Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1971

The United States of America v. Colombine Coal Comp Any, A Utah Corporation; Laura S. Monay; Walker Bank & Trust Comp Any, A Corporation; Walker Bank & Trust Com-P Any, Administrator of the Estate of Frank v. Colombo, Deceased; Carbon County, A Body Corpor-Ate and Politic of the State of Utah; Bert L. Prichard and Stand-Ard Metals Corporation : Brief of Plaintiff-Respondent the United States of America

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Utah Supreme Court
Part of the Law Commons

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.
Donald B. Holbrook and Edward J. McDonough; Attorneys for Defendants-AppellantsC. Nelson Day and A. Pratt Kesler; Attorneys for Plaintiff-Respondent

Recommended Citation
Brief of Respondent, *United States v. Columbine Coal Co.*, No. 12459 (Utah Supreme Court, 1971).
https://digitalcommons.law.byu.edu/uofu_sc2/3129

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

THE UNITED STATES OF AMERICA,
Plaintiff - Respondent,

vs.

COLOMBINE COAL COMPANY, a Utah corporation; LAURA S. MONAY; WALKER BANK & TRUST COMPANY, a corporation; WALKER BANK & TRUST COMPANY, Administrator of the Estate of Frank V. Colombo, deceased; CARBON COUNTY, a body corporate and politic of the State of Utah; BERT L. PRICHARD and STANDARD METALS CORPORATION,
Defendants - Appellants

Case No. [illegible]

BRIEF OF PLAINTIFF-RESP[illegible] THE UNITED STATES OF [illegible]

Appeal from a Judgment of the Third Distri[illegible] Salt Lake County, Honorable Joseph G. J[illegible]

C. NELSON DAY
United States Attorney
A. PRATT KESLER
Assistant United States [illegible]
Attorneys for Plaintiff-Respondent
200 U.S. Post Office & Co[illegible]
350 South Main Street
Salt Lake City, Utah 84101

DONALD B. HOLBROOK, Esq.
EDWARD J. McDONOUGH, Esq. of
Jones, Waldo, Holbrook & McDonough
800 Walker Bank Building
Salt Lake City, Utah 84111
Attorneys for Defendants-Appellants

FIL[illegible]
AUG [illegible]

TABLE OF CONTENTS

Page

NATURE OF THE CASE 1

DISPOSITION IN THE LOWER COURT 2

RELIEF SOUGHT ON APPEAL 2

STATEMENT OF FACTS 2

ARGUMENT 6

POINT I.
THE TERMS OF THE ARA LOAN NOTE AND THE ASSIGNMENT OF THE DR. COLOMBO LIFE INSURANCE POLICY AS COLLATERAL FOR THE PAYMENT OF SAID NOTE AUTHORIZED THE APPLICATION OF THE PROCEEDS FROM THE LIFE INSURANCE POLICY AS DIRECTED BY THE ARA, AND THAT THE COURT'S FINDINGS NOS. 12 AND 13 ARE IN ACCORD THEREWITH 6

POINT II.
THE AUTHORITY TO APPLY THE INSURANCE MONEY RECEIVED UPON THE DEATH OF DR. COLOMBO TO THE $325,000 LOAN IN THE INVERSE ORDER OF MATURITY MUST BE DETERMINED UNDER FEDERAL AND NOT STATE LAW 10

POINT III.
THAT THE MAKING AND SERVICING OF LOANS BY THE SBA IS A DISCRETIONARY FUNCTION WHICH IS NOT SUBJECT TO JUDICIAL REVIEW 16

CONCLUSION 20

CASES AND AUTHORITIES CITED

CASES

Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 8

Rock Island, Arkansas & Louisiana Railroad Co. v. United States, 254 U.S. 141-143 9

TABLE OF CONTENTS (Continued)

Page

Utah Power & Light Co. v. United States, 243 U.S. 389 9

Pine River Logging & Improvement Co. v. U.S., 186 U.S. 279 9

Godine v. Liberty Shoe Company, 271 F. Supp. 9

United States v. Allegheny County, 322 U.S. 174 11

Clearfield Trust Co. v. United States, 318 U.S. 363 12

Royal Indemnity Co. v. United States, 313 U.S. 289 12

United States v. View Crest Garden Apartments, Inc., 268 F.2d 381 12

United States v. John E. Wells, 403 F.2d 596 13

Director of Revenue, State of Colorado vs. United States, 392 F.2d 307 13

Cassidy Commission Co. v. United States, 397 F.2d 875 14

United States v. Sommerville, 324 F.2d 718 14

United States v. Stadium Gardens, 425 F.2d 358 15

Herlong Sierra Homes, Inc. v. United States, 358 F.2d 300 15

United States v. Walker Park Realty Inc., 383 F.2d 732 15

United States v. Wells, 403 F.2d 596 15

Commercial Security Bank v. Walker Bank, Adm., USDC D-Utah C-336-70 15

Lusch v. Hoffmaster, 253 F. Supp. 633 16

Udall v. Freeman, 336 F.2d 706 17

Kiss v. Fogliani, 388 F.2d 381 18

Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309 18

OTHER

396 F.2d, Appellate decision Godine v. Liberty Shoe above. .. 10

15 U.S.C.A. § 634, 636 11

5 U.S.C.A. 701 16

Tr. refers to Transcript

IN THE SUPREME COURT OF THE STATE OF UTAH

THE UNITED STATES OF AMERICA,
Plaintiff - Respondent,

vs.

COLOMBINE COAL COMPANY, a Utah corporation; LAURA S. MONAY; WALKER BANK & TRUST COMPANY, a corporation; WALKER BANK & TRUST COMPANY, Administrator of the Estate of Frank V. Colombo, deceased; CARBON COUNTY, a body corporate and politic of the State of Utah; BERT L. PRICHARD and STANDARD METALS CORPORATION,
Defendants - Appellants

Case No. 12459

BRIEF OF PLAINTIFF-RESPONDENT THE UNITED STATES OF AMERICA

NATURE OF THE CASE

Respondent United States of America, hereinafter called "the Government," agrees with appellants' statement as to the nature of the case, save and except that the appellants interposed, as one of several defenses, that

monies received from insurance on the life of Dr. Colombo should have been applied on the Colombine ARA loan, as directed by appellants.

DISPOSITION IN THE LOWER COURT

Respondent agrees with the statement of appellants as to the disposition of this case by the lower court.

RELIEF SOUGHT ON APPEAL

The trial court's Findings of Fact 12 and 13 in plaintiff's First Cause of Action with relation to the default on the $325,000 loan are sustained by the evidence, and this court should so hold. It should also be noted that appellants admit no error was committed by the trial court in entering its judgment and decree with relation to the $100,000 SBA loan.

STATEMENT OF FACTS

For this court to more fully understand the Government's position in this appeal, additional facts should be made available to the court in considering its decision herein.

Colombine Coal Company was a closely-held corporation managed, in the main, by Dr. Colombo. Its operation was never a financial success, mainly for the reason of poor management and being operated at all times without adequate working capital (Tr. 67-135-136-191-202). Before Dr. Colombo's death in February of 1969, he had

received a commitment from Walker Bank and Trust Company of Price, Utah for an additional loan of $25,000, conditioned on his first obtaining a loan in the amount of $30,000 from Bartek Corporation in Miami, Florida, to which corporation all of Colombo's stock had been transferred. Due to Dr. Colombo's death, these loans were never obtained (Tr. 135-136-141-142), and, as a result, the stock of Colombine Coal Company was placed in escrow with the Commercial Security Bank of Salt Lake City, Utah pursuant to a Contract of Sale of the Colombine stock to one Sabil Corporation and conditioned, among other things, that the ARA and SBA loans be brought immediately current by Sabil (Tr. 142-143-144); that upon the death of Dr. Colombo the Government made demand upon the John Hancock Mutual Life Insurance Company for payment of insurance upon the life of Dr. Colombo, the policy of which was given as collateral for payment of the ARA $325,000 loan.

An attorney by the name of Chester Abney of Miami, Florida, reported to represent both Colombine, Bartek, and Sabil Corporations (Tr. 123-138-162-163), made demand upon the said insurance company that the proceeds from the said life insurance policy should be paid to him in the capacity as such attorney and, as a result of said demands, the payment on the life insurance policy was deferred from February 1969 until January 1970 (Tr. 133-134-148), at which time the proceeds were paid to the Government and an entry record made of the payment of said insurance proceeds in the amount of $79,226.83 on January 15, 1970, Exhibit ~~P-21~~. Between the date

F-1

of Dr. Colombo's death and the date of the accelerations of the ARA and SBA loans, in December 1969 contacts were made with field offices of the SBA in Texas, Salt Lake City and Denver, who serviced both loans, with a request that the insurance money be applied on the front end of both loans (Tr. 125-126-127). Both loans became delinquent in May of 1969. There was also due and unpaid to Carbon County property taxes and royalty payments for the past several years in the approximate amount of $18,000 (Tr. 190-192-194); past due miners' wages in the amount of $9,000 (Tr. 193); past due payments to the Miners' Welfare Fund in the approximate amount of $1,800 (Tr. 137); and trade debts in an undetermined amount, one of which was for $3,500 (Tr. 137). Sabil Corporation contracted to purchase the Colombine stock on September 30, 1969 (Tr. 161-162), which stock was placed in escrow. Some time after September 20, 1969, Sabil made written application through the Salt Lake office of SBA to assume these two loans. Sabil Corporation was a closely-owned corporation headed by one William Reeves. The credit reports of William Reeves showed a poor rating and that he had no prior experience in mining (Tr. 70-71-72-73-169-170-171-190). The established policy at ARA was also that all requests to assume a loan and apply payments on past-due accounts must be in writing to the Washington, D.C. office, who had the sole authority to make these decisions (Tr. 226-229). The request to apply the insurance monies to the front end of the loan by Attorney Chester Abney for Bartek, Colom-

bine and Sabil was never made to Washington, D.C., even though he was advised to do so (Tr. 126-151).

Mr. William G. Smith testified that he was Chief of the Collateral Protection Division Office of Business Development Economic Development Administration in Washington, D.C., and that the accounting division, which serves the entire agency, follows the policy guidance and direction of his Division concerning the accounting of all ARA loans (Tr. 45), and that he, Smith, personally directed that the records should reflect that the whole of the insurance monies should be applied to the principal of the ARA loan in the inverse order of maturity (Tr. 49-50-51), which was the general policy of applying the monies received from such type of collateral (Tr. 56-57). The Government loans were never brought current by Sabil Corporation, nor did Sabil pay the past-due county taxes, county royalties, miners' salaries, welfare fund contributions, and current trade debts in the approximate amount of $35,000, nor would the application of the insurance money on the front end of the ARA loan bring the said loan current. As admitted by counsel for appellants on Page 4 of their brief, both loans were in default at the time of acceleration, and, as a result, notices of default were given and the foreclosure action commenced, and the Findings of Fact Nos. 12 and 13 of plaintiff's First Cause of Action were proper and sustained by all of the evidences submitted to and considered by the trial court.

ARGUMENT

POINT I.

THE TERMS OF THE ARA LOAN NOTE AND THE ASSIGNMENT OF THE DR. COLOMBO LIFE INSURANCE POLICY AS COLLATERAL FOR THE PAYMENT OF SAID NOTE AUTHORIZED THE APPLICATION OF THE PROCEEDS FROM THE LIFE INSURANCE POLICY AS DIRECTED BY THE ARA, AND THAT THE COURT'S FINDINGS NOS. 12 AND 13 ARE IN ACCORD THEREWITH.

The $325,000 ARA loan note, Plaintiff's Exhibit P-A, provides, in part, payee is authorized to declare all or any part of the indebtedness immediately due and payable upon the happening of any of the following events: (1) Failure to pay any part of the indebtedness when due; (2) Non-performance by the undersigned of any agreement with, or any condition imposed by, payee with respect to the indebtedness; (6) The institution of any suit affecting the undersigned deemed by payee to affect adversely its interest hereunder in the collateral or otherwise. Payee may apply the residue of the proceeds of any collateral to the payment of the indebtedness *as it shall deem proper,* returning the excess, if any, to the undersigned.

Paragraph D of the assignment of life insurance policy as collateral, Plaintiff's Exhibit Z-1, provides, in part, as follows:

> It is expressly agreed that all sums received by the assignee hereunder, either in the event of death of the insured, the maturity or surrender of the policy, the obtaining of a loan or advance on the

> policy, or otherwise, shall first be applied to the payment of one or more of the following in *such order of preference as the assignee shall determine:* (a) principal of and/or interest on liabilities.

The provisions of these two exhibits clearly afford the Government the rght to use its discretion in the application of any monies received from the collateral given to secure the payment of the ARA note, Exhibit P-A, and the assignment of the insurance policy, Exhibit P-Z-1. The Government felt insecure with regards to the ARA loan, for the reason that the Colombine mine had never operated successfully; that the principal to whom the loan was made, namely, Dr. Colombo, had died; that the financial history of William Reeves of Sabil Corporation was such that the ARA concluded that he could not be relied upon to make payments on the loan as provided by the loan documents; that a lawsuit had been commenced with relation to the Colombine stock and that the said stock had been placed with the Commercial Security Bank under an escrow agreement, which provided for the purchase of the Colombine stock by Sabil Corporation (William Reeves) and was conditioned, in part, that past due debts of Colombine, such as taxes, royalties, miners' salaries, welfare fund contributions, and current trade debts be paid by Sabil, which conditions were not fulfilled, resulting in the Collateral Protection Divison of the ARA deciding it was insecure with relation to the payment of its $325,000 loan with Colombine Coal and, based upon such decision and in accordance with the authority granted by the Exhibits P-A and P-Z-1, directed that all of the insurance monies be applied to the principal of said loan

in the inverse order of maturity, and further directed that notice of acceleration be given and an action commenced to foreclose its mortgage and other securities.

Appellants, in their brief, contend that they had been assured that Dr. Colombo's insurance monies would be applied to the front end of the loan by certain Government employees, and that the Statement of Account, until changed by the order of Mr. William Smith of the ARA, showed that the insurance monies were so applied to appellants' account.

It must be remembered that the Certified Statement of Account on the ARA loan, Plaintiff's Exhibit F-1, merely showed bookkeeping items as entered by bookkeeping personnel and remained so until the said account was submitted to Mr. Smith, who was the only person who had been delegated the final and sole authority to decide how the insurance money should be applied.

Only authorized Government officials can bind the United States and Mr. Smith was the only one so authorized to make the decision here complained of. See *Federal Crop Ins. Corp. v. Merrill,* 332 U. S. 380 at page 384-385, where the court stated:

> Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the

> rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.

And he continues by saying:

> The oft-quoted observation in *Rock Island, Arkansas & Louisiana Railroad Co. v. United States,* 254 U.S. 141-143, that "Men must turn square corners when they deal with the Government," does not reflect a callous outlook. It merely expresses the duty of all courts to observe the condition defined by Congress for charging the public treasury.

See also *Utah Power & Light Company v. United States,* 243 U.S. 389, at page 408-409. Also, *Pine River Logging and Improvement Company v. United States,* 186 U.S. 279.

In the case of *Godine v. Liberty Shoe Company,* a 1967 Massachusetts case reported in 271 F. Supp. at page 97, the court held that the insurance due under a life insurance policy assigned as collateral to secure the payment of an SBA loan could be applied immediately upon the principal of said loan in the inverse order of maturity, even though the payments of the loan on both principal and interest were current. The executors of the estate contended that the insurance proceeds should be held to pay any delinquencies that may occur in the future on the payment of both principal and interest, and if no delinquencies occurred that the proceeds from said life insurance should be paid to the estate of the deceased upon the payment of the SBA loan in full. The court stated that the assignment of the insurance policies authorized the SBA

to apply the proceeds from such policies to the liabilities of the borrower in such order as the assignee (SBA) may determine proper. The court then stated:

> I find, therefore, that under the assignments of the policies in question, SBA had the right to apply the proceeds of the policies to the unmatured liabilities of Liberty Shoe Company on the first loan; that there was no conversion of the funds.

This decision was upheld by the appellate court as reported in 396 F.2d in the Footnote No. 3 on page 369, wherein the appellate court said that the district court correctly held that the SBA was authorized to apply insurance proceeds to the loan, whether or not Liberty Shoe Company was behind in its payments.

POINT II.

THE AUTHORITY TO APPLY THE INSURANCE MONEY RECEIVED UPON THE DEATH OF DR. COLOMBO TO THE $325,000 LOAN IN THE INVERSE ORDER OF MATURITY MUST BE DETERMINED UNDER FEDERAL AND NOT STATE LAW.

Respondent's position is that under Utah law it was acting within its authority pursuant to the terms of the ARA note and assignment of Dr. Colombo's insurance policy, Plaintiff's Exhibits P-A and Z-1, in applying the insurance money received to the principal of the said note in the inverse order of maturity, and, further, that no matter how the insurance money could have been applied, when received by the Government, to the payment of the delinquent instalments of interest and principal and out-

standing obligations of Colombine Coal Company, the ARA note under its terms would still have been in default.

In the alternative, the law is well settled that if there is a conflict between federal and state laws in this type of foreclosure action the federal law shall prevail over the laws of the several states.

Congress by law created the Small Business Administration, and defines its powers in Title 15, U.S.C.A. Sections 634 and 636.

Section 636(a) authorizes the making of loans to small business concerns, and Section 636(a)(7) provides that all loans made under this subsection shall be of such sound value or so secured as reasonably to assure repayment, which delegates to the Small Business Administration the use of its discretion in what loans shall be made and how they shall be secured. These loans are made nationwide through field offices located in various cities of the United States, with the final decisions to be made in the main office located in Washington, D.C.

In functioning within its delegated power, the federal court decisions hold that the operation of such a governmental agency cannot be restricted or required to comply with state law or state court decisions with relation to the making and servicing of this type of loan.

In *United States v. Allegheny County,* reported in 322 U.S. 174 at page 182, the court states:

> Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional function, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State.

Citing many cases sustaining this position further, see *Clearfield Trust Co. v. U.S., 318 U.S.* ~~at page~~ 363 at page 367:

> In our choice of the applicable federal rule we have occasionally selected state law. See *Royal Indemnity Co. v. United States,* 313 U.S. 289. But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.

In the case of *United States v. View Crest Garden Apartments, Inc.,* a 1959 Ninth Circuit case, 268 F.2d 381, page 383, the appellate court reversed the trial court that held that under Washington State law the Govern-

ment was not entitled to have a receiver appointed, and the appellate court stated:

> After a default the sole situation presented is one of remedies. Commercial convenience in utilizing local forms and recording devices familiar to the community is no longer a significant factor. Now the federal policy to protect the treasury and to promote the security of federal investment which in turn promotes the prime purpose of the Act — to facilitate the building of homes by the use of federal credit — becomes predominant. Local rules limiting the effectiveness of the remedies available to the United States for breach of a federal duty cannot be adopted. It is urged that to hold that federal law applies would result in great hardship to the mortgagors who would thereby be deprived of all rights under state law such as the right of redemption. We do not think that such a conclusion necessarily follows.

In the case of *United States v. John E. Wells,* a 1968 Fifth Circuit case, 403 F.2d 596, at page 597, the court stated, with relation to whether or not a deficiency judgment could be entered on a mortgage foreclosure which was not permitted by state law:

> We hold that federal law does apply in such situations. The national loan program of the Veterans Administration cannot be subjected to the vagaries of the various state laws which might otherwise control all or some phases of the loan program.

See *Director of Revenue, State of Colorado vs. United States,* a 1968 Tenth Circuit case reported in 392 F.2d 307, involving the foreclosure of an SBA security agreement, the court holding that even though the SBA law

"does not provide for primacy of the state liens, the Colorado statutes do so provide. It is conceded that federal law controls the relative rights of an instrumentality of the federal government," citing other cases.

In the case of *Cassidy Commission Company v. United States,* a 1967 Tenth Circuit case, 387 F.2d 875, which was a case to determine the liability of a commission merchant in auctioning cattle which were covered by a Farmers Home Administration security agreement, the court stated:

> The making of the loans and the taking of the security therefor were the exercise by the federal government of a grant of constitutional power. The power of the United States to protect its purse from potential injury is clear. A uniform federal rule is essential to protect the security interests of the United States and to prevent such interests from being detrimentally affected through the uncertainty that would arise from the application of disparate state rules.

In the case of *United States v. Sommerville,* a 1964 case, 324 F.2d 718, a Third Circuit case involving the liability of auctioneers selling livestock subject to a security agreement, the court stated that the question was as to whether liability is governed by state or federal law, and held:

> Decisions of the Supreme Court, this court, and other courts all demonstrate that federal law is applicable in the case at bar. An independent federal rule of decision must be applied when a genuine federal interest would be subjected to uncertainty by application of disparate state rules.

In the case of *United States v. Stadium Gardens,* Ninth Circuit Case 425 F.2d 358, the court held that under a federal mortgage foreclosure there would be no right of redemption, even though Idaho law provided therefor.

For cases holding that a deficiency judgment in a foreclosure action is controlled by federal, rather than state, law, see *Herlong Sierra Homes, Inc. v. United States,* 358 F.2d 300 (C.A. 9); *United States v. Walker Park Realty Inc.,* 383 F.2d 732 (C.A. 2); *United States v. Wells,* 403 F.2d 596 (C.A. 5).

In any event, the facts clearly show that both the ARA and SBA loans were in default when the notice of acceleration was given and the foreclosure action commenced, which default could not be cured by a later change in bookkeeping entries.

Counsel for appellant in open court admitted the loans were in default, and the United States District Court for the District of Utah, in the case of *Commercial Security Bank v. Walker Bank and Trust Company, Administrator of the Estate of Frank V. Colombo, Deceased,* et al, USDC D-Utah No. C-336-70, which was an action involving two groups claiming ownership to the stock of the Colombine Coal Company, found, upon motion made by the attorney for the appellants here, in part as follows:

> Finding No. 7. The Reeves Group has failed to comply with the provisions of the Agreement requiring them to pay the loans made by the Small Business Administration and the Area Development administration to Colombine Coal Company.

> As a result thereof, the United States of America brought an action in the District Court of Salt Lake County, State of Utah (Case No. 194420) whereby said court found that because of a default in payment to the United States of America there was due and owing the sums of $226,106.31, together with daily interest thereon of $22.8146 from February 11, 1971 until paid, and $70,764, together with daily interest thereon of $9.751569 from February 11, 1971 until paid.

It must, therefore, be concluded that the application of federal law with relation to the servicing of small business loans by the SBA grants to it discretionary power in the loaning of funds, in the security required for such loans, and the collection thereof.

POINT III.

THAT THE MAKING AND SERVICING OF LOANS BY THE SBA IS A DISCRETIONARY FUNCTION WHICH IS NOT SUBJECT TO JUDICIAL REVIEW.

Under the Administrative Procedure Act, 5 U.S.C.A. 701, it is provided, in part, as follows:

> (a) This chapter applies according to the provisions thereof except to the extent that
>
> (1) Statutes preclude judicial review, or
>
> (2) Agency action is committed to agency discretion by law.

The court, in interpreting these sections with relation to the Small Business Administration in *Lusch v. Hoffmaster,* 253 F. Supp. 633, at page 635, states as follows:

> More importantly perhaps plaintiff's argument overlooks the second exception to the introduction of 5 U.S.C.A. 1009, now 701, cases where "agency action is by law committed to agency discretion." Congress has committed to the discretion of the Small Business Administrator what loans shall be made and how they shall be secured. See generally the provisions of 15 U.S.C.A. 636(a), particularly paragraph (7) thereof. The courts have consistently given effect to the provision excepting from the ambit of 5 U.S.C.A. 1009, now 701, "agency action that it by law committed to agency discretion,"

quoting several cases, and concludes by saying:

> It is so clear that the terms and conditions of loans under 15 U.S.C.A. 636(a) fall within that exception that the proposition has apparently never been challenged in the courts.

In the case of *Udall v. Freeman,* 336 F.2d 706, the question arose as to whether or not the Secretary of Interior had to accept a bid for the sale of public lands after the same had been advertised for sale. The court held that the Secretary of Interior in his discretion may refuse for whatever reason he finds adequate to sell lands as to which the Secretary had invited bidding, and further stated that the Secretary's refusal to issue a Certificate of Sale *is not subject* to judicial review. The court further stated that:

> Since Section 10 of the Administrative Procedures Act, now 5 U.S.C. 701, "by law committed to agency discretion such decision, we are without power to review the Secretary's decision in this case," and concluded by saying that, "The necessary implication is that courts may not review a

decision committed to the Secretary's discretion pursuant to a permissive type statute."

In the case of *Kiss v. Fogliani,* 388 F.2d 381, a 1968 case, the question arose as to whether or not a decision made by the Secretary of Labor with relation to claims of employees involving federal grants in aid were reviewable, and the court stated:

> Assuming standing to sue, the scope of permissible review is limited. A mere difference of judgment between a person disadvantageously affected by agency action and the responsible head of the agency over the merits of particular administrative action as a means of achieving a legislative objective, when Congress has assigned authority to make and act upon such determination to the agency, *is not judicially* reviewable.

And then stated that:

> The Administrative Procedures Act expressly excludes agency action by law committed to agency discretion from judicial review.

In the case of *Panama Canal v. Grace Line, Inc.,* 356 U.S. 309, at page 317, the court, in referring to the Administrative Procedures Act, 5 U.S.C. 1009, now 5 U.S.C. 701, holds that the said section:

> Excludes from the categories of cases subject to judicial review "agency action" that is "by law committed to agency discretion." We think the initiation of a proceeding for readjustment of the tolls of the Panama Canal is a matter that Congress has left to the discretion of the Panama Canal Company. Petitioner is, as we have seen, an agent

> or spokesman of the President in these matters. It is "authorized" to prescribe tolls and to change them. But the exercise of that authority is far more than the performance of a ministerial act. As we have seen, the present conflict rages over questions that at heart involve problems of statutory construction and cost accounting: whether an operating deficit in the auxiliary or supporting activities is a legitimate cost in maintaining and operating the Canal for purpose of the toll formula. These are matters on which experts may disagree; they involve nice issues of judgment and choice, which require the exercise of informed discretion.

From the foregoing cases it is quite apparent that the Administrator of the Small Business Administration has been granted authority to make loans to small companies needing assistance, but he is further required to see that said loans are secured by proper security and is given discretion in making the decision as to whether said loans should be made; also as to what security should be required, and under what conditions collections and necessary legal action shall be taken for the collection of said loans. The exercise of his discretion in making said decisions is not reviewable in a court of law; and his decisions thereon are final.

CONCLUSION

The testimony at the trial of this action clearly shows that Colombine Coal Company never operated at a profit and was harassed by poor management and lack of sufficient operating capital; that after Dr. Colombo's death, disputes arose as to the stock of said company, resulting in lawsuits being filed; that much time elapsed from the death of Dr. Colombo until the Government received payment of the insurance funds, and more time elapsed in giving consideration to the requests for the reinstatement and assumption of the loans by the new purchasers of Colombine Coal Company stock, namely, Sabil Corporation; that under the terms of the ARA note, and the assignment of the insurance policy as collateral for the payment thereof, the ARA was legally authorized to apply the insurance monies, as is shown upon the Certified Statement of Account, Plaintiff's Exhibit F-1. ARA was further authorized under the discretionary powers delegated to it by Congress to apply the insurance monies to the loan in the inverse order of maturity, as also shown on Plaintiff's Exhibit F-1. The evidence clearly shows that even though the insurance monies, when received, had been applied to the interest and instalment payments then past due, the ARA loan of $325,000 would have still been delinquent. This is without taking into account that appellants were also in default under the terms of the note, Plaintiff's Exhibit P-1, in that they were, and had long been, indebted to Carbon County for taxes, royalty payments under the land leases, miners' wages, Miners' Welfare Fund, and trade debts, all in the approximate amount of $35,000.

This court must, therefore, conclude that, at the time the notices of acceleration were given to appellants, the ARA loan of $325,000 was in default and the trial court properly made and entered its Findings 12 and 13 on the First Cause of Action and its Decree of Foreclosure and Order of Sale of both Real and Personal Property given to secure the payment of said ARA loan.

Respectfully submitted,

C. NELSON DAY,
United States Attorney

By
A. Pratt Kesler
Assistant United States Attorney
Attorneys for Plaintiff-Respondent