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Corporate and Commercial Law Survey

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CORPORATE AND COMMERCIAL LAW SURVEY

I. INTRODUCTION

In 1991 the Tenth Circuit Court of Appeals decided twelve cases of interest dealing with Commercial and Corporate Law. Four of the cases involve banking, four address corporations or contracts issues, three are trade regulations cases and the last is a joint venture case.

The four banking cases represent the more important developments in 1991, reflecting the continued deference and broad construction the Tenth Circuit affords banking legislation in the face of continuing economic difficulties. The remaining eight cases evidence a more straightforward approach toward the application of existing law. This Article addresses each of these twelve cases and highlights the judicial restraint and conservative approach exhibited by the court.

II. BANKING CASES

Historical Background

The savings and loan crisis of the past decade generated much attention, spurring federal regulation designed to strengthen the entire banking system.[1] In 1989, Congress passed the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA)[2] in response to financial industry failures. This law created the Resolution Trust Corporation (RTC) and gave it authority to override state branch banking laws, which precluded banks obtaining failing or failed thrifts through emergency acquisitions from operating these thrifts as branches.[3] On June 1, 1990, pursuant to the provisions of FIRREA, the RTC issued a regulation known as the "Override Regulation."[4] This regulation enables the RTC to sell a branch of a failed savings and loan to a bank, which may then operate the facility as its own branch, notwithstanding state prohibitions on branching within the state.[5]

JUDICIAL DEFERENCE UNDER FIRREA AND OTHER ACTS

A. *The Validity of the Override Regulation:* State of Colorado v. Resolution Trust Corp.[6]

In 1991 the Tenth Circuit Court of Appeals was presented with the issue of the validity of the Override Regulation. The case was combined

1. Ronald R. Glancz, *Thrift Industry Restructured: An Overview of FIRREA*, 36 FED. BAR NEWS & J. 472, 472 (1989).
2. Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. 101-73, 103 Stat. 183 (Aug. 9, 1989).
3. *Id.* at § 501.
4. 12 C.F.R. § 1611.1 (1990).
5. *Id.*
6. 926 F.2d 931 (10th Cir. 1991).

from a New Mexico case in which the federal district court upheld the regulation,[7] and a Colorado case in which the federal district court determined the regulation to be void and contrary to the provisions of FIRREA.[8] The Tenth Circuit held that the RTC's interpretation of FIRREA rests on a permissible construction of the statute and that Congress had properly granted broad rulemaking authority to the RTC.[9] Thus, the court upheld the Override Regulation and ruled that FIRREA can serve as a source of federal branching authority.[10] Additionally, the court held that the RTC regulation violates neither the McFadden Act nor the Regulatory Flexibility Act.[11]

The court first narrowly framed the issue as whether an override of anti-branch banking law is a valid exercise of the RTC's rulemaking power under FIRREA.[12] Answering affirmatively, the court relied on *Chevron, Inc. v. Natural Resources Defense Council*[13] for the proposition that where Congress has spoken unambiguously to the power of an agency courts are required to give effect to that intent.[14] The court found clear, unambiguous language indicating that the Emergency Acquisitions provisions of FIRREA provide the RTC authority to issue a regulation overriding state branching laws that preclude nationally chartered banks from converting acquired failed thrifts into branches.[15] Employing a sweeping standard of deference, the court held that RTC's interpretation that FIRREA authorized its actions was proper, given the background and language of FIRREA and legislative intent giving the RTC broad authority in implementing FIRREA. The court found especially persuasive the fact that the statute explicitly applied "notwithstanding any provision of state law."[16] Next, the court considered the states' argument that the RTC regulation directly conflicted with the McFadden Act, which both Colorado and New Mexico contended was the exclusive source of national bank branch approval.[17] The court gave great deference to the Comptroller's interpretation of the National Banking Act, and by doing so, implicitly held that FIRREA exists as an independent source of federal branching authority.

Although much of the majority opinion is devoted to the statutory construction of FIRREA and the RTC's authority to override state branch banking laws, the decision has other significance. One practical

7. Independent Community Bankers Ass'n v. Resolution Trust Corp., No. Civ.- 90-0532SC, 1990 U.S. Dist. LEXIS 18584 (D. N.M. June 15, 1990).

8. State of Colorado v. Resolution Trust Corp., No. 90-Z-190, 1990WL51191, (D. Colo. Feb. 14, 1991).

9. 926 F.2d at 936-37.

10. *Id.* at 944-45.

11. *Id.* at 945-48.

12. *Id.* at 936.

13. 467 U.S. 837 (1984).

14. 926 F.2d at 936.

15. *Id.* at 936-37.

16. *Id.* at 937 (relying on this language, the court stated that it grants the Resolution Trust Corporation broad authority to override state law that interferes with enumerated emergency acquisitions).

17. *Id.* at 945.

result of the decision is that it enlarges the class of potential purchasers of failed thrifts. Pursuant to the RTC regulation, bank holding companies no longer possess exclusive authority to purchase a thrift with facilities in multiple counties because now single unit commercial banks may also enter the bidding process. This invites hightened competitive bidding, which may result in lower costs to the American public.

Additionally, although the RTC regulation in question only preempts state laws barring intrastate branching, FIRREA may be interpreted as providing a source of authority for intrastate branching. This is because the RTC may rely upon this precedent and upon the override powers to supplant other limitations. Also, given the continuing national trend in the banking industry toward consolidation and centralization and the RTC's apparent preference for selling thrifts in their entirety rather than in a piecemeal fashion to presumably larger banks or holding companies, these larger institutions may gain a significant advantage due to the broad lender authority that results from a network of branches. These suppositions, when compounded with the fact that many larger institutions are nationally chartered banks, make it clear that the decision could, in effect, promote the erosion of the competitive equality doctrine. Finally, despite the fact that many states are gradually legislatively authorizing branch banking anyway, this precedent of deferential review may be read to extend to other, non-branching-related state banking laws.

B. *The Standard and Scope of review of Banking Insolvency Decisions:* Franklin Savings Ass'n v. Director, Office of Thrift Supervision[18]

Franklin Savings addressed the appropriate scope and standard of review to be used by a court when a bank challenges the Director of the Office of Thrift Supervision (Director) in his decision to appoint the RTC as conservator. The Tenth Circuit held that review is limited to the administrative record, and that the appointment may be set aside only if the decision is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.[19] The decision shows that the court gives great deference to the regulator as an expert decision maker, and that judicial review of evidence outside of the administrative record will be upheld only in very limited circumstances.[20]

In *Franklin Savings*, a state-chartered savings and loan association and its parent company brought suit challenging the Director's decision to appoint a conservator for the thrift. The Director had determined the thrift to be unsafe and unsound to transact business due to its aggressive and financially risky operative strategies. The thrift's management challenged the Director's decision and conclusions.

18. 934 F.2d 1127 (10th Cir. 1991), *cert. denied*, 60 U.S.L.W. 3652 (U.S. Mar. 23, 1992) (No. 91-1139).

19. *Id.* at 1142.

20. *Id.* at 1139-40.

The district court had conducted a hybrid, *de novo* review allowing counsel for the the thrift to cross-examine witnesses, depose expert witnesses and submit other evidence outside of the three-volume administrative record. The district court found that the Director lacked any factual basis for appointing a conservator and that the appointment was arbitrary and capricious. The court then ordered the removal of the conservator.[21]

The Tenth Circuit Court of Appeals reversed the district court.[22] The court first framed the issue as whether a district court can base its decision on evidence outside of the administrative record, and what degree of deference is due a Director's decision to appoint a conservator. After finding no guidance in the organic law, the court found that the Administrative Procedure Act (APA) confined the scope of review of a challenged appointment of a conservator under FIRREA to the information before the Director at the time of the decision. Thus, the administrative record provided the limits of review.[23] After reviewing the statutory scheme, the legislative history, the APA and the applicable state law the Tenth Circuit made it clear that the reviewing court should be particularly deferential when judging an agency's predictive judgment, and that in cases like *Franklin Savings*, the decisions regarding insolvency remain particularly within the agency's field of discretion and expertise.[24] While the court reaffirmed the arbitrariness, capriciousness, and abuse of discretion standard, it seems to have applied a narrow, seemingly erroneous standard.

Franklin Savings demonstrates that the court will give broad deference to challenged decisions made by regulators of financial institutions regarding future financial stability. The Tenth Circuit's rather broad interpretation of the APA implicitly presumes that the Director's decision is correct, thereby making challenges difficult. In view of well-settled administrative law in this area, the *Franklin Savings* decision appears defensible. The decision further demonstrates the great deference the Tenth Circuit gives to regulators in this area. While the trial court apparently viewed its role quite broadly, the appellate court narrowed the permissible examination, crafting a standard of review that in practice inhibits successful regulatory challenges.

C. *Decision to Close Bank for Insolvency is Unreviewable in a Pre-closure Proceeding:* American Bank, N.A. v. Clarke[25]

In *American Bank, N.A. v. Clarke*, the Tenth Circuit held that the Comptroller's decision to close a bank determined to be insolvent is unreviewable in pre-closure proceedings.[26] American Bank had been

21. *Id.* at 1135-36.
22. *Id.* at 1151.
23. *Id.* at 1137.
24. *Id.* at 1145-46.
25. 933 F.2d 899 (10th Cir. 1991).
26. *Id.* at 901.

purchased by a group of investors who were informed, pre-sale, that the bank required an infusion of $2.4 million to raise its equity capital to the minimum regulatory level. The investors made this cash infusion and bought the bank. Yet after examining the financial state of the bank again and determining that additional losses necessitated further capital influx, the Comptroller threatened to declare the bank insolvent and place it into FDIC receivership. After notice of a pending closure, the bank obtained an injunction on the grounds that the Comptroller should not be able to make a demand for new capital so soon after a purchase, and the new owners should be given more time to make the bank profitable.[27]

The district court found the bank's arguments persuasive and temporarily enjoined the Comptroller from closing the bank. The Tenth Circuit Court of Appeals reversed the district court, relying on *Adams v. Nagle*,[28] a 1938 U. S. Supreme Court decision holding that the Comptroller's decision to close a bank determined to be insolvent is unreviewable in a pre-closure proceeding.[29] The court rejected the bank's argument that the APA overruled *Adams* and noted that the APA precludes judicial review of agency action when agencies are given discretionary decision-making powers or when review is precluded by another statute.[30] The court concluded there was neither a relevant statutory grant of discretion nor a preclusion of review in this instance. Nonetheless, after looking at express language in the enabling statute, the statutory scheme, the statutory objectives, the legislative history and the nature of the administrative action involved, the court found no clear evidence of legislative intent that pre-closure decisions are unreviewable.[31] The court found that the language of the statute authorizing the Comptroller to appoint a receiver for insolvent banks gave the Comptroller great discretion. Furthermore, the court determined that while a subsequent revision of the National Bank Act provides for review of such decisions, the review here was explicitly post-closure. Finally, the court recognized that judicial intervention preventing or postponing bank closures would reduce the Comptroller's ability to respond to rapidly changing circumstances of banking activity, thus defeating the purpose of the banking laws.[32] Once again this case demonstrates the Tenth Circuit's unwillingness to second-guess regulators' determinations of bank insolvency—an area where regulator expertise is presumed. In doing so, the court broadens the scope of non-reviewability under the APA.

27. *Id.* at 900-01.
28. 303 U.S. 532 (1938).
29. 933 F.2d at 901.
30. *Id.* at 902.
31. *Id.* at 903-04.
32. *Id.* at 903.

D. *Setoff Based on Two Separate and Unrelated Commercial Transactions During Receivership is Impermissible:* Grady Properties Co. v. Federal Deposit Insurance Corp.[33]

Under the National Bank Act, when a bank is declared insolvent and it goes into receivership, the debts of the institution are prioritized for repayment and the general creditors stand in line for repayment with other creditors.[34] Often, however, there are several transactions between the institution and its creditors, which, if offset, reduce the amount of loss suffered by the creditor. Conceivably, such a setoff can increase the potential liability of the federal insuring agencies.

In *Grady Properties*, a bank, later declared insolvent, owed fees to a law firm. The law firm owned land encumbered by mortgage liens held by the bank. Following the bank's insolvency and reorganization, the law firm transferred its interest in the encumbered land and assigned its accounts receivable in the fees owed by the bank to Grady Properties. Grady Properties notified the bank that it had offset the mortgages on the land against the debts of the insolvent bank. The reorganized bank, however, refused to accept Grady's offset. Grady Properties brought a quiet title action on the properties encumbered by the mortgages, claiming that the mortgages should be canceled due to the refusal of Grady's attempted setoff. The reorganized bank itself was deemed insolvent and FSLIC became its receiver. FSLIC removed the action to federal court.

The district court determined that the setoff was based on two separate, unrelated commercial transactions completed without the agreement of the reorganized savings and loan.[35] The district court stated that since the reorganized bank had rejected the setoff, Grady Properties had to stand in line with the bank's other general creditors. The Tenth Circuit Court of Appeals affirmed the district court's decision, stating that the case of *Scott v. Armstrong*[36] provides the correct rule for setoffs under the National Banking Act. The *Scott* decision stated that setoff is not prohibited by the national banking laws when the agreements underlying the setoff demonstrate the contemplation of a mutual transaction.[37] Furthermore, setoff agreements may be implied from the nature of the transactions.[38] The Tenth Circuit held, however, that the *Grady Properties* transactions were separate and unrelated commercial transactions which did not comport with mutuality of obligation as defined in *Scott*.[39]

33. 927 F.2d 528 (10th Cir. 1991).
34. Kevin J. Foley, *Federal Deposit Insurance Corporation v. Wood: The FDIC, the Failed Bank, and the Seemingly Insurmountable Presumption*, 17 U. TOL. L. REV. 693, 712 (1986).
35. 927 F.2d at 530.
36. 146 U.S. 499 (1892).
37. 927 F.2d at 531.
38. *Id.*
39. *Id.* at 531-32.

III. JOINT VENTURES

In the area of joint ventures the Tenth Circuit in *Sullivan v. Scoular Grain Co.*[40] returns again to a hands-off approach to the interpretation of a federal statute. *Sullivan* dealt with the Federal Employer Liability Act (FELA),[41] which governs the liability of federal employers when they are sued in tort for injuries to employees. The trend in this area has recently been toward interpretary deregulation. In the face of financial instability, regulators have merely redefined organizations falling within their regulatory authority. In this context, FELA has been interpreted to exclude companies owning railroad track and cars from the definition of "common carrier" unless they carry the public for hire.[42]

In *Sullivan*, Scoular Grain Company and Freeport, a commercial warehouse lessor, entered into a joint venture to provide commercial grain storage at a railroad yard. Scoular paid for workers compensation insurance and ran the daily operations. An employee of the joint venture lost his left arm and leg while unloading grain at the railroad yard. After collecting $200,000 in worker's compensation benefits, the employee sued the joint venture, the two businesses and the railroad for negligence under FELA. One of the venturers paid workers compensation premiums and both companies claimed immunity under the state's worker compensation statute. In addition, both companies asserted that they were not "common carriers" within the meaning of the term in FELA. The district court exercized pendant jurisdiction over the state law claims, granted summary judgment for the joint venture on both issues and found that there was no genuine issue of material fact regarding either the status of the companies as common carriers, or their immunity under the Utah workers compensation statute.[43]

The Tenth Circuit affirmed the lower court, holding that although the two companies received grain shipped by railroad companies and stored grain adjacent to the tracks owned by railroad companies, their operations were not sufficient to bring them within the statutory definition of common carrier under FELA.[44] Additionally, the court found that the immunity granted under state law to immediate employers who pay compensation extends to all members of a joint venture even when the compensation is paid only by one of the venturers.[45] Framing the issue as whether every operator who uses the railroad and its operations falls under FELA's jurisdiction,[46] the court adopted the Supreme Court's analysis in *Edwards v. Pacific Fruit Express*.[47] That case held that a refrigerator car company that owned its own refrigerator cars was not a

40. 930 F.2d 798 (10th Cir. 1991).
41. FELA, 45 U.S.C. §§ 51, 57 (1988).
42. 930 F.2d at 800.
43. *Id.* at 799.
44. *Id.* at 800-01.
45. *Id.* at 800-02.
46. *Id.* at 800.
47. 390 U.S. 538 (1968).

common carrier because it did not carry the public for profit.[48] The Tenth Circuit declined to follow the Fifth Circuit's four-part test to determine common carrier status,[49] adopting instead the practice in the Sixth and Eighth Circuits of using that test as a discretionary "consideration."[50]

IV. TRADE REGULATIONS

During this survey period the Tenth Circuit considered three very different cases in the areas of trademark infringement and unfair competition, price discrimination and the application of the Petroleum Marketing Practices Act to a breach of contract claim. In none of these cases did the court establish new law.

A. *Incontestable Trademark Infringement Requires Showing of Likelihood of Confusion:* Coherent Incorporated v. Coherent Technologies, Incorporated[51]

In *Coherent* the Tenth Circuit stated that even plaintiffs with incontestable trademarks must show the likelihood of confusion to make a prima facie case of statutory trademark infringement.[52] The court reaffirmed the principle that incontestability, while giving the plaintiff the right to use a trademark, does not, as a matter of law, establish automatic infringement by another user.[53] While the court affirmed the district court's conclusion, it explicitly set out the appropriate method of analysis. *Coherent* involved a California laser manufacturer with incontestable rights to the trademark "Coherent, Inc." The manufacturer sued a Colorado laser radar systems distributor for federal trademark infringement and false designation of origin for its use of the word "coherent" in its name and for unfair competition under Colorado common law. Though both were involved in laser technology, the two firms were not direct competitors because they operated in different markets, made different end-products and marketed through different channels. Their buyers were sophisticated engineers, project managers or corporate officials who bought products built to exact specifications. Following a bench trial, the district court held that no infringement existed.[54]

The Tenth Circuit Court of Appeals affirmed the decision, holding that a plaintiff with an incontestable trademark must show the likelihood

48. 930 F.2d at 800.

49. Lone Star Steel Co. v. McGee, 380 F.2d 640, 647 (5th Cir. 1967). In *Lone Star*, The Fifth Circuit used the following four elements to determine if the defendant was a "common carrier" under FELA: First, whether there was actual performance of rail services; second, whether service being performed was contracted by the public; third, whether the defendant was engaged in interstate commerce by virtue of a contractual relationship with a railroad; and, fourth, whether defendant received remuneration from a railroad.

50. 930 F.2d at 801.

51. 935 F.2d 1122 (10th Cir. 1991).

52. *Id.* at 1124.

53. *Id.*

54. *Id.* at 1123-24.

of confusuion as an element in an infringement case.[55] The court found that interpretation of federal trademark law[56] requires the giving of some meaning to the 1988 amendment that states "such conclusive evidence of the right to use the mark shall be subject to proof of infringement . . . ."[57] The court interpreted this statement as evidence of the legislative intent to require a plaintiff to prove likelihood of confusion between two trademarks.[58] The court determined the likelihood of confusion to be a question of fact, and outlined four factors persuasive in holding that the differences between the two companies outweighed their similarities. Those factors are: (1) the name "coherent" was adopted by the Colorado company in good faith; (2) the companies were not competitors; (3) the companies marketed different products in different markets through different channels; and (4) the buyers of the companies' products were sophisticated individuals who demanded items built to exact specifications.[59] Despite survey evidence introduced by the plaintiff showing likely confusion, the court upheld the district court's holding of no likelihood of confusion. The court stated that, contrary to the plaintiff's submission, such surveys must demonstrate actual market conditions or simulate marketplace decision-making to be valid.[60]

B. *Technical Obsolescence or Introduction of New Products as a Valid "Changing Conditions" Defense to Claims of Price Discrimination:* Comcoa, Inc. v. NEC Telephones, Inc.[61]

Section 2(a) of the Robinson-Patman Act prohibits discriminatory pricing in goods of like quality, which might substantially lessen competition or create a monopoly.[62] Courts, however, do allow price differentials occasionally where they are "in response to *changing conditions* affecting the market for or the marketability of the goods concerned, such as, but not limited to, actual or imminent deterioration of perishable goods, obsolescence of seasonal goods . . . or sales in good faith in discontinuance of business in the goods concerned."[63] Thus, if the seller can show that it was operating under a variation in the usual market circumstances, that these changes were outside of his or her competitor's control and that the market change resembles one enumerated in the Act, then the seller's pricing behavior is not actionable under the "changing conditions" defense. The defense is usually narrow in scope and limited in application, thereby providing for little judicial analysis.

55. *Id.* at 1124.
56. Lanham Trade-Mark Act, 15 U.S.C. §§ 1114 through 1127 (1988).
57. 935 F.2d at 1125.
58. *Id.*
59. *Id.*
60. *Id.* at 1126.
61. 931 F.2d 655 (10th Cir. 1991).
62. FREDERICK M. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT, 328 (1962). *See also,* JULIAN O. VON KALINOWSKI, 5 ANTITRUST LAWS & TRADE REGULATIONS, § 32.04 (1969).
63. 15 U.S.C. § 13(a) (emphasis added).

The Tenth Circuit's treatment of the defense in *Comcoa*, although somewhat broader than usual, was a typical summary treatment of the law. There, the court held that technical obsolescence or the introduction of a new product model satisfies the changing conditions defense when the facts are at least similar to those established in Section 2(a) of the Robinson-Patman Act.[64]

In *Comcoa*, a defendant phone manufacturer produced two types of business telephones and offered a volume discount to some of its customers. Plaintiffs were phone equipment distributors who, despite their requests, were denied the same discounts for similar purchases. The distributors sued the manufacturer, alleging lost sales, lost assets, permanent business injury as a result of price discrimination, interference with prospective business relations and a breach of the implied duty of good faith and fair dealing. The district court granted the defendant summary judgment on the issue of the implied duty of good faith and fair dealing, but submitted the remaining issues to the jury, which rendered a verdict in favor of the defendant on the remaining claims.[65]

The Tenth Circuit affirmed the jury verdict regarding price discrimination and intentional interference with prospective business relations, but reversed the district court's summary judgment for the defendant on the issue of breach of an implied duty of good faith and fair dealing.[66] The court rejected the plaintiff's allegation that the trial court's failure to submit jury instructions containing the statutory examples of changing conditions was error. Reading Robinson-Patman's explicit language to extend the changing conditions defense beyond those substantially similar to those enumerated in the statute, the court found that pricing modifications due to technical obsolescence and the introduction of a new product are sufficiently similar to the statute's given excuses to constitute a valid defense.[67] The court concluded that the purpose of the changing conditions exception to liability under the Robinson-Patman Act is to facilitate the ready disposition of goods. To find "obsolescence of some goods" to be a valid changing condition under the Act, the court took a substance-over-form approach to the legislation, which was largely enacted to protect small businesses. The court apparently recognized that fluid market conditions would be enhanced if fact finders consider not only conditions affecting sellers of particular goods, but also temporary and special conditions affecting industry in general.

This slightly more expansive reading of the provision may, as in *Comcoa*, deny the ready disposition of goods—exactly opposite of the intent of Congress when passing the law.[68] The court's decision, however, is defensible as an implicit recognition that technical "perishability" is indistinguishable from changing conditions as enu-

64. 931 F.2d at 661.
65. *Id.* at 658-59.
66. *Id.* at 667.
67. *Id.* at 661.
68. *Id.* at 662 n.8.

merated in the Act. Such conditions may alter market conditions beyond the seller's control, thereby justifying differential pricing.

C. *Applicability of Petroleum Marketing Practices Act to Termination of Distributors Agreement:* Metro Oil Co., Inc. v. Sun Refining and Marketing Co.[69]

The case of *Metro Oil* explores whether a change in credit terms under a distributors agreement constitutes a termination of the agreement and, thus, bringing it within the Petroleum Marketing Practices Act (PMPA).[70] The Tenth Circuit held that the changed terms terminated the franchise agreement in violation of the PMPA, but that the plaintiff's suit for breach of contract and tortious interference with business relationships was barred by the PMPA's one-year statute of limitations.[71]

In *Metro Oil*, a wholesale distributor of motor fuel entered into a series of distributor agreements with a manufacturer of such fuel. The agreements provided in pertinent part that the manufacturer could establish the terms under which the distributor would pay for the product and that the agreements were subject to and governed by the PMPA. Subsequently, the distributor failed to pay certain invoices or to provide the requested proof of its ability to pay. The manufacturer changed the terms and conditions of payment to cash on delivery. From that point, the distributor alleged that the defendant had wrongfully terminated the contract, causing distributor to lose dealers. In a letter to the defendant, the distributor threatened to initiate suit under the PMPA after which the parties ceased doing business with each other. Two years later the distributor sued the manufacturer. The district court found the contract was governed by the PMPA, but that the PMPA's one-year statute of limitations barred the action. The court also held the plaintiff's claim for tortious interference was time-barred by Oklahoma's two-year statute of limitations for torts.[72] The Tenth Circuit affirmed the lower court's decision, holding that the suit was governed by the PMPA and, therefore, it was time-barred. The court concluded that summary judgment for defendants was proper because no genuine issue of material fact existed on the question of the PMPA's applicability and that the district court correctly applied the substantive law.[73] Framing the issue as whether the action was based upon a termination as contemplated under the PMPA, the court took a common sense approach that a suit, litigating a defendant's noncompliance with an agreement subject to the PMPA, required an interpretation that the defendants were actually covered by the statute. The court found that the only remaining issue for trial was which party terminated the agreement and that in either case the plaintiff could not prevail.[74] Upon review of the Oklahoma statute,

69. 936 F.2d 501 (10th Cir. 1991).
70. Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801 through 2824.
71. 936 F.2d at 504.
72. *Id.*
73. *Id.*
74. *Id.*

the Tenth Circuit affirmed the district court's conclusion that the limitation accrues upon the date of the tortious act or breach, and not upon the date of the resulting damage. The court ruled this claim was also time-barred.[75]

V. CORPORATE LAW

In 1991, the Tenth Circuit decided four Corporate Law cases. None of these cases represents a significant departure in the law and are, thus, only briefly discussed below.

A. *Liability of Successor Corporation Under State Products Liability Laws:* Williams v. Bowman Livestock Equipment Corp.[76]

In *Williams*, the court addressed the requirements that must be met under Oklahoma law before a successor corporation to a defunct predecessor can be held liable for injuries caused by products manufactured by the predecessor. Williams, the plaintiff, was injured while operating equipment manufactured by Bowman Hydro-Vat, Inc. Following liquidation of Bowman Hydro-Vat, Jim Bowman, the owner, formed a new corporation, Bowman Livestock Equipment Corporation. Williams brought suit against the new company alleging that as a successor corporation, Bowman Livestock was liable for the injuries caused by Bowman Hydro-Vat's product.

The district court dismissed the action finding no in personam jurisdiction over Bowman Livestock.[77] The Tenth Circuit determined that Bowman Hydro-Vat's contacts with the forum could be imputed to Bowman Livestock if the forum's law would hold Bowman Livestock liable for the actions of its alleged predecessor, Bowman Hydro-Vat. The court then addressed the law regarding successor liability in Oklahoma. Oklahoma law requires either a *de facto* merger, a fraudulent transaction or a new corporation that is a mere continuation of a former corporation before a court will find that a new company is a successor to a former one.[78] In addition, there must be some evidence of an agreement to assume liabilities and a sale or transfer of all, or substantially all, assets from a former to a latter corporation must be made.[79] The court determined that in this instance, none of the requirements of Oklahoma law was met. Since Bowman Livestock was determined not to be a successor to Bowman Hydro-Vat, the Tenth Circuit affirmed the district court.

B. *Excuse of Duty to Pay After Receipt of Defective Goods:* Oral-X Corp. v. Farnam Cos., Inc.[80]

In *Oral-X*, a manufacturer of horse products, Oral-X, shipped a

75. *Id.*
76. 927 F.2d 1128 (10th Cir. 1991).
77. *Id.* at 1130.
78. *Id.* at 1132 n.8.
79. *Id.* at 1132.
80. 931 F.2d 667 (10th Cir. 1991).

small quantity of defective product to its buyer, Farnam. Thereafter, Farnam canceled its remaining orders. Oral-X sued Farnam for breach of the marketing agreement, and Farnam sued Oral-X for breach of implied and express warranties. The district court entered judgment for Oral-X for unpaid production costs and royalties on product received, but denied Oral-X's request for royalties on Farnam's canceled orders.

The Tenth Circuit found that there was no material breach under Arizona law when Oral-X shipped a small amount of the product that did not contain an essential ingredient, nor were any warranties breached by Oral-X.[81] Furthermore, the court agreed with the district court that Oral-X was entitled to royalties from product already shipped, but stated that the district court erred in refusing to award Oral-X royalties for the orders that were canceled. The court determined that the royalties on the canceled orders were not too speculative in this case and that Oral-X was entitled to them.[82]

C. *Non-Occurrence of Condition Precedent and Non-Performance Under a B-B Company v. Piper Jaffray & Hopwood, Inc.*[83]

In *B-B Co.*, B-B, a corporation planning to purchase and develop resort property, sued Piper Jaffray, a bond underwriter that had promised to underwrite special improvement district bonds for B-B. The district court issued summary judgment in favor of Piper Jaffray.[84] On appeal, the Tenth Circuit stated that creation of a special improvement district was a condition precedent to Piper Jaffray's obligation to underwrite bonds. The court determined that, since Piper Jaffray had promised only to underwrite special improvement district bonds and no other bonds, failure of the creation of a special improvement district was also a failure of a condition precedent. Therefore, Piper Jaffray was under no obligation to B-B, and it did not breach its promise.[85]

D. *Summary Judgment in a Case for Specific Performance of a Contract:* Deepwater Investments, Ltd. v. Jackson Hole Ski Corp.[86]

In *Deepwater Investments*, Deepwater entered into bargaining with Jackson Hole Ski Corporation to purchase part of a ski resort's operation. After lengthy and involved negotiations, the parties developed an "interim agreement" and soon disagreements emerged between them. Eventually, Deepwater sued Jackson Hole Ski Corporation for specific performance, and upon a motion for summary judgment, the district court awarded Deepwater summary judgment for specific performance.[87] The Tenth Circuit reversed the lower court, stating that the

81. *Id.* at 670.
82. *Id.* at 671.
83. 931 F.2d 675 (10th Cir. 1991).
84. *Id.* at 676.
85. *Id.* at 678.
86. 938 F.2d 675 (10th Cir. 1991).
87. *Id.* at 1109.

existence of genuine issues of material fact precluded summary judgment for Deepwater and that the issue of whether a contract had been entered into was a question of fact for the fact finder to determine.[88]

VI. CONCLUSION

The survey period covered by this Article brought decisions from the Tenth Circuit that show either great deference to, or broad construction of, various legislation - as with the banking cases - or conformity with established law - as with the remaining cases. The court exhibited a willingness to yield to the decisions of financial institution regulators, while applying accepted principles of law in the areas of trade regulation and corporate law in general.

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88. *Id.* at 1111-12.

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