

1980

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 : Reply Brief of Appellants Bear Stearns & Co., Sutro & Co., Incorporated, Hornblower & Weeks-Hemphill,

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#### Recommended Citation

Reply Brief, *USU v. Bear Stearns*, No. 16274 (Utah Supreme Court, 1980).  
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# Noyes, Inc. and Merrill Lynch, Pierce, Fenner & Smith, Inc

Utah Supreme Court

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Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Robert S. Campbell, Michael Heyrund, Lyle W. Hillyard, David R. Melton; Attorneys for certain Third-Party Defendants Darwin C. Hansen; Attorney for Third-Party Defendant Catron David L. Wilkinson; Attorney for Plaintiff Daniele M. Allred, Kathlene W. Lowe; Attorneys for Appellants

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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- )

BEAR STEARNS & CO., a corpora- )  
tion, )

Defendant-Third Party )  
Plaintiff & Petitioner, )

-vs- )

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 INSTITUTIONAL COUNCIL )  
OF UTAH STATE UNIVERSITY OF AGRI- )  
CULTURE AND APPLIED SCIENCE, )

Third-Party Defendants. )

DOCKET NO. 16274  
(Consolidated)

REPLY BRIEF OF APPELLANTS BEAR STEARNS & CO.,  
SUTRO & CO., INCORPORATED, HORNBLOWER &  
WEEKS-HEMPHILL, NOYES, INC. and MERRILL  
LYNCH, PIERCE, FENNER & SMITH, INC.

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APR 11 1980

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IN THE SUPREME COURT OF THE STATE OF UTAH

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AGRICULTURE AND APPLIED SCIENCE, )  
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-vs- )

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CULTURE AND APPLIED SCIENCE, )

Third-Party Defendants. )

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

Plaintiff & Respondent, )

-vs- )

SUTRO & CO., INCORPORATED, )

Defendant-Third Party )  
Plaintiff & Petitioner, )

-vs- )

PHILLIP A. BULLEN, et al, )

Third-Party Defendants. )

REPLY BRIEF OF APPELLANTS  
BEAR STEARNS & CO., SUTRO  
& CO., INCORPORATED,  
HORNBLLOWER & WEEKS-HEMPHILL,  
NOYES, INC. and MERRILL  
LYNCH, PIERCE, FENNER &  
SMITH, INC.

DOCKET NO. 16274  
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a Utah body politic and corporate, )

Plaintiff & Respondent, )

-vs- )

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

Defendant-Third Party )  
Plaintiff & Petitioner, )

-vs- )

PHILLIP A. BULLEN, et al, )  
Third-Party Defendants. )

---

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

Plaintiff & Respondent, )

-vs- )

MERRILL LYNCH, PIERCE, FENNER & )  
SMITH, INC., a corporation, )

Defendant-Third Party )  
Plaintiff & Petitioner, )

-vs- )

PHILLIP A. BULLEN, et al, )  
Third-Party Defendants. )

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

The Honorable VeNoy Christofferson

---

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RESPONSE TO STATEMENTS OF FACT IN  
THE UNIVERSITY'S BRIEF

Certain mischaracterizations of the facts set forth in the University's brief must be corrected before replying to arguments which are based on those facts. The remaining respondents have not seriously assailed any of the facts as originally described by the broker-dealers on these appeals.

The University asserts in its brief (at 4-5) that, contrary to the broker-dealers' assertions, the broker-dealers recommended numerous stocks to the University for purchase. What the University fails to state is that the transactions which the University asserts were "recommended" by the broker-dealers, whatever that term may mean,\* constitute only a fraction of the hundreds of purchases and sales executed by the University during the course of its investment program. (These four broker-dealers' opening brief, at 4).

The University also devotes considerable time to questioning the origins and nature of the University's investment program as detailed in the broker-dealers' original brief. That discussion, however, begs the question: What is still uncontroverted is that the University made a threshold decision to adopt an investment program to place its non-interest bearing funds in securities. The paramount goal of that program, as copiously documented in the broker-

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\* The University relies on an affidavit filed by Donald Catron in support of its assertion that every stock purchased through Hornblower was "recommended" to him by that broker. The meaning of the term "recommended" as used by Mr. Catron is unclear and does not effectively controvert Hornblower's affidavit that it nonetheless acted only as an agent for the University on every single transaction in question.

dealers' original brief, was to depart from investments in fixed income securities to equities in the hope of relatively high long term return. The University does not controvert these facts.

Similarly, while the University contends at some length that (1) the Institutional Council did not discuss the January 20, 1972 resolution at all before approving it and (2) some Council members criticized the program from an early date, neither of these assertions is of any avail to the University. First of all, that the Council should have formally approved a resolution authorizing purchases on margin without having discussed it first seems hardly to speak well for the level of fiduciary responsibility exercised by the Council on behalf of the University. Second, this assertion makes the broker-dealers' point that University officials failed to exercise any reasonable care before launching into this massive investment program. Third, it is still uncontroverted that the full Council was presented with regular reports on all phases of the investment program; that a few Council members were indeed critical of that program at various points has no legal relevance except to the extent it highlights the irresponsibility of the full Council's failure to re-evaluate that program or to seek the advice of the Attorney General regarding the legality of that program. This only further emphasizes that it was the full Council which was responsible for monitoring, implementing, and approving the program as it was carried out.

Two final points raised in the University's statement of facts merit treatment here. First, the University apparently concedes that

the Council never sought the advice of the Attorney General regarding the legality of the program, but attempts to shift the responsibility for that inquiry to the broker-dealers. However, as a matter of law (argued in these four broker-dealers' opening brief on appeal, at 35 n.21), when the broker-dealers posed the express issues of the University's capacity and authority to purchase stock to the Institutional Council, by asking the Council for assurances of the University's power, they were relieved of any obligation they might otherwise have had to make such inquiry.

Second, the University devotes some discussion to the fact that officers of two Logan banks read a December 15, 1972 article in the Logan Herald-Journal which reported the Attorney General's tentative opinion that the University's investment program was illegal. This discussion is entirely pointless, as the University does not and cannot contend that any of those bank officers so advised the brokers, all of whom except one (Merrill Lynch, which by then had ceased dealing with the University) had no offices in Utah, and none of whom had offices or agents in Logan. Indeed, it is uncontroverted that the broker-dealers did not know the University was acting unlawfully, assuming it was, in purchasing the securities at issue, nor were they aware of any fact which might have led them to believe the University's investments were unlawful.\*

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\* Merrill Lynch, R. 1433 (Stromberg Affidavit); id. at 1422 (Dunn Affidavit); Bear Stearns, R. 1998 (Cranston Affidavit); Vol. 22, R. 1975 (Kaplan Affidavit for Hornblower); Sutro, R. 122 (Juda Affidavit).

## ARGUMENT

### PART ONE

THE UNIVERSITY MUST NOT BE ALLOWED TO RECOVER AGAINST THESE BROKER-DEALERS, AND THE BROKER-DEALERS' MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM SHOULD BE GRANTED.

### INTRODUCTION

In its prefatory argument (University brief at 14-15), the University attempts to shift the issue presented here from the question of relative liability as between the broker-dealers and the University to a focus on who should bear liability of loss as between the broker-dealers and the Utah taxpayers, who of course are not parties to this suit. The University understandably attempts to shift the issue because the taxpayers are innocent of any wrongdoing, and the policy issue thus posed would focus on who should bear the risk of loss as between two equally innocent parties, the taxpayers or the broker-dealers. In fact, however, it is not the taxpayers who seek recovery here, but the University, and as between that plaintiff and these broker-dealers, the only proper inquiry is indeed whether the University (and its responsible officers) should bear the risk of these losses after expressly warranting the propriety of these investments to the broker-dealers, or whether instead the broker-dealers, their innocent agents, should bear those losses.

This point deserves some treatment because the trial court also mischaracterized the issue presented in the same way as has the University. Both in its decisions denying the broker-dealers' first motions to dismiss and in its order granting the University's motions

for partial summary judgment, the trial court expressly noted that these transactions involve "monies placed [with Utah State University] by the taxpayers" and that there are "more than two parties interested in this matter . . . and that is the taxpayers whose money was used in these transactions and whose money was lost by reason of these transactions."\*

It is true that some yet-undefined portion of the funds invested by the University came from taxpayer monies as opposed to private donations, and Utah taxpayers have therefore suffered some indirect loss by reason of the University's investment program. This constitutes no reason, however, for requiring these broker-dealers to shoulder the responsibility for the University's losses. It must be recalled that any time a private party prevails against a government entity on a damages claim, it is the taxpayers who must ultimately shoulder that burden.\*\* Such cases demonstrate a salutary and well-established judicial determination that such losses should be spread in small increments among a large population rather than forcing one innocent private party to indemnify all taxpayers against the misconduct or excesses of authority of public officials.

Indeed, this Court has recently taken occasion to expand at some length upon the proper allocation of loss in suits involving the government and private parties and has expressly announced that the government is in the future to be subject to broader fiscal responsibility for its conduct and misconduct. In Standiford v. Salt Lake

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\* Merrill Lynch, R. 396-97; Bear Stearns, R. 2185-86.

\*\* Such recovery is, of course, authorized by the Utah Governmental Immunity Act, Utah Code Ann. §63-30-1 to -34 (1978 & Supp. 1979).

City Corp., 605 P.2d 1230 (Utah 1980), Justice Stewart noted that the purpose of that decision was "to narrow governmental immunity" and that, as a result, it "should allow more innocent victims injured by tortious conduct on the part of public entities access to the courts for redress. Fewer such people will be mercilessly and senselessly barred from recovery for their injuries sustained at the hands of the entities designed to serve them." Id. at 1237.

As in Standiford, the issue presented in these cases requires judicial determination of the best way to allocate loss between private individuals and government. In Standiford, the rule announced will have the effect of increasing expenditures of public funds to satisfy private claims. The Court need not go so far in these cases: all these brokers ask is that the Court adopt a parallel policy (similarly allocating risk to the government rather than to the private party) which would preclude private parties from shouldering public losses in instances where the private party is guilty of no wrongdoing and where high government officers induced him to act on express warranties. A ruling against the brokers on these appeals would be diametrically inconsistent with the policy of government responsibility adopted in Standiford.

#### POINT I

CONTRARY TO RESPONDENTS' CLAIMS, THIS CASE IS  
NEITHER CONTROLLED NOR GUIDED BY THE HOLDING OF  
FIRST EQUITY.

The University relies primarily upon the holding of First Equity Corp. v. Utah State University, 544 P.2d 887 (Utah 1975). The issue present in that case was the enforceability of an executory ultra

vires contract in the absence of any official warranty of the legality of the contract. Here, the issue is whether payments made in good faith pursuant to fully executed contracts and pursuant to official warranties of their legality, but later found to be ultra vires, can be recovered. While the University attempts to characterize this distinction as "relying ostrich-like on the technical meaning of the language employed," Respondent's Brief at 34, it is in fact a distinction that many courts have found not only valid but fundamental.

Even if the University had not assured the broker-dealers of the University's power to purchase the securities at issue, the University would still not be entitled to recover on executed contracts which were ultra vires. A paradigm case illustrating the distinction between executory and executed contracts of this kind is Tobin v. Town Council, 45 Wyo. 219, 17 P.2d 666 (1933). There, plaintiff was a contractor who had graded and gravelled several city streets under a written contract. After he had received approximately half the money due him under the contract, a new council repudiated the agreement, contending that it violated state statutes requiring competitive bidding. The plaintiff sued to recover the balance due him, and the city counterclaimed for the money already paid, contending that as a matter of law, it must recover illegally spent tax funds. The parties agreed that the work done could not be undone -- the city was to have the full benefit of plaintiff's labor.

The Wyoming Supreme Court agreed with the city that the balance still due on the contract could not be recovered. After determining that the contract had indeed been let in violation of the competitive

bidding statute, the court observed:

Provisions of this kind must be so administered and construed as fairly and reasonably to accomplish their vitally important purpose. Only by sternly insisting upon positive obedience thereto as mandatory provisions of law have the courts found that the policy they uphold may be maintained. We deem it unwise to relax this policy, concededly an extremely valuable safeguard to the taxpayers of the municipalities of this state.

17 P.2d at 669.

Therefore, the court held that, as a matter of law, the plaintiff could not enforce the contract in question to recover the unpaid balance of the price. Id. That is the fact situation of First Equity, and the holding is precisely consistent.

But the city's counterclaim to recover money already paid stood on quite a different footing. The court said:

The action presented by the counterclaim before us is essentially an action for money had and received. It is generally the case in such a proceeding that, in the absence of mistake, deceit, fraud, duress, oppression, or undue influence, the parties seeking to recover must be equitably entitled to a repayment of the money or no recovery can be had or repayment compelled. . . .

The equitable principles thus governing the counterclaim at bar for the recovery of the money paid by the town have been applied as well to proceedings brought by municipal corporations as to those instituted by ordinary suitors.

Id. at 674.

The court further held that the improper expenditure of taxpayers' money was an insufficient equitable basis to compel the contractor to forfeit all compensation for the work he had performed. Id. at 678.

The two branches of Tobin illustrate vividly the fallacy in plaintiff's contention that First Equity is controlling here. As



the first branch of Tobin holds, money owed under a void contract cannot be recovered. But as the second branch of Tobin holds, money already paid under such a contract cannot be recovered. First Equity is analogous to the first branch of Tobin, this case to the second. As Tobin shows, those critical factual distinctions yield different results.

The same distinctions were present in Frederick v. Douglas County, 96 Wis. 411, 71 N.W. 798 (1897). There, the county had hired Grace, an attorney, to handle a substantial amount of tax litigation beyond the expertise of the county attorney, and had made partial payment for services rendered. This arrangement was eventually challenged by a taxpayer on the basis that the county had no statutory authority to hire assistants for its attorney. The plaintiff taxpayer sought to have Grace return all the money that had been paid to him, and the trial court so ordered.

On appeal, the Supreme Court agreed that the contract with Grace was beyond the authority of the county to make, and that Grace therefore could not be paid for the balance of the services he had rendered. However, the court denied any recovery of money already paid. The opinion, which merits quotation at some length, states:

The evidence and the findings show that Mr. Grace's employment began in January, 1895, and it was a matter of public notoriety, and the plaintiff himself and presumably all taxpayers who kept track of the public proceedings knew that he was employed as early as the spring of 1895; that he performed large and valuable services, for which he was from time to time paid; and that not only he, but the county board, acted in entire good faith in the matter. . . . Mr. Grace's services ran through a number of months, and he undoubtedly has fully earned all the money which has been paid

him. During all this time the plaintiff and his fellow taxpayers remained silent, and allowed the services to be rendered and the money to be paid. They took no action until the latter part of November, 1895. Then they came into a court of equity, and asked for the stoppage of all payments in the future, and to this they are undoubtedly entitled. But he who comes into a court of equity must do equity. Could it, under any view of the circumstances, be said to be equitable to compel Mr. Grace to pay back the money which he received for long and valuable labors, rendered honestly and in good faith, the benefit of which the corporation has received, and concerning which the taxpayers . . . were, or ought to have been, fully informed during their entire progress? Were a court of equity to make this judgment under the circumstances, we should regard it as having become an engine of oppression, rather than an instrument of justice. We do not rest this decision entirely upon the ground that the remedy has been lost by laches, or that the county has become estopped, but upon the ground that under all the circumstances, the plaintiff having invoked the relief of a court of equity, that court, in granting the relief, will not take away the fruit of honest labor.

71 N.W. at 802-03 (emphasis added).

In State v. Fronizer, 77 Ohio St. 7, 82 N.E. 518 (1907), the state sought to recover partial payments made to a bridge builder. It was undisputed that the bridges in question were built and repaired in workmanlike fashion, acceptable to the county on whose behalf the state was bringing suit. However, the contracts involved were void because the county auditor had not certified that sufficient funds were available, as required by law. The court, incisively characterizing the contracts in question as "void [but not] tainted," held:

This court is of opinion that such recovery is not authorized. The principle applicable to the situation is the equitable one that where one has acquired possession of the property of another through an unauthorized and void contract, and has paid for the same, there can be no recovery back of the money paid without putting, or showing readiness to

put, the other party in statu quo, and that rule controls this case unless such recovery is plainly authorized by the statute. The rule rests upon that principle of common honesty that imposes an obligation to do justice upon all persons, natural as well as artificial, and is recognized in many cases.

82 N.E. at 520-21 (emphasis added).

In Village of Pillager v. Hewitt, 98 Minn. 265, 107 N.W. 815 (1906), the city sought to recover payments made to a bridge builder under a void contract. City officials had inspected and accepted the bridge, but had refused to pay the balance due on the ground that contract was void. In holding that the city could not recover payments made pursuant to a void contract, the court stated,

It may be conceded that the defendant could not have maintained an action on the contract to recover the contract price for the bridge, although he had fully performed the contract on his part; for upon the grounds of sound public policy the doctrine of ultra vires is applied with greater strictness to municipal than to private corporations. This, however, is an action, in the nature of an action for money had and received, which is based upon equitable principles, to recover back the consideration paid by the plaintiff to the defendant for building a bridge which was accepted by it, and which fully complied with the terms of the contract. The fact that the bridge was afterwards carried away by a flood is not material, for it was not due to any fault of the defendant or any one else. . . . The defendant in good faith received the money and bonds in payment of the bridge which he had built for the plaintiff. The consideration for such payment was full and fair, and, in equity and good conscience, it ought to have been made by the plaintiff. Such being the case, it would be most inequitable and unconscionable to compel the defendant to return the money and bonds paid to him . . . and we hold that the plaintiff cannot maintain this action to recover them.

107 N.W. at 816.

The same doctrine was squarely recognized by this court in Moe v. Millard County School Dist., 54 Utah 144, 179 P. 980 (1919). There, the school district resisted paying a balance due on a contract for the installation of heating, plumbing, and ventilating fixtures on the basis that the district had exceeded its constitutional debt limit, but it wanted to retain the fixtures in question. The plaintiff contractor sought to remove them, and offered to return the money he had already been paid if he were allowed to do so. This court, invoking the equitable doctrines previously discussed, held:

We cannot perceive the necessity of refunding the money that was paid as aforesaid. To that extent the contract has been executed, and there certainly is no good reason why in equity that matter should be reopened. Nor is it necessary to do that in order to reflect justice between the parties. . . . The only question therefore is: To what extent shall plaintiff be permitted to remove his property? In our judgment he should only be permitted to remove so much thereof in value as has not been paid for and no more.

Id. at 151-52, 179 P. at 983. While the relief sought by the parties in Moe was somewhat different than that sought in the cases from other jurisdictions, the result was identical -- equity allowed the party that had performed to retain the fruits of his labors.

The efforts made to distinguish the Moe case have been unconvincing. In a memorandum decision, Judge Christoffersen tried to distinguish the case in the proceedings below by saying:

[D]efendants here argue that because Moe was not required to return the partial payment this is authority that Utah State cannot recover payments made to the brokers on commissions or other losses. However, this would be a case where the school would enjoy the benefits of the plumbing and heat-

ing materials installed plus a return of their partial payment which is not the case here. The University does not seek to return the stocks and receive back their payments for the same . . . .

University's Brief at 39. This statement may be literally true, but is somewhat misleading, in that it implies that the University has offered to return the stocks. To the contrary, the University liquidated them. Surely, distinguishing between the retention of the specific benefits conferred (i.e., receipt of securities and the opportunity for gain or risk of loss) and the retention of those benefits in another form (i.e., money after liquidating the securities) is legally meaningless.

The University asserts that Moe is distinguishable because, as the court noted, the school district could at a later time have entered into a valid contract with the plaintiff. It is clear, however, that that remark was nothing more than a suggestion on how the school district might avoid the waste it claimed would result from removal of the fixtures. Id. at 150, 179 P. at 983. It is plain that the capacity of parties to enter into a second contract has no effect on the legal validity of the first. It is submitted that the trial court and the University cannot properly distinguish Moe from the present case. They have told us how it is different (in effect, only that plumbing equipment is different than securities), but they have stated no reasons whatsoever why the factual distinctions between this case and Moe ought to lead to a different outcome.

The important distinction, which the University attempts to belittle, is between these related appeals and First Equity. It is

simply this: While the law may occasionally require a harsh and unjust result (and the University concedes at page 73 of its brief that the result in First Equity was harsh), equity will not sanction it. The law may prevent the prospective enforcement of a contract entered into in good faith, but equity will not allow a public entity to stand idly by, reap the benefits of another's labor, and then rob him retroactively of his just compensation. First Equity was controlled by and decided under a law harsh in its application. This case presents an appeal to equity and conscience. In dismissing that distinction as meaningless and technical the University asks this Court to ignore the very existence and purpose of equity jurisprudence.

## POINT II

### MONEY RECEIVED FOR SERVICES RENDERED UNDER A GOOD FAITH CONTRACT CANNOT BE RECOVERED WHILE RETAINING THE BENEFITS OF THOSE SERVICES.

Throughout its brief the University has asserted that "public monies expended pursuant to unlawful contracts may be recovered" (e.g., at 24). It has cited a myriad of cases (most of which are simply string citations) which assertedly agree with that proposition, perhaps hoping that by the sheer weight of this "authority" it may convince this Court to abandon any notions of fair play in resolving these cases. While replete with citations, the University's brief is short on convincing authority, and for good reason. Aside from occasional bits of dicta or obiter dicta, the cited cases, with few exceptions, simply fail to support the University's position.

Because of the bulk of the University's citations, the broker-dealers will not distinguish each of those cases at this point. Rather, we invite the attention of the Court to Appendix "A" of this brief, which is devoted in its entirety to an analysis of the facts and holdings of each of the cases cited by the University from pages 24 through 32 of its brief, and which demonstrates cumulatively that those cases are no authority for the University's position.

In addition to its "authority" for the proposition that public bodies may also recover ultra vires payments, distinguished in the Appendix to this brief, the University has made several other assertions subsumed within that general topic which bear response here:

(1) the University erroneously contends that the brokers have conceded that they owe commissions to the University; (2) the University appears to posit much of its argument on the unfounded claim that the courts treat "illegal" contracts differently than "ultra vires" contracts; (3) the University claims that the general rule prohibiting recovery on illegal contracts is not applicable to public entities and that public bodies are exempt from the general principle that payments made under mistake of law cannot be recovered. Each of these assertions will be treated in turn.

1. The University May Not Recover Commission Payments.

The broker-dealers have never conceded that they are liable to the University for commissions which they received. Precedents abound which declare that a party making voluntary payments under mistake of law, including commission payments, may not recover.\*

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\*  
E.g., Railroad Co. v. Commissioners, 98 U.S. 541, 543-44 (1878); City of Philadelphia v. Collector, 72 U.S. (5 Wall.) 720, 731 (1866).

Mistaken payments to brokers are no exception to this rule.

In Buschbaum v. Barron, 1 N.J. Super. 4, 61 A.2d 512 (N.J. Super. Ct. App. Div. 1948), plaintiff sued to recover a commission already paid to a broker, on the ground that under New Jersey law the broker was not entitled to a commission from that particular transaction. The court denied relief, holding that

[g]enerally, the one who has made the payment [in an illegal bargain] is not entitled to restitution. The entire transaction had been executed. Plaintiff received from defendant full performance and paid only what he promised to pay. Plaintiff showed no basis for relief.

61 A.2d at 513.\*

Similarly, in Richardson v. Roberts, 210 Cal. App. 2d 603, 26 Cal. Rptr. 829 (Dis. Ct. App. 1962), a real estate broker sued to recover portions of his commissions which he had voluntarily paid to the defendant as consideration for obtaining loans for the broker's clients. The plaintiff argued that these payments were illegal since the defendant was not properly licensed. The court agreed that the payments were unlawful, but held for the defendant, reasoning as follows: "In the case at bar the contract is fully executed and there is no valid claim that defendant's performance was in any way deficient. . . . 'There is no equitable reason for invoking restitution when the plaintiff gets the exchange which he expected.'" 26 Cal. Rptr. at 831 (citations omitted). The University has not alleged that the broker-dealers' performance was in any way deficient. The University has not alleged that it got from the exchange anything other than what it expected. Therefore, there is no reason

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\* Accord, Messner v. Union County, 34 N.J. 233, 167 A.2d 897, 898 (1961).



for it to invoke restitution. Indeed, equity cries for a contrary result.

When the United States Supreme Court faced a case involving a broker and an already executed contract which the petitioning foreign corporation could not legally carry out, the Court declared:

The respondent [broker] is not to be deprived of his compensation simply because petitioner found itself unable to consummate the latter contract by reason of its inability to perform a condition made necessary by the provisions of the law of another country.

Even if the contract of sale was void by British law, all other questions aside, respondent's connection with it was not such as to deprive him of his commission.

Gaston, Williams & Wigmore v. Warner, 260 U.S. 202, 204, 67 L.Ed. 210, 213 (1922).

The broker-dealers are similarly situated. Their principal, the University, claims that its transactions are void. If that contention is accurate, the case just cited compels the conclusion that the broker-dealers are entitled to their compensation regardless.

Furthermore, the University is not entitled to recover commissions from these broker-dealers because they reasonably and in good faith changed their position in reliance upon the regularity of the transactions here at issue. On hundreds of occasions, the broker-dealers received payment and commissions from the University for its purchases. The broker-dealers passed on the purchase price of each security to the sellers, retaining only their commissions as their benefit of the bargain. Those commission payments were then paid out through the ordinary course of business to satisfy their regular

expenses. In so doing, the broker-dealers reasonably and in good faith changed their position in reliance upon the regularity of these transactions, and the University may not now recover monies delivered to the broker-dealers which have long since been dispersed.

In a case cited by the University in support of its position, Maricopa County v. Cities & Towns of Avondale, 12 Ariz. App. 109, 467 P.2d 949 (Ct. App. 1970), the court denied recovery to the public entity of funds paid out through a mistake of law, since the defendant had changed its position in reliance upon the regularity of the transactions there at issue. After noting the "general rule" that public bodies may recover funds mistakenly paid out, the court stated,

No claimant, however, has an absolute right to restitution for an enriching benefit, mistakenly conferred. Comment c under § 1 of the Restatement of Restitution states:

"Even where a person has received the benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it."

467 P.2d at 953.

2. There Is No Meaningful Distinction Between "Ultra Vires" and "Illegal" Contracts.

The University further contends (at 35-36) that there exists some distinction in the law between "ultra vires" and "illegal" contracts, so that the general rule denying recovery on illegal contracts is not a rule applicable to ultra vires contracts. The University cites no authority in support of this impossible semantic distinction, as indeed no such authority exists. As the term "ultra

vires" literally means "outside the law," there certainly can be no distinction between ultra vires and illegal contracts.

3. The General Rule Prohibiting Recovery on Illegal Contract Payments Made Under Mistake of Law Applies to Public Entities.

The University then asserts, however, that the general rules prohibiting recovery on illegal contracts are not applicable to public bodies (at 36-37). Similarly, the University asserts that public bodies are not subject to the general rule that payments under mistake of law are not recoverable. We will respond to those assertions as one, as there is no logical reason to distinguish between them: The older cases supporting these propositions are simply further examples of the "special treatment" sometimes historically accorded to the government for reasons which are increasingly being discarded by the courts.

As is true of the traditional notion that the government could not be estopped, or principles denying recovery against the state because of sovereign immunity, all "special treatment" of the government which forces private parties to bear the risk of government misconduct are in the process of being reversed, at least where the government acts (as it has here) in a clearly proprietary capacity. Under such circumstances, a public party will be subject to the same rules of equity and fairness as a similarly situated private party. For this same reason, the broker-dealers also should not be liable to the University for payments which they received, since the University made those payments in a proprietary capacity, and it should therefore be subject to the same rules of contract as were enunciated in the cases cited above on that issue.

The broker-dealers argued at some length in their opening brief that the University should not be allowed to recover on executed contracts even if they are ultra vires, and that ultra vires payments made under mistake of law cannot be recovered. Appellants' Brief at 41-45. Those authorities have not been refuted by the University and will not be reiterated. One of those assertions, however, bears mention because it has not been controverted at all: Like the United States, the State of Utah is subject to the commercial law applicable to contracts between private individuals when it engages in commercial activity. It matters not whether the contracting party is the federal government, a state, a municipality, or a private citizen. Appellants' Brief at 45.

A ruling for the broker-dealers on these appeals expressly adopting that principle would be the only result consistent with this court's recent ruling in Standiford v. Salt Lake City Corp., 605 P.2d 1230 (Utah 1980), which held that henceforth governmental entities in Utah will be subjected to a higher standard of responsibility for their own misconduct.\*

The broker-dealers respectfully urge this Court to adopt a principle of sovereign responsibility in these cases which would hold the government responsible for its own conduct when acting in a proprietary or rather non-governmental capacity (as that term was recently defined in Standiford). In all such instances, the government

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\* The court there held that it would abandon the traditional sovereign-proprietary distinction in resolving the question of government immunity, a result which recognizes that "a governmental entity, like individuals and private entities, should be liable for an injury inflicted by it." 605 P.2d at 1234. As this court there recognized, the doctrine of sovereign immunity "was itself largely unsound." *Id.* Similarly, related doctrines which afford special protection to the sovereign, including all of those upon which the University here relies, are equally unsound, and for the same reasons.

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should then be responsible for its own torts and likewise should be precluded from shifting liability for losses onto innocent private parties. Such a ruling would be consistent with law already announced by other courts.

For example, in Hunke v. Foote, 84 Id. 391, 373 P.2d 322 (1962), the Idaho Supreme Court held a municipality subject to the same rules applicable to private parties because the government was acting in a proprietary capacity, explaining that:

When operating in its proprietary capacity a municipal corporation is subject to the same burdens, responsibilities and liabilities as a private corporation or individual acting in the same capacity.

373 P.2d at 323. And in City of High Point v. Duke Power Co., 120 F.2d 866 (4th Cir. 1941), the court held that the city could not recover amounts paid for electrical power in excess of its legal liability, explaining:

And it has been held, and quite properly we think, that even in jurisdictions where a municipal corporation is permitted to recover voluntary payments, the rule will not be applied in case of payments made in its private and proprietary capacity.

Id. at 869.

Perhaps the clearest expression of the policy issues raised here and of the University's position on those issues is provided by the University itself in its conclusion to the first two parts of its brief on appeal (at 73-74). The University there asserts the "rudimentary principle of jurisprudence" that women and minors are properly treated differently by the law than are men, a distinction which the University claims is the result of the law's recognition "that policy considerations justify different treatment."

First of all, we are constrained to respond that the law will no longer sanction different treatment of women and men,\* an evolution in the law of which the Attorney General's office is apparently unaware. This transition in the law recognizes that its traditional treatment of women as being under a legal incapacity, and therefore deserving of special treatment, was based on unsound assumptions.

Most courts have likewise realized that special treatment of the government is premised on the unsound assumption that the government was to be given the benefit of a similar presumption of limited capacity. It is true that minors are still given some "special" protection by the law, because they are indeed under some legal incapacity but no similar inference should operate in favor of a governmental body whose chief officers and governing board are sophisticated and knowledgeable businessmen used to corporate affairs and managing investments.\*\*

### POINT III

THE DOCTRINE OF ESTOPPEL DOES APPLY TO THE UNIVERSITY. THE COURT BELOW THEREFORE ERRED IN GRANTING THE UNIVERSITY'S MOTIONS FOR SUMMARY JUDGMENT AND DENYING THE BROKER-DEALERS' MOTIONS TO DISMISS.

The University relies on dicta in First Equity Corp. v. Utah State University, 544 P.2d 887 (Utah 1975) that estoppel will not apply to a governmental entity because of acts of its "agents or officers in excess of their statutory or constitutional powers." Id.

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E.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e (1976) Utah Code Ann. §§ 34-35-1 to -8 (1974 & Supp. 1979) (comparable to Title VII).

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The sophistication of the officers and Council members is a matter set forth at some length in Appendix A to the broker-dealers' original brief on appeal.

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at 892 (quoting 15 C.J.S. 540). The issue of estoppel was not properly before the court in First Equity because there was no Institutional Council resolution in that record which represented the power of the University to purchase securities, as there is in the instant cases.

The Officers and Institutional Council Members of the University had Authority to Issue Warranties of the University's Capacity and to Direct the University's Investment Program.

The issue of the authority or lack of authority of the University's governing agents to approve and supervise the investment program is extremely important here. The importance of any ruling on that issue can be highlighted by the following simple analyses.

First, as to the primary actions, the University's sole basis for recovery is that:

1. The purchases and sales at issue here were made pursuant to ultra vires contracts with each broker-dealer.
2. The University is not estopped to recover from the broker-dealers because, in authorizing those investments, the officers and Council members exceeded their statutory authority.
3. Therefore, the University is entitled to recover against the broker-dealers.

Conversely, in the third party actions, the broker-dealers have alleged that:

1. If the University recovers in the primary actions, it will be only because the subject transactions were ultra vires and because the officers and Council members exceeded their authority.



2. If the officers and Council members exceeded their authority, they must be held personally liable on those contracts on theories of express warranty, indemnity and contribution.

3. Therefore, if the University recovers in the principal actions, the broker-dealers must be allowed to proceed with the third party actions.

Finally, once again highlighting the importance of this question of authority, the primary defense of the third party defendants, and the primary basis for the trial court's dismissal of the third party actions, can be reduced to the following summary:

1. The officers and Council members had general statutory authority to supervise and approve all University investments.

2. In authorizing and approving the subject transactions, the third party defendants were acting within the scope of that authority.

3. The third party actions must be dismissed because officers acting within their authority are immune from suit.\*

The trial court never ruled on the question of the authority of the officers and Council members to authorize and approve the investment program, but it apparently believed that the officers did exceed their authority since its ruling in the primary action is

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\* The third party defendants also assert that the broker-dealers' claims for indemnity and contribution are without merit, but they are compelled to rely on facts outside the pleadings to begin to attempt to assert those arguments, and because the orders dismissing the third party action were based upon Rule 12(b)(6) of the Utah Rules of Civil Procedure, all allegations of the third party complaints must be deemed to be true (a principle they have conceded in the opening portion of their brief), so reference to facts outside the pleadings is improper and cannot avail them.



based upon a finding that the subject transactions were ultra vires. As a matter of law and equity, however, it should have been impossible for the trial court simultaneously to allow recovery to the University on the principal actions while denying recovery to the broker-dealers on the third party actions. Those results are diametrically and irreducibly inconsistent, because the trial court indicated that the primary basis for its ruling on the third party actions was that the third party defendants enjoy the protection of official immunity. Clearly, even as that theory is argued by the third party defendants, they are not entitled to such immunity if they did indeed exceed their statutory authority. The inconsistency of these rulings is perhaps best clarified by resort to one final summary:

1. If the officers and members were without statutory authority to approve the subject transactions, they may not invoke the defense of official immunity (by their own admission), and the third party actions should not have been dismissed.

2. If the officers and members acted within their general authority, then the doctrine of estoppel as repeatedly applied by this Court must preclude recovery against the broker-dealers by the University. This point is the subject of the next part of this argument.

Before turning to an extended discussion of the application of estoppel in these cases, the broker-dealers would also like to suggest that as a matter of sound judicial policy the traditional distinctions between "excesses of authority" and acts in "excess of jurisdiction" are as fundamentally unsatisfactory in actual application as the traditional "distinctions" between governmental and

proprietary action which were recently abandoned by this court in Standiford v. Salt Lake City Corp., 605 P.2d 1230 (Utah 1980). Careful review of the dozens of cases involving resolution of that question (in estoppel cases and in cases discussing the scope of official immunity) reveals that, in actuality, those doctrines have been invoked by the courts in order to justify an equitable result.

What finally mattered in each case was the totality of equities on each side, including weighing of the relative interests of the governmental party, the private party, and the degree of adverse effect on the interests of the public of any given ruling. In any case where ruling for a private party would not result in serious detriment to the interests of the government or the public, the courts have found that officers were acting generally "within their authority" and therefore estopped the government from recovery (in those cases where the courts discussed that question at all).

Similarly, where the public interests would not suffer serious detriment and the private party had been genuinely injured by government action, the courts have found that the complained of conduct of defendant officers "exceeded their authority," and therefore denied official immunity to the defendant officers. A review of Utah cases on this subject alone (within discussions of estoppel and of official immunity) highlights the unsatisfactory nature of continuing lip service to the phrase "excess of authority."

The broker-dealers respectfully submit that a more appropriate approach to the question of authority in cases invoking either estoppel of the government or official immunity would simply be to weigh

the facts and equities present in each case, to review the degree of harm suffered by a private party in reliance on government conduct against the degree of harm to the public in precluding recovery by the government, and to base each ruling on those facts and policy considerations alone. In this era of increasing assumption of responsibility by government for its conduct, and of decreasing governmental immunity as a shield to government misconduct, such an approach would seem to be mandated.

We hasten to add, however, that while the broker-dealers should certainly prevail under such an alternate approach, they are also entitled to prevail under principles clearly established in existing law. It is that existing law upon which the remaining arguments in this brief and in the broker-dealers' original brief are based.

A Recent Decision by this Court Compels Estoppel of the University in These Cases.

This court recently held that it will apply equitable estoppel to governmental entities. Celebrity Club, Inc. v. Utah Liquor Control Commission, 602 P.2d 689 (Utah 1979). In that case plaintiff wished to open a private club where liquor would be sold and inquired whether the premises he had in mind would comply with a Utah statute prohibiting the location of private clubs within 600 feet of schools and other designated places. The Utah State Liquor Commission issued a letter to plaintiff which advised him that the location in question did not violate that statute, but after plaintiff had acted in reliance upon that letter the Commission advised

him that he would violate the statute if liquor were sold on the premises. Accordingly, the Commission refused to issue plaintiff a liquor license.

The court held that the Commission was estopped to deny plaintiff a liquor license, even though it apparently was acting in a governmental rather than a non-governmental capacity, because all the elements of estoppel were present. Id. at 690. Those elements were:

- (1) an admission, statement, or act inconsistent with the claim afterwards asserted,
- (2) action by the other party on the faith of such admission, statement, or act, and
- (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

Id. at 694 (footnote omitted).

The uncontroverted facts here relating to the resolutions issued by the Institutional Council to the broker-dealers provide greater reason for applying estoppel than did the facts in Celebrity Club. Here, the governmental entity, the University, was clearly not acting in a governmental capacity. Its commercial activity in competing with other buyers and sellers in the interstate securities markets to obtain financial gain, could hardly be more proprietary. Accordingly, application of estoppel here does not give rise to the concerns addressed by this court and others in instances where the government is performing purely a governmental function.

Each of the elements of estoppel, as set out in Celebrity Club, is present here:

1. The resolutions of the Institutional Council were "admissions" or "statements" representing that the University had power to purchase the securities at issue and the University by these lawsuits has asserted claims which are inconsistent with that affirmative representations.

2. Each broker-dealer acted in reliance on "such admission, statement, or act."

3. Each broker-dealer will be injured by allowing the University "to contradict or repudiate such admission, statement or act" and thereby recover judgment in these cases.

In addition, the public officials here were acting within their authority to the same extent as was the Liquor Commission in Celebrity Club. There the Commission had authority to license clubs located more than 600 feet from certain places, but it lacked authority to authorize clubs to locate within that radius. Even so, the Court in Celebrity Club estopped the Commission from denying a license on the basis of a survey which showed plaintiff's club to be less than 600 feet from a school. In other words, the Commission was estopped even though it lacked authority to license clubs located within 600 feet of schools, and such approval would certainly have been ultra vires.

Similarly, in this action, the University officials had authority to make investments on the University's behalf in securities generally, although this Court held in First Equity that it had authority to purchase some types of securities and not others. While the University may not have authority to purchase the specific types

of securities at issue, it was within the general authority of the Institutional Council and officers to address questions relating to the University's investment powers and to direct some investments.\*

It should also be remembered that there is no statute specifically prohibiting the University from investing in the securities at issue, and at the time the investments were made there was no opinion of any court in Utah stating that the investments were unlawful. (By contrast, in Celebrity Club there existed a clear statutory prohibition on the conduct in question there). It was not until this Court's decision in December 1975, well after the events at issue here had occurred, that there had been some official declaration on the legality of these investments.

It should also be pointed out that the Institutional Council had knowledge of the pertinent facts. They knew they wished to purchase equity securities and that the broker-dealers through whom they wished to deal had a question about the University's legal power to do so. That members of the Institutional Council may not have been aware of the state of the law is not material, particularly when at the time the state of the law was ambiguous. In this connection, it is particularly inexcusable for the Institutional Council to have rested on its ignorance when the broker-dealers had raised that question, and when they had represented the lawfulness of the transactions to the broker-dealers. They necessarily implied to the broker-dealers that they knew the transactions were lawful, when apparently they did not know.

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\* The third-party defendant officers and Council members so argue at length in their brief (at 8, 10-15).

In its brief the University attempts to undermine the broker-dealers' defense of estoppel by contending for the first time that two broker-dealers, Hornblower and Bear Stearns, did not receive copies of the resolution. Though the record is uncontroverted that both broker-dealers received such a resolution and relied on it,<sup>\*</sup> one page of the two page resolution was missing from the record on appeal in one file and both pages of the resolution were missing from the record in the other case. After filing its brief the University stipulated to supplementing the record on appeal with the missing copies, and the Court entered an order on October 9, 1979, directing the clerk to insert those documents into the record. Other copies of the same resolution were before the court below, and no one contended below that copies of the resolution had not gone to all the broker-dealers.

The University also attempts to challenge the uncontroverted sworn statements in the record that each broker-dealer relied on the resolution or resolutions it received. Broker-dealers' opening brief at 19 and references thereat to the record. The University argues that in some cases the resolutions were received after the broker-dealer had commenced to deal with the University. The University did not raise this argument below, and had it done so the broker-dealers would have supplied facts of the industry practice of obtaining oral assurance from a private or public corporation or customer that appropriate authority and capacity were present and that a resolution

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<sup>\*</sup> Bear Stearns, R. 1998 (Cranston Affidavit); Vol. 22, R. 1975 (Kaplan Affidavit for Hornblower).

to that effect would be forthcoming. These resolutions generally are delayed because corporate boards or governing bodies generally meet only periodically, and it is not uncommon for a month or more to pass before a written document is received. As in the banking industry, the securities industry necessarily relies on the good faith of others through oral assurances in order to take commercial action immediately in markets that fluctuate daily. Furthermore, as the University did not raise this argument in the Court below, and never controverted in those proceedings the broker-dealers' reiterated assertions of reliance on the written resolutions, it has waived that objection.\*

In conclusion, Utah law unequivocally supports the propriety of estopping the University from recovery here. Utah is consistent with the majority of courts in so holding.\*\* The trial court's award of partial summary judgment on liability issues to the University should therefore be reversed.

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\* As this court stated in First Equity, supra, 544 P.2d at 892 n.5: "ordinarily, an appellant cannot raise a theory on appeal for the first time different from that presented to the Court below." Accord, Ream v. Fitzen, 581 P.2d 145, 148 (Utah 1978) ("this final issue was not properly raised below and we may not consider it here for the first time . . . .")

\*\* The University contends, of course, that this is untrue (at 44-45), by inaccurately characterizing Professor Davis' recent treatise discussion of that subject. Once again we must point out that Davis' most recent commentary on this subject concludes:

The law has changed. The Treatise of 1958 said that "the courts usually hold that the doctrine of equitable estoppel does not apply to the government." That statement was based on many cases . . . . The opposite statement now has almost uniform support of decisions of the 1970s: The doctrine of equitable estoppel does apply to the government.

K. Davis, Administrative Law of the Seventies, §17.01 at 399 (1976) emphasis supplied.



#### POINT IV

THE BROKER-DEALERS' MOTIONS TO DISMISS FOR FAILURE  
TO STATE A CLAIM SHOULD PROPERLY BE GRANTED BY  
THIS COURT.

By leave of court granted during oral argument on April 19, 1978, defendants refiled motions to dismiss the University's complaints on or about ~~April 19~~ <sup>May 16</sup>, 1978 pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure. The motion was filed with the court following the filing of all affidavits now in the record and the taking of all depositions. The court thus had before it all the facts which are now in the record before it ruled. Rule 12(b) provides in part:

If, on a motion asserting the defense numbered (6) to dismiss for failure of a pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

The court did not exclude any matters outside the pleading in denying the motion. Accordingly this court is entitled to review the uncontroverted facts in the record in reviewing the lower court's denial of the broker-dealers' Rule 12(b)(6) motion to dismiss.

The University incorrectly argues beginning at page 67 of its brief that the lower court's denial of the motions to dismiss should be affirmed because there exist material issues of fact but only in connection with the broker-dealers' estoppel defense. It does not claim there are any controverted facts relating to the broker-dealers' defense that they are entitled to prevail because monies

paid pursuant to unlawful contracts may not be recovered.

The University asserts various "issues of fact" and allegations of broker culpability which should allegedly negate their estoppel defenses and thus preclude this court from entering judgment in favor of the broker-dealers pursuant to their motions to dismiss. Those contentions are without merit for several reasons.

The University alleges that the broker-dealers violated broker association rules requiring that all brokers "know their customers" and that they recommend only those investments which are "suitable" for each customer (in its brief at 48-49). It will be recalled that the University asserted the same wrongdoing in its original federal court actions, which the Tenth Circuit Court of Appeals disposed of with the comment that "USU seeks to take advantage of its own wrongful acts" and that an "ultra vires act of an institutional customer may not be converted into a wrongful act of a broker."\* Furthermore, the simple response to the University's allegations is that the broker-dealers did fulfill their responsibilities under those rules, when they sought and obtained from the Institutional Council the written warranties of capacity and authority which expressly authorized them to enter into each of the subject transactions with the University's designated agents.

The University next contends that there are "issues of fact" which would preclude ruling in the broker-dealers' favor on their motions to dismiss. No such issues of fact were ever raised by the University below, and therefore have been waived.

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\* Utah State Univ. of Agric. and Applied Science v. Bear, Stearns & Co., 549 F.2d 164, 168 (10th Cir. 1977).

Those manufactured "issues of fact" are:

- (1) that Bear Stearns and Hornblower never received a resolution from the University. We have shown at p. 31, supra, that it is uncontroverted that they did.
- (2) that because a few transactions were apparently executed on behalf of the University before copies of resolutions were received by some of the broker-dealers that there is no reliance. We responded to this at pp. 31 & 32, supra.
- (3) That there is an issue whether broker-dealers' knew of newspaper articles in December 1972 that the Utah Attorney General questioned the legality of the University's investments. We responded to this at p. 3, supra.
- (4) That there is an issue of fact whether Donald Catron received orders to buy no more stock in December 1972. This is not at issue. The issue rather was, if Catron had been so instructed were the broker-dealers so advised. It is uncontroverted that they were not advised that Catron's authority had been revoked until all of the subject transactions had been completed.\*

Finally, the University implies by note 35 at page 72 of its brief that it engaged in no discovery because the court limited discovery to a month. Discovery was only so limited because it was the broker-dealers who were seeking discovery in connection with the University's motion for summary judgment and the University strenuously objected to the broker-dealers receiving any more time. If, in over three years in the proceedings below the University elected not to engage in discovery, it should not now be heard to complain.

In summary, all the foregoing assertions by the University are entirely devoid of merit, and judgment should be entered in favor of

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\*  
Merrill Lynch, R. 1433 (Stromberg Affidavit); id. at 1422 (Dunn Affidavit); Bear Stearns, R. 1998 (Cranston Affidavit); Vol. 22, R. 1975 (Kaplan Affidavit for Hornblower); Sutro, R. 122 (Juda Affidavit).

the broker-dealers on their motions to dismiss, for the reasons advanced in their opening brief on these appeals.

## PART TWO

### THE TRIAL COURT ERRED IN DISMISSING THE THIRD-PARTY ACTIONS

#### POINT I

THE THIRD-PARTY DEFENDANTS MUST NOT BE ALLOWED TO  
INVOKE OFFICIAL IMMUNITY TO THE CLAIMS ASSERTED BY  
THE BROKER-DEALERS.

A. The Third-Party Defendants May Not Claim Official Immunity  
Because They Exceeded Their Authority in Approving the Transactions  
at Issue Here.

If this court holds that the University officials were acting outside their authority such that the doctrine of estoppel will not be applied to the University to bar its claims against the broker-dealers, then it follows that the third party defendants are not protected by official immunity because they acted outside their authority. See discussion at p. 25, supra, of relationship between the University's estoppel and the immunity claimed by third-party defendants. Here we assume, arguendo, in connection with the broker-dealers' claims against the third parties that the University is not estopped because its officials acted outside their authority<sup>\*</sup> and that accordingly the third-party defendants have no immunity.

In their effort to invoke official immunity as a defense to the

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Even if the University is not estopped, the broker-dealers are still entitled to prevail against the University under the doctrine that monies paid pursuant to an unlawful contract may not be recovered.

third party complaints, the officers and members attempt a semantic distinction between conduct "within the scope of their duties" and conduct "within the scope of their authority" (their brief at 6, 8). The essence of this argument appears to be that while they "exceeded their authority" in approving the subject transactions, they were nonetheless acting generally "within the scope of their duties" to supervise University fiscal affairs and therefore are immune from liability. This distinction is semantic, not logical.

While there is some authority for the proposition that public officers are not individually liable for simple "mistakes in the exercise of [their] judgment," if they have statutory authority to exercise such judgment in the first place, Anderson v. Granite School District, 17 Utah 2d 405, 407, 413 P.2d 597, 599 (1966), it is well-established in Utah that such officers are liable for their torts where they are mistaken with respect to basic jurisdictional facts and where, as a result, they take action for which they have no valid statutory authority. Several Utah decisions highlight this distinction.

One of the clearest examples of this principle is provided by Roe v. Lundstrom, 89 Utah 520, 57 P.2d 1128 (1936). In that case city commissioners were subject to individual liability for a tort they committed in attempting to discharge their discretionary authority, since they exercised that authority pursuant to a city ordinance which was invalid.

Since the commissioners there directed the police to act on the basis of an unconstitutional ordinance, the Supreme Court held that

they were liable to plaintiffs as joint tortfeasors for directing a trespass on plaintiffs' property. Id. at 527-28, 57 P.2d at 1131. The court held the commissioners to be liable because of this mistake with respect to basic jurisdictional facts even though the defendants acted in good faith and in the exercise of their best judgment in attempting to enforce city ordinances. Id. at 529, 57 P.2d at 1132.

On the other hand, in Logan City v. Allen, 86 Utah 375, 44 P.2d 1085 (1935), state tax commissioners were held not individually liable in accepting less than the full amount of taxes due from a hospital because they had express statutory authority to compromise tax claims. Accordingly, since they acted within their authority in compromising this particular claim, they could not be held subject to individual liability even if they made a mistake in judgment in deciding to do so. Id. at 385, 44 P.2d at 1089.

The foregoing distinction between acts which will or will not give rise to personal liability of public officers is one which has been consistently followed by this court. In Blonquist v. Summit County, 25 Utah 2d 387, 483 P.2d 430 (1971), this court held that county officials would be personally liable to plaintiffs if they were mistaken with respect to basic jurisdictional facts. The court noted that not all conduct by public officers "acting in line of duty" is insulated from suit. Id. at 388-89, 483 P.2d at 431. There, the defendants decided that a certain road was public, and they therefore directed that a locked gate on that road, maintained by the plaintiffs, should be removed. In fact, however, the com-

missioners had no authority to determine whether the road was public or private, and their order to tear down the gate was therefore invalid. Id. at 390-91, 483 P.2d at 432.

Probably one of the clearest statements as to when liability may or may not be asserted against a public officer was provided by the United States Supreme Court in Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949). The Court there noted that "official action is [not] invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so." Id. at 695 (emphasis added). In other words, if a public officer has authority to take the action complained of, he will not be liable for an error in judgment. If he lacks statutory authority so to act, however, he is liable.

In these cases, if this court affirms its holding in First Equity Corp. v. Utah State University, 544 P.2d 887 (Utah 1975), it cannot be denied that these officers and Council members lacked basic statutory authority to authorize the subject transactions. They did not simply exercise bad judgment in selecting specific securities which the University had authority to purchase; their mistake was fundamental, because the University had no power whatsoever to purchase those securities. For this reason, they were clearly mistaken with respect to basic jurisdictional facts upon which they based the representations in their corporate resolutions, and they are therefore precluded from asserting the defense of official immunity.

Nor are the cases cited by the third-party defendants to the contrary. For example, in Lister v. Board of Regents of University

of Wisconsin System, 72 Wis. 2d 282, 240 N.W.2d 610 (1976), cited throughout their brief and quoted at some length at 13, four former University of Wisconsin law students sought to recover the difference between nonresident and resident tuition which they had paid for two school years. Named defendants were the University System Board of Regents and the Registrar of the University of Wisconsin.

The only "excess of authority" asserted by the plaintiffs against the Registrar was his alleged misinterpretation of the standards set forth in the state statutes which governed the resident/nonresident determination. The court held that the registrar could properly assert official immunity in response to this claim of a simple error in judgment in exercising his valid statutory authority, as he was expressly empowered to make the resident/nonresident decision. 240 N.W.2d at 622.

Immediately following the text quoted by third-party defendants in their brief, the Wisconsin Supreme Court went on to state that "there is no substantive liability for damages resulting from mistakes in judgment where the officer is specifically empowered to exercise such judgment." Id. As the third-party defendants in these cases were not specifically empowered to exercise any kind of judgment with respect to purchasing all the stock here at issue, the Lister decision affords them no support.

Similarly, the third-party defendants' reliance on McQuillin's treatise (quoted at 20 of their brief) for the proposition that public officers will not be held liable on contracts which they execute is also misplaced. Again, almost immediately following the



passage quoted by third-party defendants, McQuillin states that "if public officers in making contracts go beyond or exceed the authority given them, they may become personally liable." 4 McQuillin, Municipal Corporations §12.214, at 171 (3d ed. 1979). Similarly, McQuillin notes that an officer may be "held liable for the injurious consequences of his discretionary acts when he exceeds his authority." Id. §12.201. McQuillin warns that:

An officer may pay out public money only in the manner prescribed by law. Money disbursed by him in an unlawful manner is paid out at his peril. Accordingly, where funds are disbursed illegally by public officers or upon their authority, they are personally liable therefor, e.g., . . . payments under illegal contracts  
. . . .

Even the fact that illegal expenditures were made by officers under the honest belief that they were authorized does not prevent recovery from such officers.

Id. §12.217, at 181 (footnotes omitted and emphasis added).

For the foregoing reasons, the third-party defendants must not be allowed to invoke official immunity as a shield for their conduct in these cases.

B. Sound Judicial Policy Requires That These Public Officers be Subject to Personal Liability for the Conduct Complained of by the Broker-Dealers Herein.

As the foregoing argument demonstrates, the third-party defendants' assertion that they are entitled to official immunity is unsupported at law. Similarly, sound judicial policy requires that their conduct give rise to liability in these cases.

The officers and members assert the usual timeworn policy arguments that official "immunity has been deemed necessary to ensure that public officials are free to exercise their duties unencumbered by the fear of damage suits growing out of the performance of [their] duties." Third-party Defendants' Brief at 7. This argument should not avail them here for several reasons.

First of all, the liability which the broker-dealers here assert is no greater than the liability which could successfully be asserted against members of governing boards of private corporations, or other private individuals. Consistent with recent holdings by this court and others, there is no sound policy basis for allowing public officers to be held to a lower standard of honesty and responsibility in their business transactions than the standard to which private individuals are held. See, e.g., Standiford v. Salt Lake City Corp., 605 P.2d 1230, 1237 (Utah 1980) (in which this court adopted a policy expressly designed to allow more citizens injured by tortious governmental conduct access to the courts for redress); Celebrity Club, Inc. v. Utah Liquor Control Commission, 602 P.2d 689, 695 (Utah 1979). These actions are based upon common law principles of indemnity, restitution, and contribution which could successfully be asserted as to private individuals, and which should also be allowed against public officers.

The "fear of damage suits" which the officers and members assert would attend the imposition of personal liability on public officials is also illusory. As Justice Stewart recently pointed out in Standiford, where a public entity (or officer) is protected from

that liability by insurance purchased by the sovereign, this concern has no basis. As Justice Stewart explained:

The insurance authorization is relevant as to whether a governmental entity should be subjected to liability on tort claims because one historical fear of limiting immunity has been the unexpected and unplanned-for expense to the public entity. With the availability of insurance protection, coupled with the statutory provisions for a ceiling on liability, governmental entities may confidently and accurately budget for their potential tort liability.

Id. at 1235.

Similarly, Section 63-30-33 of the Utah Governmental Immunity Act specifically authorizes the purchase of insurance by any governmental entity to insure any or all of its employees against liability for injury or damage. Utah Code Ann. §63-30-33 (1978). Such insurance was purchased for each of these third-party defendants by the state. Indeed, counsel for third-party defendants were employed by the insurance carrier. If the purchase of liability insurance authorized by the Immunity Act was not considered by the legislature to constitute a waiver of employees' common law official immunity, at least to the extent of the coverage, the legislature would simply have been authorizing gifts in the way of premium payments to the insurance companies. Manifestly, this result is absurd and it must be concluded that the purchase of insurance waived immunity for the officers and members.\*

Finally, the officers and members assert that they cannot be held individually liable here because the Institutional Council

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This position was argued at length to the court below in the defendants' joint memorandum opposing the motions to dismiss the third-party complaints, at 16-21.

itself is the only defendant which can properly incur such liability, as the individuals did not act individually but instead acted as a body in executing their corporate resolutions (their brief at 20). In fact, no law is offered to support any such proposition, because no such law exists.

Furthermore, however, there could be no conceivable policy basis for such a conclusion. That is, there can be no rational basis for holding that conduct which would give rise to liability if done individually will suddenly be insulated from liability simply because more than one person joined in to perform the same act. Indeed, at least one Utah decision suggests that the proper method for asserting liability in such cases is to sue the various public officers as joint tortfeasors, where several officers have acted in concert in order to take action on behalf of the public entity. Roe v. Lundstrom, 89 Utah at 527, 57 P.2d at 1131.

C. The Officers Must at Least be Held Personally Liable for Failure to Perform Ministerial Functions.

As the broker-dealers asserted in the court below and in their original brief in these cases (at 72 & n.211), the broker-dealers stated a cause of action against the officers and members for failing to notify them for several months of their revocation of Catron's authority, a purely ministerial act. As noted by the officers and members in their brief at 6, it must be accepted as true for purposes of this appeal that Catron's authority was revoked on December 4, 1972, but no notice of that revocation was given the broker-dealers until March 1973.

The officers and members do not argue in their brief that there is no liability for such conduct, so we assume that they have conceded the merit of this assertion. Accordingly, the officers and members should at least be held personally liable to the broker-dealers for all damages attributable to the time period between December 1972 and March 1973.

## POINT II

### THE BROKER-DEALERS' CLAIMS FOR INDEMNITY STATE A CAUSE OF ACTION

The officers and members contend that the broker-dealers failed to state a cause of action for indemnity because they were in fact equally as culpable as those officers and members (in their brief at 17). That assertion cannot avail them on this appeal for several reasons.

First, the well-pled facts set forth in the pleadings must be deemed to be true for purposes of this appeal.\* In its complaints against the broker-dealers, the University merely alleges that the broker-dealers faithfully carried out the instructions of one of the third-party defendants, Donald Catron, who in turn was expressly empowered to enter into the subject securities transactions by these officers and members.

The broker-dealers alleged in the third-party complaints that they acted in reliance on the Institutional Council warranties of authority and capacity in entering these transactions, that they did not know that the University lacked such authority, that the

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\*  
Discovery was not commenced until after the court granted the third-party defendants' motions to dismiss.

third-party defendants were negligent or grossly negligent in failing to determine that these securities transactions might be ultra vires, and that the broker-dealers were purely innocent agents for the University.

Under that state of pleadings, the broker-dealers have clearly asserted that the officers and members were more culpable in entering these transactions than were the broker-dealers. Under such circumstances, as the officers and members have conceded in their brief (at 17), a cause for indemnity is properly asserted.

Finally, the broker-dealers are less culpable than the officers and members as a matter of law, since the only "wrongdoing" with which they are charged is the assertion that they had constructive notice of the illegality of these transactions. As argued at some length in the broker-dealers' original brief on these appeals (at 66 and at nn.120-25), the brokerdealers must be relieved of the burden of constructive notice in these cases because they justifiably relied on express warranties of authority and capacity directed to them by these third-party defendants. At bottom, the only grounds for asserting that the broker-dealers had such constructive knowledge is that they were dealing with the sovereign, and it is proper, so the implied argument goes, to invent some theory to protect the sovereign and its officials. This raises the same issue regarding archaic and unjustified sovereign privileges addressed by this court in Standiford. The "constructive notice" argument advanced by the third-party defendants is simply a disguised way of claiming the benefits of sovereign immunity without giving reasons.

### POINT III

#### THE THIRD PARTY COMPLAINTS STATE A CAUSE OF ACTION FOR COMMON LAW CONTRIBUTION

As an alternative to their claims for indemnity, the broker-dealers have alleged that they are at least entitled to contribution from the third-party defendants if the trial court should eventually determine that the broker-dealers are equally as culpable as those third-party defendants. The officers and members have responded (in their brief at 21-22) that the broker-dealers' claims for contribution state no cause of action because these actions arose before May 8, 1973, the effective date of the Utah contribution statute.

The doctrine of contribution rests upon "principles of equity and natural justice." 18 Am. Jur. 2d Contribution §4 (1965). The general rule is that one who is compelled to pay or satisfy the whole or to bear more than his fair share of a common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them payment of their respective shares. Restatement of Restitution §81 (1937).

There is a right of contribution for acts occurring prior to the enactment of Section 78-27-39, Utah Code Ann., permitting contribution between joint tortfeasors. Contribution was permitted prior to the Act in cases where the wrongful act of the person seeking contribution was not intentional or negligent. The later Utah contribution statute simply expands the circumstances under



which contribution is allowed, to include recovery against tort-feasors.

In Culmer v. Wilson, 13 Utah 129, 44 P. 833 (1896), plaintiff was a trustee for defendant with respect to certain property. Defendant told the trustee that the property was wrongfully possessed and requested that appropriate legal action be commenced. An action was commenced and a judgment was entered ejecting the occupier of the premises. Subsequently, however, the ejected occupier brought suit in trespass, claiming that the commissioner hearing the case did not have proper jurisdiction to do so. A judgment was entered against the trustee.

The trustee (Culmer) then brought an action against defendant for contribution, alleging that his participation in the initial action was done in good faith in the firm belief that the commissioner hearing the trespass action had proper jurisdiction, and at the express direction of the defendant. The court concluded that where a "tort is one arising from construction or inference of law, and not arising from a known meditated wrong," the person charged with liability because of constructive knowledge could recover contribution from the person at whose direction he was acting. Id. at 141, 44 P. at 836.

Similarly, in these cases, if the broker-dealers are held liable to the University because they are charged with constructive knowledge that these transactions were ultra vires, they should be entitled to common law contribution from the persons at whose direction they acted, i.e., these officers and Council members.



Similarly, in Hoggan v. Cahoon, 26 Utah 444, 73 P. 512 (1903), the court found that plaintiff's liability-creating conduct had been innocent in purpose, and therefore his action for contribution stated a cause of action. There, plaintiff acted in good faith upon defendant's representation that plaintiff could take possession of certain chattels upon which defendant had a chattel mortgage. In taking possession he was not aware that his actions constituted a tort. While no one can "relieve himself from the consequences of having intentionally committed an unlawful act by seeking . . . contribution," the court noted, it is also true that "justice and sound policy" require that contribution should be allowed where the party held liable was acting upon the affirmative representation of another and where he did not know that his conduct was illegal. Id. at 449, 73 P. at 514.

The cases relied upon by the third-party defendants are not to the contrary. In both of those cases, the plaintiffs sought contribution for their own negligent or willful misconduct, and this court therefore barred contribution. Brunyer v. Salt Lake County, 551 P.2d 521 (Utah 1976); Hardman v. Matthews, 1 Utah 2d 110, 262 P.2d 748 (1953).

#### POINT IV

THE BROKER-DEALERS SHOULD BE ALLOWED TO PROCEED ON THE THIRD-PARTY ACTIONS EVEN IF THIS COURT REVERSES THE PARTIAL SUMMARY JUDGMENT ORDER ENTERED BY THE COURT BELOW IN FAVOR OF THE UNIVERSITY AND GRANTS THE BROKER-DEALERS' MOTIONS TO DISMISS THE UNIVERSITY'S CLAIMS.

The officers and members assert (at 24) that the broker-dealers

cannot "maintain an action over if they are not held liable in the first instance." The broker-dealers respectfully submit, however, that they should be allowed to recover all costs and expenses of litigation they have incurred and to proceed even if they prevail on this appeal in opposing the University's claims against them.

So to hold would be consistent with the majority view in this country. McCormick on Damages, §66 at 246, §67 at 248 ("Breaches of official duty may likewise subject the victim to the necessity of engaging in litigation, for the expense of which he may recover from the officer"), §68 (recovery for the expense of litigation is allowed in indemnity cases) (1935). The sole case cited by third-party defendants is inapposite because (1) that court never stated either that the third-party complaint prayed for indemnity or that it prayed for recovery of costs and counsel fees, and (2) even if the court had so held on this issue, that holding would have been clearly contrary to the majority view and sound policy. Southern Milling Co. v. United States, 270 F.2d 80, 84 (5th Cir. 1959) (cited by third-party defendants at 24).

As Moore points out in discussing Rule 14 of the Federal Rules of Civil Procedure (identical to Utah R. Civ. P. 14), Rule 14 is procedural only and in no way modifies substantive right. 3 Moore's Federal Practice, ¶14.03[3] (2d ed. 1979). If the right to indemnity or contribution properly exists, Rule 14 merely provides "the procedure for its enforcement." Id. at 14-158.

In successful suits for indemnity the indemnitee is entitled to reimbursement by the indemnitor for all damages sustained, in-

cluding costs and attorneys' fees incurred in defending the primary action. E.g., McCormick, supra. A recent decision by the Oregon Supreme Court aptly summarizes this general principle:

The rule in most jurisdictions, regardless of whether indemnity is based upon an implied or an express agreement, is that when a claim is made against an indemnitee for which he is entitled to indemnification, the indemnitor is liable for any reasonable expenses incurred by the indemnitee in defending against such claim, regardless of whether the indemnitee is ultimately held not liable. Paliaga v. Luckenbach Steamship Co., 301 F.2d 403, 408 (2d Cir. 1962); Miller and Company of Birmingham v. Louisville & N.R. Co., 328 F.2d 73, 78 (5th Cir. 1964); Southern Arizona York Refrigeration Co. v. Bush Mfg. Co., 331 F.2d 1, 60 (9th Cir. 1964); O'Connell v. Jackson, 273 Minn. 91, 140 N.W. 2d 65, 69 (1966); Commercial Standard Ins. Co. v. Cleveland, 86 Ariz. 288, 345 P.2d 210, 216 (1959); Restatement, Restitution § 80, Comment b., 356. We so hold.

St. Paul Fire & Marine Ins. Co. v. Crosetti Bros., Inc., 256 Or. 576, 475 P.2d 69, 71 (1970) (emphasis added).

Accordingly, the third-party actions should be revived even if the court dismisses the University's complaints against the broker-dealers.

### PART THREE

THE COURT ERRED IN DENYING MERRILL LYNCH'S MOTION FOR CHANGE OF VENUE AND THE OTHER BROKER-DEALERS' MOTIONS TO DISMISS FOR LACK OF IN PERSONAM JURISDICTION.

### POINT I

BECAUSE THE ACTION AROSE IN AND MERRILL LYNCH RESIDES IN SALT LAKE COUNTY, VENUE IN CACHE COUNTY IS NOT PROPER AS TO MERRILL LYNCH.

Merrill Lynch asserts that the cause of action arose in Salt Lake County and the University asserts that it arose in Cache County.

In its brief, the University argues that the cause of action arose in Cache County since the "wrong" occurred there, i.e., payment was made from Logan by a Logan bank acting as agent for Merrill Lynch. The University's arguments are incorrect.

A. A Cause of Action Arises Where the Defendant's Wrongful Act Occurs. Any Wrongful Acts Allegedly Committed by Merrill Lynch Must Have Occurred in Salt Lake County.

The cause of action arises where the defendant's allegedly wrongful acts or omissions occurred. Bach v. Brown, 17 Utah 435, 53 P. 991 (1898). The wrong alleged against Merrill Lynch in the case sub judice is that from 1970 through 1973 Merrill Lynch unlawfully engaged in the purchase and sale of securities pursuant to instructions given it by the governing body of the University. In asserting that acceptance of the University's funds by Merrill Lynch in Logan constituted the "wrong" for purposes of determining where the cause of action arose, the University ignores the relatively more significant portions of the allegedly illegal transactions in question. See Akichika v. Kelleher, 96 Idaho 930, 539 P.2d 283 (1975) (an action for fraudulent misrepresentation and breach of a conditional sales contract, use of bank as an agent for transfer of title merely incidental to and not an integral part of transaction at issue).

The University focuses on the last technical act necessary to complete the whole transaction, i.e., acceptance of payment for the securities, which should have little relevance to evaluating whether venue is proper. Indeed, the stock collection transactions were

nothing more than "routine clerical matters." (Hornblower, R. 664). To argue that no wrong occurs until payment is accepted, as the University asserts, is naive.

The University mischaracterizes Merrill Lynch's position as relying upon acceptance of purchase orders in Salt Lake County as the sole portion of the transaction constituting the "wrong" (University's brief at 97). Such a characterization ignores Merrill Lynch's brief, which stated that "Merrill Lynch assented to the transactions in question from its place of business in Salt Lake County, and all other actions taken by it in this state on the University's behalf occurred there." (Merrill Lynch Brief at 76) (emphasis added). In other words, Merrill Lynch's acceptance and execution of the University's orders constitute the wrong Merrill Lynch allegedly committed.

The University's complaint is in accord with this assertion, since it claims that it was damaged as a consequence of Merrill Lynch's execution of orders for the purchase of securities. (See, e.g., Merrill Lynch R. at 2, ¶¶ 9, 13). Since Merrill Lynch executed the transactions in Salt Lake County, where it conducts its Utah business, any wrongful acts or omissions necessarily occurred there.

The original brokerage agreement was entered into in Salt Lake County; all orders to buy and sell were placed by Merrill Lynch from its Salt Lake offices; while conducting the transactions in Salt Lake County, Merrill Lynch allegedly failed to make any investigation of

the University's corporate authority; Merrill Lynch received payment in Salt Lake County; and Merrill Lynch has its only place of business for this state in Salt Lake County. (Merrill Lynch, R. 21, 22, 28, 30, 31, 32).

Even if it were shown that Merrill Lynch did in fact accept transfers of funds in Logan (by the University transferring money to a bank in Logan which it designated which in turn passed the money on to Merrill Lynch in Salt Lake County), it is not uncommon for a defendant in a complex transaction to have contacts in different judicial districts. When faced with such situations, the courts "have fashioned what may be called a 'weight of contacts' approach." Ghazoul v. International Management Services, Inc., 398 F. Supp. 307, 314-15 (S.D.N.Y. 1975). The court in that case further stated:

"[T]he weight of defendant's contacts in the various districts concerned must be compared, and the claim must be deemed to have arisen in the district where the contacts had been most significant."  
... "The cause of action for venue purposes can be said to arise wherever substantial material events took place."

Id. at 315 (citations omitted).

In the present case, the "weight of contacts" for venue purposes lies in Salt Lake County. All material events surrounding the allegedly unlawful sale and purchase of securities necessarily occurred in Salt Lake County where Merrill Lynch conducts all its Utah business. (Merrill Lynch R. 31, 32).

Finally, the University ignores the clear policy of the venue statute, which by offering the alternative of the county where the defendant resides or in which the claim arose, places venue in those counties which would be most convenient to the defendant. Utah

Code Ann. §78-13-7 (1977). The statute conspicuously omits as an alternative the county where the plaintiff resides.

B. Merrill Lynch Did Not Receive Payment in Cache County and the Logan Bank Was Not an Agent of Merrill Lynch.

The preceding section demonstrates that even if Merrill Lynch had received payment in Cache County, venue is not proper there. In fact, however, all payments to Merrill Lynch were accepted in Salt Lake County.

Merrill Lynch received payment by mail from the University (Merrill Lynch R. 96, 98). Even the University concedes that in a number of cases Catron mailed checks to Merrill Lynch in Salt Lake which were drawn on the University's bank in Logan (University's Brief at 94). It follows that Merrill Lynch only accepted payment when it received those checks and cashed them in Salt Lake.

On other occasions, Catron would request that Merrill Lynch send securities to a Logan bank he had selected (University's Brief at 95). The bank would then request approval and funds from the University and, upon receiving them, would transmit the money to Merrill Lynch by mail (*id.*). Again, Merrill Lynch received payment only upon receipt of those funds in Salt Lake City.

Nevertheless, the University argues that the bank in Logan (designated by the University) was an agent for Merrill Lynch; therefore, payment was accomplished either upon the University's transfer of funds to its own designated bank or upon its approval for the bank to transmit funds to Merrill Lynch. The University bases this argument on a strained interpretation of the banking rule that,

prior to the time of settlement, a collecting bank is an agent or sub-agent for the owner of an item. Utah Code Ann. §70A-4-201(1) (1968). This provision was not intended to resolve venue questions. Indeed, Official Comment (4) to the Uniform Commercial Code cites several other purposes or results flowing from Section 201(1), including the resolution of any risk of loss disputes.

Furthermore, even if the Logan banks were deemed to be collecting banks rather than payor banks, the Uniform Commercial Code states at §70-8-313(1) (1968) that delivery of a security to a purchaser "occurs when he or a person designated by him acquires possession of a security." Under this provision, it is clear that the delivery to the University occurred when the Logan bank received the securities, since Catron designated the bank as the University's agent. (Merrill Lynch, R. 96 and 98). The University's reliance on §70A-4-201(1) is misplaced since that section states that a bank is the agent of the "owner" and according to §70A-3-313(1) the University became the owner upon delivery of securities to the Logan bank. This is also made clear by §70A-8-313(2), which provides that "[t]he purchaser is the owner of the security held for him by his broker." Accordingly, under the provisions of the UCC, which the University considers controlling (though we believe irrelevant), the Logan bank, as the agent of the "owner", was clearly the agent of the University, not of this defendant.



## POINT II

THE TRIAL COURT LACKED IN PERSONAM JURISDICTION  
OVER BEAR STEARNS, HORNBLOWER AND SUTRO.

The lower court erroneously held that Bear Stearns, Hornblower and Sutro were subject to in personam jurisdiction on the basis of "contacts" with this state which consisted of advertisements in national periodicals and the mailing of securities, confirmation slips, and monthly statements to the University in Logan (Memorandum Decision, Bear Stearns R. 293). In its brief the University further notes that these broker-dealers conversed by telephone with University employees concerning the transactions at issue, and that two of the three broker-dealers had registered as such with the Utah Securities Commission -- Hornblower registered prior to the transactions at issue and Bear Stearns registered subsequent thereto. On the basis of these contacts the University erroneously argues that the broker-dealers are subject to personal jurisdiction in Utah under both the "doing business" and the "significant minimal contacts" tests, Utah Code Ann. §§ 78-27-20 and 78-27-22 (1977).

A. The Broker-Dealers Were Not "Doing Business" in this State nor did they have Significant Minimal Contacts Here to Subject Them to In Personam Jurisdiction.

The broker-dealers are not properly subject to in personam jurisdiction in this State under either test. Under the "doing business" test, the contacts proffered by the University do not satisfy the "solicitation plus" rule, especially since the broker-dealers cannot be deemed to have engaged in the solicitation of

business in this state for a long time and in a continuous, systematic manner. None of the broker-dealers, nor any of their officers, employees or agents, has ever maintained offices, telephones, telephone listings, office equipment, employees, agents, bank accounts, records, or the like in the State of Utah (Sutro, R.39, 41; Bear Stearns, R. 60, 100; Hornblower, R. 36-37, 39, 75). It is clear the broker-dealers were not doing business in Utah; the University, rather, was doing business in California. It voluntarily decided to conduct its stock purchasing business in California rather than in Utah. It opened accounts with agent-brokers in California, maintained its accounts there and authorized the purchase of stocks in those accounts (Hornblower, R. 20, 38; Sutro, R. 36-37, 40, 42, 44; Bear Stearns, R. 51, 151, 61, 261). From California and New York, the University's orders were executed and the securities purchased (Hornblower, R. 74; Sutro, R. 39; Bear Stearns, R. 100).

Nor do the broker-dealers' contacts with the State of Utah constitute the significant minimum contacts required by the long-arm statute. The University has not shown that the broker-dealers engaged in substantial activities within the state beyond the insignificant and incidental contacts mentioned above. The contacts relied upon by the University and the court below do not constitute significant minimum contacts in the State of Utah such that the maintenance of the suit in this State does not offend "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

The University erroneously contends that the case sub judice is somehow squarely controlled by the decision in Piantes v. Hayden-Stone, Inc., 30 Utah 2d 110, 514 P.2d 529 (1973). The court in that case did not state that the telephone calls to Utah from the defendant's offices in California were sufficient contacts for asserting in personam jurisdiction over the defendant. The holding, rather, turned on numerous telephone solicitations into Utah together with at least eight personal solicitations in Utah. In the present case, on the other hand, there were telephone conversations between the University in Utah and the broker-dealers in California, but the broker-dealers did not travel to Utah to solicit the sale or purchase of securities. Rather, Catron traveled to California on several occasions to deal personally with the broker-dealers. The instances of physical presence in Piantes, as in so many other cases, made the quality and nature of the nonresident defendant's contacts much less likely to offend due process considerations than in the present case, where such contacts are lacking.

The University attempts to distinguish the cases relied on by the broker-dealers in their earlier Brief. Nevertheless, the University's distinctions are not persuasive and those cases still support the broker-dealers' contention that they should not be subject to in personam jurisdiction in this State.

B. The Broker-Dealers Did Not Engage in Purposeful Acts Within This Forum Sufficient to Justify This State's Assertion of Personal Jurisdiction.

The University relies on the fact that two of the broker-dealers--Hornblower and Bear Stearns--registered with the Utah Securities

Commission, and, by virtue of that contact, jurisdiction over them is warranted. This fact, however, is not relevant in this context. The provisions of the Utah Uniform Securities Act state that registration with the Commission constitutes irrevocable consent of service in any action which arises under that act. See, e.g., Utah Code Ann. § 61-1-26(6) & (7) (1978).

Such registration does not bring the broker-dealers within the long-arm statute. This is made clear in Koplin v. Saul Lerner Co., 52 Ill. App. 2d 97, 201 N.E.2d 763 (App. Ct. 1964). That case is particularly pertinent because, as the University states in its Brief, the Utah long-arm statute was modeled after the Illinois statute. There, the court held that the state had no personal jurisdiction over nonresident broker-dealers even though they had registered in Illinois. "Registration with the Secretary of State did not bring the defendants within Section 17 [the 'doing business' provision of the Illinois long-arm statute], nor did it vest jurisdiction in Illinois." 201 N.E.2d at 767.

The University also makes the tenuous argument that jurisdiction over the broker-dealers is warranted on the basis of the trade name protection this state affords a person if that person files an application in the office of the secretary of state. There is no evidence presented to the effect that the broker-dealers have purposefully acted to avail themselves of this protection.

C. Notions of Fair Play and Justice Dictate That Personal Jurisdiction in this State Should Not Be Asserted Over the Broker-Dealers.

The University also relies on the extent to which the broker-dealers engage in interstate commerce for support of its contention that litigating in Utah will not result in inconvenience, expense, and prejudice for the broker-dealers. The University's claim is premised on the broker-dealers' registration in numerous states, as well as their advertisements in nationally circulated periodicals. Such activities do not suffice to demonstrate that anyone is engaged in interstate commerce to such an extent that he would not be inconvenienced by defending an action in a foreign state. On the contrary, mere registration and advertising do not demonstrate that a person has even begun to engage in any business whatsoever. See id. (registration merely indicated plans and preparation for doing business in Illinois; advertising merely indicated desire and hope of doing business there). Where the broker-dealers' total contacts with this forum are quite insignificant, and where they have not been shown to be engaged extensively in interstate commerce, it seems patently prejudicial and inconvenient for the broker-dealers to defend an action in the State of Utah.

The University also argues that since public money was involved in the transactions at issue the broker-dealers should be required to defend in Utah. Whether public money is involved is irrelevant to the question of whether due process notions are offended.

The University also relies on the fact that the broker-dealers advertise in national publications, some of which are circulated in Utah. The University found no advertisements by the broker-dealers in Utah media because they do not advertise in Utah. (Bear Stearns,

R. 100). However, national advertising of the kind done by the broker-dealers is no basis for jurisdiction in Utah. The Utah Legislature has recognized that it would be unfair and unreasonable to require foreign broker-dealers to register in Utah simply because they advertise in national publications which reach Utah.

An offer to sell or to buy is not made in this state when the publisher circulates or there is circulated on his behalf in this state any bona fide newspaper or other publication of general, regular, and paid circulation which is not published in this state, or which is published in this state but has had more than two-thirds of its circulation outside this state during the past 12 months . . . .

Utah Code Ann. § 61-1-26(4) (1978).

National advertising therefore not only fails to meet a "doing business" test, but does not even constitute an offer to do business. No person should be subject to personal jurisdiction in a foreign state in which he does no business simply because he advertises in prestigious national business publications to reach markets where he does do business.

The University erroneously asserts that the use of the services of Utah banks "would certainly seem to be doing business in the State of Utah." It is uncontroverted that the University, not the broker-dealers, designated the banks in Logan, Utah to accept stock certificates and to transmit the University's money to the broker-dealers' banks in California and New York. (Hornblower, R. 73 and 74; Sutro, R. 120; Bear Stearns, R. 100). That Utah banks agreed to act for the Univesity should not suffice to establish in personam jurisdiction over the broker-dealers. Indeed, the Idaho Supreme Court in Akichika

v. Kelleher, 96 Idaho 930, 539 P.2d 283 (1975), refused to find the defendant to be "doing business" even though one of defendant's contacts with the forum state consisted of the use of an Idaho bank to transfer title to the truck involved in that controversy. See also Hamilton Brothers, Inc. v. Peterson, 445 F.2d 1334 (5th Cir. 1971) (no personal jurisdiction where defendant's contacts with forum state included deposit of money in a bank in that state).

Finally, to support its argument that sufficient contacts exist, the University asserts that the broker-dealers solicited business from the University, relying on telephone calls in which the brokers recommended that the University purchase or sell particular stocks. In addition, the University relies upon the Sutro-sponsored seminar in California which Catron attended as further evidence of solicitation on the part of Sutro.


The broker-dealers did not solicit business from the University; rather, the University, through Catron, initiated the relationship by opening accounts in California (Sutro, R. 36-37, 40, 42, 43, 44, 45, 123; Hornblower, R. 20, 38; Bear Stearns, R. 151, 261). Subsequent telephone conversations occurred during the course of the University's transaction of business with the broker-dealers in California in which some securities were actually recommended. In Sutro's case, however, it is uncontroverted that it recommended none of the securities purchased by the University (Sutro: Affidavits of Juda, 40; Johnson, 42; and Dyckman, 44).

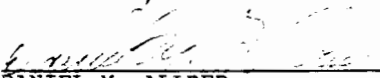
Finally, the University relies on Industrial Commission v. Kemmerer Coal Co., 106 Utah 476, 150 P.2d 373 (1944), for the pro-

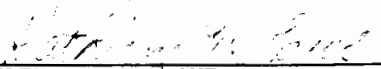
position that "very little more" than solicitation is necessary to constitute "doing business." In that case, however, the defendant maintained an office in Utah with agents in this State, and the defendant made a "regular and continuous attempt to solicit sales of its coal to consumers in Utah through these employees." Id. at 479-80, 150 P.2d at 374-75. Thus, the activity in that case was of longer duration and of a far more continuous, systematic nature than that of these broker-dealers here.

For the foregoing reasons, the lower court's ruling denying these appellants' motions to dismiss for lack of in personam jurisdiction should be reversed.

DATED this 17<sup>th</sup> day of April, 1980.

  
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## APPENDIX A

Cases cited by the University to support its assertion that government may always recover ultra vires payments are treated in this Appendix. As this discussion reveals, those cases are all distinguishable from the circumstances present here. Most significantly, none of them raise issues of estoppel or of express warranties by the public body as is the case in these appeals. In addition, most of them treat instances where the private party was asked to return an outright gratuity or where the private party had committed some clearly wrongful act. None of them supports recovery in the cases at bar, and the broker-dealers also respectfully submit that Utah law (understandably not relied upon by the University on these issues) is by itself controlling and must lead to judgment in their favor.

The University (at 24) cites Miller v. McKinnon, 20 Cal. 2d 83, 124 P.2d 34 (Cal. 1942) as allowing a taxpayer "to recover money already paid a contractor for work done pursuant to a contract which had been let without following bidding procedures." What the University fails to point out, however, is that there were allegations of fraud, conspiracy, and collusion between county officials and the contractor to pad bills and bilk the public treasury for services that were not needed and not performed. Since the appeal to the California Supreme Court was from a judgment for dismissal in favor of the county, the court had to accept those allegations as true. That case, then, illustrates the classic situation in which the ultra

vires doctrine is applied: that is, where corruption is involved. In the instant case, there is neither any evidence nor even a veiled allegation of anything other than good faith on the part of the broker-dealers.

In its brief at 26-27, the University cites State v. Axtell, 393 P.2d 451 (N.M. 1964) for the proposition that "[t]he state could recover monies expended pursuant to a seemingly valid legislative enactment which was later declared unconstitutional." The brief is understandably silent as to the facts of the case. It involved legislation allowing the state of New Mexico to put up money, matched by federal funds, for the purchase of hay and feed grain for ranchers whose animals were endangered by harsh winter weather. The statute was subsequently held unconstitutional as a donation of public funds. Recovery was sought against ranchers who had benefited from a gratuity, and not from those who had provided the services -- the feed sellers. Far from supporting Respondent herein, Axtell suggests that the University's remedy must be against those members of the USU faculty, staff and student body who received the benefits from the early years of the investment program.

At 27-29 of its brief, the University discusses and quotes extensively from Gerzof v. Sweeney, 264 N.Y.S.2d 376 (Ct. App. 1965), 276 N.Y.S.2d 485 (S.Ct. 1966), 286 N.Y.S.2d 392 (S. Ct. 1968), modified at 289 N.Y.S.2d 392, and 239 N.E.2d 521 (Ct. App. 1968). As the University states the facts, "in that case, a contractor installed a generator for the village of Freeport pursuant to a contract held to have been awarded in violation of state

bidding law." (Brief at 28). But, as the court explained, the violation involved "[s]pecifications . . . prepared 'with the active assistance of a representative of the defendant Nordberg' and were 'so slanted as to make impossible a bid . . . by any other manufacturer.'" 239 N.E.2d at 522. As in Miller v. McKinnon, supra, the seller of goods and services was a wrongdoer, entitled to no equitable consideration.

While the University quotes the admonition of the Gerzof court to the effect that under those circumstances the Village might be entitled to retain the generator and the contractor forced to repay all money received, the court's actual holding was:

[T]he patently illegal conduct of the defendants entitles them to little consideration, . . . the amount to be awarded should be less than [the full amount received]. We may adopt this course, in the unusual circumstances of the present case, without disturbing the salutary rationale and policy [of enforcing competitive bidding statutes]. . . . The sheer magnitude of the forfeiture that would be suffered by the defendant Nordberg, as well as the corresponding enrichment that would inure to the Village of Freeport, . . . adds an element to this case not to be found in any of those in which the principles . . . have been applied.

. . . The purposes of our competitive bidding statutes may be fully vindicated here without our rendering so Draconian a decree as to subject the defendant Nordberg to a judgment for over three quarters of a million dollars. Justice demands that even the burdens and penalties resulting from disregard of the law be not so disproportionately heavy as to offend conscience.

239 N.E.2d at 524.

The remedy allowed by the Gerzof court was payment by the defendant of the difference between the price for the expensive equipment that

he wrongfully induced the Village to buy, and the price of less expensive equipment the Village had desired before defendant's machinations began. Gerzof, then, does not mandate recovery in a good faith situation, nor does it even mandate a full recovery from an active wrongdoer.

The other New York cases cited by Respondent as following Gerzof are similarly inapposite. S.T. Grand, Inc. v. City of New York, 32 N.Y.2d 300, 298 N.E.2d 105 (1973) did indeed decree that the recipient of public funds should return every dollar and take nothing for the services it performed. But in that case, the City and company officials had been convicted of bribery. The court observed that there was no "untainted" proof that any work was needed, so it considered forfeiture an appropriate remedy.

In Cupid Diaper Service Corp. v. New York City Health & Hospitals Corp., 86 Misc.2d 116, 381 N.Y.S.2d 996 (Sup. Ct. 1976), the court simply invalidated an oral modification of a written contract, and declared the money received thereunder to be a setoff against claims the company made against the hospital.

In Lance Investigation Service, Inc. v. City of New York, 88 Misc.2d 117, 387 N.Y.S.2d 32 (App. Div. 1976), there was dicta about the right of a governmental agency to recover funds spent pursuant to an invalid contract, but the court held that the contract in question was valid, and granted summary judgment to plaintiff for the value of its services.

As for the federal cases which the University asserts as following Gerzof, Fabrizio & Martin, Inc. v. Board of Education, 290 F. Supp. 945 (S.D.N.Y. 1968), denied a contractor's suit for damages

stemming from an alleged breach of an invalid contract. The court denied the school board's counterclaim for all money paid under the contract, and remanded the case for determination of damages consistent with Gerzof, which, it is again pointed out, does not mean a forfeiture of all money received for services actually rendered. Board of Education v. Aetna Casualty & Surety Co., 453 F.2d 264 (2d Cir. 1971), was a related action against a surety in the same case.

At 30-32 of its brief the University cites, without explanation, 28 cases which it claims "hold that a public body may recover payments made ultra vires." A review of the facts of each of those cases indicates that Respondent's statement of the law is badly misleading. This brief will conform to the numbering system used by the University.

1. J.W. Bateson Co. v. United States, 308 F.2d 510 (5th Cir. 1962) -- Here, a contractor, through various artifices, managed to sell the same item to the government twice, each time at a profit. The action was to force disgorgement of the second profit made. As the court said, "This case boils down to unjust enrichment." Id. at 514. The recovery involved was for services not performed, a situation which does not exist in the present case.

2. Stone v. United States, 286 F.2d 56 (8th Cir. 1961) -- In this case, the United States recovered payments made to a wood grower who was erroneously certified as eligible to participate in a federal support program. The recipient of the payments had done nothing to earn the money.

3. State v. Fourth National Bank of Columbus, Ga., 117 So. 2d

145 (Ala. 1959) -- This was an action to recover payments made to road contractors pursuant to a contract let in violation of the competitive bidding statutes. The court mentioned in dicta that the contractors could not enforce such an agreement, but it sustained a demurrer denying any recovery of funds.

4. Reliance Insurance Co. V. Alaska State Housing Authority, 323 F. Supp. 1370 (D. Alas. 1971) -- The state recovered progress payments erroneously made to a bank instead of to the surety, which had assumed responsibility for work begun by an insolvent contractor. Again, this case stands for the proposition that a public entity may recover funds mistakenly paid to one who has not performed any service.

5. Mackey v. McDonald, 504 S.W.2d 726 (Ark. 1974) -- This case was a dispute over the earmarking of federal revenue-sharing funds for a court's "contingency" account. No services were involved. The appropriation was sustained.

6. Mayes Printing Co. v. Flowers, 154 So.2d 859 (Fla. Dist. Ct. App. 1963) -- A contractor who installed a counter in a courthouse in contravention of competitive bidding statutes was required to return the purchase price. He was allowed to remove the counter.

7. Polk County v. Lincoln National Life Insurance Co., 262 F.2d 486 (5th Cir. 1959) -- After paying life, health and accident insurance premiums for its employees for several years, the county became aware that such payments were apparently illegal under provisions of the Georgia Constitution prohibiting employee benefits in excess of the statutorily prescribed salary. The county did not seek a full recovery of all premiums paid, but asked that it receive the

difference between the premiums it paid and the amount the insurance company paid out in benefits to county employees. The amount involved was some \$14,000. The Circuit Court, strictly applying what it believed to be Georgia law, allowed that recovery of money received minus money paid out. That decision provoked an outraged dissent from Chief Justice Hutcheson. While conceding that his two fellow judges had decided the case according to their interpretation of Georgia law, he remarked:

If, on the other hand, the majority . . . had held that the correct way to decide it as a case of first impression was to deny liability and permit the county to avoid payment for the insurance, the benefits of which it had received, thus welshing on its agreement, I should content myself with saying that the decision was neither morally nor legally right, and, in support, should point to the uniform course of authority to the contrary . . . .

Id. at 492. It is submitted that Judge Hutcheson's summary of the issues is equally applicable to this case.

8. State v. McCarty, 279 P.2d 879 (Idaho 1955) -- The state recovered retirement benefit overpayments mistakenly made to judges under a misinterpretation of a statutory amendment. The excess was, at best, a gratuity to which the judges were not entitled, and for which they had rendered no additional service.

9. National Fire Insurance Co. v. Butler, 152 N.W.2d 271 (Iowa 1967) -- This case involved private parties, and is completely inapposite.

10. State v. Rucker, 126 A.2d 846 (Md. 1956) -- In this case, a discharged employee had been reinstated and awarded back pay. The employer deducted the amount of unemployment compensation received



during the wrongful layoff from the back pay award. The state successfully reclaimed the amount of the unemployment compensation, because its retention would have unjustly enriched the employer.

11. Dunne v. City of Fall River, 104 N.E.2d 157 (Mass. 1952) -- This was an ultra vires contract under which the city agreed to pay a promoter for inducing businesses to locate in that city. The city sought to recover funds paid prematurely, when businesses had promised to move to the area and subsequently failed to do so. Despite the ultra vires nature of the contract, the city neither sought nor received the return of any funds for any services that were actually performed.

12. City of Saint Paul v. Dual Parking Meter Co., 39 N.W.2d 174 (Minn. 1949) -- This was a competitive bidding statute violation involving the installation of parking meters, in which the city and installers operated in defiance of an injunction. The court specifically found that the parties were not acting in good faith, but it still forced the city to return a certain amount of money to the contractor. The University cites dicta in a dissent.

13. J.S. Love Co. v. Town of Carthage, 65 So.2d 568 (Miss. 1953) -- In this case, the governmental entity illegally contracted with an agent to handle legal and technical problems involving the sale of bonds to finance a natural gas transmission system. It sought a recovery of the commission paid the agent, minus the agent's expenses, and received that award. While this case is somewhat favorable to the University, there is an important factual difference in that the agent solicited and initiated the contract with the town, whereas here, Utah State solicited and initiated the business.



14. County of St. Francis v. Brookshire, 302 S.W.2d 1 (Mo. 1957) -- An attorney was forced to return money paid him by a county to defend several county employees in their individual capacity on the basis that the individuals, not the entity, had the responsibility of making such payment. "[T]here were no services performed by defendant for the county." Id. at 5.

15. City-Wide Asphalt Co. v. City of Independence, 546 S.W.2d 493 (Mo.Ct. App. 1976) -- The court resolved this construction dispute by finding that there was no valid contract. The company took nothing from the city, and vice versa.

16. Fulk v. School District, 53 N.W.2d 56 (Neb. 1952) -- A school district, in an action later determined to be ultra vires, purchased a home for its superintendent of schools. The court ordered rescission of the conveyance, with the vendor returning the purchase price and the school district returning the property. However, the court considered the possibility that the property might have declined in value during the years it was held by the school district. To account for that possibility, it allowed the original vendor, at his option, to keep the money and force a sale of the property, with the proceeds from the sale to be turned over to the school district. The court held that if the sale generated insufficient money to compensate the school district for those funds wrongfully expended, the trustees would pay the difference. Court costs and interest on the money were also taxed to the trustees, as was the cost of any sale of the property. Appellants submit that this was an equitable and sensible approach to situations where restoration of the status quo would not be possible due to the decline in

value of the things wrongfully purchased from the good-faith supplier.

17. Consentino v. Carver-Greenfield Corp., 433 F.2d 1274 (8th Cir. 1970) -- This case involved the right of a citizen to bring a derivative antitrust action on behalf of the city. The court observed in dicta that a citizen may have standing to bring an action to recover tax funds spent illegally, but could not bring a derivative antitrust action.

18. Opinion of the Justices, 175 A.2d 396 (N.H. 1961) -- A state which had wrongfully overpaid mileage allowances to its legislators was allowed to recover the excess. The justices suggested that they would more readily allow a recovery of this sort against public officials than against private individuals or corporations.

19. Thornton v. Village of Ridgewood, 111 A.2d 899 (N.J. 1955) -- A city's contract to buy a building was challenged as ultra vires on the basis that the city's plans for the structure would violate zoning ordinances. While the court in dicta mentioned rules concerning void contracts, it held that this one was valid because a municipality could change its own zoning ordinances.

20. Shebell v. Strelechi, 249 A.2d 10 (N.J. Super. Ct. App. Div. 1969) -- The state recovered money it had paid to the victim of an accident involving an uninsured motorist when the recipient of the funds subsequently was compensated by his employer.

21. Rider v. Lenoir County, 78 S.E.2d 745 (N.C. 1953) -- This case did not involve the recovery of public funds in any way. Plaintiff had enjoined a construction project during a period of falling costs and the contract was subsequently relet at a substantially

lower price. He sought attorneys' fees for having saved the taxpayers the difference. He did not get them.

22. Horner v. Chamber of Commerce, 72 S.E.2d 21 (N.C. 1952) -- Plaintiff was awarded attorneys' fees for bringing an action that forced the Chamber of Commerce to return money wrongfully paid to it by the city. The return was ordered because the Chamber performed no services for the appropriation.

23. Town of Bennettsville v. Bledsoe, 84 S.E.2d 554 (S.C. 1954) -- The defendant contractor acknowledged that he had been overpaid on a job. The town recovered the excess.

24. Hauck v. Bull, 110 N.W.2d 506 (S.D. 1961) -- The South Dakota Supreme Court reversed a motion for judgment on the pleadings in favor of a contractor, and held only that a taxpayer had standing to bring a claim that public money had been illegally expended on the contract. The case did not reach the merits of the issue.

25. Carlson v. City of Faith, 67 N.W.2d 149 (S.D. 1954) -- Several city councilmen were required to return money they had been paid for goods and services sold to the city in contravention of a statute making it a misdemeanor for any city official to deal with the city in any way. The case held that forfeiture of all money received was an appropriate remedy to a criminal transaction.

26. Crass v. Walls, 259 S.W.2d 670 (Tenn. Ct. App. 1953) -- Here, a small town illegally contracted with a garbage disposal service owned by the mayor and his brother. As in the previous case, this specifically violated state law. The city recovered the one-half of the money paid to the mayor, but his brother, who was innocent of any wrongdoing, was allowed to keep his half.

27. State v. Continental Baking Co., 431 P.2d 993 (Wash. 1967) . This case is precisely the same as State v. Rucker, supra. The state recovered unemployment compensation payments from an employer.

28. Leuch v. Egelhoff, 38 N.W.2d 1 (Wis. 1949) -- Here, a summary judgment for the defendant was reversed, and the plaintiff taxpayer was granted standing to sue. The merits of the case were not addressed.

Appellants regret the need for the foregoing lengthy exposition of the University's authorities. However, Appellants cannot allow such gossamer to be elevated into "well-settled" law. As the University's authorities indicate, a total forfeiture such as the University seeks in this case had never been ordered absent criminal activity, proved or presumed. Furthermore, even partial forfeitures have been extremely rare.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Reply Brief of Appellants was hand delivered this 11<sup>th</sup> day of April, 1980 to each of the following:

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This is to also certify that a copy of the foregoing Reply Brief of Appelants was mailed this 10<sup>th</sup> day of April, 1980 to each of the following:

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