

1978

# Cache Valley Syndicate Trust v. State of Utah : Reply Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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In the Matter of:                   :  
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CACHE VALLEY SYNDICATE           :  
TRUST, Statutory Assign-        : Supreme Court No. 15396  
ment for the Benefit of        :  
Creditors of Financial         :  
Service Co., Inc.               :  
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REPLY BRIEF OF APPELLANT

\* \* \* \* \*

APPEAL FROM THE JUDGEMENT OF THE DISTRICT COURT  
OF CACHE COUNTY, HONORABLE VENOY CHRISTOFFERSEN, JUDGE

\* \* \* \* \*

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FILED

SEP 11 1978

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In the Matter of:

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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STATE OF UTAH	)	
In the Matter of:	)	
	)	
Cache Valley Syndicate Trust	)	Case No. 15396
	)	
Successor to	)	
Financial Service Co., Inc.	)	

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REPLY BRIEF OF APPELLANT

STATEMENT OF FACTS

The appellant disagrees with the Statement of Facts of the respondent and most of these disagreements are set forth in the Statement of Facts in the appellant's original Brief. However, the respondent raises an additional issue in paragraph two of his Statement of Facts when he alleges that the appellant, Elmer Erickson, was determined to be criminally culpable in causing losses to Cache Valley Syndicate Trust. This is not an accurate statement of facts. Elmer Erickson entered a plea of guilty to three separate criminal complaints entitled "The State of Utah vs. Elmer Erickson" File Nos. 18711, 18712 and 23004. The first two complaints were issued on the 29th day of August, 1972, and the third complaint was issued on the 11th day of February, 1976. Those three complaints

alleged that Elmer Erickson obtained money from individuals contrary to state law. Elmer Erickson was never charged with taking money from Cache Valley Syndicate Trust or any other illegal activity pertaining to Cache Valley Syndicate Trust.

#### POINT 1

THE CLAIMS OF ELMER G. ERICKSON WERE NOT BARRED BY ANY COURT ORDER OR PROBATION AGREEMENT.

The appellant strenuously objects to the respondent attempting to embellish the records in the lower court by attaching to his Brief copies of court orders and probation agreements from other criminal actions. If the respondent intended these matters to be considered by the court, then he should have introduced them in the lower court and then designated them as part of the record on appeal in accordance with Rule 75 A. The respondent did not do so, and consequently said documents should not now be considered by the Supreme Court.

The respondent contends that the appellant is barred from filing this appeal and supposedly from maintaining an action in the lower court for claims he has as a creditor or as a beneficial interest holder. This is a position that was not asserted in the lower court and the record on appeal clearly demonstrates that the appellant was notified of all actions in the lower court and was allowed to appear and participate in all hearings in the lower court. The respondent did not contend in the lower court that the appellant had

standing and obviously the lower court felt that the appellant had a right to be present, to present evidence and to maintain his claim. The very fact that the claims of the appellant were given classification by the court supports the lower court's belief that the appellant had standings before it.

The respondent claims that placing the appellant's claim in third classification indicated a complete rejection of his claim. There is no evidence in the record to demonstrate any such position. In fact the respondent does not even attempt to support the contention by any reference to the transcript or record. This is because he knows there is no evidence to support such a position.

As indicated in the appellant's Statement of Facts on pages 4 and 5 of the appellant's Brief, Cache Valley Syndicate Trust has filed a lawsuit against the appellant for \$92,000, and the appellant has filed a Counterclaim for approximately \$100,000. That case is pending trial at this time. There has never been a motion filed asking that the appellant's Counterclaim be dismissed because of any previous court orders. The respondent has not raised this issue in any lower court and he should not be able to raise it for the first time on appeal.

Even if this court were to rule that the respondent may raise this issue on appeal, it is clear that the documents attached as Appendix A, B and C establish the position of the

appellant. The court order, Appendix A, and the probation  
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agreement, Appendix C. state that Elmer G. Ericson is to assign any beneficial interest he has in Cache Valley Syndicate Trust to individuals who have suffered a loss by reason of his activities. The probation agreement is explicit that this refers to beneficial interest units and not to claims that he may have as a creditor. The appellant fully intended to comply with the order. However, he can not comply with that order unless he takes reasonable efforts to protect the interest represented by his beneficial shares. It is obvious that the court order expects him to preserve these claims to the best of his ability so that he can assign some of the interest to those individuals that have suffered this loss. If the appellant does not comply with the probation agreement the court may find him guilty of a probation violation. However, his compliance or non-compliance with the probation agreement should not effect the case now pending before the court.

It should be noted that there were three criminal actions filed against Elmer Erickson in Cache County. They were entitled "State of Utah vs. Elmer Erickson" File Nos. 18711, 18712 and 23004. Elmer Erickson was never charged with taking money from Cache Valley Syndicate Trust, the respondents. Each one of the criminal actions related to obtaining money from individuals. It was these individuals that the court wanted to protect with its order. It was not Cache Valley Syndicate Trust. The respondent's statement that hundreds of individuals had been injured by the appellant's criminal

activities is totally unsupported by any evidence whatsoever, as are the majority of the other allegations made by the respondent in his Brief.

#### POINT TWO

THERE WAS NO EVIDENCE TO JUSTIFY BONNIE ERICKSON'S CLAIM BEING PLACED IN CLASS THREE.

The transcript which is part of the file contains the proceedings of two separate hearings. The first hearing was on the 12th day of April, 1977. That hearing is covered in the transcript from page 1 through page 89. The second hearing was on May 23, 1977, and is contained in the transcript from page 90 through page 106. On April 12, 1977, the court indicated that within thirty (30) days the parties should file motions with "memorandums or affidavits." (R. 312) Thereafter, on May 23, 1977, Robert V. Phillips, one of the attorneys for the appellant, asked the court what actions would be taken concerning certainty of the claims. Judge Christoffersen stated that there would be a further evidentiary hearing on the issues that were contested. (T. 105) One of those issues was the question of whether or not Bonnie Erickson's claim would be placed in class three. The attorneys for the respondent had earlier conceded that her claim should not be treated the same as Elmer Erickson's. (T. 73) No such further evidentiary hearing was held. Consequently, it is a contention of the appellant, Bonnie Erickson, that the court had no basis to place her in class three since no evidence

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was ever produced by the respondent indicating that she had any involvement in mismanagement of the trust property.

The respondent cites 9 Am Jur 2d, Bankruptcy, Section 572 Page 441 apparently in support of his position that it is Bonnie Erickson's burden to prove she was not involved in any mismanagement of trust funds. That section does not establish that principal, but in fact states that a married woman should not be treated any different than any other creditor by reason of her marital relationship. Counsel does not cite any authority for the position that it is Bonnie Erickson's burden to prove she was not involved in mismanagement. It would seem apparant that this is a burden borne by the trust if they intend to relegate her to an inferior position to that of other beneficial interest holders. The respondent does not claim that Bonnie Erickson did not file a claim with the trust or that it was not timely. Consequently, it is the position of the respondent that Bonnie Erickson must be treated the same as all other beneficial interest holders who have not been involved in mismanagement of trust funds.

### POINT THREE

THE LOWER COURT HAD NO AUTHORITY TO ESTABLISH A PRIORITY BASED UPON AN ALLEGED COMMON LAW ASSIGNMENT FOR THE BENEFIT OF CREDITORS CREATED ON NOVEMBER 1, 1971.

that in fact said Declaration of Trust was a common law assignment for the benefit of creditors. The respondent is the only one to ever raise the issue of a common law assignment. The Declaration of Trust which is set out in its entirety in the record, pages 11 through 14, and which is cited extensively in the appellant's Statement of Facts does not claim to be a common law assignment for the benefit of creditors. The introduction paragraph of that Declaration of Trust states in part "that we ...entered into an agreement to create a trust...to operate a specific investment as hereinafter explained by this statement." Paragraph two of that Declaration of Trust states in part "... it is understood and agreed that we...being entitled to the equitable and beneficial interest of all profits and property..." (emphasis added).

It is clear from the Declaration of Trust that those individuals agreeing to be subscribers to said document intended that the business be operated in such a manner to be profitable. In fact paragraph 13 of said trust states "That this trust shall continue for such time as the business proves to be profitable, but may be terminated sooner by the trustee if he finds it desirable to do so for the best interest of the estate and Cestuis que trustents. This trust shall terminate twenty-one (21) years after the death of the last subscriber of this declaration unless sooner terminated by the trustee." It is clear that the trust was created for the purpose of dealing in property and other securities

for the benefit of the beneficial interest holders. The assignment of trust was not for the purpose of liquidating the assets or distributing the proceeds to the creditors or beneficial interest holders.

The purpose of an assignment for the benefit of creditors, whether at common law or by statute is to liquidate the assets and distribute them to the creditors and other parties having an interest or claim. This was not the purpose of the assignment of trust, nor was this done by the trustee established by the assignment of trust. The respondent attempts to classify the assignment of trust as a common law assignment for the benefits of creditors because he realizes that this is the only possible way he can justify the distribution which he asks this court to accept. The appellant opposes that distribution because the trustee of the assignment of trust created in 1971 continued to do business and incurred indebtednesses and obligations with new creditors while trying to operate the trust at a profit. Having done so, said creditors are entitled to priority in their claims over and above the beneficial interest holders who signed the assignment of trust and agreed to engage in the business.

The beneficial interest holders and other creditors in existence in 1971 could have elected to proceed with an assignment for the benefit of creditors. However, when they did not do so but rather elected to make the trust a profit business, they thereby became obligated to see that the creditors dealing with said trust were first payed before any

proceeds were distributed to the beneficial interest holders.

The respondent cites Utah Assn. of Credit Men v. Connell as supporting its position that the 1971 assignment of trust was really an assignment for the benefit of creditors. That case does acknowledge that a common law assignment for creditors can be created even though Utah has a statute regulating such assignments. However, that case establishes that certain formalities must be observed. The assignment in that case was a general assignment without preference for the benefit of all creditors. All creditors were notified and apparently acquiesced or accepted the assignment. The court stated in part "...It is not our purpose nor do we wish to be understood as here deciding that in a proper case under the Utah statute creditors may not complain of the failure to comply with statutory formalities and procedure; but what we do now decide is that the case at bar presents in all its phases a valid assignment...." Absolutely no evidence was produced in the lower court to demonstrate that the November 1971 assignment of trust was intended to be an assignment for the benefit of creditors or that it complied with any of the formalities and procedures necessary to create a valid assignment for the benefit of creditors.

The respondent in his Brief alleges many reasons why the court accepted the priority proposed by the trustee. However, it should be noted that none of these allegations are supported by references to the transcript or record.

The record from the lower court does not give any reason for the priority established by the court.

CONCLUSIONS

The allegations of the respondent in his Brief are unsupported by the record and the transcript of the court below and contrary to the provisions of the assignment of trust. Consequently, the position of the respondent should be rejected and the relief prayed for by the appellant granted.

RESPECTFULLY SUBMITTED this                      day of September, 1978

BY

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ROBERT A. ECHARD  
Attorney for Appellant

I hereby certify that I mailed a copy of the foregoing Reply Brief of Appellant to David R. Daines, N. George Daines III, Attorneys for Respondent, 128 North Main Street, Logan, Utah, 84321 this                      day of September, 1978.

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SECRETARY