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COMMERCIAL LAW

OVERVIEW

This section of the Tenth Circuit Survey is devoted to those decisions involving bankruptcy, banking, government contracts, debtor-creditor, and the Uniform Commercial Code (U.C.C.) rendered by the Tenth Circuit during the 1975-76 survey period. Discussion of each case is limited in length and is not intended to be exhaustive. It is the author's desire that this section serve as a research tool for the practicing lawyer, and it is written with this intent.

Few of the decisions in the survey period presented major developments or changes in the law. However, a large number are noteworthy because of either the isolated application of the law or the facts of the case. In addition, a case comment concerning banking law follows this overview.[1]

I. BANKRUPTCY

A. *Scope of Rule 401(a)*

On October 1, 1973, Rule 401(a) of the Bankruptcy Court became effective.[2] This rule provides that the filing of a petition for bankruptcy shall operate as an automatic injunction prohibiting either legal actions or the enforcement of judgments founded on unsecured provable debts.[3] *Zestee Foods, Inc. v. Phillips Food Corp.*,[4] dealt with the operation of Rule 401(a) in a situation where both service of a garnishee summons and adjudication of the debtor's bankruptcy occurred prior to the effective date of the rule.

Zestee had obtained a judgment in excess of $60,000 against Phillips. Subsequently, on November 24, 1972, a petition was

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[1] The comment discusses Bank of Boulder v. Board of Governors, 535 F.2d 1221 (10th Cir. 1976), and Bank of Commerce v. Smith, 513 F.2d 167 (10th Cir. 1975).

[2] Rule 401(a) provides:

> *Stay of Actions*—The filing of a petition shall operate as a stay of the commencement or continuation of any action against the bankrupt, or the enforcement of any judgment against him, if the action or judgment is founded on an unsecured provable debt other than one not dischargable under clause (1), (5), (6), or (7) or § 17a of the Act.

Bankruptcy R. 401(a), 11 U.S.C. App. R. 401(a) (1970 & Supp. IV 1974).

[3] *Id.*

[4] 536 F.2d 334 (10th Cir. 1976).

filed in involuntary bankruptcy against Phillips. On December 12, 1972, Zestee caused a garnishment summons to be served on a party indebted to Phillips. Phillips was adjudicated a bankrupt six days later.[5]

The garnishee sought adjudication as to whether the trustee of the bankrupt's estate or Zestee was entitled to the funds owed. However, the case remained dormant until 1975, at which time the trustee moved to dismiss the garnishee summons. The motion was granted and Zestee appealed, asserting that Rule 401(a) could not affect an adjudication of bankruptcy occurring prior to its effective date.[6]

The Tenth Circuit, per Judge Doyle, held that Rule 401(a) applied to all bankruptcy proceedings and legal actions not completed as of the effective date: "The Rule declares that the stay is in effect during the continuation of any action of the enforcement of any judgment. The . . . submission of the garnishee summons is part of the enforcement efforts of Zestee. By the specific terms of the rule the automatic stay takes effect."[7] Since Phillips was adjudicated bankrupt, Rule 401(b) applied to make the stay continuous.[8]

Two other reasons were advanced for upholding dismissal of the garnishment summons. First, the court noted that, notwithstanding the automatic stay provided in Rule 401(a), the bankruptcy court had expressly enjoined the garnishment on November 5, 1973.[9] Further, the court determined that the garnishment summons could not be effective since title to the assets affected

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[5] *Id.* at 335.

[6] *Id.*

[7] *Id. See* note 2 *supra*.

[8] Rule 401(b) provides:

> *Duration of Stay*—Except as it may be deemed annulled under subdivision (c) or may be terminated, annulled, or modified by the bankruptcy court under subdivision (d) or (c) of this rule, the stay shall continue *until the bankruptcy case is dismissed or the bankrupt is denied a discharge* or waives or otherwise loses his right thereto.

Bankruptcy R. 401(b), 11 U.S.C. App. R. 401(b) (1970 & Supp. IV 1974) (emphasis added).

[9] 536 F.2d at 335. Under Rule 401(e) the bankruptcy court has the authority to expressly grant appropriate injunctive relief. Bankruptcy R. 401(e), 11 U.S.C. App. R. 401(e) (1970 & Supp. IV 1974). *See also*, Bankruptcy Act § 17(c)(4), 11 U.S.C. § 35(c)(4), (1970).

had legally passed to the trustee under section 70(a) of the Bankruptcy Act[10] as of the date the petition was filed.[11]

Zestee is a reminder that proceedings in bankruptcy are subject to both present and future regulations until the proceedings are terminated. Therefore, it is imperative that all parties to a bankruptcy proceeding note with a watchful eye all changes in the rules and evaluate the effect of those changes throughout the proceedings.

B. *Post-Petition Interest*

Ordinarily, unsecured creditors are not entitled to recover interest accruing on a debt after the filing of a petition for bankruptcy.[12] In *Continental Illinois National Bank & Trust Co. v. First National City Bank (In re King Resources Co.)*[13] the Tenth Circuit grappled with the rights of a senior creditor to recover post-petition interest under a subordination agreement with other creditors.

As a condition to a loan, Continental required King Resources to provide for the subordination of certain outstanding debentures. King Resources subsequently underwent Chapter X reorganization. Continental asserted the right to post-petition interest out of the shares of the subordinated creditors, basing its claim on general subordination provisions contained in indentures dealing with the subordinated debt. The trustee denied recovery of the post-petition interest.[14]

The Tenth Circuit affirmed the trial court's disallowance of post-petition interest.[15] Following the rules established in *In re Kingsboro Mortgage Corp.*[16] and *In re Times Sales Finance*

[10] 11 U.S.C. § 110(a) (1970).

[11] 536 F.2d at 336. Zestee argued that service of the garnishee summons resulted in the creation of a preferential transfer and that the trustee had failed to file suit to set aside the transfer within the two year statute of limitations. *Id. See* Bankruptcy Act § 11(e), 11 U.S.C. § 29(e) (1970). The court found that even if it were assumed that service of a garnishee summons was capable of transferring property, there was no preferential transfer here; the summons was served after the petition was filed and therefore the property had vested in the trustee. 536 F.2d at 336.

[12] Continental Ill. Nat'l Bank & Trust Co. v. First Nat'l City Bank (*In re* King Resources Co.), 528 F.2d 789, 791 (10th Cir. 1976).

[13] 528 F.2d 789 (10th Cir. 1976).

[14] *Id.* at 791.

[15] *Id.* at 792.

[16] 514 F.2d 400 (2d Cir. 1975).

Corp.,[17] the court held that a subordinate agreement will not give a senior unsecured creditor the right to post-petition interest absent explicit language in the agreement to that effect.[18]

C. *"Fiduciary Capacity" under Section 17a(4)*

Allen v. Romero (In re Romero)[19] represents a possible expansion of the concept of fiduciary capacity under section 17a(4) of the Bankruptcy Act.[20] Allen hired Romero, a licensed contractor in New Mexico, to build three four-plexes at a stated price. Allen then advanced funds to Romero with the understanding that these funds would be used to pay subcontractors, materialmen, and laborers as payments became due, thus avoiding the imposition of liens on the properties. Romero did not use these funds as agreed and liens were filed on the structures. The bankruptcy court found that Romero owed a sum in excess of $54,000[21] to Allen, and further concluded that this debt was non-dischargeable under sections 17a(2) and (4) of the Act.[22]

The Tenth Circuit affirmed this judgment on the basis of section 17a(4).[23] Noting that section 17a(4) required the existence of a fiduciary relationship and further noting that this fiduciary capacity was limited to "technical" and not implied trusts, the court held that the provisions of the New Mexico contractor's licensing statute created the necessary relationship.[24] The statute

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[17] 491 F.2d 841 (3d Cir. 1974).

[18] 528 F.2d at 792. *Cf.* Allen v. Romero (*In re* Romero), 535 F.2d 618 (10th Cir. 1976) (which reaffirms that post-petition interest is always recoverable on a non-dischargeable debt).

[19] 535 F.2d 618 (10th Cir. 1976).

[20] 11 U.S.C. § 35(a)(4) (1970). Subsection (a)(4) makes non-dischargeable those debts that "were created by [the bankrupt's] fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." *Id.*

[21] Although the judgment of the bankruptcy court against the bankrupt was affirmed on appeal, the Tenth Circuit reduced the award from $54,708.30 to $53,143.43. This reduction was ordered due to a finding by the Tenth Circuit that the amount in question was either an error in mathematical computation or an improper award for mental suffering.

[22] 535 F.2d at 621. Bankruptcy Act §§ 17(a)(2), (4), 11 U.S.C. 535(a)(2), (4) (1970).

[23] 535 F.2d at 621. The Tenth Circuit selected 17(a)(4) as the appropriate provision, although the court might have been able to affirm the judgment on section 17(a)(2) which makes non-dischargeable "liabilities for obtaining money or property by false pretenses or false representations . . . ." *See* note 14 *supra*.

[24] 535 F.2d at 621-22. N.M. STAT. ANN. §§ 67-35-1 to -67 (1953) provides for the licensing of persons involved in the construction industry.

provided that a license was subject to revocation or suspension in the event that the licensee wrongfully diverted such advances.[25]

The implication arising from this case is that section 17a(4) may be applied to all licensed practices if the terms of the license provide some duty or condition which can be construed as creating a statutory obligation on the licensee. Accordingly, the terms and conditions of any license should be carefully considered during investigation of any section 17a(4) claims.

D. *Comity in the Bankruptcy Court*

IIT v. Lam (In re The Colorado Corp.)[26] involved a contested provisional disallowance of certain alleged creditors prior to the election of a trustee.[27] Appellants, IIT and Venture Fund,[28] had been declared in liquidation by courts in Luxembourg and the Netherlands Antilles prior to this proceeding. Liquidators appointed in the foreign proceeding filed substantial claims against the Colorado Corporation, the bankrupt. The Tenth Circuit found that the bankruptcy court's disallowance was an abuse of discretion based on an erroneous denial of comity.[29]

The appellees argued that the foreign court orders appointing the liquidators should not be recognized in American courts and therefore the liquidators had no authority to represent IIT and Venture Fund in the proceedings. This argument was based on the assertion that Canadian courts had not given comity to Colorado bankruptcy court orders and the claim that Canadian citizens had procured the foreign decrees involved. The Tenth Circuit noted that reciprocity has been a consideration in granting or withholding comity but held that "[d]enying comity to the Netherlands Antilles order because of lack of reciprocity in Canada is such a misdirected use of the reciprocity consideration as

[25] N.M. STAT. ANN. § 67-35-26 (1953) provides for the revocation or suspension of a license on the grounds of diversion of funds received for the prosecution or completion of a contract. The Tenth Circuit viewed this section as imposing "a fiduciary duty on contractors who have been advanced money pursuant to construction contracts." 535 F.2d at 621.

[26] 531 F.2d 463 (10th Cir. 1976).

[27] Because their claims were provisionally disallowed, petitioners were not allowed to vote in the election of a trustee in bankruptcy. *Id.* at 466.

[28] IIT and Venture Fund were part of Robert Vesco's IOS operation. The Colorado Corporation was part of the John King empire. *Id.* at 464.

[29] *Id.* at 469.

to constitute an abuse of discretion."[30] Comity is withheld when recognition of the foreign law would prejudice the forum's citizens. Allowing foreign creditors to vote for a trustee who is subject to American law could not prejudice American citizens.[31]

The court went on to hold that the filing of a claim is prima facie evidence of the claim and its validity.[32] Therefore, the burden of proof rests upon the party seeking provisional disallowance of the claim, which burden was not carried in this case.[33]

E. *Preferential Transfers*

Boyd v. First National Bank (In re J & J Sales, Inc.)[34] emphasizes the need to affirmatively prove some aspect of insolvency before a transaction may be voided as preferential or fraudulent under the Bankruptcy Act.[35] The trustee petitioned for a turn-over order claiming that the bank illegally transferred $8,012.98 from the account of a bankrupt corporation and applied it toward the personal indebtedness of individual stockholder officers. The bankruptcy judge and the district court denied the petition and the Tenth Circuit affirmed.

Mr. and Mrs. Tilley were the sole stockholders and officers of J & J Sales, Inc., the bankrupt. Over a considerable period of time the bank had been in the practice of making personal loans to the Tilleys of funds needed to operate the business. The Tilleys would loan these funds to the bankrupt and periodically repay themselves when money was available. On October 25, 1972, a large check was deposited in the business account and, on Mrs. Tilley's direction, $8,012.98 of the proceeds was applied by the bank to satisfy an outstanding loan of the Tilleys' that had been in default. J & J Sales filed a voluntary bankruptcy petition about five weeks later.

The Tenth Circuit found that a turn-over order could not be

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[30] *Id.* at 468.

[31] *Id.*

[32] *Id.* at 467, 469.

[33] Appellants also objected to the claims on the grounds that IIT and Venture Fund no longer had any legal existence, and therefore the liquidators had no right to press claims on their behalf in the United States. The Tenth Circuit rejected the argument, holding that the orders of the court in Luxemburg were sufficient to grant the liquidators authority to pursue the claims. *Id.* at 469.

[34] No. 74-1364 (10th Cir., Oct. 30, 1975) (Not for Routine Publication).

[35] Bankruptcy Act §§ 60, 67, 11 U.S.C. §§ 96, 107 (1970).

based on the preference theory[36] because there was no evidence that the transfer was made while the bankrupt was insolvent. An essential element of a preference is that the transfer was made by the debtor while insolvent and within four months of filing the petition.[37] The burden of proving insolvency on the date of the transfer rests with the trustee.[38]

Nor would the evidence support an order based on the fraudulent transfer theory.[39] There was no evidence that the debtor was, or would be, rendered insolvent by the transfer[40] or that the property remaining in the debtor after the transfer was unreasonably small capital.[41] Similarly, there was no proof that the transfer was intended to hinder or defeat creditors[42] or that the transfer was made without fair consideration by a debtor who believed he would become insolvent.[43]

F. *Brief Mention*

First State Bank & Trust Co. v. Sand Springs State Bank[44] dealt with the jurisdictional parameters of the bankruptcy court. Two creditors contested title to certain assets of the bankrupt. The trustee conceded that one of the two was entitled to the assets, and that the determination of the dispute would not affect the bankrupt's estate. Under these circumstances the Tenth Circuit held that the bankruptcy court lacked jurisdiction to resolve the dispute,[45] because the determination did not materially affect the administration of the estate.[46]

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[36] Bankruptcy Act § 60(a)(1), (b), 11 U.S.C. §§ 96(a)(1), (b) (1970).

[37] Bankruptcy Act § 60(1), 11 U.S.C. § 96(a)(1) (1970). *See* Moran Bros., Inc. v. Yinger, 323 F.2d 699, 701 (10th Cir. 1963) for an explanation of section 60.

[38] Inter-State Nat'l Bank v. Luther, 221 F.2d 382, 390-91 (10th Cir.), *appeal dismissed*, 350 U.S. 944 (1955).

[39] Bankruptcy Act § 67(d)(2), (3), 11 U.S.C. § 107(d)(2), (3) (1970).

[40] Bankruptcy Act § 67(d)(2)(a), (3), 11 U.S.C. § 107(d)(2)(a), (3) (1970).

[41] Bankruptcy Act § 67(d)(2)(b), 11 U.S.C. § 107(d)(2)(b) (1970).

[42] Bankruptcy Act § 67(d)(2)(d), 11 U.S.C. § 107(d)(2)(d) (1970).

[43] Bankruptcy Act § 67(d)(2)(c), 11 U.S.C. § 107(d)(2)(c) (1970).

[44] 528 F.2d 350 (10th Cir. 1976).

[45] *Id.* at 353-54. Although the issue of jurisdiction was not raised by the parties on appeal, the court raised this issue on its own motion. *Id.* at 353.

[46] *See generally* Bankruptcy Act §§ 1, 2, 11 U.S.C. §§ 1, 11 (1970). Under the facts of this case the resolution of the conflict between the creditors had no effect upon the remaining overall debts of the bankrupt and the distribution of assets to the creditors. Obviously, it had a direct effect on determining which creditor was entitled to receive the secured assets, and therefore full payment, in contrast to the general creditors' shares of

Booker v. Booker (In re *Booker*)[47] serves as a reminder that a property settlement is dischargeable in bankruptcy whereas an alimony judgment is not.[48] Since the court order in question was ambiguous the court construed the order from its terms, concluding that it was intended as a property settlement and was therefore dischargeable.[49]

In *Adams Chevrolet Co. v. Bollinger* (In re *Bollinger*),[50] the bankrupt bought a car, falsely claiming that a trade-in car was unencumbered. The court found the debt to be nondischargeable under section 17a(2) of the Bankruptcy Act[51] notwithstanding lack of ill-will of the bankrupt.[52] The court noted that the requirement that a conversion be "willful" and "malicious" was satisfied by the performance of an intentional act, absent just cause or excuse, which necessarily produces harm.[53]

II. BANKS AND BANKING

In *Bank of Boulder v. Board of Governors*,[54] the Tenth Circuit refused to interfere in a federal decision to create a federally-chartered bank pursuant to the Bank Holding Company Act,[55] even though the Colorado banking authorities had reviewed and denied an identical application for a state bank. This case is the subject of a comment immediately following this Overview.

United Bank v. Hartford Accident & Indemnity Co.[56] is notable because of its construction of language contained in a banker's blanket bond. The bond covered losses that occurred while funds

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the remaining assets. It would appear that if one creditor's claim against the bankrupt materially differed from the other's as to priority or amount, then the bankruptcy court might have had jurisdiction.

[47] No. 75-1733 (10th Cir., May 6, 1976) (Not for Routine Publication).

[48] Under 11 U.S.C. § 35(a)(7) (1970), alimony judgments are nondischargeable in bankruptcy.

[49] In construing the ambiguous order, the court considered the presence of indemnification, acceleration, and lien provisions to enforce the debt as some evidence that the order was a property settlement and not an alimony judgment.

[50] No. 76-1221 (10th Cir., July 28, 1976) (Not for Routine Publication).

[51] 11 U.S.C. § 35(a)(2) (1970). *See* note 16 *supra*.

[52] No. 76-1221 at 4-5.

[53] *Id. See* McIntyre v. Kavanaugh, 242 U.S. 138 (1916); Bennett v. W.T. Grant Co., 481 F.2d 664 (4th Cir. 1973). *See also* Davis v. Aetna Acceptance Co., 293 U.S. 328 (1934).

[54] 535 F.2d 1221 (10th Cir. 1976).

[55] 12 U.S.C. §§ 1842-1850 (1970).

[56] 529 F.2d 490 (10th Cir. 1976).

were in transit, prior to "delivery at destination."[57] The court determined that the purpose of the blanket bond was to provide coverage in the event of loss while funds were in transit but not in the custody of an insured carrier.[58] In light of this purpose and the language of the bond, the court held that the bond covered the loss of a cash letter which was delivered to an employee of the recipient bank at a bus station and stolen from the employee while in the bank's outdoor mall, but prior to entering the building.[59]

Finally, in *Colorado* ex rel. *State Banking Board v. First National Bank*,[60] the Tenth Circuit reversed the district court and held that electronic banking facilities were "branch banks" within the meaning of the federal laws prohibiting branch banking.[61] The district court had held that the use of these facilities to receive deposits was branch banking under state and federal laws, but that use for withdrawal and transfer of funds was not.[62]

Since the district court decision, other circuits had concluded that electronic banking facilities were branch banks when used for these other purposes as well.[63] The Tenth Circuit adopted the rules of these cases, concluding that although the technology and services differed somewhat from the statutory definition, the intent and purpose of the Act[64] mandated the inclusion of these

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[57] The exact language of the bond placed in dispute provided for insurance coverage

> [w]hile the Property is in transit anywhere in the custody of any of the Employees or partners of the Insured or of any other person or persons acting as messenger, except while in the mail or with a carrier for hire other than an armored motor vehicle company for the purpose of transportation, such transit to begin immediately upon receipt of such Property by the transporting Employee or partner or such other person, and to end immediately upon delivery thereof at destination.

529 F.2d at 493 (emphasis omitted).

[58] *Id.* at 494.

[59] *Id.* at 494-95.

[60] 540 F.2d 497 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977).

[61] 12 U.S.C. § 36 (1970).

[62] In reaching this construction, the district court had relied heavily on the use of the definitional terms of "checks paid" and "money lent" in 12 U.S.C. § 36(f) (1970). Colorado *ex rel.* State Banking Bd. v. First Nat'l Bank, 394 F. Supp. 979, 983-85 (D. Colo. 1975). This restrictive view of the terms has since been criticized. 11 TULSA L.J. 85 (1975).

[63] Independent Bankers Ass'n of America v. Smith, 534 F.2d 921 (D.C. Cir. 1976); Illinois *ex rel.* Lignoul v. Continental Ill. Nat'l Bank & Trust Co., 536 F.2d 176 (7th Cir.), *cert. denied*, 97 S. Ct. 184 (1976).

[64] The Tenth Circuit noted that the overriding purpose of 12 U.S.C. § 36 was to place national and state banks on a level of "competitive equality" regarding branch banking.

services and facilities within the definition of branch banking.[65]

III. GOVERNMENT CONTRACTS

Burgess Construction Co. v. M. Morrin & Son Co.[66] involved a suit by a subcontractor against a government contractor for an alleged breach of an implied obligation under the subcontract.[67] Morrin, the subcontractor, agreed to perform concrete work for Burgess according to a contractual schedule dependent upon Burgess providing access to the sites on certain dates. Various delays prevented access on the specified dates, and as a result the work was not completed on time. Both parties brought separate suits under the contract which were consolidated for trial. Morrin asserted that Burgess was contractually bound to provide access on the specified dates and, therefore, had breached this express and implied covenant.

The Tenth Circuit construed the contract as not including an express covenant to provide access.[68] However, the court noted that an implied covenant not to hinder or delay access might nonetheless exist in the absence of a contractual clause contemplating and excusing the delay. The court held that a contractual provision allowing extensions of time for the subcontractor's performance in the event of delay demonstrated some evidence of the intent of the parties to allow delay. Therefore, no implied obligation existed.[69]

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540 F.2d at 499-500. The Colorado law on branch banking, COLO. REV. STAT. § 11-6-101(1) (1973), would prohibit state banks from maintaining banking machines under similar circumstances. Accordingly, prohibition of federal use of these machines served to preserve this equality in Colorado. 540 F.2d at 500. A question arises whether the same reasoning would have been applied had Colorado state authorities permitted the use of these machines, or had merely not yet made a determination.

[65] 540 F.2d at 499-500. The Tenth Circuit found the proper construction of 12 U.S.C. § 36(f) (1970) to be that the statute provided examples, but not limitations, of what constituted branch banking. In any event, the withdrawal of funds and the transfer of funds from one account to another were traditional banking functions "well within the prohibition of the statute." 540 F.2d at 500.

[66] 526 F.2d 108 (10th Cir.), *cert. denied*, 97 S. Ct. 176 (1976).

[67] The subcontractor's action was based on the Miller Act, 40 U.S.C. § 270b (1970), which allows suits on government contractors' bonds to be brought in federal district courts. 526 F.2d at 110 n.1. *See generally* 40 U.S.C. § 270a (1970).

[68] 526 F.2d at 113. Reading the contract as a whole the court concluded that the parties did not intend that Burgess be absolutely required to provide access on the specified dates. *Id.*

[69] On this theory, the Tenth Circuit harmonized the cases of George A. Fuller Co. v. United States, 69 F. Supp. 409 (Ct. Cl. 1947) and United States v. Howard P. Foley Co.,

IV. DEBTOR-CREDITOR

A. *U.C.C.C.*[70] *and the Truth in Lending Act*[71]

In *Hinkle v. Rock Springs National Bank*,[72] the Tenth Circuit reaffirmed the rule that a bank and a credit seller who fail to disclose the necessary financing information as required by the Truth in Lending Act are jointly liable for the statutory penalty.[73] Since the lack of disclosure violated both U.C.C.C. and Truth in Lending Act requirements, it was argued that penalties under both statutes could be recovered. The Tenth Circuit rejected this argument because Wyoming credit transactions had been declared exempt from the disclosure requirements of the Truth in Lending Act following the state's adoption of the U.C.C.C.[74] The exemption, however, only served to replace the federal requirements with the almost identical requirements of the U.C.C.C.[75] and did not affect concurrent federal-state jurisdiction.[76] The court concluded that the federal courts had subject matter jurisdiction, but there could only be one cause of action and one recovery for a non-disclosure.[77]

B. *Effect of U.C.C.C. on Negotiable Instruments*

Circle v. Jim Walter Homes, Inc.[78] presented questions concerning the effect of U.C.C.C. remedial provisions[79] on the U.C.C. definition of negotiability.[80] The plaintiffs had bought homes

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329 U.S. 64 (1946), concluding that an implied obligation only exists in the absence of a contract clause contemplating the delay. 526 F.2d at 114.

In addition, the court noted that even if there were an implied obligation it would not be breached by good faith delay: "Breach of an implied promise not to hinder or delay the other party's performance is not established merely by proving there was delay. The delay must be unnecessary, unreasonable or due to defendant's fault." *Id.* at 115. Morrin had successfully objected to the introduction of any evidence of good or bad faith at the time of trial, but other evidence indicated that Burgess had acted in good faith and that the delays were not unreasonable. *Id.*

[70] Uniform Consumer Credit Code.

[71] 15 U.S.C. § 1601-1681s (1970).

[72] 538 F.2d 295 (10th Cir. 1976).

[73] *Id.* at 297. Both were creditors under the act and responsible for the disclosures. *Id. See* 12 C.F.R. §§ 226.2(s), 226.6(d) (1976).

[74] 15 U.S.C. § 1633 (1968). *See also* 12 C.F.R. § 226.12 (1976).

[75] 538 F.2d at 298. U.C.C.C. § 2-301(2); WYO. STAT. § 40-2-301(2) (Cum. Supp. 1975).

[76] *See* 12 C.F.R. § 226.12(c) (1976).

[77] 538 F.2d at 298.

[78] 535 F.2d 583 (10th Cir. 1976).

[79] U.C.C.C. § 5-202.

[80] U.C.C. § 3-104(1).

from the defendant, signing negotiable notes to cover the mortgage debt, in violation of the U.C.C.C.[81] The trial court dismissed plaintiffs' claims for refund of the finance charge and for the statutory penalty; the Tenth Circuit reversed.[82]

The principal issue on appeal was whether the U.C.C.C. provision prohibiting the use of negotiable instruments in consumer transactions made the notes nonnegotiable. The Tenth Circuit read U.C.C.C. section 2-403 as plainly indicating the intent *not* to render the notes nonnegotiable.[83] This conclusion followed from the fact that under section 2-403 a holder could not be a holder in due course if he took the instrument with notice that it was issued in violation of the section. This was the sanction imposed on the use of negotiable instruments in consumer transactions; therefore, the notes in question remained negotiable.[84]

It was also argued that the prepayment and rebate provisions of the U.C.C.C.[85] rendered the sum of the note uncertain and, therefore, nonnegotiable.[86] The court found that the note itself did not allude to anything creating uncertainty but was simply an unencumbered promise to pay a definite sum.[87] The court stated: "Even if a holder in due course were subject to the prepayment rebate provision, it could operate only as a *defense*; it would not render the original instrument non-negotiable."[88]

A final point covered by the court involved plaintiffs' right to bring a class action. The trial court denied the right because the plaintiffs had failed to prove that a class action was a superior method for conducting the litigation.[89] The Tenth Circuit disagreed, finding that a single suit where one party was awarded damages and where the court ordered one negotiable instrument changed into a nonnegotiable one would not solve the problems of the other members of the class.[90] Here the class was large but

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[81] U.C.C.C. § 2-403 prohibits the seller from taking a negotiable instrument other than a check as evidence of the buyer's obligation.

[82] 535 F.2d at 585, 589.

[83] *Id.* at 586.

[84] *Id.*

[85] U.C.C.C. §§ 2-209, 210.

[86] U.C.C. §§ 3-104, 106.

[87] 535 F.2d at 588.

[88] *Id.* at 587 (emphasis in original).

[89] *See* FED. R. CIV. P. 23(a).

[90] 535 F.2d at 589.

not unmanageable and if all the parties were before the court "complete justice" could be accomplished in one action.[91] Furthermore, it was error for the district court to refuse to certify the class action on the ground that the damages would be prohibitively high.[92]

C. *Brief Mention*

In *Surveillance Corp. v. Sentry Insurance*,[93] a mortgagee had the right under the mortgage to collect attorney's fees in the event of default and foreclosure. However, at the time of foreclosure this sum was not presented as part of the claim. The foreclosure produced more funds than expected, and the mortgagee filed a separate claim for attorney's fees. The court held that the mortgagee's claim was barred by the doctrine of res judicata.[94] The court noted that the mortgagee was in error when it claimed that the two actions were divisible: one for *debt* and one for contractual obligation to pay attorney's fees. Both claims gave rise to a single indebtedness, and therefore the enforcement of one barred an action for the other.[95]

In *United States v. Immordino*,[96] the Tenth Circuit reaffirmed the general rule that joint guarantors of an indebtedness are entitled to demand proportionate contribution from each other in payment of the debt.[97] However, in *Immordino* this right was waived by a written clause in a Small Business Administration (S.B.A.) guaranty form that allowed the S.B.A. to settle claims against such guarantor without affecting liability of the others.[98]

V. UNIFORM COMMERCIAL CODE

A. *Forward Contracts*

Following the trend in the Fifth Circuit,[99] the Tenth Circuit,

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[91] *Id.*
[92] *Id.*
[93] 538 F.2d 298 (10th Cir. 1976).
[94] *Id.* at 300.
[95] *Id.*
[96] 534 F.2d 1378 (10th Cir. 1976).
[97] *Id.* at 1381.
[98] *Id.* at 1382.
[99] *E.g.*, Riegel Fiber Corp. v. Anderson Gin Co., 512 F.2d 784 (5th Cir. 1975); Hohenberg Bros. Co. v. Killebrew, 505 F.2d 643 (5th Cir. 1974).

in *Bradford v. Plains Cotton Cooperative Association*,[100] held that forward contracts[101] for the sale of cotton were enforceable even though "unconscionable" at the time of performance. In 1973 the Association made numerous forward contracts, at the then current price, with numerous cotton growers in Oklahoma. However, at the time for delivery the market price of cotton had more than doubled and the growers brought suit to invalidate the contracts.

The trial court found the contracts invalid.[102] Reversing, the Tenth Circuit held that the great increase in price had nothing to do with unconscionability: "The test is the character of the contract at the time of its making."[103] Nothing showed unfairness at the time of execution. The Association's expertise in the cotton market did not result in an inequality of bargaining power that would make the contracts unconscionable. The Association had immediately sold seventy-five percent of the cotton it purchased under each contract; therefore, its "expertise" was not used to predict the price increase.[104]

B. *Proceeds of Security*

In *McConnico v. Alliance Business Investment Co. (In re Rose Homes, Inc.)*, [105] the trustee in bankruptcy sought return of certain bank funds taken by Alliance after the bankrupt's insolvency and within four months of the initiation of bankruptcy proceedings.[106] Alliance claimed these funds as proceeds of security held in a bank account;[107] the trustee, however, contended that it was instead an invalid security interest in an account.[108]

Alliance had loaned money to the bankrupt, Rose Homes, Inc., on the condition that the loan amount be placed in an income trust account controlled by Alliance.[109] These monies were

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[100] 539 F.2d 1249 (10th Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977).

[101] A forward contract is a contract whereby a grower agrees to sell crops grown on designated acreage during a certain crop year for delivery after harvesting. *Id.* at 1251.

[102] *Id.*

[103] *Id.* at 1255. *See* U.C.C. § 2-302, Official Comment 1.

[104] 539 F.2d at 1255.

[105] No. 75-1178 (10th Cir., Nov. 19, 1975) (Not for Routine Publication).

[106] The trustee asserted that there had been a preferential transfer in violation of section 60(1)(a) of the Bankruptcy Act, 11 U.S.C. § 96(a)(1) (1970).

[107] *See* U.C.C. § 9-306.

[108] U.C.C. § 9-104(k).

[109] The loan agreement required Rose to deposit all its corporate receipts in the income trust account. Furthermore, Rose executed a security agreement and financing

transferred to the bankrupt's checking account as needed and constituted the sole source of funds for that account. After the bankrupt became insolvent, it transferred $19,450 to Alliance from the checking account as payment on the loan.

The issue was whether a secured party loses its security interest in identifiable proceeds if the proceeds are deposited in the debtor's checking account. The Tenth Circuit, reversing the bankruptcy and district courts, held that the funds were covered proceeds of the security trust account, and therefore were not preferential transfers.[110] The court noted that the fact that the entire bank account was proceeds did not mean that the bank account itself was security. Rather, it merely made identification of the proceeds simpler.

Thus, one way of insuring that cash proceeds of a loan will remain identifiable "proceeds" under the U.C.C. is to require a debtor to establish special accounts to hold these funds separate from others.[111] This will not create a prohibited security interest in a bank account, but would tie the funds to the original source for identification.

Percival Construction Co. v. Miller & Miller Auctioneers, Inc.[112] involved the right to proceeds from an auction sale of construction equipment. The P&A Construction Company (P&A) "leased" heavy equipment from the Percival Construction Company (Percival) under an agreement that included an option to purchase at a stated price and provided that ninety-three percent of all monthly payments were to be applied toward the purchase price.[113] After obtaining possession of the equipment P&A borrowed from the Stock Yards Bank (Bank), giving security interests in all its accounts receivable and certain listed equipment as

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statement covering all of its current and after-acquired inventory, equipment, accounts receivable, contract rights, and general intangibles. Proceeds were specifically covered in the agreement and financing statement, and the parties agreed that the security interests created were properly perfected. No. 75-1178 at 2.

[110] *Id.* at 5-6.

[111] U.C.C. § 9-306(3)(b) covers cash proceeds of security so long as they are identifiable.

[112] 532 F.2d 166 (10th Cir. 1976).

[113] Percival did not file a financing statement covering the equipment. 387 F. Supp. at 884.

collateral.[114] Included by mistake in the list of equipment intended as collateral were two backhoes covered by the P&A-Percival lease.

P&A became financially distressed and, in conjunction with the Bank and Percival, arranged to have Miller & Miller Auctioneers, Inc. (Miller) sell the equipment involved. During this same period the United States filed two liens against P&A for unpaid taxes. When the equipment was sold, Percival, the Bank, and the United States each demanded a portion of the proceeds from Miller, but because the claims exceeded the sale price no disbursements were made. Percival brought a diversity action against Miller for the proceeds. Miller counterclaimed and interpleaded the other claimants and deposited into the court the gross proceeds of the sale, less expenses and commissions.

The trial court found that the P&A-Percival lease was actually a conditional sale with the reservation of an unperfected security interest by Percival and, recognizing the Bank's priority, granted a partial summary judgment against Percival in favor of the Bank.[115] Verdicts were directed in favor of Miller, the Bank, and the United States; Percival and the United States appealed to the Tenth Circuit.[116]

Percival first argued that the court lacked jurisdiction to hear the interpleader action because Miller had not deposited into the court the entire sum in his possession as required by federal statute.[117] Miller's counterclaim, however, was not based on the statute but on Rule 22 of the Federal Rules of Civil Procedure.[118] The Tenth Circuit found that the entire sum requirement did not apply to actions under the Rule[119] and that Miller had acted properly under the Rule. Compliance with the statutory requirements for jurisdiction was not required because the court

[114] The bank perfected its security interests by filing financing statements. 532 F.2d at 169.

[115] 387 F. Supp. at 887. *See also* 532 F.2d at 170.

[116] 532 F.2d at 170.

[117] 28 U.S.C. § 1335 (1970).

[118] 532 F.2d at 170.

[119] In interpleader actions under FED. R. CIV. P. 22 the amount that must be deposited is left to the court's discretion. 532 F.2d at 171. *See also* Emmco Ins. Co. v. Frankford Trust Co., 352 F. Supp. 130 (E.D. Pa. 1972); United States v. Coumantaros, 146 F. Supp. 51 (S.D.N.Y. 1956).

had already assumed jurisdiction based on diversity.[120]

The Tenth Circuit upheld the trial court's determination that the P&A-Percival lease was actually a sale with the reservation of a security interest in Percival.[121] The U.C.C. definition of a security interest provides that while the inclusion of an option to purchase in a lease does not necessarily make the lease one intended for security, when the agreement provides that the lessee may purchase at the end of the term for little or no consideration then the lease is intended as security.[122] The determinative factors are the consideration necessary to exercise the purchase option and the percentage the consideration bears to the list price of the items leased.[123]

Percival also argued that it was error to grant a directed verdict in favor of the Bank because they had entered into an informal subordination agreement regarding the Bank's interest in the proceeds from the sale. The Tenth Circuit held that the motion was properly granted because the agreement was based upon a mutual mistake that went to the essence of the contract and, under Oklahoma law, was therefore unenforceable.[124]

On appeal the United States challenged the trial court's finding that the Bank had a perfected security interest, as accounts receivable, in the proceeds from the sale of equipment that was *not* listed as collateral on the security agreements between the Bank and P&A.[125] The Bank argued that it had a perfected

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[120] 532 F.2d at 171.

[121] *Id.* at 171-72.

[122] U.C.C. § 1-201(37).

[123] 532 F.2d at 171. The leading case on this issue, Crest Inv. Trust, Inc. v. Atlantic Mobile Corp., 252 Md. 286, 250 A.2d 246 (1969), held that if the percentage is less than 25% it shows the parties' intention to make the lease serve as security. In the instant case the purchase option price was 10.6% of the list price. Furthermore, 93% of the "rent" payments were applied toward the purchase price. 532 F.2d at 174. *See also In re* Royer's Bakery, Inc., 1 U.C.C. Rep. Serv. 342 (E.D. Pa. 1963). There is an indication that a lease is intended to create a security interest if under the terms of the agreement the only sensible alternative at the end of the term is to exercise the option. 532 F.2d at 172.

[124] *See* OKLA. STAT. ANN. tit. 15, §§ 53, 62-64 (West 1972); Watkins v. Grady County Soil & Water Conservation Dist., 438 P.2d 491 (Okla. 1968). The mutual mistake was that Percival owned the equipment. 532 F.2d at 172. The court used the same analysis to uphold a directed verdict against Percival and in favor of Miller on the issue of an agreement regarding disbursement of the sale proceeds. *Id.* at 173.

[125] The government conceded that the Bank had a prior perfected security interest in the P&A equipment specifically identified in the financing statement, *i.e.*, the two backhoes. 532 F.2d at 173.

security interest in all of P&A's accounts receivable which included the auction sale proceeds because P&A had a right to payment for the goods sold by Miller as auctioneer. The Tenth Circuit applied Oklahoma law and determined that Miller was acting as P&A's agent. Since payment had been made to the agent, P&A had no further right to receive payment from the buyer and, therefore, the proceeds were not an account receivable. For this reason the directed verdict in favor of the Bank was reversed.[126]

C. *Commercially Reasonable Sale of Collateral*

Liberty National Bank & Trust Co. v. Acme Tool Division of the Rucker Co.[127] was an interpleader action[128] in which Mrs. Bailey, the holder of a subordinate security interest in an oil rig, claimed that the Liberty National Bank & Trust Co. (Liberty) had sold the rig in a commercially unreasonable manner.[129]

Liberty had no previous experience with selling oil rigs and therefore made inquiries regarding the method by which such sales were usually conducted. Liberty was advised that ordinarily the rig was moved to a convenient location, cleaned, painted, and sold by a professional auctioneer. Generally, interested persons were notified and advertisements placed in trade journals and newspapers.[130]

Liberty did not follow any of this advice but rather had a bank attorney who had no experience with oil drilling equipment conduct the auction. The rig was not cleaned, painted, or moved to a convenient site. Furthermore, the sale was conducted during a snowstorm.[131] The rig had been appraised at $60,000 to $80,000 but the final sale price was $42,000.[132] In this state of affairs the Tenth Circuit found that the trial court's ruling that the sale was commercially unreasonable was supported by the evidence.[133]

Gilbert Porter

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[126] *Id.* at 173-74.

[127] 540 F.2d 1375 (10th Cir. 1976).

[128] *See* 28 U.S.C. § 1335 (1970).

[129] Liberty had a prior security interest in the rig which belonged to Tarus, an oil drilling company. Tarus agreed that Liberty should sell the rig and apply the proceeds toward the debt owed to Liberty. Liberty, however, had notice of Mrs. Bailey's interest. 540 F.2d at 1377.

[130] *Id.*

[131] *Id.* at 1377, 1382.

[132] *Id.* at 1377.

[133] *Id.* at 1382.

NATIONAL BANK CHARTERS AND THE BANK HOLDING COMPANY ACT

Bank of Boulder v. Board of Governors, 535 F.2d 1221 (10th Cir. 1976)

INTRODUCTION

Within the last two years, the United States Court of Appeals for the Tenth Circuit has decided two major cases involving applications for a national bank charter where the proposed bank was to be part of a bank holding company: *Bank of Boulder v. Board of Governors*[1] and *Bank of Commerce v. Smith.*[2] These cases and the Tenth Circuit's understanding of *Whitney National Bank v. Bank of New Orleans & Trust Co.*,[3] the National Bank Act,[4] and the Bank Holding Company Act of 1956[5] are the subject of this Comment.

I. SUMMARY OF FACTS

A. Bank of Boulder v. Board of Governors[6]

Bank of Boulder arose out of the efforts of Westland Banks, Inc., a bank holding company (Westland), to establish a subsidiary bank in the vicinity of the Bank of Boulder. The Bank of Boulder was a state bank which opened for business only a year before in the spring of 1972. Westland filed an application with the state banking authorities to move its subsidiary state bank to the new Boulder location.[7] After a public hearing in which the Bank of Boulder appeared as a protesting witness, the Colorado State Banking Board voted to deny Westland's request.[8] The state board found that the proposed service area of Westland's subsidiary overlapped the primary service area of the Bank of Boulder and held that to grant Westland's application "would

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[1] 535 F.2d 1221 (10th Cir. 1976).

[2] 513 F.2d 167 (10th Cir. 1975).

[3] 379 U.S. 411 (1965).

[4] 12 U.S.C. §§ 21-42 (1970).

[5] 12 U.S.C. §§ 1841-1850 (1970).

[6] 535 F.2d 1221 (10th Cir. 1976).

[7] The procedures for application for a Colorado state banking charter are outlined in COLO. REV. STAT. §§ 11-3-109, -110 (1973).

[8] Bank of Boulder v. Board of Governors, 535 F.2d 1221, 1222 (10th Cir. 1976).

result in the creation of two weak and unprofitable banks in the Boulder area."[9]

The state board's decision was made October 26, 1973. On November 5, 1973, before the final order was entered, Westland applied to the United States Comptroller of Currency (Comptroller) for a nationally chartered bank in the identical location.[10] The Comptroller granted preliminary approval of the proposed national bank conditioned upon the approval by the Board of Governors of the Federal Reserve Board (Board of Governors) of Westland's acquisition of the controlling shares of the new bank.[11] The Board of Governors approved Westland's application to acquire the controlling shares.[12]

The Bank of Boulder appealed the Board of Governors' decision to the United States Court of Appeals for the Tenth Circuit which upheld the Board of Governors' decision approving Westland's application.[13] Thus, a bank holding company was denied a banking charter in a state procedure but was granted a charter under the same circumstances in a federal procedure.[14]

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[9] *Id.* at 1223.

[10] *Id.*

[11] In order to acquire a national bank charter, associations must follow the procedures of formation outlined in the National Bank Act, 12 U.S.C. §§ 21-24 (1970), and apply to the Comptroller who may grant the charter application pursuant to 12 U.S.C. §§ 26-27 (1970). The Comptroller's regulations provide that he may condition his final approval upon the fulfillment of conditions specified by him which in this situation is the approval of Westland's acquisition of the controlling shares of the new bank by the Board of Governors. 12 C.F.R. § 4.2(c) (1976). The Comptroller conditions his final approval on the Board's approval of the application to acquire the controlling shares because the Bank Holding Company Act provides that it is

> unlawful, except with prior approval of the Board, . . . (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank . . . .

12 U.S.C. § 1842(a)(3) (1970).

[12] Bank of Boulder v. Board of Governors, 535 F.2d 1221, 1223 (10th Cir. 1976).

[13] *Id.* at 1225. Any party aggrieved by an order of the Board may appeal the Board's decision to a federal court of appeals. 12 U.S.C. § 1848 (1970). A party who would become a competitor of the applicant has the right as an aggrieved party to obtain judicial review as provided in section 1848. 12 U.S.C. § 1850 (1970).

[14] For a comprehensive discussion of competitive equality between national and state banks, see Redford, *Dual Banking: A Case Study in Federalism*, 31 LAW & CONTEMP. PROB. 749 (1966). This apparent inequality will not be discussed in this Comment. However, such a decision may have an effect on the dual banking system which provides for national and state banks to exist side by side essentially in competition since both have the power

The Tenth Circuit held that in charter application cases involving bank holding companies, the decision of the Comptroller is not subject to independent court review, and the only review is that of the Board of Governors' decision.[15] The court noted the discretionary authority of the Board to hold hearings and, following the authority of other circuits, held that there is no constitutional or statutory right for a protesting bank to have a hearing before the Board.[16] Accordingly, the Tenth Circuit affirmed the granting of the national charter to Westland, holding that the findings of the Board were supported by substantial evidence.[17]

B. Bank of Commerce v. Smith[18]

Bank of Commerce was decided nearly a year before *Bank of Boulder.*[19] In *Bank of Commerce,* a protesting state bank sought judicial review of the Comptroller's actions in the United States District Court for the District of Wyoming. The protesting bank asserted that political influence had prompted the Comptroller to grant approval for a national charter to a proposed subsidiary of a bank holding company.[20] The district court determined that it

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to grant charters. Congress has chosen to maintain a "competitive equality" between state and national banks by refusing to exercise its power to preempt the field. The Bank Holding Company Act contains several provisions calculated to preserve the position of the states. 12 U.S.C. § 1842(b) (1970) provides that the state supervisory authority should be consulted about an application for acquisition and section 1846 provides that states may exercise powers and jurisdiction over bank holding companies.

[15] Since both agencies consider the same factors and since it is the "exclusive function of the Board to act in such cases," *Whitney Bank,* the decision of the Comptroller is not subject to independent review. Instead review of the proceedings under the Bank Holding Company Act is limited to the actions of the Board of Governors.

Bank of Boulder v. Board of Governors, 535 F.2d 1221, 1224 (10th Cir. 1976).

[16] *Id.* at 1224-25. If the application for approval to acquire shares is disapproved by the Comptroller, the Board must hold hearings. 12 U.S.C. § 1842(b) (1970). However, where the Comptroller does not disapprove, the Board in its discretion may allow oral argument or hold hearings for the purpose of taking evidence. Bank of Commerce v. Board of Governors, 513 F.2d 164 (10th Cir. 1975). Commercial Nat'l Bank of Little Rock v. Board of Governors, 451 F.2d 86 (8th Cir. 1971), held that where the Comptroller recommends approval of the application, it is established that a protestant has no constitutional right to a hearing before the Board. Northwest Bancorporation v. Board of Governors, 303 F.2d 832 (8th Cir. 1962) held that there is no statutory right to a hearing.

[17] "The findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive." 12 U.S.C. § 1848 (1970).

[18] 513 F.2d 167 (10th Cir. 1975).

[19] *Bank of Commerce* was decided in March 1975 and *Bank of Boulder* was decided in June 1976.

[20] 513 F.2d at 169.

lacked jurisdiction to review the actions of the Comptroller in bank holding company situations and the Tenth Circuit affirmed.[21] Relying on *Whitney National Bank v. Bank of New Orleans & Trust Co.*,[22] the Tenth Circuit held that there is no independent court review of the Comptroller's decision in bank holding company applications; that review of the proceedings under the Bank Holding Company Act is limited to the Board of Governors' decisions; and that only the court of appeals may review those decisions.[23]

In both *Bank of Commerce* and *Bank of Boulder*, the Tenth Circuit held that review of the Comptroller's actions is different when an independent bank is applying for a national charter than when a bank holding company is involved.[24] The Tenth Circuit arrived at this conclusion on the basis of *Whitney Bank* and the requirement under the Bank Holding Company Act that the Board must grant approval of the acquisition of shares of a new bank by a bank holding company.[25] An examination of the perti-

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[21] *Id.* at 168-69.

[22] 379 U.S. 411 (1965).

[23] Bank of Boulder v. Board of Governors, 535 F.2d 1221, 1225 (10th Cir. 1976); Bank of Commerce v. Smith, 513 F.2d 167, 169 (10th Cir. 1975).

The Overview of the Commercial Law section of the *Second Annual Tenth Circuit Survey* reviews *Bank of Commerce* and two other cases involving bank holding companies: American Bank v. Smith, 503 F.2d 784 (10th Cir. 1974), and Bank of Commerce v. Board of Governors, 513 F.2d 164 (10th Cir. 1975). 53 DEN. L.J. 55-56 (1975). *Bank of Commerce v. Board of Governors* is a companion case to *Bank of Commerce v. Smith* which is discussed in the text.

[24] In *Bank of Commerce*, the court said:

> The standard of review of the Comptroller's action upon an application of an independent bank is set forth in Camp, Comptroller v. Pitts . . . . However, it is obvious that this issue is not reached because of the dual approval required here of the new bank as a subsidiary of a holding company, and by reason of the Supreme Court's decision as to the proper sequence in the much cited case of Whitney National Bank v. Bank of New Orleans.

513 F.2d at 169 (citations omitted).

In *Bank of Boulder*, the court discussed its decision in *Bank of Commerce* saying, "This court first noted that the case of Camp, Comptroller v. Pitts outlined the applicable standard of review of the Comptroller's action upon application for charter by an independent bank. But we recognized the different role of the Comptroller in proceedings involving the Bank Holding Company Act." 535 F.2d at 1224 (citation omitted).

The United States Supreme Court in *Camp v. Pitts* held: "The appropriate standard for review was, accordingly, whether the Comptroller's adjudication was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' as specified in 5 U.S.C. § 706(2)(A) [the Administrative Procedure Act]." 411 U.S. 138, 142.

[25] *See* note 24 *supra*. 12 U.S.C. § 1842(a) provides that the Board must approve the acquisition of shares of a new bank by a bank holding company.

nent provisions of the National Bank Act and the Bank Holding Company Act in light of the facts of *Whitney Bank* indicates that the Tenth Circuit's decision represents an unwarranted extension of bank holding company procedures to applications for a national charter.

II. THE STATUTORY SCHEME

The National Bank Act[26] governs application procedures to establish an independent bank and to establish a subsidiary of a bank holding company. The applicant first files a charter application with the Comptroller.[27] If the Comptroller determines that the association is lawfully entitled to commence the business of banking, he grants a certificate to commence business.[28] The Comptroller may condition final approval on fulfillment of conditions specified by him.[29] Judicial review of the Comptroller's decision is available in the federal district court.[30]

Another step in the procedure is added when the applicant is to be controlled by a bank holding company. The Bank Holding Company Act[31] makes it unlawful for a holding company to form, acquire, merge, or consolidate with another bank without the prior approval of the Federal Reserve Board.[32] The holding company must submit an application for approval to acquire the controlling shares of the new bank to the Board of Governors.[33] Therefore, the Comptroller may condition his final approval of the charter application upon the approval by the Board of Governors of the holding company's application to acquire controlling interest in the newly chartered subsidiary.[34] The Bank Holding Company Act provides that review of the Board's decision may be had in the federal court of appeals.[35]

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[26] 12 U.S.C. §§ 21-42 (1970).

[27] *Id.* § 21.

[28] *Id.* §§ 26-27.

[29] 12 C.F.R. § 4.2(c) (1976).

[30] Camp v. Pitts, 411 U.S. 138, 140 (1973). *See* note 24 *supra.*

[31] 12 U.S.C. §§ 1841-1850 (1970).

[32] *Id.* § 1842(a).

[33] 12 C.F.R. § 225.3 (1976).

[34] 12 C.F.R. § 4.2(c) provides: "If preliminary approval is granted, the Comptroller may, if he determines that such action is necessary or desirable for the protection of public interest, at any time withdraw such approval or provide that final approval shall be subject to the fulfillment of conditions specified by him."

[35] 12 U.S.C. § 1848 (1970).

The distinction between the charter application and the application to acquire the controlling shares of the new bank is extremely important. Bank holding companies have to file both a charter application and an application to acquire controlling shares, while an independent bank only has to file a charter application. The Tenth Circuit did not distinguish the two kinds of applications stating that: "It is apparent that this two-track approach by appellant is derived from the fact that separate agencies and statutes are involved, but the arguments are foreclosed by the Supreme Court's opinion in the *Whitney Bank* case hereinafter referred to."[36]

The Bank Holding Company Act was apparently intended to supplement the already existing National Bank Act. The Bank Holding Company Act deals with only the holding company's application for acquisition of controlling interest and not the charter application itself.[37] The Board of Governors is required to forward a copy of the application for acquisition to the Comptroller for his recommendation.[38] If the Comptroller disapproves the application, the Board must hold a hearing;[39] otherwise, the Board is not required to conduct a hearing.[40] The Comptroller is a consultant with regard to the application for acquisition, whereas he is the decision maker in the charter application.[41] These procedures are so distinct that even the identity of the applicant parties may differ; in *Bank of Commerce,* the individual organizers of the proposed subsidiary filed the charter application with the Comptroller, and the bank holding company, a

[36] Bank of Commerce v. Smith, 513 F.2d 167, 168 (10th Cir. 1975).

[37] This conclusion is reached because the Bank Holding Company Act does not cover charter application procedures and the National Bank Act clearly outlines the procedure for charter applications.

[38] 12 U.S.C. § 1842(b) (1970).

[39] *Id. See also* 12 C.F.R. § 225.3(c) (1976).

[40] *See* note 39 *supra.*

[41] This section is a compromise between the position that the Comptroller should have the authority to veto the application to acquire shares and the position that the Comptroller should have only an informal consulting role which would not necessarily be heeded. The compromise provides for input from the Comptroller whereby he recommends approval or denial of the application, but retains the final decisionmaking authority to approve the application to acquire shares with the Board. S. REP. NO. 1095, 84th Cong., 2d Sess., *reprinted in* [1956] U.S. CODE CONG. & AD. NEWS 2482, 2490.

separate entity, filed the application for acquisition with the Board of Governors.[42]

In the Bank Holding Company Act, Congress intended to regulate the growth of bank holding companies in order to discourage monopolies and to confine holding company activities to the management and control of banks.[43] It does not appear that this Act was intended to remove bank holding companies from the purview of the National Bank Act; instead, it was designed to regulate the one aspect of bank holding companies which distinguishes them from independent banks: that these subsidiary banks are part of a bank holding company and thus are able by this affiliation to exercise greater influence in the banking market.[44] Thus, an applicant for a national bank charter files his application with the Comptroller under the National Bank Act whether the bank is to be an independent bank or a subsidiary of a bank holding company. A bank holding company must take the additional step of filing under the Bank Holding Company Act with the Board of Governors for approval of acquisition.

It is this dual function of the Comptroller and the two relevant statutory provisions that are the basis of the Tenth Circuit's apparent misunderstanding of these application procedures. The Tenth Circuit has held that some aspects of the National Bank Act apply to bank holding company applications and others do not; specifically, the Tenth Circuit recognized that the charter application is made to the Comptroller as prescribed in the National Bank Act but held that review of the Comptroller in bank holding company applications is precluded by the Bank Holding Company Act.[45]

III. *Whitney National Bank v. Bank of New Orleans & Trust Co.*[46]

In light of the statutory background, *Whitney Bank* should be distinguished on its facts from the Tenth Circuit cases. In

[42] Brief for Appellant at 2-3, Bank of Commerce v. Smith, 513 F.2d 167 (10th Cir. 1975).

[43] S. REP. No. 1095, 84th Cong. 2d Sess., *reprinted in* [1956] U.S. CODE CONG. & AD. NEWS 2482.

[44] *Id.*

[45] Bank of Commerce v. Smith, 513 F.2d 167, 168-69 (10th Cir. 1975); Bank of Boulder v. Board of Governors, 535 F.2d 1221, 1223-24 (10th Cir. 1976).

[46] 379 U.S. 411 (1965).

Whitney Bank, the protesting banks were challenging the acquisition of a new national bank in the adjoining county by a holding company created for the purpose of circumventing the laws of Louisiana prohibiting branch banking.[47] Whitney National Bank of New Orleans (Whitney-New Orleans) wanted to establish another national bank in an adjoining parish.[48] Louisiana law prohibits the opening of branch offices by banks in other than their home parish.[49] State branch banking laws are applicable to national banks by 12 U.S.C. § 36(c)(2) (1970).[50] In order to avoid the branch banking laws, Whitney-New Orleans organized a bank holding company. "The net result of the maneuver would be that the original stockholders of the old Whitney-New Orleans would own the holding company which in turn would own and operate both banks, *i.e.*, the new Whitney-New Orleans and Whitney-Jefferson."[51] The Board of Governors approved the plan May 3, 1962.[52] Louisiana subsequently passed a law, effective July 10, 1962, prohibiting the opening of subsidiaries of bank holding companies within the state.[53] The protesting banks sought judicial review of the Board's decision in the Court of Appeals for the Fifth Circuit on June 30, 1962, as provided in 12 U.S.C. § 1848. That case was pending when this Supreme Court case was decided.[54]

In this suit taken up to the Supreme Court, the protesting banks were attacking the authority of the Comptroller to issue a certificate. The United States District Court for the District of Columbia held that the Bank Holding Company Act, 12 U.S.C. § 1846, reserved to the states final authority to prohibit the opening of subsidiaries within their borders and, even though Louisiana adopted such a law after the Board's approval, the Comptroller should be enjoined from issuing the certificate. The Board's approval was not final because the decision was being reviewed in the court of appeals. On appeal from the district court, the court of appeals upheld the district court decision,

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[47] *Id.* at 413.
[48] *Id.*
[49] *Id.* n.1.
[50] *Id.*
[51] *Id.* at 415-16.
[52] *Id.* at 416.
[53] *Id.* at 414 & n.4.
[54] *Id.* at 413 & n.2.

concluding that the proposed Jefferson Parish bank would be but a branch of Whitney-New Orleans which was prohibited by the Act. The Supreme Court held:

> We have concluded that the District Court for the District of Columbia had no jurisdiction to pass on the merits of the holding company proposal; that appropriate disposition of the controversy cannot be made without further consideration of the case by the Federal Reserve Board, where original exclusive jurisdiction rests; and that since the application for review of its decision is now pending in the Court of Appeals for the Fifth Circuit, reasonable time should be allowed for that court to act.[55]

The Supreme Court made the distinction that its decision was a response to a complaint attacking the propriety of the holding company arrangement itself, not an attack on the Comptroller's decision to create a new national bank:

> We think it clear that the thrust of respondents' complaint goes to the organization of Whitney-Jefferson by the holding company rather than merely the issuance of authority to Whitney-Jefferson to do business. Respondents' chief contention is that Whitney-Jefferson would be but a branch bank of Whitney-New Orleans. But this would not follow simply by virtue of the issuance of authority for the opening of the new bank. Such a situation would occur, if at all, when the Board approved the holding company plan including the organization of Whitney-Jefferson as its subsidiary. Thus, it is the plan of organization by the holding company which lies at the heart of respondents' argument. . . .
>
> The respondents also argue that the operation of Whitney-Jefferson is barred by a valid state law prohibiting any subsidiary of a bank holding company from opening for business "whether or not, a charter, permit, license or certificate to open for business has already been issued." Here, as with their first argument, respondents' quarrel is in actuality not merely with the opening of the bank, but rather with its opening as a subsidiary of Whitney Holding Corporation.[56]

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[55] *Id.* at 414-15. The Court went on to say:

> Again, the Board could not approve a holding company arrangement involving the organization and opening of a new bank if the opening of the bank, by reason of its ownership by a bank holding company, would be prohibited by a valid state law.
>
> We therefore conclude that respondents' complaint tenders issues cognizable by the Federal Reserve Board, and we turn to the question of whether such objections must first be raised there.

Id. at 418-19.

[56] *Id.* at 417-18.

The Supreme Court explored the legislative history of the Bank Holding Company Act in order to buttress its conclusion that the Board is the sole means by which the organization of a new bank may be tested. It is this author's opinion that the Court was referring to questions pertaining to the holding company arrangement itself, but *not* to the issuance of a certificate to do business, *i.e.*, to the *application for acquisition of the controlling shares* made to the Board, but *not* to the *application for a national charter* made to the Comptroller. For instance, the Court said:

> That action by Congress [to provide review in the court of appeals] was designed to permit an agency, expert in banking matters, to explore and pass on the ramifications of a proposed bank holding company arrangement. To permit a district court to make the initial determination of a plan's propriety would substantially decrease the effectiveness of the statutory design.[57]

There would be no reason for Congress to change the procedure for reviewing the actions of the Comptroller simply because a bank holding company was making the application for a charter. The Bank Holding Company Act provisions deal only with the intricacies of bank holding company arrangements which are to be reviewed by a board of experts and thereafter subject to judicial review in the court of appeals.

Thus, *Whitney Bank* was limited to a controversy concerning the propriety of the bank holding company's *application for acquisition.* Controversies concerning the Comptroller's actions in response to a *charter application* by an independent bank or by a bank holding company were not reached by *Whitney Bank.* The Tenth Circuit has, therefore, extended the *Whitney Bank* decision by holding that it is the "exclusive function of the Board to act" in all cases involving bank holding companies, not merely those instances where the *acquisition* arrangement is challenged as was the situation in *Whitney Bank.*[58]

In *Bank of Commerce,* the protesting banks challenged the propriety of the actions of the Comptroller in granting the charter because of alleged political influence.[59] Similarly, in *Bank of*

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[57] *Id.* at 420.

[58] Bank of Boulder v. Board of Governors, 535 F.2d 1221, 1224 (10th Cir. 1976) (quoting Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411, 419 (1965)). (1965)).

[59] 513 F.2d at 169.

Boulder, the actions of the Comptroller in deciding to grant a charter were challenged by the Bank of Boulder.[60] Yet, the Tenth Circuit held that *Whitney Bank* controlled in both cases even though the issue was the Comptroller's actions in response to the charter application and *not* a question of the organization of the holding company or its acquisition of the subsidiary bank which by statute is limited to the Board.

Whitney Bank was distinguished by the United States District Court for the District of Columbia in 1973 in *First National Bank of Homestead v. Watson.*[61] In *Homestead,* the protesting banks challenged the Comptroller's approval of a bank holding company charter application in the district court on the basis of his failure to comply with the provisions of the National Environmental Policy Act of 1969 (NEPA).[62] The court distinguished *Whitney Bank* on its facts by pointing out that the issues in *Whitney Bank* were clearly those reserved to the *Board* and that plaintiffs were in reality challenging a decision of the Board by collaterally attacking the Comptroller.[63] In contrast to *Whitney Bank,* the complaint in *Homestead* was clearly against the actions of the Comptroller.[64] The court held that the actions of the Comptroller are independently reviewable even when bank holding companies are involved if the complaint concerns the Comptroller's granting of the charter and not the Board's approval of the application for acquisition.[65] *Homestead* thus rejected the contention that *Whitney Bank* precluded district court review of the Comptroller in bank holding company cases and distinguished between claims against the Board as in *Whitney Bank* and claims against the Comptroller.

In *Bank of Commerce,* the Tenth Circuit considered the decision in *Homestead* but said that "the considerations there were entirely different as the only issue was the claim under the NEPA."[66] Yet, the issue in *Homestead* was also whether the district court had jurisdiction to hear complaints made against the

[60] 535 F.2d at 1223.
[61] 363 F. Supp. 466 (D.D.C. 1973).
[62] 42 U.S.C. §§ 4321-4347 (1970).
[63] 363 F. Supp. at 471.
[64] *Id.*
[65] *Id.* at 468-71.
[66] 513 F.2d at 169.

Comptroller in bank holding company cases or whether all complaints made with respect to bank holding company charter applications must be resolved by the Board and reviewable only in the court of appeals.[67] It seems that the issue of whether the Comptroller followed the proper procedure as prescribed by NEPA in making his decision to grant a charter in *Homestead* is parallel to the issue of whether the Comptroller was persuaded by political considerations as alleged in *Bank of Commerce.*[68] Both complaints are solely with the propriety of the Comptroller's actions in response to charter applications by bank holding companies.

The Tenth Circuit should have distinguished the claims against the *Board* from the claims against the *Comptroller* as the court did in *Homestead.* Instead, in *Bank of Commerce,* where the principal claim challenged the Comptroller's considerations in granting preliminary approval of the bank charter, the Tenth Circuit held that *Whitney Bank* controlled:

> There the Court held that the proper place to challenge the organization of a new holding company owned bank was in the proceedings before the Board of Governors. . . . The Court considered the problems which would be caused by a challenge of the Comptroller's action as an independent matter, and the duplication which would result. The Supreme Court thus decided that the opposition must ". . . first attack the arrangement before the Board."[69]

Yet, in *Whitney Bank,* the Court was talking about the duplication which would result if the protesting banks *collaterally* attacked the Board's determination in the district court by a suit against the Comptroller, not whether there was a suit against the Comptroller for his own actions.[70] *Whitney Bank* did not reach the issue of a claim solely against the Comptroller. Likewise, in *Bank of Boulder,* the court relied on *Whitney Bank* even though the claim was against the Comptroller and not against the Board. The protesting banks brought before the Board the case against the Comptroller and got review of the decision in the court of appeals because they were foreclosed from bringing the issue before the district court against the Comptroller directly based on

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[67] 363 F. Supp. at 471.

[68] *Id.* at 472; 513 F.2d at 169.

[69] 513 F.2d at 169.

[70] 379 U.S. at 421-22.

the Tenth Circuit Court's decision in *Bank of Commerce*. Nevertheless, the court reconfirmed its stand with respect to distinguishing between claims against the Comptroller and claims against the Board saying:

> Since both agencies consider the same factors and since it is the "exclusive function of the Board to act in such cases," *Whitney Bank*, the decision of the Comptroller is not subject to independent review. Instead, review of the proceedings under the Bank Holding Company Act is limited to the actions of the Board of Governors.[71]

IV. Effect of the Tenth Circuit Decisions

Based on the Tenth Circuit decisions, protestant banks have two very different procedures to follow in order to challenge a national charter application filed by an independent bank as opposed to one filed by a bank holding company: approval of charters for independent banks is challenged by review of the Comptroller's decision in federal district court; approval of charters involving bank holding companies are reviewed in the court of appeals based on the Board's decision.

There are several problems which arise from this situation. One problem lies in the confusion that has arisen over these conflicting procedures.[72] Another, more severe, problem is that in bank holding company cases the decision of the Comptroller to approve the charter is not reviewable. The Comptroller grants preliminary approval of the charter application, conditions it upon approval by a separate agency of a separate application for acquisition, and then grants final approval of the charter application. The only reviewable decision is the narrow one of whether the bank holding company conformed to the provisions of the Bank Holding Company Act. Neither the Bank Holding Company Act nor the National Bank Act gives the Board the authority to review the decision of the Comptroller; the statutes only provide the Board with the authority to review the acquisition arrangement.[73] Therefore, it is possible that no review of the

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[71] 535 F.2d at 1224.

[72] *See* note 77 *infra*.

[73] 12 U.S.C. § 1842(b) (1970) discusses the role of the Comptroller with regard to the application filed with the Board by the bank holding company to acquire the controlling shares of the bank. No other section of the Bank Holding Company Act discusses the Board's authority to review the Comptroller's decision on the charter application.

Comptroller's decision to grant a charter will be available in bank holding company cases.

The results of the two cases in the Tenth Circuit demonstrate these problems. In *Bank of Commerce v. Board of Governors,*[74] the protesting bank filed its application for a state charter with the state authorities a few months before the applicant bank filed its application with the Comptroller. The Comptroller granted preliminary approval to the applicant before the protesting state bank received its approval.[75] The protesting state bank wanted to attack the actions of the Comptroller, but was precluded from doing so.[76] The protesting state bank also failed to appear before the Board and, therefore, was foreclosed from protest or review in that forum as well.[77] There, the state bank was not challenging the Board's approval of the acquisition plan but the charter approval of the Comptroller. The result was that the protesting bank was deprived of access to a forum empowered to grant relief.

In *Bank of Boulder,* the protesting bank did not try to challenge the Comptroller's actions directly in the district court in light of the *Bank of Commerce* decision.[78] Bank of Boulder appeared before the Board, but was denied relief without a hearing.[79] It then appealed the Board's decision to the court of appeals and tried to attack the Comptroller's actions in that forum with no success.[80]

CONCLUSION

The most significant problem apparently created by the decisions of the Tenth Circuit is that the decisions of the Comptroller in response to charter applications by bank holding companies are not reviewable. In the future, the application to the Comptroller for a charter and the application to acquire shares made to the

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[74] 513 F.2d 164, 165 (10th Cir. 1975). This is a companion case to Bank of Commerce v. Smith, 513 F.2d 167 (10th Cir. 1975), and the facts are the same.

[75] 513 F.2d at 165.

[76] Bank of Commerce v. Smith, 513 F.2d 167, 169 (10th Cir. 1975).

[77] Bank of Commerce v. Board of Governors, 513 F.2d 164, 166-67 (10th Cir. 1975), held that since the protesting banks failed to assert their claims against the Comptroller before the Board, they were barred from getting review in the court of appeals. Yet, the reason protesting banks did not attack the application before the Board was that their claim was against the Comptroller, not against the Board.

[78] 535 F.2d at 1222.

[79] *Id.* at 1223-25.

[80] *Id.* at 1223-24.

Board should perhaps be more clearly differentiated so there is less confusion in interpreting the relation of the National Bank Act and the Bank Holding Company Act. Another approach would be to distinguish *Whitney Bank* on its facts and recognize that, although the language in *Whitney Bank* appeared broad, it was limited to the narrow situation of an issue solely cognizable by the Board. And last, perhaps the Bank Holding Company Act itself could more clearly define the relationship of bank holding companies to the Comptroller with respect to the charter applications and the extent to which the National Bank Act reaches charter applications made by bank holding companies.

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