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COMMERCIAL LAW

This section comments briefly on Tenth Circuit cases applying the law of bankruptcy, the Uniform Commercial Code ("UCC"), corporations, and creditor-debtor relations. Except that most were occasioned by a business failure, the cases have little in common, and their significance is otherwise limited. Narrow but interesting questions of law are approached with caution. Opportunities to make new law are generally avoided by the court. The holding and principal consequences of each case are discussed in the text. Extended comment on the court's analysis is usually reserved for the notes.

I. BANKRUPTCY

A. *Sherr v. Sierra Trading Corp.*, 492 F.2d 971 (10th Cir. 1974)

Although unusual in its facts, *Sherr v. Sierra Trading Corp.*[1] reaffirmed the familiar rule that a bankruptcy court does not have summary jurisdiction over property of a debtor which, on the date of the filing of the petition in bankruptcy or other assertion of jurisdiction, is held adversely to the bankrupt estate unless the adverse claimant consents.[2] Here the debtor, a Colorado corporation, was the owner of certain oil and gas leaseholds situated in Wyoming. The property over which the Colorado bankruptcy court asserted summary jurisdiction was all of the proceeds from the sale of production from one of these leaseholds, in which the debtor owned a 25 percent working interest. These funds were held by an Ohio corporation which had purchased the production in Wyoming, presumably before the filing of the petition, and had then resold it. Subject to offsets for production costs, the proceeds were allocable among the debtor and the holders of the remaining 75 percent working interest, residents of New York. Following the filing of the petition in bankruptcy, but before the trustee obtained a Turnover Order, the owners of the 75 percent working interest brought an action against the Ohio corporation in a Wyoming state court for an accounting of the proceeds.

Distinguishing the production proceeds from the debtor's

[1] 492 F.2d 971 (10th Cir. 1974).

[2] *In re* Rosser, 101 F. 562 (8th Cir. 1900); 2 COLLIER ON BANKRUPTCY ¶ 23.04[2], .06[1], .10[2] (14th rev. ed. J. Moore ed. 1974) [hereinafter cited as COLLIER]. The basic jurisdiction of the bankruptcy court is defined in section 23 of the Bankruptcy Act, 11 U.S.C. § 46 (1970).

leasehold interest,[3] the court found that, at the time of the bankruptcy court's assertion of jurisdiction, the funds were held by the Ohio corporation, which it characterized as a "third person."[4] To the extent that the proceeds were subject to the adverse claims of the New York owners of the 75 percent working interest, the court concluded they were not the "property of the debtor" within the meaning of section 111 of the Bankruptcy Act.[5] Plenary jurisdiction was therefore a prerequisite to an adjudication of rights in the proceeds, and since the Wyoming state court had obtained constructive possession of the proceeds through valid proceedings prior to the Turnover Order, the jurisdiction of the state court became exclusive.[6] Accordingly, the appellate court suggested that the bankruptcy court should consider directing the trustee to appear in the Wyoming state court proceedings and to initiate such ancillary proceedings as might be necessary to determine the claimed rights of the debtor in the proceeds from production of other leaseholds.[7]

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[3] 492 F.2d at 977. *Cf.* UNIFORM COMMERCIAL CODE § 2-107(1), which defines the sale of severed minerals as a sale of goods, and thus of a property interest separate from the land. The court in *Sherr* thus impliedly overrules Davidson v. Schofield, 153 F.2d 7 (10th Cir. 1946). On virtually identical facts, the circuit court there rejected an objection to the bankruptcy court's summary jurisdiction over adverse claims of title to production proceeds, in the possession of a third party, from an oil leasehold in which the adverse claimant held an undivided one-half interest. It gave as a reason for its rejection the fact that, on the date of the filing of the petition, the property, if not the proceeds, was in the constructive possession of the debtor.

[4] 492 F.2d at 977. This is one of the few subtle issues of law raised by *Sherr*. The court hedges on whether the crude oil purchaser, which was little more than a stakeholder, should be viewed as an "adverse claimant," or whether the subjection of the proceeds in its possession to the adverse claims of the owners of the 75 percent working interest was sufficient to deny summary adjudication. Although several courts have suggested that the third party-possessor must be the claimant, *In re* United General Wood Products Corp., 483 F.2d 975 (9th Cir. 1973) (where debtor factored accounts receivable with financial institution, bankruptcy court had summary jurisdiction to adjudicate claims to funds in possession of factor which asserted no claim to them, notwithstanding adverse claims of Government, which had served notice of tax levy on debtor prior to filing of petition in bankruptcy); 2 COLLIER ¶ 23.04[2], the court in *Sherr* seems to argue that the crude purchaser, in assuming a duty to collect and remit the proceeds of sale to the owners of the working interest, acted in some sense as the agent of each claimant, and that in that event it should be viewed as an adverse claimant in itself. *See* Buss v. Long Island Storage Warehouse Co., 64 F.2d 338 (2d Cir. 1933) (summary jurisdiction will not lie against warehouseman who, at the time of bankruptcy of buyer, held goods subject to competing claims of buyer and seller); 2 COLLIER ¶ 23.06[1].

[5] 11 U.S.C. § 511 (1970).

[6] 492 F.2d at 977-78; Metcalf v. Barker, 187 U.S. 165, 175 (1902); 2 COLLIER ¶ 23.17.

[7] 492 F.2d at 977.

B. *In re Public Leasing Corp.*, 488 F.2d 1369 (10th Cir. 1973)

In re Public Leasing Corp.[8] consolidated two unrelated bankruptcy cases on appeal. In the first, a creditor bank asserted a contractual right to deduct attorney's fees from the sale proceeds of certain reclaimed collateral. Although the debtor had originally filed a petition for reorganization, the bank and other secured creditors successfully moved for an involuntary adjudication of bankruptcy. Counsel for the receiver, relying on the only Tenth Circuit decision on point,[9] argued that a creditor has a provable claim only for those services rendered prior to the filing of a petition in bankruptcy, and that therefore the bank's right to deduct attorney's fees from the proceeds extended only to those services performed before the filing of the reorganization petition.

The court declined to reexamine the rationale of its earlier decision, the importance of which has been blunted, since the 1938 amendment of section 63a, by the admission to proof of "claims based upon contingent debts and contingent contractual liabilities."[10] Instead, the court held simply that a "reorganization" is not a "bankruptcy,"[11] and that therefore the bank had a provable claim for attorney's services rendered until the adjudication in bankruptcy. By that time, the debtor was clearly in default, and the bank had "properly and necessarily employed attorneys" in its effort to reclaim.[12] Although approving the claim, and despite the fact that the parties had stipulated to the reasonableness of the attorney's fee requested, the court remanded for a determination of the proper amount.[13]

The second case affirmed the validity, under section 9-204(5) of the UCC,[14] of cross-collateralization clauses in security agree-

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[8] 488 F.2d 1369 (10th Cir. 1973).

[9] American Nat'l Bank v. Bartlett, 40 F.2d 21 (10th Cir. 1930).

[10] 13A COLLIER ¶ 63.15[3]; *see* 11 U.S.C. § 103a(8) (1970). The argument, of course, is that, apart from the question of reasonableness, the amount of a debt for attorney's fees is generally fixed by contract and therefore liquidated, but the fact of the need for his services may be contingent upon such occurrences as the allowance of reclamation. Under the more liberal post-1938 interpretation of section 63a, attorney's fees may be regarded as a provable claim even where the services are not provided until after the adjudication. *See* Hartman v. Utley, 335 F.2d 558 (9th Cir. 1964); Blackford v. Commercial Credit Corp., 263 F.2d 97, 115 (5th Cir. 1959); *In re* Crowder, 301 F. Supp. 1102, 1104 (E.D. Ark. 1969).

[11] 488 F.2d at 1373.

[12] *Id.* at 1374.

[13] *Id. See* Webster Drilling Co. v. Walker, 286 F.2d 114, 117 (10th Cir. 1961); American Nat'l Bank v. Bartlett, 40 F.2d 21, 25 (10th Cir. 1930); 13A COLLIER ¶ 63.15[3].

[14] All Code citations in this section, unless otherwise noted, are to the official version of the UNIFORM COMMERCIAL CODE.

ments. Thus, a secured creditor was permitted to apply the sale price of certain reclaimed collateral against all cross-collateralized obligations of the debtor.[15]

C. *E. F. Corp. v. Smith*, 496 F.2d 826 (10th Cir. 1974)

E. F. Corp. v. Smith[16] made several striking additions to the law of bankruptcy and secured transactions. The Tenth Circuit concluded that an accounting firm gave no "value," as defined in UCC section 1-201(44),[17] when it took a $40,000 note, secured by a mortgage and other security interests, from a client-debtor partly for an antecedent debt of $8,000 and partly because "[future] accounting services were contemplated."[18] Value, the court held, was given only later when the services were actually and "voluntarily" performed. Since the debtor filed a petition in bankruptcy 6 months after the transaction but within 4 months of the performing of the services, the accounting firm was denied the status of a secured creditor, and its claim on the note as to the new services was barred under section 60 of the Bankruptcy Act[19] as a preference.

In thus holding, the court notes but does not apply UCC section 1-201(44)(d), which states that value may be given "in return for any consideration sufficient to support a simple contract."[20] In contract law, of course, a promise is sufficient consideration for a promise,[21] and the only other case in point has specifically held that the section 1-201(44) definition of "value" does include a promise.[22] Although the accounting firm's contempla-

[15] When the debtor sold certain pieces of financed equipment and remitted the balances owing to the creditor, the creditor's release of its security interest as to those items was regarded by the court as the accommodation of a valuable customer, and not as the waiver of the creditor's cross-collateralization rights. 488 F.2d at 1378.

[16] 496 F.2d 826 (10th Cir. 1974).

[17] UNIFORM COMMERCIAL CODE § 1-201(44) states that:

> [A] person gives "value" for rights if he acquires them
> (a) in return for a binding commitment to extend credit . . . or
> (d) generally, in return for any consideration sufficient to support a simple contract.

[18] 496 F.2d at 828.

[19] 11 U.S.C. § 96 (1968). *See* UNIFORM COMMERCIAL CODE §§ 9-303(1), 9-203(1) *as amended.*

[20] 496 F.2d at 830.

[21] United States v. Bethlehem Steel Corp., 315 U.S. 289, 299 (1942).

[22] *In re* Nicolosi, 4 UCC Rep. Serv. 111 (S.D. Ohio 1966). In that case, the court said:

> The Uniform Commercial Code definition of "value" (because of the code purpose of being so broad as to not derogate from the ideal ubiquitous secured creditor), very definitely covers a promise for a promise.

Id. at 113. *See also* UNIFORM COMMERCIAL CODE §§ 1-201(44) (b), 3-303(b), which conceivably may also apply.

tion of future services may well have amounted to a promise,[23] the court does not consider this factual issue. Instead, it disposes of the separate issue as to whether or not the creditor gave any "binding commitment" in return for the note and mortgage,[24] and it draws a sharp distinction between personal services and loans as claims which a creditor may be permitted to secure as against a trustee in bankruptcy. In broad language, the court states:

> We see no conflict between this result and the holdings in the accounts receivable and after-acquired inventory cases [in which money had been loaned, or a commitment made to advance in the future, against after-acquired assets of the bankrupt]. In those cases, the benefit had been received by the bankrupt before the four-month cutoff. In the instant case it had not. To permit relation back of a claim for voluntary personal services within the four-month period would provide a loop hole which, in our opinion, was not intended by either the Bankruptcy Act or the Uniform Commercial Code. Secured status was properly denied for the amount due on account of the personal services in question.[25]

There is no basis in law or policy for such a distinction, which has the effect of denying the literal meaning of section 1-201(44)(d) and of excluding from the class of secured parties all creditors other than lenders. Such a conclusion could not have been intended by the court, which may wish to reexamine its major holding and the dicta on which it apparently was based.

One other bankruptcy question was decided by the Tenth Circuit in *E. F. Corp.* The court held that where a corporate director had no knowledge of the unauthorized giving of a mortgage on the corporation's assets, his ratification of all actions taken by the officers and directors was ineffective, and the mortgage was therefore invalid.[26] Moreover, the corporation could not

[23] It is difficult to conclude that some agreement as to the future work was not made, for the note given was for five times the amount of the unpaid portion of the antecedent debt, and equalled the sum of the unpaid portion and both bills for future services. 496 F.2d at 828. Indeed, the court states that the note was given "[p]ursuant to a demand for security on the old debt *and for the future work.*" (Emphasis added) *Id.* The court's references to the "voluntary" nature of the creditor's expenditure of $20,000 in new accounting services are thus presumably inapt. *Id.* at 831. So too is its characterization of the transaction as one involving "future advances." *Id.* at 830. The decision does suggest a certain terminological confusion. Twice the court refers to financing statements as "financial statements." *Id.* at 831.

[24] "The only claim of value here is that of a binding commitment to render future accounting services." *Id.* Conceivably, the section 1-201(44)(d) claim was not pursued by the creditor's attorneys, who were also parties to the action. In any event, section 1-201(44)(a) refers specifically to a commitment "to extend credit" and, therefore, would not appear to have been at issue.

[25] *Id.*

[26] *Id.* at 829.

be estopped from denying the validity of the mortgage since no benefits had flowed to it and, if they had, they would have been accepted without knowledge.[27] When the corporation later, within the 4 months prior to the filing of its petition in bankruptcy, gave to the mortgagee a note which, in the words of the court, was "allegedly secured under the future advance clause of the . . . mortgage,"[28] the transfer "had nothing to relate back to"[29] and was therefore voidable as a preference.

The court's reference to future advances appears to be inappropriate, as there is no indication in the opinion that the creditors, who were attorneys retained by the bankrupt, had performed services for it, or had contracted to do so, within the 4-month period prior to the filing of the petition. It would necessarily have been such services, or some other value passing from the creditors to the bankrupt, and not a note passing from the bankrupt to the creditors, which might properly be characterized as a "future advance." Even if the mortgage had been valid, therefore, there could have been no relation back of note to mortgage. There ie a more critical problem with the court's reasoning, however. The incurring of the new obligation was not a parting with or encumbering of the corporation's property. Consequently, it was not a *preferential* transfer, as the term "transfer" is defined in section 1(30) of the Bankruptcy Act.[30] At best the giving of the note constituted a *fraudulent* transfer,[31] with different consequences and elements of proof.

Finally, the court held that when the accounting firm, to improve its position as a secured creditor of the bankrupt, purchased an assignment of yet another note and mortgage of the bankrupt, with knowledge that the note was past due, it had notice of the infirmity, was therefore not a holder in due course under UCC section 3-302(1)(c), and could not recover on the in-

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[27] *Id.* at 829-30.

[28] *Id.* at 830.

[29] *Id.*

[30] 11 U.S.C. § 1(30) (1966). That section defines "transfer" as

> the sale and every other and different mode, direct or indirect, of disposing of or parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein . . . as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise. . . .

[31] 11 U.S.C. § 107d(2) (1953). By definition, a fraudulent transfer includes the incurring of an obligation.

strument, presumably because it became subject to the personal defense of invalidity.[32]

II. UNIFORM COMMERCIAL CODE

A. *Port City State Bank* v. *American National Bank*, 486 F.2d 196 (10th Cir. 1973)

Port City State Bank v. American National Bank[33] construed UCC section 4-108(2).[34] The point at issue was whether the failure of a payor bank's computer excused a late return[35] of two dishonored checks. The Tenth Circuit held that the trial court's finding of justifiable delay, predicated on both an "emergency condition" and a "circumstance beyond the control of the bank," was "in no way erroneous."[36] In support of its holding, the court asserted that the "statute is clear and unambiguous on its face,"[37] and that the views of the district court judge should carry "extraordinary peruasive weight on appeal" because he was a resident of the state where the controversy arose.[38]

While the equities may have favored the payor bank,[39] *Port City State Bank* is nevertheless a remarkably expansive reading of section 4-108(2). An equipment failure is not typically regarded as *force majeure* or an "Act of God,"[40] and it is hardly accurate to conclude that the computer failure was entirely "beyond the control of the bank." Certainly the computer equipment was selected by it for its use, was within its custody and physical con-

[32] 496 F.2d at 830. The invalidity of this third mortgage is not discussed in the opinion, but it may be assumed that it too was executed by two of the corporation's directors without the knowledge or knowing ratification of the third.

[33] 486 F.2d 196 (10th Cir. 1973).

[34] UNIFORM COMMERCIAL CODE § 4-108(2) reads as follows:

> Delay by collecting bank or payor bank beyond time limits prescribed or permitted by this Act or by instructions is excused if caused by interruption of communication facilities, suspension of payments by another bank, war, emergency conditions or other circumstances beyond the control of the bank provided it exercises such diligence as the circumstances require.

[35] *See* UNIFORM COMMERCIAL CODE § 4-302.

[36] 486 F.2d at 200.

[37] *Id.*

[38] *Id.*

[39] Apparently a rural financial institution, the payor bank would have been accountable under UNIFORM COMMERCIAL CODE § 4-302 for over $192,000 in late returns had the delay not been excused. No policy basis requires its accountability, particularly in view of its admitted diligence in seeking to correct the failure. 486 F.2d at 200.

[40] *See, e.g.*, Gulf Oil v. Lemmons, 198 Okla. 596, 181 P.2d 568 (1947) (Act of God means some inevitable accident which could not have been prevented by human care, skill, and foresight, but which results exclusively from nature's cause, such as lightning, tempest, and floods).

trol, and was subject to maintenance by its operatives.[41] If the risk of "products liability" under article 4 is to be borne by the banking system as a whole, then it would seem that breakdowns of less sophisticated pieces of equipment and other minor "emergencies" should also act to excuse collecting and payor banks from adherence to the time limits imposed. Whether such a conclusion is consistent with efficient collections is questionable.

B. *Amoco Pipeline Co. v. Admiral Crude Oil Corp.*, 490 F.2d 114 (10th Cir. 1974)

In *Amoco Pipeline Co. v. Admiral Crude Oil Corp.*,[42] the court affirmed the jurisdiction of the New Mexico district court, as against an Oklahoma reorganization court, to determine adverse claims of right in certain crude oil and its proceeds. These were in the possession of a common carrier in New Mexico at the time that the Oklahoma buyer was adjudicated bankrupt. In so concluding, the circuit court relied upon two alternative theories. First, it held that when the buyer "refused to accept" the carrier's "tender" of oil conditioned upon the discharge of its lien for prior deliveries, any title to the oil existing in the buyer revested, under UCC section 2-401(4),[43] in the sellers.[44] The reorganization court thus could have no subsequent jurisdiction over the property or its proceeds since, under section 111 of the Bankruptcy Act,[45] they were not "property of the debtor" at the time of the assertion of jurisdiction.[46] Second, the court held that, even if the buyer could be described as having taken title to the oil, the sellers had validly exercised their rights of stoppage *in transitu*, under UCC sections

[41] *Cf.* Sun River Cattle Co., Inc. v. Miner's Bank of Montana, 31 St. Rep. 44, 13 UCC Rep. Serv. 1117, *aff'd on rehearing*, 521 P.2d 679 (Mont. 1974), in which a bank's normal operating procedure of transporting checks by truck to a computer center three hours from the bank was held insufficient, under UNIFORM COMMERCIAL CODE § 4-108, to demonstrate such diligence as the circumstances required where the truck and computer both malfunctioned, resulting in late returns. *But see* UNIFORM COMMERCIAL CODE § 4-108, Official Comment 3, which includes, among the listed examples of emergency conditions and other circumstances beyond the control of the bank, "abnormal operating conditions such as substantial increased volume or substantial shortages of personnel during war or emergency situations." Under appropriate circumstances, and properly plead, this might seem to excuse the "abnormal operating condition" of a computer failure.

[42] 490 F.2d 114 (10th Cir. 1974).

[43] UNIFORM COMMERCIAL CODE § 2-401(4) reads:

> A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, . . . revests title to the goods in the seller . . . .

[44] 490 F.2d at 117.

[45] 11 U.S.C. § 511 (1970).

[46] *Cf.* Sherr v. Sierra Trading Corp., 492 F.2d 971 (10th Cir. 1974), text accompanying notes 1-7 *supra*, which was decided on a similar theory.

2-702(1) and 2-705, and reclamation, under section 2-702(2).[47] In support of this theory, the court observed that the 10-day period following delivery within which demand for reclamation ordinarily must be made[48] did not apply since evidence of the buyer's insolvency[49]—the dishonoring on account of insufficient funds of a check it had issued to the sellers—also constituted a written "misrepresentation of solvency" under UCC section 2-702(2).[50]

Although the holding appears just, the language of the decision raises certain questions. For example, there is no UCC provision entitling a seller or carrier, absent prior agreement,[51] to condition delivery of goods to even an insolvent buyer on payment of an indebtedness on *other* contracts.[52] Moreover, it has been held that nonpayment alone is not a basis under section 2-401(4) for a revesting of title in the seller.[53] Therefore, only if the buyer's "rejection or other refusal"[54] extended specifically to receipt of the goods, and not to the condition attached to their delivery, is the court's revesting-of-title theory founded on Code law.[55]

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[47] 490 F.2d at 117. UNIFORM COMMERCIAL CODE § 2-702(2) reads:

> Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply . . . .

Because the New Mexico version of section 2-702(3) does not contain the words "lien creditor," N.M. STAT. ANN. § 50A-2-702(3) (1962), no issue of bankruptcy law was raised in Amoco. *See In re* Colacci's of America, Inc., 490 F.2d 1118 (10th Cir. 1974), discussed in text accompanying notes 60-79, *infra*.

[48] UNIFORM COMMERCIAL CODE § 2-702(2).

[49] *Id.* § 1-201(23).

[50] 490 F.2d at 117.

[51] *See* UNIFORM COMMERCIAL CODE § 2-401(1).

[52] UNIFORM COMMERCIAL CODE § 2-702(1) allows such a condition only as to the delivery at hand and to "payment for all goods theretofore delivered under *the* contract." (Emphasis added). *Cf.* § 2-507, which is similarly restricted. This codifies the right of a common carrier at common law to a specific lien on goods involved in one transaction or consignment only. Arkansas Fuel Oil Co. v. Leisk, 133 F.2d 79, 81 (5th Cir. 1943); Hammer Lumber Co. v. Seaboard Air Line Ry., 179 N.C. 359, 102 S.E. 508 (1920). At common law, where a carrier delivered goods without collecting payment for charges against them, the carrier's lien was waived. Missouri Pac. R.R. v. Pfeiffer Stone Co., 66 Ark. 266, 266 S.W. 82 (1924); 13 C.J.S. *Carriers* § 330 (1939). Of course, Amoco may have had a contract right to assert and enforce its lien for charges incurred in connection with prior deliveries against the crude oil presently in its possession, but this would not have justified the Code interpretation expressed by the court.

[53] Jordan v. Butler, 182 Neb. 626, 156 N.W.2d 778 (1968); Underwood v. Commonwealth, 390 S.W.2d 635 (Ky. Ct. App. 1965). *Cf.* Metropolitan Auto Sales Corp. v. Koneski, 252 Md. 145, 249 A.2d 141 (1969).

[54] UNIFORM COMMERCIAL CODE § 2-401(4).

[55] On this point, the decision is equivocal. The court's recitation of the facts states that "[o]n February 10, 1972, . . . Admiral [the buyer] refused to pay the lien claim

Similarly, the sellers' reclamation rights depend upon the court's finding that a dishonored check, *without more*, constitutes a written misrepresentation of solvency, and for this rule there is no support in the case law.[56] *Theo. Hamm Brewing Co. v. First Trust & Savings Bank*,[57] cited as authority by the court, held instead that, under Illinois law, checks cannot be regarded as a representation of solvency unless the seller treats them as such, as in relying on them in its dealings with the buyer. *Hamm* is thus typical of recent cases[58] which have read a common law element of reliance into section 2-702(2). However, the Tenth Circuit in *Amoco* did not consider the extent, if any, to which the crude oil sellers, in making their February 1 shipment, relied upon the buyer's check in payment of its December purchases.[59]

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and refused to accept the oil . . . ." (Emphasis added) 490 F.2d at 116. Other references in the opinion, however, fail to make clear whether the buyer's refusal to accept delivery of the goods was discrete and separate from its refusal to pay the lien claim. For instance, the court concludes that "Admiral, when it refused on February 10, 1972, to accept the tender of the crude oil from Amoco [the carrier] *conditioned upon payment* by Admiral of Amoco's common carrier lien, caused thereby title to revest, if indeed it ever passed to Admiral, in the oil producing sellers." *Id.* at 117 (emphasis added). More importantly, since the crude oil was never transported to the buyer, but rather was held in storage at or near the point of receipt from the sellers, *id.* at 114 and 116, it is unlikely that the buyer was ever in a position, under section 2-401(4), to refuse to "receive or retain the goods . . ." or, in the paraphrase of the court, "to accept the tender . . . ." *Id.* See UNIFORM COMMERCIAL CODE § 2-103(1)(c), which defines "receipt" as "taking physical possession."

[56] Neither the Code nor the Official Comments define what is meant by a "written misrepresentation." Note that the sellers' reclamation rights also depend upon the court's implicit, and perhaps mistaken, finding that the buyer had received the goods. *See* notes 47 and 55 *supra*.

[57] 104 Ill. App. 2d 190, 242 N.E.2d 911 (1968).

[58] *In re* Fairfield Elevator Co., Inc., 14 UCC Rep. Serv. 96 (S.D. Iowa 1973) (dishonored check may be a representation of solvency within the meaning of section 2-702(2), but under Iowa law the payee must rely thereon as a representation of solvency with the prudence of an ordinary businessman); *In re* Hardin, 485 F.2d 938 (7th Cir. 1972); *In re* Haugabook Auto Co., Inc., 9 UCC Rep. Serv. 1095 (M.D. Ga. 1971). Except for the financial statement, the most generally accepted form of representation, *In re* Bel Air Carpets, Inc., 452 F.2d 1210 (9th Cir. 1971), courts have been reluctant to bring other writings within the language of the Code. *See In re* Regency Furniture, Inc., 7 UCC Rep. Serv. 1381 (E.D. Tenn. 1970) (purchase order indicating payment terms did not constitute written representation of solvency by buyer); *In re* Units, Inc., 3 UCC Rep. Serv. 46 (D. Conn. 1965) (letter from bankrupt admitting it was unable to pay its bills as they matured, and referring to its unbalanced inventory and a temporary bind, did not constitute a written representation of solvency).

[59] Only the court's argument that the sellers had validly exercised their rights of stoppage *in transitu* seems immune from criticism. In that event, however, despite Official Comment 6 to section 2-705, it is unclear that title would have revested in the sellers so as to deny the Oklahoma reorganization court's jurisdiction over the oil and its proceeds. Official Comment 6, which has never been construed, states that:

> After an effective stoppage under this section the seller's rights in the goods are the same if he had never made a delivery.

C. *In re Colacci's of America, Inc.*, 490 F.2d 1118 (10th Cir. 1974)

In re Colacci's of America, Inc.,[60] joins the handful of federal court cases[61] which have considered the interrelation of section 2-702(2) of the UCC,[62] defining a defrauded seller's right of reclamation, and section 60 of the Bankruptcy Act,[63] giving a trustee in bankruptcy the power to avoid preferential transfers. Numerous commentaries[64] have analyzed the inclusion in the official version of section 2-702(3) of the term "lien creditor,"[65] which appears to make illusory the right of reclamation by bringing the provisions of section 2-702 squarely into conflict with those of the Bankruptcy Act.[66] The court in *Colacci's*, in a well-written opinion, avoids these theoretical problems by finding that no conflict between seller and trustee arose because no effective reclamation ever was asserted.

The facts of the case illustrate the plight of the slothful seller. Bar Control of Colorado sold restaurant equipment to Colacci's. The terms agreed to were cash on delivery. After the equipment

[60] 490 F.2d 1118 (10th Cir. 1974).

[61] *In re* Bel Air Carpets, Inc., 452 F.2d 1210 (9th Cir. 1971); *In re* Kravitz, 278 F.2d 820 (3d Cir. 1960); *In re* Helms Veneer Corp., 287 F. Supp. 840 (W.D. Va. 1968).

[62] The court considers the Colorado version of this section, COLO. REV. STAT. ANN. § 155-2-702 (Supp. 1965).

[63] 11 U.S.C. § 96 (1970).

[64] *See* Braucher, *Reclamation of Goods from a Fraudulent Buyer*, 65 MICH. L. REV. 1281 n.2 (1967).

[65] Sixteen states, not including Colorado, have amended their versions of the Official Code to delete the words "lien creditor" from section 2-702(3). 5C HART & WILLIER, BENDER'S U.C.C. SERVICE T-39 (1973).

[66] UNIFORM COMMERCIAL CODE § 2-702 allows sellers, "subject to the rights of a . . . lien creditor under this article (section 2-403)," upon discovery of the borrower's receipt of goods on credit while insolvent, and on demand made within 10 days after receipt of the goods, to reclaim them. Section 2-403 states that the rights of lien creditors are governed by article 9. Section 9-301(3) defines "lien creditor" to include a trustee in bankruptcy. Section 606 of the Bankruptcy Act empowers the trustee in bankruptcy to avoid preferences made at a time when the transferee had reasonable cause to believe the debtor to be insolvent. A preference is described in subdivision a(1) as a transfer of "any property of a debtor" to a creditor for an antecedent debt suffered by such debtor while insolvent and within 4 months before the filing by or against him of a petition in bankruptcy. Transfers, defined in section 1(30) of the Act, need not be voluntary. Whether or not property is "of a debtor" is determined by reference to state law, in particular to section 2-401 of the UCC, which holds that title to goods under contract of sale passes to the buyer at the time of delivery. Transfer of goods under section 60(2) of the Bankruptcy Act occurs when the actual transfer becomes perfected as against subsequent lienors, or immediately before the filing of the petition, whichever first occurs. A reclamation which occurs at any time prior to the filing of a petition in bankruptcy is therefore voidable as a preference unless the seller's interest is superior to the rights of subsequent lienors.

had been delivered and installed, Colacci's agent revealed that the restaurant could not pay for it. He said that Colacci's would have the money in a couple of days. Bar Control's president returned frequently and remonstrated over a period of months with Colacci's, but was unsuccessful in obtaining payment. Finally, following the formation of a creditors' committee, Bar Control ordered the equipment removed. At the time of the removal, Colacci's was clearly insolvent.

What began as a cash sale became, in the court's opinion, a credit transaction. The buyer's conditional right to retain the goods[67] was waived when the seller failed to "follow up" his rights.[68] Among these was the right to retake the goods, for even as a cash sale the "provision of [section 2-702] for a ten-day limit within which the seller may reclaim goods delivered on credit to an insolvent buyer is also applicable here."[69] Not later than 10 days after delivery, therefore, the seller having made no effort to regain possession, title to the bar equipment vested in the buyer.[70]

Consent to retention of the equipment without payment, the court suggests, amounted to an extension of credit.[71] In that event, section 2-702(2) was directly applicable,[72] and Bar Control needed only to demonstrate the effectiveness of its demand,

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[67] UNIFORM COMMERCIAL CODE § 2-507(2).

[68] *Id.*, Official Comment 3. "Follow up" is defined by the court in *Colacci's* as a "regaining of possession or a bona fide attempt to do so." 490 F.2d at 1121.

[69] UNIFORM COMMERCIAL CODE § 507(2), Official Comment 3. Note that the language of this Comment is an inaccurate paraphrase of § 2-702(2).

[70] *See* UNIFORM COMMERCIAL CODE § 2-401.

[71] *See* 490 F.2d at 1121. The court does not draw this connection explicitly, but it is consistent with the provision of section 2-511, Official Comment 6 that the acceptance of a check postdated by even one day is equivalent to a credit transaction. Case law, however, is unclear on the effect of a deferral of payment in altering the terms of an agreed-upon cash sale. One federal court, adopting the law of a jurisdiction which had enacted the UCC, has concluded that "the fact that the delivery and payment were not exactly simultaneous does not affect the nature of the transaction where the parties intended to accomplish a cash sale." *In re* Smithdale Industries, 219 F. Supp. 862, 864 (E.D. Tenn. 1963). *See also* Engstrom v. Wiley, 191 F.2d 684, 686 (9th Cir. 1951). *But see In re* Helms Veneer Corp., 287 F. Supp. 840, 843 (W.D. Va. 1968). Here the parties' course of dealing, which included a rejection in fact of the only method of cash payment discussed, appears to support the court's conclusion that the seller acquiesced in a modification of the contract of sale and thereby became a creditor.

[72] UNIFORM COMMERCIAL CODE § 2-702(2) reads in part:

> Where the seller discovers that the buyer has received goods on credit while insolvent, he may reclaim the goods upon demand made within ten days after the receipt. . . . Except as provided in this subsection, the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

within the 10 days after receipt, to reclaim.[73] Neither Colorado nor any other state having defined "demand" in this context,[74] the court merely concludes that Bar Control's demands, if any, during the first 10 days after receipt were to obtain payment rather than to regain possession.[75] Therefore, no effective reclamation could have occurred, and the subsequent retaking constituted a preference voidable by the trustee in bankruptcy.[76]

Notwithstanding the court's cautious approach, Bar Control's last argument is disposed of in language suggesting that, even if a valid reclamation had occurred, it would have been subject to avoidance. Bar Control asserted that, by retaking the equipment, it had "cancelled" the sale agreement pursuant to section 2-703(f). To this argument, the court countered:

> The "cancellation" by retaking the goods could not be effective because whatever the action is called, it was still a "transfer" within the meaning of the Bankruptcy Act "for or on account of an antecedent debt" within four months of the filing of the bankruptcy petition.[77]

After *Colacci's*, therefore, Colorado sellers not obtaining cash on delivery would appear hard pressed to avail themselves as against a trustee in bankruptcy of section 2-702(2) unless the Tenth Circuit chooses to adopt the doctrine of *In re Helms Veneer Corp.*[78] There the seller obtained payment on a sale of $5,084 by accepting a check, subsequently dishonored, for $4,000 and a promise of future payment of the balance. The court concluded that if the intent of the parties was to accomplish a cash transaction, acceptance of a check in part payment did not convert it into a credit sale.[79] Whether and how far this doctrine might be extended—absent convincing evidence that a credit transaction was intended, could acceptance of $10 from an insolvent debtor with a promise of the remaining $99,990 suffice?—is problematical.

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[73] *Id.*

[74] 490 F.2d at 1121.

[75] *Id.* The court also concludes, without necessity, that as a creditor Bar Control failed to "follow up" its rights in the meaning of section 2-507, Official Comment 3.

[76] 490 F.2d at 1121.

[77] *Id.*

[78] 287 F. Supp. 840 (W.D. Va. 1968).

[79] *Id.* at 844-45.

III. CORPORATIONS

National Equipment Leasing Corp. v. Farrier
486 F.2d 258 (10th Cir. 1973)

The decision in *National Equipment Leasing Corp. v. Farrier*[80] in effect pierced a corporate veil. In reversing the district court's entry of partial summary judgment against the appellant, the Tenth Circuit implied that a leasing company was entitled to recover on a claim under a lease agreement against the successor of the lessee where a wholly-owned subsidiary of the successor, two weeks after the dissolution of the lessee, adopted the lessee's name and executed 10 of 12 schedules of leased equipment. The schedules, the court found, had been appended to and incorporated by reference in the original lease contract.

In an opaque opinion, the court concluded that the successor was bound on the underlying contract; that the schedules, while not executed by the parties to the contract, as required therein, created no liabilities apart from the contract; that the subsidiary had held itself out as the lessee, and the leasing company, in executing the schedules and extending credit, had relied on the subsidiary's apparent identity as the original contracting party; that the subsidiary had intended to become a party to the contract; and that the parent-successor had affirmed its contract obligations by attempting unlawfully to delegate them to the subsidiary.

Much of the court's analysis may be misplaced. Perhaps the appended schedules created no new liabilities,[81] but they clearly defined the successor's limits of liability under the contract. Just as clearly, they were not in fact executed by both of the contracting parties, their successors, or assigns.[82] It is a questionable con-

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[80] 486 F.2d 258 (10th Cir. 1973).

[81] *See* Guerini Stone Co. v. Carlin, 240 U.S. 264, 277 (1916); Rehart v. Clark, 448 F.2d 170 (9th Cir. 1971); Johnson v. Grand Fraternity, 255 F. 929, 932 (8th Cir. 1919); Shanks v. Wilson, 86 F. Supp. 789, 795 (S.D.W. Va. 1949). Although these cases stand generally for the rule that exhibits are binding upon the parties only to the extent required by the terms of the contract in which they are incorporated, "[t]he mere statement that the exhibit is 'made a part' of the contract is not controlling." Johnson v. Grand Fraternity, *supra*, at 933.

[82] "The lease agreement provided that the schedules made pursuant to the agreement would ' . . . be attached hereto and to become a part hereof as same are executed from time to time *by the parties hereto*.' " 486 F.2d at 260 (emphasis added). However, the successor's subsidiary executed them. Moreover, because the court concluded that the successor's attempted delegation of contract duties was unlawful, *see* text accompanying note 89, *infra*, the subsidiary could not have been the successor's assignee.

tract construction which ignores the expressed intent of the parties[83] to conclude that the successor is liable because appended schedules are not contracts in themselves.[84] By this logic, a mere interloper, without even apparent authority, might effectively bind a contracting party through the execution of an incorporated document specifying key contract terms.

Similarly, the actions of the subsidiary in assuming the identity of the lessee, or in evidencing its intention to become a party to the contract,[85] and of the leasing company in relying thereon might be grounds to estop the subsidiary from denying its liability under the contract.[86] However, this would not be consistent with the holding. To find the parent-successor liable, it must be argued either that the subsidiary had no power or intention to act pursuant to the contract or that the exercise of any such power operated by law to obligate the parent-successor.[87] Because the court opts for a no-new-contract argument,[88] its discussion of what would be the basis for an estoppel is dicta.

The critical point in the court's analysis, therefore, is its assertion that the change of the subsidiary's name demonstrates the attempt of the parent-successor to delegate its contract duties. Such a delegation, the court rightly concludes, was ineffective absent the consent of the leasing company.[89] Having pre-

[83] *See* Aetna Cas. & Sur. Co. v. Means, 382 F.2d 26 (10th Cir. 1967); Tenneco Oil Co. v. Gaffney, 369 F.2d 306 (10th Cir. 1966); Texaco, Inc. v. Holsinger, 336 F.2d 230 (10th Cir. 1964), *cert. denied*, 379 U.S. 970 (1965); Century Refining Co. v. Hall, 316 F.2d 15 (10th Cir. 1963); Roosevelt Materials Co. v. Nolan Bros., Inc., 264 F.2d 807 (10th Cir. 1959).

[84] Whether the schedules were appendices or contracts is not dispositive of the issues. Having concluded they were "amendments," the court might have considered whether or not they were valid or enforceable. Here the expressed intention of the parties to the contract was to limit the validity of schedules to those "executed . . . by the parties hereto." The court considered the legal effect of the schedules only to establish that the successor was the real party in interest.

[85] As an evidentiary matter, the portion of each schedule quoted by the court hardly appears to demonstrate that intent. More importantly, since the subsidiary was not a party to the action, establishing intent in it to be bound serves no purpose within the court's analysis of parent-successor liability.

[86] *See* Hillyer v. Pan Am. Petroleum Corp., 348 F.2d 613, 623 (10th Cir. 1965); Glenn v. State Farm Mut. Auto. Ins. Co., 341 F.2d 5, 7 (10th Cir. 1965); State Farm Mut. Auto. Ins. Co. v. Petsch, 261 F.2d 331 (10th Cir. 1958); Phillips Petroleum Co. v. Buster, 241 F.2d 178, 183 (10th Cir.), *cert. denied*, 355 U.S. 816 (1957); Liberty Nat'l Bank & Trust Co. v. Bank of America Nat'l Trust & Sav. Ass'n, 218 F.2d 831 (10th Cir. 1955); Yates v. American Republics Corp., 163 F.2d 178 (10th Cir. 1947).

[87] This would follow, for example, if it could be shown that the subsidiary, in executing each schedule, had acted as the parent-successor's agent. Such an argument, however, would raise troublesome questions of fact and law not addressed by the court.

[88] *See* note 84 *supra*.

[89] 486 F.2d at 262, *citing* Saxe v. Feinstein, 366 Pa. 473, 77 A.2d 419 (1951). *See also*

viously determined that no separate contract liabilities had been created in the subsidiary by virtue of its execution of the schedules, the court thus concludes that the successor "remained obligated for performance of all duties bargained for under the lease agreement."[90]

These analytical difficulties might have been avoided had the court been in a position to acknowledge the independent action of the subsidiary in executing each schedule but to invoke explicitly the instrumentality rule to bind the parent-successor on any obligations thereby created or defined.[91] As developed in the Tenth Circuit, the rule makes a parent corporation responsible for the obligations of its subsidiary when "the subsidiary has become its mere instrumentality."[92] Three elements must be present to find "mere instrumentality": control, fraud or wrong, and unjust loss or injury to the claimant.[93] Control and injury were apparent in *National Equipment*, and although fraud or wrong was implied by the court as the reason for the name change, there is no question that that element also was capable of proof. Not only is there support in the case law for a finding of fraud on the facts presented,[94] but at the time of the name change and at all times during the proceeding, the use of the name of a defunct corporation by its former shareholders doing business in Texas was a violation of the Texas penal code.[95] As the last share-

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Chappel v. Winslow, 144 F.2d 160 (4th Cir. 1944); Ocean Accident & Guar. Corp. v. Southwestern Bell Tel. Co., 100 F.2d 441 (8th Cir.), *cert. denied*, 306 U.S. 658 (1939); Thomas-Bonner Co. v. Hooven, Owens & Renthschler Co., 284 F. 386 (6th Cir. 1922). Until now, the familiar rule that a personal service contract may not be assigned without the consent of the obligee has apparently not been adopted or applied in the Tenth Circuit.

[90] 486 F.2d at 262.

[91] The elements of the instrumentality rules were not plead by the appellant's attorneys.

[92] Taylor v. Standard Gas & Elec. Co., 96 F.2d 693, 704 (10th Cir. 1938), *rev'd on other grounds*, 306 U.S. 307 (1939).

[93] Steven v. Roscoe Turner Aeronautical Corp., 324 F.2d 157, 160 (7th Cir. 1963).

[94] *See* Associated Oil Co. v. Seiberling Rubber Co., 172 Wash. 204, 19 P.2d 940 (1933) ("similarity in names of 'Seiberling Rubber Company' and 'The Seiberling Rubber Company,' and commingling of business operations, is a fraud upon plaintiff suing on a guaranty contract, entitling plaintiff to treat the two corporations as a single entity"); Graves v. District Grand Lodge, 161 Ga. 110, 129 S.E. 783 (1925); Central Mut. Ins. Co. v. Central Mut. Ins. Co., 275 Mich. 554, 267 N.W. 733 (1936); Grand Temple and Tabernacle v. Independent Order, 44 S.W.2d 973 (Tex. Comm'n of App. 1932).

[95] The former penal code read:

> In all cases in which the charter or right to do business of any private corporation heretofore or hereafter chartered under the laws of this State . . . shall have been or shall hereafter be forfeited it shall be unlawful for any person or persons who were or shall be stockholders or officers of such corporation

holder of the dissolved lessee, therefore, the successor corporation may have committed a criminal wrong if it continued to "do business" in Texas under the lessee's name.

The holding in *National Equipment* turned on an unstated recognition of inequity. Had this recognition been defined in terms of the subsidiary's instrumentality, the court might have extended the rule judiciously to cover transactions ancillary to general contracts.

Robert E. Olsen

IV. CREDITOR-DEBTOR RELATIONS

Stevens v. Rock Springs National Bank, 497 F.2d 307 (10th Cir. 1974)
Littlefield v. Flanagan, 498 F.2d 1133 (10th Cir. 1974)

The Tenth Circuit considered the Truth in Lending Act[96] in two 1974 cases. Each sought to define the time of a violation of the Act's disclosure requirements such as to commence the running of the statute of limitations on civil actions.[97] In *Stevens v. Rock Springs National Bank*,[98] the court implied that a general disclosure violation may occur, and the 1-year statute of limitations contained in section 1640(e) of the Act may begin to run,[99] only upon the execution of the credit contract. Neither the Act nor Regulation Z defines "violation" or when a violation occurs, but the court pointed out[100] that both mandate that the required disclosures be made before each credit transaction is "consum-

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> at the time of such forfeiture to do business within this State in or under the corporate name of such corporation . . . .

Vernon's Ann. P.C., Art. 141 (repealed by Acts 1973, 63d Leg., p. 991, ch. 399, § 3(a), effective January 1, 1974).

[96] 15 U.S.C. §§ 1601-65 (1970); Regulation Z, 12 C.F.R. § 226 (1974). For further discussion of the Truth in Lending Act see 1 CCH CONSUMER CREDIT GUIDE ¶¶ 1001-3995 (1971); 1 P-H CONSUMER AND COMMERCIAL CREDIT—INSTALLMENT SALES ¶¶ 9001-10,211 (1964). For a helpful appendix of all Truth in Lending Act cases, indexed by issue through the publication date of the article, see Garwood, *Truth in Lending—a Regulator's View*, 29 BUS. LAWYER 193, 201 (1973).

[97] The Truth in Lending Act contains two penalty provisions: 15 U.S.C. § 1640 (1970) establishes a general civil remedy of damages and attorney's fees; 15 U.S.C. § 1635 (1970) provides for rescission of certain real property transactions. For a discussion of these remedies see *Truth in Lending Act—Civil Liability*, 11 ALR Fed. 815 (1972).

[98] 497 F.2d 307 (10th Cir. 1974).

[99] The subsection in full reads:

> (e) Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction within one year from the date of the occurrence of the violation.

[100] 497 F.2d at 310.

mated."[101] If disclosures must be made prior to consummation but otherwise at no particular time, then consummation must be the earliest that a violation can occur. The District of Columbia Circuit has so held.[102]

This does not define the time of a violation or rule out the possibility of a continuing disclosure violation. The Sixth Circuit confronted this issue in *Wachtel v. West*,[103] where the complaint was filed 18 months after the execution of the credit contract. The court in *Wachtel* decided that a continuing violation is not contemplated for section 1640 damages,[104] and that the action therefore was barred. The Tenth Circuit in *Stevens*[105] agreed with the analysis of *Wachtel*, and concluded that a violation occurs at one specific time from which the statute will run.[106]

Although it appears reasonable to infer that the "specific time" of a violation is simultaneous with the execution of the credit contract, the Tenth Circuit did not expressly reach that conclusion. The court merely states "[W]e must hold that . . . no violation can occur *until* such a credit contract is executed."[107] This seems to imply that the violation could occur at a later time. That no such implication was intended is borne out by the court's adjudication of the Stevens' claim.[108] The court agreed with the

[101] Disclosures must be made "before the credit is extended," 15 U.S.C. § 1639(b) (1970), or "before the transaction is consummated," 12 C.F.R. § 226.8(a) (1974). Consummation is defined in 12 C.F.R. § 226.2(cc) (1974) as follows:

> A transaction shall be considered consummated at the time a contractual relationship is created between a creditor and a customer irrespective of the time of performance of either party.

[102] Bissette v. Colonial Mortgage Corp., 477 F.2d 1245 (D.C. Cir. 1973). The plaintiff-consumer argued that the required disclosures ought to be made in advance of a real estate closing to give the consumer time to shop for better terms. The District of Columbia Circuit Court of Appeals agreed that the plaintiff had a reasonable policy argument but concluded that the Act did not require disclosures at any particular time prior to closing. Thus disclosure could be made in the last instant before the parties completed the closing.

[103] 476 F.2d 1062 (6th Cir. 1973).

[104] *Id.* at 1064-65, where the Sixth Circuit states:

> It thus appears that a credit transaction which requires disclosures under the Act is completed when the lender and borrower contract for the extension of credit. The disclosures must be made sometime before this event occurs. If the disclosures are not made, this violation of the Act occurs, at the latest, when the parties perform their contract. The provisions with respect to the right of rescission seem to contemplate a continuing violation when the disclosures are not made, but such is not the case when damages are sought.

[105] 497 F.2d at 309. The court specifically refrained from adopting the Sixth Circuit's reference to the date of "performance" as the date of violation.

[106] *Id.*

[107] *Id.* at 310 (emphasis added).

[108] The Hinkles, the other named plaintiffs, executed their credit contract less than

district court that the 1-year period had run as to the Stevens barring their action, which was filed 20 months after the execution of their credit contract. This suggests that the violation, as to the Stevens, occurred when the credit contract was executed. Support for this interpretation is contained in *Littlefield v. Flanagan,*[109] handed down a few weeks later, where the court decided that *Stevens* disposed of the section 1640 claim of Littlefield because "the action was brought more than one year after the consummation of the transaction."[110]

Littlefield, now superceded by statute, was a case of first impression at the federal appellate level. The issue was whether an action for rescission under section 1635[111] was barred by the 1-year statute of limitations contained in section 1640(e). The court decided that since the 1-year statute of limitations in section 1640(e) was limited to "[a]ny action under this section," and since the rescission remedy in section 1635 was not limited by the section's own terms if proper disclosures were not made,[112] the violation remained a continuing one until the required disclosures were made.[113] The holding followed logically from the wording and structure of the statute, but it created an uncertainty regarding possible unexpired rights of rescission with the further consequence that the titles to many residential real estate properties might have become clouded.[114]

The Board of Governors of the Federal Reserve System early recognized the merchantability of title problem the statute presented and recommended to Congress that the right to rescind be limited to 3 years.[115] Congress enacted the recommendation, along with a number of other amendments to the Truth in Lending Act, and the President signed the measure into law on October 28,

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one year before the action was filed. The circuit court therefore reversed the district court's dismissal of their action and remanded for further proceedings.

[109] 498 F.2d 1133 (10th Cir. 1974).

[110] *Id.* at 1136.

[111] For further details on rescission see Regulation Z, 12 C.F.R. § 226.9 (1974); CCH CONSUMER CREDIT GUIDE ¶¶ 1800-80 (1971).

[112] Subsection 1635(a) gives the obligor the right to rescind

> until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures required under this part, whichever is later . . . .

[113] Wachtel v. West, 476 F.2d 1062 (6th Cir. 1973) (dictum).

[114] FRB, *Annual Report to Congress on Truth in Lending for the Year 1973*, in 271 CCH INSTALLMENT CREDIT GUIDE 22 (1974).

[115] *Id.*

1974.[116] Effective that date, the statute of limitations for section 1635 became 3 years from the consummation of the transaction or the sale of the property, whichever happens first.[117] Presently, then, the time of a Truth in Lending Act violation should be the same for sections 1635 and 1640; that is, a violation will occur, if at all, at the consummation of the credit transaction.[118]

James D. Geyer

V. BRIEFLY NOTED

In *Amerine National Corp. v. Denver Feed Co.*,[119] the court properly found that an agreement for the sale of turkeys, where its express terms were in dispute, should be construed in the context of a well-established course of dealing between the parties.

The opinion in *Umdenstock v. American Mortgage & Investment Co.*[120] rejected a shotgun assault on the nonpayment by mortgage lenders of interest on funds escrowed to pay taxes and similar charges.[121] Acknowledging the extensive recent litigation of this point,[122] however, the court reversed the lower court's granting of a motion for summary judgment in favor of the defendant lenders and remanded for further discovery on an anti-trust claim.

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[116] Pub. L. No. 93-495 (Oct. 28, 1974).

[117] The amendment to section 1635, a new subsection, reads as follows:

> (f) An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs earlier, notwithstanding the fact that the disclosures required under this section or any other material disclosures required under this chapter have not been delivered to the obligor.

[118] Real estate closings may be a possible exception. Section 209 of the 1974 amendments (amending 15 U.S.C. § 1631), effective October 28, 1975, gives the Federal Reserve Board the authority to require disclosures earlier than the closing, thereby making possible a violation before consummation.

[119] 493 F.2d 1275 (10th Cir. 1974).

[120] 495 F.2d 589 (10th Cir. 1974).

[121] The complaint alleged breach of trust, unjust enrichment, violation of the Truth in Lending Act, and violation of sections 1, 2, and 3 of the Sherman Act. *Id.* at 591.

[122] *Id.* at 592.