine prices of non-monopoly commodities and services should also be allowed to apply to the pricing of money and credit:

. . .  
Fourth, for competition effectively to determine the pricing of money and credit requires:

a. for credit grantors, relatively easy entry into the market to avoid monopoly;

b. for knowledgeable and sophisticated credit recipients, eliminating or at least minimizing controls;

c. For the protection of less knowledgeable and less sophisticated credit recipients:

1. uniform disclosure of the costs and terms of credit . . .

2. ceilings on the price of credit, restrictions on creditors' rights and remedies, and enhancements of debtors' rights and remedies sufficient to prevent overreaching by creditors without unduly limiting the availability of credit;

3. administrative powers and self-executing judicial remedies ample to assure compliance with statutory requirement. . . .

7 Uniform Laws Annotated, pp. 242-3 (emphasis added).

Comments to Utah Code Ann. 70B-3-502:

1. Supervised lenders may include supervised financial organizations. Section 1.301(17). Since supervised financial organizations are already subject to supervision by a state or federal official or agency, such organizations are not required to obtain a license under this Act from the Administrator, but their powers may be limited by statutes other than this Act. Section 1.108. Other persons making supervised loans in this State or taking assignments of loans for collection or enforcement in this State must obtain a license from the Administrator.

. . .

3. Licenses need not be renewed annually; such a requirement would merely increase the administrative burdens of the Administrator and the licensee. This section requires a licensee to obtain only one license to operate one or more offices in the State. While the single license permits the licensee to locate offices wherever he chooses, he must annually notify the Administrator of the location of each office. Section 6.202. . . .

Comments to Utah Code Ann. 70B-3-503:

1. This section is intimately related to disclosure (Part 3 of Article 2 and Part 3 of Article 3) and to maximum charges (Part 2 of Article 2 and Part 2 of Article 3). The purpose is to facilitate entry into the cash loan field so that the resultant rate competition fostered by disclosure will generally force rates below the permitted maximum charges. . . .

2. A secondary purpose is to reduce the likelihood of establishing localized monopolies in the granting of cash credit. . . .

3. This section does not apply to supervised financial organizations. Their authority to open new offices at which they may receive deposits and make loans is found not in this Act but in the statutes otherwise governing those organizations.  
. . . (Emphasis added.)

Comments to Utah Code Ann. 70B-3-505:

1. This section seeks to give to the licensee wide discretion in the method of keeping records. No rigid requirements are imposed with respect to the method of record keeping. Instead, records are acceptable if kept in accordance with generally accepted accounting principles, and if they enable the Administrator to determine whether the licensee is complying with the Act. Modern techniques frequently require that records be kept in one central place, which in the case of multi-state lenders may be outside the State. This section allows central record keeping and allows records to be kept anywhere so long as the Administrator is given free access to them. See Section 3.506(2).

2. Licensees are required to file composite annual reports; information need not be given as to individual loan outlets. This allows the Administrator to compile statistics to aid him in his duties and to provide the Legislature with information necessary for a proper evaluation of the effectiveness of the Act. This section provides for confidential treatment by the Administrator of information contained in annual reports. The Administrator may not publish information concerning individual lenders; all information published must be in composite form.

Comment to Utah Code Ann. 70B-3-506:

1. This section provides for periodic examinations of supervised lenders but there is no requirement of annual examinations. The Administrator may tailor his examination policy as he sees fit. . . Under Section 6.106 the Administrator has general authority to investigate any person who he has reasonable cause to believe has engaged in an act which is subject to action by the Administrator. . . . (Emphasis added.)

Comment to Utah Code Ann. 70B-9-102:

This section provides automatic licensing under Article 3, Part 5, for all lenders previously licensed under the State's licensed lender statutes prior to the effective date. No application or administrative action is required and the formal license under the prior statute, which will be repealed, will be a license under Part 5 of Article 3. . . . .