

1987

In the Matter of the Registration Statement of Amenity Inc. Capital General Corporation v. Utah Securities Division and the Department of Buisness Regualtion : Brief of Appellant

Utah Court of Appeals

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BRIEF

UTAH

DEPARTMENT

OF

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DOCKET NO. 870567-CA IN THE COURT OF APPEALS OF THE STATE OF UTAH

In the Matter of the
Registration Statement of
AMENITY, INC.

CAPITAL GENERAL CORPORATION,

Petitioner and Appellant

UTAH SECURITIES DIVISION
AND THE DEPARTMENT OF
BUSINESS REGULATION,

Respondents.

No. 870567-CA

Priority No. 14.a

BRIEF OF APPELLANT

Appeal from the Order of the District Court for Salt Lake County, Judge Pat B. Brian, upholding the Final Order of the Utah Securities Advisory Board and the Executive Director of the Department of Business Regulation suspending all secondary trading exemptions of Amenity, Inc. stock.

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STATEMENT OF JURISDICTION OF THE UTAH COURT OF APPEALS
AND NATURE OF PROCEEDINGS BELOW

This is an appeal from the Order of the District Court for Salt Lake County, Judge Pat B. Brian, upholding the Final Order of the Utah Securities Advisory Board and the Executive Director of the Department of Business Regulation suspending all secondary trading exemptions of Amenity, Inc. stock. Jurisdiction is vested in the Utah Court of Appeals pursuant to §78-2a-3(2)(a) Utah Code 1977-1988, as an appeal from a District Court review of a final order of a state agency.

STATEMENT OF ISSUES

The issues presented by this appeal are:

1. Whether the statute prohibiting sales of securities without registration with the Utah Securities Division (§61-1-7 Utah Code 1987-1988) also prohibits gifts. That is, is a "gift" a "sale" within the meaning of said statute?
2. Whether the gifts of stock in Amenity, Inc. made by appellant were made in good faith or bad faith.
3. Whether the respondents properly applied their statutory authority in issuing the Final Order.

DETERMINATIVE STATUTE: §61-1-7 Utah Code 1987-1988

"It is unlawful for any person to offer or sell any security in this state unless it is registered under this chapter or the security or transaction is exempted under Section 61-1-14."

STATEMENT OF THE CASE

Nature of the Case. This is an appeal from District Court review of administrative agency action.

Course of Proceedings and Disposition Below. On June 5, 1986, the Utah Securities Division (the "Division") brought an action before itself pursuant to §61-1-14(3) of the Utah Uniform Securities Act (the "Act") to revoke all trading exemptions of Amenity, Inc. under said §61-1-14 (R. 73,74). Said petition alleged in substance that appellant had made a distribution of Amenity, Inc. stock in violation of §61-1-7, quoted above, and that such was done for the purpose of evading the registration requirements of the Act (R. 73,74).

The matter was set for hearing on June 19, 1986, (R. 75) at which time it was agreed between the parties that the facts were not in dispute and that the matter would be submitted on legal briefs on the following stipulated facts (R. ___, see footnote 1, following page):

1. Amenity, Inc. ("the company") was incorporated on January 7, 1986, with capitalization of 100,000,000 shares of \$0.001 par value.

2. On January 8, 1986, 1,000,000 shares were issued to appellant Capital General Corporation ("CGC") for a consideration of \$2,000.00 cash. As of that date, CGC was the only shareholder of the company.

3. CGC is a financial consulting firm, incorporated in 1971, and has numerous contacts, customers, former customers, business associates, etc. in the financial world.

4. CGC gave 100 shares each out of its 1,000,000 shares of the company's stock to approximately 900 of such

contacts, customers, etc. Persons or entities who received the gifts were selected at random and included shareholders of such contacts, customers, etc. and persons who formerly had no direct or indirect contact with CGC. No registration statement for the gifted shares was filed.

5. Although a prime reason for making the gifts was the rewarding of past association and loyalty and the general exposure of CGC's financial consulting business to persons in the financial world, or, in other words, the creation and/or maintenance of goodwill, no consideration or payment of any kind for the stock was solicited or accepted. That is, it was strictly a free and bona fide gift, no strings attached. The recipients did not have to buy anything, become a customer of CGC, fill out a questionnaire or pay or provide any consideration at all, and they were free to reject the gifts if they desired.

At said hearing on June 19, 1986¹ it was stipulated that the issues in the case were solely issues of law and related to now the above quoted §61-1-7 and related provisions of the Act

¹The respondents recorded the two subsequent hearings referred to below, but they failed to record the first hearing on June 19, 1986, at which the stipulation was made and the stipulated facts were received in written form. Appellant discovered only two days before its brief was due that portions of the record below occurring after said nonrecorded hearing, but establishing said stipulation, have been omitted by the Clerk of the District Court, presumably inadvertently. Rather than seek a continuance to allow time to rectify the problem, it was decided to write this footnote of explanation inasmuch as appellant does not believe respondents will deny their stipulation in their brief. This is because (1) to do so would throw yet another error in the proceedings below inasmuch as it was respondents' responsibility to record the hearing, and appellant has relied on said stipulation in subsequent hearings, (2) respondents have not denied the stipulation in any of the several proceedings and filings since said hearing, and (3) it appears from respondents arguments below that they yet feel entitled to have the judgment below affirmed as a matter of law based on the stipulated facts, either alone or with additional facts subsequent to said hearing. Should appellants belief be in error, i.e. should respondents deny having entered into the stipulation on June 19, 1986, appellant will request the Clerk of the District Court to certify the missing portions of the record and will supplement this brief to provide the appropriate references to the record.

applied to the above facts. The parties submitted briefs and the matter was set down for further argument in September 1986, and in October 1986 the administrative law judge, Honorable J. Steven Ecklund, issued his findings and conclusions and recommended order (included in addendum) that the petition of respondents' be denied and dismissed "there being no proper basis to conclude that the registration requirements mandated by Section 61-1-7 are applicable to the disposition of the securities in question." (R. 31).

Respondent regulatory agencies were naturally disappointed in Judge Ecklund's recommended order dismissing their petition and therefore caused further review of said order and further factual hearing before the Utah Securities Advisory Board on January 20, 1987, (R. 25) at which time they were successful in persuading their advisory board to overrule Judge Ecklund and find and conclude and rule that the gifts of stock by appellant violated §61-1-7. Based thereon, respondents issued the Final Order of suspension (R. 16-20).

Thereafter, appellant filed a petition with the District Court for Salt Lake County seeking a review of said Final Order (R. 2-8). The District Court having upheld said Final Order, appellant has appealed to the Court of Appeals.

Facts. As of the date of respondent's petition, June 5, 1986, and the hearing thereon, June 19, 1986, the above stipulated facts constituted all of the facts of the case. Subsequent

to said date, appellant conducted further activity with respect to Amenity, Inc., including the rendering of assistance for a fee (R. 118, page 57) in causing an infusion of assets into (R. 118, page 19), and the acquisition of control of, the corporation by third parties. Appellant does not believe facts developed subsequent to the said June 1986 petition and hearing are inconsistent with or change the legal effect of the above stipulated facts (see footnote 2 on page 18) and therefore will not itemize them further at this time. Undoubtedly respondents will emphasize in their brief those facts they feel are most important, but essentially the facts are not in dispute. What is in dispute is the conclusions of respondents in the Final Order with respect to the facts.

SUMMARY OF ARGUMENT

The District Court summarily and without listing any findings or reasons for its ruling, upheld the Final Order of the respondents' suspending all secondary trading exemptions (R. 107, 108). Appellant believes that the District Court's said order should be reversed because it is contrary to the statutes and unsupported by the evidence adduced in the administrative hearings. This can be summarized in three main areas, any one of which is sufficient to require reversal of the order, as follows:

1. "Gift" v. "Sale." The plain meaning of the statute (§61-1-7 Utah Code 1987-1988) clearly limits its application only to sales. Appellant acknowledges that it did not register the shares of stock that it gave away, but the wording of the statute, both by the plain meaning and import of the terms used (it uses "sale" and "sell," not "give" or "gift"), and the purposes of the securities laws (to protect people who pay money or other consideration for securities) is clearly against the interpretation placed on it by the respondents.

It is appellant's position that because the Act, and in particular the section quoted above, is limited by its terms to situations involving sales, the Division and the Act have no power or application whatsoever relating to the giving of the gifts by appellant. Therefore respondents' order suspending trading of the gifted shares based upon the alleged wrongful act in the giving of the shares must be set aside and reversed as a matter of law.

Appellant acknowledges that once the shares have been gifted that the Act would apply to subsequent transfers of such shares, i.e., that any subsequent trades would have to comply with the provisions of the Act and the respondents' rules with respect to secondary trading. However, respondents' petition and order is not brought or based on violation of the secondary trading rules, but is founded solely on respondents' allegations that the gifts

were in violation of the statutory prohibition against sales of unregistered stock. Since there were no sales, the order should be reversed.

2. Bad Faith vs. Good Faith Gifts. Even if the term "sale" does include the term "gift," §61-1-13(15)(d)(i) specifically exempts a good faith gift. It would seem obvious that any gift, a good faith gift or a bad faith gift, is still a gift, i.e., not a sale and therefore not covered by the Act. Whether or not there is even such a thing as a bad faith gift is open to question (it is not mentioned or defined in the Act and it is otherwise unfamiliar terminology). But if it is assumed for a minute as argued by respondents that a bad faith gift is a sale, the Order entered below should nevertheless be overruled because, in fact, the gifts made by appellant were good faith gifts. This is shown in that a) the original stipulated facts when it was agreed to submit the matter solely on a question of law state that the gifts were "bona fide gifts," b) the administrative law judge's findings and conclusion state that the gifts were made in good faith (R. 31), and c) the facts adduced at the final hearing subsequent to the administrative law judge's findings and conclusions, held January 20, 1987, again show clearly that Capital General Corporation took every reasonable step to comply with the law and acted in good faith in every way (R. 118).

3. Respondents Exceeded Their Authority. Respondents have exceeded their statutory authority in any event. Respondents' authority is contained in §61-1-14(3). This section grants respondents the authority to revoke secondary trading exemptions granted by statute only if the the person seeking the exemption has failed to come within the statutorily defined criteria for the exemption. It does not grant authority to revoke exemptions which have not been claimed, nor does it allow revocation based on grounds outside of said §14. Respondents' petition and order violate both of these statutory limitations on their authority.

ARGUMENT

POINT I. RESPONDENTS' FINAL ORDER AND THE ORDER OF THE DISTRICT COURT SHOULD BE SET ASIDE ON THE GROUND THAT AS A MATTER OF LAW §7 OF THE UTAH UNIFORM SECURITIES ACT APPLIES ONLY TO SALES OF SECURITIES AND NOT TO GIFTS OF SECURITIES.

Section 7 is quoted above on page 2. Simply stated, it is appellant's position that since the legislature limited the application of the statute to situations involving the selling of securities, the action of respondent regulatory agencies in applying it to the giving of securities is gross error.

The matter is so simple, it would seem it would require no argument. Everyone surely has been aware ever since grammar

school that "sale" and "gift" do not mean the same thing, but connote totally different concepts. These words are practically as common in usage and understanding as "yes" and "no." Even so, the legislature defined "sell" or "sale" in the Act (§61-1-13 (15)(a)) as a disposition "for value," which, as one would predict for such a commonly used and understood word, is identical to the dictionary definition and the common accepted usage. Although "gift" is not defined in the statute it is no less well understood.

That words used in statutes are to be construed according to their plain meaning is likewise such a simple and universally established principle as to require no argument. Nevertheless, a few citations follow:

Section 68-3-11 Utah Code 1987-1988:

Words and phrases are to be construed according to the context and approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition.

"Sell" is not a peculiar or technical word, and the definition in the statute is totally consistent with the plain meaning and approved usage in the language.

Gord v. Salt Lake City, 434 P.2d 449 (Utah 1967) at 451:

The statute should not be stricken down nor applied other than in accordance with its literal wording unless it is so unclear or confused as to be wholly beyond reason, or inoperable, or it contravenes some basic constitutional right. If it meets these tests it

is not the court's prerogative to consider its wisdom, or its effectiveness, nor even the reasonableness or orderliness of the procedure set forth, but it has a duty to let it operate as the legislature has provided.

There is nothing about the word "sell" which is unclear, confused, inoperable, beyond reason, etc. On the contrary, it is totally clear and fits totally within the scheme and purpose of securities regulation, i.e., to protect purchasers of stock.

Patrolmen's Benevolent Association v. City of New York, 359 N.E.2d 1338 (N.Y. Ct. App. 1976) at 1341:

Hence, where as here the statute describes the particular situations in which it is to apply, "an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." (McKinney's Constitutional Laws of N.Y., Book 1, Statutes, §240).

Had the Utah Legislature intended the prohibition respecting sales of securities in §7 to also apply to gifts of securities, it would have been an easy thing for the legislature to have included gifts as well as sales in the wording of the statute. However, having described "the particular situation in which it is to apply," i.e. sales, an irrefutable inference must be drawn that it was intended to omit gifts.

Finger Lakes Racing Association v. New York State Racing, 382 N.E.2d 1131 (N.Y. Ct. App. 1978) at 1135:

Courts are constitutionally bound to give effect to the expressed will of the Legislature and the plain and obvious meaning of the statute is always preferred to any curious, narrow or hidden sense that nothing but a strained interpretation of legislative intent would discern (Citations).

It is an elementary principle of statutory construction that courts may only look behind the words of a statute when the law itself is doubtful or ambiguous (Citations). If, as here, the terms of a statute are plain and within the scope of legislative power, it declares itself and there is nothing left for interpretation. To permit a court to say that the law must mean something different than the common import of its language would make the judicial superior to the legislative branch of government and practically invest it with lawmaking power.

Appellant would add to the above and say that to permit the respondents to say that §7 of the Act means something different than the common import of its language would make the respondent regulatory agencies superior to the legislature; and that surely it is obvious that what respondents have done is "nothing but a strained interpretation of the legislative intent..." in issuing their Final Order in this matter.

There are hundreds of precedents all over the country which have held similar to the above authorities, and it serves no purpose to burden this brief with dozens more appellate court citations to the same obvious effect. Inasmuch as the District Court failed to list any findings, conclusions or reasons for its ruling upholding the respondents' Final Order, appellant does not know why the District Court did not adopt these well known doctrines of statutory construction. However, the record at the agency level indicates that the rationale for the Final Order is to the effect that appellant's gifts to approximately 900 donees, which admittedly were gifts from the standpoint of the donee (i.e. they were not asked to, nor did they, give any value for

the stock they received), were not gifts from the standpoint of appellant because appellant obtained some value from having made the gifts, e.g., valuable goodwill and cash for services in connection with ongoing activities of the company.

In a nutshell, it appears the claim of respondents is that appellant's "gifts" are in fact "sales" because of the profit, potential or actual, which has or may become available to appellant from having made the gifts. No doubt this line of reasoning is deemed advisable because of the obvious difficulty in getting around appellant's plain meaning arguments and irrefutable authorities cited above. However, appellant respectfully submits that it just won't work. Such line of reasoning is still totally inconsistent with the well established plain meaning doctrine and the above cited authorities and is merely a play on words in an attempt to get around the said authorities without having to challenge their obvious correctness. Consider the following simple illustration:

Labeling a chicken a duck does not make it so, even though both are birds and one can point out many similarities between them, such as size, feathers, walk, etc. In the same way, both gifts and sales are transfers of property and there are many similarities between them, as for example, in both cases the transferor receives something from having made the transfer. In the case of a gift the transferor may receive goodwill, perhaps

greater loyalty from the giftee, an opportunity for profitable business in the future, or just a good feeling, etc. There is no such thing as a gift that does not provide something for the giver. The obvious reason that a sale is different is that a sale connotes a bargain, i.e., a contractually agreed upon consideration. This is the common and accepted usage and is identical to the definition in the Act. Section 61-1-13(15)(a) provides:

"Sale or "sell" includes every contract for sale of, contract to sell, or disposition of, a security or interest in a security for value. (Emphasis added).

Notwithstanding respondents' apparent willingness to call a chicken a duck, appellant respectfully submits that no reasonable mind can seriously contend that under the plain meaning and common usage of the words gift and sale, the gifts of Amenity stock were sales to purchasers rather than gifts to donees. Pointing out, as respondents have done, that as of the date of the gifts and respondents' petition alleging them to be unlawful there was hope for ongoing profit from other sources and activities and that subsequently a portion of such hope became a reality, does not change the nature of the gift transactions. There is still no bargain, no contract, no purchase, no disposition for value, and the recipients of the stock are still donees of gifts, and to hold otherwise would be a violation of the above well established and documented plain meaning doctrines just as clearly as if it were held that "sell" means "give."

Notwithstanding the obviously correct principles and authorities cited above, suprisingly enough there have been other enterprising litigants who have contended for the strained interpretation respondents would seek to establish. But without exception, every time anyone has tried it they have been overruled and their twisted interpretation of the statute disallowed. For example, in two Federal cases, Truncale v. Blumberg, 80 F.Supp. 387 (S.D.N.Y. 1948) and Shaw v. Dreyfus, 172 F.2d 140 (2nd Cir. 1949), cert. den., 37 U.S. 907, it was sought to include gifts in the definition of sales under the Securities Exchange Act of 1934. Similar arguments were used as in the present case, i.e., that the persons making the gifts had received some benefit from having done so, such as goodwill, loyalty of their executives, etc. These arguments were rejected by the Southern District of New York and the Second Circuit, and they refused to consider the gifts made in those cases as sales within the meaning of §16(b) of said 1934 Act for the same reasons stated above by appellant, that is, those courts emphasized the natural and plain meaning of the words gift and sale and said that "to sell or otherwise dispose of" as used in the statute could not be inferred to include a gift, Truncale v. Blumberg, supra at 390.

For an additional Federal point of view and that the Securities and Exchange Commission has issued statements consistent with the above principles, see Greater Jersey Bankcorp., (Sept.

29, 1980) CCH 76,718. This was a "no action letter" of the S.E.C. involving a situation where a company proposed to give to approximately 50 to 75 persons per year for an indefinite number of years, approximately \$50 worth of stock each. These shares were to be given to employees who maintained perfect attendance for a year. The S.E.C. stated that such gifts did not come within the purview of the Securities and Exchange Act of 1933 requiring registration of sales. It is significant to note that those giftees had to actually do something to earn the gifts (perfect attendance) whereas in the present case there are no strings attached to the gifts whatsoever. Clearly there was a benefit to the employer in making the gifts, but this did not make them sales.

It is not necessary to look to other jurisdictions to see the fate of those arguments that have sought to convince appellate courts that gifts are sales or that receipt of some benefit changes a gift to a sale. The Utah Supreme Court considered the precise issue of this case in Andrews v. Chase, 49 P.2d 938 (Utah 1935). This case is so precisely in point that a quote from the opinion could be substituted for some of the paragraphs in appellant's brief as though it had been written solely for that purpose. At page 941:

The stock here involved is not one of the kinds of securities which are exempt from the provisions of the Securities Act. Appellant does not contend otherwise. What he does contend is that the Act merely regulates the

sale of securities and has no application whatever to securities which are given away. It will be observed that "sale or sell" is defined as every disposition, or attempt to dispose, of a security or interest in a security for value. The words "for value" are descriptive of, and constitute a limitation on, the kind of transactions which the Securities Act was intended to regulate. It is a cardinal rule of the construction of a statute that, when possible, effect must be given to all the language used in the Act. If the legislature had intended the words "sale or sell" should include "gift or give," it would not have limited the former words to such disposals, or attempted disposals of securities as are made for value.... Had the lawmaking power intended that the Act should apply to gifts of securities, it would have been a simple matter to have so provided.

It is to be noted that although the Securities Act referred to in the above case is not the identical securities act as is presently in use, the key provisions and definitions are the same. It is also significant to note that as in the present case, the company that gave the gifts of stock to the public did so with the hope of receiving some benefit (an even more direct benefit than in the present case in that it hoped to receive assessments on the stock directly from the persons whom the stock was given to). In rejecting the argument of respondent and ruling in favor of appellant in that case, the Utah Supreme Court relied on the same reasoning stated above in this brief, i.e., the plain meaning of the words and that it was not a sale or attempted sale because there was no contractual agreement that the giftees would pay the levied assessments (even though many did pay them voluntarily). At page 942:

A mere hope or anticipation that the transferees of the stock would pay the assessment, if and when levied, may not be said to be a disposition or an attempt to dispose of the stock for value within the meaning of the Act. A gift does not become a sale merely because the donor hopes to receive something for the gift.

In the present case the gifts of Capital General were given to maintain and establish goodwill and provide an ongoing vehicle for potential future business with respect to Amenty, Inc., which in fact occurred. Likewise, many of the giftees of stock in the Andrews case paid the assessments as was the hope and anticipation of those givers of stock.² But that didn't transform those distributions of stock from gifts to sales, and the wording of the Utah Supreme Court, "...had the lawmaking power intended the Act should apply to gifts of securities, it would have been a simple matter to have so provided" is still the last word on the subject and still the inescapably logical and correct conclusion.

²It is noteworthy that although many of the donees paid the assessments, the Supreme Court in its ruling in the above quoted material from page 942 mentions only the hope of receiving it and not the subsequent actuality of receiving it. This is significant because it clearly shows that the Utah Supreme Court correctly looked at the gift transactions as of the time they were made, i.e., if they were gifts at the time they were made the character of them does not change depending upon whether, or the extent to which, the hope of the giver subsequently materializes.

In discussing this Point I, appellant has cited several precedents and authorities, and there are many more to the same effect. On the other hand, after approximately a year and a half since the first briefs were filed on the question, with subsequent hearings and further briefs, respondents have yet to locate a single case in any jurisdiction construing any securities law where gifts of securities have been held to constitute sales. In attempting to do such in the proceedings below, respondents have cited the Federal "spin-off" cases, chief among which is S.E.C. v. Harwyn Industries Corp., 326 F. Supp. 943 (S.D.N.Y. 1971). However, notwithstanding dicta in those cases to the effect that for a transfer to be a sale the purchase price or value need not flow directly from the recipient of the stock, it is obvious in reading those cases that they do not involve gifts in any sense of the word. The recipients of stock in those cases were not giftees, but they received the "spin-off" stock as a result of contractual obligations and contractual rights to receive it, that is, they had purchased stock previously which legally entitled them to a prorata share of the subsequently distributed stock.

That neither the legislature nor the respondents (prior to this case) ever intended §7 to apply to gifts is clear by the conspicuous absence of any reference to such, not only in the Act, but in the respondents' own regulations and procedures for

registering securities. This is, the respondents' own regulations apply only to sales, and there are no procedures or regulations established for the registering of gifts. Appellant's attempts to obtain a response from the respondents to this obvious defect in their arguments have been totally unsatisfactory. One such response has been that all of the same requirements for registration of sales of security would apply to gifts and that the same procedure would be used (R. 118, page 69). It would unduly burden this brief to go into a detailed analysis of each of the requirements for registration as adopted by the respondents pursuant to the Act to show that they all contemplate sales and none contemplate gifts, but just one example here will be sufficient to establish the error in respondents' arguments:

The respondents' rules place certain limitations on stock dilution following the sales of stock to the public. For example, if one pays a dollar for a share of stock, but immediately after the sale of stock to the public that share is only worth 50¢ because of being diluted with other outstanding stock of less value, then the value of the public stock has been reduced by 50% immediately upon sale. The respondents' dilution formulas limit the amount of such devaluation that is allowed in sales of stock to the public, and they have argued that its dilution formulas would apply to petitioner's gifts. But this

cannot be done (because the stock can't be devalued below zero, the price of the stock to the giftees), and to suggest that it could or should is ridiculous. Clearly, respondents' own rules promulgated under the Act as well as the clear purpose of the legislature in enacting §7 is to prevent people from losing their money by purchasing securities about which they do not have sufficient information. In the present case, the donees of the stock have paid nothing, and so there is nothing to lose and nothing to regulate, i.e., they are not in the class needing protection since they made no "investment decision." S.E.C. v. Ralston Purina Co., 346 U.S. 119, at 127 (1953). This is a very glaring fact that the respondents have consistently chosen to ignore.

POINT II. RESPONDENTS' CONCLUSION IN THEIR FINAL ORDER THAT APPELLANT'S GIFTS WERE NOT MADE IN GOOD FAITH IS UNTRUE AND NOT SUPPORTED BY THE EVIDENCE.

At the outset of this discussion of Point II, appellant would strenuously urge that the question, raised by respondents, of the good faith or bad faith nature of the gifts is not a proper question for consideration. This is because the authorities and principles cited under Point I, above, exclude all gifts from the operation of §7 of the Act, and so it is pointless to discuss what type of gift it was. To hold otherwise would be to

read into the statute wording that is not there, i.e., the statute would read that one must register both sales and bad faith gifts.

That such was not the intent of the legislature is clear, not only from the plain wording of the statute which limits the operation of the statute to sales for value, but also from the fact that nowhere in the Act is the term "bad faith gift" even mentioned, let alone defined. Surely, if the legislature is going to proscribe conduct, it must follow the fundamental rule, "that restraints or duties imposed by law must be clear and unequivocal." (Basin Flying Service v. Public Service Commission, 531 P.2d 1303 (Utah 1975) at page 1305). To allow respondents to read into the statute that a bad faith gift is a sale within the meaning of §7 is no less a violation of the established principles and authorities cited under Point I than calling any other non-sale for value transaction a sale. Though "bad faith gift" may have a negative connotation, and there may therefore be reasons independent of the Act that one may wish to avoid being accused of it, the simple fact remains that it is not defined, no one really knows what it means or has even heard of it before respondents brought it up in this case, and for sure §7 doesn't say anything about it, let alone prohibit it.

Nevertheless, since respondents have relied heavily on this fiction in the proceedings below, appellants will discuss it

briefly. This has been necessitated by the fact that notwithstanding the stipulated facts at the initial hearing that the gifts were bona fide gifts, and notwithstanding the administrative law judge's finding some months later that the gifts were made in good faith, respondents thereafter required further hearing on the specific issue of whether the gifts were made in good faith or bad faith, and they thereafter concluded that the gifts were made in bad faith. Although appellant has strenuously urged that such was not a proper question to be determined by respondents, appellant would even more strenuously urge that to the extent good or bad faith may be in issue, there certainly has never been any bad faith on the part of appellant, and that respondents' conclusion to the contrary, which was upheld by the District Court, has no basis in fact or evidence in the record or otherwise.

Respondents have emphasized in the proceedings below that §61-1-14.5 of the Act places on appellant the burden of proving its gifts were made in good faith. Said section says, in substance, that a person claiming the facts fit within an exception from a definition has the burden of so proving. Although good faith gifts are specifically excepted under §61-1-13(15)(d)(i), it does not follow that appellant must prove its gifts come within said exception. On the contrary, respondents must show that appellant's conduct fits within the prohibition of the

statute, i.e., that appellant sold securities, before any other provisions of the Act, including any exceptions to definitions, penalties, or any regulatory power of the respondents at all, come into play. And that they cannot do (see Point I, above). Nevertheless, assuming for a moment that it is necessary to determine whether or not appellant acted in good faith in making the gifts of stock, the evidence overwhelmingly supports the proposition that the gifts were in fact made in good faith.

Facts in the record establishing the gifts to have been made in good faith are as follows:

1. The stipulated facts are that the gifts were bona fide gifts (page 4, above).

2. The administrative law judge concluded that the gifts were made in good faith (R. 31).

3. No government witness or any other person testified that the gifts were made in bad faith.

4. It is undisputed that no recipient of the gifts was required to pay anything, do anything or provide any consideration (or even accept the gifts).

5. Testimony indicated a bona fide and good faith intent on the part of appellant to benefit the various donees (R. 118, pages 24, 25, 31).

6. Testimony also showed that in furtherance of appellant's good faith intent to benefit the giftees of stock, it took further action with respect to the development of Amenity, Inc. into a viable business, thus enhancing the value of the gifts (R. 118, page 19).

7. The testimony was undisputed that appellant had no intent to violate §7 requiring registration of sales of stock, would have been happy to register the gift shares had it believed the statute required registering of gifted shares, etc. (R. 118, pages 9, 11, 17, 23, 38, 63).

In summary, if the above isn't sufficient to sustain the burden of proof that the gifts were made in good faith, appellant would ask, "How else does one prove good faith?" The absence of any evidence of bad faith ought to be sufficient in itself.

Nevertheless, the Department of Business Regulation, through its Securities Advisory Board and Executive Director, concluded that the gifts were made in bad faith (R. 12). In Point I, above, it is pointed out that respondents have not been able to produce a single case supporting their strained interpretation of the statute. Similarly, under this Point II, they cannot point to even one shred of evidence in the record that appellant is guilty of bad faith. Nevertheless, the structure of respondents' Final Order is internally logical in that it states as a finding of fact, in substance, that appellant's gifts of stock were done with an intent to circumvent or frustrate the registration requirements of §7, (R. 11) and then it concludes from said finding that having such intent amounts to bad faith (R. 12). That would be logical and make good sense if there weren't two very glaring and terminal problems, as follows:

1. There is not any evidence in the record that the gifts were made with an intent to avoid the registration requirements of §7. On the contrary, the evidence shows that appellant investigated the registration requirements with the intend to comply with whatever they might be (R. 118, pages 9, 11, 17, 23, 38, 63).

2. It is categorically impossible for anyone to circumvent the provisions of any statute when the statute does not prohibit the conduct in question. In this case, since §7 of the Act does not require the registration of gifts of securities, how can one circumvent the Act by giving unregistered securities? It is about as logical as saying that one who has deliberately stayed within the speed limit to avoid a citation is guilty anyway because he has circumvented the statutory requirement that he be subject to the imposition of fine for exceeding the speed limit. Perhaps it would frustrate any governmental purpose there might be to fill its coffers by the collection of speeding fines - but have we really gone that far?

Every day businesses and others review statutory requirements on myriads of subjects and purposely keep their activities out of the scope of the regulations in order to avoid the expense and inconvenience in dealing and complying with them. How is that bad faith? Of course it isn't. In other words, what is a desire to make a gift (not regulated by statute) instead of a sale (regulated by statute) in order to avoid being regulated by the statute have to do with the question of good or bad faith? This rhetorical question is asked only to illustrate the error in respondents' thinking, but it does not represent the facts of the present case inasmuch as appellant has been willing to register

the stock if required (R. 17). But even if appellant deliberately chose gifts instead of sales because it didn't want to deal with the registration requirements of §7, it does not establish bad faith - only that it stayed within the speed limit.

The bottom line is this: Respondents have not been given regulatory authority over the gifting of stock, but they want it and appear to be willing to call a chicken a duck (see Point I, above) and make unsupported findings (discussed above) to accomplish it. It is clear that respondents are arguing backwards in an attempt to accomplish their goal, that is, they would seek to establish the proposition that the lack of registration of the gifted stock is in and of itself sufficient to establish intent to circumvent, with consequent bad faith, etc., i.e., that such lack of registration is the only fact of importance, and from such it can be presumed that there was an intent to violate the statute requiring registration.³ That makes sense, of course, only if the statute really does require registration of gifts. Since it doesn't (see Point I), said argument of respondents' can avail them nothing, and the record remains without any evidence of intent to circumvent or bad faith, and the only evidence is of

³See the bottom of page 68 and top of page 69 of the transcript of the January 20, 1987 hearing, (R. 118) where counsel for respondents in his closing argument basically admits that the testimony supports good faith intent, but asks that the Securities Advisory Panel look behind the testimony to what actually happened, i.e., no registration, to establish the real intent of appellant.

good faith and intent to comply with the law. To hold otherwise would render it impossible to give away unregistered stock in good faith because no matter how good one's intentions may be, he would always be stopped by that unalterable fact that the stock is unregistered. Obviously the specific sections of the statute in question and the Act as a whole could not possibly have contemplated such an incongruity or unjust result.

In a nutshell, it would appear that respondents' bad faith argument is just another attempt to circumvent and frustrate the plain meaning and wording of §7 quoted on page 3, above. First they say gifts are sales. Then we're told that if gifts normally are not sales, certainly appellant's gifts were since they intended to obtain some benefit. These arguments being irrefutably disposed of above under Point I, we are now told that bad faith gifts are sales. No one knows what a bad faith gift is, but fortunately respondents come to the front and tell us that a bad faith gift is one that is unregistered (notwithstanding the evidence shows good faith). So in this way we find out that anything not registered is a sale, and so in effect respondents have extended the definition of sales to include gifts contrary to the plain meaning of §7 and the many authorities cited above in Point I. All of these erroneous, circuitous and lifting by one's own boot strap type arguments of respondents are rooted in the failure of respondents to fully comprehend that 1) the

statute allows them to regulate sales only, and 2) the fact that a giver of gifts receives some benefit from having done it does not somehow change those gifts into sales, cast doubt on the good faith nature of them, or show any purpose to circumvent or frustrate laws not applicable to gifts.

Although the reasons the respondents might have for wanting to regulate gifts are not necessarily material to this appeal, since motives have been discussed, it might be pertinent for appellant to indicate that it believes that not only has the legislature failed to allow respondents to regulate the gifting of stock, but there are no valid reasons that respondents should be allowed to. This is mentioned here because in all of the furor and excitement in the arguments and briefs of the respondents, one may get the impression that someone has been hurt or lost money or made a complaint, etc. with respect to the activities of Capital General Corporation in its stock gifting program, or in other words, that maybe "policy reasons" demand a closer look at the possibility of adopting respondents' strained interpretations of the statutes than would seem to be indicated by the numerous authorities cited above to the contrary.

In view of the substantial efforts and determination on the part of the respondents to put a stop to the gifts, one might expect to find some very insidious and very damaging results to be evident at this time, approximately two years after the gifts

were made. Yet none of this is the case, and no such things have even been alleged or claimed by anybody to the best of appellant's knowledge. That is, respondents have failed anywhere in their arguments or factual presentations to point out any examples of losses or even potential losses to anybody. They have pointed out in the hearing below that some secondary sales in Amenity stock have occurred which might not have been in conformity with secondary trading regulations, but they have not shown that if such sales were out of compliance how anyone has been hurt, or how the respondents would have been able to prevent it if the gifts had been registered under §7.

The point is that if in fact secondary trading regulations are being violated in sales by giftees, the situation would be no different than if a company that registered sales of securities (i.e., complied with §7) failed to comply with the secondary trading laws thereafter. Such an issue relates to compliance or noncompliance with laws which are applicable only after the original stock distribution, and not as part of it. And if respondents really believed there were violations of such laws in connection with subsequent sales of the gifted stock, it could easily have brought their petition to stop the violations based on such laws (and they could still do so with respect to this company, even now) - no one questions their authority to do that. In other words, if there are such violations, respondents

have their remedy already in place, and therefore it is wholly unwarranted for them to bring this action under §7 (which, requires a judicial rewriting of the statute and changing its plain meaning).

In summary, not only have the respondents wholly failed in the proceedings below to establish that the gifting program of appellant comes within the purview of its regulatory powers, but they have not established any advantage to anyone that such be the case. There is no statutory or other authority for respondents to take the action they did, and there is no public benefit from such either.

POINT III. RESPONDENTS' FINAL ORDER AND THE ORDER OF THE DISTRICT COURT SHOULD BE SET ASIDE AS A MATTER OF LAW FOR THE REASON THAT RESPONDENTS EXCEEDED THEIR STATUTORY AUTHORITY.

Respondents have exceeded their statutory authority in any event. Respondents' authority is contained in §61-1-14(3). Appellant's concern with respect to said authority is that said section fails to list any criteria upon which the action of respondents in issuing suspension orders, such as the one issued in this case, are to be based. In considering the entire Section 14 as a whole on the subject of exemptions, and Subsection (3), in particular, on respondents' authority to revoke exemptions, two things are apparent.

a. That at least some criteria for exercising the authority is implied by Subsection (3), or otherwise there would be no need for a hearing (i.e. it does not appear the legislature intended to grant respondents the authority to revoke statutorily granted exemptions solely upon their whim of the moment), and

b. That, though not specifically mentioned in Subsection (3), the authority to revoke exemptions is based on the factual question of whether or not the particular exemption sought to be revoked is applicable, i.e. authority is granted to revoke an exemption when it is determined by respondents after opportunity for a hearing that the facts don't fit the claimed exemption.

Respondents seem to agree with a. in that they held the hearing and listed grounds, but they apparently disagree with b. in that the grounds they listed were appellant's alleged violation of §7 in making the gifts without registration. Appellant asks, "Where does it say that?"

In other words, respondents have exceeded their authority because nowhere in §14 or in Subsection (3) of §14 or elsewhere is there any statement that exemptions which may otherwise be valid under §14 would be rendered invalid because some other prior transaction on the same company violated §7.

To be even more specific, suppose for the sake of argument that John Doe, giftee, received his gift of 100 shares of stock

in Amenity, Inc. in a gift transaction that was in violation of §7. A year later, or 10 years later or at any time, he wants to sell the shares based on one of the exemptions described in §14, for example, Subsection (2)(a), the isolated transaction exemption, i.e., John Doe wants to sell it to his brother in a private transaction. Here's the point: the acquisition or the gift in the first place, perhaps years prior, is a totally separate transaction from the subsequent private sale. It is therefore very apparent that Subsection (3), though failing to list specific criteria within the subsection itself, contemplates the criteria listed in the rest of §14, in this illustration, whether or not the sale proposed by John Doe to his brother was in fact an isolated transaction that complied with Subsection (2)(a). There is no basis in the wording of said Subsection (3) to add to that criteria the question of whether John Doe had acquired the shares in a transaction that had not been registered in violation of §7.

That this is so and can be put to rest forever is shown by the fact that under §7 it is lawful to sell securities on an either/or basis, i.e., if they are either registered or exempt under §14. In other words, it is contemplated exclusively that the exemptions described in §14 apply only to unregistered stock. Yet respondents are saying the fact the stock is unregistered in this case is the reason the §14 exemptions don't apply - just the opposite of what the statute says!

The fact is undisputed that on June 5, 1986, when the respondents filed their petition seeking suspension of all §14 exemptions, neither John Doe nor any other giftee had sought or claimed any §14 exemptions.⁴ Only the first transaction, i.e., the gifts, had taken place, and so it can be seen that what the respondents are attempting to do is forever dispose of any possibility that any giftee might come within any of the §14 exemptions and be able to sell their stock. Appellant believes that such is totally unwarranted by the language of the statutes. On the contrary, instead of allowing a blanket suspension of all exemptions, the statute clearly contemplates only that each potential exemption should be considered on its own merits, i.e., whether it fits the statutory description of the exemption at such time as a particular person or group of persons may seek it in selling their stock.

Regardless of other considerations, logically, it would appear that there are only two possible ways of interpreting said Subsection (3): The first one would be that respondents are allowed to revoke exemptions without any grounds or upon grounds or reasons of their own choosing. However, if the legislature

⁴ Nor have they since said date, to the best of appellant's knowledge, although subsequent to said date there have been some trades perhaps on the assumption that certain §14 exemptions are applicable.

wanted to grant them that much authority there would have been no need to require a hearing. The second possible interpretation would be that exemptions can be revoked only upon the grounds stated in the other portions of the section, i.e., Subsection (3) establishes respondents as watchdog as to whether or not specific transactions, e.g. in the example given above, the isolated sale transaction, really comply with the statutory description of such.

This latter view is the one that makes sense. It doesn't make any sense that the legislature would describe by statute particular fact situations that are exempt, require an opportunity for a hearing if revocation is sought by respondents, and then allow respondents to revoke the exemptions at their pleasure or on other grounds totally outside of the statutory description. Yet, that is exactly what respondents' Final Order has done, and if it is upheld, there is no way to remedy it for any of the stockholders, not now or 50 years from now, because it is a final order based on a fact alleged and existing on the date respondents' petition was filed, June 5, 1986 (i.e. the gifts having been made without registration), which fact is history and cannot change.

That the arguments of appellant are correct is seen not only from the plain wording of the sections of the Act discussed above, but also from §§20 and 21. These sections plainly and clearly provide respondents with several specific alternative and

cumulative remedies for violations of §7, if any there be in the facts of this case. These remedies include rescission, fines, disgorgement of profits, injunctions, and even criminal penalties. As has been shown under Points I and II above, there has been no violations of §7, but certainly it is obvious from the statutory provisions themselves that if there had been, it is totally improper for respondents to claim any remedies under §14(3) which would necessitate a total departure from the statutory provisions. There can be no question but that the legislature intended violations of §14 (i.e. claimed exemptions that do not fit the statutory descriptions) to be brought under §14(3) and violations of §7 to be brought under §§20 and 21, and that therefore respondents having exceeded their authority under §14(3), their Final Order based thereon should be overruled.

CONCLUSION

Appellant respectfully requests the Court of Appeals to set aside and reverse the Order of the District Court and the Final Order of respondent regulatory agencies as a matter of law and/or on the basis that it is not supported in the record below. Clearly, the fact that Capital General has made numerous gifts of stock and expects to gain something by it does not change the character of the gifts so that they are sales within the meaning

of §7 of the Act. The hold otherwise would violate the plain meaning of the English language, numerous authorities cited above, the statutory definition of "sale" and long established rules of statutory interpretation including those which require that if the government is going to prohibit something, it must define it and spell it out in plain English.

In the three points discussed above, appellant has established that:

1. The section of the Act relied on by respondents, §7, requiring registration of sales of securities, has no application to appellant's gifts of stock. Since the orders entered below are based upon the opposite proposition, they must be reversed as a matter of law.

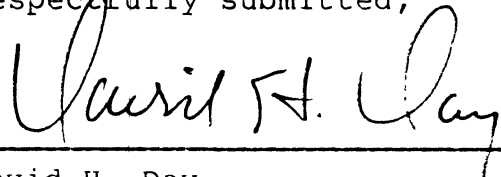
2. Even if §7 were to have been violated by appellant, the orders entered below must be reversed as a matter of law because the Act does not allow respondents to issue orders revoking exemptions based on a violation of §7 but provides for different exclusive remedies under §§20 and 21.

3. The issue of good or bad faith is not a proper issue for determination, but is brought up by respondents in an attempt to circumvent the plain meaning of said §7. But if it were a proper issue, appellant has met its burden of establishing its gifts were made in good faith without any intent to violate said §7.

In summary, the respondents, who are state agencies, brought an action and held hearings (basically before themselves) and after three tries finally got the result they wanted, although it required making unsupported findings and conclusions and twisting the words of the statute far beyond their plain meaning and purposes. The District Court summarily upheld respondents' actions without listing findings or reasons. Appellant respectfully requests the Court of Appeals to review with scrutiny the proceedings below, the statutes in question, the numerous authorities cited above, etc., and reverse the orders entered below for the reasons stated herein.

DATED this 5th day of February, 1988.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "David H. Day", written over a horizontal line.

David H. Day
DAY & BARNEY
45 East Vine Street
Murray, Utah 84107

Attorneys for Petitioner
and Appellant

CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing Brief of Appellant was mailed, postage prepaid, to:

David L. Wilkinson
ATTORNEY GENERAL
Steven G. Schwendiman
CHIEF, ASSISTANT ATTORNEY GENERAL
William B. McKean
ASSISTANT ATTORNEY GENERAL
TAX & BUSINESS REGULATION DIVISION
130 State Capitol Building
Salt Lake City, Utah 84114

on this 5th day of February, 1988.

David L. Wilkinson

ADDENDUM

I. Order of September 18, 1987:

Order of the District Court for Salt Lake County, Judge Pat B. Brian upholding the Final Order of the Department of Business Regulation and the Securities Advisory Board.

II. Order of February 18, 1987:

Final Order of the Department of Business Regulation and the Securities Advisory Board suspending all secondary trading exemptions of the securities of Amenity, Inc. pursuant to §14(3) of the Utah Uniform Securities Act.

III. Order of October 28, 1986:

Recommended Order of J. Steven Ecklund, Administrative Law Judge, dismissing the petition of the Utah Securities Division seeking suspension of trading of Amenity, Inc. stock.

Order of September 18, 1987:

Order of the District Court for Salt Lake County, Judge Pat B. Brian upholding the Final Order of the Department of Business Regulation and the Securities Advisory Board.

18 1987

Bradeville

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


	:	ORDER
)	
In the Matter of the	:	Civil No. C87-2625
Registration Statement of)	
AMENITY, INC.	:	Judge Pat Brian
)	

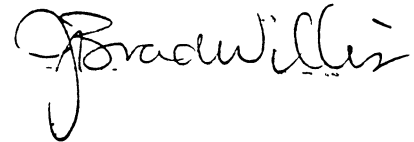
This matter was heard before this Court on September 17, 1987, at 8:00 a.m. The Petitioner was represented by David H. Day while the Respondent was represented by Nicholas E. Hales, Assistant Attorney General. Both parties had previously filed briefs with the Court outlining their positions.

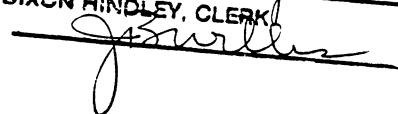
The Court, after having heard oral argument, reviewed the briefs on file, and examined the record from the administrative proceedings, rules as follows:

The Final Order of the Utah Security Advisory Board and the Executive Director of the Department of Business Regulation is upheld.

DATED this 18 day of September, 1987.


Pat B. Brian
District Court Judge



STATE OF UTAH
COUNTY OF SALT LAKE) SS
I, THE UNDERSIGNED, CLERK OF THE DISTRICT
COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY
CERTIFY THAT THE ANNEXED AND FOREGOING IS
A TRUE AND FULL COPY OF AN ORIGINAL DOCU-
MENT ON FILE IN MY OFFICE AS SUCH CLERK.
WITNESS MY HAND AND SEAL OF SAID COURT
THIS 28 DAY OF Sept 19 87
H. DIXON HINDLEY, CLERK
BY  DEPUTY

Order of February 18, 1987:

Final Order of the Department of Business Regulation and the Securities Advisory Board suspending all secondary trading exemptions of the securities of Amenity, Inc. pursuant to §14(3) of the Utah Uniform Securities Act.

Utah Securities Division
Department of Business Regulation
Heber M. Wells Building
160 East 300 South
Post Office Box 45802
Salt Lake City, UT 84145
Telephone: (801) 530-6600

BEFORE THE SECURITIES DIVISION
OF THE DEPARTMENT OF BUSINESS REGULATION
OF THE STATE OF UTAH

IN THE MATTER OF THE : FINAL ORDER
REGISTRATION STATEMENT OF :
AMENITY, INC. : CASE NO. SD-86-11

This proceeding was initiated pursuant to a Petition, dated June 5, 1986. A memorandum in support of a suspension or trading exemptions was filed by the Division on July 15, 1986. On August 12, 1986, Respondent filed a response to the Division's memorandum. The Division filed a reply memorandum on September 2, 1986. On September 25, 1986, oral argument was heard before the Administrative Law Judge, J. Steven Ecklund. Mr. Ecklund issued his findings of fact, conclusions of law and recommended order on October 28, 1986.

On January 8, 1987, the Utah Securities Advisory Board and William E. Dunn, Executive Director of the Department of Business Regulation, after careful review of Mr. Ecklund's recommended order, issued an order adopting certain provisions of

Mr. Ecklund's findings of fact and conclusions of law, but rejecting the recommended order. The January 8th Order called a hearing on January 20, 1987, for the limited purpose of receiving evidence as to the intent of Capitol General Corporation and its principals in their distribution of Amenity stock. We incorporate the January 8th Order herein by reference.

On January 21, at 3:00 p.m. the additional hearing was held. The hearing was held before the Utah Securities Advisory Board with J. Steven Ecklund, Administrative Law Judge, conducting the hearing. Respondent Amenity, Inc. was represented by David Day while Petitioner Utah Securities Division was represented by Nicholas E. Hales, Assistant Attorney General.

The Utah Securities Advisory Board and William E. Dunn Executive Director of the Department of Business Regulation, after careful consideration of all the evidence presented by both parties at both hearings, and review of the briefs on file, hereby makes the following Findings of Fact and Conclusions of Law and Final Order:

FINDINGS OF FACT

1. Capital General Corporation has incorporated approximately 30 other companies ("companies") and caused them to go public by distributing their shares to a wide range of shareholders in a similar fashion to Amenity.

2. In June of 1986, Amenity Inc. was acquired by Elkin Weiss and Companies Inc. Two additional "companies" have also been acquired. They are Olympus Enterprises, now Florida Growth Industries, Inc., and Y Travel, now H & B Carriers, Inc.

3. Capital General Corporation was instrumental in the acquisition of Amenity, Olympus, and Y Travel by the acquiring companies. Capitol General received \$25,000.00 for the services it performed.

4. The distribution of Amenity stock was done with an intent to circumvent or frustrate the purposes of the Utah Uniform Securities Act and the registration provisions contained therein.

Conclusions of Law

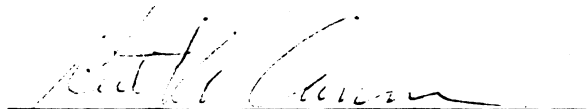
As was concluded in our January 8, 1987, Order, as a matter of law, the term "good faith gift" in the context in which it is used, i.e., in the Utah Uniform Securities Act, means a bona fide gift of securities given in "good faith", i.e., not given with an intent to circumvent or frustrate the purposes of the Utah Uniform Securities Act and, most relevant to the instant case, the registration provisions contained therein. We have found that the distribution of Amenity stock was done with an intent to circumvent or frustrate the purposes of the Utah Uniform Securities Act. As such, we conclude that the distribution of the gifted Amenity stock was not done in good faith.

We have previously concluded that the gift distribution of Amenity stock was done for consideration, and thus was an offer or sale of a security as defined by the Utah Uniform Securities Act. The distribution of the Amenity stock is not entitled to the good faith exclusion provided by the Act because it was not done in good faith. The Respondent has not demonstrated the existence of any exemption or exception for the Amenity distribution. No registration of the stock has been sought or granted. We must conclude that the distribution of Amenity stock constituted the unregistered offer or sale of a security in violation of the Act.

ORDER

THEREFORE, pursuant to Section 14(3) of the Utah Uniform Securities Act, it is hereby ordered that the use of all secondary trading exemptions of the securities of Amenity, Inc., its affiliates and successors, be and are hereby suspended.

DATED this 18th day of February, 1987.



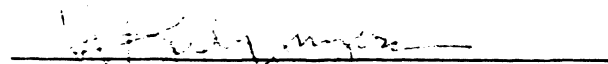
Keith A. Cannon
Chairman,
Securities Advisory Board



William E. Dunn
Executive Director,
Department of Business Regulation



Margaret Wickens
Member
Securities Advisory Board



Kent Burgen
Member
Securities Advisory Board



David E. Hardy
Member
Securities Advisory Board

CERTIFICATE OF MAILING

I hereby certify that on this 26th day of February, 1987, I mailed, regular mail, postage-prepaid, a copy of the foregoing Final Order to David H. Day, Day and Barney, 45 E. Vine St., Murray, Utah 84107.

William Peterson
/

Order of October 28, 1986:

Recommended Order of J. Steven Ecklund, Administrative Law Judge, dismissing the petition of the Utah Securities Division seeking suspension of trading of Amenity, Inc. stock.

BEFORE THE SECURITIES DIVISION
OF THE DEPARTMENT OF BUSINESS REGULATION
OF THE STATE OF UTAH

In the matter of the Registration Statement of Amenity Inc.	:	FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER Case No SD-86-11
	:	
	:	
	:	

Appearances:

Nicholas E. Hales for the Division of Securities

David H. Day for Respondent

By the Administrative Law Judge:

The instant proceeding was initiated pursuant to the issuance of a Petition, dated June 5, 1986. Thereafter counsel for the respective parties agreed to submit the matter on memoranda. On July 15, 1986, the division filed a memorandum in support of a suspension of trading exemptions regarding Respondent's securities. On August 12, 1986, Respondent filed its responsive memorandum. A reply memorandum was subsequently filed on September 2, 1986.

Oral argument was presented on September 25, 1986 before J. Steven Eklund, Administrative Law Judge for the department. The Administrative Law Judge, being fully advised in the premises, now enters the following findings of fact, conclusions of law and recommended order.

FINDINGS OF FACT

1 Respondent was incorporated on January 7, 1986 in the State of Utah with a capitalization of 100,000,000 shares of stock at \$0.001 par value per share. Respondent's incorporators and directors are Julie Harmon, Cynthia Paskett, and Jeri Pattersson.

2 On January 7, 1986, 1,000,000 shares of stock were issued by Respondent to Capital General Corporation for \$2,000. Capital General Corporation is a financial consulting firm, whose officers and directors are David R. Yeaman, Ms. Paskett, and Ms. Pattersson. The monies paid for the stock represent Respondent's only asset.

3. As of the just-stated transaction, Capital General Corporation was the only shareholder of Respondent. Thereafter, Capital General Corporation gave 100 shares of the stock it held to each of approximately 900 people. Those who received the stock consist of various contacts, customers, former customers, and business associates of Capital General Corporation.

4. No consideration or payment for the securities thus transferred was solicited or accepted by Capital General Corporation. Those who received the securities were not required to purchase anything, become a customer of Capital General Corporation, or provide any consideration for the securities in question. Capital General Corporation distributed the stock to reward past association and loyalty and to provide exposure of Capital General Corporation's consulting business to various financial entities as the means of creating or maintaining good will.

5. Capital General Corporation has previously capitalized three other subsidiaries, caused said subsidiaries to become public, and thereafter sold them in mergers with other companies. Respondent's promoters intend to do likewise respecting Respondent.

CONCLUSIONS OF LAW

The division asserts that Capital General Corporation's distribution of the stock represents the sale of a security within the meaning of Section 61-1-13(15)(a) and that distribution of said securities without registration of the same constitutes the violation of Section 61-1-7, quoted below. The division urges that both the initial and subsequent purchasers of a public offering are entitled to the protection afforded by disclosure mandated through registration requirements. Thus, the division contends that full compliance respecting both initial registration requirements and secondary trading laws must exist and all that possible exemptions from registration requirements as to future trading of Respondent's securities should be suspended.

In opposition thereto, Respondent asserts that the distribution of the securities constitutes a good faith gift, which is excluded from the definition of a sale of a security by reason of Section 61-1-13(15)(d)(i). Respondent contends that the creation or maintenance of good will is not sufficient consideration to conclude that value has passed within the meaning of Section 61-1-13(15)(a). Respondent further asserts that registration requirements are inapplicable as to the initial distribution of the securities which occurred, inasmuch as the donees of said distribution invested nothing and, thus, do not fall within the class intended to be protected by the disclosure afforded through

registration requirements. Respondent concedes that any subsequent public trading of the gifted securities is subject to applicable secondary trading laws.

Section 61-1-7, Utah Code Ann. (1953), as amended, provides:

It is unlawful for any person to offer or sell any security in this state unless it is registered under this chapter or the security or transaction is exempted under Section 61-1-14.

Section 61-1-13(15)(a) defines "sale" or "sell" to include:

... every contract for sale of, contract to sell, or disposition of, a security or interest in a security for value.

"Offer" and "offer to sell" are defined in Section 61-1-13(15)(b) to include:

... every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

Section 61-1-13(15)(d)(i) further provides that the above-defined terms do not include a "good faith gift".

Clearly, the previously-described transaction by Capital General Corporation represented a disposition of a security for value within the meaning of Section 61-1-13(15)(a) or (b). Despite Respondent's assertion that there is insufficient consideration present to find that value passed to Capital General Corporation from the donees of the securities in question, the creation and/or maintenance of good will and the resulting beneficial exposure of Capital General Corporation's business in various areas represents the value envisioned by the just-cited statutes. See Blackburn vs. Ippolito, Fla., 156 So. 2d 550 (1963); King et. al. vs. Southwestern Cotton Oil Co., Okla. App., 585 P.2d 385 (1978).

Thus, the only remaining question is whether the disposition of the securities constituted a good faith gift exempted from compliance with the registration requirements set forth in Section 61-1-7 by reason of the applicability of Section 61-1-13(15)(d)(i). The division asserts that the transfer of the securities from Capital General Corporation to the donees constitutes a subterfuge designed to avoid registration requirements mandated by statute and/or rule, the implication being that the transfer was not one made in "good faith". Concededly, the transfer of the securities was made to a significant number of entities and the term "good faith gift" is not defined by statute. However, it has been stated that "there is no warrant for superimposing a quantity limit on private offerings as a matter of statutory interpretation." S.E.C. vs. Rawlston Purina Co., 346 U.S. 119, 127 (1953). Further, there is no

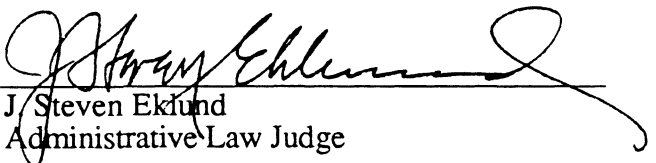
evidence that the disposition of the securities by Capital General Corporation was conditioned upon either action or inaction of the donees of said securities and the mere fact that value passes upon disposition of a security is not such as to necessarily conclude that a good faith gift has not been made.

A more considered review reveals that the recipients of the securities were mere donees, to whom the protection afforded by compliance with registration requirements respecting financial disclosure as to the securities or the issuer of the same is not relevant. Clearly, securities laws are remedial in nature and should be broadly and liberally construed to give effect to the legislative purpose. Payable Accounting Corp. vs. McKinley, Utah, 667 P.2d 15 (1983). Nevertheless, under the facts and circumstances presented, Respondent correctly asserts that the purpose generally served by compliance with registration requirements (i.e., protection of the investing public) has no applicability as to the donees of the securities in the instant case.

RECOMMENDED ORDER

WHEREFORE, IT IS ORDERED that the relief sought in the Petition, dated June 5, 1986, be denied and said Petition be dismissed, there being no proper basis to conclude that registration requirements mandated by Section 61-1-7 are applicable to the disposition of the securities in question.

Dated this 28th day of October, 1986.


J. Steven Eklund
Administrative Law Judge