

1978

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

Utah Supreme Court

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Robert A. Echard; Attorney for Appellant;

David N. Daines; Attorneys for Respondent;

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IN THE SUPREME COURT OF THE STATE OF UTAH

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In the Matter of: :  
:  
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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BRIEF OF RESPONDENT

\* \* \* \* \*

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF  
CACHE COUNTY, HONORABLE VENNY CHRISTOFFERSEN, JUDGE

\* \* \* \* \*

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FILED

MAR 10 1978



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: Supreme Court No. 15396  
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BRIEF OF RESPONDENT

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STATEMENT OF KIND OF CASE; DISPOSITION IN LOWER COURT;  
RELIEF SOUGHT ON APPEAL; and DESIGNATION OF PARTIES; are accepted  
by Respondent as set forth in Appellant's Brief.

STATEMENT OF FACTS

The facts relevant to this appeal as stated in  
Appellant's Brief are contested by Respondent in the following  
particulars:

1. Risk investors or shareholders in Financial  
Service Company, Inc., did not receive any beneficial interest  
certificates in Cache Valley Syndicate Trust. Beneficial  
Interest Units were given only in exchange for legal unsecured  
claims of unsecured creditors of Financial Service Company, Inc.,  
(T 99 to 101 and Appellant's Brief, page 3 re: Bonnie Erickson's  
interest.)

2. Elmer G. Erickson was barred by order of a  
court in a criminal proceeding from asserting claims against  
Cache Valley Syndicate Trust and in the same proceeding was

determined to be criminally culpable in causing losses to Cache Valley Syndicate Trust. He did not appeal that order. (T 70, 71 and 72 ANNEXES A, B, and C.)

3. It is not known or established in the record whether the source of Bonnie L. Erickson's claims are or are not severable from her husband's barred claims. She offered and then failed to produce proof segregating her claims according to the courts procedural order or otherwise. (T 73, R.312, R.313 to 36, R.353.)

#### POINT I

ELMER G. ERICKSON HAS NO STANDING ON APPEAL. HIS CLAIMS AND ANY JUSTICIABLE INTEREST IN CVST WERE BARRED BY A FINAL UNAPPEALED PROBATION ORDER AND HIS OWN AGREEMENT. HIS WIFE'S CLAIMS ARE ALSO BARRED.

Attached as an appendix to this brief are certified copies of documents from criminal files #1745, 1746 and 2032 in the First District Court for Cache County all under the title of State of Utah v. Elmer G. Erickson.

The order of June 21, 1976, Appendix A, is clearly part and parcel of the plea bargaining agreement, Appendix B. Elmer G. Erickson was ordered to "withdraw all connections with CVST (Cache Valley Syndicate Trust, the Respondent) and assign all interests for restitution to persons who suffered losses through his activities." This order was followed by the

probation agreement signed by Mr. Erickson. See Appendix C.

The agreement is supported by consideration, not only consideration inherent in the probation and parol process but also in the plea bargaining agreement which provides that:

"All other potential charges whereby said Elmer G. Erickson could be prosecuted for illegal conduct under Utah Code Annotated or County Ordinances will be barred and no further criminal prosecution will be filed against him if said acts occurred prior to January 25, 1976."

There was no appeal from the order establishing the terms of the probation or the agreement. See Appendix C. It would be a gross miscarriage of justice now to hold that criminal prosecutions are barred by the agreement but the corresponding bar to Mr. Erickson's civil remedies is not binding, or that he may continue to harrass Cache Valley Syndicate Trust with this appeal. (T 70 to 73.)

Mr. Erickson's claims were relegated into the third class, not only based on the principal of equitable degradation but also as to a complete rejection in recognition of the absolute bar above referred to.

It may be understandable that some of Mr. Erickson's participation in the hearings in the record were part of the qualification "as you may be called upon to give advice and assistance as the occasion may arise." But, his lodging of this



appeal is clearly in violation of his agreement to "terminate any relationship with Cache Valley Syndicate Trust" and it is clear that he has no enforceable beneficial interest units in the trust, or other claims.

This bar and standing issue as applicable to Elmer G. Erickson should also apply to Bonnie L. Erickson, his wife, in view of the fact that she wholly failed to produce evidence to segregate her beneficial interest shares from Mr. Erickson's as more particularly set forth under Point III.

Another possible approach to the question of Mr. Erickson's standing would be for Supreme Court to hold that by violating his agreement and court order by lodging this appeal, Mr. Erickson has removed the corresponding bar to prosecutions contained in his plea bargaining agreement. This approach would then empower the court to consider the merits of the issues he raises on appeal and open again the possibility of further criminal prosecution.

It is only on the possibility that the court may rule in accord with the previous paragraph that the following substantive responses are made to Appellant's Brief.

In spite of the order and agreement requiring disassociation which is final and stands unreversed, Mr. Erickson

is the only one of the hundreds of those injured by his overt criminal activities to appeal the priority determination of the court. This appeal directly reduces the pittance available to those who were to be protected from him by the disassociation order. His continuing violations of the order do reduce and continue to reduce the amount available for distribution.

## POINT II

### (RESPONSE TO APPELLANTS #1)

THE LOWER COURT CORRECTLY ESTABLISHED A PRIORITY CLASSIFICATION COMBINING PRE-ASSIGNMENT CREDITORS OR, BENEFICIAL INTEREST HOLDERS AND POST ASSIGNMENT CREDITORS.

The Cache Valley Syndicate Trust entity was established in 1971. The defunct entity out of which Cache Valley Syndicate Trust arose was Financial Service Company, a Corporation. The Appellant's Brief fails to recognize the well established fact that all beneficial interest holders in the common law assignment of 1971 (CVST) were, in fact, creditors of and not investors or shareholders in the defunct entity, Financial Service Company, Inc., (Appellant's Brief, page 3 as to Bonnie Erickson's Interests and T 99 to 101.)

Appellants fail to recognize that the date of the assignment was November 1, 1971, and that on that date all beneficial interest holders indeed had a clear right to instigate an action against Financial Service Company, Inc., the Assignor. Cache Valley Syndicate Trust was never an Assignor.

It was from the inception an Assignee for the benefit of creditors not for the benefit of risk investors.

Appellants confuse the dates. The common law assignment created on November 1, 1971, was converted to a statutory proceeding on July 28, 1976. The entity did not become insolvent in 1976, it was insolvent when it was created and that was the reason for its creation.

"Where a debtor, by trust deed assented to by all his creditors, conveys his property to trustees to be converted into money, the proceeds thereof to be distributed to his creditors, the creditors take a vested, and not a contingent, interest in the trust estate. This interest has been said to be an equity equaling that of the holder of an unpaid check against the insolvent's bank, so that an assignee claiming under notice given the bank prior to presentation of the check has a superior right to the insolvent's funds in the bank's hands."

6 Am Jur 2d Assignment for the Benefit of Creditors, §108, at pages 393 and 394.

If the court erred, it erred in not preferring creditors on the date of the assignment who are the beneficial interest holders over the subsequent creditors. Appellant's Brief referred to all but the last and most significant sentence in §109 of 6 Am Jur 2d, Assignment for the Benefit of Creditors, at 394 which states "The rights of creditors are fixed at the date of the assignment and only those who are creditors of the assignor at that date are entitled to participate in the distribution of the estate."

The law is that anyone becoming a general unsecured creditor of an assignment for creditors after an assignment is made has no standing at all. He is on notice of the insolvency and deals in continuing unsecured transactions with such entity at his absolute peril.

Common law assignments for the benefit of creditors are recognized as valid in Utah when made according to the common law, Utah Assn., of Credit Men v. Connell, 50 U.531, 157 P. 817; 6 Am Jur 2d, Assignment for the Benefit of Creditors, §4 at 328, and carry with them the consequences above cited as was the case on November 1, 1971.

Appellants argue the reverse of this established principle and would award creditors after the assignment a preference over creditors at the date of the assignment (beneficial interest holders.)

The early creditors (beneficial interest holders) are not claiming error for being "lumped with" later creditors and the classification should stand.

A class priority without distinction as to the creditors before and after the assignment was considered by the successor assignee and the court to be a fair and equitable divergence of a harsh legal principle in view of the flagrant divergence of the original assignment from properly limiting

its activities to liquidating and distributing assets. That divergence included sloppy management and significant acts of criminal malfeasance at best.

### POINT III

#### (RESPONSE TO APPELLANTS #II)

BONNIE ERICKSON'S CLAIM WAS PROPERLY EXCLUDED WITH HER HUSBAND'S CLAIM BECAUSE SHE FAILED TO PRODUCE PROFFERED EVIDENCE THAT HER CLAIM DID NOT EMANATE FROM HER HUSBAND.

The Assignee and the Court were willing to consider and provided an opportunity to Bonnie L. Erickson to present evidence that her claimed interest was derived from her own funds separate from her husband. Her counsel claimed they had evidence that "some estate (her mothers) and monies of her own had gone directly into this and I do not think she has any reason to be placed with Mr. Erickson in the bottom category." (T 73.)

The order of April 12, 1977, (R.312) provided her with a procedure to submit proof by affidavit in which she could have segregated her claim by showing that her separate funds were the source of some or all of her claim. No such affidavit was presented. Had such evidence been produced, the Assignee or other interested party might have rebutted it, resulting in an evidenciary hearing on that point. She waived, perhaps for her own good reasons, the right to improve her

position in the priority classification as to all or part of her claim.

The following quotation places in proper perspective the position of a wife in such priority alignments in a reasonable analogous bankruptcy situation:

"A married woman whose status is such under the law that she has the right to acquire, hold, use, and dispose of property to the same extent as if she were unmarried, is entitled to prove against the estate of her husband in bankruptcy a bona fide debt owing by him to her, and if such debt is established by proof, she is to be neither postponed nor preferred to other creditors solely because of the marital relation."

9 Am Jur 2d, Bankruptcy, §572 pp. 441.

It is reasonable and sustainable that the burden of proof be upon the wife to show that the source of the claim is seperable from her husband's barred claim.

It is clear that at the April 12 priority hearing the court ordered a procedure for establishing facts and law to vary the proposed classifications. All protesting parties were to file within 30 days briefs with memorandums (law) and affidavits (facts) objecting to "amount of claims, amounts paid and priority." (R. 312) The hearing was held on May 23rd to rule on objections as to the law and facts. (T. 90) No factual issues were raised by Appellants; they filed no affidavits and made certain bare legal arguments (R. 334, 335, 336) which were ruled

on in the Declaratory Judgment. The Judgment was final as to all matters raised on appeal. (R 357 to 362.)

#### POINT IV

##### (RESPONSE TO APPELLANTS #III)

APPELLANTS COUNTERCLAIMS ARE BARRED PER POINT #1. ALTERNATIVELY THEY WERE PROPERLY EXCLUDED OR DOWNGRADED FOR EQUITABLE REASONS IN FIXING PRIORITIES.

The court need not await prolonged litigation on an obviously barred counterclaim before establishing priorities. Even if a counterclaim were determined to be valid, the court is clearly entitled to downgrade the priority of an asserted claim or reject the claim based on equitable consideration under analogous bankruptcy principles.

The priority system utilized by the District Court was to follow the bankruptcy priorities and procedures. A bankruptcy court can apply equity in subordinating claims:

"While the bankruptcy court does not have the power to create a priority not granted by the Bankruptcy Act out of equitable considerations, it does, according to most of the authorities, have the power to adjudicate equities among creditors in the distribution of dividends, at least where there is a substantial relationship between the circumstances which give rise to the equity and the claims upon which dividends are awarded. The equitable powers conferred on bankruptcy courts by Bankruptcy Act §2, in conjunction with the provisions of §57(k) of the

Act, relating to the rejection of claims according to the equities of the case, include the power to subordinate claims in the light of equitable considerations. In addition to modifications on distribution of assets imposed by the Bankruptcy Act with respect to preferences, priorities, and the like, it has been said that the courts must impose other modifications which they deem necessary in the interest of justice."

9 Am Jur 2d, Bankruptcy §566 at 435 (footnotes omitted.)  
The rationale used by these courts in subordinating claims of participants in the bankrupt's affairs is well established.

The equitable power of a bankruptcy court to disallow or subordinate a claim in the light of equitable considerations applies to claims presented, on the bankruptcy of a corporation, by an officer, director, or stockholder; and it is immaterial whether the claim has been reduced to judgment. The subordination by a bankruptcy court on equitable consideration of claims of a dominant or controlling stockholder of a bankrupt corporation may be based simply upon a violation by him of the rules of fair play and good conscience or upon a breach of the fiduciary standards of conduct which he owes the corporation, its stockholders, and creditors. Actual fraud is not necessarily essential to the subordination."

9 Am Jur 2d, Bankruptcy §569 at 438 (footnotes omitted.)

With respect to Mr. Erickson's claim, Respondent urges that the criminal convictions of Mr. Erickson for his activities as manager of CVST on their face show a compelling



reason for the equitable subordination of all of his claims. There is no mere question of whether the niceties of fair play have been followed, Mr. Erickson's conduct as manager was criminal.

#### CONCLUSIONS

Elmer G. Erickson has no standing on appeal in this case and his wife is also barred. The appeal should be dismissed with prejudice with costs to Respondent. If the court decides the bar to criminal proceedings against Elmer G. Erickson is lifted as a result of this appeal then it should determine that the lower court properly applied the principal of equitable subordination to all of Appellant's claims and counterclaims. It should be determined that the lower court did not err in establishing in one class unsecured creditors prior to and subsequent to the original assignment for the benefit of creditors.

RESPECTFULLY SUBMITTED this 15th day of March, 1978.

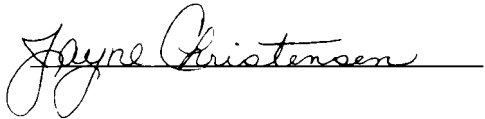
DAINES & DAINES

By \_\_\_\_\_  
David R. Daines  
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the foregoing BRIEF OF RESPONDENT, postage prepaid, this 17 day of March, 1978, upon:

Robert V. Phillips  
Robert A. Echard  
Attorneys for Appellant  
427-27th Street  
Ogden, UT 84401

A handwritten signature in cursive script, reading "Jayne Christensen", is written over a solid horizontal line.

Appendix "A"

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
IN AND FOR THE  
COUNTY OF CACHE, STATE OF UTAH**

.....  
 Plaintiff  
 vs.  
 .....,  
 Defendant

ORDERED ENTERED June 21, 1978  
 CASE NUMBER 1745

VE NOY CHRISTOFFERSEN, Judge  
 George Parker, Court Reporter  
 Court Clerk

.....  
 .....

.....  
 .....

CERTIFIED THIS 15 DAY OF March 1978  
 AS A TRUE COPY OF THE WITHIN INSTRUMENT ON  
 FILE IN THE OFFICE OF THE COUNTY CLERK.  
 FILE NO. 1745  
 SETH S. ALLEN,  
 CLERK OF THE DISTRICT COURT OF UTAH

ROBERT V. PHILLIPS  
Patterson, Foley, Phillips,  
Gridley & Echard  
Attorney for Defendant  
427 - 27 Street  
Ogden, Utah 84401  
Telephone: 394-7707

CERTIFIED THIS 15 DAY OF March 19 76  
TO A TRUE COPY OF THE WITHIN DOCUMENT ON  
FILE IN THE OFFICE OF THE COUNTY CLERK.  
FILE NO. 2032  
SETH S. ALLEN,  
CLERK OF THE DISTRICT COURT OF UTAH  
BY Seth S. Allen

IN THE FIRST JUDICIAL DISTRICT COURT OF  
CACHE COUNTY, STATE OF UTAH

STATE OF UTAH,	)	
	)	
Plaintiff,	)	
	)	NOTICE OF PLEA
-vs-	)	BARGAINING AGREEMENT
	)	
ELMER ERICKSON,	)	Civil No. 2032
	)	
Defendant.	)	

WHEREAS, there are three cases presently pending under the name and caption of State of Utah vs. Elmer Erickson, Civil No. 2034, theft, Civil Nos. 1745 and 1746, probation violation by reason of said theft charge, and

WHEREAS, the County Attorney's office and the attorneys for the defendant with the defendant's advice and concurrence, and

WHEREAS, it is agreed that said defendant, Elmer Erickson, will enter a plea of guilty to the charge of theft, and admits the allegations of a probation violation affidavit in case number 1745. In exchange for the County Attorney's office representation and approval by the court that the other charge, ~~along with~~ the probation violation, will be dismissed and any and all other potential charges whereby said Elmer Erickson could be prosecuted for illegal conduct under Utah Code Annotated or County Ordinance will be barred and no further criminal prosecution will be filed against him <sup>if said acts occurred prior to January 25, 1976</sup> ~~as of the date of the filing of the complaint on case number 2032.~~ In addition thereto, in spite of the representation

of the County Attorney's office that it is their avowed purpose to recommend incarceration for defendant, Elmer Erickson, that said Elmer Erickson shall be granted a right to a mitigation hearing with respect to the charges and the probation violation which he has entered a plea of guilty to. Said lawyers which are signatories

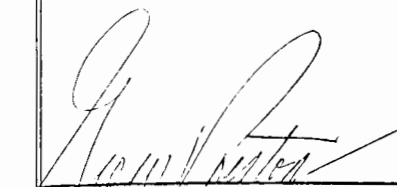
Number 2032

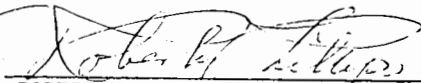
FILED APR 8 1976

hereto and said defendant, Elmer Erickson, hereby agree that said Elmer Erickson is aware of his right to trial by jury, to his subpoena power, to compel attendance of witnesses, and to his right not to be compelled to testify against himself, and he hereby waives those rights, affirming that there has been neither threat nor promise made by his counsel or the County Attorney's office, except as provided herein, and that he enters a plea and admissions to the probation violation affidavit voluntarily and pursuant to the terms and conditions herein set forth.

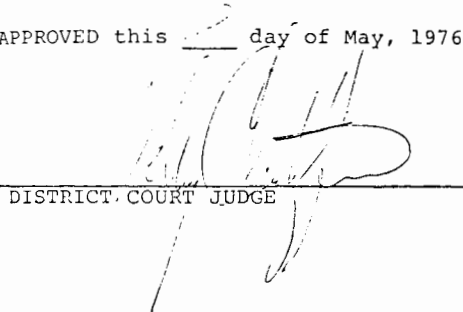
DATED this 3 day of May, 1976.

  
ELMER ERICKSON

  
Cache County Attorney

  
ROBERT V. PHILLIPS  
Attorney for Defendant

APPROVED this      day of May, 1976:

  
DISTRICT COURT JUDGE

BOOK 35 PAGE 516



Appendix C-1

ADULT PROBATION AND PAROLE

Elmer Ericksen No. 1745

I agree to abide by the following condition of my probation:

- To make regular written reports to my Supervising Officer by the fifth day of each and every month, or more often if requested to do so.
- To follow my Supervising Officer's instructions and advice.
- To permit my Supervising Officer to visit me at home or elsewhere.
- To work faithfully at legitimate employment.
- To support my dependents.
- To violate no penal law of any local, state, or federal government and to be of good behavior.
- To abstain from use or possession of narcotics or drugs, except on order of a licensed physician.
- To avoid association with any person who has been convicted of a felony.
- To refrain from the receipt, possession, or transportation of a firearm.
- To obtain written permission from the Utah Adult Probation and Parole Section before leaving the State of Utah, or any other state if permitted to reside outside the State of Utah under the Interstate Probation and Parole Compact.

To secure permission from and consent of my Supervising Officer to:

- A. Marry
- B. Change Employment
- C. Change residence

To abide by the following special conditions, if any

1. Terminate any relationship with Cache Valley Syndicated Trust except insofar as you may be called upon to give advice and assistance as the occasion may arise.
2. Assign such interests you may have in beneficial interest units; that those interests will be in the form of restitution to those persons who have a financial loss as a result of your activities.

I expressly acknowledged that should I leave the State of Utah without written permission from the Adult Probation and Parole Section, that I hereby waive extradition from any state in which I may be held to the State of Utah.

I understand and agree that should I violate any of the above conditions of my probation, or should I fail to report to my Supervising Officer, I shall be subject to arrest as provided by law.

This \_\_\_\_\_ day of \_\_\_\_\_ 197\_\_\_\_\_

SIGNED: Elmer Ericksen  
PROBATIONER

RESIDENCE ADDRESS: \_\_\_\_\_

WITNESSED BY: D. L. Wilson March 15, 1978

CERTIFIED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_ 197\_\_\_\_\_  
AS A TRUE COPY OF THE WITHIN INSTRUMENT ON  
FILE IN THE OFFICE OF THE COUNTY CLERK,  
FILE NO. 1745

Number 1745

FILED AUG 2 1976

SETH S. ALLEN, Clerk

Deputy

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CLERK OF THE DISTRICT COURT OF UTAH

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BY: [Signature]