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Noelle Paige

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OVERVIEW

Once again this year, most Tenth Circuit commercial law decisions addressed procedural and substantive areas of bankruptcy. There was also an unusual case in which the Tenth Circuit reinforced the notion that an Indian tribe is on the same plane of sovereignty as a governmental entity and thus not subject to suit absent tribal consent. In that decision, the court determined specifically that without tribal consent an entity established by a tribe cannot obligate the tribe for the entity's debts. Additionally, the Tenth Circuit considered questions arising under the Uniform Commercial Code concerning security interests, parol evidence, and damages.

I. BANKRUPTCY PETITIONER'S RIGHT TO AMEND EXEMPT PROPERTY LIST

In *Redmond v. Tuttle*,[1] the Tenth Circuit considered two bankruptcy issues. The first was whether bankruptcy petitioners have an absolute right to amend their exempt property schedules when new assets are discovered before the bankruptcy is closed.[2] The second issue was whether, given petitioners' right to amend, the exemption can be denied upon timely objection by the bankruptcy trustee.[3]

The Tuttles filed a voluntary bankruptcy petition which included a schedule of federal exemptions.[4] More than two months later the bankruptcy trustee learned that the Tuttles owned a checking account which had not been declared as an asset of their estate and which had not been included on their exemption schedule.[5] Following an objection to discharge based on the allegedly fraudulent concealment of the checking account, the Tuttles requested that the proceeds from the account be added to their schedule of exemptions, contending that they had been unaware of the account's existence.[6] The trustee objected to the amendment because the Tuttles had not challenged the exemption schedule within fifteen days from the date of the creditors' meeting, as required by the local bankruptcy rules.[7]

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1. 698 F.2d 414 (10th Cir. 1983).

2. *Id.* at 416.

3. *Id.*

4. *Id.* at 415. 11 U.S.C. § 522 (1982) sets forth the categories and amounts of property which may be exempted from the bankruptcy estate.

5. The First National Bank of Quinter, Kansas notified the bankruptcy trustee of the existence of a joint personal checking account owned by the Tuttles which had a $4,563.80 balance. 698 F.2d at 415.

6. *In re* Tuttle, 15 B.R. 14, 15 (Bankr. D. Kan.), *aff'd*, 16 B.R. 470 (D. Kan. 1981), *aff'd in part*, 698 F. 2d 414 (10th Cir. 1983). *See* 11 U.S.C. § 727(a)(2) (1982) (barring discharge where a debtor intentionally conceals assets).

7. 15 B.R. at 17. 11 U.S.C. § 341(a) (1982) states that "[w]ithin a reasonable time after the order for relief in a case under this title, there shall be a meeting of creditors." The local rule required objections to the exemption schedule to be filed within fifteen days of the creditors' meeting held pursuant to section 341(a). 15 B.R. at 18.

The bankruptcy court disallowed the amendment, asserting three bases for its action. First, the Tuttles had not complied with the relevant local rule.[8] Second, the requested amendment could not be permitted as an exercise of discretion because interested parties (the creditors) had relied on the finality of the exemption schedule, as evidenced by the lack of creditor objections prior to expiration of the fifteen day period.[9] Finally, the bankruptcy court held that the voluntary transfer of the money into the bank account prevented the petitioners from using the statutory provision[10] which permits an exemption when the trustee recovers property which has been involuntarily transferred from the bankrupt's estate.[11] The district court affirmed,[12] reiterating the need for finality of the exemption list and concluding that the bankruptcy court's denial of a discretionary amendment was not unreasonable in light of the Tuttles' inexcusable neglect in failing to ascertain the existence of the bank account.[13]

The Tenth Circuit disagreed with the lower courts concerning the right to amend the exemption schedule,[14] but refused to allow the exemption itself.[15] In upholding the Tuttles' right to amend the court followed Rule 110 of the Federal Rules of Bankruptcy Procedure,[16] which permits amendment of the voluntary petition "as a matter of course at any time before the case is closed. . . ."[17] The court noted that permitting amendments as a matter of right would not prejudice creditors, because under Rule 403[18] any party in interest retained the right to object to the amendment within fifteen days.[19]

On the question of whether the exemption itself should be allowed, the Tenth Circuit noted that the exemption was sought on the basis that the money had been involuntarily transferred from the estate.[20] The debtors argued that the transfers were involuntary because the bank had independently placed funds in a checking account which the petitioners thought they had closed.[21] Because the debtors had included no deposit instructions on the checks, however, the court held that responsibility for the deposits ultimately rested with the debtors.[22] The funds were therefore in the bank account as a result of voluntary transfers out of the debtor's estate, and such

8. 15 B.R. at 17.

9. *Id.* at 18.

10. 11 U.S.C. § 522(g) (1982).

11. 15 B.R. at 19-20. The bankruptcy court ruled that although the Tuttles had intended to deposit the money in their personal checking account, the act of voluntarily depositing the money precluded a finding of involuntary transfer even though the bank, on its own decision, credited the money to a business account. *Id.* at 20.

12. *In re* Tuttle, 16 B.R. 470 (D. Kan. 1981), *aff'd in part*, 698 F.2d 414 (10th Cir. 1983).

13. 16 B.R. at 472.

14. Redmond v. Tuttle, 698 F.2d 414, 417 (10th Cir. 1983).

15. *Id.* at 417-18.

16. FED. RULE BANKR. P. 110. The Bankruptcy Rules were revised effective August 1, 1983. Rule 110 was replaced by Rule 1009.

17. FED. R. BANKR. P. 110.

18. FED. R. BANKR. P. 403. Rule 403 has been replaced by Rule 4003.

19. 698 F.2d at 417.

20. *Id. See* 11 U.S.C. § 522(g)(1) (1982).

21. 698 F.2d at 417.

22. *Id.* at 418.

funds were not exempt.[23]

The result in *Tuttle* is sound law. It is reasonable to allow an amendment by right, because an automatic exemption does not accompany the amendment. Questionable transfers may be objected to under Rule 403, with hearings required when there is a dispute as to the propriety of granting an exemption.

II. GOOD FAITH PURCHASER STATUS FOR AFFILIATES OF DEBTOR'S GENERAL PARTNER

In *Tompkins v. Frey (In re Bel Air Associates, Ltd.)*,[24] the Tenth Circuit determined the conditions under which Rule 805[25] good faith purchaser status can be accorded to an affiliate of a debtor's general partner.[26]

Bel Air Associates, Ltd. (Bel Air) was a limited partnership organized by Frey, Tompkins, and others to purchase and operate an apartment complex owned by Leroy Properties and Development Corporation (Leroy) and managed by PM & M Company (PM & M), a wholly-owned subsidiary of Leroy.[27] The partners agreed that Frey would be the general partner of Bel Air and that PM & M would manage the purchased complex.[28] Prior to completing the sale, Frey revealed his controlling interests in PM & M and Leroy to Tompkins and the other limited partners.[29] The limited partnership nonetheless purchased the apartment complex, assuming the first mortgage, paying some cash, and giving Leroy a second mortgage as security for the remainder of the purchase price.[30]

Subsequently, because of financial failure, Frey, in his capacity as general partner of Bel Air, filed a bankruptcy petition listing Leroy and PM & M as the principal creditors.[31] The approved reorganization plan required selling the complex by auction and paying the creditors with the proceeds.[32] Leroy submitted the bid with highest present value. The bid included assumption of the mortgage, satisfaction of Bel Air's debts to Leroy and PM & M, and payment of Bel Air's administrative expenses.[33] Tompkins, a limited partner of Bel Air, objected to the plan and requested that the bankruptcy court stay any further proceedings, including the sale of the property to Le-

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23. *Id.*

24. 706 F.2d 301 (10th Cir. 1983).

25. FED. R. BANKR. P. 805. This rule stated in pertinent part:

> Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser or holder knows of the pendency of the appeal.

Id.

26. *See* 706 F.2d at 305-06 & n.17.

27. *Id.* at 303.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 303-04.

32. *Id.* at 304.

33. *Id.*

roy.[34] The bankruptcy court granted the stay, subject to Tompkin's payment of a supersedeas bond.[35] When Tompkins failed to post the bond the bankruptcy court allowed the reorganization plan to proceed, and the property was sold to Leroy as the highest bidder.[36]

When Tompkins appealed the sale the district court held that the appeal was moot because Leroy's status as a good faith purchaser precluded setting aside the sale.[37] The issues addressed by the Tenth Circuit were whether Leroy could be a good faith purchaser in light of either the make-up of its bid or Frey's simultaneous interests in Leroy and Bel Air.[38] In holding that Leroy was a good faith purchaser, the Tenth Circuit adopted a recognized two-prong test. A good faith purchaser is one who buys in good faith and who gives value.[39] The court found that Leroy's purchase satisfied both conditions.[40] Leroy had clearly given value; because its claims against Bel Air were valid, and because Leroy's use of a present value analysis in valuing its bid was not misleading, Leroy had acted in good faith.[41]

The next argument Tompkins asserted was that Frey's status as a fiduciary of Bel Air should prevent his direct purchase of the apartment complex, and that a similar restraint should be imposed on Leroy because it was Frey's controlled corporation.[42] The court held that, even assuming that Leroy was Frey's alter ego,[43] Leroy was a secured creditor of Bel Air, and secured creditors had the right to bid for collateral at a bankruptcy sale.[44] While a different result might have been reached if Frey had concealed his interest in Leroy,[45] full disclosure of that interest prior to Leroy's becoming a secured creditor entitled Leroy to assert all rights inuring to secured creditors.[46]

Tompkins continues the recent trend of more favorable treatment to creditors in the area of bankruptcy litigation.[47] Because it is now settled in the Tenth Circuit that transactions involving affiliated secured creditors are not necessarily excluded from the good faith purchaser protections, *Tompkins* may encourage the extension of credit.

III. BANKRUPTCY COURT JURISDICTION

The Tenth Circuit case of *General Electric Credit Corp. v. Montgomery Mall*

34. *Id.*
35. *Id. See* FED. R. BANKR. P. 805, providing that a sale may take place to a good faith purchaser unless there is a stay of the action.
36. 706 F.2d at 304.
37. *Id.* If Leroy had not been a good faith purchaser Rule 805 would have been inapplicable, and the sale could have been modified or voided.
38. *See* 706 F.2d at 305-06.
39. *Id.* at 305. The Tenth Circuit had not previously defined the elements establishing a good faith purchaser in bankruptcy cases. *See id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 306.
44. *Id.*
45. *See id.* at 306 n.17.
46. *Id.* at 306.
47. *See* Mathews, *The Scope of Claims Under the Bankruptcy Code*, 57 AM. BANKR. L.J. 339 (1983).

Limited Partnership (In re Montgomery Mall Limited Partnership)[48] presented two issues concerning the limits of bankruptcy court jurisdiction. The first issue addressed was whether bankruptcy courts had jurisdiction to grant summary judgment in state foreclosure proceedings, or whether bankruptcy jurisdiction was limited to full hearings.[49] The second issue addressed involved the effect of the bankruptcy judge's failure to comply with the notice requirements incident to a motion for summary judgment.[50]

Montgomery Plaza Shopping Center was owned by Montgomery Mall, a limited partnership.[51] The partnership owed a debt to General Electric Credit Corp. (GECC), which was secured by mortgages and an assignment of leases and rent payments.[52] When the partnership defaulted, GECC filed a foreclosure action in state court and moved for summary judgment.[53] Prior to a hearing on the motion the partnership filed a petition in bankruptcy, thereby staying the foreclosure action.[54] GECC then moved the bankruptcy court for emergency relief under section 362(f) of the Bankruptcy Code,[55] requesting that the bankruptcy court remove the automatic stay[56] imposed on the foreclosure proceedings.[57] The next day the bankruptcy judge granted GECC's motion, terminated the stay of the bankruptcy proceedings to the extent of allowing GECC to foreclose, and entered summary judgment on the foreclosure action.[58] At a rehearing several weeks later the partnership objected to the summary judgment primarily because the plaintiffs had not provided the notice required by Federal Rule of Civil Procedure 56(c).[59] The district court, apparently rejecting this argument, reaffirmed its grant of summary judgment.[60]

As indicated above, the partnership's first argument on appeal was that section 362(f) did not invest the bankruptcy court with jurisdiction to grant the requested summary judgment.[61] The Tenth Circuit resolved this contention by examining the temporal relationship between the bankruptcy court's action and the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Oil Co*.[62]

At the time *Northern Pipeline* was decided, *Montgomery Mall* was pending

48. 704 F.2d 1173 (10th Cir.), *cert. denied*, 104 S. Ct. 108 (1983).
49. *See id.* at 1175.
50. *See id.* at 1176.
51. *Id.* at 1173.
52. *Id.* at 1173-74.
53. *Id.* at 1174.
54. *Id.*
55. 11 U.S.C. § 362(f) (1982) This section provides:
The court, without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.
Id.
56. *See* 11 U.S.C. § 362(a) (1982).
57. 704 F.2d at 1174.
58. *Id.*
59. FED. R. CIV. P. 56(c) provides in part that a summary judgment motion "shall be served at least 10 days before the time fixed for the hearing."
60. 704 F.2d at 1174.
61. *Id.* at 1175.
62. 458 U.S. 50 (1982).

appeal.[63] *Northern Pipeline* deemed unconstitutional the broad grant of jurisdiction delegated to bankruptcy judges, at least insofar as the bankruptcy court exercised jurisdiction over suits between two private litigants involving rights created by state law.[64] The Tenth Circuit pointed out that *Northern Pipeline*'s narrowing of bankruptcy court jurisdiction was prospective only.[65] Accordingly, cases on appeal when *Northern Pipeline* was decided on June 28, 1982, such as *Montgomery Mall*, were unaffected by the *Northern Pipeline* holding.[66] Thus, the scope of jurisdiction for such cases was determined by reference to Congress' original intent.[67] The Tenth Circuit held that Congress had intended bankruptcy courts to have the power to grant summary judgments in state foreclosure suits pursuant to section 362(f),[68] and the bankruptcy court had therefore properly exercised its jurisdiction in *Montgomery Mall*.[69]

The Tenth Circuit then rejected the partnership's lack of notice objection to the summary judgment, holding that the partnership's knowledge of the stayed state summary judgment proceedings should have alerted it to the probability that GECC would request summary judgment in the bankruptcy court.[70] Because the partnership could therefore show no prejudice flowing from the lack of the statutorily required notice, reversible error had not been committed.[71] Supplementing its position, the court pointed to case law holding that removing a case from state court to federal court does not affect the state court's procedural schedule.[72] The court read this case law to implicitly recognize that notice given in state court proceedings provides notice in proceedings removed to federal court.[73]

The last issue determined by the Tenth Circuit in *Montgomery Mall* was whether the bankruptcy court's grant of emergency relief to GECC under section 362(f) was substantively correct.[74] The court concluded that because emergency relief was necessary to prevent irreparable damage to GECC, the bankruptcy judge had acted properly.[75]

Montgomery Mall clarifies the scope of bankruptcy court jurisdiction both before and after the *Northern Pipeline* case. The case also points out that even after *Northern Pipeline*, ten days notice prior to a summary judgment hearing will not be required in all circumstances.

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63. *See* 704 F.2d at 1175.

64. *See* 458 U.S. at 69-70 (resolution of private rights disputes fundamental attribute of judicial power); 458 U.S. at 90-91 (Rehnquist, J., concurring) (bankruptcy court jurisdiction unconstitutional insofar as it reaches state law disputes between two private litigants).

65. 704 F.2d at 1175 (citing *Northern Pipeline*, 458 U.S. at 88).

66. 704 F.2d at 1175.

67. *Id.*

68. *See id.*

69. *Id.*

70. *Id.*

71. *Id.* (citing Milwaukee Typographical Union No. 23 v. Newspapers, Inc., 639 F.2d 386, 391 (7th Cir.), *cert. denied*, 454 U.S. 838 (1981); Hoopes v. Equifax, Inc., 611 F.2d 134, 136 (6th Cir. 1979)).

72. *See* 704 F.2d at 1176.

73. *Id.*

74. *Id.*

75. *Id.*

IV. TRIBAL ENTITY AS SEPARATE FROM TRIBE

In *Navajo Tribe v. Bank of New Mexico*,[76] the Tenth Circuit analyzed the circumstances in which an entity established by an Indian tribe can obligate the tribe for the entity's debts. The entity, Navajo Housing and Development Enterprise (NHDE), was created by the Navajo Tribe (Tribe) in conformance with tribal law.[77] When NHDE failed to repay promissory notes for money borrowed from the Bank of New Mexico (Bank), the Bank offset the amount due against a certificate of deposit held in the name of the Tribe.[78] The Tribe challenged this action, arguing that NHDE was distinct from the Tribe and that therefore the Tribe could not be charged with NHDE's debts.[79] The district court agreed and ordered return of the offset.[80] On appeal, the Bank argued that the Tribe lacked power to create a semi-governmental entity distinct from the Tribe, and that even assuming that capacity the tribe's conduct estopped it from asserting NHDE's separateness.[81]

Recognizing that the Tribe, as a sovereign, has the power to create a semi-governmental entity,[82] the court noted that the relevant inquiry was whether the Tribe had created an independent entity.[83] Tribal control of NHDE was not determinative in characterizing NHDE's separate status.[84] The inquiry used by the court essentially assumed that the tribe had created a distinct entity, and then analyzed the extent to which the entity could be considered separate without impinging on the sovereignty of the government creating the ostensibly distinct entity.[85] Because tribal sovereignty was not threatened by holding NHDE responsible for its own debts, NHDE was an independent enterprise.[86]

The court also noted two other factors militating towards NHDE's separateness. *White Mountain Apache Indian Tribe v. Shelley*[87] was cited for the proposition that "the right to sue a tribal enterprise was exclusively within the inherent power of the Tribe to establish."[88] Thus, to impute a breach in tribal immunity in the absence of express consent would unreasonably interfere with tribal sovereignty.[89] The Tenth Circuit then surveyed a number of cases recognizing the notion that tribes and tribal entities are to be treated separately where tribal sovereignty is not in issue.[90]

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76. 700 F.2d 1285 (10th Cir. 1983).
77. *Id.* at 1286.
78. *Id.* at 1286-87.
79. *Id.* at 1287.
80. Navajo Tribe v. Bank of New Mexico, 556 F. Supp. 1 (D.N.M. 1980), *aff'd*, 700 F.2d 1285 (10th Cir. 1983).
81. 700 F.2d at 1287.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 1288.
87. 107 Ariz. 4, 480 P.2d 654 (1971).
88. 700 F.2d at 1288.
89. *Id.*
90. *Id.* (citing Navajo Tribal Util. Auth. v. Arizona Dep't of Revenue, 608 F.2d 1228 (9th Cir. 1979); R.C. Hedreen Co. v. Crow Tribal Hous. Auth., 521 F. Supp. 599 (D. Mont. 1981);

From these premises the circuit court concluded that the Tribe could not be liable for NHDE's debts unless a threat to tribal sovereignty existed or the Tribe in creating NHDE had intended to assume its debts; any other treatment would nullify the power of the tribal government to create a governmental corporation.[91] Because neither of these conditions were present, the Tribe could not be held liable through an organizational analysis.[92]

The court also rejected the argument that NHDE could be deemed the alter ego of the Tribe due to the Tribe's conduct in NHDE's dealings with the Bank.[93] Examination of the record revealed no affirmative conduct by the Tribe which would lead the bank to conclude that NHDE was not a separate and distinct entity.[94] In fact, the record indicated that the Bank had actual knowledge that the Tribe did not intend to honor NHDE's debts.[95] Thus, there was no right to charge the Tribe's account with NHDE's debts. Such a right exists only where there is a creditor-debtor relationship, which was not present between the Tribe and the Bank with respect to NHDE's debts.[96]

The result of this case illustrates to creditors that if a tribal entity exists, "piercing its veil" and looking to the tribe for payment of the entity's obligations will meet significant judicial resistance. Hence, only the assets of the entity itself should be relied on in making a loan determination.

V. UNIFORM COMMERCIAL CODE DECISIONS

A. *Lease as Security Interest*

Adelman v. General Motors Acceptance Corp. (In re Tulsa Port Warehouse Co., Inc.)[97] arose out of a lease of automobiles to Tulsa Port Warehouse, a firm which later filed a petition in bankruptcy.[98] General Motors Acceptance Corporation (GMAC), the assignee of the leases, claimed a priority interest in the cars.[99] The trustee in bankruptcy objected, claiming that the leases were actually unperfected security agreements, and that GMAC therefore lacked a priority interest.[100] If the purported lease was actually a security interest, the effect would have been subordination of GMAC's claims be-

Namekagon Dev. Co., Inc. v. Bois Forte Reservation Hous. Auth., 395 F. Supp. 23 (D. Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975)).

91. 700 F.2d at 1288.

92. *See id.*

93. *Id.* at 1289.

94. *Id.* at 1288.

95. *Id.* The court pointed out that two senior vice-presidents of the Bank were on NHDE's board, and also found that the Bank knew it had the ability to procure financial guarantees from the Tribe, but took no steps to secure such guarantees. *Id.* at 1288 & n.2. The district court had held that the Bank's knowledge of NHDE's separate nature estopped the bank from denying NHDE's separate existence, in a reverse application of the "corporation-by-estoppel" doctrine. Navajo Tribe v. Bank of New Mexico, 556 F. Supp. 1, 3 (D.N.M. 1980), *aff'd*, 700 F.2d 1285 (10th Cir. 1983).

96. 700 F.2d at 1289. Because NHDE was separate from the Tribe, the creditor-debtor relationship was between the enterprise and the Bank.

97. 690 F.2d 809 (10th Cir. 1982).

98. *Id.* at 810.

99. *Id.*

100. *Id.*

cause its interest was admittedly unperfected.[101]

The bankruptcy court and the district court both ruled in favor of the trustee and concluded that the leases in the instant case constituted security interests.[102] The Tenth Circuit affirmed, relying in large measure on *Steele v. Gebetsberger (In re Fashion Optical, Ltd.)*,[103] a Tenth Circuit decision on the same general question decided just one year earlier. In *Fashion Optical* the court stated that even when there was no purchase option, a lease would be deemed one intended as security "if the facts otherwise expose economic realities tending to confirm that a secured transfer of ownership is afoot."[104] *Tulsa Port* pointed to a number of factors which other courts have used in determining the economic reality of a purported lease. These factors included: 1) whether the lessee obtained an equity interest; 2) whether the lessee was required to provide insurance with benefits running to the lessor; 3) whether the lessee paid sales tax; 4) whether maintenance and annual taxes were the lessee's responsibility; and 5) whether the lessee bore the risk of loss.[105]

Because nearly all of the factors were present in Tulsa Port's leases, the lessee held all incidents of ownership save legal title, and the leases constituted secured transactions.[106] The court added that there was no economic difference between these leases and secured transfers of property, and concluded that a buyer and seller should not be allowed to " 'masquerad[e] their secured installment sale as a 'lease', thereby placing it beyond the reach of the UCC provisions governing secured transactions.' "[107]

Tulsa Port reiterates that courts will look beyond the form of a lease agreement to determine whether the provisions of the contract reflect the parties' underlying objective of effecting a sale. The case also outlines the criteria which should be taken into account when one wishes to enter into a true lease in order to avoid a later determination that the lease is a secured transaction.

B. *Parol Evidence and Damages*

In *United States ex rel. Federal Corp. v. Commercial Mechanical Contractors*,[108] the seller, Federal, had submitted a bid to supply underground fuel storage tanks to the buyer, Commercial Mechanical Contractors, which was to use these tanks in conjunction with a contract with the United States Army.[109] Included in the seller's quotation form was an exculpatory clause which stated that the seller would not be liable for any delays arising from causes beyond its control.[110] This quotation form, along with a letter amendment

101. *Id.*
102. *Id.*
103. 653 F.2d 1385 (10th Cir. 1981).
104. *Id.* at 1389.
105. 690 F.2d at 811.
106. *Id.* at 811-12.
107. *Id.* (quoting *Fashion Optical*, 653 F.2d at 1388).
108. 707 F.2d 1124 (10th Cir. 1982).
109. *Id.* at 1126.
110. *Id.*

and an invoice, were the only documents involved in the sales transaction.[111]

Trial testimony supported the conclusion that Commercial would not have accepted Federal's bid if Federal had not assured Commercial that the tanks would be delivered within a specified time.[112] The tanks were delivered late, and as a consequence Commercial was required to incur added expenses for maintenance and excavation of the holes prepared for the tanks.[113] A jury awarded Commercial both actual and consequential damages for Federal's breach of contract.[114]

The Tenth Circuit considered three issues in this case. The first issue was whether parol evidence concerning the essentiality of timely delivery was correctly admitted in the trial court, or whether the contract, the amendment, and the invoice constituted the entire agreement of the parties.[115] The court noted that the posture of Commercial's claim[116] made it unclear whether federal or state law controlled construction of the contested contract.[117] Finding that there was no conflict between applicable state law and general principles of contract law,[118] the Court resolved the parol evidence issue by reference to the Uniform Commercial Code (UCC).[119]

The court began its analysis by noting that the UCC recognizes contracts which include both oral and written terms.[120] Given the incomplete nature of the extant written terms, the trial court's determination to admit evidence of oral terms was permissible.[121] Because the record supported a determination that the parties had intended to include a term that "time was of the essence," the jury could have properly found that Federal had breached this contractual duty.[122]

The second issue was whether the seller was estopped from asserting the exculpatory clause as a defense to late performance.[123] The Tenth Circuit found that the jury could have reasonably concluded that Federal had deliberately misrepresented its ability to effect timely delivery.[124] Because the

111. *Id.*

112. *Id.*

113. *Id.* Because the tanks were late, the walls of the holes began to collapse and had to be re-excavated. Additionally, overhead costs continued to accumulate because of the extended time needed for completion of the contract. Both of these complications resulted in added expense for Commercial. *Id.*

114. *Id.* at 1125-26.

115. *See id.* at 1126.

116. Commercial's contract claim was asserted in a proceeding Federal had brought pursuant to the Miller Act, 40 U.S.C. §§ 270a-270f (1982). The Miller Act provides a remedy for persons who have not been paid for materials used in a public works project. *Id.* § 270b. Commercial had failed to pay Federal the entire amount due for supplying the fuel tanks. 707 F.2d at 1125.

117. 707 F.2d at 1126 n.1.

118. *Id.*

119. *See id.* at 1126-28.

120. *Id.* at 1127 (citing U.C.C. § 2-204).

121. 707 F.2d at 1127-28.

122. *Id.* at 1128.

123. *Id.* As noted, the exculpatory clause excused the seller from liability for delays beyond its control. *See supra* text accompanying note 110.

124. 707 F.2d at 1128. Commercial alleged that it had begun excavation in reliance upon Federal's representations that the tanks were in the process of being delivered. *See id.* at 1126, 1128.

elements of estoppel were otherwise supported by the record,[125] the Tenth Circuit upheld the jury's finding of estoppel.[126]

The final issue on appeal was whether the trial court had correctly recognized the elements of Commercial's damages.[127] Following the historical case of *Hadley v. Baxendale*,[128] the circuit court reaffirmed that a buyer can recover all damages which are reasonably foreseeable to the parties at the time they enter into a contract.[129] Thus, damages could include extended overhead expenses and expenses for maintenance of already excavated sites which the buyer incurred as a result of the seller's delay in completing its side of the contract.[130] Because the evidence supported the conclusion that all the contested damages were foreseeable, and were attributable to Federal's breach, the damage award was upheld.[131]

Commercial Mechanical Contractors seems to imply that an exculpatory clause may be used only by one who exhibits good faith in performing his part of a contract, and who does not induce reliance on timely performance and then seek to use the exculpatory clause to escape liability. This case also reaffirmed the proposition that any written contract should explicitly state that it is the full and final expression of the parties, if that is their intent. Finally, the circuit court continued the trend of including as consequential damages those damages which may be somewhat remote as long as the damages were reasonably foreseeable at the inception of the contract.

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125. *See id.*
126. *Id.*
127. *See id.* at 1129. Specifically, Federal objected to including both Commercial's extended overhead expenses and maintenance expenses for a second hole as elements of damages. *Id.*
128. 156 Eng. Rep. 145 (1854).
129. 707 F.2d at 1129.
130. *Id.*
131. *Id.*