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

In The Supreme Court of the State of Utah

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

-v-

GLEN R. SWENSON,
Defendant and Appellant.

Case No.

BRIEF OF RESPONDE

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In The Supreme Court of the State of Utah

GOLDEN R. ALLEN, et al,
and HERBERT SMART,
Plaintiffs and Respondents,
-v-
GLEN R. SWENSON,
Defendant and Appellant.

Case No. 187703

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

This is an action pursuant to Sections 78-33-1, 2, U.C.A. 1953, as amended, for declaratory judgment declaring Chapter 263, Laws of Utah 1969, unconstitutional. Said Chapter 263, Laws of Utah 1969 is void and cannot require the transfer of $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 within the meaning of the United States Constitution, Amendment 14 and Utah Constitution, Article 1, Section 7.

DISPOSITION IN THE LOWER COURT

The District Court held that Chapter 263, Laws of Utah 1969, violates the Amendment 14 of the Constitution of the United States and Article 1, Section 7 of the Constitution of the State of Utah and is therefore void.

RELIEF SOUGHT ON APPEAL

Respondent prays that the judgment of the District Court be affirmed.

STATEMENT OF FACTS

Section 35-1-46, U.C.A. 1953, of the Utah's Workmen's Compensation Act, requires in part that each employer in the state, except for counties, cities, towns and school districts:

> ". . . secure compensation to their employees in one of the following ways: (1) by insuring and keeping insured the payment of such compensation with the state insurance fund, (2) by insuring and keeping insured the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this state, (3) by furnishing annually to the commission satisfactory proof of financial ability to pay direct compensation in the amount, in the manner and when due as provided for in this title. . ."

The State Insurance Fund was created in 1917 (R. 5). Section 35-3-1, U.C.A. 1953, provides, interalia, that:

> "There shall be maintained a fund, to be known as the state insurance fund, for the purpose of insuring employers against liability for compensation based upon compensable accidental injuries and against liability for compensation on account of occupational diseases, and of assuring to the persons entitled thereto the compensation, provided by law. Such fund shall consist of all premiums and penalties received and paid into the fund, of property and securities acquired by and through the use of moneys belonging to the fund, and of interest earned on money belonging to the fund and deposited or invested as herein provided. . ."

At the time of the creation of the fund, the state advanced $40,000 for the fund (R.5). This, however, was repaid to the state in 1923 (R.5) (Audit Report 1924-5, Schedule 1, April 12, 1926). The assets of the fund are comprised wholly of premiums and penalties paid by employers and interest earned from the investment of those funds (R. 6, 7). State agencies are required to pay premiums into the fund to protect employers against the several claims of their employees. All contributions made by the State of Utah to the insurance fund have been in the form of premiums paid pursuant to Section 35-1-49 U.C.A. 1953. There is no distinction between the State of Utah as an employer and contributor to said fund and any other contributing employer who is a member of the fund (R.7). Mr. Herbert F. Smart is now the duly appointed and acting Director of Finance. He has held that position for over four years. His duties include, among others, the administration of the

State Insurance Fund (R.2). At the date of the trial, the approximate balance in the State Insurance Fund was $17,000,000. There was no liquid cash in the fund as of the trial date (R.6). The source of said funds are from the various contributing employers, according to Mr. Smart. Mr. Smart testified that the funds received from the employers are maintained in a separate account and are not co-mingled with the General Fund of the State (R.6,7).

In connection with the anticipated effect of S.B. 193 (Chapter 263, Laws of Utah), Mr. Smart testified that in the event such grant was required, the fund would in fact be depleted by an amount greater than $8,100,200 (R.8). The reason for Mr. Smart's opinion was that many long-term investments would have to be discounted at unfavorable rates. Therefore, the loss to the fund would exceed, to an unknown extent, the amount required by S.B. 193.

Mr. Smart testified that if $8,100,200 were taken from the fund pursuant to S.B. 193, dividends paid to contributing employers would be greatly reduced or eliminated and eventually premiums required to be paid by the contributing employers would have to be increased (R. 10,11). Mr. Smart further testified that there is a possibility that employees' claims would be greater than the assets of the Insurance Fund, if the fund were so depleted (R.12).

The expenses of the Insurance Fund are paid for out of the assets of the fund and not out of the Gen-

ered Fund of the State of Utah (R.23). On some occasions, the Legislature has appropriated from the State Insurance Fund the amount required to meet the fund's expenses. On other occasions when the Legislature has failed to make such appropriations, the director of the fund has prepared the budget himself and appropriated the money from the fund without a legislative appropriation (R. 23,24).

ARGUMENT

POINT I

THE TAKING OF PRIVATELY OWNED MONEYS IS PROHIBITED BY UNITED STATES CONSTITUTION, ARTICLE 1 SECTION 7.

An early statement of the definition of property within the meaning of the 14th Amendment is found in *Campbell v. Hold,* 115 U.S. 620 (1885). In his dissent, Justice Bradley stated that:

> **"The term property in this clause embraces all valuable interest which a man may possess outside of himself. That is to say, outside his life and liberty."**

In *Campbell,* the court held that the petitioner did not have a property right in having the action against him barred by the Statute of Limitations. Had the claimed right been more tangible, the court would have most likely agreed and found the protection of the 14th Amendment applicable.

POINT II

PRIVATE PARTICIPATING EMPLOYERS HAVE PROPERTY INTERESTS IN THE ASSETS OF THE STATE INSURANCE FUND.

(a) Employers who have insured themselves through the State Insurance Fund have a right in being protected from possible claims due to the injury, illness, or death of any employee.

If, pursuant to Chapter 263, Laws of Utah 1969, over $8,100,200 were taken from the State Insurance Fund and the balance of that fund was depleted to approximately $9,000,000, there is a possibility that the assets of the fund could be depleted and claimants would not be compensated for work-related injurines, illnesses, or death. In that event, the employer would be personally liable to the employee for such compensation. The balance in the fund as of the trial date was approximately $17,000,000. It would cost more than the $8,100,200 required by Chapter 263, Laws of Utah 1969 to make an appropriation to the general fund because the assets of the fund are not liquid, and it would cost a great deal of money to discount securities to obtain the required $8,100,200. In *American Fuel Company of Utah v. Industrial Commission*, 55 Utah 483, 187 P. 633 (1920), the Utah Supreme Court held that the employer has the primary liability to employees and liability is not removed by the employer's purchase of insurance protection. In *American Fuel*, the employers were liable for compensation when the insurance comp-

ny went into receivership. Accorling to testimony of Mr. Smart, employers' protection would be jeopardized if the State Insurance Fund were reduced by more than $8,100,200. The right to protect provided by adequate reserves in the State Insurance Fund is clearly a right that should be protected under the due process clauses of the United States and Utah Constitutions.

(b) Contributing employers have property rights in dividends that are to be paid to the contributing employers of any excess balance in the Insurance Fund.

Pursuant to Section 35-3-10 (4) U.C.A. 1953, the balance of funds not needed to maintain adequate reserves is to be paid to contributing employers in the form of dividends. The discretion for declaring a surplus is placed with the Commission of Finance. Under Chapter 263, Laws of Utah 1969, the Legislature is declaring in fact that there is an surplus and that such surplus shall be paid into the General Fund. If in fact there is an surplus, that surplus must be paid to contributing employers pursuant to Section 35-3-10(4). Failure to do so would clearly be deprivation of property belonging to the employers.

(c) Contributing employers have a property right in lower dividends which result from income received by the fund from investments made with the assets of the fund.

Another aspect of the problem is that a portion of the assets of the Insurance Fund is derived from

"interest earned upon money belonging to the fund and deposited or invested", Utah Code Annotated Section 35-3-1 (1953). If more than $8,100,200 is taken from the money deposited or invested, the interest earned would be reduced. Therefore, the premiums to be paid by the employers would have to be increased to maintain the fund because of the reduced interest income.

Chapter 263, Laws of Utah 1969 would therefore cause an increase in premium rates, which is an unlawful depriving of property within the meaning of Amendment 14 of the U.S. Constitution and Article 1, Section 7 of the Utah Constitution.

Because of the removal of protection against liability, the taking of $8,100,200 that, if excess, must be paid to employers and the caused increase in insurance premiums, the enforcement of Chapter 263, Laws of Utah 1969 would constitute a "depriving of property."

POINT III

THE STATE OF UTAH HAS NO GREATER PROPERTY RIGHT IN THE ASSETS OF THE FUND THAN DOES ANY OTHER PARTICIPATING EMPLOYER.

The State Insurance Fund is very much like a private insurance company. In *Chez v. Industrial Commission*, 90 Utah 447, 62 P.2d 549 (1936), the court said that the fund" . . . was a venture by the state as an employer and certain private employers who choose to come in, in which they pool their premiums to

create a fund for the purpose of paying, not a state obligation or making expenditures on behalf of the state, but of paying their contingent compensation liabilities . . .", at 449.

The state initiated the insurance fund by advancing $40,000 (surpra). That amount was paid back to the state. State agencies pay premiums to the fund as do other employers throughout the state.

The state has a special role, however, in that some of its officers are officers and employees of the fund. Utah Code Annotated, Section 35-3-1 provides that:

> **". . . The commission of finance may appoint, with the approval of the governor, a manager and such other employees as are needed to carry out the activities of the fund . . ."**

Section 35-3-2, Utah Code Annotated 1953 requires that the state auditor make an annual audit of the Insurance Fund. The cost thereof is paid by the Insurance Fund—not by the state. Section 35-3-7, Utah Code Annotated 1953 provides that the state treasurer shall be the custodian of the funds of the Insurance Fund. Section 35-3-7 is mandatory in that:

> **". . . the money shall be paid over to the state treasurer to the credit of the insurance fund."**

Clearly, the funds are not to be co-mingled with the general Fund. Mr. Smart testified that such funds are not co-mingled.

It is significant that the state officers who perform services for the fund are acting as agents for the Insurance Fund. They are paid from the assets of the fund—not the State's General Fund, and the commission of finance may decline the services of the attorney general and hire private counsel, and disbursements by the state treasurer are made pursuant to directives from the commission of finance.

The nature of the State Insurance Fund was discussed at length in *Chez v. Industrial Commission, supra.* The court recognized that the fund is administered by a public body that held that the assets of the fund are not assets of the state and that a debt owing to the State, and further, that the Insurance Fund is separate from the state and the Insurance Funds are not the state's:

1. In *Woldberg v. Industrial Commission,* 74 Utah 309, 279 P.2d (1929), an attempt was made to draw a distinction between the State Insurance Fund and private insurers by claiming that when dealing with the State Insurance Fund, the Industrial Commission was not a judicial tribunal, but only administrator of the fund. The court disallowed that distinction saying that:

> **"No distinction can be made between the different kinds of employers and insurance carriers, but ( ) all must be treated alike." At 611.**

2. In *Chez v. Industrial Commisison, surpa,* it was

held that a debt owed to the Insurance Fund was not a debt owed to the state.

3. Utah Code Annotated, Section 35-3-10(4) requires that any surplus balance of the income of the funds remaining after payment of expenses shall be paid to employers as a dividend. The only way the state can have access to this money is by virtue of its having been a contributing employer.

4. The very fact that state agencies are required to pay premiums into the fund is an indication that the assets of the Insurance Fund don't belong to the state. It would be meaningless for the state to pay premiums if the state owned the assets of the fund.

5. Utah Code Annotated 35-3-16(2) requires the State Insurance Fund to pay to the State Tax Commission "a tax of the same percentage as required by law to be paid by insurance companies." If the Insurance Fund were a state agency, it would surely be tax exempt.

6. As mentioned previously, the services of the state auditor and other officers are paid for out of the Insurance Fund—not out of the state's General Fund.

CONCLUSION

Employers who contribute to the State Insurance Fund have property rights in the assets of the fund and have property rights in not having the assets of the fund depleted pursuant to Chapter 263, Laws of Utah 1969. The State of Utah has no rights

in the assets of the fund other than those rights it has by virtue of being a contributing employer. Therefore, the taking of $8,100,200 from the State Insurance Fund and appropriating the same to the General Fund and thence to the State Building Board would constitute an unconstitutional and illegal "depriving of property" within the meaning of the United States Constitution, Amendment 14 and Utah Constitution, Article 1, Section 7. Therefore, Laws of Utah, Chapter 263 1953 should be declared unconstitutional and void..

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