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Contracts

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Contracts

CONTRACTS

I. INTRODUCTION

The decisions of the Tenth Circuit have covered a wide variety of contract issues with no concentration in any particular area.[1] Holdings ranged from the necessity of explanatory language in a full recourse assignment in order to constitute an unconditional guarantee[2] to the lack of a fiduciary relationship between a manufacturer and a dealer because of their relatively equal bargaining positions.[3] The Tenth Circuit continues to validate the promises made by parties to a contract and to be reluctant to find a fiduciary relationship where parties are in relatively equal bargaining positions.

II. FULL RECOURSE ASSIGNMENT OF NONNEGOTIABLE DOCUMENTS, ABSENT EXPLANATORY LANGUAGE, IS ONLY A CONDITIONAL GUARANTEE: *MERCANTILE BANK V. FARMERS & MERCHANTS STATE BANK*[4]

Under Kansas law, the full recourse assignment of a nonnegotiable instrument without any other explanatory language is only a conditional guarantee. Kansas courts have defined two types of guarantees: conditional and unconditional.[5] If the guarantee is conditional, the creditor must attempt collection from the principal obligor before pursuing the guarantor.[6]

Mercantile State Bank (Mercantile) was assigned promissory notes and related equipment leases by Farmers & Merchants State Bank (F&M). The endorsement language on the notes assigning them to Mercantile contained the words "without recourse" but the language on the leases assigned was "with full recourse." When the lessees defaulted, Mercantile sued F&M claiming F&M, as assignor of the notes, was re-

1. This survey Article discusses contract cases decided by the Tenth Circuit Court of Appeals between December 1990 and December 1991. For more specific areas of contracts combined with other areas of law see the following: for a dual decision in the area of contracts and antitrust see COMCOA, Inc. v. NEC Telephones, Inc., 931 F.2d 655 (10th Cir. 1991) (evidence in antitrust case supported use of the changing conditions defense); for a discussion of contracts in an Intellectual Property setting see Harris Market Research v. Marshall Marketing and Comm., Inc., 948 F.2d 1518 (10th Cir. 1991) (inconsistent verdicts sustained allowing development costs as damages in copyright infringement claim).

2. Mercantile Bank v. Farmers & Merchants State Bank, 920 F.2d 1539 (10th Cir. 1990).

3. Devery Implement Co. v. J.I. Case Co., 944 F.2d 724 (10th Cir. 1991).

4. 920 F.2d 1539 (10th Cir. 1990).

5. Kansas State Bank & Trust Co. v. DeLorean, 640 P.2d 343, 350 (Kan. Ct. App. 1982).

6. *Id.*; *see* KAN. STAT. ANN. § 84-3-416 (1983) (guarantees distinguished by "collection guaranteed" or "payment guaranteed" added to signature; UNIFORM COMMERCIAL CODE § 3-419(d) (if signautre is accompanied by words guaranteeing collection, the signor is obligated to pay only if creditor has pursued collection from debtor).

quired to honor the full recourse assignments of the leases.[7]

The United States District Court in Kansas concluded that F&M's assignment with "full recourse" was a unilateral mistake on F&M's part and that F&M must bear the responsibility. However, the district court found that F&M was only secondarily liable. This secondary liability required Mercantile to make collection efforts against the lessees before it could recover from F&M. The district court then ruled in favor of F&M on the grounds that Mercantile failed to attempt collection from the lessees prior to pursuing F&M as assignor of the notes.[8] Mercantile appealed.

The Tenth Circuit affirmed in part and reversed and remanded in part. While noting that an assignor is not normally liable to the assignee for breaches by the debtor, the Tenth Circuit stated that an assignment "with full recourse" typically acts as a guarantee by the assignor in case of breach.[9] The next question was whether such a guarantee is unconditional. The Tenth Circuit accepted the district court's analogy to Article 3 of the Uniform Commercial Code and held that " 'full recourse' assignment of nonnegotiable documents without *any other* explanatory language is only a conditional guarantee."[10]

Although the Tenth Circuit agreed with the application of Article 3, it found that the district court erred in applying those principles to four of the five leases in question.[11] As the district court noted, secondary liability of an endorser of a negotiable instrument is based on three conditions: presentment, dishonor and notice of dishonor.[12] In this case, four out of five lessees signed guarantees that waived presentment. Under Kansas law, a document which contains a waiver of presentment by the assignor, is binding on all parties.[13] Therefore, F&M was liable on the four leases but not on the fifth lease which did not contain the waiver.[14]

III. PREFERENTIAL RIGHTS UNDER GOVERNMENT CONTRACT: *HAMILTON STORES, INC. V. HODEL*[15]

Preferential rights arising out of a government contract can only be asserted when the clear conditions of the rights have not been honored. This case represents the first time a federal circuit court has addressed these distinctions in preferential rights arising out of government contracts.

Hamilton Stores, Inc. (Hamilton) was a concession contractor at

7. *Mercantile Bank*, 920 F.2d at 1541.
8. *Id.* at 1543.
9. *Id.* at 1544.
10. *Id.*
11. *Id.* at 1545.
12. *Id.*
13. KAN. STAT. ANN. § 84-3-511(6) (1983). "Where a waiver of presentment or notice or protest is embodied in the instrument itself it is binding upon all parties. . . ."
14. *Mercantile Bank*, 920 F.2d at 1545.
15. 925 F.2d 1272 (10th Cir. 1991).

Yellowstone National Park. Under the terms of its long-term contract, Hamilton had a preferential right of first refusal for new or additional services or accommodations. The Park Service had a similar contract with another concessionaire, Yellowstone Park Co. but was dissatisfied with its service. The Park Service therefore sought a new concessionaire and invited bids, including one from Hamilton. When the Park Service awarded the contract to another bidder, Hamilton sued claiming both that the Park Service did not correctly follow statutory procedure,[16] and that it failed to honor Hamilton's contractual rights. The district court granted summary judgment to the Park Service.

The Tenth Circuit affirmed the district court's grant of summary judgment. While Hamilton had a right to bid for the contract replacing Yellowstone Park Co., the Park Service had no obligation to award the contract to Hamilton.[17] The decision found that Hamilton's preferential rights to contract for new services were not jeopardized because the awarded contract was not for new services or accomodations but for existing services.[18] The Park Service applied the proper regulation when denying Hamilton's bid.[19]

IV. EQUITABLE RELIEF TO ALLOW LATE NOTICE OF LEASE RENEWAL: *CAR-X SERVICE SYSTEMS, INC. V. KIDD-HELLER*[20]

Equitable relief is appropriate, under Kansas law, even in the face of a clear unambiguous lease when the lessee would suffer relatively great harm compared with the harm imposed on the lessor. This approach to equitable relief follows the tradition of Kansas law.[21] This decision represents the first time the Tenth Circuit has analyzed the issue of equitable relief where an unambiguous contract exists.

Kidd-Heller, a subtenant, leased real property to Car-X Services Systems, Inc. (Car-X). The lease provided for a ten-year term with an option to extend the lease for five years if six-months notice was provided. If the option was exercised, the lease payments were to increase. Car-X then subleased to Mufflers of Kansas City, Inc. (Mufflers) which opened an automobile repair shop on the premises. The sublease agreement made Mufflers subject to the terms and conditions of the lease agreement between Car-X and Kidd-Heller. A dispute arose over Mufflers' failure to obtain permission for certain improvements to the property and Kidd-Heller threatened suit. The situation was resolved

16. 36 C.F.R. § 51.6 (1980).

17. *Hamilton Stores*, 925 F.2d at 1281-82. Hamilton argued that the Park Service had applied the wrong regulation in denying Hamilton's contract bid. Hamilton asserted that the regulation applicable to additional services applied. 36 C.F.R. § 51.6 (1989).

18. *Id.* at 1281.

19. *Id.* at 1282. *See* 36 C.F.R. § 51.4 (1989).

20. 927 F.2d 511 (10th Cir. 1991).

21. In a situatin where a contract must be forfeited because existing conditions make strict performance unjust and inquitable, it is proper for the court to order equitable relief. *Id.* at 515 (quoting Nelson v. Robinson, 336 P.2d 415, 420 (Kan. 1959)).

when Mufflers agreed to pay additional monthly sums and Kidd-Heller agreed not to file suit.

Car-X gave notice to renew the lease when the ten-year term expired, but this notice was not given six months prior to expiration as required in the lease. Kidd-Heller then terminated the lease. Car-X sought a district court action for equitable and other relief. The district court found that equitable relief was available to allow acceptance of the untimely renewal notice. The court also found that Kidd-Heller was unjustly enriched by Mufflers' payment on the agreement to forbear suit and ordered the return of $7,300.

The Tenth Circuit affirmed the grant of equitable relief[22] but reversed the unjust enrichment award.[23] Since Kansas law provided no guidance, the district court looked to the trends in other jurisdictions[24] in ruling that equitable relief applied. Although the lease was clear and unambiguous in its terms, Car-X would suffer relatively great harm if forfeiture occurred. Car-X had operated a successful business on the leased premises for ten years,[25] and termination of its lease, which would disrupt it operations would cause severe economic loss. The court then balanced this with the incidental harm Kidd-Heller would suffer since Kidd-Heller would continue to receive lease payments at an increased rate and had taken no substantial steps to find another lessor.[26]

The Tenth Circuit reversed the award for unjust enrichment, finding that forbearance to sue constitutes adequate consideration for a contract.[27] The Kansas Supreme Court has ruled that relinquishment of a legal right is sufficient consideration for a promise, notwithstanding whether the party would have prevailed in the threatened suit.[28] However, forbearance as adequate consideration carries the requirement that the claim be non-frivolous.[29] The Tenth Circuit then concluded that Kidd-Heller had a reasonable and sincere belief in the validity of

22. *Car-X*, 927 F.2d at 517. Kansas law provided no direct authority on the fact situation in the present case, but the court of appeals agreed with the district judge's application of the dominant views in other jurisdictions.

In using its "discretion to anticipate the rule state courts in similar circumstances likely would make[,]" Herndon v. Seven Bar Flying Serv. Inc., 716 F.2d 1322, 1332 (10th Cir. 1983), federal courts "may consider all resources, including . . . the general weight and trend of authority." Hartford v. Gibbons & Reed Co., 617 F.2d 567, 569 (10th Cir. 1980).

23. *Car-X*, 927 F.2d at 517.

24. *See* Gardner v. HKT Realty Corp., 744 S.W.2d 735, 737-38 (Ark. Ct. App. 1988); Linn Corp. v. LaSalle Nat'l Bank, 424 N.E.2d 676, 678-79 (Ill. Ct. App. 1981); Wharf Restaurant, Inc. v. Port of Seattle, 605 P.2d 334, 340-41 (Wash. Ct. App. 1979); Sosanie v. Pernetti Holding Corp., 279 A.2d 904, 907-08 (N.J. Super. 1971).

25. *Car-X*, 927 F.2d at 516.

26. *Id.* at 517.

27. *Id.*

28. EVCO Distrib., Inc. v. Brandau, 626 P.2d 1192, 1196 (Kan. Ct. App. 1981). *See also* Frets v. Capitol Fed. Sav. & Loan Ass'n, 712 P.2d 1270, 1276 (Kan. 1986) (legal right is sufficient consideration for a promise); Snuffer v. Westbrook, 795 P.2d 950, 951 (Kan. 1932) (forebearance is usually sufficient consideration for a contract).

29. *EVCO*, 626 P.2d at 1196-97. "Forbearance to sue can be good consideration . . . if the one who forbears has a reasonable and sincere belief in its validity."

her claim.[30]

V. No Breach of Implied Duty of Good Faith Under Joint Operating Agreement Absent Breach of Specific Contract Provisions: *Davis v. TXO Production Corp.*[31]

Based on Oklahoma law, the Tenth Circuit found no breach of implied duty of good faith to perform under an operating agreement absent breach of specific contractual provisions. This decision conforms to Tenth Circuit precedent concerning the existence of a joint venture between parties to an operating agreement.[32]

As operator under a joint operating agreement, William Davis (Davis) brought suit against the owner of a nonoperating interest, TXO Production Corp. (TXO). Davis asserted that TXO had breached the implied covenant of good faith and fair dealing by making false and malicious statements concerning Davis's operation of oil and gas units. The district court dismissed Davis's claim for failure to state a cause of action for which relief could be granted. On appeal, the judgment was affirmed.

The Tenth Circuit applied the district court's analysis that Davis's claim arose out of a recognized fiduciary duty between co-tenants of an oil and gas lease.[33] Here, no breach existed because TXO had performed on its obligations under the express covenants of the contract. There was no evidence, therefore, to indicate that TXO breached its implied duty to perform.[34]

The court also rejected Davis's argument that an implied duty of good faith exists independent of a fiduciary duty. Davis based its argument on the concept that neither party may do anything to impede the other party's right to the "fruits of the contract,"[35] but the facts of this case did not present a such a situation. Davis did not adequately allege he was deprived of any fruits of the contract or that TXO's actions harmed the joint estate.[36] The joint operating agreement did not specify a plan for unitization or require TXO's cooperation with such a plan,[37] and the agreement did not prohibit TXO from voicing its opinion of the operators.[38]

30. *Car-X*, 927 F.2d at 518.
31. 929 F.2d 1515 (10th Cir. 1991).
32. Frankfort Oil Co. v. Snakard, 279 F.2d 436, 443 (10th Cir. 1960).
33. *See* Teel v. Public Serv. Co, 767 P.2d 391, 396 (Okla. 1985).
34. *Davis*, 929 F.2d at 1519.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*

VI. EXPECTATION DAMAGES APPLY IN BREACH OF CONTRACT FROM CANCELLED ORDERS: *ORAL-X CORPORATION V. FARNAM COMPANIES, INC.*[39]

A product supplier is entitled to damages for royalties on cancelled orders. Through this decision, the Tenth Circuit maintains the tradition of awarding damages so that the non-breaching party is placed in the position he or she would have been in had the breach not occurred.[40]

Oral-X Corp. (Oral) is a manufacturer of nutritional paste for horses. Farnam Companies, Inc. (Farnam) is a large nation-wide seller of horse care products. These parties entered into a contract that required Oral to manufacture and sell its product to Farnam for a specified price plus a ten percent royalty on the ultimate sale price. Farnam cancelled several orders and terminated the contract after discovering that a small amount of Oral's product was improperly manufactured. Oral sued Farnam for the purchase price and royalties for products received and sold by Farnam as well as the royalties on orders cancelled by Farnam. Farnam counterclaimed on the basis of breach of express and implied warranties of merchantability.

The district court concluded that the product did not breach any warranties and awarded damages to Oral-X for the unpaid production costs and royalites on the products actually shipped.[41] However, it did not award royalites on orders placed and cancelled by Farnam[42] because the price and uncertainty of an actual sale were too "speculative."[43]

The Tenth Circuit affirmed the district court's judgment that no warranties of merchantibility were breached. Although Oral-X shipped a small amount of defective product to Farnam, "[t]his slight variation did not constitute a material breach of contract excusing Farnam's performance."[44]

The Tenth Circuit reversed the district court decision not to award damages for royalties on cancelled orders based on uncertainty about the sale and price of the product.[45] Oral-X was entitled to recover royalty payments it would have received had Farnam performed. This determination was based on the established proposition that damages are awarded to place the non-breaching party in the same position as if the contract been performed.[46] Had Farnam performed and sold the product, Oral-X would have received royalties on the product sold. Further, the contract itself established Oral-X's expectation that it would receive

39. 931 F.2d 667 (10th Cir. 1991).

40. *Id.* at 670 (citing RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (1981); J. CALAMARI & J. PERILLO, CONTRACTS § 14-4 (3d ed. 1987) (citing U.C.C. § 1-106; 5 ARTHUR LINTON CORBIN, CONTRACTS § 992 (1964); CHARLES T. MCCORMICK, DAMAGES § 137 (1934); 11 SAMUEL WILLISTON, CONTRACTS § 1338 (1968)).

41. *Oral-X*, 931 F.2d at 668.

42. *Id.*

43. *Id.* at 671.

44. *Id.* at 670. *See* J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 10-2 (3d ed. 1988).

45. *Oral-X*, 931 F.2d at 671.

46. *See* A.R.A. Mfg. Co. v. Pierce, 341 P.2d 928, 932 (Ariz. 1959).

royalties after the product was sold.[47] The district court's distinction between the orders Oral-X shipped and those Farnam cancelled was erroneous in both cases because although the amount of royalties due would be difficult to determine, recovery for lost profits should not be denied.[48] The court then remanded for determination of damages based on the orders Farnam cancelled.

VII. NONOCCURRENCE OF CONDITION PRECEDENT DISCHARGES DUTY TO PERFORM: *B-B COMPANY V. PIPER JAFFRAY & HOPWOOD, INC.*[49]

When a contract is based on the occurrence of some future event, such as obtaining approval for a special improvement district, nonoccurrence of such a condition precedent discharges the other party's duty to perform. The following case illustrates the established principle that failure of a condition precedent invalidates the contract.[50]

B-B Co. (BB) planned to use proceeds from special improvement district bonds to purchase and develop resort property. BB was to arrange for industrial revenue bonds from the municipal government while Piper Jaffray & Hopwood, Inc. (Piper) would underwrite the bonds. BB was was unable to get approval for the special improvement districts and Piper refused to underwrite the project. BB sued Piper for breach of promise to underwrite the bonds. After hearing arguments, the district court granted Piper's motion for summary judgment holding that B-B had failed to meet an essential condition precedent.[51]

The Tenth Circuit affirmed after giving BB's argument closer scrutiny.[52] BB asserted that the original agreement with Piper was based on Piper's promise to underwrite about $2,000,000 in bonds for the project. BB claimed that Piper's failure to underwrite the bonds forced it to abandon the project at considerable time and expense. However, the Tenth Circuit found that since BB was unable to arrange for the special improvement districts there was nothing for Piper to underwrite.[53] A condition precedent existed for BB to establish the special improvement districts.[54] When this condition was not satisfied, Piper's duty of performance under the contract was discharged.[55]

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47. *Oral-X*, 931 F.2d at 670.

48. *Id.*

49. 931 F.2d 675 (10th Cir. 1991).

50. Absent case precedent, the Tenth Circuit based its decision on secondary authority. "Non-occurrence of a condition precedent discharges the other party's duty of performance." *Id.* at 678. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 275(1) & (2) (1981).

51. *B-B Co.*, 931 F.2d at 676.

52. *Id.*

53. *Id.* at 678.

54. *Id.* "A condition precedent is defined as an act or event, other than a lapse of time, which must exist or occur before a duty of immediate performance of promise arises." *Id.*

55. *Id.*

VIII. STANDARD FIDUCIARY RELATIONSHIP OF JOINT VENTURERS MAY BE CONTRACTED AWAY: *DIME BOX PETROLEUM CORP. V. LOUISIANA LAND AND EXPLORATION CO.*[56]

The Tenth Circuit found that the parties in a joint venture may contract for a different relationship than the standard fiduciary relationship usually found in a joint venture agreement. Absent an agreement to the contrary, Tenth Circuit cases have held that a fiduciary relationship exists in a joint venture.[57]

Louisiana Land and Exploration Co. (LL&E) and Dime Box Petroleum (Dime Box) entered into certain agreements, including one "farm-out" agreement,[58] to acquire and develop oil and gas leases. Subsequently, the parties entered into an operating agreement which designated LL&E as operator. The agreement gave LL&E the duty to drill, complete and produce wells, and Dime Box had a duty to pay its proportionate share of the costs and expenses. Dime Box brought suit claiming LL&E breached its fiduciary duty under the operating agreement based on overcharges and fraud. LL&E counterclaimed that Dime Box had breached its agreement to pay for its share of the acquisition of oil and gas leases.

The district court held in favor of LL&E since the operating agreement was not a joint venture agreement and concluded that no fiduciary relationship had been created.[59]

While the Tenth Circuit affirmed, it disagreed with the lower court's analysis that no joint venture was created by the operating agreement. The facts at trial established a joint venture:[60] the parties had a joint interest in the leases; they had an express agreement to share in the profits or losses; and their conduct showed cooperation in the venture.[61] The court further found that the nature of this joint venture created a fiduciary relationship based on LL&E's control over the operation[62] but the parties had contracted for a different standard than that which is traditionally applied to fiduciaries. The operating agreement provided that "operator has no liability to nonoperator for negligence or unintentional misconduct."[63] While such a standard is not the traditional measure of a fiduciary relationship, the trial court did not err in concluding the parties contracted for a standard that modified the

56. 938 F.2d 1144 (10th Cir. 1991).

57. *See* Rajara v. Allied Corp., 919 F.2d 610, 623 (10th Cir. 1990); Cascade Energy and Metals Corp. v. Banks, 896 F.2d 1557, 1570 (10th Cir. 1990).

58. A "farm-out" agreement occurs when an oil and gas lessee agrees to assign its lease to another party who earns its interest in the leased minerals by drilling a well.

59. 717 F. Supp. 717 (D. Colo. 1989).

60. In Colorado, three elements are required to establish a joint venture: a joint interest in property; an express or implied agreement to share in the profits or losses and conduct showing cooperation in the venture. *Dime Box*, at 1147. *See* Agland, Inc. v. Koch Truck Line, Inc., 757 P.2d 1138 (Colo. Ct. App. 1988); Fullenwider v. Writer Corp., 544 P.2d 408, 410 (Colo. Ct. App. 1975).

61. *Dime Box*, 938 F.2d at 1147.

62. *Id.*

63. *Id.* at 1147-48.

fiduciary relationship.[64]

IX. Absent Evidence of No Arms-Length Bargain, Fiduciary Relationship Does Not Exist: *Devery Implement Co. v. J.I. Case Co.*[65]

Based on Oklahoma law, the Tenth Circuit held that a farm equipment manufacturer did not have a fiduciary relationship with a dealer under a dealership agreement because there was no evidence that the parties were not bargaining at arms length at the time of the agreement. This decision is based on the Oklahoma practice of looking for lack of an arms-length transaction before finding a fiduciary duty.[66]

Devery Implement Co. (Devery), a farm equipment dealer, sold parts and service for Steiger tractors.[67] Devery brought an action against J.I. Case Co. (Case)[68] after Case terminated the dealership agreement for lack of sales. Devery claimed that the termination constituted a breach of fiduciary duty by Case.

A jury returned a verdict for Devery finding that a fiduciary relationship existed between Devery and Case.[69] The Tenth Circuit reversed the jury verdict finding no evidence to indicate that the parties had not bargained at arms length.[70] The decision stated that the district court's ruling on the existence of a fiduciary relationship was "inherently contradictory"[71] because it found the agreement could be terminated at will, which indicates an arms-length bargain, but also that a fiduciary relationship could exist in the contract which implicates lack of an arms-length transaction.[72]

The Tenth Circuit also looked to other Oklahoma precedent to determine whether a fiduciary relationship existed in this case. In Oklahoma, a fiduciary relationship can arise when confidence or trust from one party establishes the dominance or control of another.[73] The facts in this case, however, were not indicative of a fiduciary relationship, particularly because Devery did not sell Steiger products as its primary line. Devery sold several other lines, indicating that Devery was not in a weak position relative to Case, therefore it could not be concluded that Devery was forced to substitute Case's will for its own.[74] The court concluded that a fiduciary duty could arise out of a dealership agreement if

64. *Id.* at 1148.
65. 944 F.2d 724 (10th Cir. 1991).
66. *Id.* at 730 (citing Appleman v. Kansas-Nebraska Natural Gas Co., 217 F.2d 843, 848-49 (10th Cir. 1955).
67. Steiger Tractors Inc. was also a defendant named in this action.
68. Tenneco, Inc. acquired Stieger Tractors, Inc. and subsequently assigned Steiger to J.I. Case Company, one of Tenneco, Inc's subsidiaries.
69. *Devery*, 944 F.2d at 725.
70. *Id.* at 732.
71. *Id.* at 731.
72. *Id.*
73. *Id.* at 729.
74. *Id.* at 731.

the facts showed an imposition of trust and confidence.[75]

X. Waiver of Refund by Voluntarily Paying Prices in Excess of Contract: *Prenalta Corp. v. Colorado Interstate Gas Co.*[76]

The Tenth Circuit found that sufficient evidence existed to remand the case on the issue of whether Colorado Interstate Gas Co. (CIG) waived its right to pay the escalated base price of a gas purchase contract by paying a higher price during settlement negotiations. This decision applies the "voluntary payment" rule, recognized under Wyoming law, which holds that a party may not later recover damages for payments made voluntarily.[77]

Prenalta Corp. (Prenalta) and other parties named in the action, owned working interests in several natural gas wells in Wyoming. CIG is a company that purchases and transports gas. Prenalta and CIG entered into long-term contracts whereby CIG would purchase the gas produced from Prenalta's wells. At the time the contracts were executed, the price of gas was regulated by the federal government.[78] However, Prenalta, anticipating deregulation and a resulting decrease in gas prices negotiated as part of the agreement with CIG for "take-or-pay" clauses,[79] and a clause permitting it to seek a redetermination of the price for gas under the contract. If Prenalta failed to seek redetermination of prices within six months after deregulation, the price-escalating provisions of the contract would take effect. When deregulation occurred, CIG refused to make payments to Prenalta based on the "take-or-pay" provision. After negotiations failed, Prenalta brought suit.

The district court granted summary judgment to CIG, finding that the contract provision was clear and unambiguous.[80] Further, Prenalta was entitled to a refund of any prices paid over the amount set forth in the escalated-price base.[81]

The Tenth Circuit reversed and remanded finding there was sufficient evidence to present a factual question as to whether CIG waived its right to a refund.[82] "Waiver is the intentional relinquishment of a known right manifested in an unequivocal manner."[83] CIG's retroactive

75. *Id.* at 730.
76. 944 F.2d 677 (10th Cir. 1991).
77. Fulton v. Des Jardins, 227 P.2d 240, 245 (Wyo. 1951).
78. Interstate transport and sale of gas under these contracts was regulated by the Federal Energy Regulatory Commission (F.E.R.C.) until January 1, 1985, when the prices under two of the contracts were deregulated by the Natural Gas Policy Act of 1978, 15 U.S.C. § 3331 (1978). *Id.* at 679.
79. A take-or-pay clause requires the purchaser to take a minimum quantity of gas annually from a well or pay for a specified quantity whether actually taken from the well-site or not. *Id.* at 680.
80. *Id.* at 684.
81. *Id.*
82. *Id.* at 685.
83. *Id.* (quoting St. Paul Fire & Marine Ins. Co. v. Albany County School Dist. No. 1, 763 P.2d 1255, 1262 (Wyo. 1988).

and continuous payments presented a question of fact of whether it had intentionally relinquished its claim to the refund. Wyoming law regarding voluntary payments precluded CIG from asserting entitlement to a refund based on the claim that it was under no obligation to pay it in the first instance.[84]

XI. CONCLUSION

The cases analyzed follow the well-established principle of holding parties to the promises made, especially when changing circumstances such as deregulated gas prices make the contract less than an ideal bargain. The Tenth Circuit continues to be reluctant to find a fiduciary relationship where the contracting parties are in relatively equal positions.

In sum, this year's Tenth Circuit decisions have been consistent with those of past years. Given current economic trends, decisions in contract law will probably continue to hold parties to the conditions of their contracts and not hold one party more responsible than another unless there is clear evidence of dominance or control.

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84. *Id.* "[M]oney voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered back on the ground that . . . there was no liability to pay in the first instance." (quoting Fulton v. Des Jardins, 227 P.2d 240, 245 (Wyo. 1951).