ORAL ARGUMENT – 01-07-04
02-1110
DALLAS COUNTY COMMUNITY COLLEGE V. BOLTON

LAWYER: This case is unique in my experience with the number of complex and important issues that it presents. I will discuss three major issues. Those three issues are: the statutory authority for the technology fee, duress, and sovereign immunity.

At the heart of this case are questions about whether the district's technology fee required specific statutory authorization, and if so, whether that authorization is to be found in §130.123 of the Education Code?

Junior College districts in Texas enjoy some measure of home rule authority. They are subject to the Texas Education Agency and to the Higher Education Coordinating Board, as well as to the specific statutory directives. But they are otherwise vested with authority to conduct their own affairs as they see fit.

The primary check and balance on the actions of the Junior College districts as distinguished from 4 year colleges in Texas, is not the statutory regulation from Austin, but accountability of local trustees to local voters.

HECHT: It's hard for me to make sense of that. Why would you give more discretion and latitude to Junior Colleges than to U.T.?

LAWYER: Because, if I don't like what a Jr. College has done, I can campaign against the trustees for that Jr. College and have some chance of having my voice heard. If I don't like what U.T. does, my choice is to campaign against the government. And that is a very different level of political accountability than it is to raise that issue on a statewide basis.

O'NEILL: Are you hinging part of your argument on the funding source, because less state funding goes into junior colleges and it relies on more on local property taxes, that somehow they should be different?

LAWYER: No. It is more to do with the fact that a junior college is a political subdivision like a school district, like a county, which is accountable to local voters on a regular basis where you may expect local issues to receive more attention than they would receive on a statewide basis. So it's a structural issue, not primarily a funding issue.

The funding comes in in §130.003(d) and it's connection to ch. 54. And to understand the relationship of those chapters, you have to go back in history and see how junior and senior colleges were regulated by statute.

Before 1971 the statutory provision that for senior colleges and junior colleges were wholly separate. Senior colleges were governed by a variety of statutes, junior colleges by the junior college's act. It was brought into the education code when it was enacted in 1969.

In 1971, the senior college provisions were moved into the education act. The junior college provisions became ch. 130. The senior college provisions became various chapters, including ch. 54. The linkage is 54.002, which says ch. 54 applies to junior colleges only to the extent provided by the funding statute 130.003(b). That section sets forth six eligibility criteria for state funding. One of those is to collect matriculation and other session fees in amounts required by law.

Now the fees required by law are not specified in ch. 130, so you have to refer back to the fee chapter, which is ch. 54. But that applies only to the extent provided by 130.003(b).

Several points about that statute. It imposes no mandates, merely funding eligibility criteria. The consequence of not complying with 130.003(b) is that in the next funding cycle you will not be certified by the Coordinating Board as eligible for an appropriation. It requires that fees be charged in the required amounts, but does not prohibit them from being charged in larger amounts or different fees. So when §54.002 says ch. 54 applies, to the extent provided in 130.003(b), it is as a reference point only in determining eligibility for funding.

The overall structure of the code then reemerges. Senior colleges are regulated in their fees by ch. 54. Junior colleges are regulated in their fees only by a requirement that they charge at least the ch. 54 fees if they wish to be eligible for state funding.

HECHT: And if they charge a whole lot of fees, otherwise you're just supposed to turn out the ____ fees at the next election?

LAWYER: That's correct. Just like if you don't like your city taxes that's what you do with your city council.

HECHT: Except if they charged you illegal tax at the city, you can sue to get that back. Right?

LAWYER: Right. But the tax is illegal only if the legislature has affirmatively said it is illegal. Similarly there is no statute affirmatively saying that a particular fee by a junior college is illegal, or at least these kinds of fees.

Even if a specific statutory authority is necessary, it is found in §130.123(c) which authorizes each junior college district board to fix and collect rentals, rates, charges and, or fees from students and others for the occupancy, use, and, or availability of all or any of its property, buildings, structures, activities, operations, or facilities of any nature.

Now the respondents concede that this statute on its face authorizes the technology fee. But they argue that other parts of §.123 show that it is limited to fees pledged to revenue bonds, and they argue that that is necessary to avoid conflict with ch. 54.

But as I've already explained, ch. 54 is not applicable to junior colleges except as a reference point in determining funding eligibility. So there's no conflict with ch. 54. Nor do these other parts of §123 indicate that the fees which it authorizes must be pledged to revenue bonds. To the contrary, the language of the statute indicates that the use of revenue bonds is clearly optional. The board is authorized, not required, to pledge the fees. But these may, not must be pledged. All or any part of the fees may be pledged, which reduces the respondents to arguing that a fee is lawful if 1% of it is pledged, but unlawful if 0% of it is pledged without positing any rational reason why the legislature would set up such a scheme. When the fees are pledged they must be at least sufficient to repay the revenue bonds.

If junior colleges cannot charge fees under subsection (c) without pledging those fees to revenue bonds, then it follows that they cannot build buildings or operate programs under section (a) without financing those facilities or programs from revenue bonds. If somehow that obstacle is overcome, then they cannot charge fees for those facilities and programs.

If a junior college district builds a dormitory, for example, out of current revenues, it can't charge dormitory rents. If it builds a stadium it can't charge its concessionaires a concession fee under the respondent's theory of the statute.

A further important point about .123(c). This technology fee was in fact pledged to revenue bonds. The revenue bonds circular is in the record. Clearly states that the technology fee was pledged. The respondents attempt to overcome this fact by arguing that it was not pledged in the revenue bond resolution itself. But to achieve that result you would have to take .123 language out of context. If you look at .123(c) and .123(d), those provisions require that fees which are pledged must comply with the revenue bond resolution or order. A very sensible requirement that the order or resolution control the district's actions. But there is no requirement that fees be imposed only in revenue bond resolutions or orders.

The second overriding issue in this case is the issue of duress. As a general proposition a citizen who voluntarily pays a tax or fee cannot sue to recover that tax or fee claiming that it was illegal. An exception was made in cases of duress.

Now this court has developed the business compulsion rule under which if the tax or fee is paid upon the pain or the loss of the right to do business, then it is paid under duress and a suit to recover it is permitted.

The courts have stressed that duress is a fact specific inquiry. For that reason alone, the class wide summary judgment on duress and the class certification were inappropriate. Beyond that, being a junior college student is not a business. It may be like a business for some in

the sense of its importance and scope as a part of a student's life. But it is like hobby for others.

HECHT: Do you think duress could be proved class wide in any situation?

LAWYER: It would be very rare. But for example, in the cases that gave rise to duress in the 30's where the statute says an out of state corporation shall as a condition of doing business in Texas pay this franchise fee. Then on a class wide basis everyone subject to that statute is being threatened with deprivation of the right to do business in the state. So that kind of a case could be class certified. But where the consequences of not paying the fee are individual specific as they are here.

HECHT: And how is that? Because you are still going to lose certain interest at the university.

LAWYER: You're going to lose the right to take classes at the college district. How important is that right? Is it comparable in scope to not being able to write bail bonds in the county, or to not being able to conduct your insurance business in the state of Texas?

HECHT: You argue that well they could go to another learning institution, but bail bondsmen could go to Ellis county.

LAWYER: But going to Ellis county is a pretty fundamental thing. And it may be a pretty fundamental thing for a particular student who can't get in to any of the other institutions to not be able to go to the district. But for somebody else it may be a pretty trivial thing. If I can't take a course in Portugese or in photography or something, that may have only a minor impact on my life, whereas someone else if they can't take classes at the district they may lose their job, they may lose their welfare benefits, or it may be a major thing to them.

The point is, in this kind of a situation you can't resolve that on a class wide basis for 270,000 people at once.

Turning to sovereign immunity. This court's modern sovereign immunity jurisprudence makes it clear that sovereign immunity from liability exists in all cases unless it has been waived by the constitution, or by legislative action, or by the litigation conduct with the governmental unit, or by contract.

HECHT: Does the dispute here come down to whether these fees are like taxes?

LAWYER: I don't think so. I think we concede that there is no difference between taxes and fees for this purpose. Sovereign immunity exist under these modern cases unless the affect of the line of cases from this court about illegal taxes and fees dictates a different outcome. That line originated in two cases from the 1930's involving a corporate charter registration fee. The Austin National Bank case and the Nabisco case. Those were not sovereign immunity cases. In each of

those cases the legislature have recognized the validity of the claim, authorized it, and appropriated money for its payment. And the question before this court was, was that appropriation valid under the constitutional provision that limits payment of claims to those provided by pre-existing law. And the answer of the court was yes, because those fees were paid under duress.

That yes answer is ambiguous when you translate it in to the sovereign immunity context. The respondents say that the court was saying there simply is no immunity from liability in illegal tax for fee cases. And that's one possible interpretation.

But another is that the court was merely saying that there was a pre-exiting law that allowed recovery of payments erroneously made under duress. That is the principle that goes way back. It's applicable to government and private parties alike. And so pre-existing law as of the 1930's allowed recoupment of payments made voluntarily but under duress.

So the question boils down to was there no immunity to be waived or was the appropriation of money by the legislature an effective waiver of immunity because it was valid under the constitutional provision, because it was provided for by pre-existing law.

For the court to reconcile those cases, it needs to hold that sovereign immunity from liability in illegal tax or fee cases exist unless there is a recognized form of waiver.

* * * * * * * * * * *

RESPONDENT

MANDEL: The students brought this class action as a last resort. The district enacted the technology fee via policy in Dec. 1993, relying solely upon the Texas Education Code §54.504 as the legal basis for imposing that fee. Section 54.504 allows the charging of incidental fees.

In 1995, the students brought this to the attention of the board of trustees of the district both in writing and at board meetings that the technology fee could not possibly constitute an incidental fee. The students pursued this issue with the board for over 1 year, and the district finally asked for a Texas AG opinion in Aug. 1996.

The students then waited over another year until the Texas AG issued his opinion DM 450 in Sept. 1997, in which he said that §54.504 did not allow the technology fee. At that point the students expected that the district would discontinue the technology fee and refund the previous three years worth of fees. The district didn't do that. Instead it simply changed its official policy manual in Oct. 1997 to reflect Texas Education Code §130.123(c) and not 54.504 as the sole legal basis for its imposition of the technology fee.

HECHT: Why doesn't that section authorize this fee?

MANDEL: To answer that question, we need to start with the scheme of the Texas

Education Code.

HECHT: Let me take you to the part of the argument that troubles me the most, which is you admit in your brief that only part of the revenue has to be pledged to the bonds. A dollar I suppose.

MANDEL: No. Paragraph (d) of 130.123, and it's not as arbitrary as 1% verses 0%. There's additional language that's the key in paragraph (d). And what it says is that when such resources are pledged to the payment of bonds they must be in an amount that would be at least sufficient together with any other pledged resources to provide for the payments of bonds. So it's our position that the fees have to be pledged to the payment of revenue bonds, have to be enacted in the revenue bond resolution, and they have to be in an amount sufficient with other revenues to pay the bonds.

HECHT: Okay. But that could be a dollar. We're just one dollar short of pledging all we need to pay off these revenue bonds, so we take a dollar out of the technology fee.

MANDEL: That seems unlikely, but theoretically that's possible.

HECHT: Then what sense does any of that make?

MANDEL: I think the paragraph (g), which is the incontestability provision. The case law says that - paragraph (g) says that they have to review the revenue bonds in the proceedings which enacted them, which would include the revenue bond resolution. The case law which we've cited for you says that they review all of the proceedings, the way it was enacted. And if there is any taxes or fees which were enacted as part of this package to pay off the bonds, and that's provided for in the resolution, then the fear the tax is also reviewed by the AG, and it becomes incontestable as well.

Now the key to this thing is we've got people out there that we want to buy these revenue bonds. And they want to be assured in the marketplace that these bonds have value. Part of that is, that they want to know that if fees are pledged which are necessary to the payment of the bonds, that those fees are going to be there. Because if they are not, then the bonds could become valueless and they are not going to be marketable.

HECHT: This is another part that troubles me. There were revenue bonds to which these fees were pledged. Later. But they were approved by the AG.

MANDEL: The case law in this says that only what's in those revenue bond resolution, that the fee was not enacted in the revenue bond resolution in any set of bonds that were ever approved. Therefore, the fee was not reviewed by the Texas AG, so it didn't become incontestable. That's the problem with what the - and something I don't think the legislature foresaw, which is that somebody would pass a fee, 4 years later pledge it to the payment of preexisting revenue bonds, which is what happened here. They did a master bond resolution, which essentially said here are

some things that we are going to pledge to all of our preexisting bonds and to all of our future bonds. But it wasn't actually a resolution enacting a specific set of bonds. So the Texas AG never reviewed this fee.

OWEN: That's where your argument to me falls apart, where you say well the sanctity of the bonds and their stability is undermined if we don't read the statute this way. But that's not true it seems to me because there were adequate revenues already pledge and fees were reviewed and all of that at the time the bonds were issued. So they are sort of stand alone. They are secure. What difference does it make from the security of the bonds if a junior college then pledges additional fees that aren't part of this to those bonds to maybe pay down their debt quicker? I mean that doesn't to me undermine the stability of the bonds as _____.

MANDEL: I'm not suggesting that any particular bonds issued by the district are in any danger...

OWEN: That's what your brief said, not these bonds, but that the scheme. And I don't see how the scheme is affected.

MANDEL: What we're arguing is that paragraph (g), the incontestability provision is the reason that paragraph (d) says that if you pledge fees to a bond they have to be enacted in the bond or resolution.

OWEN: But just pledging them doesn't make them incontestable. To me they are two different kinds of fees that are pledged. There are the kinds that support the bonds, and you say the case law says they are incontestable, and then you can pledge other fees that just by pledging them doesn't mean that they are incontestable.

MANDEL: The reason for the requirement in (d), which I think that's the plain language of the bond. It says when the fees are pledged they have to be...

OWEN: It says all or any part of fees. It doesn't say you have to pledge all of the fees.

MANDEL: The pertinent part is fees for the availability of property may be pledged to the payment _____ and shall be fixed and collected, and shall be determined and provided by the board in the resolution or order authorizing issuance of the bonds. So I think the plain language in (d) is saying that the fees have to be fixed and collected as shall be determined and provided by the board in the resolution or order. In other words, the fee that is pledged has to be provided for and enacted by the bond resolution.

OWEN: The fee that's pledged. That's my point. The fee that's pledged to support this particular bond issuance that goes to the AG's approval process. That doesn't mean you have to pledge all of the fees, nor does it mean that you can't enact fees later and pledge them that are not part of this incontestable process.

MANDEL: First of all, we rely on (b) for the proposition they must be pledged. But as far as (d) goes, which essentially says if they are pledged they must be in the resolution or order doing it. And then the reason for that is (g), because if it's in the resolution or order it becomes incontestable. And what the legislature is concerned about is the situation which could and perhaps often has occurred where a fee or a tax was pledged, and it was absolutely essential to the payment of those bonds. And what we don't want to have is a situation later long where the fee or the tax can be collaterally attacked, and once that happens the bonds become worthless. And the solution the legislature came up with was we're going to have it in the resolution or order and it becomes incontestable.

The cases that I'm referring to on the incontestability are at page 15-16 of our brief, and includes the City of Galveston case from 1940, 143 S.W.2d @ 1035; the Leonard case from Austin, petition denied, 47 S.W.3d at 528; the Walling case 195 S.W.2d @ 671. And in those cases they were specifically taxes that were enacted as part of the revenue bond resolution, and those taxes were to be used to payoff the bonds or other things in issue. And somebody came and tried to collateral attack the tax to fee and the court said no. Those are incontestable because they were in the revenue bond resolution, they were reviewed by the Texas AG and he approved them. And the rationale of these cases is that we have to make sure that these bonds are going to be marketable, and part of the marketability would be if there are certain things that are pledged to them that are essential to their repayment, we know that those are incontestability as well. And that's the rationale of the requirement that it be in the revenue bond resolution or order. And if we say that it doesn't have to be in the revenue bond resolution or order when it's pledged to it, then we create the situation where bonds in essence could become worthless because the fee or the tax is collaterally attacked.

OWEN: It seems to me the bonds when they are issued they have fees that have gone through this process, they are incontestable, and they stand alone to support the bonds. I don't see anything in the statute that says the institution can't later pledge additional fees to more quickly reduce its debt obligation, or bond obligation. And that does not affect the stand alone's financing scheme that originally underpinned the bond's _____.

MANDEL: I agree that the statute itself doesn't address that exact circumstance of a later pledge.

OWEN: Isn't that what happened here? This is a later pledge.

MANDEL: There was a later pledge. But I think we have to look at 130.123 in context rather than just pulling out (c) as they would do and say look. We have this integrated statute 130.123 that essentially says that we can issue bonds to build buildings, we can charge fee for those, pledge those to the bonds and essentially provide for self liquidating bonds. And what they would have you believe that in this revenue bond provision, which it's an integrated statute, that the legislature there decided to put in an independent super fee provision that would allow for virtually any fee in any amount. The language of (c) is fees for the usage or availability or property. As the

CA noted, that could be virtually anything: $100 a semester to use our sidewalks; $1000 to use our pencil sharpeners. Anything in any amount could be there.

So would the legislature in a revenue bond statute have put this super fee provision?

HECHT: So you think the AG would go through the revenue bond and conclude that it was adequately collateralized, but with a fee that couldn't have been charged, and withhold approval of the bond?

MANDEL: I think that would be his obligation.

HECHT: He says $18 is too much. It should have been $14.

MANDEL: He has to determine whether the bonds are issued pursuant to law? If the bonds are issued with certain fees pledged to them, which are not legal, then that would arguably not be allowed by law.

HECHT: But he has to make that determination right?

MANDEL: Yes.

HECHT: Otherwise, the college could charge anything. So he has to decide in the course of approving these bonds is $18 a reasonable technology fee, or should it be $12?

MANDEL: If it had been in the resolution which enacted the bonds, he would have had to make a determination as to the legality of it.

HECHT: The reasonableness of it.

MANDEL: Not the reasonableness of it.

HECHT: Then what difference does it make whether he thinks it's too high or not?

MANDEL: What I'm suggesting to the court regarding the fact is we're saying to say would they have enacted this provision as a super - it's essentially a super fee provision. On its face it has no limits whatsoever.

HECHT: And you say they could charge $1000 technology fee when there is no basis for that at all. And the AG is going to stop that.

MANDEL: If the AG had reviewed it, I would think as a matter of statutory construction and analyzing whether the technology fee was legal or not, he would look at that issue just as this

court should.

HECHT: To see if the money is too much. You keep saying legal. But he has to look and see if $1000 is too much.

MANDEL: It's not a matter of the amount of any particular fee. What I'm suggesting to you is if we just look at the plain language of (c) and take it out of context of 130.123, and out of 130.123 context and the whole thing, it would be a super fee provision. So then the question becomes would the legislature have put a super fee provision in a revenue bond provision.

HECHT: And your answer is no. And you say the check on that is the AG.

MANDEL: Well the check on that is (b) and (d). Paragraph (b) requires, because it says the bonds must be payable from the fees...

OWEN: I think you're misunderstanding his question. Assume that they had done this as part of revenue bond and the AG had passed on that. And let's suppose they put $1000 technology fee in there. His question is, where would the AG get the authority to say $1000 is too much, I think it should be $40?

MANDEL: I'm not suggesting that the AG would have the right to question the amount of a particular fee, unless the legislature had specifically put a limit on a particular fee I'm saying that the AG if it had been in the revenue bond resolution would have been charged with saying whether a technology fee at all of any amount could be charged.

HECHT: Well it can be under (c). You don't argue that.

MANDEL: I'm saying that the technology fee falls within the face of the language of (c).

HECHT: You agree they can charge a fee. They just have to pledge it to the revenue bonds. That's your argument.

MANDEL: Yes. That's right. They could charge a fee for the availability of property, which this technology fee was if they comply with (b) and (d). And they didn't comply with (b) from 1994 to 1998 because...

HECHT: All I'm saying to you is if they had complied with (b) and (d) they could still have charged $1000.

MANDEL: That's correct.

HECHT: Well then you say they would never put a super fee in the statute and just allow them to charge anything. But then you say, but they could have charged as long as they

pledged it.

MANDEL: I think the reasoning in the legislature was this. Nobody is going to issue revenue bonds because of the financial obligation involved just to be able to enact a fee. They are going to do revenue bonds as a carefully consideration on a lot of different factors. And then they can decide whether they want a specific fee, and they can pledge it to that. And so people aren't going to just willy nilly for generating more revenue. Issue revenue bond obligations. So that puts a significant limit on colleges, which is consistent with ch. 54 and the prohibition in...

OWEN: You're basically saying that the only way that junior colleges can get funds to operate is through revenue bonds - financing. One of the three ways of financing. What if the junior college is 30 years old, they don't need any more buildings, they want to do a few things here and there, and they want to raise fees to cover it. Where in the statute does it say they can't do that?

MANDEL: That brings us to 54.003 of the Education Code, which says that no institution of higher education can enact any fee accept as permitted by law, which is going to require a statutory authorization. The question then becomes, does 54.003 and ch. 54 more generally apply to junior colleges. 54.002 says that ch. 54 applies, which includes 54.003, to junior colleges to the extent provided by §130.003(b) of the Education Code. When you get to 130.003(b) it doesn't say anything on its face about the applicability of ch. 54 to junior colleges. It just sets forth six criteria that junior colleges have to meet in order to be eligible for a share of the public appropriation of state money to junior colleges.

The class and the student's position is that what this means is that state funded, that if a junior colleges accepts, makes the optional choice of taking state funding then it's subjected to ch. 54. Just like all other state funded institutions in the State of Texas.

What the district wants to do is arbitrarily of the six criteria pick (b)4 and (b)5 and say, look. We think only these are relevant to junior colleges. It only applies to ch. 54 to the extent that it sets minimum mandatory fees and their minimum amounts, and the scholarships and tuition exemptions that have to be applied.

HECHT: Regards to the court's judgment and the award to the class and the reservation of ruling as to what to do with any unclaimed proceeds, is there any evidence or argument in the case that the money was not used by the colleges for the purposes for which it was collected?

MANDEL: No.

HECHT: So the technology fee didn't go to do something wrong. They used it on technology.

MANDEL: Let me say, I think that's indirectly. I mean the money all went into a bank account and they set up a subaccount on their books for this technology fund and then as they bought

technology in their normal course of business they debited against that same subaccount which they had credited. So in that sense, to the extent that it went into their bank account and they bought some technology and they sort of separately kept it on their books, yes. It went for that purpose. But in a sense that's an accounting type of thing.

HECHT: The argument for a _____ or a fluid recovery usually is that the wrongdoer ought not to get to keep the money that he took wrongly when other people got no benefit from that. But here it seems to me the students got the benefit from the collection of the fees. You just contend they shouldn't have been charged. Who's that money going to go to if it doesn't go back to the colleges?

MANDEL: Let me suggest, I think that decision is premature. The final judgment said that if there are any undeliverable funds. We have the individual names of these people. We have the last known addresses. We sent class notice out to these people. We did address update. So we know that we can reach tens and tens of thousands of people. But inevitably you can never find everyone. So the question is, if there is any money left over, which we don't know, the TC in the final judgment said he would consider four options. One is _____. One is ____ to the state. One is pro rata distribution of the funds to the located class members. And the fourth is reversion to the district.

HECHT: You said we should just wait on that and not jump into this?

MANDEL: Generally my impression is we wait until there is a decision that actually has to be made. And we don't know if there is going to be _____ award.

HECHT: You agree you can't recover attorney fees under 38.001, so what do you claim it under?

MANDEL: We said that the court - there was an award of about $271,000 in attorney's fees, and the court should reverse that.

HECHT: But you can still claim attorney fees?

MANDEL: Well that's two different issues. That was attorney's fees the class recovered from the district. There was a separate issue of class counsel recovering attorney's fees from their clients out of the common fund, and that has not been challenged on appeal.

* * * * * * * * * *

REBUTTAL

LAWYER: Mr. Mandel argues that under .123(d) all of a fee must be pledged, and the amount is what need merely be sufficient, least sufficient to pay the bonds. But that's not what the opening sentence of .123(d) says: Each board shall be authorized to pledge all or any part of its

revenues. So we're back to the situation where the fee is legal if $1 of it is pledged, but allegedly not legal if none of it is pledged.

J. Owen, the case law cited in our brief at page 20, note 25, indicates that where the bonds have been approved by the AG, not only the bonds are incontestability but the fees pledged in support of those bonds are incontestable.

The way this worked in a case of the district had a master bond resolution that said in essence, here is how we do revenue bonds and what it is is the district pledge. And then as each bond issue would come up, a supplemental bond resolution would be passed saying so many millions in revenue bonds are hereby issued under the authority of and subject to the terms of the master bond resolution.

These were not additional revenues pledged to existing bonds. These were refunding bonds, which were used to retire other bonds. But they were a new issue of bonds in which the technology fee was pledged as part of the pledged revenue.

I think what the respondents argument boils down to in major part is a focus on the title of §130.123(c) revenue bonds. The Gov't Code says we're not supposed to function to focus on a title. And there's good reason for that. If you look at the structure of (g) of ch. 130, you will see a variety of funding sources: ad valorem taxes; bonds (anticipating those); and revenues. And the way 123(c) is written it's intended to be a revenue bond statute that a bond underwriter or bond counsel can go to as the primary source of authority for revenue bonds. But the way it's written it deals with revenues and what they may be used for more generally in the language of (a) and (c).

Finally, on the issue of fees verses tuition. Since at least 1985 and probably before, junior colleges had been unregulated in their charging of tuition. And so to say that this fee is illegal because it was called a fee, but would have been legal if it had been called tuition, is to make a very arbitrary statutory distinction. In fact when this litigation erupted, the district solution was to abolish the technology fee, and to increase its tuition charges by a corresponding amount, so that that part of the tuition funded technology purchases.

Surely, the validity of a fee and the district's liability should not turn on the label that it passed to that fee.

HECHT: On immunity your position is that the government can't be sued for collecting illegal taxes? It can't be sued for a refund?

LAWYER: Unless it has waived immunity. At the state level, the stated has set up a mechanism with respect to most taxes - a refund procedure. Also for ad valorem taxes at the local level they've set up a refund procedure. There is no refund procedure for this kind of a fee. So it would require some sort of legislative authorization for a waiver by the district through failure to assert sovereign immunity from liability.

HECHT: And the bail bond cases were just wrong?

LAWYER: Yes. The bail bond cases proceed from a particular interpretation of Austin National Bank and _____. If that's the correct interpretation then they were right. Our belief is go back and analyze those cases. That was not the correct interpretation.