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Contracts

CONTRACTS

Bill's Coal Company v. Board of Public Utilities, 887 F.2d 242

Author: Judge McKay

Plaintiff, Bill's Coal Company ("Bill's"), brought this action claiming defendant, Board of Public Utilities ("Board"), had breached and repudiated a contract by which Bill's was to supply coal to the Board. The district court of Oklahoma applied Missouri law to defeat an award of attorney's fees, applied U.C.C. § 2-708(1) to measure damages by the difference between the contract price and the market price at the time and place of tender, and denied interest charges and other expenses to plaintiffs under U.C.C. § 2-710. The court also denied reimbursement for a mistake in overpayment of depreciation credit. Bill's appealed and the Board cross-appealed.

The Tenth Circuit held that application of Missouri law was proper. In diversity cases generally, attorney's fees are determined by state law and are substantive for diversity purposes. The application of U.C.C. § 2-708(1) to calculate damages was also proper. U.C.C. § 2-708(2), which allows for lost profits, was not available because Bill's could not qualify as a lost volume seller. The purpose of U.C.C. § 2-710 is to reimburse the seller for expenses reasonably incurred as a result of the buyer's breach. Here, Bill's interest expenses were incurred as the result of preparing for litigation. The district court correctly denied interest charges and other expenses. The judgment was affirmed as to all but the overpayment of the depreciation credit and remanded to make necessary adjustment.

Boyd Motors, Inc. v. Employers' Insurance of Wausau, 880 F.2d 270

Per Curiam

Plaintiff, Boyd Motors ("Boyd"), sued defendant, Employers' Insurance of Wausau ("Wausau"), for the diminished value of automobiles damaged by hail. The district court granted summary judgment in favor of Wausau, based on an exception in the insurance policy for loss resulting from "loss of market." The district court found the diminution of value to be within this market loss exception. Boyd appealed, arguing that the repairs did not put the vehicles in the same condition as they were and that an insurer is obligated to return the damaged property to substantially its original condition.

Distinguishing between a "loss of market" and a "loss of market value," the Tenth Circuit ruled that this case fell within the latter. Thus, the insurance policy covered the post-repair diminution in value of Boyd's vehicles, and such coverage was not defeated by the "loss of market" exclusion.

Business System Leasing v. Foothills Automotive Plaza, 886 F.2d 284
Per Curiam

Defendant, Foothills Automotive Plaza ("Plaza"), appealed a district court decision in a breach of contract action involving a computer system which had been leased to it by plaintiff, Business Systems Leasing ("BSL"), and serviced by plaintiff, Display Data Corporation. Plaza appealed on three grounds.

The Tenth Circuit affirmed. First, the court held that Plaza expressly waived by agreement any claim it might have had regarding BSL's failure to mitigate damages. Moreover, BSL simply chose one of its statutory remedies under the Uniform Commercial Code when it chose to proceed toward a judgment, and, in electing this course of action, BSL was under no duty to further mitigate its damages. Secondly, the court ruled that Display Data Corporation was entitled to recover for breach of the maintenance contract on both third party beneficiary theory and unjust enrichment theory. Lastly, Plaza objected to attorneys' fees, but the court concluded that the record clearly supported the district court's determination that Plaza had engaged in delaying tactics. Thus, attorneys' fees were correctly awarded.

Chase v. Dow Chemical Co., 875 F.2d 278
Author: Judge Seth

Plaintiff, Chase, brought this action to recover damages allegedly caused by defendant, Dow Chemical Company's ("Dow"), product, Sarabond. Dow moved for summary judgment, citing a Release and Indemnification Agreement executed with Chase as part of an earlier settlement. Chase objected, claiming that: (1) Dow fraudulently induced him into signing the release; and (2) the release is void as the product of a mutual mistake. The district court granted summary judgment in Dow's favor. The district court reasoned that Chase did not, as a matter of law, satisfy three of the five elements necessary to establish fraud under Colorado law. Chase subsequently appealed.

The Tenth Circuit held that Chase satisfied the first element of fraud. In essence, Chase proved that Dow falsely represented or concealed a material fact with evidence of affirmative misrepresentations and misleading half-truths. Chase also satisfied the second element of fraud. Chase proved that he was ignorant of Dow's false representation. In particular, Chase demonstrated that he was unaware of Dow's misrepresentations regarding research that showed Sarabond causes corrosion and cracking. The third element of fraud required that action be taken on the representation or concealment causing damages. The court disagreed with the district court's position that Chase was unjustified in relying on the veracity of Dow's representations, in light of the adversarial relationship. The court held that a party is not categorically barred from relying on an opposing party's representations when negotiating the settlement of a dispute which involves a claim for fraud. Conse-

quently, the court held that Chase satisfied three of the five elements necessary to establish fraud. Finally, the court affirmed the district court's finding that Chase bore the risk of a mistake under the release agreement terms. Absent fraud, Chase is bound by the release's terms and is barred from bringing suit. Accordingly, the court affirmed in part, reversed in part, and remanded for further proceedings.

Empire Fire and Marine Insurance Co. v. Guaranty National Insurance Co.,
868 F.2d 357

Author: Judge Ebel

Defendant, Guaranty National Insurance Company ("Guaranty"), insured an interstate motor carrier licensed by the Interstate Commerce Commission ("ICC"), and the policy contained a special endorsement as required. The special endorsement stated that Guaranty could not be relieved from liability or from paying a final judgment. The motor carrier leased a truck from a company insured by the plaintiff, Empire Fire and Marine Insurance Company ("Empire"). After an accident and Guaranty's refusal to defend, Empire settled the case with the third party. Empire sued Guaranty to recover the settlement amount.

The Tenth Circuit vacated the district court's summary judgment in Empire's favor. The court concluded that the ICC endorsement in Guaranty's policy negated limiting language in the body of the policy, such as an "excess coverage" clause, but it did not establish primary liability over other policies as a matter of law. The court held that after reading out the limiting language of Guaranty's policy, the two policies must be compared pursuant to traditional state insurance and contract law principles to determine how liability should be allocated.

Fischer v. Owens-Corning Fiberglass Corp., 868 F.2d 1175

Author: Judge Brown, sitting by designation

The plaintiff, Fischer, filed his first complaint in 1985, alleging injury from asbestos exposure including possible malignant mesothelioma. The claim was settled and Fischer, with advice of counsel, signed a release relieving the defendant, Owens-Corning, from all future actions, known or unknown. Twenty days after the release was signed and the parties had stipulated to an order of dismissal with prejudice, Fischer was diagnosed as having malignant mesothelioma. Shortly thereafter, Fischer filed a second complaint alleging he suffered malignant mesothelioma as a result of his exposure to asbestos. Owens-Corning moved for a motion to dismiss, alleging the action was barred by the release. Fischer argued that the release was based on a mutual mistake of fact and should be set aside. The district court ruled as a matter of law that the release barred the second complaint and Fischer appealed.

Upholding the district court's ruling and the validity of the release, the Tenth Circuit held that when Fischer signed the release he surrendered any cause of action for mesothelioma caused by exposure to asbestos. The language of the release relinquished actions for both known

and unknown claims. Applying Oklahoma law, the court found that the release was a contract. The language in the release was clear and the type of harm Fischer suffered was foreseeable. Moreover, the court ruled that Fischer was undeniably aware that he had a possible claim for mesothelioma when he signed the release. Any other conclusion would make it impossible to settle claims prior to trial.

Grayson v. American Airlines, 864 F.2d 712

Author: Judge McWilliams

Plaintiff, Grayson, a discharged employee, appealed dismissal of his suit against American Airlines for breach of an employment contract and promissory fraud.

The Tenth Circuit held that American Airlines was under no legal obligation to accept Grayson's offer to be demoted or transferred in exchange for keeping his job. Moreover, American Airlines' refusal to accept such offer did not constitute a breach of the duty of good faith and fair dealing. The court affirmed the district court's dismissal of the case.

High Plains Natural Gas Co. v. Warren Petroleum Co., 875 F.2d 284

Author: Judge Brorby

Defendant, Warren Petroleum Company ("Warren"), moved for summary judgment against plaintiff, High Plains Natural Gas Company ("High Plains"). Warren contended that the remedies sought by High Plains could not be awarded as a matter of law. Warren reasoned that the contract executed by both limited the remedies available for its breach. The remedies were limited to rejection of the natural gas to be delivered by Warren, or termination of the contract. The district court granted summary judgment in favor of Warren. High Plains appealed, asserting three errors. First, High Plains asserted that it was entitled to pursue its claim for breach of implied warranty because the limitations of remedies provision did not modify the implied warranties. Second, High Plains asserted that the limitations of remedies clause in the contract did not prohibit High Plains from pursuing its remedies under the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA"). Finally, High Plains asserted that Warren breached its implied duty of good faith and fair dealing.

The Tenth Circuit applied Texas law. First, the court held that when the contract clearly demonstrates an intent to limit the seller's liability, the provisions limiting remedies also apply to the remedies for breach of implied warranties. The court defined the second issue as one of an apparent conflict in Texas law. Under the Uniform Commercial Code ("U.C.C."), as adopted by Texas, remedies for breach of warranty can be limited. Under the DTPA, however, a "no waiver" provision provides that any waiver of the provisions of the DTPA is unenforceable and void. The court, therefore, concluded that a limitation of remedies for breach of an express or implied warranty, created under the Texas U.C.C., is valid as long as it is not an enumerated violation under the

DTPA. High Plains did not specify any enumerated violation. Third, the court held that High Plains failed to make a factual showing that Warren did not act in good faith. Accordingly, the district court properly granted summary judgment on this claim. The judgment of the trial court was affirmed.

Kaiser-Francis Oil Co. v. Producer's Gas Co., 870 F.2d 563

Author: Judge Baldock

Plaintiff, Kaiser-Francis Oil Company ("Kaiser"), entered into contracts for the sale of natural gas to defendant, Producer's Gas Company ("PGC"). PGC was required to purchase minimum amounts at minimum prices under the contracts. The price of natural gas subsequently fell below the minimum contract price, and PGC refused to purchase the gas from Kaiser pursuant to the contracts. PGC argued that it paid Kaiser's co-owners for the gas at reduced prices. Kaiser sued for breach of contract, and the district court granted its motion for summary judgment.

PGC appealed arguing that the *force majeure* clause in the contracts was applicable to the lack of demand for natural gas and decrease in price, and operated to relieve PGC from its obligations under the contracts.

The Tenth Circuit upheld the district court's decision. The court stated that neither a decline in demand nor an inability to sell gas at or above the contract price constituted a *force majeure* event. PGC must bear the risk of the market demand and, thus, was not relieved of its obligation to pay. The court also discounted PGC's argument that payment to Kaiser's co-owners satisfied its obligation to pay. The court stated the contracts' intent was that PGC must pay Kaiser in accordance with the latter's percentage ownership in the wells. The court also upheld the district court's findings of fact and the summary judgment based upon those facts.

MAI Basic Four, Inc. v. Basis, Inc., 880 F.2d 286

Author: Judge Seth

Plaintiff, MAI Basic Four, Inc. ("MAI"), sued defendants, Basis, Inc., ("Basis"), for breach of a patent waiver agreement and a confidentiality and nondisclosure agreement, following the marketing by defendants of two software products markedly similar to MAI's. The district court granted summary judgment to Basis based on the decision that the agreements were restrictive covenants, comparable to agreements not to compete, and were void for lack of sufficient consideration.

The Tenth Circuit held that the agreements at issue were not restrictive covenants. The agreements were confidentiality agreements protecting and preserving trade secrets and other valuable confidential information and were necessary to ensure the commercial viability of companies competing in the development of technology. Because the

district court erred in finding the agreements void for lack of consideration, the judgment was reversed and remanded.

Thompson v. Shelter Mutual Insurance, 875 F.2d 1460

Author: Judge Logan

Defendant, Shelter Mutual Insurance Company ("Shelter"), appealed an award in favor of plaintiffs, Thompsons, for breach of contract and bad faith relating to insurance payments for a fire at the Thompsons' home. Shelter asserted that: (1) the evidence was insufficient to submit the claim of bad faith to the jury; (2) there was insufficient evidence to support the jury's awards for dwelling repair and personal property damage; and (3) the fee awarded to the Thompsons' attorneys was erroneous.

The Tenth Circuit applied Oklahoma law. Regarding the insufficiency of evidence and bad faith claims, Shelter argued that it had no duty to pay living expense money until the parties agreed upon Shelter's liability for repair costs. The court held that an unresolved dispute as to other policy claims does not, as a matter of law, excuse the insurer's failure to pay living expense benefits, when the liability for such benefits is undisputed. The court found that the evidence was sufficient to create a jury question for bad faith. Second, the damages awarded for personal property exceeded the proofs of loss for the personal property. The court held that when the damages awarded are unsupported by competent evidence, the plaintiff may be ordered to remit the amount above that which is supported by the evidence. Accordingly, a remittitur was ordered with affirmance of the modified award conditioned upon the Thompsons' agreement to the reduction. Finally, the court held that under OKLA. STAT. tit. 36, § 3629 (B), the award of attorneys' fees was proper. The court determined that this statute allows fees for time spent preparing and trying a claim of bad faith, provided the plaintiff succeeds on his claim of bad faith and also meets the statutory requirement of obtaining a total judgment larger than the greatest settlement offer made by the insurer.

Triad Systems Corp. v. Alsip, 880 F.2d 247

Per Curiam

Plaintiff, Triad Systems Corporation ("Triad"), brought this action to recover the full purchase price for a computer system plus payment for maintenance and service of the system. Defendant, Alsip, counter-claimed seeking a refund due to alleged revocation of acceptance. The district court found for Alsip, awarding him a refund less setoff value for his use of the system. Triad asserted that the district court erred in submitting the issue of Alsip's purported revocation of acceptance to the jury. Triad also contended that the express contract language precluded Alsip's revocation of acceptance. Last, Triad argued that certain statements admitted by the district court were precluded by the parole evidence rule.

First, the Tenth Circuit held that the effectiveness of a revocation of acceptance is a question of fact and, therefore, the issue was properly left to the jury. Second, the court viewed the contract language as simply expanding upon normal consumer remedies under the U.C.C., in line with the presumption that clauses prescribing remedies are cumulative rather than exclusive. Finally, evidence of pre-contract oral representations and warranties made by Triad were not precluded under the parole evidence rule. This evidence was introduced merely to explain or supplement the contract terms, a purpose expressly sanctioned by the rule.

Tri-State Generation and Transmission Association, Inc. v. Shoshone River Power, Inc., 874 F.2d 1346

Author: Judge McKay

Dissent: Judge Baldock

Plaintiff, Tri-State Generation and Transmission Association ("Tri-State"), brought an action to enjoin the sale of defendant, Shoshone River Power's ("Shoshone"), assets to a private utility. Shoshone, a member of Tri-State rural electrification cooperative, had a long term requirements contract with Tri-State, effective until the year 2005. The district court set aside the jury verdict in favor of Tri-State, granted a new trial, and denied Tri-State's request for a permanent injunction. Tri-State subsequently appealed.

The Tenth Circuit stated that it had jurisdiction to review the district court's denial of the permanent injunction, even though it was interlocutory. The court concluded that the issues could be decided without further development of the record. Moreover, the court stated that it would be a waste of judicial resources to not review the district court's ruling. The court ruled that Shoshone had an implied obligation to remain in business and not eliminate its service as long as there were members in the Shoshone system requiring electric power. Therefore, the court held that Shoshone breached its requirements contract when it attempted to sell its member's subscriptions and cease business. Consequently, the court found no abuse of discretion by the district court in denying the permanent injunction. A new trial on damages was required, however. As a result, the order denying the permanent injunction was vacated.

Underwriters at Lloyds of London v. North American Van Lines, 890 F.2d 1112

Author: Judge Anderson

Defendant, North American Van Lines ("North American"), appealed the district court's denial of its motion for a partial summary judgment restricting its liability to the amount stated in its bill of lading. Shippers contracted with North American to transport personal belongings and household items. The shippers obtained the lowest amount of coverage offered by North American, which amount was reflected in

North American's bill of lading. Shippers then obtained an insurance policy for the full value of the goods from plaintiff, Lloyds of London ("Lloyds"). The goods were destroyed during shipment. Lloyd's paid on its policy and then, pursuant to its subrogation rights, filed suit against North American for the entire amount of the loss, regardless of the limit of liability contained in the bill of lading. Lloyds alleged common law negligence by North American reasoning that a cause of action in tort is completely different from an action on the bill of lading.

The Tenth Circuit held that the Carmack Amendments to the Interstate Commerce Act, 49 U.S.C. §§ 11707 and 10730, preempt state common law remedies for negligent damage to goods shipped by common carriers under a lawful bill of lading. North American's liability for damages to the shippers was limited to the amount stated in the bill of lading. The court stated that to the extent its prior decisions held otherwise, those decisions were overruled. The district court's judgment was vacated and the case remanded.

Williams v. Maremont Corp., 875 F.2d 1476

Author: Judge Anderson

Plaintiff, Williams, sued defendant, Maremont Corporation ("Maremont"), for wrongful discharge after being fired from his job for alleged sexual harassment. Maremont appealed the jury verdict and judgment in favor of Williams and the district court's denial of Maremont's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.

The Tenth Circuit held that the district court's reliance on tort, not contract, principles was erroneous. The court therefore found error in the award of punitive damages and damages for injury to reputation because these damages are recoverable in tort actions only.

Williams claimed breach of contract, alleging that the employee handbook constituted a contract between Maremont and himself. The court found that Williams presented insufficient evidence to support his breach of contract claim to the jury and held that the motion for judgment notwithstanding the verdict should have been granted. In its decision to reverse, the court also relied on public policy considerations favoring elimination of sexual harassment in the workplace.

Wylie v. Marley Co., 891 F.2d 1463

Author: Chief Judge Holloway

Plaintiff, Wylie, brought an action against defendant, Marley, claiming breach of an employment agreement. Wylie also asked the district court for a declaratory judgment for breach of contract. The district court awarded Wylie compensatory damages. Marley appealed, claiming error in jury instructions, and exclusion of testimony. Marley also argued that the district court erred in awarding prejudgment interest on the total amount of the verdict.

First, the Tenth Circuit held that the district court erred in instructing the jury that written resignation must be found. The court reasoned that under KAN. STAT. ANN. § 17-6302 (A), a written resignation is not the mandatory and exclusive form for officer resignation. Second, the court held that the district court erred in failing to give jury instructions on affirmative defenses. The court reasoned that these instructions must be given on retrial if supported by evidence. Third, the district court did not abuse its discretion by granting Wylie's motion *in limine* to suppress testimony of Marley's general counsel on the grounds of attorney-client privilege. Fourth, the district court erred in awarding prejudgment interest on the amount of the verdict not yet due prior to the entry of judgment. The court reasoned that under Kansas law, a claim becomes liquidated for prejudgment interest purposes when the total amount is due, or when specific amounts prior to entry of judgment become due as provided for in the employment agreement. Because of the above findings, the court reversed the judgment on the contract claim and the declaratory judgment and remanded for further proceedings consistent with this opinion.

Zenith Drilling Corp. v. Internorth, Inc., 869 F.2d 560

Author: Judge Logan

Plaintiff, Zenith Drilling Corporation ("Zenith"), leased oil rigs to defendants, two oil exploration companies, ("Internorth"). The parties agreed by "Letter of Agreement" ("Agreement") to reduce the charges for the rigs. Zenith sought to rescind the Agreement because Internorth's continuing failure to pay the charges constituted a material breach. Zenith also sued Internorth under contracts formed prior to the Agreement in 1981. The district court granted Zenith's summary judgment for breach of contract.

The Tenth Circuit found that the district court properly treated the Agreement as an executory accord which did not extinguish Internorth's prior obligations under the 1981, contracts unless its terms were satisfied. Moreover, the court determined that Internorth materially breached the Agreement, and therefore, breached the original contracts, when they intentionally failed to pay the charges owed to Zenith. Thus, the court held that summary judgment in Zenith's favor was proper.

The court affirmed the district court's denial of punitive damages because Oklahoma law, which governed this case, generally prohibits such awards in contract actions. Instead, punitive damages are allowed only if the breaching party commits an "independent, willful tort." The court did not consider the Internorth's actions to be such torts.

