

1993

West One Bank, Utah v. Life Insurance Company of Virginia : Petition for Rehearing

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Carolyn Montgomery; James H. Woodall; Parsons, Behle & Latimer; Attorneys for Appellee.
Russell C. Fericks; Richards, Brandt, Miller & Nelson; Attorneys for Defendant.

Recommended Citation

Petition for Rehearing, *West One Bank v. Life Insurance Company of Virginia*, No. 930476 (Utah Court of Appeals, 1993).
https://digitalcommons.law.byu.edu/byu_ca1/5396

This Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU
50
.A10
DOCKET NO.

930476

IN THE UTAH COURT OF APPEALS

WEST ONE BANK, UTAH, Plaintiff/Appellee, vs. LIFE INSURANCE COMPANY OF VIRGINIA, Defendant/Appellant.	Case No. 930476-CA
--	--------------------

PETITION FOR REHEARING

CAROLYN MONTGOMERY
JAMES H. WOODALL
PARSONS, BEHLE & LATIMER
Attorneys for Appellee
201 South Main Street #1800
Salt Lake City, UT 84111
Telephone: (801) 532-1234

RUSSELL C. FERICKS [A3793]
RICHARDS, BRANDT, MILLER
& NELSON
Attorneys for Defendant
Key Bank Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
Salt Lake City, UT 84110-2465
Telephone: (801) 531-2000

FILED

JAN 0 5 1995

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

WEST ONE BANK, UTAH,

Plaintiff/Appellee,

vs.

LIFE INSURANCE COMPANY OF
VIRGINIA,

Defendant/Appellant.

Case No. 930476-CA

PETITION FOR REHEARING

CAROLYN MONTGOMERY
JAMES H. WOODALL
PARSONS, BEHLE & LATIMER
Attorneys for Appellee
201 South Main Street #1800
Salt Lake City, UT 84111
Telephone: (801) 532-1234

RUSSELL C. FERICKS [A3793]
RICHARDS, BRANDT, MILLER
& NELSON
Attorneys for Defendant
Key Bank Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
Salt Lake City, UT 84110-2465
Telephone: (801) 531-2000

RUSSELL C. FERICKS [A3793]
RICHARDS, BRANDT, MILLER & NELSON
Attorneys for Defendant
Key Bank Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: (801) 531-2000
Fax No.: (801) 532-5506

IN THE UTAH COURT OF APPEALS

WEST ONE BANK, UTAH, Plaintiff/Appellee, vs. LIFE INSURANCE COMPANY OF VIRGINIA, Defendant/Appellant.	Case No. 930476-CA
--	--------------------

PETITION FOR REHEARING

The appellant, Life Insurance Company of Virginia ("LOV"), petitions for rehearing on the Opinion issued by the Court on December 21, 1994. This petition is brought under Rule 35 of the Utah Rules of Appellate Procedure. Counsel for the petitioner certifies that the petition is presented in good faith and not for delay.

POINTS AND AUTHORITIES
IN SUPPORT OF PETITION

The Court has incorrectly decided the issues. The Court's error is in characterizing the appellant's conduct as a setoff. All of its analysis and the erroneous conclusion derive from that seminal error.

The Court's error is apparent from inconsistencies in the Opinion itself. In its recitation of facts on page 2, the Court acknowledges that the arrangement for LOV to apply UUI's commissions was consensual and intentional, and it was made as consideration for LOV's advance of funds to UUI.¹ This undisputed fact is again noted in footnote 5 on page 8 of the Opinion. LOV applied the commissions as a result of "a second assignment in favor of Life of Virginia." *Id.* These facts are

¹What the Court characterizes in its Opinion as "a second assignment in favor of Life of Virginia" is an explicit instruction by UUI to apply ongoing commissions for the repayment of LOV's advance: "Assignor hereby authorizes and directs the Life Insurance Company of Virginia to credit said commission [sic] against the balance of the Assignor's obligation to the Life Insurance Company of Virginia by virtue of the Note dated March 1, 1989 made by the Assignor and held by the Life Insurance Company of Virginia." Record at 00093. This authorization is dated March 2, 1989. It is an integral part of the agreement between for LOV's advance to UUI. It is not an alternative source of repayment arranged after the advance or as a consequence of any failure by UUI to make payments from some other, originally contemplated source. (R. at 00093)

incompatible with the conclusion that LOV exercised a unilateral setoff.

The Court is obviously aware of the law of setoff which it announced in Mark VII Financial Consultants Corp. v. Smedley, 792 P.2d 130, 132 (Utah App. 1990) and cited on page 4 of the Opinion. A setoff is a counterclaim which arises from a separate or unrelated transaction. Id. at 132. Smedley does suggest that the distinction between setoff and recoupment is not significant for purposes of civil procedure (i.e., for determining mandatory and permissive counterclaims under Rule 13 of the Rules of Civil Procedure). But Smedley does not abandon setoff as a discrete principle of law. Unfortunately, the present Opinion does, and it does so sub silentio.

The Opinion seems to rely on a perception that LOV is trying to subordinate or trump West One's interest, and because LOV has shown no defect in that properly perfected interest, LOV must necessarily fail. (See Opinion at page 2-3) This characterization of LOV's position is incorrect, and it has skewed the Court's analysis. LOV does not contest that West One's interest in the insurance policy commissions was perfected prior to the assignment from UUI to LOV. However, West One's rights are not unlimited. No one, including West One, has ever even suggested that.

It is a given that West One's rights are limited by the terms of its own security documents. U.C.A. Section 78-9-201; and Insley Manufacturing Corp. v. Draper Bank & Trust, 717 P.2d 1341, 1345 (Utah 1986). And yet, West One has never satisfied the basic requirements of its own contract.²

It is also fundamental that UUI had the right to "use, commingle or dispose of all or part of the collateral" until West One acted on its perfected security interest by directing the account debtor (LOV) to pay the commissions directly to West One. U.C.A. Section 78-9-205. The Court acknowledged this right when the issue was addressed in oral argument. Yet, nowhere does the Court's Opinion explain why that right somehow disappears when

²West One's security agreement is contained in the document entitled Assignment of Contract as Collateral. Paragraph 7a. of that document says: "Upon or at any time after default [by UUI] . . . [West One may] make demand and sue for all rents, income, commission and profits under the Contracts. . . ." Record at 00088. Under this term, West One must wait for a default by UUI and then make demand for LOV to pay over commissions before LOV is obligated to do anything other than follow UUI's direction.

Section 7a. of the security agreement continues: "Assignor (UUI) is further authorized to direct the Companies (i.e., LOV) under any Contracts hereafter entered into by Assignor, on receipt of written notice from Assignee (i.e., West One), to pay to Assignee all rents, income, issue and profits accruing under the Contracts. . . ." Here again, West One's interest is limited by its own document which requires direction to the contract debtor (LOV) to make payment directly to West One before any obligation to do so arises.

Except to the extent its June 19, 1992 Complaint can be couched as the requisite notice to pay over commissions, West One has still not exercised its contractual and statutory rights correctly.

the source of the commissions happens to coincide with a destination for them which is intentionally and volitionally designated by UUI.

Finally, it is undisputed that LOV, as the account debtor on the commissions, had the right to follow UUI's direction as to the payment of the commissions until it received notification from West One that "the amount due or to become due has been assigned and that payment is to be made to the assignee." U.C.A. Section 78-9-318(3). Neither West One nor UUI ever gave notice to LOV to pay commissions to West One.³ LOV's right, even its obligation, to follow UUI's direction for the "use, commingling, or disposal" of the commissions is thus statutorily protected.

This is the statutory scheme of intermingled rights under the Uniform Commercial Code. It is also the express term of the security agreement between UUI and West One, and the express term in the notification given by West One to LOV. The Court's Opinion reads the fundamental protections of Sections 9-205 and 9-318(3) right out of the Uniform Commercial Code in the

³West One's Notice of Assignment to LOV specifically recites that "upon written notice from Continental Bank & Trust Company [i.e., West One's predecessor in interest], all monies due or to become due under the Contract described above are to be paid to The Continental Bank & Trust Company pursuant to this Assignment." Record at 00042. This is explicitly not a current direction to pay commissions directly to West One's predecessor.

context of assigned accounts. It also inexplicably enhances West One's rights over those which are allowed by statute and reserved in West One's own documents.

In reaching its conclusion, the Court relies on several cases which involve true setoffs of non-mutual debts in non-consensual circumstances. For instance, Insley Manufacturing Corp. involves a bank which covered overdraft checks without contemplation or consideration of the source of repayment. Later, when unrelated funds which were restricted proceeds of collateral came through its account, it unilaterally applied those funds to the overdrafts. In essence, the bank executed on someone else's collateral.

The contrast between those circumstances and the present case is fundamental. Here, LOV only made the advance to UUI in contemplation of and with the direction by UUI that the source of repayment would be the commissions. Certainly, LOV was on notice that the commissions were subject to the perfected security interest of West One. And if West One had acted on its security interest, LOV would have been required to bow to West One's priority. However, UUI had the right to make the assignment to LOV and LOV had the right to follow or accept the assignment until West One declared a default and demanded payment over to itself. West One never made the requisite demand.

The Court also relied on In re Apex Oil Co., 975 F.2d 1365 (8th Cir. 1992). But the Court's own recitation of the Apex facts shows that in that case the assignor's (ARTOC) invoices were stamped not only with notice of the secured creditor's interest but also with a present direction that payments be made to the secured creditor's lock box. This is a critical distinction from the facts of the present case. The same pivotal distinction is also found in Pioneer Commercial Funding Corp. v. United Airlines, Inc., 122 B.R. 871, 875 (D.C. S.D.N.Y. 1991).

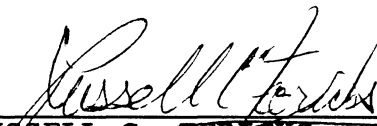
CONCLUSION

Obviously, LOV would like the Court's Opinion corrected because the result is unfavorable to it. But in addition, the Opinion should be changed because it undermines the carefully balanced rights of creditors and debtors under the Uniform Commercial Code. Furthermore, it implicitly and unnecessarily broadens the concept of setoff, with unknown mischief to be reaped in the future. Finally, because of the internal inconsistencies in the Opinion, it is simply bad jurisprudence. The Opinion strains to reach a result which is not necessary and

not justified by the statutes, by West One's documents, or by any overriding equities.

DATED this 5th day of January, 1995.

RICHARDS, BRANDT, MILLER
& NELSON



RUSSELL C. FERICKS
Attorneys for Defendant/
Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing instrument were mailed, first-class, postage prepaid, on this 5th day of January, 1995, to the following:

Carolyn Montgomery
James H. Woodall
PARSONS, BEHLE & LATIMER
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111

38999

