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 : Reply Brief of Defendant-Appellant Colombine Coal Company

Donald B. Holbrook and Edward J. McDonough; Attorneys for Defendants-AppellantsC. Nelson Day and A. Pratt Kesler; Attorneys for Plaintiff-Respondent

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

Reply Brief of Defendant-Appellant Colombine Coal Company

Appeal from a Judgment of the Third District Court of Salt Lake County, Honorable Joseph G. Jeppson, Judge

NELSON DAY,
ited States Attorney
PRATT KESLER,
istant United States Attorney
orneys for Plaintiff-
pondent
U. S. Post Office and
urthouse
South Main Street
t Lake City, Utah 84101

DONALD B. HOLBROOK, Esq.
EDWARD J. McDONOUGH, Esq.
of JONES, WALDO, HOLBROOK & McDONOUGH
Attorneys for Defendant-Appellant
800 Walker Bank Building
Salt Lake City, Utah 84111

TABLE OF CONTENTS

CASES

OTHER

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

Reply Brief of Defendant-Appellant Colombine Coal Company

ARGUMENT

POINT I.

STATE LAW, NOT FEDERAL LAW, CONTROLS IN DETERMINING THE EFFECT OF THE ACCEPTANCE OF PAYMENT OF INTEREST AND PRINCIPAL INSTALLMENTS AFTER NOTICE OF DEFAULT.

The central question to the determination of this appeal is *not* whether the Government had authority to apply the proceeds of the insurance policy differently than the Government did, *nor* whether the servicing of SBA loans is a discretionary function. The question on appeal is whether the acceptance of interest and principal installments by the Government constituted an abandonment and waiver of the notice of acceleration and default which rendered subsequent foreclosure proceedings void.

The question of the *effect* of the Government's action in accepting payments after notice of default and acceleration upon a foreclosure suit in the Third District Court of Utah brought under Utah statutory foreclosure law is a question of Utah state law and procedure. The Government chose the forum in this case. The Government cannot now be heard to complain because Utah state law is applied. Moreover, as this brief will more fully develop, under case law precedent, Utah law is controlling. The cases cited by the Government and, more importantly, a case decided by the United States Supreme Court which was overlooked by the Govern-

ment's Brief, hold that state law controls on issues such as are here presented.

The cases cited in the Government's Brief under Point II beginning at page 10, do not apply to the issue before the Court. All of the cases cited by the Government are federal cases, brought in federal court, under federal law, proceeding under federal statutory authority. The choice-of-law question in all of the cases cited by the Government was whether, under the vagaries of the Erie Doctrine, the federal court had to apply the law of the state in which it was sitting. ***Erie R. Co. v. Thompkins***, (1938) 304 U.S. 64, 82 L.Ed. 1188. What all of the cases cited by the Government ultimately held was that in certain defined areas, such as government contracts or securities, a federal court did not *have* to adopt a state rule as the rule of decision in a federal case. Of course, the Erie Doctrine problems do not arise in state courts. There is no corollary of the Erie Doctrine which applies to state courts and there could not be, for the reasoning behind requiring federal courts to follow state law would make no sense if the state courts themselves were not allowed to follow state law. In order to achieve uniformity *among federal courts* on certain narrow questions, the federal courts have carved out a narrow exception to the general rule. The cases cited by the Government are a fairly exhaustive representation of this exception. Yet, even under federal precedent, the rule urged by the Government is too narrow in its scope to be applied here. On page 14 of the Government's Brief, for instance, the Government quotes from *Cassidy Commis-*

sion Company v. United States (10th Cir. 1967), 387 F.2d 875, in support of the Government's position. A comparison of the quotation with the text of the original, however, reveals that the case does not argue for so absolute a rule. On page 878 of the Tenth Circuit opinion we find that interposed between the second and third sentences of the Government's quote is the following sentence:

> In the absence of an applicable act of Congress, it is the duty of the federal courts to fashion a federal rule governing the rights of the United States under such security instruments as the chattle mortgage here involved. 387 F.2d at 878.

The meaning of the quoted passage is considerably changed by the addition of the omitted sentence. What the Tenth Circuit was talking about was the right of federal courts, under certain circumstances, to adopt their own federal rule of decision. This is a far cry from saying that a state supreme court must abandon its own law and adopt as a rule of decision the policy guidelines of a federal agency.

Similarly, the passage quoted in the Government's Brief from *United States v. Sommerville* (3rd Cir. 1964), 324 F.2d 718 (Government's Brief, p. 14) takes on new meaning when read in context. The quoted passage ends in a footnote which explains:

> Two separate inquiries must be made. The first is to ascertain if the requisite federal interest is present. If there is, a federal rule may be formu-

> lated. The necessity of uniformity must decide whether a state law should be rejected as the source for the applicable federal rule. 324 F.2d at 715, n. 8.

And what is the "requisite federal interest" which would allow a federal court to ignore the state rule? The answer, the Company submits, has been fully presented by the United States Supreme Court in a case which demonstrates quite clearly that the requisite federal interest would *not* be present in the instant case. A federal court, it would seem, presented with this identical appeal, would adopt the Utah rule.

In the case of *United States v. Yazell* (1966), 382 U.S. 341, 15 L.Ed.2d 404, 86 S.Ct. 500, the United States Supreme Court was presented with a case involving, as does the instant case, the collection by the Government of a Small Business Administration loan. The SBA had granted a disaster loan to a husband and wife in Texas, taking a note secured by a chattle mortgage accompanied by the wife's separate acknowledgment required by the Texas law of coverture. At that time, Texas law provided that a wife could not bind her separate property unless she had first obtained a court decree removing her disability to contract. In the United States suit on the note, the federal district court sustained the wife's plea of coverture. The Fifth Circuit and the United States Supreme Court affirmed even though the Supreme Court expressed dislike for the state doctrine. Many of the same arguments were urged by the Government in *Yazell* as are presented by the Government

in this case. All such arguments were rejected by the United States Supreme Court, which held, *inter alia*:

> Clearly, in the case of these SBA loans there is no "federal interest" which justifies invading the peculiarly local jurisdiction of these States, in disregard of their laws, and of the subtleties reflected by the differences in the laws of the various States which generally reflect important and carefully evolved state arrangements designed to serve multiple purposes. 15 L.Ed.2d at 411.

The Court quoted with approval a case in point involving California law:

> The Ninth Circuit, in Bumb v. United States, 276 F.2d 729 (CA 9th Cir.), aptly observed in response to a claim by the Small Business Administration that the 'need for uniformity' excused it from complying with a California 'bulk sales' statute requiring notice of intent to mortgage:
>
> "It is true that the Small Business Administration operates throughout the United States, but such fact raises no presumption of the desirability of a uniform federal rule with respect to the validity of chattle mortgages in pursuance of the lending program of the Small Business Administration. The largeness of the business of the Small Business Administration offers no excuse for failure to comply with reasonable requirements of local law. . . . It must be assumed that the Small Business Administration maintains competent personnel familiar with the laws of the various states in which it conducts business, and who are advised of the steps required by local law in order to acquire a valid security interest within the various states." 15 L.Ed.2d at 407, n. 13, *quoting* 276 F.2d at 738.

The Court pointed out that the Small Business Administration's Financial Assistance Manual, SBA-500, "is replete with admonitions to follow state law carefully," 15 L.Ed.2d at 413, n. 35, and repeatedly emphasized that the loan, like most SBA loans, was a specially designed transaction not in need of "uniformity rule" protection.

> Again, it must be emphasized that this was a custom-made, hand-tailored, specifically negotiated transaction. It was not a nation-wide act of the Federal Government, emanating in a single form from a single source. 15 L.Ed.2d at 408.

And on this point the Court distinguished *Clearfield Trust Company v. United States*, 318 U.S. 363, 87 L. Ed. 838, 63 S.Ct. 573, which is relied upon by the Government in the instant case. *Id.* (see Government's Brief, p. 12). The other previous United States cases on the subject were also distinguished on the point that they involved general plans or programs, not individual contracts, and explained on this basis the "necessity of uniformity" doctrine.

> The decisions of this Court do not compel or embrace the result sought by the Government. None of the cases in which this Court has devised and applied a federal principal of law superceding state law involved an issue arising from an individually negotiated contract. . . .
>
> The Court's decisions applying 'federal law' to supercede state law typically relate to programs and actions which by their nature are and must be uniform in character throughout the nation. . . . 15 L.Ed.2d at 411.

> On the other hand, in the type of case most closely resembling the present problem, state law has invariably been observed. . . . 15 L.Ed. at 412. . . . There is here no need for uniformity. There is no problem in complying with the state law; in fact, SBA transactions in each state are specifically and in great detail adapted to state law. There is in this case no defensible reason to override state law. . . . 15 L.Ed.2d 413.

In the instant case there is also no defensible reason to override state law. All of the reasons advanced by the United States Supreme Court for following state law in *Yazell* apply to this case also. This case, as did *Yazell*, involves the collection by the Government of an individually negotiated SBA administered loan. If this case were in federal court *Yazell* would control and Utah state law would have to be applied by the federal court. But unlike *Yazell* and all the cases cited in the Government's Brief, this case was brought, by the Government, in state court. By this fact alone, irrespective of the compelling *Yazell* precedent, the Government subjected itself in this case to the jurisdiction of the Utah courts and the rule of Utah law. For it is the general rule that the United States, by coming into state court as a party plaintiff seeking affirmative relief, accepts the status of an ordinary litigant with no special privileges. *See* 91 C.J.S., *United States* §§ 175, 183, 197; 54 Am.Jur., *United States* § 116; and the cases cited therein, *c.f.*, *The Southern Cross*, (2d Cir. 1941), 120 F.2d 466 at 468.

UNITED STATES OF AMERICA	)	
	)	
VS	)	Case No. 12459
	)	
COLOMBINE COAL COMPANY, ET AL.	)	

ADDITIONAL AUTHORITY ON BEHALF OF DEFENDANTS-APPELLANTS, COLOMBINE COAL COMPANY, ET AL.

Defendants-Appellants respectfully cite for the consideration of this Court the case of Walker Bank & Trust Company v. Neilson, 490 P.2d 328 (Utah, 1971), which was decided after the briefs in this case had been filed.

The proposition to which the Walker Bank v. Neilson case applies is:

That where money has been made available to pay the amount due on a mortgage prior to or about the same time as the notice of acceleration, and where a tender was made and money paid into court at the foreclosure proceedings, it is proper to deny foreclosure.

CONCLUSION

According to the Utah case law precedent cited in the Appellant's Brief, the notice of acceleration was waived and vacated, because the Government accepted payment of interest and principal installments after giving notice of acceleration, and all subsequent proceedings in the foreclosure were void and taken in error. Utah law, not federal law, is controlling on this point. The Government must start its foreclosure proceedings over if it wants to foreclose the $300,000 loan. The present order of sale, based upon the combined foreclosure of both notes, is invalid, and must be set aside. It is respectfully submitted that this case should be remanded to the trial court for determination of the correct amounts due and the effect of the Company's tender in light of the smaller amount due.

Respectfully submitted,

Donald B. Holbrook, Esq.
Edward J. McDonough, Esq. of
JONES, WALDO, HOLBROOK
& McDONOUGH

Attorneys for Defendant-Appellant

800 Walker Bank Building
Salt Lake City, Utah 84111