

1979

Utah State University of Agriculture and Applied Science, A Utah Body Politic and Corporate v. Bear Stearns & Co., A Corporation v. Phillip A. Bullen, Jay R. Bingham, O.C. Hammond, Jay Dee Harris, Beverly D. Kumpfer, Snell Olsen, Rex G. Plowman, W. B. Robins, Alva C. Snow, William R. Stockdale, Jane S. Tibbals, Glen L. Taggart, Dee A. Broadbent, L. Mark Neuberger, Donald A. Catron, John Does, the Industrial Council of Utah State University of Agriculture and Applied Science : Brief of Respondents Phillip A. Bullen, Jay R. Bingham, O.C. Hammond, Jay Dee Harris, Beverly D. Kumpfer, Snell Olsen Rex G. Plowman, W. B.

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# Robins, Alva C. Snow, William R. Stockdale, Jane S. Tibbals, Glenn L. Taggart, Dee A. Broadbent, and L. Marx Neuberger

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH STATE UNIVERSITY OF  
AGRICULTURE AND APPLIED SCIENCE,  
A Utah body politic and corporate,

Plaintiff-Respondent

-vs-

HORNBLOWER & WEEKS-HEMPHILL, NOYES,  
INC., a corporation,

Defendant & Third-Party  
Plaintiff-Appellant

Docket No. 16274  
(Consolidated)

-vs-

PHILLIP A. BULLEN, JAY R. BINGHAM, O. C.  
HAMMOND, JAY DEE HARRIS, BEVERLY D. KUMP-  
FER, SNELL OLSEN, REX G. PLOWMAN, W. B.  
ROBINS, ALVA C. SNOW, WILLIAM R. STOCKDALE,  
JANE S. TIBBALS, GLENN L. TAGGART, DEE A.  
BROADBENT, L. MARK NEUBERGER, DONALD A.  
CATRON, JOHN DOES, THE INSTITUTIONAL COUN-  
CIL OF UTAH STATE UNIVERSITY OF AGRICULTURE  
AND APPLIED SCIENCE,

Third-Party Defendants-  
Respondents

BRIEF OF RESPONDENTS

PHILLIP A. BULLEN, JAY R. BINGHAM, O.C. HAMMOND,  
JAY DEE HARRIS, BEVERLY D. KUMPFER, SNELL OLSEN  
REX G. PLOWMAN, W. B. ROBINS, ALVA C. SNOW,  
WILLIAM R. STOCKDALE, JANE S. TIBBALS, GLENN L.  
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SEP 17 1979

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IN THE SUPREME COURT OF THE STATE OF UTAH

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UTAH STATE UNIVERSITY OF :  
AGRICULTURE AND APPLIED SCIENCE, :  
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Plaintiff-Respondent :

-vs- :

HORNBLOWER & WEEKS-HEMPHILL, NOYES, :  
INC., a corporation, :

Defendant & Third-Party :  
Plaintiff-Appellant :

-vs- :

PHILLIP A. BULLEN, JAY R. BINGHAM, O. :  
C. HAMMOND, JAY DEE HARRIS, BEVERLY :  
D. KUMPFER, SNELL OLSEN, REX G. :  
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BROADBENT, L. MARK NEUBERGER, DONALD :  
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COUNCIL OF UTAH STATE UNIVERSITY OF :  
AGRICULTURE AND APPLIED SCIENCE, :

Third-Party Defendants- :  
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BRIEF OF RESPONDENTS  
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BROADBENT, and L. MARK  
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Docket No. 16274  
(Consolidated)

On Appeal from the First Judicial District Court  
In and For Cache County, Utah

The Honorable VeNoy Christofferson

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BRIEF OF RESPONDENTS PHILLIP A. BULLEN,  
JAY R. BINGHAM, O.C. HAMMOND, JAY DEE  
HARRIS, BEVERLY D. KUMPFER, SNELL OLSEN,  
REX G. PLOWMAN, W.B. ROBINS, ALVA C.  
SNOW, WILLIAM R. STOCKDALE, JANE S.  
TIBBALS, GLENN L. TAGGART, DEE A. BROADBENT  
and L. MARK NEUBERGER

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NATURE OF THE CASE

1. The Primary Action

This action was commenced by plaintiff-respondent Utah State University (hereinafter "the University") in December, 1975 to recover losses and expenses allegedly sustained by the University in connection with its purchase and sale of various securities between December, 1971 and September, 1972. The University seeks to recover losses and expenses which it allegedly incurred in connection with stock transactions executed by Hornblower & Weeks-Hemphill, Noyes, Inc. (hereinafter "Hornblower") on the University's behalf. The University contends that it is entitled to recover from Hornblower because the transactions were ultra vires.

2. The Third Party Action

In addition to denying liability in the primary action, Hornblower filed a third-party complaint in August, 1977 seeking indemnity or

contribution from a number of other entities and individuals.<sup>1/</sup> Among the individuals named as third party defendants were officials at the University who allegedly authorized the investments in question. Those individuals included members of University's Institutional Council<sup>2/</sup> and several of the University's administrators<sup>3/</sup> (hereinafter referred to as "Respondents").

This brief is respectfully submitted in the captioned action on behalf of the following individual Respondents Phillip A. Bullen, Jay R. Bingham, O.C. Hammond, Jay Dee Harris, Beverly D. Kumpfer, Snell Olsen, Rex G. Plowman, W. B. Robins, Alva Snow, William Stockdale, Jane S. Tibbals, Glenn L. Taggart, Dee A. Broadbent, and L. Mark Neuberger in response to Hornblower's opening brief.<sup>4/</sup>

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<sup>1/</sup> Apart from the Appellees involved in these appeals, Hornblower's third party complaint also asserted claims against the State, the Institutional Council, and a bank which had acted as transfer agent in the security transactions at issue. Hornblower's claim against the foregoing entities were dismissed by the trial court Hornblower has apparently chosen not to appeal those rulings.

<sup>2/</sup> Phillip A. Bullen, Jay R. Bingham, O.C. Hammond, Jay Dee Harris, Beverly D. Kumpfer, Snell Olsen, Rex G. Plowman, W.B. Robins, Alva Snow, William Stockdale, and Jane S. Tibbals were Institutional Council members during the period in question.

<sup>3/</sup> The University Administrators were Glenn L. Taggart (President), Dee A. Broadbent (Vice-President for Business Affairs) and L. Mark Neuberger (Secretary to the University's Institutional Council) The third-party complaints also named Donald A. Catron, another administrator who actually ran the investment program on a day-to-day basis, as a defendant. Mr. Catron is separately represented.

<sup>4/</sup> By order of this Court dated March 20, 1979, the appeals in this action were consolidated with the appeals in four similar cases. Hornblower's opening brief was also submitted on behalf of stock-brokers in three of those other cases.

### DISPOSITION IN THE LOWER COURT

These Respondents moved to dismiss Hornblower's third-party complaint for failure to state a cause of action. On March 21, 1978, the trial court granted Respondent's motion to dismiss after extensive briefing and oral argument. The trial court certified its ruling as final for the purposes of appeal on January 3, 1979.

The trial court also entered various orders in the primary action between the University and Hornblower, from which Hornblower is presently appealing and which are described in Hornblower's brief.<sup>5/</sup> Those issues do not directly relate to these Respondents and are, accordingly, not addressed in this brief.

### RELIEF SOUGHT ON APPEAL

These Respondents seek affirmance of the trial court's order dismissing Hornblower's third-party complaint.

### STATEMENT OF FACTS

Each of the individual Respondents on whose behalf this brief is submitted either held a position on the Institutional Council of Utah State University or held a position as an upper level administrator at the University during the period of the investment program in question. The Institutional Council

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<sup>5/</sup> Hornblower's brief, p. 1-2.

members were largely chosen from the members of the community, while the administrators were essentially professionals in the field of education. By virtue of their positions, the Respondents were responsible for supervising most of the University operations. concerned the University. Those responsibilities encompassed a broad spectrum of activities, ranging from supervision of athletic and academic programs to supervision of the University's property and financial affairs.

Hornblower has laid out an elaborate and lengthy statement of facts in its brief which describes the involvement of these Respondents in the investment program in issue. Although that statement of facts contains much that should properly be labeled argument, no purpose would be served by attempting to identify the inaccuracies or to separate the fact from conjecture in the Hornblower brief, because the position of these Respondents with respect to the facts in this case is determined by the procedural posture of the case. This is an appeal by Hornblower from the dismissal of its third-party complaint. As such the relevant facts are those which were alleged in that third-party complaint.

In its third-party complaint Hornblower alleged the following as the factual predicate for its claims against these Respondents:

1. Hornblower alleged that these Respondents approved one or more resolutions which represented that the University had authority to purchase and sell securities.

The resolutions designated Donald Catron as one of the individuals who was empowered to direct purchases and sales of securities on the University's behalf. (R. 475).

2. Hornblower further alleged that these Respondents ratified Catron's actions by reviewing periodic reports which described the transactions Catron had entered into on the University's behalf (R. 476).

3. Hornblower further alleged that it relied upon the foregoing actions by these Appellees in executing the securities transactions in question on the University's behalf (R. 477).

Solely for the purposes of this appeal, the factual allegations of Hornblower's third-party complaint will be treated as though true.<sup>6/</sup>

It is Respondents' position that the trial court properly dismissed Hornblower's third-party complaint for the reasons set forth in the following sections of this brief.

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<sup>6/</sup> In its brief, Hornblower incorrectly contends that the Court must also treat as true the following allegations: (1) that Appellees exceeded their statutory authority in authorizing or ratifying the securities transactions in issue and (2) allegations that Appellees' actions gave rise to an express or implied agreement to indemnify Hornblower against liability arising out of the transactions in question. Appellees submit those allegations are conclusions of law which are not admitted by a motion to dismiss. E.g. Rapp v. Salt Lake City, 527 P.2d 651 (Utah 1974); Mirin v. Justices of the Nevada Supreme Court, 415 F.Supp. 1178, 1181 (D.Nev.1976) (construing identical federal rule). Even if true, however, those allegations would not be sufficient to state a cause of action against Appellees, for the reasons set forth in the following sections of this brief.

## ARGUMENT

### I. THE TRIAL COURT PROPERLY DISMISSED HORNBLOWER'S THIRD-PARTY COMPLAINT ON THE GROUNDS THAT THESE INDIVIDUAL RESPONDENTS ARE ENTITLED TO OFFICIAL IMMUNITY

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#### A. As Public Officials, These Respondents Are Entitled To Immunity For Acts Performed In Good Faith And Within The Scope Of Their Duties

Public officials, both in Utah and elsewhere, have long enjoyed a qualified immunity from suits growing out of the performance of their duties. E.g. Barr v. Matteo, 360 U.S. 575, 79 S.Ct. 1335 (1959); Board of Education of Nebo School District v. Jeppson, 74 Utah 576, 280 P. 1069 (1929) Such immunity has been deemed necessary to assure that public officials are free to exercise their duties unencumbered by the fear of damage suits growing out of the performance of their duties -- suits which consume time and energy better devoted to public service and which deter competent individuals from assuming the responsibilities of public office. Anderson v. Granite School District, 17 Utah 2d 405, 413 P.2d 597 (1966); Smith v. Losee, 485 F.2d 334, 340-41 (1973).

The scope of immunity to which particular officials are entitled varies, depending on the nature of the officials' responsibilities. Barr v. Matteo, 360 U.S. 575, 79 S.Ct. 1335 (1959); Connell v. Tooele City, 572 P.2d 697 (Utah 1977). Officials such as Respondents, who are charged with a wide range

of duties and responsibilities that require the exercise of judgment and discretion, must be and are accorded a relatively broad form of immunity. Smith v. Losee, 485 F.2d at 343-344.

This Court has, accordingly, recognized the need for such protection. It has repeatedly extended immunity to officials charged with discretionary duties. E.g. Sheffield v. Turner, 21 Utah 2d 312, 445 P.2d 367 (1968); Hjorth v. Whittenburg, 121 Utah 324, 241 P.2d 907 (1952). So long as such officials have acted in good faith and within the scope of the matters committed to their supervision or control, they have been accorded immunity. Anderson v. Granite School District, 17 Utah 2d at 407, 413 P.2d at 599 (1966); Board of Education of Nebo School District v. Jeppson, 74 Utah 576, 280 P. 1069 (1929); Prosser, The Law of Torts, Sec. 132 pp. 988-991 (4th Ed. 1971); 4 McQuillan, Municipal Corporations, Sec. 12.208.

As this Court has succinctly stated:

...it is the settled policy of the law that when a public official acts in good faith, believing what he does to be within the scope of his authority and in the line of his duty, he is not liable for damages even if he makes a mistake in the exercise of his judgment.

Anderson v. Granite School District, 17 Utah 2d at 407, 413 P.2d at 599.

In these related actions Respondents' official immunity fully justified dismissal of Hornblower's third-party complaint. Hornblower's complaint sought to hold Respondents personally liable for actions which Respondents took in supervising the University's financial affairs. Yet that complaint utterly failed to allege facts sufficient to impose personal liability on Respondents.



Hornblower could not and did not allege that Appellees had ever acted in bad faith. The undisputed fact is that Respondents were at all times acting in good faith. Nor could Hornblower allege that Respondents had acted outside the scope of their duties, for the responsibility of overseeing investment of the University's funds is one of the many duties imposed upon Respondents by statute. Utah Code Annotated Secs. 53-48-10(5); 53-48-20(3).<sup>7/</sup>

In short, Hornblower's third-party complaint did not allege facts which would justify stripping Respondents of their immunity for actions which they took in a good faith effort to carry out their duties. Respondents respectfully submit, therefore, that the trial court properly dismissed Hornblower's third-party complaint.

B. Respondents Are Entitled To Immunity Even If They Inadvertently Exceeded Their Authority, Because They Were Acting In Good Faith And Within The Scope Of Their Duties

In its brief Hornblower has recognized the existence of the official immunity doctrine. However, Hornblower has argued that Respondents are not entitled to immunity in these actions because Respondents "exceeded their authority" by authorizing investments

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<sup>7/</sup> U.C.A. Sec. 53-48-10(5) (1970) provides, in relevant part, that each university may handle its own financial affairs under the general supervision of the Board of Higher Education, which has delegated such duties to the Institutional Council.

U.C.A. Sec. 53-48-20(3) (1970) provides, in relevant part, that an institution may retain, accumulate, invest, commit and expend funds received for research programs authorized by the Board.

which were later determined to be ultra vires.<sup>8/</sup> Hornblower's apparent contention that public officials may be held personally liable whenever they exceed their authority seriously misconstrues the limits of the immunity doctrine.

The primary flaw in Hornblower's argument is its failure to acknowledge that an official may unwittingly exceed his authority while still acting within the scope of the matters committed to his supervision or control. As noted above, the scope of an official's immunity is determined by the nature of the official's responsibilities. Officials such as Respondents, whose duties require the exercise of judgment and discretion, enjoy a broader form of immunity than those officials and employees whose duties are purely ministerial in nature. Connell v. Tooele City, 572 P.2d 697, 699 (Utah 1977); Board of Education of Nebo School District v. Jeppson, 74 Utah 576, 280 P.1065, 1069 (1929); Smith v. Losee, 485 F.2d 334, 342-43 (10th Cir. 1973); Prosser, The Law of Torts, Sec. 132, pp. 988-989 (4th Ed. 1971). Courts do not permit officials who are charged with discretionary responsibilities to be held liable simply because they have inadvertently "exceeded their authority."

Instead, as the Supreme Court long ago noted, "A distinction must be...observed between excess of jurisdiction and the clear

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<sup>8/</sup> Hornblower brief, p. 70-73. This Court determined that such transactions were ultra vires in 1975. First Equity Corp. of Florida v. Utah State University, 544 P.2d 887, 891 (Utah 1975).

absence of all jurisdiction." Bradley v. Fisher, 80 U.S.335, 351-52, 20 L.Ed. 646 (1871); Spalding v. Vilas, 161 U.S.483, 498, 16 S.Ct.631, 637 (1896); C.J.S. "Officers" Sections 125-127. Only in the latter case -- i.e., when officials have acted totally outside the scope of the matters committed to their control and supervision -- may they be held personally liable.

Thus, it is well established that officials cannot be held personally liable so long as they act in good faith and within the scope of the matters committed to their supervision, even though they may "exceed their authority" through an error in judgment. For instance, in Anderson v. Granite School District, 17 Utah 2d 405, 413 P.2d 597 (1966), several landowners attempted to hold the individual members of a school board personally liable for official acts taken in connection with the acquisition of property for a new school, a matter within the scope of the board members' duties. Despite allegations in the landowners' complaint that the school board members had exceeded their authority, this Court upheld dismissal of that complaint, stating:

...it is the settled policy of the law that when a public official acts in good faith, believing what he does to be within the scope of his authority and in the line of his duty, he is not liable for damages even if he makes a mistake in the exercise of his judgment. [footnote omitted]

17 Utah 2d at 407, 413 P.2d at 599.

Numerous decisions, both in Utah and elsewhere, reflect the same principle.<sup>9/</sup> A good example of the application of that principle to facts resembling those here is Lister v. Board of Regents of

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9/ E.g., Sheffield v. Turner, 21 Utah 2d 314, 445 P.2d 367, 369 (1968) (prison warden could not be held personally liable for negligent supervision so long as he was acting in good faith and within the scope of his duties); Hjorth v. Whittenburg, 121 Utah 324, 241 P.2d 907, 909 (1952) (members of Road Commission could not be held personally liable for damages arising "out of the faithful and honest performance of their duties"); Board of Education of Nebo School District v. Jeppson, 74 Utah 576, 280 P.1065 (1920) (county treasurer could not be held liable for erroneous decision made in good faith); Smith v. Losee, 485 F.2d 334 (10th Cir. 1973) (university officials in Utah charged with broad duties could not be held personally liable for official acts unless malice was shown); Standard Nut Margarine Co. v. Mellon, 72 F.2d 557, 559 (D.C.Cir. 1934) (Tax Commissioner could not be held personally liable for erroneous construction and application of statute, as it was a matter committed to his control and supervision); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) ("What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him"); Cole v. Tuttle, 366 F.Supp. 1252, 1254 (N.D.Miss. 1973) (prison board officials could not be held individually liable for alleged negligence by Board in administering prison); Miller v. City and County of San Francisco, 187 Cal.App.2d 480, 483, 9 Cal. Rptr.767 (1960) (city officials misrepresented to plaintiff that city would take action which the officials had no power to authorize; held: no liability because officials were acting within scope of their employment); Martelli v. Pollack, 162 Cal.App.2d 655, 328 P.2d 795, (1958) (city officials could not be held personally liable for entering into ultra vires contract, even though "they may have labored under some misapprehension as to the scope of their powers"); Gildea v. Ellershaw, 363 Mass. 800, 298 N.E.2d 847 (1973) (city officials who followed erroneous procedure in removing city manager could not be held personally liable for errors in exercise of judgment and discretion); Wray v. McMahon, 183 Miss. 592, 182 So.99, 100 (1938) (city officials could not be held personally liable for negligence or error in appointing police officers); Lister v. Board of Regents of University of Wisconsin System, 72 Wis.2d 282, 240, N.W.2d 610, 621-22 (1976) (university officials could not be held personally liable for damages arising from their allegedly erroneous interpretation of statute and acts in excess of statutory authority).

University of Wisconsin System, 72 Wis.2d 282, 240 N.W.2d 610 (1976). There, as here, the plaintiff sought to hold university officials personally liable, claiming that the officials had exceeded their statutory authority. In affirming dismissal of that complaint, the Wisconsin Supreme Court stated:

The general rule is that a public officer is not personally liable to one injured as a result of an act performed within the scope of his official authority and in the line of his official duty...

\* \* \*

The complaint in this action contains allegations that [the defendant] misconstrued or misapplied sec. 36.16, Stats., thereby exceeding his authority and power under that statute. It is clear that the protection afforded by the principle of civil immunity attaches only to the consequences of official conduct and does not extend to an officer's actions as a private citizen. However, for the purpose of imposing liability for damages, a distinction must be made between those acts which constitute a mistake of judgment within the officer's lawful authority and those which are completely outside that authority. [The defendant's] conduct in this case clearly falls within the former category and, therefore, within the scope of the immunity. [footnotes omitted] 240 N.W.2d at 622.

In the cases presently before the Court, Hornblower sought to hold Respondents personally liable for discretionary acts which were performed in good faith and were within the scope of the matters

committed to Respondents' supervision and control.<sup>10</sup>/ As noted above, Respondents are responsible under the statutes of this State for overseeing the University's financial affairs. Utah Code Annotated, (1970) Secs. 53-48-10(5); 53-48-20(3). The acts for which Hornblower sought to hold Respondents liable fell squarely within the scope of the foregoing duties; as such, Respondents are entitled to immunity.

The cases cited in Hornblower's brief do not indicate otherwise. The primary case upon which Hornblower relies simply illustrates that the immunity enjoyed by public employees who are performing purely ministerial duties is narrower than that for public officials who are performing discretionary duties. Cornwall v. Larsen, 571 P.2d 925, 927 (Utah 1977) ("In this case, the defendant...was an employee performing a ministerial act and not a discretionary act..." [emphasis in original]). The other cases cited by the Brokers are equally inapposite.<sup>11</sup>/

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<sup>10</sup> / There is no question that Respondents were performing discretionary acts when they authorized or ratified the investment of University funds. At the prompting of the Governor and State Auditor, Respondents determined that idle University funds could be best employed by investing them. Such a decision undoubtedly required the exercise of judgment on the part of these Respondents. See Connell v. Tooele City, 572 P.2d 697, 699 (Utah 1977); Board of Education of Nebo School District v. Jeppson, 74 Utah 576, 280 P. 1065, 1069 (1929); Lister v. Board of Regents of Univ. Wis. System, 72 Wis.2d 282, 240 N.W.2d 610, 621-22 (1976).

<sup>11</sup>/ In only two of the other decisions cited by Hornblower were public officials actually held liable. The first of those decisions, Blonquist v. Summit County, 25 Utah 2d 387, 483 P.2d 430 (1971), is inapplicable because like the Cornwall case, it "...involved a ministerial function only", 25 Utah 2d at 390, 483 P.2d at 432. The other decision simply held that officials could be held liable if they acted "...entirely outside the scope of their official duties" (emphasis added). Roe v. Lundstrom, 89 Utah 520, 527, 57 P.2d 1128, 1131 (1936). Neither decision warrants holding Respondents liable in this case.



In summary, Hornblower's third-party complaint could not allege that Respondents had acted in bad faith or totally beyond the scope of their duties. In the absence of such allegations, there is no basis for stripping Respondents of their immunity, as the trial court properly recognized.

II. HORNBLOWER'S THIRD-PARTY COMPLAINT  
DID NOT STATE A CAUSE OF ACTION FOR  
INDEMNITY OR CONTRIBUTION.

While there is some diversity in the labels which Hornblower has applied to the causes of action in its third party complaint, the facts alleged in each count of the third party complaint are identical. Hornblower contends that those facts entitle it to recover either indemnity or contribution from Respondents. Respondents respectfully submit that the facts alleged in the third party complaint are insufficient to sustain an action for either indemnity or contribution for the reasons set forth below, even if Respondents were not public officials entitled to official immunity.

A. Hornblower is Barred from Seeking  
Indemnity Because It Actively  
Participated in the Events Giving  
Rise to Liability

Even if Respondents were not public officials entitled to the benefit of official immunity, Hornblower's third-party complaint would not be sufficient to state a cause of action for indemnity. Hornblower would be barred from seeking indemnity, because it

played an active and essential role in the transactions giving rise to liability -- buying and selling securities, extending credit, and receiving commissions. In light of its active participation, Hornblower could not and cannot shift all liability in connection with those transactions to Respondents.

It is well established that no right to indemnity exists where a person has actively participated in the events giving rise to liability. Bettilyon Construction Co. v. State Road Commission, 20 Utah 2d 319, 437 P.2d 449, 450 (1968); Schneider v. Suhrmann, 8 Utah 2d 35, 327 P.2d 822, 826 (1958); Pinal County v. Adams, 13 Ariz. App. 571, 479 P.2d 718 (1971); William F. Larrick v. Burt Chevrolet, Inc., 147 Colo. 133, 362 P.2d 1030 (1961); Bush Terminal Bldgs. v. Luckenbach S.S. Co., 9 N.Y.2d 426, 174 N.E.2d 516, 214 N.Y.S.2d 428 (1961). A right to indemnity will be granted only where an individual is held vicariously liable for the wrongful acts of another or where there is so great a difference between the culpability of two tortfeasors that one of them should be forced to bear the entire loss. Cahill Brothers, Inc. v. Clementina Co., 208 Cal.App.2d 367, 25 Cal. Rptr. 301 (1962); Rio Grande Gas Co. v. Strahmann Farms, Inc., 80 N.M. 432, 457 P.2d 364 (1969). See also Chamberlain v. McCleary, 217 F.Supp. 591, 597 (E.D. Tenn. 1963).

Here the facts do not justify shifting Hornblower's liability to these Respondents. If Hornblower is held liable to the University, it will presumably be because it had a duty to determine for itself whether the University had authority to enter into the transactions



in question.<sup>12/</sup> Yet, if Hornblower has failed to fulfill that duty, it may not seek indemnity from these Respondents. Even if these Respondents were charged with a similar duty, as Hornblower has vigorously contended, Hornblower and Respondents would be no more than joint tortfeasors. Under those circumstances no action for indemnity would lie, even under the cases cited by Hornblower.<sup>13/</sup>

There is simply no great difference in the culpability (or lack of culpability) of Hornblower and Respondents such as is necessary to justify an indemnity action. The fact that Hornblower's knowledge of the limits of the University's powers is merely constructive knowledge does not justify shifting liability for those

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<sup>12/</sup> See First Equity Corp. of Florida v. Utah State University, 544 P.2d at 892

See further Rule 405 of the New York Stock Exchange imposing a similar duty upon Hornblower. 2 CCH New York State Exchange Guide, Paras.2405, 2405.10

<sup>13/</sup> For example, in Hoggan v. Cahoon, 26 Utah 444, 73 P.512, 514 (1903), the Court noted "...It is only where a person knows or must be presumed to know that his act was unlawful, that the law will refuse to aid him in seeking an indemnity or contribution..." We admit the rule that the law will not endorse contribution nor indemnity between wrongdoers. But that rule does not apply to any case where the act of the agent was not manifestly illegal in itself and was done bona fide in the execution of his agency and without knowledge (either actual or implied by law) that it was illegal..." [citations omitted; emphasis added])

In order for Hornblower to be held liable to the University under the principles announced in the First Equity case, Hornblower would have to be charged with constructive knowledge that the investments in question were ultra vires. First Equity Corp. of Florida v. Utah State University, 544 P.2d at 892. As the foregoing statement from the Hoggan case makes clear, such knowledge would bar an action for indemnity. See further Trimble v. Exchange Bank of Kentucky, 23 Ky. L. Rep. 367, 62 S.W. 1027 (1901).

transactions to Respondents -- for Respondents' "knowledge" would also be constructive. Nor does the fact that Respondents passed resolutions authorizing the opening of accounts with Hornblower justify holding the Appellees personally liable. Hornblower is a sophisticated investment house. It had access to the statutes of this State and to attorneys who could interpret those statutes for it.

In short, Hornblower played an active and essential role in the transactions giving rise to liability. As such, it is barred from shifting all responsibility for these transactions to Appellees.

B. Respondents Cannot Be Held Individually  
Liable For Warranties Or Representations  
Made By The Institutional Council As A Whole

In its brief Hornblower argues that its third-party complaint states a cause of action for misrepresentation or breach of warranty. It contends that resolutions passed by the Institutional Council, authorizing the opening of accounts with Hornblower, incorrectly represented that the University had authority to invest in common stocks.<sup>14/</sup>

It matters not whether Hornblower's characterization of the Council's resolutions is correct. Even if the resolutions constituted representations or warranties, they were representations or warranties made by the Institutional Council as a whole and not by the individual members of the Council. If Hornblower has a cause of action for misrepresentation or breach of warranty, it is a claim

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<sup>14/</sup> Hornblower Brief, pp. 66-68.

against the Institutional Council, not against these individual Respondents.

The foregoing principle has been recognized in similar cases where attempts have been made to hold public officials personally liable on ultra vires contracts which they had entered into on behalf of public entities. In a majority of jurisdictions which have considered the issue, it is held that a public official can not be held personally liable on such a contract. Those decisions have been summarized by a noted commentator as follows:

Ordinarily when an officer or public agent contracts in good faith with parties having knowledge of the extent of his authority or who have equal means of knowledge, especially where the authority of the officer is prescribed by law, he will not become individually responsible unless the intent to incur liability is clearly expressed, although it should be found that, through ignorance of the law, he may have exceeded his authority.

4 McQuillen, Municipal Corporations, Section 12.214.<sup>15/</sup>

Here, any warranty or representation was made by the Council as a whole, not by the individual Respondents. If Hornblower has a claim for misrepresentation or breach of warranty, it is a claim against the Council. It cannot reasonably be contended that Respondents made any representations or warranties in their individual capacities for which they could be held personally liable.

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<sup>15/</sup> In addition to the decisions cited by McQuillen see Toronto v. McBride, 29 U.C.Q.B. 13 (1869)

C. Hornblower's Third-Party Complaint  
Did Not State A Cause of Action  
For Contribution

In the alternative to its claims for indemnity, Hornblower's third-party complaint attempted to state a cause of action for contribution, on the theory that Hornblower and Respondents were joint tortfeasors (R. 482-483). However, Hornblower failed to recognize that there is no right to contribution between joint tortfeasors in Utah for acts committed prior to May 8, 1973, the effective date of the Utah Contribution Statute.<sup>16/</sup> Brunyer v. Salt Lake County, 551 P.2d 521 (1976).

In Brunyer, this Court held that the Utah statute governing contribution between joint tortfeasors has no retroactive effect. Affirming the dismissal of a third-party complaint, the Court stated,

The contribution statute established a primary right and duty which was not in existence at the time the injuries in this case arose, and the statute not being retroactive by its terms did not create a right on behalf of the third-party plaintiffs. 551 P.2d at 522.

In the cases now before the Court, all the acts on which Hornblower bases its claim for contribution occurred between December, 1971 and September, 1972 prior to the effective date of the contribution statute. As such, Hornblower's claim for contribution failed to state a cause of action and was properly dismissed.

In its brief Hornblower has contended that under Utah common law it was entitled to maintain a cause of action for contribution

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<sup>16/</sup> Utah Code Annotated, (1970) Sec. 78-27-39.

bution.<sup>17/</sup> In support of that contention Hornblower relies upon dicta in several cases which actually dealt with principles of indemnity.<sup>18/</sup> However, in cases where this Court has actually dealt with the right to contribution it has expressly held that no right to contribution existed among joint tortfeasors under the common law of this State. For instance, in Hardman v. Matthews, 1 Utah 2d 110, 262 P.2d 748 (Utah 1953), this Court upheld the dismissal of a third-party complaint seeking contribution, stating,

...contribution cannot be had between joint or concurring tort-feasors in a case like this, unless sanctioned by statute, there being none such in Utah.

262 P.2d at 749. In Brunyer v. Salt Lake County, supra, this Court again observed, in dismissing a claim for contribution, that

The contribution statute established a primary right and duty which was not in existence at the time the injuries in this case arose. 551 P.2d at 522.

Accordingly, Respondents respectfully submit that the trial court did not err in dismissing Hornblower's claim for contribution.

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<sup>17/</sup> Hornblower Brief, p. 68.

<sup>18/</sup> Hornblower Brief, p. 68, Fn. 197.

III. IF THIS COURT FINDS THAT THE UNIVERSITY'S COMPLAINT FAILED TO STATE A CAUSE OF ACTION, IT SHOULD SUMMARILY AFFIRM DISMISSAL OF HORNBLOWER'S THIRD-PARTY COMPLAINT

These Respondents respectfully submit that Hornblower's third-party complaint failed to state a cause of action and was properly dismissed for the reasons set forth above; however, it should also be noted that there are other issues presently pending before this Court, the resolution of which could make a decision on the sufficiency of Hornblower's third-party complaint unnecessary.

In its brief Hornblower has argued, among other things, that the University's complaint in the primary action failed to state a cause of action.<sup>19/</sup> Hornblower contends that (a) the securities transactions in question were not ultra vires and (b) that the University should not be permitted to maintain these actions even if the transactions were ultra vires. Hornblower has advanced substantial arguments in support of both positions. If this Court agrees that the University's complaint in the primary action failed to state a cause of action, then Respondents submit that this Court may summarily affirm dismissal of Hornblower's third-party complaint without reaching the issues discussed in the foregoing sections of this brief.

Hornblower cannot maintain an action over if it is not held liable in the first instance. Under Rule 14 of the Utah Rules of

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<sup>19/</sup> Hornblower Brief, pp. 31-61.

Civil Procedure, a defendant--third-party plaintiff may only maintain a claim against a party "...who is or may be liable to him for all or part of the plaintiff's claim against him." If Hornblower is not liable to the University, i.e., the plaintiff, it has no basis for maintaining a third-party claim against these Appellees under Rule 14. E.g. Southern Milling Co. v. U.S., 270 F.2d 80, 84 (5th Cir. 1959). (construing identical provision of federal Rule 14). ("If there had been no recovery against the appellant-defendant there could have been no liability on the third-party claim.")<sup>20/</sup>

Respondents respectfully submit, therefore, that if the University's complaint against Hornblower falls, Hornblower's third-party complaint against Respondents must also fall.

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<sup>20/</sup> It has been suggested in Hornblower's brief that this Court must rule on the sufficiency of the third-party complaint even if the Court concludes that the University's complaint failed to state a cause of action, because Hornblower has included its attorneys fees among the sums for which it claims indemnity (Hornblower brief, p. 62). That contention is erroneous. Hornblower's attorneys fees do not constitute a portion of the plaintiffs' claims for which indemnity could properly be sought under Rule 14. Nor has Hornblower alleged any facts which suggest in any manner that Respondents agreed to indemnify Hornblower against liability arising in connection with these transactions.

## CONCLUSION

Hornblower has strenuously argued in its brief that it is unfair to permit the University to hold it liable in the primary action, and such a result does, indeed, seem harsh; however, the harshness of that result would not be lessened by shifting liability from Hornblower to the individual third-party defendants, who were simply striving to carry out their official duties in good faith. Nor does the harshness of that result alter the fact that Hornblower's third-party complaint failed to state a cause of action against these individual Respondents.

Accordingly, for the reasons set forth above in the foregoing sections of this brief, Respondents submit that the trial court did not err in dismissing Hornblower's third-party complaint.

Respectfully submitted this 14<sup>th</sup> day of September, 1979.

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CERTIFICATE OF SERVICE

The undersigned attorney does hereby certify that he caused a copy of the foregoing Brief of Respondents Phillip A. Bullen, Jay R. Bingham, O.C. Hammond, Jay Dee Harris, Beverly D. Kumpfer, Snell Olsen, Rex G. Plowman, W. B. Robins, Alva C. Snow, William R. Stockdale, Jane S. Tibbals, Glenn L. Taggart, Dee A. Broadbent and L. Mark Neuberger, to be mailed to each of the following, first class, postage prepaid:

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