

1980

Robert B. Hansen, Attorney General v. Utah State Retirement Board, Et al. : Respondent University Medical Center Trust Fund, First Security Bank of Utah, Trustee : Brief of Respondent University of Utah

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

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 B. HANSEN, THOMAS C. ANDERSON, WILLIAM T. EVANS; Attorneys for Respondents; ROBERT B. HANSEN, WILLIAM GIBBS, BERNARD M. TANNER; Attorneys for Appellant

Recommended Citation

Brief of Respondent, *Hansen v. Utah State Retirement Board*, No. 16851 (Utah Supreme Court, 1980).
https://digitalcommons.law.byu.edu/uofu_sc2/2092

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
OF THE STATE OF UTAH

ROBERT B. HANSEN,
Attorney General,

Plaintiff-
Appellant,

vs.

UTAH STATE RETIRE-
MENT BOARD, et al,

Defendants-
Respondents.

:
:
:
:
:
:
:

Case Nos. 16851
16714
16560

BRIEF OF RESPONDENT
UNIVERSITY OF UTAH

Appeal from the Decisions of the Third Judicial
District Court for Salt Lake County, State of Utah
The Honorable Christine M. Durham, and
The Honorable Homer F. Wilkinson

ROBERT B. HANSEN
Attorney General
THOMAS C. ANDERSON
WILLIAM T. EVANS
Assistant Attorneys General
25 South Wolcott
Salt Lake City, Utah 84102
Attorneys for Respondent,
University of Utah

ROBERT B. HANSEN
Attorney General
WILLIAM GIBBS
BERNARD M. TANNER
Assistant Attorneys General
236 State Capitol
Salt Lake City, Utah 84114
Attorneys for Appellant,
Robert B. Hansen

FILED

JUL 14 1980

IN THE SUPREME COURT
OF THE STATE OF UTAH

ROBERT B. HANSEN,
Attorney General,

Plaintiff-
Appellant,

vs.

UTAH STATE RETIRE-
MENT BOARD, et al,

Defendants-
Respondents.

:
:
:
:
:
:
:

Case Nos. 16851
16714
16560

BRIEF OF RESPONDENT
UNIVERSITY OF UTAH

Appeal from the Decisions of the Third Judicial
District Court for Salt Lake County, State of Utah
The Honorable Christine M. Durham, and
The Honorable Homer F. Wilkinson

ROBERT B. HANSEN
Attorney General
THOMAS C. ANDERSON
WILLIAM T. EVANS
Assistant Attorneys General
25 South Wolcott
Salt Lake City, Utah 84102
Attorneys for Respondent,
University of Utah

ROBERT B. HANSEN
Attorney General
WILLIAM GIBBS
BERNARD M. TANNER
Assistant Attorneys General
236 State Capitol
Salt Lake City, Utah 84114
Attorneys for Appellant,
Robert B. Hansen

TABLE OF CONTENTS

STATEMENT OF NATURE OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
FACTS	2
ARGUMENT	
POINT I THE DISTRICT COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT BECAUSE THE SELECTION OF A LEGAL ADVISER TO AN INDEPENDENT TRUST DOES NOT VIOLATE THE CONSTITUTIONAL AUTHORITY OF THE ATTORNEY GENERAL	3
POINT II THE DISTRICT COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT BECAUSE THE SELECTION OF A LEGAL ADVISER TO AN INDEPENDENT TRUST IS SPECIFICALLY AUTHORIZED BY STATUTE AND DOES NOT VIOLATE THE STATUTORY AUTHORITY OF THE ATTORNEY GENERAL	6
POINT III THE DISTRICT JUDGE WAS CORRECT IN GRANTING SUMMARY JUDGMENT BECAUSE UNDER THE TRUST AGREEMENT THE UNIVERSITY DOES NOT HIRE LEGAL COUNSEL IN VIOLATION OF SECTION 67-5-5	8
CONCLUSION	9

CASES CITED

<u>Hansen v. Barlow</u> , 23 Utah 2d 27, 456 P.2d 177 (1969)	5
<u>Hansen v. Legal Services Comm.</u> , 19 Utah 2d 231, 429 P.2d 979 (1967)	4

CONSTITUTIONAL PROVISIONS CITED

Utah Constitution, Article VII, Section 18	2, 3
Utah Constitution, Article XXIV, Section 12	4

STATUTES CITED

Utah Code Ann., Section 53-31-1 <u>et seq.</u> (1953 as amended)	2
Utah Code Ann., Section 53-31-46 (Repl. 1970)	2
Utah Code Ann., Section 63-30-28 (Repl. 1978)	7
Utah Code Ann., Section 63-30-28 (as amended 1979)	7, 8
Utah Code Ann., Section 67-5-1 et seq. (Repl. 1978)	6
Utah Code Ann., Section 67-5-3 (Repl. 1978)	2
Utah Code Ann., Section 67-5-5 (Repl. 1978)	6, 8

IN THE SUPREME COURT
OF THE STATE OF UTAH

ROBERT B. HANSEN,
Attorney General,

Plaintiff-
Appellant,

vs.

UTAH STATE RETIRE-
MENT BOARD, et al,

Defendants-
Respondents.

:
:
:
:
:
:
:

Case Nos. 16851
16714
16560

BRIEF OF RESPONDENT
UNIVERSITY OF UTAH

STATEMENT OF NATURE OF CASE

This is a lawsuit filed by the Attorney General of the State of Utah against various state agencies and First Security Bank as Trustee for the University of Utah Medical Center Trust Fund, claiming that each of these entities has retained legal counsel and that such action improperly usurps the constitutional and statutory duties and functions of the Attorney General.

DISPOSITION IN LOWER COURT

On four different occasions, two trial court judges (Judge Christine Durham and Judge Homer F. Wilkinson) granted summary judgments to the defendants. Plaintiff appeals from these four orders. The appeals have been consolidated.

RELIEF SOUGHT ON APPEAL

The University of Utah seeks affirmance of Judge Christine Durham's Order of June 5, 1979 granting summary judgment in favor of the University of Utah.

FACTS

The following facts appear undisputed in the record and were the basis for Judge Durham's decision (R. 69-70) granting summary judgment in favor of the University of Utah holding, in effect, that the trust fund mechanism established to insure against malpractice liability did not violate the Utah Constitution, Article VII, Section 18, nor Utah Code Ann. Sections 67-5-3,5 (1953 as amended).

The University of Utah (hereafter "University") is a body politic and corporate and a state institution of higher education (Utah Code Ann. Section 53-31-1 et seq., 1953 as amended). It operates the University of Utah Hospital at the University of Utah Medical Center as authorized by statute (Section 53-31-46 et seq.) [All statutory references are to the Utah Code.] The Medical Center provides some educational services to the University of Utah and to that extent receives some state funding, but it is primarily funded through receipts from patient care and federal sources (primarily Medicare).

On July 21, 1977, the University entered into an agreement with First Security Bank of Utah, N.A. as Trustee (hereafter

"Trustee"), for the administration of a trust for the purpose of insuring against malpractice claims (R. 231). The trust document allows the Trustee to employ legal counsel to effectuate the purposes of the trust. The trust is a self-insurance mechanism designed to avoid the excessive premium costs of commercial malpractice insurance and was contemplated to effect an ultimate cost savings to the University. The trust is funded solely through patient care revenues based on independent actuarial evaluation. Because of the involvement of federal funds through several federal assistance programs, the trust was established pursuant to federal regulations (R. 237). Pursuant to those regulations, Section 2162.7 (A) (2), the Trustee "must have legal title to the fund" and "cannot be related to the provider either through ownership or control". Therefore, under the trust arrangement the University does not, and cannot, hire or pay for legal counsel. Furthermore, no state funds are appropriated to the trust (R. 244).

ARGUMENT

POINT I

THE DISTRICT COURT WAS CORRECT IN GRANTING
SUMMARY JUDGMENT BECAUSE THE SELECTION
OF A LEGAL ADVISER TO AN INDEPENDENT TRUST
DOES NOT VIOLATE THE CONSTITUTIONAL
AUTHORITY OF THE ATTORNEY GENERAL

The Utah State Constitution, Article VII, Section 18,
provides that:

The Attorney General shall be the legal adviser of the state officers, and shall perform such other duties as may be provided by law.

(emphasis added)

Appellant maintains that the appointment of an attorney by an independent trustee, to defend an independent trust (to which no state funds are appropriated) as a malpractice insurance machanism for a state agency somehow violates this provision. However, the term "state officers" refers to those officers listed in Article XXIV, Section 12, (governor, secretary of state, state auditor, state treasurer, attorney general, superintendent of public instruction, members of the Senate and House of Representatives, Supreme Court and District Court judges, representatives to Congress). This is the holding of Hansen v. Legal Services Comm., 19 Utah 2d 231, 429 P.2d 979 (1967), in which this Court held unconstitutional an act appointing a legal adviser for the Legislature.

Thus, it is only the legal representation of these specific individual state officers that is required of the Attorney General by the constitution. Other duties of the Attorney General, such as representing state agencies, falls under the constitutional category of "such other duties as may be provided by law". These other duties are not mandated by the constitution but are provided for by the Legislature in statutes or may be implied by

the "common law", Hansen v. Barlow, 23 Utah 2d 27, 456 P.2d 177 (1969). It was held in that case that the Attorney General of Utah, by inherent common law authority, has standing to bring a declaratory judgment action to challenge the constitutionality of a statute (the very authority the Attorney General has exercised in this case to bring the present action). It is clear from that case and the authorities cited therein that any such common law authority is subject to express legislation to the contrary. Appellant has cited no authority for any "common law" power of the Attorney General to be the sole legal adviser to all agencies of the state or entities associated with the state. But of greater significance is the fact that there is express statutory authority for the hiring of legal counsel by an independent trustee as part of a malpractice insurance mechanism similar to commercial insurance to protect a state agency. (See Point II, infra.)

Neither the University of Utah, nor the University of Utah Hospital, nor the University of Utah Medical Center, nor the trust fund nor the independent trustee are "state officers" as that term is used in Article VII, Section 18 of the Utah Constitution. The right or duty to represent these entities, if any, would arise from statute. Under these circumstances the selection of trust fund counsel from outside the Attorney

General's Office does not violate any of the Attorney General's constitutional powers and duties and the District Court was correct in granting summary judgment in favor of the University of Utah.

POINT II

THE DISTRICT COURT WAS CORRECT
IN GRANTING SUMMARY JUDGMENT
BECAUSE THE SELECTION OF A LEGAL ADVISER
TO AN INDEPENDENT TRUST IS SPECIFICALLY
AUTHORIZED BY STATUTE AND DOES NOT
VIOLATE THE STATUTORY
AUTHORITY OF THE ATTORNEY GENERAL

The Legislature has made it clear that in addition to his constitutional duties as legal adviser to "state officers" the Attorney General also has considerable authority to represent "the state" generally, Section 67-5-1 et seq.

Specifically, Section 67-5-5 provides in part:

Except where specifically authorized by the Utah Constitution, or statutes, no agency shall hire legal counsel, and the Attorney General alone shall have the sole right to hire legal counsel for each such agency. . . .

(emphasis added)

Appellant maintains the the selection of trust fund counsel by the independent Trustee violates this provision. However, by its own terms, this statute recognizes statutory exceptions to the general rule that the Attorney General is the legal counsel to state agencies. Assuming, arguendo, that the University of

Utah under the present circumstances has "hired counsel" or assuming, arguendo, that the independent trustee is a "state agency" or "quasi-state agency", there is nevertheless a specific statutory exception to this general rule. That exception is found in Section 63-30-28 within the Governmental Immunity Act. This provision originally provided, in relevant part:

Any governmental entity within the state may purchase insurance or self insure against any risk created by this act.

This Section was amended by the 1979 Legislature in Senate Bill 172 to clarify the Legislative intent and specifically authorize the creation of such a trust as that created by the University, including the employment of counsel by the trust. These amendments were effective on May 8, 1979 and provide as follows:

Any governmental entity within the state may purchase commercial insurance or self insure against any risk created by this act or by Section 63-48-1 through 63-48-7.

A governmental entity supported in whole or in part from federal sources may self insure with respect to specified classes of claims, in accordance with applicable federal regulations, by establishing a trust account under the management of an independent private trustee having authority with respect to claims of that character to expend both principal and earnings of the trust account to pay the costs of investigation, discovery and other pretrial and litigation expenses including attorney's fees, and to pay all sums for which the governmental entity may be adjudged liable or for

which a compromise settlement may be agreed upon. Notwithstanding any law to the contrary, the trust agreement between the governmental entity and the trustee may authorize the trustee to employ counsel to defend actions against the entity and its employees and to protect and safeguard the assets of the trust, to provide for claims, investigations, and adjustment services, to employ expert witnesses and consultants, and to provide such other services and functions necessary and proper to carry out the purposes of the trust.

(emphasis added)

Therefore, even assuming, arguendo, that the University of Utah "hires" counsel or is "represented by" counsel under the trust arrangement, or that the trust fund is a "state agency", any such relationship is "specifically authorized" by statute, Section 63-30-28. Therefore, there is no violation of the Attorney General's statutory authority and the District Court was correct in so holding.

POINT III

THE DISTRICT COURT WAS CORRECT IN
GRANTING SUMMARY JUDGMENT BECAUSE
UNDER THE TRUST AGREEMENT
THE UNIVERSITY DOES NOT HIRE
LEGAL COUNSEL IN VIOLATION OF 67-5-5

As already noted, supra, Section 67-5-5 prohibits an agency of state government from hiring or being represented by counsel other than through the Attorney General's Office, except as specifically authorized by statute. However, it is not the

University, but the independent Trustee, that hires and pays for legal counsel in the same general manner that counsel is hired and provided through commercial insurance carriers to agencies of state agovernment. It has been a common practice for years for state agencies to be defended by counsel retained by insurance companies. In compliance with the federal regulations under which the trust is established, the independent trustee hires and provides legal counsel and not the University. Under these circumstances, even the Attorney General, as the general legal counsel for the state, could not exercise authority over the trust without violating the federal regulations. Therefore, there is no violation of the constitution or statutes of the State of Utah in this arrangement.

CONCLUSION

The University does not hire legal counsel under the trust fund agreement. Such counsel is hired by an independent Trustee, an pursuant to federal regulations no control can be exercised over that Trustee by the University or, for that matter, by the Attorney General. Such an arrangement is specifically authorized by statute and is not in conflict and does not violate the statutes or the Constitution of the State of Utah. The District Court was correct in so ruling.

Respectfully submitted this _____ day of July,
1980.

ROBERT B. HANSEN
Attorney General
MICHAEL L. DEAMER
Deputy Attorney General
WILLIAM T. EVANS
Assistant Attorney General

Attorneys for Respondents,
University of Utah

Two copies of the foregoing Brief were mailed first class
United States mail this 14th day of July, 1980 to:

Bernard M. Tanner
Attorney for Robert B. Hansen
236 State Capitol Building
Salt Lake City, Utah 84114

Mark A. Madsen
Attorney for Utah State Retirement Board
540 East 200 South
Salt Lake City, Utah 84102

Robert Moore
Attorney for Utah State Insurance Fund
10 Broadway Building, #400
Salt Lake City, Utah 84101

Frank V. Nelson
Attorney for Industrial Commission of Utah
236 State Capitol Building
Salt Lake City, Utah 84114

Merlin Lybbert
Attorney for University of Utah
Medical Center Trust Fund
701 Continental Bank Building
Salt Lake City, Utah 84101