

1969

Golden R. Allen, Et Al. and Herbert Smart v. Glen Swenson : Brief of Defendant and Appellant

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

GOLDEN R. ALLEN, et al. and HERBERT SMART,
Plaintiffs and Respondents,

vs.

GLEN SWENSON,
Defendant and Appellant.

Case No.

11896

BRIEF OF DEFENDANT AND APPELLANT

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STATEMENT OF NATURE OF CASE

This is an action for declaratory judgment (Title 78, Chapter 33, Utah Code Annotated 1953) declaring that Chapter 263, Laws of Utah 1969 is unconstitutional and void in allowing the legislature to transfer \$8,100,200 from the State Insurance Fund to the General Fund and appropriating said amount to the State Building Board in that it constitutes a taking of property without due process of law.

DISPOSITION IN LOWER COURT

The District Court concluded that Chapter 263, Laws of Utah 1969, is unconstitutional and void, violating the 14th Amendment of the United States Constitution and Art. I § 7 of the Utah Constitution.

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of the judgment and a declaration that Chapter 263, Laws of Utah 1969, is constitutional and binding upon the plaintiffs.

STATEMENT OF FACTS

On March 13, 1969, the Thirty-Eighth Legislature of the State of Utah passed S. B. 193 (Chapter 263, Laws of Utah 1969), which provides:

“Be it enacted by the Legislature of the State of Utah:

“Section 1. Notwithstanding the provisions of section 35-3-14, Utah Code Annotated 1953, or any other provision of law relating to the investment of moneys in the state insurance fund, a transfer from the state insurance to the general fund in the amount of \$8,100,200 is hereby authorized and the state treasurer is directed to deposit this sum in the general fund. Said \$8,100,200 is appropriated to the Utah state building board for carrying out such programs of acquisition, construction, alteration and repair of state grounds, buildings and facilities, as may be authorized by the legislature, in its 1969 appropriations act. Provided, however, that the Utah state building board shall not expend any part of the sum hereby appropriated until the constitutionality of the transfer provided for in this act has been determined by the Supreme Court of the State of Utah.”

The plaintiffs brought this action to have this enactment declared void and unconstitutional under the 14th Amendment of the United States Constitution and Art. I § 7 of the Utah Constitution and to be relieved of their re-

responsibilities of compliance therewith. Golden R. Allen is the State Treasurer who, under the Utah Code, is the custodian of the State Insurance Fund (Section 35-3-7) and Herbert F. Smart is the Director of Finance, who has the responsibility of administering the Fund (Section 35-3-1), and Glen R. Swenson is Director of the State Building Board.

The State Insurance Fund was created by the Utah State Legislature in 1917, when the Workmen's Compensation Act was passed (R. 5). At that time the State contributed \$40,000, which was later paid back, to implement the Fund (R. 5). The source of the Fund is money paid by contributing employers (R. 7), but they have no voice in the management of the Fund (R. 14). The State contributes as an employer to the Fund (R. 7).

Administrative expenses of the Fund are paid out of the Fund (R. 14), but the Fund must submit a budget to the legislature and work under state agency rules and restrictions (R. 15, 24). The legislature makes appropriations from the Fund for said expenses, and any unused appropriations lapse in the General Fund of the State of Utah (R. 16, 25).

The balance of the State Insurance Fund is approximately \$17,000,000, but little or none of this is in liquid cash (R. 6). Claims and administrative expenses average \$10,000 — \$17,000 per day (R. 6). State Insurance Fund premiums are approximately 30% lower than those of private insurers (R. 9, 19), yet the Fund's net income in fiscal year 1968 was approximately \$537,000 after dividends (R.

21). Though the State Insurance Fund pays insurance premium tax, it pays no income tax (R. 22).

On the basis of these facts, the District Court found that the State Insurance Fund was privately owned and the appropriations from the Fund authorized by Chapter 263 of the Laws of Utah 1969 violated the Due Process clause of the 14th Amendment of the U. S. Constitution and Art. I § 7 of the Utah Constitution. This decision was based on the case of *Chez v. Industrial Commission*, 90 Utah 447, 62 P. 2d 549 (1936), where the Fund was declared to be a private fund under public administration.

ARGUMENT

POINT I.

THE MONEYS IN THE STATE INSURANCE FUND SHOULD BE SUBJECT TO APPROPRIATION BY THE LEGISLATURE AS PUBLIC MONEYS BECAUSE THE STATE INSURANCE FUND, BY ITS VERY NATURE, IS A PUBLIC FUND.

- (a) Complete control and administration of the Fund rests in public officials.

At the outset it must be admitted that if the State Insurance Fund belongs to the contributing employers, a transfer therefrom by the Legislature would be a taking of property without due process of law as prohibited by the 14th Amendment of the United States Constitution and Art. I, Sec. 7 of the Utah Constitution. However, it must also be acknowledged that if the Fund is a public fund the

Legislature can lawfully transfer any surplus to the State Building Board. The Legislature has plenary control over all state funds and nothing in the Constitution prohibits the transferring of funds from one department to another for public purposes (*Kimball v. Grantsville City*, 19 Utah 368, 57 P. 1 (1899)).

The appellant is aware of no case ruling directly on the question of a transfer of money from a State Insurance Fund to another public use. The Utah case of *Chez v. Industrial Commission*, 90 Utah 447, 62 P. 2d 549 (1936), on which the District Court based its decision, seems to be the most applicable to the present controversy. In that case the court, in a 3-2 decision, determined the status of the State Insurance Fund in considering whether or not it was a state owned fund whose directors were prohibited from "releasing indebtedness, liability or obligation of any corporation or person to the state . . ." as prohibited by Art. VI, Sec. 27 of Utah Constitution. The Court held that the State Insurance Fund was not public money, but only publicly administered. It is appellant's contention that as S. B. 193 calls for a re-examination of the State Insurance Fund status, the ruling in the closely decided *Chez* case, supra, should also be re-examined and brought in harmony with the practical realities which exist with respect to the State Insurance Fund.

The Fund is completely controlled by officers of the State of Utah. The entire management of the fund is given to the State Commission of Finance. It has full authority to do "all things . . . as fully and completely as the govern-

ing body of a private insurance carrier." (Section 35-3-3). The Commission of Finance appoints officers and employees, "with the approval of the governor." (Section 35-3-1). The Commission fixes rates (Section 35-3-4) and establishes its own rules and regulations pertaining to the Fund (Section 35-3-11) and may sue in its name "but may be sued only in matters pertaining to the administration of the State Insurance Fund." (Section 35-2-23). The State Treasurer is the ". . . custodian of any and all moneys in the State Insurance Fund, which moneys shall be invested by the division of investments in accordance with this act." (Section 35-3-13, Supp. 1969). The Attorney General or any District or County Attorney shall act as legal counsel to the Commission of Finance in connection with the State Insurance Fund. (Section 35-3-20). The State Auditor audits the Fund (Section 35-3-2), and for any award from the Fund the Industrial Commission must give its approval. (Section 35-3-5).

The Legislature also has great control over the Fund. In addition to the general power to control investments made by the State Treasurer of the funds pursuant to the act (Section 35-3-13, Supp. 1969), the Legislature can make specific use of the Fund, as illustrated by the \$3,000,000 required to be invested in student loans pursuant to Chapter 152, Laws of Utah 1969. (Section 53-47-1). A budget of administrative expenses of the Fund must be submitted by the Commission to the Governor for inclusion in his budget to the Legislature which in turn appropriates the required amount. "The administrative expenses required

in administering this act shall be provided for by legislative appropriation from the resources of the State Insurance Fund." (Section 35-3-1, Supp. 1967). Any of this appropriation which remains unused does in fact lapse into the General Fund of the State of Utah (R. 16, 25).

In the face of this high degree of state control, it must be remembered that contributing employers have no voice in the administration of the State Insurance Fund (R. 14). The obvious result is certainly not a private fund, but a public fund under the control of public officers for the public benefit.

- (b) The State Insurance Fund was created by a special act of the Legislature and as an arm of the State government enjoys benefits and advantages not available to private insurers.

Another reason for denying the private nature of the State Insurance Fund is that the Fund has no legal existence independent of the State and the Industrial Commission. Such was the holding in *Ban and Kariya Co. v. Industrial Commission*, 67 Utah 301, 247 P. 290 (1926). The Fund was found to be not a proper party to a law suit because it was really only an arm or department of the machinery set up by the Workman's Compensation Act, and not an independent legal entity. The reason for such a holding is explained in Justice Moffat's dissenting opinion in the *Chez* case, *supra*, in which he said:

"Section 1, art. 12, of the Utah Constitution provides:

“Corporations may be formed under general laws, but shall not be created by special acts . . .

* * *

“The State Insurance Fund, under the limitations imposed by the above provision, could not, by the Legislature, be created or made a private corporation. Nor could the Legislature make the Industrial Commission a private corporation. Both the State Insurance Fund and the State Industrial Commission were created by special acts of the Legislature, and whatever status either of them may occupy in the administrative economy of the state, it must be that of an arm of the state and function as such. Neither the Industrial Commission or the State Insurance Fund can be municipal corporation. Section 5, art. 11, of our Constitution provides, among other things, that ‘Corporations for municipal purposes shall not be created by special laws.’”

The result of the State Insurance Fund being an arm of the State is that certain advantages flow to it that are not available to private insurance carriers. In *Taslich v. Industrial Commission*, 71 Utah 33, 262 P. 281 (1927) the court held that there could be no waiver of an objection that an application was made too late by officials who administered the Fund because it was a public fund and such a waiver would result in injustice and favoritism against the public good. This is a valuable procedural advantage not available to private carriers.

The State Insurance Fund, though it pays a modest insurance premium tax, does not pay income taxes (R. 22), and the income of the State Insurance Fund, for example in fiscal year 1968, was in excess of \$500,000, even after

dividends had been paid to contributing employers (R. 21). This accounts in part, at least, for the fact that the premiums charged by the State Insurance Fund can remain about 30% lower than those of private insurance carriers (R. 9, 19).

The clear implication is that the State Insurance Fund is a public fund not only as created and controlled by public officials, but in its enjoyment of the benefits of such status.

CONCLUSION

In view of the true nature of the State Insurance Fund it should be clear that the Fund is public in nature, and the case of *Chez v. Industrial Commission*, 90 Utah 447, 62 P. 2d 549 (1936) should be re-examined, and Chapter 263, Laws of Utah 1969 should be declared constitutional, valid and binding upon all parties.

Respectfully submitted,

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