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Overview

Bankruptcy filings were at record levels in 1980[1] so it is no surprise that appeals from bankruptcy decisions dominate the commercial area of the Tenth Circuit survey. As of September 1, 1980, there were 3,888 bankruptcies filed at the United States Bankruptcy Court for the District of Colorado alone, and filings were higher in the other districts of the Tenth Circuit.[2] Bankruptcy cases outnumbered all other types of commercial cases during the period of this survey,[3] but all of the appeals were decided under the now largely superseded Bankruptcy Act.[4] To be useful to the practicing attorney this comment will suggest how the bankruptcy decisions would have differed had they been made under the new Bankruptcy Code,[5] and references to the new Code will be provided in the footnotes. Additionally, this comment will review a banking law appeal from Utah and will summarize bankruptcy decisions that would remain unchanged under the Bankruptcy Code.[6] Finally, it will consider other cases in commercial law.

I. Priority in Bankruptcy

The policy of the bankruptcy laws is to distribute the bankrupt estate equally among the various creditors. For reasons of policy and fairness, however, Congress has established a system of priorities requiring higher ranking claims to be satisfied in full before lower ranking claims are satisfied at all. The priority in bankruptcy given to a corporation created by Congress was the concern in *Turner v. Tennessee Valley Authority*.[7]

In *Turner*, the Tenth Circuit held that the Tennessee Valley Authority (TVA), a corporation created by Congress, was entitled to the governmental priority given by statute. The bankrupt, Agricultural Business Company, Inc., owed the TVA money for fertilizer that the TVA had produced and sold to it. TVA claimed that it fell within the statutory provision[8] giving priority to entities of the United States.[9] The trustee in bankruptcy objected to granting a priority to the TVA because he felt that the debt owed to the

1. Wall St. J., Aug. 28, 1980, at 1, col. 5; Rocky Mtn. News, Aug. 11, 1980, at 83-84.
2. Interview with JoAnn Vigir, Intake Deputy Clerk, and Sharon Howard, Supervising Clerk, Bankruptcy Court, Denver, Colorado (Sept. 17, 1980).
3. This survey runs from June 1, 1979 to May 31, 1980.
4. 11 U.S.C. §§ 1 to 1200 (1976).
5. *Id.* §§ 101 to 1501 (Supp. III 1979). The new Code was enacted as Pub. L. No. 95-598, 92 Stat. 2549 (1978), on November 6, 1978 and became effective on October 1, 1979.
6. 11 U.S.C. §§ 101 to 1501 (Supp. III 1979).
7. 613 F.2d 783 (10th Cir. 1980) (decided under the Bankruptcy Act).
8. The old Bankruptcy Act, 11 U.S.C. § 104(a) (1976), provided that "[t]he debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be . . . (5) debts other than for taxes owing to any person, including the United States, who by the laws of the United States is entitled to priority." The new Bankruptcy Code, 11 U.S.C. §§ 501 to 510 (Supp. III 1979), does not contain a comparable provision.
9. 613 F.2d at 784.

TVA was not a debt owed to the government.[10]

The court of appeals was not persuaded by the trustee's argument that *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*[11] established that the TVA could not claim that it was a part of the federal government.[12] The court distinguished *Turner* from *Sloan Shipyards* with the observation that the sole stockholder of the TVA is the United States Government while the stockholders of the United States Shipping Board Emergency Fleet Corporation could include private persons.[13] Confining *Sloan* to its facts, the court noted that in *United States v. Remund*[14] the Farm Credit Administration, an unincorporated administrative unit of the United States Government, was entitled to priority in bankruptcy.

The test the court alluded to for determining whether a corporation is a governmental entity is based upon the government's control over the corporation, the purpose of the corporation, and the government's responsibility for the corporation's actions.[15] The government is permitted to carry on its operations through corporations,[16] and, as the Tenth Circuit noted, other courts have referred to the TVA as an "instrumentality of the United States,"[17] as "an administrative arm of the executive department,"[18] and as "a wholly owned government corporation . . . the United States in action."[19] The court stated that unless the statute creating the TVA expressly denied it priority status, then the priority existed.[20]

Under the old Bankruptcy Act, the order of priority was 1) costs and expenses of administration,[21] 2) wages and commissions of claimants,[22] 3) reasonable costs and expenses incurred by creditors in certain situations,[23] 4) taxes due the United States, a state, or a subdivision of the state,[24] 5) debts, other than taxes, owed to any person, including the United States, who by federal law is entitled to priority.[25] Non-tax debts owed to the government fell within a separate statutory provision, which specifically gave priority to entities of the United States Government.[26]

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10. *Id.* at 785. 31 U.S.C. § 191 (1976) provides that if a person indebted to the United States becomes insolvent, "the debts due the United States shall be first satisfied." *See* note 26 *infra*.
11. 258 U.S. 549 (1922).
12. 613 F.2d at 785.
13. *Id.* at 786.
14. 330 U.S. 539 (1947).
15. 613 F.2d at 786 (quoting Cherry Cotton Mills v. United States, 327 U.S. 536, 539 (1946)).
16. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947).
17. Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 134 (1938).
18. Morgan v. TVA, 115 F.2d 990, 994 (6th Cir. 1940).
19. Ramsey v. United Mine Workers, 27 F.R.D. 423, 425 (E.D. Tenn. 1961).
20. 613 F.2d at 787.
21. 11 U.S.C. § 104(a)(1) (1976).
22. *Id.* § 104(a)(2).
23. *Id.* § 104(a)(3).
24. *Id.* § 104(a)(4).
25. *Id.* § 104(a)(5).
26. 31 U.S.C. § 191 (1976) provides that

> Whenever any person indebted to the United States is insolvent . . . the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his

Under the new Bankruptcy Code, a governmental entity, such as the TVA, is not given priority in bankruptcy.[27] The Code has altered the order of priorities and now includes administrative expenses first[28] together with statutory fees and charges assessed against the bankrupt's estate.[29] Second priority is given to unsecured claims for debts incurred after the commencement of an involuntary bankruptcy proceeding but before appointment of a trustee and entry of the order for relief,[30] that is, during the so-called "involuntary gap."[31] The third priority is for unsecured claims for wages, salaries, or commissions.[32] Fourth are unsecured claims for contributions and payments to employee benefit plans,[33] and fifth priority is given to the unsecured claims of individuals[34] who, prior to the commencement of the case, deposited money with the bankrupt for the purchase, lease, or rental of property or the purchase of services for their personal, family, or household use.[35] The unsecured tax claims of federal, state, and local governments have sixth priority.[36]

When enacting the Code, Congress specifically omitted claims of the United States for debts due and owing. It then amended the law giving priority to such debts[37] to exclude its application to the Bankruptcy Code.[38] Therefore, a claim by a governmental entity, such as the TVA, does not have priority under the Code.

II. THE DISCHARGE OF MEDICAL MALPRACTICE DEBTS

The Tenth Circuit addressed the issue of whether bankruptcy is an alternative to medical malpractice insurance in *Franklin v. First National Bank of Albuquerque*.[39] An osteopathic surgeon had a medical malpractice judgment taken against him by default. He subsequently instituted bankruptcy proceedings and listed as dischargeable debts the judgment entered against him in the prior medical malpractice action. The "creditors" objected to the dis-

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debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

27. *See* 11 U.S.C. § 507 (Supp. III 1979).

28. *Id.* § 507(a)(1).

29. Bankruptcy court costs are an example of such fees. *See generally* 28 U.S.C. §§ 1911-1929 (1976 & Supp. II 1978).

30. 11 U.S.C. § 507(a)(2) (Supp. III 1979).

31. *Id.* § 502(f) (Supp. II 1978). For a discussion of the "involuntary gap," see COLLIER ON BANKRUPTCY §§ 502.06, 549.02, -.06 (15th ed. 1979).

32. 11 U.S.C. § 507(a)(3) (Supp. III 1979).

33. *Id.* § 507(a)(4). According to the legislative history, this section overrules United States v. Embassy Restaurant, Inc., 359 U.S. 29 (1958), and falls into line with the realities of modern labor contract negotiations. H.R. REP. NO. 95-595, 95th Cong., 1st Sess. 357-58 (1977).

34. Neither partnerships nor corporations are included in this category.

35. 11 U.S.C. § 507(a)(5) (Supp. III 1979).

36. *Id.* § 507(a)(6). Taxes due generally include income taxes, property taxes, withholding taxes, employment taxes, and excise taxes, but not fines or penalties which do not represent compensation for actual pecuniary loss. *Id.*

37. *See* 31 U.S.C. § 191 (1976). *See also* note 26 *supra*.

38. 31 U.S.C. § 191 (Supp. II 1978) was amended by Pub. L. No. 95-598, 92 Stat. 2549 (1978), on November 6, 1978 to provide that "[t]he priority established under this section does not apply . . . in a case under Title 11."

39. 615 F.2d 909 (10th Cir. 1980).

charge of the debts under the Bankruptcy Act.[40] There is no indication whether the judgment against Franklin was based upon a contract,[41] tort,[42] or hybrid[43] theory. The bankruptcy judge held that the state court record was ambiguous as to one plaintiff, an adult, and unambiguous as to the other plaintiff, a child.[44] Thus, the bankruptcy judge, without going behind the record, found Franklin's conduct to be willful and malicious and concluded that the debt was not dischargeable as to the guardian of the minor. The judge also ordered an evidentiary hearing to evaluate the doctor's conduct as to the minor's mother.[45] The district court affirmed the bankruptcy court.

Both courts relied on *Raley v. Nicholas*[46] in deciding that the court should be confined to a review of the judgment and record of the prior state court proceedings and not take additional evidence. *Nicholas* was overruled, however, by *Brown v. Felsen*,[47] wherein the Court held that the bankruptcy court is not confined to a review of the judgment and record in the prior state court proceedings when considering the discharge of respondent's debt.[48] Thus, in *Franklin* the Tenth Circuit Court of Appeals reversed and remanded the matter, ordering the bankruptcy court to look behind the record of the state court proceeding to consider the conduct of the physician.[49]

The court of appeals never had the opportunity to consider the important issue concerning the dischargeability in bankruptcy of a physician's malpractice debts. Under both the Bankruptcy Act[50] and the new Bankruptcy Code[51] a debt for an injury arising from the willful and malicious conduct of the debtor toward another is not dischargeable in bankruptcy. "Willful," according to the legislative history of the new Code means "deliberate or intentional."[52] The term malicious is not defined in the legislative

40. 11 U.S.C. § 35(a) (1976). Under the new Bankruptcy Code, the objection would be based upon 11 U.S.C. § 523(6) (Supp. III 1979), which states that there is no discharge from a debt arising from "willful and malicious injury by the debtor to another entity or to the property of another entity." While fraud was hinted at in the decision, *see* 615 F.2d at 910, the fraud discussed by the Bankruptcy Code does not appear to be the type of fraud which would be the basis of a malpractice suit, that is, fraud in the concealment. 11 U.S.C. § 523(4) (Supp. III 1979) provides no discharge for debts arising from fraud or defalcation while acting in a fiduciary capacity.

41. W. PROSSER, THE LAW OF TORTS § 32 (4th ed. 1971). *See, e.g.*, Brown v. Moore, 247 F.2d 711 (3d Cir. 1957). *But see* Kennedy v. Parrott, 243 N.C. 355, 90 S.E.2d 754 (1956) (physician's agreement to accept individual as patient does not create contract in ordinary sense of term but creates status or relationship).

42. A tort action is based upon a doctor's negligent breach of duty to his patient.

43. A hybrid tort-contract action most often sounds in tort. *See* Brown v. Moore, 247 F.2d 711 (3d Cir. 1957); Noel v. Proud, 189 Kan. 6, 367 P.2d 61 (1961).

44. 615 F.2d at 910.

45. *Id.*

46. 510 F.2d 160 (10th Cir.), *cert. denied*, 421 U.S. 1012 (1975).

47. 442 U.S. 127 (1979). For a comment on Brown v. Felsen, see Overview, *Commercial Law, Sixth Annual Tenth Circuit Survey*, 57 DEN. L.J. 165, 165-66 (1980).

48. 442 U.S. at 138-39.

49. 615 F.2d at 911.

50. 11 U.S.C. § 35(a) (1976).

51. *Id.* § 523(4) (Supp. III 1979).

52. H.R. REP. NO. 95-595, 95th Cong., 1st Sess. 365, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5963, 6320.

history,[53] but in a legal sense a willful injury and a malicious injury are nearly identical.[54] The legislative history does not address the discharge of medical malpractice judgments.

The exceptions to discharge are related to actions in tort and not to breaches of contract.[55] The malpractice action, however, must be framed as an intentional tort because debts for injuries caused by negligent, careless, and unintentional behavior are apparently not within the discharge exception for willful and malicious injuries.[56] A malpractice judgment can be brought within the exception by showing that the injury resulted from an intentional disregard of a duty owed to the patient,[57] which includes abandonment and assault. Gross negligence is the equivalent of an intentional wrong under the exception to discharge, where it is defined as a willful disregard of the rights of others.[58]

Imagine the following scenario. Based upon the pleadings and judgment in the trial court, a physician is found guilty of "unintentional" malpractice. Rather than pay the judgment creditor, the physician declares bankruptcy, has his malpractice debts discharged, and leaves the injured creditor with a useless malpractice judgment. Thus, the Bankruptcy Code leaves an outlet for a physician who is adjudged liable to a patient for malpractice; instead of paying the creditor the physician might have the debt discharged in bankruptcy.

This opportunity for evasion conflicts with the policy of helping those who have been injured by the intentional or unintentional mistakes of physicians. A malpractice suit is the best method a person has to remedy a wrong that a physician has committed.[59] Nothing in the Bankruptcy Code can be interpreted to prevent the discharge of debts incurred for unintentional malpractice torts or breaches of contracts with patients. Therefore, in a malpractice suit the complaint ought to be drafted in terms of an intentional tort or gross negligence so that when a judgment is rendered against the physician, the debt will not be dischargeable in bankruptcy.

III. BRANCH BANK OR DRIVE-IN FACILITY

In *Utah v. Zions First National Bank*[60] the court of appeals found that a

53. *Id.*
54. *See* MacLean v. Scripps, 52 Mich. 214, 17 N.W. 815 (1883); Rea v. Motor Ins. Corp., 48 N.M. 9, 144 P.2d 676 (1944).
55. Allen v. Lindeman, 164 N.W.2d 346 (Iowa 1969).
56. 11 U.S.C. § 523(6) (Supp. III 1979). *See In re* Byrne, 296 F. 98 (2d Cir. 1924); Robinson v. Early, 248 Cal. App. 2d 19, 56 Cal. Rptr. 183 (1967); Panagopulos v. Manning, 93 Utah 198, 69 P.2d 614 (1937).
57. Flanders v. Mullin, 80 Vt. 124, 66 A. 789 (1907) (doctor who intentionally injures a patient in a way not essential to the operation performs a willful and malicious act in the required sense).
58. Saueressig v. Jung, 246 Wis. 82, 16 N.W.2d 417, 419 (1944). Additionally, wrongful death judgments are not dischargeable.
59. S. KLAW, THE GREAT AMERICAN MEDICINE SHOW 95-109 (1975). *See* S. JONAS, HEALTH CARE DELIVERY IN THE UNITED STATES (1977). *But see* H. LEWIS & M. LEWIS, THE MEDICAL OFFENDERS 264-65 (1970) (malpractice suits may be good for plaintiffs, but they are expensive to the doctor and the insurer); D. STROMAN, THE MEDICAL ESTABLISHMENT AND SOCIAL RESPONSIBILITY 161-82 (1976).
60. 615 F.2d 903 (10th Cir. 1980).

national bank had established a branch bank in violation of both state[61] and federal[62] law by maintaining a drive-in facility 271 feet from the bank's main structure. While the court was careful to follow precedent by not allowing the national bank to maintain the drive-in facility, the decision is not necessarily the correct one, for it perhaps lessens the competitiveness of the Zions First National Bank in the banking market of Ogden, Utah.

Utah is a state which allows limited branch banking.[63] That is, in first class cities, those with 100,000 or more people,[64] branch banking is permitted.[65] In second class cities, however, which, like Ogden, have between 60,000 and 100,000 people, branch banking is not authorized if a bank is already in the community. An exception is allowed if the existing bank is attempting to establish a branch by taking over another bank in the community.[66]

The Comptroller of the Currency ruled initially that Zions could legally establish a *drive-in facility* on Zions' corner property.[67] The appellate court, however, gave no weight to the Comptroller's ruling, finding instead that Zions' drive-in facility was actually a branch bank and not permitted by state or federal law.[68] "Branch" is defined identically under Utah and federal law.[69] The court found that Zions' drive-in facility was a branch bank under Utah law. Since this "branch bank" was not contiguous to the main bank structure, as state law required, nor within the exception established by the Utah Commissioner of Financial Institutions allowing a facility to be maintained immediately across the street from a bank if it is connected to the banking house by a pneumatic tube or other means of transmission,[70] the court reasoned that the facility was an unauthorized branch bank. Specifically, the court was influenced by the presence of structures between the main bank and the facility, although the bank apparently had built the facility as near to the bank as possible.

The court of appeals used the correct definition of a branch bank[71] but incorrectly found that the bank's drive-in facility was a branch bank. It relied on *First National Bank v. Dickinson* in which the Supreme Court had said that a branch bank is "any place for receiving deposits or paying checks or lending money apart from the chartered premises."[72] In *Dickinson*, the Court had ruled that an armored car similar to a "mobile drive-in" facility

61. UTAH CODE ANN. § 7-3-6 (1953).
62. 12 U.S.C. § 36(c), (f) (1976).
63. *See* Gup, *A Review of State Laws on Branch Banking*, 88 BANKING L.J. 675 (1971).
64. UTAH CODE ANN. § 20-1-1 (1953).
65. *Id.* § 7-3-6.
66. *Id.*
67. 615 F.2d at 905.
68. *Id.*
69. UTAH CODE ANN. § 7-3-6 (1953). 12 U.S.C. § 36(f) (1976) provides that
the term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.
70. UTAH CODE ANN. § 7-3-6 (1953).
71. *Id.*
72. 396 U.S. 122 (1969).

and a receptacle for money located one mile from the bank were branch banks and, therefore, were not permitted by Florida law. However, in separate dissents, Justices Stewart and Douglas argued with the majority's rationale,[73] stating that the practices of the facilities in question were not those of a branch bank and that the Comptroller's decision should not be overturned, absent overriding reasons. The Tenth Circuit believed that the facts in *Dickinson* applied to *Zions*, which led the appellate court to its conclusion that the drive-in facility was a branch bank.[74]

The appellate court erred in finding that the Utah drive-in facility was a branch bank. Although the differences between a branch bank and drive-in facility are not easily distinguished, they do exist.[75] A branch bank offers complete banking services including receiving deposits, cashing checks, and lending money. Drive-in facilities, on the other hand, which are commonly used by banks, are only for depositing money and cashing checks; they do not lend money. Furthermore, drive-in facilities often stay open beyond regular banking hours as a convenience to customers.

The Tenth Circuit applied the branch bank rule too harshly. The court did recognize that the *Dickinson* rule should not be rigidly or mechanically applied.[76] Other factors "such as the distance separating the main bank from the added facility, the presence or absence of intervening structures . . . and *the availability of other locations* for attached expansion may be considered."[77] In *Zions*, the facts indicated that the bank was unable to establish a facility on its own property and could not purchase surrounding property for a facility.[78] Therefore, Zions established the facility on property located as near the bank as possible.[79] The court maintained a rigid stance by not considering Zions' efforts to purchase contiguous property[80] and incorrectly noted that the other factors cited in *Dickinson* were not in Zions' favor.[81]

While it is true that electronic banking facilities are considered branch banks under the federal statutory definition,[82] the Zions facility was not an electronic banking facility. Therefore, decisions in electronic facility situations are not as sufficiently analogous to Zions' situation as the court of appeals believed.[83]

73. *Id.* at 138.
74. 615 F.2d at 906.
75. *See, e.g.*, NEB. REV. STAT. § 8-157 (Reissue 1977), in which the Nebraska Legislature prohibited branch banks but allowed auxiliary teller offices (drive-in facilities). These are what the Zions First National Bank apparently maintained.
76. 615 F.2d at 906.
77. *Id.* (emphasis added). *See* Nebraskans for Independent Banking, Inc. v. Omaha Nat'l Bank, 530 F.2d 755 (8th Cir.), *vacated and remanded*, 426 U.S. 310 (1976) (remanded in light of new state legislation).
78. 615 F.2d at 904.
79. *Id.* at 904-05.
80. *Id.* at 906.
81. *Id.*
82. State Banking Bd. v. First Nat'l Bank, 540 F.2d 497 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977); Independent Bankers Ass'n of America v. Smith, 534 F.2d 921 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976). *See also* Illinois v. Continental Ill. Nat'l Bank & Trust Co., 535 F.2d 176 (7th Cir. 1976); Missouri v. First Nat'l Bank, 538 F.2d 219 (8th Cir.), *cert. denied*, 429 U.S. 941 (1976). *See Banking Decisions, CBCTs as Branch Banks*, 94 BANKING L.J. 159 (1977).
83. 615 F.2d at 906.

Finally, and perhaps most importantly, the court erred by stressing that Zions' branch would violate the doctrine of competitive equality[84] established by the McFadden Act.[85] Zions' facility perhaps increased competition in the Ogden market area and should have been approved as a matter of public policy. Obviously, if other national and state banks in Ogden can maintain drive-in facilities and Zions cannot, Zions will be at a competitive disadvantage. Competition is important in formulating banking policy,[86] and despite objections to branch banking,[87] certain types of branch banking increase competition.[88] The Tenth Circuit would have been in line with modern banking policy if it had allowed Zions to maintain the drive-in facility, unless doing so would have given Zions an unfair advantage over its competitors.[89]

The distinction between Zions' drive-in facility and an actual branch bank is slight, but Zions' facility must have improved the bank's competitiveness in the Ogden market. Therefore, the court, in recognizing the competitive equality doctrine, could properly have found for Zions.

IV. THE SELLER'S RIGHT OF STOPPAGE UNDER THE U.C.C.

An interesting interplay between the Uniform Commercial Code (U.C.C.), the bankruptcy laws, and certain liens against the government occurred in *In re Murdock Machine & Engineering Co.*,[90] where a conflict arose between the United States Government and Ramco Steel, two creditors of the Murdock estate. Specifically, *Murdock* addressed the unique question of whether a seller may stop delivery of goods under section 2-705 of the U.C.C. as against a good faith purchaser for value.

On May 13, 1975, Murdock, a Utah corporation, filed a petition seeking to be adjudged bankrupt. On May 22, Ramco, without knowledge of Murdock's petition, made its last shipment of steel to Murdock. All steel was sold on credit to Murdock, delivery F.O.B. Buffalo, New York, the place of shipment. Upon learning of the bankruptcy petition on May 23, 1975, Ramco stopped delivery of steel held in Indiana; another delivery was stopped on

84. *Id.* at 907. Some maintain that national banks, which have venue wherever they are located are at a competitive advantage. *See* Citizens & Southern Nat'l Bank v. Bougas, 434 U.S. 35 (1977); Bell & Work, *National Banks in Courts: Unequal Protection*, 94 BANKING L.J. 484 (1977). *See also* Dunne, Citizens & Southern Nat'l Bank v. Bougas*: Closing the Gap*, 95 BANKING L.J. 307 (1978).

85. Pub. L. No. 69-639, 44 Stat. 1224 (1927) (codified in scattered sections of 12 U.S.C.). According to J. WHITE, BANKING LAW (1976), "[t]he McFadden Act of 1927 established 'competitive equality' between national banks and state banks which were members of the Federal Reserve system by allowing both to establish 'inside' branches—within the municipality of their main banking facilities—in those states that permitted branch banking." *Id.* at 478.

86. *See* M. MAYER, THE BANKERS (1974).

87. *Id.* at 87. *See* H. BARGER, MONEY, BANKING, AND PUBLIC POLICY 239-42 (2d ed. 1968).

88. De novo branch banking, for example, requires those interested in opening branch banks to start new institutions rather than acquire established banks. *See* H. BARGER, *supra* note 87.

89. The modern trend is to allow branch banking. *See* J. WHITE, BANKING LAW (1976).

90. 620 F.2d 767 (10th Cir. 1980).

June 11, 1975. The steel was shipped to an Indiana warehouse and ultimately reshipped to Utah.

Unknown to Ramco, Murdock intended to use the steel to fulfill a contract with the United States. The contract between Murdock and the United States contained a title-vesting clause providing that title to Murdock's materials vested in the United States immediately upon Murdock's receipt of the materials.[91] Thus, the United States claimed that Ramco's statutory right to stop delivery of the steel in transit was exercised subject to the title that had vested in the United States immediately after Murdock had acquired title to the steel at the point of shipment.[92] Ramco argued that since Murdock did not obtain possession of the steel, the United States did not acquire title.[93] According to the court of appeals, the United States, in effect, urged that the Uniform Commercial Code not be followed. Additionally, the United States claimed that it had a lien on the property by virtue of having taken title. The court, however, felt that Ramco had obtained the first lien; that is, under the Uniform Commercial Code, Ramco's lien attached immediately when Murdock filed for bankruptcy.[94] Title could not have vested in the government until the steel was shipped from Buffalo, New York.[95]

Ramco argued that its lien on the steel or the proceeds derived from it remained valid, even if the title had vested in the government, citing *Armstrong v. United States*[96] and *United States v. Alabama*[97] to support its contention. The government analogized to the principle that no creditor can obtain a lien against a public work to which the United States has taken title

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91. The title-vesting clause in the Murdock-United States contract reads:

> Immediately upon the date of this contract, title to all parts; materials; . . . acquired or produced by the contractor (Murdock) and allocated or properly chargeable to this contract under sound and generally accepted accounting principles and practices shall forthwith vest in the Government; and title to all like property thereafter acquired or produced by the contractor and properly chargeable to this contract as aforesaid, shall forthwith vest in the Government upon said acquisition, production, or allocation.

Id. at 769.

92. *Id.* Under U.C.C. § 2-401(2), "F.O.B." means that title passes at the time and place of shipment, which was Buffalo, New York in this instance.

93. 620 F.2d at 769.

94. *Id.* at 770. U.C.C. § 2-702(1) provides: "Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this Article." U.C.C. § 2-705(1) provides: "The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent." Generally, to stop delivery a seller must establish that the buyer is insolvent within one of the three tests established in U.C.C. § 1-201(23). Matsushita Elec. Corp. of America v. Sonus Corp. 362 Mass. 246, 284 N.E.2d 880 (1972). U.C.C. § 1-201(23) provides: "A person is 'insolvent' who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law."

95. 620 F.2d at 770.

96. 364 U.S. 40 (1960) (state-created materialman's lien, which attached to a privately owned vessel under construction for the government, remained valid after title vested in the government).

97. 313 U.S. 274 (1941) (while lands owned by the United States cannot be taxed by the state, as far as prior state tax liens are concerned the United States stands in no different position from other purchasers of land who take the land after the tax date).

without the government's consent.[98] However, this rationale did not support the government's position, for the liens in *Ansonia* were against public works while in *Murdock* the liens were against personal property.[99] Thus, the United States obtained title to Murdock's steel subject to Ramco's right to withhold possession.[100]

Advancing a public policy argument, the court of appeals noted that in *United States v. Kimbell Foods, Inc.*[101] the Supreme Court held that the priority of private liens and liens arising from the lending programs sponsored by the Small Business Administration and the Federal Housing Administration is to be determined by state priority rules. Although *Kimbell* is expressly limited to federal claims arising from these government loans,[102] the Tenth Circuit found *Kimbell* persuasive. The court recognized that businessmen must be able to rely on codified rights and duties.[103] Additionally, the government should not be allowed greater rights than others in the marketplace. Further, state commercial laws do not frustrate government programs, and sellers should not be required to investigate every sale to see if the government is lurking in the background with a superior right.[104] The court observed that the government could easily have worked within the framework of state laws to ensure its receipt of the steel.[105] Like large businesses, the government can work within the idiosyncracies of each state's commercial code.[106]

The government urged that it was a good faith purchaser for value. But, the court distinguished Ramco's stoppage of goods before Murdock received them from section 2-702(3) of the U.C.C.,[107] which limits a seller's right to reclaim goods by the rights of a good faith purchaser for value.[108] A good faith purchaser is not so explicitly protected from a seller's right of stoppage, however.[109] Therefore, the seller's right to stop goods in transit[110] is effective even if title has passed to the buyer.[111]

The court of appeals then reduced *Murdock* to a seldom litigated issue: whether a seller may stop delivery of goods under section 2-705 of the Uniform Commercial Code as against a good faith purchaser for value. The

98. *See* United States v. Ansonia Brass & Copper Co., 218 U.S. 452 (1910).
99. 620 F.2d at 771.
100. *Id.*
101. 440 U.S. 715 (1979).
102. *Id.* at 740.
103. 620 F.2d at 772.
104. *Id.*
105. *Id.*
106. *Id.*
107. U.C.C. § 2-702(3) provides: "The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this Article (Section 2-403). Successful reclamation of goods excludes all other remedies with respect to them."
108. *See* U.C.C. § 2-403 (discussion of good faith purchasers).
109. 620 F.2d at 774.
110. Stoppage *in transitu* is defined as "[t]he act by which the unpaid vendor of goods stops their progress and resumes possession of them, while they are in course of transit from him to the purchaser, and not yet actually delivered to the latter." BLACK'S LAW DICTIONARY 1273 (5th ed. 1979).
111. Amoco Pipeline Co. v. Admiral Crude Oil Corp., 490 F.2d 114 (10th Cir. 1974).

court found only one relevant case[112] in which a federal district court held that until delivery of the goods, the rights of a good faith purchaser for value are subject to the seller's right of stoppage. The Tenth Circuit concluded that delivery of the goods to a bailee constitutes a delivery. Since the government did not contend that the steel had been delivered to it and since the bailee, the Indiana warehouse, asserted that Murdock did not have physical or constructive possession of the goods in the warehouse, the steel in question was never delivered to either Murdock or the government.

As an aside, the court speculated that the steel might have been consigned under non-negotiable straight bills of lading.[113] Even under the federal statute which deals with bills of lading, however, the government was subject to Ramco's right of stoppage.[114] The Court also noted that the equitable right of stoppage *in transitu* defeated the rights of good faith purchasers for value.[115] Finally, since Ramco was unaware of Murdock's transfers to the government, it could not possibly have acquiesced in the government's purchase. Such acquiescence would have made applicable the official comments to section 2-705 of the U.C.C., which indicate that receipt of the goods by a subpurchaser acquiesced in by the seller bans the seller's stoppage of goods in transit.[116]

V. Case Digests

A. *Admiralty Liens in the Tenth Circuit*

It has always seemed likely that a case involving admiralty liens would not appear in the Tenth Circuit, but such a case did surface during the past term in an appeal from an Oklahoma bankruptcy decision. In *Riffe Petroleum Co. v. Cibro Sales Corp.*,[117] Riffe was the debtor in possession in a chapter 11 bankruptcy proceeding, filed on June 2, 1978, in Oklahoma. On June 5,

112. Ceres, Inc. v. ACKI Metal & Ore Co., 451 F. Supp. 921 (N.D. Ill. 1978).

113. 620 F.2d 774. The court said:

> The provisions of the Code concerning documents of title support our conclusion that a good faith purchaser for value does not cut off the seller's right to stop delivery of goods in transit. Goods in transit, and 'in the possession of a carrier or other bailee' (U.C.C. § 2-705(1)), invariably are consigned under a document of title, such as a bill of lading. There was evidence in this case that the steel was consigned under non-negotiable straight bills of lading.

114. 49 U.S.C. § 119 (1976) provides that

> Where an order bill has been issued for goods no seller's lien or right of stoppage *in transitu* shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage in transitu. Nor shall the carrier be obliged to deliver or justified in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation.

49 U.S.C. § 109 (1976) provides that

> A bill may be transferred by the holder-by-delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby. A straight bill can not be negotiated free from existing equities, and the indorsement of such a bill gives the transferee no additional right.

Thus, even if the government were a transferee of the straight bills of lading covering the steel, it would be subject to Ramco's right of stoppage. 620 F.2d at 775.

115. 620 F.2d at 775. *See, e.g.*, Branan v. Atlanta & W.P.R. Co., 108 Ga. 70, 33 S.E. 836 (1899); Pattison v. Culton, 33 Ind. 240 (1870).

116. 620 F.2d at 775.

117. 601 F.2d 1385 (10th Cir. 1979).

1978, the district court entered a stay order. In October of 1977, a subsidiary of Riffe had entered into a maritime contract for a vessel and also contracted to have its oil supplied by Cibro. Cibro delivered the fuel oil but was never paid. On June 16, 1978, Cibro, having received notice of the bankruptcy stay order, filed, as a listed creditor of the estate, a complaint in rem in a New Jersey court to enforce its maritime lien for furnishing bunker oil to Riffe's vessel. The ship was seized on June 17, 1978, but the cargo remained on the ship. Cibro did not apply to the bankruptcy court in Oklahoma for a modification of the stay order, but Riffe knew of the seizure. A New Jersey judge ruled that the seizure did not violate the bankruptcy stay order. The cargo was eventually released when the exporter, Shell Curaçao, paid the Cibro bill, taking in return an assignment of Cibro's claim.

The Oklahoma judge held Cibro and its attorneys in contempt of court for violating the stay order; it levied various penalties against them and ordered Cibro's officers and other attorneys to show cause for their failure to follow the court's orders. The Tenth Circuit granted a stay of the contempt judgment until the final disposition of the case.

Conflicts exist between admiralty and bankruptcy law.[118] A bankruptcy stay order enjoins action against property owned or in possession of the debtor.[119] However, the parties in *Riffe Petroleum* entered into a time charter agreement, which "is a contract for a special service to be rendered by the owners of the vessel" who agree to carry goods in a ship in which the charterer has no interest.[120] This is distinguishable from a contract to lease the vessel[121] in which the lessee, the charterer, in effect becomes the owner of the ship for the length of the charter.[122]

A maritime lien allows a ship to keep moving in commerce but prevents it from sailing away to escape its debts.[123] The Maritime Lien Act[124] grants a lien on a vessel for necessaries supplied, including fuel oil; the lien arises automatically upon the furnishing of necessaries and has priority over mortgages or purchasers without notice.[125] The vessel is a distinct entity responsible for its own debts,[126] and a suit brought to enforce a maritime lien is brought as an in rem proceeding in the district where the vessel is located.[127] Thus, the New Jersey proceeding was strictly against the ship.[128]

The Tenth Circuit noted that Riffe's subsidiary was a time charterer and not the vessel's owner; had this not been the situation, the stay order

118. 601 F.2d at 1389. *See, e.g.*, Biele, *Maritime Liens Arising Out of Collision*, 51 TUL. L. REV. 1134, 1151-52 (1977); Landers, *The Shipowner Becomes a Bankrupt*, 39 U. CHI. L. REV. 490 (1972).

119. Under the Bankruptcy Code the applicable provision is 11 U.S.C. § 362 (Supp. III 1979).

120. 601 F.2d at 1389 (quoting Leary v. United States, 81 U.S. (14 Wall.) 607, 610 (1871)). *See* Bergan v. International Freighting Corp., 254 F.2d 231 (2d Cir. 1958).

121. 601 F.2d at 1389.

122. Marr Enterprises, Inc. v. Lewis Refrigeration Co., 556 F.2d 951, 957-58 (9th Cir. 1977).

123. 601 F.2d at 1389.

124. 46 U.S.C. § 971 (1976).

125. Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co., 254 U.S. 1, 12 (1920).

126. 601 F.2d at 1389.

127. Platoro Ltd. v. Unidentified Remains of a Vessel, 508 F.2d 1113, 1115 (5th Cir. 1975).

128. 601 F.2d at 1389.

would probably have been enforceable.[129] While the bankruptcy court has exclusive jurisdiction over the debtor and its property, wherever located,[130] the debtor must have title or possession for the property to be within the court's jurisdiction.[131] Riffe's subsidiary operated under a time charter agreement and had neither title to nor possession of the vessel. Ownership of the cargo was of no importance because the shipowner, not Cibro, prevented the unloading of the cargo.[132] "Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate,"[133] for a debtor's property may be affected by admiralty proceedings, which do not constitute a claim against the property.[134] Furthermore, although the court did not mention it in the opinion, a court of admiralty has exclusive jurisdiction of an action to enforce a maritime lien.[135] Absent a claim, the contempt proceedings could not continue.[136]

Finally, the court of appeals dispelled the argument that Cibro had obtained a preference. There was no proof that Cibro had filed a claim, and Shell Curaçao had paid Cibro's bill in return for an assignment of Cibro's claim against Riffe.[137] Thus, the court concluded that the stay order had not been violated, and it dismissed the case.

B. *Abuse of Discretion in the Bankruptcy Court*

In *Security National Bank v. Turner*[138] the bank held a security interest in the property of the bankrupts, the Ocobocks, and received $34,000 from the sale of their business. Two months later the Ocobocks filed for bankruptcy, and two claims were submitted against the estate. The bank was listed as a creditor, but it made no claim. The trustee, upon receiving the bankruptcy court's permission to act as his own attorney, sued the bank, asserting that it had obtained a preference by receiving funds two months prior to the filing of the bankruptcy petition.

After negotiations with the trustee, the bank sent to him a check for $8,000 and a "Release and Settlement Agreement" in which the bank relinquished any right it might have to file a claim against the estate. Shortly thereafter, the trustee objected to the two claims that had been filed and presented to the bankruptcy court an application for approval of the settlement with the bank, an application for his attorney's fees, and a final report showing a positive balance of $8,436.84. Notice of a meeting of creditors was sent to the bank, but not to the bank's counsel.

Less than one month later, the bankruptcy judge sustained the trustee's objections to the two claims, approved both the attorney's fees and the re-

129. *See id.* at 1390.
130. Under the Bankruptcy Code the applicable provision is 28 U.S.C. § 1471(e) (Supp. II 1978).
131. Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 481 (1940).
132. 601 F.2d at 1390.
133. *Id.* (quoting Callaway v. Benton, 336 U.S. 132, 142 (1949)).
134. 601 F.2d at 1390.
135. Hercules Co. v. The Brigadier General Absolom Baird, 214 F.2d 66 (3d Cir. 1954).
136. *Id.*
137. 601 F.2d at 1390-91.
138. 608 F.2d 1358 (10th Cir. 1979).

port of the trustee, and awarded the surplus to the bankrupts. The court subsequently approved the settlement agreement with the bank. One week later the bank learned that the objections had been sustained, and it appealed the bankruptcy court's decision. The district court affirmed, citing no proof of error in the bankruptcy court.

The bank claimed a legal error because it was the sole creditor of the estate.[139] The court of appeals said that compromises achieving unjust results amount to abuses of discretion and should be set aside.[140] A bankruptcy court is a court of equity,[141] and equitable principles govern its jurisdiction.[142] In *Turner* the results were unjust because the bank had settled with the understanding that other allowable claims existed.[143] Since the bankruptcy court and the trustee knew there would be no other allowable claims and the settlement would create a surplus,[144] the Tenth Circuit found that the bankruptcy court had abused its discretion by allowing the bankrupts to receive a windfall of over $6,000.[145] Therefore, it reversed the orders of the bankruptcy court.

C. *Proof of Personal Ownership in Bankruptcy Proceedings*

Despite a lower court's finding that a corporate officer lacked credibility, the Tenth Circuit Court of Appeals held, in *In re White House Decorating Co.*,[146] that documentary evidence which the officer presented established the title to personal property found on the bankrupt's premises in the officer personally and not in the bankrupt corporation. Therefore, the personal property was not subject to the bankruptcy proceedings.

The court gave "great weight" to the bankruptcy court's conclusion that the testimony of the company's president lacked credibility.[147] The president had presented uncontradicted documentary evidence, however, establishing that he himself owned the personal property in question, which consisted of three boats.[148] Although owners sometimes abuse the closely-held corporation,[149] unless a contention is made that the corporate form should be disregarded so that creditors can reach personal assets or that a fraud was perpetrated on the creditors, once a claimant establishes ownership, it becomes the trustee's burden to prove the asset should remain in the bankrupt's estate.[150] In *White House*, the trustee failed to produce evidence contradicting the officer's documents.[151] The court noted that the boats had

139. *Id.* at 1360.
140. *Id.* (quoting Albert-Harris, Inc. v. Woodward, 313 F.2d 447, 449 (6th Cir. 1963)).
141. American Employers Ins. Co. v. King Resources Co., 556 F.2d 471 (10th Cir. 1977).
142. Bank of Marin v. England, 385 U.S. 99, 103 (1966).
143. 608 F.2d at 1360.
144. *Id.* at 1361.
145. *Id.*
146. 607 F.2d 907 (10th Cir. 1979).
147. *Id.* at 909.
148. *Id.* at 911.
149. *Id.* at 910.
150. *Id.* at 911.
151. *Id.* at 910.

been purchased more than ten years before the litigation,[152] making it difficult to account for all pertinent documents; but, it disregarded the trustee's handicap in having incomplete corporate records at his disposal[153] because of the considerable weight it gave to the documentary evidence. Thus, the boats remained in the personal possession of the corporate president, immune from bankruptcy proceedings.

D. *Security Interests in Insurance Proceeds*

In *Brown v. First National Bank*[154] the Tenth Circuit Court of Appeals considered the question of whether proceeds of insurance carried on collateral are proceeds of collateral within the meaning of section 9-306(1) of the Oklahoma Uniform Commercial Code.[155] In 1974, the Browns, owners of a paint and gift store, gave the bank a security interest in all of the goods and merchandise belonging to the business, including additions to and substitutions for collateral. The bank took the interest as security for a note that the Browns executed in its favor for over $36,000 and for future advances. The security interest was perfected.

In the agreement the Browns covenanted to insure the collateral with policies written for the benefit of the debtor and the bank. They obtained insurance to cover a loss of inventory by fire, but only the Browns were named insureds;[156] no clause designated the bank as payee.

The business was later destroyed by fire, and the Browns received $25,000 from the insurance company. The bank went to court and recovered this amount in October 1976. On December 1, 1976, the Browns were adjudicated bankrupts. The trustee sued the bank, claiming that its acquisition of the insurance check was a transfer by the insolvent Browns to an unsecured creditor within four months of filing the voluntary petition in bankruptcy and was, therefore, a voidable preference.[157] The district court reversed the bankruptcy court and held that the bank had a continuously perfected security interest in the insurance proceeds, which satisfied the requirements of the U.C.C. The Tenth Circuit affirmed that finding.

Section 9-306(1) of the Uniform Commercial Code, as adopted in Oklahoma, provides that "proceeds" includes "whatever is received when

152. *Id.*

153. *Id.* at 911. Under the Bankruptcy Act the failure to keep and turn over records could be a bar to a discharge in bankruptcy. 11 U.S.C. § 32(c)(2)(1976). Further, failure to maintain records can work against the bankrupt when the trustee has the burden of proof. 607 F.2d at 911. The Bankruptcy Code provides that the court will not grant a discharge if

> the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case.

11 U.S.C. § 727(a)(3) (Supp. III 1979).

154. 617 F.2d 581 (10th Cir. 1980).

155. OKLA. STAT. ANN. tit. 12A, § 9-306 (West 1963). For a discussion of insurance on collateral as proceeds within the U.C.C., see Henson, *Insurance Proceeds as "Proceeds,"* 18 CATH. U.L. REV. 453 (1969).

156. 617 F.2d at 582.

157. 11 U.S.C. § 107 (1976). Ninety days is the time limit for establishing a voidable preference under the Code. 11 U.S.C. § 547(f) (Supp. III 1979).

collateral or proceeds is sold, exchanged, collected or otherwise disposed of."[158] Oklahoma's courts had not considered the question of whether proceeds of insurance on collateral are proceeds within the meaning of the Code, and other courts were divided on the issue.[159] Therefore, the Tenth Circuit had to decide how the Oklahoma Supreme Court would decide the question.

The trustee argued first that insurance proceeds arising from the destruction of collateral are outside the U.C.C. because section 9-104(g) indicates that article 9 precludes treatment of proceeds of insurance on collateral as proceeds of collateral under section 9-306.[160] Next, he maintained that Oklahoma accepted the personal contract theory of insurance, which establishes that insurance payments arise from a personal contract and not from a contract running with the property.[161] Finally, the trustee urged that a literal reading of the section establishes that proceeds arise only from the voluntary disposition of property and not from the involuntary disposition of property, such as loss to fire.[162]

Cognizant of the revision of the Uniform Commercial Code, making insurance on collateral proceeds within the meaning of section 9-306(1),[163] the Tenth Circuit rejected the plausible arguments presented by the trustee. First, the court stated that section 9-104(g) applies only to the creation of security interests in the insurance policy itself.[164] In *Brown* the bank was asserting an interest in the moneys already paid, not in the policy. Second, the court noted that an exception to the personal contract of insurance theory arises if the mortgagor promises to insure the property for the mortga-

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158. OKLA. STAT. ANN. tit. 12A, § 9-306 (West 1963).

159. *See, e.g.*, Quigley v. Caron, 247 A.2d 94 (Me. 1968); Universal C.I.T. Credit Corp. v. Prudential Inv. Corp., 101 R.I. 287, 22 A.2d 571 (1966) (insurance proceeds paid for a loss are not proceeds within the term proceeds under § 9-306(1) of the Uniform Commercial Code).

In 1972, however, the U.C.C. was revised to include the following provision: "proceeds includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds. Insurance payable by reason of loss of damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security agreement." The addition was intended to overrule cases holding that proceeds of insurance on collateral are not proceeds of the collateral. Now insurance payable by reason of loss to the collateral is proceeds if payable to the party to the security agreement. *See* U.C.C. § 9-306, Comment 1 (1972) which provides that the purpose of the new sentence is to make clear that insurance proceeds from a casualty loss are proceeds within the meaning of this section. *See, e.g.*, PPG Indus., Inc. v. Hartford Fire Ins. Co., 531 F.2d 58 (2d Cir. 1976); Insurance Management Corp. v. Cable Services of Fla., Inc., 359 So.2d 572 (Fla. Ct. App. 1978); First Nat'l Bank v. Merchant's Mut. Ins. Co., 89 Misc. 2d 771, 392 N.Y.S.2d 836 (1977), *aff'd*, 65 App. Div. 2d 59, 410 N.Y.S.2d 679 (1978).

At the time of this decision, Oklahoma had not revised its U.C.C. to reflect this change. OKLA. STAT. ANN. tit. 12A, § 9-306 (West 1963). Of the other states in the Tenth Circuit, only New Mexico has not made the change in its commercial code. N.M. STAT. ANN. § 55-9-306 (1978). All other states in the Tenth Circuit have amended their commercial codes to reflect this important change. *See* COLO. REV. STAT. § 4-9-306 (Supp. 1979), KAN. STAT. ANN. § 84-9-306 (Supp. 1979), UTAH CODE ANN. § 70A-9-306 (Supp. 1979), and WYO. STAT. § 34-21-935 (1977).

160. 617 F.2d at 583.

161. *Id.*

162. *Id.* at 584.

163. *See* note 159 *supra*.

164. *See* Paskow v. Calvert Fire Ins. Co., 579 F.2d 949 (5th Cir. 1978).

gee's benefit. Even if the insurance proceeds are not made payable to the mortgagee, the mortgagee acquires an equitable lien on the proceeds to the extent of indebtedness.[165] Under this exception the lien is superior to the interests of the mortgagor's other creditors. Since the Browns had insured the property for the bank's benefit, the court of appeals believed the Oklahoma courts would not utilize the contract theory of insurance to deny the bank its protection. Finally, the court, liberally construing the U.C.C., felt that a literal reading of section 9-306 did not distinguish between voluntary and involuntary dispositions of collateral.[166] Therefore, it affirmed the district court's decision that insurance proceeds from the fire loss of collateral were proceeds payable to the bank.

E. *Improper Use of Credit Reports*

In *Heath v. Credit Bureau of Sheridan, Inc.*[167] the plaintiff, Charles Heath, brought suit against the Credit Bureau of Sheridan, Inc. for allegedly preparing and delivering a "consumer report" to Heath's union. Heath claimed that the credit bureau should have known that the union was requesting the report to embarrass, humiliate, and discredit him, all of which are improper purposes under the Fair Credit Reporting Act.[168] The Tenth Circuit held that the plaintiff had stated a claim for relief against the credit bureau because it appeared that the bureau might have known, when it delivered the report, that the union had requested it for an impermissible purpose.[169] The credit bureau was not necessarily liable to Heath, however, for it could reasonably assume that the agency requesting the information would use the report for the represented, proper purpose.[170] Thus, the court found necessary a further inquiry into the credit bureau's knowledge of the purpose for the request.[171]

The Tenth Circuit did reverse the trial court's ruling on the credit bureau's failure to open its files to Heath.[172] According to the appeals court, the lower court had dismissed Heath's claim because it believed jurisdiction depended upon the existence of a consumer report.[173] The Fair Credit Reporting Act, however, requires consumer reporting agencies to disclose, at a consumer's request, the information in its files and the names of recipients of that information. Nowhere does the statute limit the request to consumer reports.[174] Thus, Heath had properly invoked the jurisdiction of the trial court, and this issue was remanded for a determination whether the bureau had in fact failed to open its files to Heath. Finally, the appellate court

165. Frensley Bros. Lumber Co. v. Fireman's Fund Ins. Co., 104 Okla. 8, 229 P. 598 (1924); Smith & Furbush Mach. Co. v. Huycke, 72 Okla. 30, 177 P. 919 (1919).

166. 617 F.2d at 584.

167. 618 F.2d 693 (10th Cir. 1980).

168. 15 U.S.C. §§ 1681-1693 (1976).

169. 618 F.2d at 697.

170. *Id.* at 696.

171. *Id.* at 697.

172. *Id.*

173. *Id.*

174. *See* 15 U.S.C. § 1681 (1976).

dismissed Heath's claim against all union defendants except the credit bureau because Heath failed to establish the only statutorily supportable claim, which was that they had obtained the information from the credit bureau under false pretenses.[175]

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175. 618 F.2d at 697.