

*States v. Culoso*, 461 F.Supp. 128, 134 (S.D.N.Y.1978) (receipt of a finder's fee for obtaining a fraudulent loan from the SBA was an overt act in furtherance of the conspiracy). Defendants had no further communications with the SBA. See *United States v. Elkin*, 731 F.2d 1005, 1008 (2d Cir.1984) (fraudulent verification letter sent two years after defendant received improperly obtained money was part of scheme to defraud). Defendants did not pledge additional collateral or make further assurances that the loan would be repaid in order to "lull" the SBA into inactivity. See *United States v. Rubin*, 609 F.2d 51, 65 (2d Cir.1979) (attempts to lull defrauded bank into believing a loan will be repaid or that collateral is sufficient are overt acts in furtherance of a conspiracy to defraud). After four years of inactivity, the government argues defendants' 1998 deposition testimony was an overt act in furtherance of the conspiracy. However, the 1998 deposition testimony does nothing to further the objectives of the crime of defrauding the SBA. The only function of the 1998 deposition testimony was to avoid detection.

The court finds the last overt act in furtherance of the conspiracy occurred on April 4, 1994. Because the last overt act in furtherance of the conspiracy occurred on April 4, 1994, the five year statute of limitations expired on April 4, 1999. The indictment was returned on January 18, 2000, over nine months after the statute of limitations expired. Therefore, the court's analysis in its June 9, 2000, memorandum and order regarding the statute of limitations remains unchanged, except to the extent the court finds the correct date of the expiration of the statute of limitations is April 4, 1999, rather than March 1, 1999. Because the court finds its analysis remains unchanged, defendant's request that the court strike its discussion of the statute of limitations is denied.

#### **B. Findings Regarding the Sealed Indictment and Prejudice**

The government also requests that the court reconsider or clarify its findings re-

garding the government's stated reasons for sealing the indictment and prejudice suffered by the defendants. The court has reviewed its analysis in light of the government's arguments and finds no reason to alter its findings on these issues.

**IT IS THEREFORE BY THE COURT ORDERED** that the government's Motion for Reconsideration of Court's Order Granting Defendants' Motions to Dismiss for Post-Indictment Delay under the Statute of Limitations (Doc. 82) is granted in part and denied in part. The motion to reconsider is granted to the extent the correct date of the expiration of the statute of limitations is April 4, 1999, rather than March 1, 1999. All other requests for relief are denied.



**MOONGATE WATER CO., INC.,  
a New Mexico Public  
Utility, Plaintiff,**

v.

**BUTTERFIELD PARK MUTUAL DOMESTIC WATER ASSOCIATION,  
a/k/a Butterfield Park Mutual Domestic Water Consumers and Mutual Sewage Works Association, Defendant.**

**No. 00CV0063.**

United States District Court,  
D. New Mexico.

Oct. 25, 2000.

Water utility sought a declaratory judgment that rural water service association was not entitled to statutory protection against encroachment on its territory, and association sought a declaratory judgment that utility had unlawfully violated its rights, and sought money damages. On

## MOONGATE WATER v. BUTTERFIELD PARK DOMESTIC WATER 1305

Cite as 125 F.Supp.2d 1304 (D.N.M. 2000)

utility's motion for summary judgment and association's motion for partial summary judgment, the District Court, Conway, J., held that: (1) association was an "association" within the meaning of section of the Consolidated Farm and Rural Development Act protecting qualified associations which have a continuing indebtedness to the Farmers Home Administration (FmHA) against encroachment on their territories; (2) association had continuing indebtedness to the FmHA so as to be entitled to statutory protection, though its notes had been assigned to a third party; and (3) association made service available to particular property, so as to be entitled to protection, though it had conditioned service on owner's granting an easement across her property.

Plaintiff's motion denied, defendant's motion granted, and injunction issued.

### 1. Waters and Water Courses ⇔202

Water service association was an "association" within the meaning of section of the Consolidated Farm and Rural Development Act protecting qualified associations which have a continuing indebtedness to the Farmers Home Administration (FmHA) against encroachment on their territories, where its articles of incorporation stated that it was a non-profit organization, and though the articles authorized the distribution of "surplus funds" to members of the organization, this was not inconsistent with a non-profit organization, and even if the refunded contributions rendered the association a "for-profit corporation," it qualified as a "quasi-public corporation" providing an essential public service. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).

See publication Words and Phrases for other judicial constructions and definitions.

### 2. Waters and Water Courses ⇔202

Any doubts about whether a rural water association is entitled to protection from competition under the Consolidated Farm and Rural Development Act should be resolved in favor of an association which

is indebted to the Farmers Home Administration (FmHA) and is seeking protection for its territory. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).

### 3. Waters and Water Courses ⇔202

A rural water association which had obtained loans from the Farmers Home Administration (FmHA) for constructing water facilities had continuing indebtedness to the FmHA so as to be entitled to statutory protection against encroachment on its territory, though its notes had been assigned to a third party pursuant to the Omnibus Budget Reconciliation Act (OBRA) of 1986, prior to amendment of OBRA to state that the statutory protection would be applicable to all notes or other obligations sold under OBRA; the amendment was merely a clarification of the existing law and not a change. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b); Omnibus Budget Reconciliation Act of 1986, § 1001(f, g), 7 U.S.C.A. § 1929a note.

### 4. Waters and Water Courses ⇔202

Rural water service association with indebtedness to the Farmers Home Administration (FmHA) made service available to particular property, so as to be entitled to protection of its territory against encroachment by another water utility, where association provided service to the neighborhood and provided service to the property in question before the present owner purchased it, thus meeting the "pipes-in-the-ground" test, though it conditioned continued service on owner's granting an easement across her property for its waterline, as requested fees and easement were not unreasonable. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).

### 5. Waters and Water Courses ⇔202

Statute providing protection against encroachment on its territory to a rural water service association with indebtedness to the Farmers Home Administration (FmHA) is not intended to authorize an association to charge unreasonably high

rates or fees, and thus an association which conditions service on the user's agreement to pay unreasonable fees is not "making service available," as required for statutory protection. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).

See publication Words and Phrases for other judicial constructions and definitions.

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#### **MEMORANDUM OPINION AND ORDER**

CONWAY, District Judge.

THIS MATTER came on for consideration of Plaintiff's Motion for Summary Judgment, filed April 3, 2000 (*Doc. 16*), and Defendant's Motion for Partial Summary Judgment, filed April 5, 2000 (*Doc. 21*). The Court has reviewed the motions, the memoranda submitted by the parties and the relevant authorities. The Court finds that Plaintiff's motion is not well taken and will be denied. The Court also finds that Defendant's motion is well taken and will be granted.

This matter also came on for consideration of Plaintiff Moongate's Motion in Limine to Exclude and Strike Supplemental Affidavit of Mary Berry, filed April 20, 2000 (*Doc. 26*). The Court has reviewed the motion, the memoranda submitted by the parties and the relevant authorities. The Court finds that the motion is moot.

#### **Background**

The material facts of this case are not disputed. Defendant Butterfield Park Mutual Domestic Water Association ("Butterfield") is an organization which provides water and sewer service to residents within its territory. Pursuant to regulations promulgated by Butterfield, a resident wishing to obtain water service from Butterfield must provide an Application for

Membership, a Membership Agreement, Proof of Property Ownership and pay the requisite fees. In 1988, Butterfield began providing water service to 9165 Berry Patch Lane, a property within its territory owned by the Donnahoos. In early 1998, Ms. Frances Hutson moved onto the property. Sometime during the next year, Ms. Hutson purchased the property from the Donnahoos, whereupon Butterfield requested that Ms. Hutson comply with its rules and regulations relating to the provision of water service. In subsequent exchanges, Butterfield warned that service would be terminated if Ms. Hutson did not comply. Ms. Hutson refused to comply, citing that Butterfield conditioned service upon her granting an easement for their facilities across her property. On September 22, 1999, Butterfield terminated service to Ms. Hutson's property.

Upon learning that Ms. Hutson's water service had been terminated, Plaintiff Moongate Water Company ("Moongate") sought permission from the Public Regulation Commission to provide her with water service. On September 28, 1999, after receiving a letter which indicated that such formal approval was not needed, Moongate connected Ms. Hutson to its water system. Subsequently, Moongate sent a letter to other Butterfield customers, soliciting their business.

A dispute arose as to whether Moongate is permitted to sell water to customers within the Butterfield service area under 7 U.S.C. § 1926. This statute was enacted to allow the Secretary of Agriculture to make loans through the Farmers Home Administration, now known as the Rural Utilities Service ("FmHA"). Under § 1926(b), "service provided or made available through any such association shall not be curtailed or limited . . . during the term of such loan." Moongate brings suit seeking a declaratory judgment that Butterfield is not entitled to the protections afforded by 7 U.S.C. § 1926(b) in regards to water service to Ms. Hutson and other customers whom Moongate seeks to ser-

vice. Conversely, Butterfield argues that, as a recipient of an FmHA loan, it is entitled to protection under the act from present and future competition. Accordingly, Butterfield seeks a declaratory judgment that Moongate has unlawfully violated its rights under § 1926(b). Butterfield also seeks money damages as a result of Moongate's alleged actions. Now before the Court are the parties' cross-motions for summary judgment, both of which turn on the application of 7 U.S.C. § 1926(b).

### Analysis

#### I. Plaintiff's Motion in Limine

After both motions for summary judgment were filed, Plaintiff Moongate submitted its Motion in Limine to Exclude and Strike Supplemental Affidavit of Mary Berry, file April 20, 2000 (*Doc. 26*). Specifically, Moongate asked that this court enter an order excluding and striking the last sentence of ¶ 4; and ¶¶ 5, 6, and 7 of Ms. Berry's supplemental affidavit. *See* Pl.'s Mot. in Limine at 1 (*Doc. 26*).

In the following analysis addressing the summary judgment motions submitted by the parties, the Court did not rely upon nor utilize any information set forth in Mary Berry's supplemental affidavit. Therefore, Plaintiff's motion to exclude or strike the supplemental affidavit is moot.

#### II. Motions for Summary Judgment

##### A. Standard

Summary judgment is appropriate only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c). When ruling on a motion for summary judgment, the court must construe the facts in the light most favorable to the non-movant. *See Magnum Foods v. Continental Cas. Co.*, 36 F.3d 1491, 1497 (10th Cir.1994). The moving party bears the initial burden of showing that no genuine issues of material fact exist. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Only then does the burden shift to the non-movant to come forward with evi-

dence showing that there is a genuine issue of material fact. *See Bacchus Indus. v. Arvin Indus.*, 939 F.2d 887, 891 (10th Cir.1991). All doubts must be resolved in favor of the existence of triable issues. *See World of Sleep v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1474 (10th Cir.1985).

##### B. Discussion

As part of the Consolidated Farm and Rural Development Act, 7 U.S.C. §§ 1921–2009n, Congress authorized the Secretary of Agriculture to make or insure loans to non-profit water service associations for “the conservation, development, use, and control of water” in order to encourage soil conservation practices, water service and management, waste facilities and other community facilities for farmers, ranchers and other rural residents. *See Glenpool Util. Servs. Auth. v. Creek County Rural Water Dist. No. 2*, 861 F.2d 1211, 1214 (10th Cir.1988). By including water service to “other rural residents,” Congress intended 1) to reduce per user cost resulting from the larger base of users, 2) to provide greater security for the federal loans made under the program, and 3) to provide a safe and adequate supply of water. *See* S.Rep. No. 566 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2243, 2309. In order to protect the nonprofit water service associations and the federal loans made to them, Congress enacted 7 U.S.C. § 1926(b) to protect against “competitive facilities which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system.” *Id.*

Section 1926(b) provides that:

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as

a condition to continuing to serve the area served by the association at the time of the occurrence of such event. 7 U.S.C. § 1926(b).

In this case, Moongate and Butterfield dispute whether Butterfield is entitled to protection under § 1926(b) against service provided by Moongate to Ms. Hutson and other potential customers. The Tenth Circuit has held that in order to receive the protection against competition provided by § 1926(b), a qualified water association must “(1) have a continuing indebtedness to the FmHA, and 2) have provided or made available service to the disputed area.” *Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow*, 191 F.3d 1192, 1197 (10th Cir.1999) (citations omitted).

### 1. Association

[1] Before a party can prevail on a § 1926(b) claim, the party must establish that it is entitled to § 1926(b) protection by establishing that it is an “association” within the meaning of the Act. *See Lexington-South Elkhorn Water Dist. v. City of Wilmore, Ky.*, 93 F.3d 230, 234 (6th Cir. 1996). Title 7 U.S.C. § 1926 authorizes the Secretary of Agriculture “to make or ensure loans to associations including corporations not operated for profit . . . and public and quasi-public agencies.” 7 U.S.C. § 1926(a). Butterfield argues that it is an incorporated, non-profit association created for the purposes of providing water and waste disposal facilities to the residents within its service area. *See* Articles of Incorporation, attached as Ex. 1 to Def.’s Mot. for Partial Summ. J., filed Apr. 5, 2000 (*Doc. 21*). Moongate, on the other hand, contends that Butterfield is not a true non-profit corporation because it is required to distribute its profits to its members. Moongate also disputes that Butterfield is a public or quasi-public entity.

The Court finds that Butterfield is an association within the meaning of the stat-

ute. The Articles of Incorporation clearly state that Butterfield is a non-profit organization. *See id.* While Article X of the Articles of Incorporation authorize the distribution of “surplus funds” to members of the organization, such acts are not inconsistent with a non-profit organization. On the contrary, members are refunded a percentage of their contribution to the organization whenever there is a surplus, eliminating any profit. *See id.* at Art. X. Nonetheless, even if the refunded contributions render Butterfield a “for-profit corporation,” Butterfield’s inclusion as an association under the statute can be found in the clear definition of a “quasi-public corporation” as “[a] for-profit corporation providing an essential public service. . . . [a]n example is an electric company or other utility.” BLACK’S LAW DICTIONARY, 344 (7th ed.1999).

[2] Finally, Congress enacted § 1926(b) to encourage rural water development and to provide greater security for FmHA loans. *See Sequoyah*, 191 F.3d at 1196. Thus, any “[d]oubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the FmHA-indebted party seeking protection for its territory.” *Id.* Therefore, the Court’s holding is supported by the public policy underlying the federal statute.

### 2. FmHA Loans

[3] The analysis continues with the indebtedness prong of § 1926(b). In order to seek protection under § 1926, Butterfield must have had a continuing indebtedness to the FmHA during the alleged competition or encroachment into their service area. *See Bell Arthur Water Corp. v. Greenville Util. Comm’n*, 173 F.3d 517, 523 (4th Cir.1999). Butterfield obtained loans from the FmHA on March 1, 1972 and March 5, 1974, for the purpose of constructing water facilities.<sup>1</sup> Pursuant to

On March 1, 1972, and on March 5, 1974, Butterfield obtained loans from the government (“FmHA”) for the purposes of

1. Moongate disputes Butterfield’s Undisputed Statement of Fact No. 7 which states that,

the Omnibus Budget Reconciliation Act (“OBRA”) of 1986, enacted “[a]s part of an overall effort to reduce the federal deficit,” the FmHA assigned Butterfield’s notes to Community Property Trust No. 1987A (with General Electric Credit Corporation acting as agent for Shawmut Bank NA) in September of 1987. *See* OBRA § 1001(a)-(e) (codified at 7 U.S.C. § 1929a note, subsections (a)-(e)).

Subsequently, Congress amended OBRA by requiring the FmHA to provide rights of first refusal to its debtors before it attempted to sell the obligations to third party purchasers. *See* OBRA § 1001(f), as amended by ACA § 803(f) (codified at 7 U.S.C. § 1929a note, subsection (f)). As part of the same series of amendments, Congress enacted the following provision:

Applicability of Prohibition on Curtailment or Limitation of Service.—Section [1926(b)] . . . shall be applicable to all notes or other obligations sold or intended to be sold under this section.

OBRA § 1001(g), as amended by the Agricultural Credit Act (“ACA”) of 1987 § 803(g) (codified at 7 U.S.C. § 1929a note, subsection (g)).

Accordingly, when an issuer opts to repurchase its own bond under OBRA § 1001(f), courts have held that the debt is considered canceled and the issuer no longer qualifies as a debtor for § 1926(b) protection. *See Bell Arthur*, 173 F.3d at 522–23 (holding that § 1926(b) protection does not extend to the retirement of indebtedness authorized by OBRA § 1001(f)); *see also Scioto County Reg’l Water Dist. No. 1 v. Scioto Water, Inc.*, 103 F.3d 38, 42 (6th Cir.1996); *Rural Water Sys. No. 1 v. City of Sioux Ctr.*, 967 F.Supp. 1483, 1523 (N.D.Iowa 1997). In

construction water facilities to meet the needs of the residents within its service area. Butterfield remains indebted on these loans today. Ex. 3, St. No. 8 and Exs. 6 and 7, true and correct copies of the loan documents for the 1972 and 1974 FmHA Loans.

*See* Br. in Supp. of Def.’s Mot. for Partial Summ. J. at 2 (*Doc. 21*). Moongate argues that Butterfield failed to attach the full loan

contrast, the Tenth Circuit has noted that § 1001(g) “clearly extends the protection of § 1926(b) to situations in which the government sells notes or other obligations to third parties.” *Sequoyah*, 191 F.3d at 1198. Here, the FmHA loans held by Butterfield were not repurchased, but sold to a third party; however, the sale was made before OBRA § 1001(g) was passed. Thus, the question now before the Court is whether the amendment reflected a change in the law such that assignments made prior to the amendment are not protected by § 1926(b), or whether the amendment was merely a clarification of the existing law, in which case the assignments remain subject to the protections of § 1926(b).

One of the principal purposes of 7 U.S.C. § 1926(b) is to protect federal loans insured by the Rural Development Insurance Fund. *See Bell Arthur*, 173 F.3d at 523. Thus, protection under § 1926(b) is afforded “during the term of such loan.” 7 U.S.C. § 1926(b). OBRA, as amended by the ACA, did not intend to delete this condition. *See Bell Arthur*, 173 F.3d at 523. While the issuer’s debt remains outstanding, the underlying policy behind § 1926(b) stands, regardless of the loan holder. OBRA § 1001(g) was enacted to ensure that a third-party purchaser enjoyed the same assurance of repayment that the federal government had as the holder of the notes. *See id.* It would defeat the underlying purpose of the statute if the court were to carve out a brief time period in which § 1926(b) did not apply. This position is supported by the legislative history accompanying the act which referred to the amendments as “technical and correcting changes in agri-

documents. Elsewhere, however, the fact that the loans were made is not disputed. *See* Plaintiff’s Mot. for Summ. J. at 5, ¶ 24 (*Doc.16*). Therefore, there is no genuine issue of material fact concerning whether Butterfield obtained FmHA loans. Instead, the issue in dispute is whether those loans remain in effect for the purpose of § 1926(b) protection.

culture programs.” See S. 1793, 101st Cong., 103 Stat. 1876 (1989) (enacted). Thus, congressional intent appears to reflect a desire to clarify the applicability of § 1926(b), rather than a desire to alter the applicability of the statute. Therefore, the court finds that OBRA, as amended by the ACA, merely clarified the continuing application of § 1926(b) to loans transferred by the FmHA. The Court further finds that Butterfield did not lose the protection afforded to FmHA debtors when the FmHA sold the loans to Community Property Trust 1987A.

### 3. Availability of Service

[4] Finally, the Court must determine whether Butterfield has provided or “made service available” to Ms. Huston’s property. See *Sequoyah*, 191 F.3d 1192, 1201. Recently, the Tenth Circuit has held that the analysis should center on “whether the association has proximate and adequate ‘pipes-in-the-ground’ with which it has served or can serve the disputed customers within a reasonable time.” *Id.* at 1203. A water association may meet the “pipes-in-the-ground test” by demonstrating “that it has adequate facilities within or adjacent to the area within a reasonable time after a request for service is made.” *Bell Arthur*, 173 F.3d at 526. In determining whether a water association is entitled to protection, every federal court which has interpreted § 1926(b) has liberally interpreted the statute to protect FmHA -indebted rural water associations from encroachments. See *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 913 (5th Cir.1996).

Butterfield had been providing service to the property located at 9165 Berry Patch Lane for many years before Ms. Huston purchased the property. In fact, Butterfield had provided water service to the entire area for many years, including the time period in which Ms. Huston first moved onto the property and then eventually purchased the property. To this day, Butterfield provides water service to the neighborhood, albeit under threat of encroachment by Moongate. Therefore, the

court finds that Plaintiff has met the “pipes-in-the-ground” test promulgated by the Tenth Circuit.

[5] However, § 1926(b) protection is not intended to authorize an association to charge unreasonably high rates or fees. See *Rural Water Dist. No. 1 v. City of Wilson*, 29 F.Supp.2d 1238, 1247 (D.Kan. 1998). Accordingly, a rural water association which conditions service on the user’s agreement to pay unreasonable fees is not “making service available.” See *id.* (finding that service was not made available where rural water provider sought reimbursement in excess of \$32,000 for the cost of building additional lines and infrastructure); *Wayne v. Village of Sebring*, 36 F.3d 517 (6th Cir.1994) (finding that annexation as a condition of receiving water service was unreasonable).

Moongate argues that because Butterfield has conditioned service on Ms. Huston granting an easement across her property for the waterline, Butterfield has failed to make service available. I disagree. In this case, the requisite fees are not unreasonable. Butterfield merely requests an 8-inch line easement in order to provide Ms. Huston and other customers with water service, and a right of entry to the property, presumably in order to maintain and service the line. Butterfield merely asks for an access line to provide service, which is quite different than ordering that a customer’s property be annexed. Therefore, the Court finds that the requested fees and easement are not unreasonable under the facts of this case, and Butterfield has “made service available” to 9165 Berry Patch Lane under § 1926(b).

### Conclusion

Butterfield’s ability to repay its federal loan and to provide a low per user cost to its customers depends in part on the economic well-being and territorial integrity of its service area. See *Bell Arthur* at 525. Butterfield has met the requirements for protection under § 1926(b) and is there-

fore entitled to protection from encroachment by Moongate.

Wherefore,

IT IS ORDERED that Plaintiff Moongate's Motion in Limine to Exclude and Strike Supplemental Affidavit of Mary Berry, file April 20, 2000 (*Doc. 26*), is declared **moot**.

IT IS ALSO ORDERED that Defendant's Motion for Partial Summary Judgment, filed April 5, 2000 (*Doc. 21*), is **granted**.

IT IS ALSO ORDERED that Plaintiff's Motion for Summary Judgment, filed April 3, 2000 (*Doc. 16*), is **denied**.

IT IS FURTHER ORDERED that the issues of damages, attorney fees and costs will be determined later.

IT IS DECLARED that Moongate's sale of water within the Butterfield service area is in violation of § 1926(b).

IT IS ALSO DECLARED that Moongate Water Co., Inc., must terminate water sales to 9165 Berry Patch Lane.

IT IS FINALLY DECLARED that Moongate is enjoined and restrained from further encroachment upon Butterfield's service area.



**Herman SCOTT, Plaintiff,**

v.

**DIXIE HOMECRAFTERS, Defendant.**

**No. CIV. A. 00-D-134-E.**

United States District Court,  
M.D. Alabama,  
Eastern Division.

Dec. 27, 2000.

Homeowner brought action against contractor, raising claims arising from installation of vinyl siding. Upon contractor's motion for summary judgment, the District Court, DeMent, J., held that: (1) homeowner, who had not paid contractor

for any of the work performed, suffered no contractual damages and therefore could not maintain breach of contract claim, and (2) summary judgment was precluded in favor of contractor on homeowner's misrepresentation claim.

Motion granted in part and denied in part.

### 1. Sales ⇐3.1

If the contract is predominately for goods, with the incidental provision of labor and services, then Alabama Commercial Code governs.

### 2. Sales ⇐426

Alabama law permits a seller of goods to limit the buyer's redress for breach of warranty, except in circumstances when the warranty fails of its essential purpose; damages limitation must not be inconspicuously placed and should be reasonably calculated to alert the seller of its existence. Ala.Code 1975, § 7-2-719.

### 3. Sales ⇐418(6)

Homeowner, who had not paid contractor for any of the work performed, suffered no contractual damages and therefore could not maintain breach of contract claim under Alabama law; contractor's damages limitation, which was written in standard font on the first page of the contract, was reasonable, and therefore enforceable and limited homeowner's recovery to out of pocket expenses. Ala. Code 1975, § 7-2-719.

### 4. Fraud ⇐3

As a general rule, a prima facie case of misrepresentation under Alabama law requires a showing of: (1) a false representation of material fact; (2) which is relied upon by the plaintiff; (3) to the plaintiff's detriment.

### 5. Fraud ⇐12

To the extent that a plaintiff alleges a misrepresentation related to future actions, to show that defendant: (1) intended to deceive him; and (2) intended not to