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COMMERCIAL LAW

By Robert E. Olsen*

Overview

I. Banks and Banking

American Bank v. Smith, 503 F.2d 784 (10th Cir. 1974), *held:* Where the organizers of a new national bank had close connexity with a second national bank and its parent holding company and apparently an effort had been made by the organizers to avoid the appearance that the new bank was a subsidiary of the bank holding company, claim of an opponent of the new bank to that effect and that Comptroller of Currency had no power to issue certificate of authority to do business without referring question to the Federal Reserve Board was substantial; district and circuit courts were without jurisdiction to adjudicate the matter, because it was within the exclusive jurisdiction of the Federal Reserve Board; under the *Whitney Bank* doctrine, the court of appeals had power to stay issuance of certificate of authority pending motion for remand of action to the Board.

Observation: The court noted the "curious" absence of legislation requiring the Comptroller to notify the Federal Reserve Board when the Board's authority to approve bank holding company acquisitions is in question.

Bank of Commerce v. Board of Governors, 513 F.2d 164 (10th Cir. 1975), *held*: The opponent of a new bank, to be acquired by a bank holding company, must exhaust its administrative remedies (by attacking acquisition application before the Federal Reserve Board) before seeking judicial review; where the opponent fails to give testimony before the Board, it is barred thereafter from appealing the Board's decision approving the acquisition; publication in the Federal Register of the Board's invitation to comment on a proposed bank holding company acquisition, as required by 12 C.F.R. § 262.3(g), is legally sufficient notice, because the Board's decision does not result in direct deprivation of opponent's property; where the opponent is not a party directly involved in the Board proceedings, it has a duty to inform itself as to the state of the proceedings.

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Bank of Commerce v. Smith, 513 F.2d 167 (10th Cir. 1975), *held:* Under the *Whitney Bank* doctrine, where a bank holding company must seek approval of charter and acquisition applications for a new bank from separate federal agencies, an opponent of the acquisition must exhaust its administrative remedies (by attacking acquisition application before the Federal Reserve Board) before seeking judicial review; judicial review is possible only in the federal court of appeals; and, where an opponent first attacked approval of the charter application by bringing an action in a federal district court against the Comptroller of Currency, the opponent failed to exhaust its administrative remedies, and the district court was without jurisdiction to adjudicate the matter.

II. BANKRUPTCY

Prisbey v. Noble, 505 F.2d 170 (10th Cir. 1974), *held:* (1) Circumstantial evidence of actual intent to defraud creditors is sufficient for a determination of fraudulent transfer under section 67d(2)(d) of the Bankruptcy Act, and intrafamily transactions are to be closely scrutinized; (2) an intent to *prefer* one creditor over others is an important consideration in determining if an intent to *defraud* exists; (3) a transferee's good faith is not appropriate to the determination of actual intent to defraud under section 67d(2)(d); (4) a transfer, determined to be fraudulent under section 67d, may not be preserved for the bankrupt's estate if a bona fide purchaser has given present fair equivalent value for the transfer; but, if the transfer was for an antecedent debt, no present value was given, and the court may, therefore, properly order the transfer preserved; (5) a transfer, to be a voidable preference under section 60a, need not occur at a time when the creditor knew of the debtor's insolvency, but the trustee must prove that the creditor had knowledge or notice of facts and circumstances which would incite a person of reasonable prudence under similar circumstances to make inquiry if such inquiry would lead to the development of the facts essential to a knowledge of the insolvency; (6) an indemnitor's right of contribution, contingent on liability being established, constitutes a preexisting claim against coindemnitor for the purpose of determining whether "value" is given for rights (construing Uniform Commercial Code sections 1-201(44) and 8-302); (7) where the bank released to the debtor collateral owned by him on the condition

that the collateral would soon be returned, where debtor thereupon transferred the collateral to a creditor who constituted a bona fide purchaser in a transaction so as to meet the test of a preference under section 60, and, where within 4 months thereafter the debtor was adjudicated a bankrupt, the trustee was held to have succeeded to the ownership rights of the bona fide purchaser, and the bank lost its status as a secured creditor; and (8) equitable considerations do not permit a court to set aside the applicable bankruptcy law.

Observation: Holding (7), although correct in its result, is confused in its logic and its reading of section 60b of the Bankruptcy Act; for the avoidance of such a transfer and recovery by the trustee of the transferred property, it is immaterial whether the debtor's transferee is a bona fide purchaser.

Wadell v. Fleming, 510 F.2d 4 (10th Cir.), *cert. denied,* 422 U.S. 1007 (1975), *held:* (1) Where the bankrupt sought to have a judgment lien on his property, obtained within 4 months of filing petition in bankruptcy, declared null and void under section 67a of the Bankruptcy Act, the burden was on him to establish his insolvency at the time the lien was obtained; (2) a bankrupt's equity in his property could be considered an asset for the purpose of determining his solvency with respect to a section 67a application to avoid a judgment lien thereon, even though such property was exempt as a homestead under state law.

Nicholas v. Nicholas, 510 F.2d 160 (10th Cir.), *cert. denied,* 421 U.S. 1012 (1975), *held:* Where a liability has been reduced to judgment, the nature of the claim as revealed by the judgment and a review of the record is decisive; in a subsequent bankruptcy proceeding, the creditor will not be permitted to go outside the record in an effort to show by extrinsic evidence that the real nature of the claim would support a finding of nondischargeability under the Bankruptcy Act.

Observation: In representing a creditor, if the debtor's bankruptcy is imminent, counsel should frame pleadings in any civil action to include claims that would support a complaint under section 14 or section 17 of the Bankruptcy Act.

Goldstein, Samuelson, Inc. v. Danning, 517 F.2d 324 (10th Cir. 1975), *held:* On an analysis of specific facts, the determination by the bankruptcy judge that a party in possession of certain

funds was the agent of the bankrupt and not a constructive trustee for third parties, or agent for both the bankrupt and third parties, was not clearly erroneous; property of the bankrupt in the hands of the bankrupt's agent when a petition in bankruptcy is filed is subject to the summary jurisdiction of the bankruptcy court, which may require that it be turned over to the trustee; possession, and not title, is the test of summary jurisdiction, and constructive possession is sufficient to establish possession; thus, the party in possession was not an adverse claimant, and plenary jurisdiction was not required.

Observation: The fact situation here is similar to that in *Sherr v. Sierra Trading Corp.*, 492 F.2d 971 (10th Cir. 1974), where the Tenth Circuit denied summary jurisdiction because the party in possession, which it characterized as a "third-party," was not clearly the debtor's agent; this concept of agency as applied for purposes of a debtor-in-possession hearing is not a well-developed area in bankruptcy law; see *Tenth Circuit Survey,* 52 DENVER L.J. 61 n.4 (1975).

Gulfco Investment Corp. v. Hogan, 520 F.2d 741 (10th Cir. 1975), *held*: The power of a trustee in bankruptcy to reject executory contracts of a debtor reorganizing under Chapter X of the Bankruptcy Act implies a like power to assume such contracts; a trustee is entitled to a reasonable time to determine whether to reject or assume executory contracts. During such time, the bankruptcy court has summary jurisdiction to stay the efforts to rescind a contract by a party contracting with the debtor.

In re Kraft, No. 74-1281 (10th Cir., Jan. 3, 1975) (Not for Routine Publication), *held*: The purpose of the Certificate of Title Act is to protect the rights of third parties; however, as between the parties to the sale of a new vehicle, which parties include the buyer and a lien creditor, title passes (subject to the lien) on delivery of the vehicle accompanied by a title document showing the lien, notwithstanding noncompliance with a literal reading of the Act.

In re Littlejohn, 519 F.2d 356 (10th Cir. 1975), *held:* The giving of a bill of sale, which indicates to the buyer of a vehicle a creditor's lien, places third parties on notice of the existence of the lien notwithstanding noncompliance with the Certificate of Title Act; the Uniform Commercial Code does not contemplate

requiring a creditor to insure the issuance of a certificate of title, and the lien creditor was, therefore, entitled to reclaim the vehicle as against the buyer's trustee in bankruptcy.

Observation: This decision goes far beyond the simple logic of *In re Kraft, supra,* and, in furtherance of an obscure rule of Kansas law, effectively dispenses with the notice filing concept; this result could encourage fraud.

In re Parker Square, Inc., No. 74-1502 (10th Cir., May 16, 1975) (Not for Routine Publication), *cert. filed,* 43 U.S.L.W. 3133 (U.S. Sept. 8, 1975) (No. 75-367), *held:* A corporate debtor's failure during an 8-month period of state foreclosure proceedings to take any action which would support its claim of equity in the property to be sold, and debtor's subsequent filing of a petition under Chapter X of the Bankruptcy Act, indicates the debtor's intent to delay state foreclosure. This constitutes an insufficient showing of good faith in seeking the protection of the Bankruptcy Act, and, therefore, the petition was properly dismissed.

Observation: Although the opinion has no precedential value, it is of great significance in demonstrating shifting federal court standards on the jurisdictional showing requisite to approval of a bankruptcy petition.

III. CORPORATIONS

Harman v. Wilbern, 520 F.2d 1333 (10th Cir. 1975), *held:* Where a controlling interest is sold, the controlling shareholders' fiduciary duty to minority shareholders to be reasonably alert to the intentions of purchasers to loot the corporation is determined on the basis of the facts and circumstances existing at the time of sale; corporate directors are not charged with knowledge of the actions of corporate officers.

IV. UNIFORM COMMERCIAL CODE

United States v. Ed Lusk Construction Co., 504 F.2d 328 (10th Cir. 1975), *held:* Where the assignee of construction contract rights sought to perfect its security interest by filing a financing statement in accordance with section 9-401 of the Uniform Commercial Code, but erred by filing locally instead of both centrally and locally as required by state statute, and where the United States subsequently filed a notice of tax liens locally in accordance with section 6323 of the Internal Revenue Code, the state statute provision that improper filing was effective "against

any person who has knowledge of the contents of such financing statement" requires that such person have *actual* knowledge; where there was no evidence that the United States had actual knowledge of the contents of the local filing, assignee had an unperfected security interest under state law, and the federal tax lien was, therefore, prior in right.

Observation: As quoted *supra* UCC section 9-401 has been adopted by all of the six states comprising the Tenth Circuit.

Transport Equipment Co. v. Guaranty State Bank, 518 F.2d 377 (10th Cir. 1975), *held:* (1) A transfer for security, in order to constitute an exception to the bulk sale provisions of the Uniform Commercial Code, need not be evidenced by a security agreement denoted as such (construing UCC section 6-103(1)); (2) a financing statement does not constitute a security agreement absent language of the debtor granting a security interest (construing UCC section 9-203(1)(b)); (3) possession of goods, to demonstrate ostensible ownership to other potential creditors, must be evidenced by unequivocal, absolute, notorious, and actual physical control, and not by such a symbolic act as mere presence on the debtor's property (construing UCC section 9-305); (4) a creditor's possession of collateral presumably obviates the necessity of a written security agreement, and, if the secured party gives value and the debtor has rights in the collateral, a security interest therein is created and attaches (dictum) (construing UCC section 9-303); (5) where a security interest is perfected by possession, there is no relation back of priority to the date of the financing statement filing to a time when the security interest did not exist (construing UCC section 9-305); and (6) in assessing damages for collateral unlawfully repossessed and sold, "fair market value" is not the retail value of the collateral where, at the time of sale, the collateral was not in a condition to be sold at retail; also, the objecting party has the burden of establishing proper market value (construing UCC section 9-507).

Observation: The dictum confuses the Code requirements for creation and perfection of security interests.

V. INSURANCE

Gilmore v. Constitution Life Insurance Co., 502 F.2d 1344 (10th Cir. 1975), *held:* An insurance company which clothed its agent with authority to sell insurance policies, deliver the cash

value of the policies to insureds, use company letterhead, open a checking account in the company's name, and draw upon that account, assumed the duty to supervise its agent; where the company failed to supervise its agent who perpetrated a fraud on the insured during and after the effective policy period, the agent had apparent authority to perform the acts constituting fraud, and the company was, therefore, responsible for the acts he committed.

Observation: Failure of the insurance company to establish and maintain a program of effective supervision of its agents seems to have been the key factor in the Tenth Circuit's decision to uphold the lower court as to the fact of the agent's apparent authority.

Markel v. Travelers Insurance Co., 510 F.2d 1202 (10th Cir. 1975), *held:* Where a life insurance contract was silent as to the method of cancellation, renewal was at the option, and subject to the consent, of insurer; consent to renewal was manifested by the insurer's mailing of a renewal notice (invoice) to the general agent, and a third-party creditor's payment to the general agent sufficed as payment and, thereby, effected renewal; insured's intent in fact to cancel was not determinative since cancellation could only be effected by mutual consent; the general agent, who knew of insured's intent to cancel prior to insured's death, was authorized under state law only to sell insurance and was not authorized by insurer to consent to cancellation; thus, where notice of insured's intent to cancel was not received by the insurer until after the insured's death, the insurance contract remained in force.

Observation: This case illustrates the disproportionate risk to insurance companies of selling insurance on credit where the insurer is dependent on the computer billing and premium collection procedures of a third-party creditor.

Salco Corp. v. General Motors Corp., 517 F.2d 567 (10th Cir. 1975), *held*: An automobile franchisor's refusal to approve the site to which an existing dealer wished to remove its business, and franchisor's insistence that the dealer instead select a site within one of two other areas proposed by the franchisor were acts in "good faith" as required by the Automobile Dealers Franchise Act.

Observation: This decision upholds the right of franchisors to control market selection subject only to the antitrust laws.

RULE 23 AND THE TRUTH IN LENDING ACT *Redhouse v. Quality Ford Sales, Inc.*, 511 F.2d 230 (10th Cir. 1975)

Since the landmark decision in *Ratner v. Chemical Bank N.Y. Trust Co.*,[1] the federal courts have waxed philosophical on the subject of class action certification in Truth in Lending Act[2] cases. The Tenth Circuit first faced a Truth in Lending Act class action in *Wilcox v. Commerce Bank*,[3] where it denied certification. Now it has again denied class action status in a case which bristles with policy concerns. That the three-judge panel in *Redhouse v. Quality Ford Sales, Inc.*[4] was forced to issue three separate opinions perhaps suggests that the policy of the Tenth Circuit on those concerns is far from definite. In addition to its ruling on the class action issue, the court in *Redhouse* denied liquidated damages where there was no showing of actual damage and causation.

I. FACTS

In *Redhouse* two Navajo Indians purchased trucks from a Utah automobile dealer. Because neither purchaser could read English, friends executed the purchase contracts for them. Each of the sales was apparently financed; therefore, disclosure statements in compliance with the Truth in Lending Act, Regulation Z[5] promulgated thereunder, and the Utah Uniform Consumer Credit Code (UUCCC)[6] were provided to the purchasers. Neither purchaser could afford the full amount of the downpayment required. Nevertheless, the dealer permitted each buyer to take possession of his vehicle by paying only a portion of the cash downpayment indicated in the disclosure statement and by executing and delivering to the dealer a short-term, interest-free, single-payment note for the balance. There was no indication on

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[1] 54 F.R.D. 412 (S.D.N.Y. 1972). In *Ratner* the holder of a credit card brought an action alleging a Truth in Lending violation for failure to include the "nominal annual percentage rate" on a periodic statement reporting an outstanding principal balance but no interest charge. The court held no class action could be maintained as there was no affirmative need or justification shown and the allowance of thousands of minimus statutory recoveries would carry the prescribed remedy to an absurd extreme.

[2] 15 U.S.C.A. §§ 1601-66 (1970), *as amended* (Supp. Feb. 1975).

[3] 474 F.2d 336 (10th Cir. 1973).

[4] 511 F.2d 230 (10th Cir. 1975).

[5] 12 C.F.R. § 226 (1975).

[6] UTAH CODE ANN. §§ 70B-1-101 to -11-105 (Supp. 1975).

either disclosure statement that a portion of the downpayment had been deferred.

The purchasers subsequently brought suit against the dealer and its manager on behalf of themselves and a class of 80 or 90 other persons similarly situated, alleging: That full disclosure in a single document is required by the Truth in Lending Act and the UUCCC; that full disclosure includes an identification of any portion of the cash downpayment which is deferred; and that, for failure to make such disclosure in a single document, the dealer was liable to the members of the class in accordance with the liquidated damages provisions of the respective federal and state statutes.

The trial court granted summary judgment for the individual plaintiffs, determined that the case might proceed as a class action, permitted recovery under the liability sections of *both* the Truth in Lending Act and the UUCCC, held that the inclusion in the downpayment figure of a deferred portion not so identified on the federal disclosure statement violated the disclosure provisions of both statutes, and held that the manager of the dealership was individually liable under both statutes.

II. Holding

A. *Summary Judgment Issue*

On appeal the Tenth Circuit reversed the trial court's judgment in every respect. The majority opinion found that there existed a genuine issue as to a material fact; entry of summary judgment, therefore, had been in error. Specifically, the court questioned whether the vehicles had been purchased primarily for a personal or a business purpose and, thus, whether the respective consumer credit protection statutes were applicable. The concurring opinion agreed but also expressed the view that the summary judgment must be set aside because "the class action matter had not then been fully acted upon."[7] Presumably, by this reference the concurring judge meant that a determination of class action status had not been made in accordance with rule 23 of the Federal Rules of Civil Procedure, had not been appealed for a final adjudication, or that the class had not been certified. The dissenting judge opined, as an evidentiary matter, that no genuine factual issue existed.

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[7] 511 F.2d at 239.

B. *Class Action Issue*

The majority opinion denied class action status on the sweeping and unprecedented grounds that a "class action is not superior to other available procedures for the fair and efficient adjudication of cases under the Truth in Lending Act."[8] The majority opinion also concluded, with questionable authority, that "class actions are not proper in cases such as the one at bar, where the action is predominantly for monetary damages."[9] The concurring opinion agreed that the class action determination should be set aside, but only so that the trial court might find the required elements. The dissenting opinion argued that there was "no persuasive reason why this cannot be treated as a class action" since, contrary to the holding of the majority, "damages *are* obtainable under a subsection (3) class action";[10] nevertheless the dissenting judge agreed with the concurring opinion that the cause should be remanded for a determination as to whether the rule 23[11] requirements had been met. Each opinion quoted from

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[8] *Id.* at 236.

[9] *Id.*

[10] *Id.* at 240.

[11] FED. R. CIV. P. 23. For an action to be maintained as a class action, the moving party must meet all of the requirements of rule 23(a) and one of three alternative requirements of rule 23(b). The alternative requirements figure in the discussion that follows. They are:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members

or referred to *Eisen v. Carlisle & Jacquelin,*[12] which denied the trial court "authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[13]

C. *Damages Issue*

In an extraordinary departure from existing law, the majority opinion apparently held that, in the absence of a showing of actual damages and causation, it was improper for the trial court to award liquidated damages under either the federal or state statute. The concurring and dissenting opinions argued that actual damages need not be proved since the statutory provision for liquidated damages effectively dispenses with the necessity of such proof.

D. *Disclosure Violation Issue*

As to the disclosure violation itself, the majority opinion, declining to adopt the rule of law established in a Seventh Circuit case,[14] created new law in holding that the deferred, short-term, non-interest bearing portion of a downpayment is exempt from disclosure under the Truth in Lending Act and under the state statute, which incorporates by reference the federal statute as well. The court analogized this holding to the rule in *Umdenstock v. American Mortgage & Investment Co.*[15] that non-interest bearing escrow accounts were exempt from disclosure.[16] The majority opinion thereby avoided the trial court issue as to whether the use of more than a single document might constitute effective disclosure.

The concurring opinion argued that the purpose of the Truth in Lending Act is to insure adequate disclosure of the *cost* of

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of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

[12] 417 U.S. 156 (1974).

[13] *Id.* at 177.

[14] Gilbert v. Wood Acceptance Co., 486 F.2d 627 (7th Cir. 1973). The court held that a statement in the installment purchase contract that the purchaser had paid a "cash downpayment" of $350, when in fact he paid only $100 and was to pay the remaining in weekly installments, violated the Truth in Lending Act by concealing an unpaid part of the sales price in the category of a cash downpayment. *Id.* at 631.

[15] 495 F.2d 589 (10th Cir. 1974).

[16] The court failed to note that escrow accounts are specifically excepted from disclosure under Reg. Z, 12 C.F.R. § 226.8(e)(2)(i) (1975).

credit and that, since no such cost is involved in relation to a non-interest bearing note, no disclosure violation had occurred. The dissenting opinion would have affirmed the trial court determination that there had been no effective disclosure by means of a single document. Even assuming that more than one document was permissible, the dissenting opinion urged, there had been no effective disclosure under Regulation Z since the deferred portion of the downpayment constituted a balloon payment as to which certain disclosures were required but not made.[17]

E. *Scope of Liability Issue*

Finally, all three opinions, in a case of first impression, held that the dealer's managing agent was not a "creditor" within the meaning of the Truth in Lending Act[18] and, therefore, could not be held personally liable for disclosure violations of the dealership.

III. ANALYSIS

A. *Summary Judgment*

There is little question that the trial court failed to find, as a matter of fact, that the respective plaintiffs had purchased their trucks in a consumer credit transaction. Purchases primarily for business use are not subject to the protection of the Truth in Lending Act or UUCCC. Yet whether or not the evidence supported the entry of summary judgment is not particularly insightful. More interesting is the issue, raised in the concurring opinion, as to whether the entry of summary judgment in favor of certain individual parties must await a final adjudication of class action status or a certification of the class of which the individuals are members. This question appears not to have been raised previously in precisely this form.[19]

It is clear that the dictum in *Eisen v. Carlisle & Jacquelin*[20] is supported by ample authority to the effect that a determina-

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[17] *See* 12 C.F.R. § 226.504(d) (1975). There is no indication in any opinion as to whether the sidenote payments met the definition of balloon payments. Nor is there any indication as to whether the disclosures as to balloon payments which are required by Regulation Z were made in the sidenotes.

[18] *See* 15 U.S.C.A. § 1602(f) (1974).

[19] *See* Federal Practice and Procedure section for a discussion of the Tenth Circuit's treatment of class actions.

[20] 417 U.S. 156 (1974). *See* text accompanying notes 12-13 *supra*.

tion on the merits is not a prerequisite to the maintenance of a class action.[21] It is not clear, however, that the inverse of that proposition is equally true—that a final adjudication of class action status or a certification of the class is a prerequisite to a finding on the merits as to certain of the members of the class (in the instant case, by way of summary judgment). Yet logic and due process would seem to require such a conclusion. The plaintiffs in *Redhouse* based their class action petition on subdivision (b)(3) of rule 23, which requires the court to find that common questions of law and fact predominate over individual questions. If the questions raised by the named plaintiffs were truly common, the avoidance of a multiplicity of actions, the essence of the class action, should have dictated a certification of the class followed by a trial on the merits and by one entry of judgment. If they were not common, the individual plaintiffs should have been segregated into a subclass[22] or the class action petition should have been dismissed. Without prejudice to the right of unnamed members of the class to receive notice of the class action and to determine whether or not to be bound by the judgment or to enter an appearance, any judgment entered prior to class certification could only bind the named plaintiffs, once again necessitating a series of law suits.[23]

B. *Class Action Issue*

While plaintiffs might not have met their burden of establishing that the requirements for a class action had been satisfied, the court's blanket insistence that a class action is not superior to other available procedures for Truth in Lending Act adjudications[24] suggests a profound distrust of class actions. Certainly, the cases cited in support of this rule are not in point.[25] The dissenting

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[21] Kahan v. Rosenstiel, 424 F.2d 161 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970); Shaw v. Mobil Oil Corp., 60 F.R.D. 566 (D.N.H. 1973); Haas v. Pittsburgh Nat'l Bank, 60 F.R.D. 604 (W.D. Pa. 1973); Cole v. Schenley Indus., Inc., 60 F.R.D. 81 (S.D.N.Y. 1973); City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971). *But see* Milberg v. Western Pac. R.R., 51 F.R.D. 280 (S.D.N.Y. 1970).

[22] FED. R. CIV. P. 23(c)(4)(B).

[23] *See id.* 23(c)(2), (3).

[24] 511 F.2d at 236.

[25] Rodriguez v. Family Publications Serv., Inc., 57 F.R.D. 189 (C.D. Cal. 1972), was expressly limited to its facts. Ratner v. Chemical Bank N.Y. Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972), held a class action inappropriate in view of the immense civil liability ($13 million) to which the defendant bank would have been subjected.

opinion is correct in its criticism of the majority opinion, which concluded that "class actions are not proper in cases such as the one at bar, where the action is predominantly for monetary damages."[26] The cases cited by the majority make clear that relying *only on subdivision (b)(2)* of rule 23 is improper in actions for monetary damages.[27] Subdivision (b)(2), not at issue in this subdivision (b)(3) case, is expressly limited to actions for injunctions and declaratory judgments. However, subdivision (b)(3) class actions have been held proper where the relief sought is monetary.[28]

In view of the court's apparent bias, *Redhouse* is a significant departure from prior denials of class action status in consumer credit protection cases. *Ratner v. Chemical Bank N.Y. Trust Co.*[29] attracted wide attention because the representative member of the class, who had suffered no actual damage as a result of defendant bank's nondisclosure, represented 130,000 other members and, thereby, subjected defendant to potential liability, under the liquidated damages provision of the Truth in Lending Act, of $13 million. The court in *Ratner* approved the cause of action but denied class action status.

In *Wilcox v. Commerce Bank*[30] the Tenth Circuit similarly denied class action status in a Truth in Lending Act case in which 180,000 class members subjected defendant bank to over $1 billion in civil liability. The ostensible basis for denial in *Wilcox* was the fact that the representative members had alleged no actual damage, but the court's concern for the consequences of a class action determination was evident.[31] The court was sensitive to the criticism in the briefs filed to the effect that its denial of class action status was in fact a policy decision. Despite this, the court still decided on policy grounds:

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[26] 511 F.2d at 236.

[27] Richardson v. Hamilton Int'l Corp., 62 F.R.D. 413, 421 (E.D. Pa. 1974) (class was in fact certified under rule 23(b)(3) and damages were sought); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968), *rev'd on other grounds*, 417 U.S. 156 (1974).

[28] *See, e.g.*, Richardson v. Hamilton Int'l Corp., 62 F.R.D. 413 (E.D. Pa. 1974).

[29] 54 F.R.D. 412 (S.D.N.Y. 1972).

[30] 474 F.2d 336 (10th Cir. 1973).

[31] *Wilcox* was distinguished in Haynes v. Logan Furniture Mart, Inc., 503 F.2d 1161 (7th Cir. 1974), and class action status was granted on the basis that actual damages had been alleged. It might have been more significant, however, that the class in *Haynes* included only 2,500 purchasers.

> Indeed the Rule [23] generally may be at the crossroads, many knowledgeable lawyers and some judges maintaining that it should be completely scrapped; others that it should be substantially revised or reformed; and still others that it should be even more liberally administered to effectuate or promote societal objectives *bearing little relationship to economics or practicality.*[32]

Thus, in the court's view, apparently the only practical alternatives were to scrap, to revise, or to reform rule 23.

In *Redhouse* the proposed class was of only 80 to 90 members, so that "realism and good sense"[33] (*i.e.*, the crushing consequences of imposing class action liability) were no longer factors. Since *Wilcox,* moreover, an amendment to the Truth in Lending Act has limited class action recoveries to the lesser of $100,000 or 1 percent of the creditor's net worth.[34] Yet the Tenth Circuit in *Redhouse* has gone to great lengths, in terms unrelated to the consequences of a class action determination, to express its dissatisfaction with consumer credit class actions.

C. *Damages Issue*

In requiring proof of actual damages and causation, the majority opinion strains at statutory construction and discounts the plain meaning of the liquidated damages sections of the federal and state statutes. Its reading of the purpose of the Truth in Lending Act is inconsistent, and the cases cited are not on point.[35] The purpose of the Truth in Lending Act, by its own terms, is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various *credit terms* available to him and avoid the uninformed use of credit."[36] Whether, by this statement of purpose, the Act is "remedial" or "punitive" should have no bearing whatsoever on liability for

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[32] 474 F.2d at 348-49 (emphasis added).

[33] *See id.* at 346-47 for an intelligent commentary on the judicial application of "realism and good sense" in weighing competing considerations in a class action determination.

[34] 15 U.S.C.A. § 1640(a) (Supp. Feb. 1975), *formerly* ch. 41, § 1640(a), 82 Stat. 157 (1968).

[35] Umdenstock v. American Mortgage & Inv. Co., 495 F.2d 589 (10th Cir. 1974), contained no reference to the purpose of the Truth in Lending Act. W.T. Grant Co. v. Commissioner, 483 F.2d 1115, 1117 n.4 (2d Cir. 1973), *cert. denied,* 416 U.S. 937 (1974), contained such a reference only in dictum. Wachtel v. West, 476 F.2d 1062 (6th Cir.), *cert. denied,* 414 U.S. 874 (1973), did *not* relate the Truth in Lending Act to *cost disclosure,* but rather said that "the purpose of disclosure is clearly to give the borrower an opportunity to do some comparative shopping for *credit terms.*" *Id.* at 1064 (emphasis added).

[36] 15 U.S.C.A. § 1601 (1974) (emphasis added).

only actual, as opposed to liquidated, damages. In fact, a recent amendment to the Act has made it clear that actual damages need not be alleged or proved although, if they are, recovery for actual damages *in addition to* liquidated damages will be allowed.[37]

Moreover, the phrase "credit terms" includes numerous non-cost items of information which Congress intended to be disclosed to consumers to prevent the uninformed use of credit.[38] If creditors may not be held liable for failure to disclose items which ordinarily lead to no out-of-pocket loss to consumers, then portions of the Truth in Lending Act and Regulation Z are merely precatory. Such a result is untenable, and the court's actual damages theory should, therefore, be rejected.[39]

The court's uneasiness with imposing liability where neither causation nor actual damages are shown[40] cannot be justified by statutory construction. It probably comports, however, with an accurate understanding of the relatively slight impact which the Truth in Lending Act has had on consumer attitudes. One research study has concluded, on the basis of research performed 15 months after the implementation of the federal statute, that:

> The Truth-in-Lending Act held promise for dramatic changes in the ways in which consumer credit was perceived and used by both consumers and credit sources. . . . While some changes were observed during the surveys of California consumers, it must be con-

[37] 15 U.S.C.A. § 1640(a) (Supp. Feb. 1975), *formerly* ch. 41, § 1640(a), 82 Stat. 157 (1968).

[38] *See, e.g.,* 12 C.F.R. § 226.8 (1975) which lists as disclosure items the method of rebate calculation, the existence and description of any penalty charge, the existence and description of any security interest, and the method of computation of any default or delinquency charges. A broad construction of the purpose of the Truth in Lending Act as compelling more than merely a disclosure of cost terms has been upheld. *See, e.g.,* N.C. Freed Co. v. Board of Governors, 473 F.2d 1210 (2d Cir.), *cert. denied*, 414 U.S. 827 (1973).

[39] *Cf.* Burgess v. Charlottesville Sav. & Loan Ass'n, 477 F.2d 40 (4th Cir. 1973) (dictum); White v. Arlen Realty & Dev. Corp., 374 F. Supp. 151 (D. Md. 1974) (dictum); Ratner v. Chemical Bank N.Y. Trust Co., 329 F. Supp. 270 (S.D.N.Y. 1971).

[40] The court in *Redhouse* goes so far as to note that the plaintiffs, who did not read their contracts prior to execution by their friends, could not thereby have been affected by any omission of information. 511 F.2d at 237. This argument, of course, would lead to the wholly unreasonable conclusion that one who cannot read is not subject to the protection of the Truth in Lending Act. It is submitted that disclosure is good per se, and that any rule of law which tends to minimize disclosure responsibilities (as well as to estop consumers who, in contract law, would not be bound by a contract they could not read) is bad policy.

> cluded that to date the higher hopes of the Truth-in-Lending Act remain unfulfilled. . . .
>
> . . . .
>
> Despite the rise in consumer knowledge, the effect of disclosure on actual purchase behavior has been minimal.[41]

The court's common sense approach in noting that "[n]o harm arose from the [creditor's] technical violations" may, therefore, be the first stirrings of judicial unrest on the damages issue, just as *Ratner* was on the issue of *in terrorem* liability in class actions. As usual, however, until the Truth in Lending Act is amended to reflect the court's possible perception of the Act's limitations, the concurring and dissenting opinions, which would have applied the statutory liquidated damages provisions, would appear to be the better view.[42]

D. *Disclosure Violation Issue*

There is no question that the giving of a sidenote, either to a dealer or to a third-party lender, to obtain a portion of a required downpayment (the "pickup payment") is a common practice in the automobile industry.[43] In recognition of this,[44] the majority opinion declined to follow *Gilbert v. Wood Acceptance Co.*,[45] which apparently held that, since a promissory note is "property" (and not cash) such as might be given in downpayment on a consumer sale, it should be identified on the disclosure statement. The court in *Redhouse* simply found the giving of a sidenote to be exempt from disclosure under the Truth in Lending Act on the theory that "no harm was done . . . ."[46] Like the concurring opinion, this erroneously assumes that disclosure is relevant

[41] Brandt & Day, *Information Disclosure and Consumer Behavior*, 7 U. MICH. J.L. REF. 297, 327 (1974).

[42] The court failed to reach the issue, raised below, of whether the creditor, who was alleged to have violated the disclosure provisions of both the Truth in Lending Act and the UUCCC, should be held liable in damages under both statutes, so as to permit a double recovery. There is no statute or judicial holding directly on point on this issue. It might be noted, however, that under the new Equal Credit Opportunity amendments to the Federal Consumer Credit Protection Act, proof of sex discrimination in the granting of credit will permit a credit applicant to pursue either a state or a federal remedy, *but not both*. 15 U.S.C.A. § 1591d(e) (Supp. Feb. 1975).

[43] For a regulation recognizing this practice, see 12 C.F.R. § 226.504(a) (1975).

[44] 511 F.2d at 238.

[45] 486 F.2d 627 (7th Cir. 1973).

[46] 511 F.2d at 238.

only where actual damages, resulting from a failure to disclose costs, are possible.[47]

The court might have relied upon Regulation Z, which provides in part that no disclosure need be made of a required "deposit balance" where the balance is to be "wholly applied toward satisfaction of the customer's obligation in the transaction."[48] Although this language may have been intended to describe only Morris Plan transactions, if a pickup payment can be characterized as a "deposit balance" the section would seem to cover partial downpayments as well. The language quoted, it might also be observed, is part of the same interpretation which may have been relied upon in *Umdenstock v. American Mortgage & Investment Co.*[49] to except escrow accounts from disclosure.[50]

Alternatively, the court might have held that the disclosure as contained in the sidenote itself was adequate, and that disclosure by means of more than one document is permissible. There is no authority for the statements in the majority and dissenting opinions that the Truth in Lending Act requires disclosure in a "single document."[51] The Act is silent on the form of disclosure,[52] and Regulation Z merely provides that "[a]ll of the disclosures shall be made together on . . . [o]ne side of a *separate statement* which identifies the transaction."[53] It is not inconceivable that a "separate statement" may consist of more than one page. Certainly disclosures not required by the Truth in Lending Act may be supplied to the consumer on a separate page.[54] In fact, Regulation Z expressly provides that disclosure of the consumer's right to rescind a credit transaction shall, under certain circumstances, be given by a separate document.[55]

On this point the court's common sense approach, which causes it to ignore possible technical violations of the Act, is on firmer ground than it is in regard to the damages issue. Human beings are limited in their capability to perceive and act upon raw

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[47] *See* text accompanying notes 36-37 *supra*.
[48] 12 C.F.R. § 226.8(e)(2)(ii) (1975).
[49] 495 F.2d 589 (10th Cir. 1974). *See* text accompanying notes 15-16 *supra*.
[50] *See* 12 C.F.R. § 226.8(e)(2)(i) (1975).
[51] 511 F.2d at 233 (majority), 239 (dissent).
[52] *See* 15 U.S.C.A. §§ 1631-66 (1974), *as amended,* (Supp. 1975).
[53] 12 C.F.R. § 226.8(a) (1975) (emphasis added).
[54] 15 U.S.C.A. § 1632(b) (1974); 12 C.F.R. § 226.6(c) (1975).
[55] 12 C.F.R. § 226.9(b) (1975).

information. The utility to the plaintiffs of having an itemized description of the sidenotes included in their federal disclosure statement is difficult to comprehend. Nondisclosure of a pickup payment knowingly contracted for can only work to the detriment of a major *creditor,* which may require a downpayment as evidence of the debtor's payment capacity when in fact no such capacity exists. For these reasons, if Congress or the Board of Governors intends the concept of disclosure to extend this far, it should expressly say so.

E. *Scope of Liability Issue*

Showing the only unanimity in the case, each opinion absolved the dealership manager from liability as a "creditor" under the Truth in Lending Act. The definitions contained in the Act provide that the "term 'creditor' refers only to creditors who regularly extend, or arrange for the extension of, credit . . . ."[56] As an "arranger" of credit, dealers have been held liable for disclosure violations.[57] Similarly, the connexity test has been adopted to bind assignees as "creditors."[58] That a dealer's agent was not held liable as a "creditor" in this case of first impression would appear consistent with the notion of *respondeat superior.*

BANKER'S BLANKET BOND

First National Bank & Trust Co. v. Continental Insurance Co., 510 F.2d 7 (10th Cir. 1975)

The risk of doing business, as well as the dramatic increases in the cost of insuring against bad business practices, which only lately occupied the attention of doctors and lawyers, now concerns the banking industry as well. Reliance on the standard Banker's Blanket Bond to offset an extraordinary range of normal losses has inspired a flurry of litigation as banks endeavor to pare the definition of excluded risks.[59]

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[56] 15 U.S.C.A. § 1602(f) (1974).

[57] Starks v. Orleans Motors, Inc., 372 F. Supp. 928 (E.D. La.), *aff'd*, 500 F.2d 1182 (5th Cir. 1974). *But cf.* Manning v. Princeton Consumer Discount Co., 390 F. Supp. 320 (E.D. Pa. 1975).

[58] Philbeck v. Timmers Chevrolet, Inc., 361 F. Supp. 1255 (E.D. Ga. 1973).

[59] *See Definition of Dishonesty in Banker's Blanket Bond Differs by Court Jurisdic-*

In *First National Bank & Trust Co. v. Continental Insurance Co.*[60] plaintiff bank, incorporated in Oklahoma, issued a letter of credit covering a depositor's checks. The depositor then apparently embarked upon a check-kiting operation. The check-kiting scheme broke down, but, because the bank believed it was liable to a collecting bank on the letter of credit, several checks presented for payment were paid and the depositor's account was permitted to become overdrawn. To cover the overdraft without necessitating a charge to the profit and loss account, the bank obtained signed notes from the depositor in an amount equal to the overdraft. The depositor-borrower later defaulted on the notes, and the bank ultimately incurred a loss of $121,324.38.

When normal collection efforts failed, the bank brought suit against the insurance carrier and alleged that, under its standard Banker's Blanket Bond, the insurer was liable for the loss. Although the bond specifically excluded liability for loan losses, losses of property through "false pretenses" were included in the coverage. The bank argued that the loss had been caused by the check-kiting scheme and, as such, represented a loss of property through "false pretenses." In support of its position, the bank pointed to the non-existence of certain collateral supposedly assigned to secure the notes. The non-existence of the collateral, the bank contended, further evidenced the depositor-borrower's intent to defraud.

The Tenth Circuit, in this case of first impression, rejected the bank's argument. "False pretenses," for the purpose of determining liability under a Banker's Blanket Bond, the court stated, has repeatedly been deemed to include a loss of money through a check-kiting operation. Here, however, plaintiff bank suffered a *loan loss,* the cause of which could be traced only indirectly to the check-kiting scheme. That the loan might have been induced by a pledge of non-existent collateral did not affect the character of the loss as an excluded risk since the loan was still valid on its face. The court suggested that when the bank discovered the check-kiting operation, it made a calculated credit decision to cover its loss with a note. The Tenth Circuit thus agrees in princi-

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tion, Lawyers Say, AMERICAN BANKER, August 13, 1974 at 1; *Walker of C & S Advises Banks Widen Reliance on Risk Management, Reduce Use of Insurance,* AMERICAN BANKER, April 23, 1974 at 1.

[60] 510 F.2d 7 (10th Cir.), *cert. denied,* 421 U.S. 949 (1975).

ple with *First National Bank v. Aetna Casualty & Surety Co.*[61] in which the Sixth Circuit noted that "[i]t was not intended by the bond to provide credit insurance for the Bank. . . ."[62]

The court's decision comports with the equitable principles which appear to govern the identification of excluded risks in Banker's Blanket Bonds.[63] However, the opinion overstates and tends to federalize the law on what constitutes "false pretenses." The cases relied upon by the court, in concluding that a check-kiting loss is a loss through "false pretenses," all make clear that the question is one of state law. Whether an overdraft is deemed a loan is a question of state law,[64] as is the question of intent to defraud, which is generally held to be one of the elements of the crime of false pretenses.[65] For example, in Illinois and Nebraska the deceptive practices statutes contain a statutory presumption of intent to defraud; check-kiting schemes are clearly within the scope of the statutes.[66] Similarly, a Missouri statute identifies check-kiting as one of the offenses of false pretenses punishable as a felony.[67] There is no question that "Louisiana's criminal law prohibits the knowing issuance of worthless checks,"[68] and that Alabama law regards the withdrawal of funds from an account to which bogus drafts had previously been credited as a "false pretense."[69] In *Continental Insurance*, however, the court gave no consideration to the applicable Oklahoma law on either over-

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[61] 309 F.2d 702, (6th Cir. 1962), *cert. denied*, 372 U.S. 953 (1963).

[62] *Id.* at 705.

[63] *See id.*, where the Sixth Circuit went so far as to characterize a bank's out-of-court settlement with third parties as a loan loss, and thus an excluded risk, even though the loan in question had been *paid in full*. The settlement had the effect of protecting the bank from a claim of the borrower's trustee in bankruptcy, who, if successful in asserting the claim, could have preserved for the bankrupt's estate the amount of the repayment on the loan.

[64] *See* First Nat'l Bank v. Insurance Co. of N.A., 424 F.2d 312 (7th Cir. 1970); National Bank of Commerce v. Fidelity & Cas. Co., 312 F. Supp. 71 (E.D. La. 1970), *aff'd.*, 437 F.2d 96 (5th Cir. 1971).

[65] *See* Reeves v. State, 68 Okla. Cr. 163, 96 P.2d 536 (1939).

[66] First Nat'l Bank v. Insurance Co. of N.A., 424 F.2d 312 (7th Cir. 1970); United States v. Western Contracting Corp., 341 F.2d 383 (8th Cir. 1965).

[67] Mo. ANN. STAT. § 561.450 (Vernon 1953). *See* Fidelity & Cas. Co. v. Bank of Altenburg, 216 F.2d 294 (8th Cir. 1954); Hartford Acc. & Indem. Co. v. FDIC, 204 F.2d 933 (8th Cir. 1953).

[68] National Bank of Commerce v. Fidelity Cas. Co., 312 F. Supp. 71, 74 (E.D. La. 1970), *aff'd*, 437 F.2d 96 (5th Cir. 1971).

[69] Shoals Nat'l Bank v. Home Indem. Co., 384 F. Supp. 49 (N.D. Ala. 1974).

drafts or intent to defraud (or any other state law definition of false pretenses). Instead the court suggested that, at least in the Tenth Circuit, check-kiting is very nearly per se an act evidencing false pretenses.

Attorneys representing banks can learn several lessons from *Continental Insurance*. First, because loan losses in the Tenth Circuit are likely to be regarded henceforth as excluded risks irrespective of the circumstances under which they arise, it is absolutely essential that the rights of a bank against its insurer be fully evaluated by counsel before the bank takes back a note to evidence an indebtedness; otherwise any right under a Banker's Blanket Bond may be deemed waived. In *Continental Insurance* the bank's difficulties began when its lending officer issued an unlimited letter of credit to a collecting bank "guaranteeing" payment of all the depositor's checks when presented under specified conditions. Such an unrestricted letter of credit is susceptible to any number of fraudulent practices and should be avoided.

Second, if a meritorious claim against the insurer exists, the bank should consider, as an alternative to taking back a note or to allowing a debt to arise and then charging it against the profit and loss account, the simple expedient of giving notice of the claim and refusing to honor any contractual commitment at stake. In *Continental Insurance* it would have been an easy matter for the plaintiff bank to dishonor the depositor's checks when presented for payment, thus avoiding the overdraft in the first instance. Although plaintiff might well have been obligated to the collecting bank on its letter of credit, the better course of action would have been to litigate the obligation and allow any such liability to be reduced to judgment, because even then it could have asserted its claim against the insurer. *First National Bank v. Maryland Casualty Co.*[70] held that, if such a judgment is binding and based upon a specific finding that the bank against which judgment is entered incurred a loss as a result of a covered act, the bank's consequent liability on the judgment is similarly covered and the indemnitor is bound.[71] Another district court, in construing a Banker's Blanket Bond, has also held that:

[70] 354 F. Supp. 189 (S.D.W. Va. 1973).
[71] *Id.* at 194-95.

> The payment of a legal liability caused by the dishonest act of the employee is a "loss of money" to the same practical effect as it would be if the employee actually took the money out of the till.[72]

Third, in asserting a claim against its insurer for a loss through "false pretenses," no bank in the Tenth Circuit should rely on evidence of extrinsic fraud. On this point, the federal courts speak in harmony.[73] In adding its voice, the Tenth Circuit implicitly adopts a construction of the term "false pretenses" which is consistent with the concept of intrinsic fraud or fraud in the execution. Only if a loan or other transaction is invalid on its face—presumably by virtue of the documents employed, the signatories to it, or otherwise—will the court consider allocating risk for a loss arising from it to an insurer.

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[72] Hooker v. New Amsterdam Cas. Co., 33 F. Supp. 672, 673 (W.D. Ky. 1940); *cf.* Imperial Ins., Inc. v. Employers Liab. Assurance Corp., 442 F.2d 1197 (D.C. Cir. 1970).

[73] *See* Roodhouse Nat'l Bank v. Fidelity & Deposit Co., 426 F.2d 1347 (7th Cir. 1970) (falsification of retail installment contracts used by used-car dealer to obtain credit, even though a forgery under Tennessee law, comes within exclusion); East Gadsen Bank v. U.S. Fidelity & Guar. Co., 415 F.2d 357 (5th Cir. 1969) (inducement by extrinsic facts leading to loan loss comes within exclusion); Capitol Bank v. Fidelity & Cas. Co., 414 F.2d 986 (7th Cir. 1969) (properly executed written instruments describing non-existent underlying transactions, not being forged or counterfeited under Illinois law when taken as collateral to secure loan leading to loss, come within exclusion); First Nat'l Bank v. Aetna Cas. & Sur. Co., 309 F.2d 702 (6th Cir. 1962), *cert. denied*, 372 U.S. 953 (1963) (warehouse receipts describing non-existent soya beans, not being forged under Tennessee law, come within exclusion); State Bank v. Maryland Cas. Co., 289 F.2d 544 (8th Cir. 1961) (inducement by extrinsic facts leading to loan loss comes within exclusion); Community Fed. Sav. & Loan Ass'n v. General Cas. Co., 274 F.2d 620 (8th Cir. 1960) (false representations inducing loan which leads to loss come within loan loss exclusion of Banker's Blanket Bond).