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OVERVIEW

During the period covered by this survey, the Tenth Circuit Court of Appeals selected for publication several Truth in Lending decisions along with decisions in other areas of commercial law, including bankruptcy and secured transactions. A discussion of the Truth in Lending cases dominates this section.

Only opinions selected for official publication are reviewed here. Few of the decisions in the survey period represent major developments or dramatic changes in the law. However, a number of the decisions are noteworthy because of the isolated application of the law or the particular facts of the cases.

I. TRUTH IN LENDING ACT

Meaningful Disclosure

James v. Ford Motor Credit Co.[1] and its companion case, *Hernandez v. O'Neal Motors, Inc.*,[2] consider what constitutes meaningful disclosure under the Truth in Lending Act.[3] In these cases the Tenth Circuit Court of Appeals considered whether failure to disclose the right of the seller to a returned and unearned insurance premium is a violation of the requirement for disclosure of a security interest pursuant to the Truth in Lending Act and Regulation Z.[4] Specifically at issue were automobile installment contracts. The Tenth Circuit held there was no violation.

In *James*, the plaintiffs, Colorado residents, purchased a pickup truck and executed an installment purchase contract, which was assigned to Ford Motor Credit Co.[5] Insurance on damage to the vehicle was part of the credit transaction. The insurance charge was specifically noted on the face of the contract and was included in the total amount to be repaid in monthly installments.[6] Paragraph thirteen of the signed face page of the contract[7] provided that the seller would have a security interest under the Uniform Commercial Code in the property (the pickup truck) and in the proceeds thereof to secure the payment, in cash, of the total of the installment payments. Paragraph fifteen of the signed face page provided that the terms and conditions on the reverse side of the contract were incorporated by

1. 638 F.2d 147 (10th Cir. 1980), *cert. granted*, 101 S. Ct. 3134 (1981).
2. 638 F.2d 153 (10th Cir. 1980), *vacated and remanded in part, cert. denied in part*, 101 S. Ct. 3134 (1981).
3. 15 U.S.C. § 1601 (1976).
4. 12 C.F.R. § 226 (1981).
5. 638 F.2d at 148.
6. *Id.* at 150.
7. Paragraph 13 of the contract provided: "Security Interest: Seller shall have a security interest under the Uniform Commercial Code in the Property (described above) and to the proceeds thereof to secure the payment in cash of the Total of Payments and all other amounts due or to become due thereunder." *Id.* at 148.

reference.[8] Finally, paragraph eighteen on the reverse side of the contract[9] contained an express assignment from the buyer to the seller of insurance proceeds, including returned or unearned premiums.

The plaintiffs-purchasers sued for the statutory liability and attorneys' fees provided for under the Truth in Lending Act,[10] claiming that the assignment of the returned and unearned portion of the insurance premium was a security interest[11] under section 4-9-102 of the Colorado Uniform Commercial Code.[12] Thus, the purchasers contended that the putative security interest should have been disclosed on the signed face page of the installment purchase contract, pursuant to Regulation Z.[13] The district court rejected this contention.[14] The Tenth Circuit affirmed, holding that there was no violation of the requirement for disclosure of a security interest because the installment credit contract provided: 1) the seller had a security interest in the pickup truck and the proceeds thereof; 2) the buyer assigned to the seller any monies payable under the insurance policy including returned or unearned premiums; and 3) the amount financed included the insurance premium.[15]

A superficial reading of *James* would suggest that no new principle of law was established by this case. As Judge Doyle pointed out in a dissenting opinion, however, *James* represents a distinct departure from the conclusions of the Third,[16] Fifth,[17] and Seventh[18] Circuit Courts of Appeals that the nondisclosure of the seller's right to unearned and returned insurance premiums is a violation of the Truth in Lending Act, subjecting the seller to the

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8. *Id.*

9. Paragraph 18 of the contract provided in pertinent part:

> Buyer hereby assigns to Seller any monies payable under such insurance, by whomever obtained, including returned or unearned premiums, and Seller hereby is authorized on behalf of both Buyer and Seller to receive or collect same . . . . The proceeds from such insurance, by whomever obtained, shall be applied toward replacement of the Property or payment of the indebtedness hereunder in the sole discretion of the Seller.

Id.

10. 15 U.S.C. § 1640(a) (1976). Failure to properly disclose the required information subjects the offender to a civil liability in an amount equal to the sum of actual damages sustained as a result of the failure plus not more than $1,000 plus reasonable attorneys' fees.

11. 15 U.S.C. § 1638(a)(10) (1976). The Truth in Lending Act requires the disclosure of "[a] description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates." Although the Truth in Lending Act does not define "security" or "security interest," Regulation Z provides in pertinent part: " 'Security interest' and 'security' mean any interest in property which secures payment or performance of an obligation. The terms include, but are not limited to, security interests under the Uniform Commercial Code. . . ." 12 C.F.R. § 226.2(gg) (1981).

12. *See* COLO. REV. STAT. § 4-9-102 (1973).

13. 12 C.F.R. § 226.8(a) (1981) provides that all required disclosures be made on either: "(1) The note or other instrument evidencing the obligation on the same side of the page and above the place for the customer's signature; or (2) One side of a separate statement which identifies the transaction."

14. 638 F.2d at 148.

15. *Id.* at 150.

16. *See* Gennuso v. Commercial Bank & Trust Co., 566 F.2d 437 (3d Cir. 1977).

17. *See* Edmondson v. Allen-Russell Ford, Inc., 577 F.2d 291 (5th Cir. 1978), *cert. denied*, 441 U.S. 951 (1979).

18. *See* Valencia v. Anderson Bros. Ford, 617 F.2d 1278 (7th Cir. 1980), *rev'd sub nom.* Anderson Bros. Ford v. Valencia, 101 S. Ct. 2266 (1981).

prescribed statutory liability.[19] The Third, Fifth, and Seventh Circuit cases viewed the assignment of a returned or unearned insurance premium as a security interest. Therefore, for purposes of Regulation Z and the Truth in Lending Act, such a security interest had to be disclosed. Each of the three circuit court cases ruled that a general provision stating that the "Seller shall have a security interest under the Uniform Commercial Code in the Property [the automobile] and in the proceeds thereof . . ."[20] was not an adequate disclosure to the consumer.

In *James*, the Tenth Circuit found the Third, Fifth, and Seventh Circuit cases inapposite because enactment of the Truth in Lending Simplification and Reform Act[21] amended the disclosure section of the Truth in Lending Act.[22] The language of the amended section calls for disclosure of the principal property that provides the security for a loan but does not require a listing of related or incidental interests in the property, such as insurance proceeds or unearned insurance premiums.[23] The Tenth Circuit relied extensively on the legislative history accompanying the amendment in reaching its holding in *James*.

The appellate court's holding in *James* was also influenced by dictum in *Ford Motor Credit Co. v. Milhollin*,[24] a 1980 United States Supreme Court case. The Court stated in *Milhollin* that meaningful disclosure cannot be applied in the abstract and is not synonymous with more disclosure.[25] The Tenth Circuit thus concluded that the Truth in Lending Act does not require, nor did Congress intend for the Act to require, the disclosure on the face of an installment contract of the seller's right to the return of an unearned insurance premium.

It is significant that the United States Supreme Court recently reversed the Seventh Circuit's holding that an assignment of unearned insurance premiums in a consumer credit installment contract is a security interest for purposes of disclosure under the Truth in Lending Act.[26] In a five to four decision, the Court announced a holding identical to that of the Tenth Cir-

19. 638 F.2d at 151-52 (Doyle, J., dissenting).

20. 577 F.2d at 295.

21. Pub. L. No. 96-221, § 601, 94 Stat. 168 (1966) (to be codified in 15 U.S.C. § 1602).

22. 15 U.S.C. § 1638(a) (1976).

23. S. REP. NO. 368, 96th Cong., 2d Sess. 30, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 266. With reference to amendment of the disclosure requirements of § 1638(a), the Senate Report states:

> The security interest disclosure is also simplified to eliminate the technical disclosure of the type of security interest taken. When a security interest is being taken in property purchased as part of the credit transaction, this section requires a statement that a security interest has been or will be taken in the property purchased. When a security interest is being taken in property not purchased as part of the credit transaction, the Committee intends this provision to require a listing by item or type of the property securing the transaction, but not a listing of related or incidental interests in the property. For example, a loan secured by an automobile (not being purchased with the proceeds of the loan) would require a statement indicating that the loan is secured by an automobile but would not require a listing of incidental or related rights which the creditor may have such as insurance proceeds or unearned insurance premiums, rights arising under, or waived in accord with state law, accessions, accessories or proceeds.

24. 444 U.S. 555 (1980).

25. *Id.* at 568.

26. Anderson Bros. Ford v. Valencia, 101 S. Ct. 2266 (1981).

cuit in *James*: an assignment of unearned insurance premiums does not create a security interest that must be disclosed pursuant to the Truth in Lending Act.[27] In reaching its holding, the Court pointed to the Federal Reserve Board's revision of Regulation Z to expressly exclude "incidental interests" such as interests in insurance proceeds or premium rebates from the definition of a security interest.[28]

Hernandez v. O'Neal Motors, Inc.[29] raised the identical issue posed in *James*. The Tenth Circuit held that the outcome of *Hernandez* was governed by the court's decision in *James*.[30] Judge Doyle filed a dissenting opinion based upon his dissent in *James*.[31]

Not all cases involving the Truth in Lending Act turn on esoteric facts nor on latent disclosure defects. In *Yazzie v. Reynolds*,[32] a creditor endeavored to avoid the intricacies of the Truth in Lending Act and nearly succeeded. Despite the district court's disposition of the case on defendant's motion for summary judgment, the Tenth Circuit reversed and remanded having found well-defined issues of fact precluding summary judgment.[33]

Suit was brought on behalf of five plaintiffs who purchased cars on an installment payment basis from defendant Reynolds.[34] The plaintiffs-purchasers claimed that Reynolds violated the Truth in Lending Act[35] and Regulation Z[36] by failing to disclose a finance charge and to express it as an annual percentage rate when, in fact, a finance charge was imposed on credit customers.[37]

Reynolds' company, Ben's Auto Sales, was engaged in the retail sale of used cars. Nearly ninety-eight percent of the company's sales were pursuant to installment contracts which provided for four or more payments payable on a prearranged schedule.[38] The same printed form contract was used in each sale to the several plaintiffs. Each contract contained the following statement: "Buyer . . . having been quoted both a time sale price and a lesser cash price hereby purchased from Seller on a time price basis . . . the

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27. *Id.* at 2273.

28. *Id.* at 2271.

29. 638 F.2d 153 (10th Cir. 1980), *vacated and remanded in part, cert. denied in part*, 101 S. Ct. 3134 (1981).

30. *Id.* at 154-55.

31. *Id.* at 155 (Doyle, J., dissenting).

32. 623 F.2d 638 (10th Cir.), *cert. denied*, 449 U.S. 982 (1980).

33. *Id.* at 643.

34. *Id.* at 639.

35. 15 U.S.C. § 1605(a) (1976) requires the amount of the finance charge "imposed directly or indirectly by the creditor as an incident to the extension of credit" to be determined by including any of the following:

(1) Interest, time price differential, and any amount payable under a point, discount, or other system or additional charges.
(2) Service or carrying charge.
(3) Loan fee, finder's fee, or similar charge.
(4) Fee for an investigation or credit report.
(5) Premium or other charge for any guarantee or insurance protecting the creditor against the obligor's default or other credit loss.

Id.

36. 12 C.F.R. § 226.4(a) (1981).

37. 623 F.2d at 639.

38. *Id.*

following property . . . ."[39] At no time did Reynolds quote to the purchasers two different prices. In fact, the prices quoted as the "cash price" and the "deferred payment price" in the contracts were the same. Further, Reynolds did not quote or charge any of his customers different prices according to the payment terms. Each of the contracts in *Yazzie* disclosed the finance charge and the annual percentage rate as zero.[40]

The Tenth Circuit concluded that Reynolds' single-price sales approach tended to show that the defendant sought to conceal the cost of credit in order to circumvent the Truth in Lending Act.[41]

II. BANKRUPTCY

Retroactive application of section 522(f)(2) of the Bankruptcy Reform Act[42] is unconstitutional, the Tenth Circuit held in *Rodrock v. Security Industrial Bank*.[43]

Rodrock consolidated seven cases[44] where debtors appealed from judgments of the United States Bankruptcy Courts dismissing complaints for lien avoidance under section 522(f)(2) of the Bankruptcy Reform Act of 1978 (the Reform Act).[45] Each of the debtors claimed a personal property exemption and sought to avoid secured creditors' non-possessory, non-purchase money security interests in the items of personal property that served as collateral.[46]

The principal issue in the case was whether section 522(f)(2) of the Reform Act applies retroactively to security interests that attached prior to the effective date of the Reform Act,[47] in instances where debtors instituted bankruptcy proceedings after the effective date of the Reform Act. The Tenth Circuit concluded that Congress intended for substantive provisions of the Act, such as section 522(f)(2), to be applied retroactively—governing security interests that came into being before the effective date of the Reform

39. *Id.*

40. *Id.*

41. *Id.* at 642-43.

42. 11 U.S.C. § 522(f)(2) (Supp. III 1979).

43. 642 F.2d 1193 (10th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3479 (Dec. 15, 1981).

44. Five of the seven cases were direct appeals from judgments entered in the United States Bankruptcy Court for the District of Colorado. Two of the cases were direct appeals from judgments entered in the United States Bankruptcy Court for the District of Kansas. 642 F.2d at 1195.

45. 11 U.S.C. § 522(f) (Supp. III 1979) provides:

> Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is: (1) a judicial lien; or (2) a nonpossessory, nonpurchase-money security interest in any: (A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor; (B) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or (C) professionally prescribed health aids for the debtor or a dependent of the debtor.

46. 642 F.2d at 1195.

47. The effective date of the Bankruptcy Reform Act of 1978 was October 1, 1979.

Act.[48] However, the Tenth Circuit was unwilling to apply section 522(f)(2) retroactively without launching a constitutional inquiry.

In reaching its holding that retroactive application of the section is unconstitutional, the Tenth Circuit was influenced by a 1935 United States Supreme Court case, *Louisville Joint Stock Land Bank v. Radford*.[49] The Supreme Court held in *Radford* that: 1) the bankruptcy power is subject to the fifth amendment; and 2) although Congress may, under the bankruptcy power, discharge a debtor's personal obligation, Congress cannot take for the benefit of the debtor rights in specific property acquired by a creditor.[50] In *Rodrock*, the creditors acquired rights in specific property prior to the enactment of the Reform Act, and under *Radford*, such vested rights cannot be taken from the creditor for the benefit of the debtor.[51] By disallowing retroactive application of the lien avoidance provisions of the Reform Act, the Tenth Circuit Court of Appeals recognized that a substantive right in specific property, such as a lien, cannot be substantially impaired by legislation enacted after the right has been created without doing violence to the lien holder's right to due process.

In re McCoy[52] presented interesting questions under the Oklahoma automobile exemption statute[53] and the Bankruptcy Act. Ted McCoy filed voluntary bankruptcy claiming a 1977 Cadillac as property physically exempt from bankruptcy administration under section 6 of the Bankruptcy Act[54] and under the Oklahoma automobile exemption statute.[55] The bankruptcy court rejected this claim holding that the Oklahoma statutory exemption applies only to the owner's equity interest in the vehicle.[56] This holding was not helpful to the bankrupt since McCoy's car was subject to an unperfected security interest in favor of General Motors Acceptance Corporation (GMAC). McCoy, GMAC, and the trustee stipulated that McCoy's indebtedness to GMAC exceeded the vehicle's market value, that is, that McCoy's equity interest in the car was zero.[57]

The district court reversed the bankruptcy court, holding that the vehicle itself was exempt from bankruptcy administration because the bank-

48. 642 F.2d at 1196.

49. 295 U.S. 555 (1935). *Radford* involved an amendment to the Bankruptcy Act which preserved to a defaulting mortgagor of farm property the ownership and enjoyment of his farm and took from the mortgagee rights in specific property held as security.

50. *Id.* at 589.

51. 642 F.2d at 1197.

52. 643 F.2d 684 (10th Cir. 1981).

53. *Id.* at 685 n.2. OKLA. STAT. ANN. tit. 31, § 1(A)(12) (West Supp. 1981-1982), provides:

> § 1. Property exempt from attachment, execution or other forced sale—Bankruptcy proceedings A. Except as otherwise provided in this title and notwithstanding subsection B herein, the following property shall be reserved to every person residing in the state, exempt from attachment or execution and every other species of forced sale for the payment of debts, except as herein provided. . . . 12. Such person's interest, not to exceed One Thousand Five Hundred Dollars ($1,500.00) in value, in one (1) motor vehicle.

54. Chandler Act, ch. 575, § 6, 52 Stat. 883 (1938) (repealed 1979) (formerly codified at 11 U.S.C. § 24 (1976)).

55. 643 F.2d at 685.

56. *Id.* at 686.

57. *Id.*

rupt's equity interest was less than the $1,500 statutory exemption.[58] The Tenth Circuit reversed the district court and upheld the bankruptcy court's determination that the Oklahoma exemption statute applied only to the bankrupt's equity interest in the car and not to the vehicle itself.[59] The Tenth Circuit relied on *In re Cummings*,[60] a 1969 case which arose under the Colorado exemption statute.[61] The Colorado statute at issue in *Cummings* exempted the equity value of $750 worth of household goods owned and used by the head of a family. The sellers of household goods in *Cummings* wished to exempt certain goods from bankruptcy administration in which the sellers had unperfected security interests. The Tenth Circuit disallowed exempting the household goods from bankruptcy administration. The court reasoned that to treat the exemption as extending to the household goods—as opposed to the bankrupt's equity interest in the goods—would have the effect of giving the lien holder a priority to which he was not entitled.[62]

The Tenth Circuit therefore concluded that *In re Cummings* was dispositive of the issue presented in *In re McCoy*. Thus, the Oklahoma automobile exemption statute applies exclusively to a bankrupt's equity interest in an automobile. If the bankrupt has no equity interest in the vehicle, then the vehicle itself will be included in the bankruptcy estate for the benefit of general creditors.

III. UNIFORM COMMERCIAL CODE

The importance of including a description of collateral in security agreements is emphasized in *In re Permian Anchor Services, Inc.*[63] Permian Anchor Services, Inc. was the bankrupt. The principal issue raised was the relative priority of two creditors, the First National Bank of Lea County (the Bank) and Marvel Engineering (Marvel), after the sale of the bankrupt's assets. The Bank appealed from the district court's reversal of the bankruptcy court.[64] The bankruptcy judge had awarded the Bank the proceeds on sale of collateral described as miscellaneous equipment.[65]

The Bank based its claim on a security agreement[66] and financing statement. While the financing statement contained a description of equipment

58. *Id.*

59. *Id.* at 687.

60. 413 F.2d 1281 (10th Cir. 1969), *cert. denied*, 397 U.S. 915 (1970).

61. *See* COLO. REV. STAT. § 77-2-2(f) (1963) (current version at COLO. REV. STAT. § 13-54-102(e) (1973)).

62. 413 F.2d at 1286.

63. 649 F.2d 763 (10th Cir. 1981).

64. *Id.* at 765.

65. Examination of the miscellaneous equipment disclosed: 6 augers, 2 belling tools, 1 welder, 4 metal chairs, 2 filing cabinets, 1 butane bottle, 1 leased auger, and 4 collections of unidentified items. *Id.* at 766.

66. The signed security agreement primarily covered drilling rigs and vehicles. These particular items were listed in an attachment to the security agreement entitled "Equipment List, Permian Anchor Service, Inc." However, the equipment list failed to name a single item which was of the same class as the miscellaneous items. Thus, the similarity of the "miscellaneous equipment" to a drilling rig worth several thousand dollars more than any one of the items of "miscellaneous equipment" was remote. *Id.* at 766-67.

collateral, it omitted the address of the debtor.[67] On the other hand, the security agreement did list the debtor's address but was devoid of any collateral description.[68] The Bank urged that the signed financing statement and the signed security agreement should be construed together in order to fulfill the requirements of the Uniform Commercial Code.[69]

The Tenth Circuit found the Bank's approach sensible. However, the appellate court felt constrained to apply New Mexico common law, which was contrary to the Bank's position. *Jones & Laughlin Supply v. Dugan Production Corp.*,[70] a 1973 New Mexico case, held that where an unsigned financing statement has a broader list of collateral than the security agreement has, the security agreement controls.

The Bank sought to distinguish *Jones & Laughlin* on the ground that in the present case the financing statement was signed by the debtor. The Tenth Circuit rejected the Bank's argument and, applying *Jones & Laughlin*, held: 1) the financing statement was invalid for lack of a debtor's address; and 2) where the financing statement (which lacked the debtor's address) listed equipment, but the security interest did not, the security agreement controlled and therefore, no security agreement attached to the equipment.[71]

An after-acquired property clause was at issue in *Montoya v. Postal Credit Union*.[72] Under the Truth in Lending Act[73] and Regulation Z,[74] a lender must disclose the fact that a security interest covers after-acquired property. The question was whether this is the extent of the obligation to disclose or if state law variations as to the limits and effect of after-acquired property provisions need also be described. The New Mexico Uniform Commercial Code provides that a security interest including after-acquired property covers only such property acquired by the borrower within ten days after the lender "gives value."[75]

Although the lender in *Montoya* stated that the security interest covered after-acquired property, the plaintiffs brought suit alleging that the lender's failure to disclose the ten-day limitation imposed by state law was a violation of the Truth in Lending Act and Regulation Z.[76] The Tenth Circuit found the plaintiffs' assertion untenable and held that in a consumer loan transaction, the disclosure that "[t]he Security Agreement secures further advances and covers after-acquired property . . ."[77] is sufficient. The appellate court also pointed out that state laws are part of a contract whether or not they are

67. *Id.* at 765.
68. *Id.*
69. *See* N.M. STAT. ANN. §§ 55-9-203 to -204 (1978).
70. 85 N.M. 51, 508 P.2d 1348 (1973).
71. 649 F.2d at 766.
72. 630 F.2d 745 (10th Cir. 1980).
73. 15 U.S.C. § 1639(a)(8) (1976).
74. 12 C.F.R. § 226.8(b)(5) (1981).
75. N.M. STAT. ANN. § 55-9-204(4)(b) (1978).
76. 630 F.2d at 746.
77. *Id.*

referred to in the agreement.[78]

IV. CASE DIGESTS

In *Solomon v. Pendaries Properties, Inc.*,[79] the purchasers of land in a New Mexico development, Pendaries Village, sued the developer and its successor for rescission of the land purchase contract. The Solomons' dissatisfaction with their purchase of a lot arose from the failure of the developer, Pendaries Properties, Inc. (PPI), to construct all the amenities it had represented would be a part of the completed development.[80] The purchasers sought rescission, alleging fraud or intentional misrepresentation on the part of the developer.[81] The defendant, PPI, contended that the evidence was insufficient to establish fraud or misrepresentation under either the Interstate Land Sales Full Disclosure Act (the Land Sales Act)[82] or the common law of New Mexico.

Following a nonjury trial, the district court granted rescission to the purchasers.[83] The Tenth Circuit reversed, holding that the Land Sales Act as it existed at the time of this transaction[84] did not confer a cause of action for the developer's failure to perform acts that, *at the time of sale*, it intended in good faith to carry out.[85] The appellate court also concluded that the purchasers failed to prove a cause of action under the common law. New

78. *Id.* at 748 (citing Farmers Bank v. Federal Reserve Bank, 262 U.S. 649 (1923); Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535 (1866)).

79. 623 F.2d 602 (10th Cir. 1980).

80. *Id.* at 602. In 1973, when the Solomons purchased land in Pendaries Village, the development had a lodge, a swimming pool with cabana, and a twelve-hole golf course. The Solomons received from PPI a report, as required by the Land Sales Act, and several other communications describing the improvements of the completed project. The district court found that PPI had represented in the property report that by December 1975 it would build ten new lakes and ponds, an additional nine-hole golf course, eight tennis courts, a golf course club house and pro shop, a security system, a saddle club area, a main lodge with additional recreational facilities including a second swimming pool, camp-grounds, a complete water system, and streets built to certain specifications. By the end of 1975, PPI had constructed two or three ponds, the nine-hole golf course, two tennis courts, the golf pro shop, a partial security system, some horse-riding facilities, a partial water system, and streets not built to specifications. *Id.* at 603.

81. *Id.*

82. 15 U.S.C. § 1703 (1976).

83. 623 F.2d at 602.

84. 15 U.S.C. § 1703 (1976), as it existed at the time of this transaction, provided:

> (a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails—(1) to sell or lease any lot in any subdivision unless a statement of record with respect to such lot is in effect in accordance with section 1407 [1706] of this title and a printed property report, meeting the requirements of section 1408 [1707] of this title, is furnished to the purchaser in advance of the signing of any contract or agreement for sale or lease by the purchaser; and (2) in selling or leasing, or offering to sell or lease, any lot in a subdivision—(A) to employ any device, scheme, or artifice to defraud, or (B) to obtain money or property by means of a material misrepresentation with respect to any information included in the statement of record or the property report or with respect to any other information pertinent to the lot or the subdivision and upon which the purchaser relies . . . .

Interstate Land Sales Full Disclosure Act, Pub. L. No. 90-448, tit. XIV, § 1404, 82 Stat. 591 (1968) (current version at 15 U.S.C. § 1703 (1976)).

85. 623 F.2d at 604 (emphasis in original). The appellate court's review of the record found no evidence from which to infer a fraudulent intent on the part of the developer at the time of sale.

Mexico follows the general rule that a representation of future events is not actionable fraud except when there is a misstatement of present intent.[86] In *Solomon*, there was no misstatement of present intent.[87]

The Tenth Circuit also discussed the 1979 Congressional amendment to section 1703 of the Land Sales Act. Although the amended language did not control the transaction in *Solomon*, it added support to the court's decision. Congress amended section 1703 in recognition of the problems created when developers become bankrupt before completing promised amenities.[88] The amendment provides a contractual basis for relief when roads, utilities, and recreational amenities are not in fact completed by developers. The legislative history accompanying passage of the amendment explained that whenever a developer represents orally or in writing that roads, sewers, water or electric service, or recreational amenities will be provided or completed by the developer, the contract of sale or lease must stipulate that such services or amenities will be provided or completed.[89] Under the amended Land Sales Act, purchasers of land will have a statutory basis for suing a developer if the land purchase contract fails to reflect the representations that were made.

Southwestern Stationery & Bank Supply, Inc. v. Harris Corp.[90] dealt with an acceptance clause in a purchase order. Southwestern wanted to purchase a used printing press from Harris. Following a series of pre-offer contacts, Harris sent Southwestern several copies of a Harris purchase order and also supplied instructions for submitting the order.[91] Southwestern completed the purchase order and returned four copies to Harris, with a down payment check and an irrevocable letter of credit for the balance of the purchase price. Subsequently, Harris notified Southwestern that the third party owner of the used press would not release possession. Harris returned the uncashed check, the letter of credit, and three copies of the purchase order, none of which bore any Harris notation of acceptance.[92] Southwestern then purchased a comparable new printing press and instituted an action against Harris for breach of the sales contract.

The case turned on the meaning of the acceptance clause language printed on the back of the Harris purchase order.[93] Southwestern argued that the method of acceptance was not made explicit by the document and,

86. *Id.* at 605 (citing Telman v. Galles, 41 N.M. 56, 63 P.2d 1049 (1936); W. PROSSER, THE LAW OF TORTS § 109, at 728-31 (4th ed. 1971)).

87. 623 F.2d at 604.

88. *Id.*

89. H.R. REP. NO. 154, 96th Cong., 1st Sess. 36, *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 2317, 2351-52.

90. 624 F.2d 168 (10th Cir. 1980).

91. *Id.* at 169.

92. *Id.*

93. *Id.* at 169-70. The acceptance clause read:

> This order is subject to acceptance by Seller at its home office written herein. Thereupon, Seller shall mail to Purchaser a signed duplicate copy hereof, and the same shall constitute the entire contract between the parties, which shall be changed only by written agreement of the parties.

In addition, the purchase order included, on its face, the following signature block: "This order is hereby accepted and dated at Seller's Cleveland, Ohio, Office on ——— HARRIS CORPORATION, a Delaware Corporation Sheet Fed Press Division, Seller By ———."

therefore, pursuant to section 2-206 of the Uniform Commercial Code, any "reasonable manner of acceptance" would suffice.[94]

Following a jury verdict for Southwestern, the district court entered a judgment notwithstanding the verdict for Harris.[95] The Tenth Circuit affirmed, holding that the seller's purchase order, which provided that the order was "subject to acceptance by Seller" and that "Seller shall mail to Purchaser a signed duplicate copy hereof, and the same shall constitute the entire contract between the parties"[96] unambiguously indicated the method of acceptance, and thus, in the absence of a written acceptance by the seller (Harris), there was no contract for sale of the printing press.[97]

Harris reaffirms the time-honored rule that parties to a contract retain the power to require specific methods of acceptance. Moreover, as the Tenth Circuit pointed out, any well-trained lawyer can create ambiguities in interpreting even the most straightforward sentences. However, ambiguity does not exist merely because care must be exercised in reading contract provisions. The appellate court concluded that the language of the contract was susceptible to only one reasonable interpretation: the signature block of the purchase order clearly required signature by Harris for the contract to be accepted. Since Harris unambiguously indicated the method of acceptance, the other party was foreclosed from pointing to evidence that would establish any other "reasonable manner of acceptance" under section 2-206 of the Uniform Commercial Code.[98]

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94. U.C.C. § 2-206 (adopted in Oklahoma as OKLA. STAT. ANN. tit. 12A, § 2-206 (West 1971)).
95. 624 F.2d at 170.
96. *Id.* at 169-70.
97. *Id.*
98. *Id.* at 170.